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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1731

No. 202200867 B4

Royal Courts of Justice

Friday, 9 December 2022

Before:

LORD JUSTICE EDIS
MR JUSTICE SWEETING
SIR NICHOLAS BLAKE

REX
V
NICHOLAS ADAM CURTIS

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Non counsel application

J U D G M E N T

LORD JUSTICE EDIS:

1 Nicholas Adam Curtis is now 36 years old. On 29 April 2019, in the Crown Court at Liverpool, he was convicted of murder. No verdict was taken on Count 2 on the indictment, manslaughter, because that was an alternative to Count 1. His brother Stuart stood trial on the same indictment at the same time and was convicted of murder also. He has not applied for leave to appeal. Nicholas Curtis has applied for leave to appeal against conviction and now renews that application following refusal by the single judge. The single judge also refused his application for a long extension of time in which to apply for leave to appeal. He requires an extension of 1,025 days.

2 Given the fact that the conviction is for an offence of murder and that it resulted in a sentence of life imprisonment with a lengthy minimum term of 18 years, it seems to us that if the applicant has identified any properly arguable point the interests of justice would require in this case that we should grant the necessary extension. The particular factor giving rise to that conclusion is that the applicant, having been represented at trial, has subsequently drafted his own grounds. It is obvious from that document that a great deal of time, effort and thought has gone into it. He has plainly worked hard and attempted to assist the court to the best of his ability by setting out the grounds on which he wishes to rely. That being so, we should, we think, look at those grounds with care to determine whether any of them is arguable.

The Facts

3 It is not necessary, for the purposes of this decision on this renewed application for leave, to set out the facts on which the prosecution relied and the issues at trial in great detail. The applicant himself is plainly fully aware of the facts of the case, having provided to us an extensive summary of them at the start of his document to which we have already referred.

4 Essentially, the victim, Glenda Jackson, had been in company in Birkenhead with the Curtis brothers and others during the evening of 29 September 2018. A good deal of alcohol had plainly been consumed by all present and post-mortem sampling revealed that she had also taken some cocaine. In the early hours of the following morning, there was an altercation in the street between different members of the group. She became angry and threatened to stab the people with whom she had become angry. There was something of a standoff. The police attended. They saw that she had, by then, been injured. She said she did not want an ambulance. She said she did not want to make any complaint because she was going to deal with the matter herself. After they left, she managed to acquire a knife and an incident then occurred during which she was stabbed to death. The applicant later attended hospital, he himself having two stab wounds to his torso.

5 When he was in hospital, under the influence of some morphine administered to control the pain, he spoke to the police. The conversation was recorded on body worn video and in it he gave an explanation of how he had come to be in the hospital on which the prosecution later relied. He was not, at that time, a suspect in relation to the death of Glenda Jackson because her body had not been found by then. She was found at 7.55 in the morning on 30 September, lying dead in a communal hallway in the building where she lived. The prosecution case was that the Curtis brothers had themselves together attacked her when she had been damaging their van in an act of vengeance following the earlier altercation and that during the ensuing fight she had died and the applicant had been injured. There had been some violence in the street, but the death had occurred in the hallway where the body was found and the prosecution relied on some blood spatter evidence which showed, they said, that the death had occurred during an attack in the hallway which involved not only stabbing but also kicking and other forms of physical violence to her as she lay on the ground.

6 The defence case at trial was self-defence. A number of the grounds of appeal relate to the way in which the evidence concerning the initial altercation was dealt with by counsel who defended Mr Curtis, the applicant, at the trial. The defence case was that he had been a peacemaker during that earlier altercation and that his response when the fatal violence was inflicted had been lawful self-defence – he had been stabbed by a drunken, determined and angry woman, there was a struggle and he defended himself. He said that at no point had he deliberately stabbed her, he did not know how or when the stab wounds to her body were caused and all violence that he had used was lawful. His brother, Mr Stuart Curtis, also gave evidence at the trial. He said he had arrived at the scene in the hallway only after the deceased had received her injuries.

7 After all that evidence was advanced before the jury, the judge summed-up and the verdicts were as we have already explained.

8 The applicant advances 10 grounds of appeal. Grounds 1 to 3 concern the way in which the initial altercation was dealt with. It is complained in Ground 1 that a witness called Lesley Donnelly was not called to give evidence about that; Ground 2 says that the defence failed to put a document to a prosecution witness, James Lunt, which gave an account of an incident in a pub before the initial altercation and Ground 3 says that the witness, Kelly Landers, who gave evidence about the initial altercation, had not been properly questioned. This arises out of the way in which the recording of a 999 call she had made was dealt with at the trial. She was not herself asked about what was going on when she made that call, but the tape was relied upon in cross-examination of the applicant by the prosecution, who suggested that it showed that at the time of the call "Nick" was instructed by her to get in the car and that in the background there were noises suggesting that an assault was going on and the jury was invited to infer that the reason she said that Nick should get into the car was because he was committing that assault. She did not give that account in her evidence, her evidence being inconsistent with it and exculpatory of the applicant of any criminal involvement in any assault at that time.

9 Defence counsel has responded to those allegations of failures on his part and explained why the defence case was conducted as it was and says that, where appropriate, the applicant's instructions and consent to the course that was taken were obtained and followed.

10 Grounds 4 and 5 relate to body worn footage taken by the police of remarks made by the applicant when he was in hospital. It is contended that no application was made to exclude this, as it should have been, because of breaches of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 and it is contended that the defence were ambushed by its late production. Defence counsel says that, in fact, an application was made to exclude this material at trial, but the judge ruled that it was admissible.

11 Grounds 6 and 7 are complaints about the summing-up, which is said to be biased and to contain too many pro-prosecution comments and also, in Ground 7, to contain some inaccuracies.

12 Ground 8 complains of inadequate legal advice about Count 2, which was added to the indictment on the first day of the trial. Defence counsel has responded in writing to this court, saying that he gave full advice to the applicant about the significance of the addition of the count of manslaughter, but that no question of the prosecution accepting a plea to manslaughter arose because they would have refused to do so. The applicant's complaint

here is that if he had been properly advised, as he says he was not, he might have pleaded guilty to manslaughter, which might have avoided his murder conviction.

13 Ground 9 is a fresh evidence ground. The applicant says that he would now wish, in support of this appeal, to call his brother, who would say, if called, that he had lied to the jury in his evidence in order to minimise his own guilt, but would essentially accept responsibility for the killing of Glenda Jackson, thereby exonerating the applicant.

14 Ground 10 complains about the treatment of a defence expert witness who would have given evidence if called about the absence of any blood spatter on the clothing of the applicant. He would have said that this showed that it was not the applicant who had kicked the victim, causing that blood spatter. He would, however, also have said that somebody had kicked her, causing the blood spatter, which was inconsistent with the case being advanced by both Curtis brothers at the trial. Defence counsel says that that was the consideration which led to the decision made not to call that evidence at trial.

15 The prosecution has served a respondent's notice responding to those 10 grounds of appeal; we will not set out the contents of it. We have carefully considered both the grounds and the responses and we have also carefully considered the decision in relation to each of the 10 grounds which was made by the single judge when she refused to give leave to argue any of them. That decision was fully set out in writing and for our part it is necessary to say only a little more about it.

16 Refusing leave to appeal the single Judge gave the following reasons:

> "Ground 1: The decision by your representatives not to call Les Donnelly was a considered one which was discussed with you and with which you agreed. The prosecution did not call him because they did not consider him to be a witness of truth. He had given two statements about the earlier incident, in one of which he blamed the co-accused and the other he blamed James Lunt. One of Mr Donnelly's two statements contradicted your case that your brother (and co-accused) was not involved in that earlier assault. The existence of later text messages between Mr Donnelly and Kelly Landers does not detract from the point that he had given a statement that contradicted your case concerning the earlier incident on which he would inevitably have been cross-examined if he had been called.
>
> Ground 2: As to your criticisms of your legal team for not putting an entry in D/Constable Roberts' Day Book, noting a discussion with staff at Seamus O'Donnel calling the bouncer, it is evident that your experienced counsel addressed the issue as to whether Mr Lunt injured his thumb earlier in the evening by grabbing a bouncer and twisting it (as he claimed), or during the earlier incident by assaulting Ms Jackson (the deceased) (as you alleged), in a reasonable and proportionate manner.
>
> Ground 3: There was nothing arguably improper in the prosecution playing the 999 call during your evidence and putting to you their case that you were assaulting Ms Jackson. It would have been open to your representatives to ask Ms Landers questions about the 999 call but that evidence was very unhelpful to your case. The sound of the deceased being assaulted can be heard as well as Ms Landers, your girlfriend,

saying “What the fuck” and (repeatedly) “Nick, get in the car” and “Nick, get in your car”.

Grounds 4 and 5: It is not reasonably arguable that the statement of PC Pulford-Doyle or the bodycam footage should have been excluded under s.78 as a breach of PACE. The transcript of the discussion of the admissibility of this evidence shows that objection was initially taken by your counsel but it was established that you were not a suspect at the time. The Judge expressly reminded the jury that the bodycam footage was taken whilst you were in hospital, under sedation and he directed the jury that they must exercise caution when assessing this evidence.

Grounds 6 & 7: The Judge’s summing up was eminently fair and even-handed. The allegation that it was biased in favour of the prosecution is not reasonably arguable. The allegation that the Judge failed to remind the jury that you were stabbed is not well-founded. He did so repeatedly and this was evidence the jury were undoubtedly very well aware of. The fact that the Judge referred to Ms Landers repeatedly urging you during the initial incident to “get in the car” as Ms Landers telling you to “leave the area” cannot fairly be criticised. Moreover, the jury would have been well aware of the words Ms Landers used. The 999 call was played to the jury again during the summing up, they had a transcript of the call, and they had the audio and transcript during their deliberations.

Ground 8: It is not reasonably arguable that you were inadequately advised regarding the new count of manslaughter (which was added to assist the jury). Your regret that you did not plead to manslaughter does not arguably render your conviction for murder unsafe and, in event, it is apparent the Crown would not have accepted a plea of manslaughter.

Ground 9: The fresh evidence you seek to adduce in the form of a statement from your brother and co-accused in which he admits that he kicked and may have stamped on the deceased, while maintaining his denial that the two of you attacked her together, contradicts the accounts that he gave in evidence and is contrary to the evidence of a joint attack that the jury found proved. Having regard to s.23(2) of the Criminal Appeal Act 1968, this evidence does not appear to be capable of belief or to afford any reasonably arguable ground of appeal.

Ground 10: The decision by your representatives not to call Mr Hayward, an expert from whom blood spatter evidence was obtained, was a considered one which was discussed with you in a pre-trial conference with the expert. His evidence would have been that the blood spattering was not consistent with a struggle, some of the spattering was more consistent with kicking or stamping, and he would have given evidence that your co-accused was involved in the assault. This was directly counter to the case which you instructed your representatives to run.

It is not reasonably arguable that your conviction is unsafe and accordingly I refuse permission to appeal. In the circumstances I also refuse the lengthy extension of time that you seek.”

17 We agree with the single judge, both as to the decisions that she made and her reasons for those decisions.

18 The applicant has plainly formed the view, in reflecting on the trial, that the rights and wrongs of the initial altercation were of substantial importance and that, therefore, they should have been litigated more energetically than they were by his counsel who then appeared. We do not think that his complaints in relation to that are arguable in any way. That was the historical context which preceded the fatal attack on Glenda Jackson as the jury found it was. There was no doubt that immediately preceding that fatal attack she herself had been behaving erratically and in a way that was dangerous. Precisely how that had come to pass was not central to the issue the jury had to decide, which is how she came by her death and at whose hands and feet. Grounds 1 to 3 are clearly not arguable.

19 Grounds 4 and 5 are equally clearly not arguable. The body worn footage contained things which the applicant had said when the police spoke to him while he was in hospital suffering from the wounds that he had sustained. Those things were clearly inconsistent with what he later said at his trial and the prosecution were quite entitled to adduce them and to rely on them. There was nothing unfair about that. As we have said, when he was being spoken to in hospital he was not under suspicion of committing any offence, certainly not the offence of murder for which he was ultimately tried.

20 Because of Ground 6 and 7, we have carefully read the whole of the summing-up of the judge in order to determine for ourselves whether it was unbalanced and unfair. We unhesitatingly reject the criticisms of it which are advanced. It is a model of comprehensive fairness which summarises both sides of the case and invites the jury to consider the critical questions which they had to answer.

21 Ground 8 has quite obviously no merit in a case where the applicant's position at trial was that he had committed no offence at all. We accept defence counsel's recollection that the prosecution would not have accepted any proffered plea to manslaughter. It is very hard to see on the evidence that was available to the prosecution how such a disposal could possibly have been appropriate so far as they were concerned.

22 There is nothing either in the two fresh evidence grounds. The evidence of Stuart Curtis, if given on any appeal to this court, would not be capable of belief since it contradicted his earlier sworn evidence at trial. It would therefore not afford any ground for allowing the appeal and would not be received under the Criminal Appeal Act 1968.

23 As for the blood spatter expert, Mr Hayward, whose evidence was available to be called at the trial but was not called, the reasons for that decision, in view of the factual evidence to be given to the jury by both Curtis defendants at the trial is plainly sensible. It was a forensic decision that counsel had to take and about which he plainly gave advice. That witness might have supported the different case which the applicant might now wish to have run, but would have been very damaging indeed to the case which was actually being run by both Curtis defendants at their trial.

24 Accordingly, and in substance for the reasons given by the single judge, we have concluded that there is no merit in any of these grounds of appeal and we therefore refuse this renewed application for leave.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge