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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202200288/B4
[2023] EWCA Crim 1050



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 4 August 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GOOSE

MRS JUSTICE FARBEY DBE

REX

V

MUBARAK ABDI JIBRIL

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MR D HAROUNOFF appeared on behalf of the Applicant.

J U D G M E N T

MRS JUSTICE FARBEY:

1. On 22 July 2021, in the Crown Court at Leicester before Mr Recorder Auty KC, the applicant (then aged 26) was convicted of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861 (count 1) and arson being reckless as to whether life is endangered, contrary to section 1(2) and (3) of the Criminal Damage Act 1971 (count 3). He was acquitted of arson with intent to endanger life (count 2).
2. On 17 December 2021, before the same Recorder, the applicant (then aged 27) was made the subject of an extended sentence for the arson, comprising a custodial term of 12 years and an extension period of 5 years. He was sentenced to a concurrent sentence of 4 years' imprisonment for the wounding offence. He renews his application for leave to appeal against conviction following refusal by the single judge.
3. Having advanced grounds of appeal before the single judge without the benefit of legal representation, he instructed fresh counsel and solicitors who have very properly abandoned all of the grounds advanced to the single judge. The applicant now applies for leave to vary the Notice of Appeal to advance fresh grounds settled by Mr David Harounoff who appears before us on his behalf. We are grateful to Mr Harounoff for his helpful written and oral submissions, as well as for the work undertaken by those who instruct him.

The Prosecution Case

4. In the early hours of 3 January 2021, police officers and ambulance staff were on duty in Eldon Street, Leicester, dealing with an unrelated incident. While they did so a man, Sukhwinder Sukhwinder, stumbled towards them. He was very drunk. He asked for help and said he had been hurt. He had several wounds, including some to his neck, that were bleeding. On examination by paramedics, he was found to have wounds to his chest, stomach, arms and head. There were ten wounds in total. Mr Sukhwinder seemed unclear about what had happened. He was taken to hospital. Officers made their way to his address and discovered that his flat was on fire.
5. When officers entered they found a man, Arnold Matsa, asleep on the floor. They woke Mr Matsa, who was unaware that there was a fire upstairs. The officers searched the flat. In the bedroom there was what appeared to be a mattress or bedding on fire. There was nobody else in the flat. Fire fighters and police evacuated the thirty or so other residents in the block.
6. Mr Matsa, having been the only other person known to have been in the flat, was arrested on suspicion of causing the injuries to Mr Sukhwinder. Mr Matsa told police that another male (whom he knew by the name of "Smoky") had been to the flat. Mr Sukhwinder and Smoky had argued upstairs while he had been downstairs. When Mr Sukhwinder came downstairs, he told him that Smoky had stabbed him with scissors. Meanwhile Smoky had come downstairs, threatened to burn the flat down and then left. Mr Sukhwinder left

the flat saying he was going to get some cigarettes. While he was out Smoky returned to the flat; at that point Mr Matsa was under a duvet downstairs falling asleep but he saw Smoky go into the flat and go upstairs. Smoky said that he had returned to get his belongings. He returned a few minutes later carrying what Mr Matsa described as a red blanket. He also had a pair of scissors which he put in a drawer. Smoky said “sorry” and left. Mr Matsa then drifted off to sleep.

7. CCTV footage recorded a man running across a nearby road carrying what looked like a large red blanket. Sometime later another camera captured the image of someone on nearby Maidstone Road getting into a parked car. The police went to the location of the car just after 5.30 am. The applicant was inside the car asleep. He was arrested and detained. A red item was recovered from the car.
8. In interview, the applicant's legal representative read out a prepared statement, in which he denied the offences and said that he was looking for somewhere to drink. As a Muslim he could not drink at home. It was cold and snowing so he had to run to a car he knew he could use on Maidstone Road. He replied “no comment” to all questions asked.
9. The seat of the fire was identified as being in the upstairs front bedroom in the centre of the window. The most likely cause of the fire was deliberate ignition of combustible materials by a naked flame.
10. Clothing was seized from the applicant. DNA analysis of blood found on the applicant's coat and jeans matched Mr Sukhwinder. The police found bloodstained scissors beneath a chest of drawers in the flat. A DNA sample taken from the scissors had a profile that matched Mr Sukhwinder.
11. Mr Sukhwinder was known to the police as a vulnerable individual. He suffered from mental health problems and had been attempting to access support from Social Services. On the day of the incident, he seemed not to know what had happened. A month later he was spoken to again and recalled that there had been several people at his address earlier in the evening but by the early morning there was only an older African man, who was downstairs on the sofa, and upstairs was Mr Sukhwinder and someone he described as a “boy” between 18 and 20, with darker skin than him. He remembered arguing with the boy but was not sure what it was about. There had been some pushing and the boy had pushed and tried to hit him. The boy then left. Mr Sukhwinder realised his head felt wet but did not know that he had been injured. He did not know how the fire had started but it was not there when he left his flat. Mr Sukhwinder picked out the applicant during an identification procedure.
12. The prosecution case was that the applicant attacked Mr Sukhwinder in his flat, by repeatedly stabbing him with the scissors, and started the fire. In support of that case, the prosecution relied on a number of strands of circumstantial evidence. First, there was the evidence of events which came from Mr Sukhwinder and Mr Matsa, the CCTV footage, the evidence of police officers and the police body-worn camera footage. Secondly, there was the DNA evidence. Thirdly, there was bad character evidence, which showed that

the applicant had previously both threatened with, and used, knives and had previously threatened to burn a house. Fourthly, the prosecution relied on adverse inferences to be drawn from the applicant's failure to mention matters when interviewed by police which he relied on as part of his defence.

The Defence Case

13. In his Defence Statement the applicant denied assaulting Mr Sukhwinder as alleged or at all and denied that he had caused the fire. He gave evidence at trial. He told the jury that he had gone to Mr Sukhwinder's flat during the evening of 2 January 2021 with two friends, Power and Max. Mr Sukhwinder and Mr Matsa were there. He had not met either man before. He recognised a man called "Adam" and there were three others at the property. They socialised and were drinking and smoking. At around 12.30 am he left with his friend Power to purchase a second bottle of alcohol. When they returned Mr Sukhwinder was bleeding from the neck. They asked Mr Matsa what had happened, he replied that he did not know. The applicant and Power went upstairs and found that Max was no longer there. Power rang Max and asked where he was. Power told Max that Mr Sukhwinder was injured. They remained at the flat for about an hour or so. Max did not return to the property. Mr Sukhwinder joined them upstairs. He was very drunk and fell to the floor. The applicant picked him up. He and his friend then took Mr Sukhwinder downstairs and put him on the sofa. Mr Matsa was seen on the floor smoking from a crack pipe. The applicant and Power then left the flat before 2.00 am, Power went home, and the applicant went to the car in Maidstone Road in order to drink alcohol. He remained there until he was subsequently arrested. He denied arguing with Mr Sukhwinder, denied injuring him and denied setting fire to the premises. Under cross-examination he accepted his nickname was "Smoky".
14. At the close of the prosecution case the applicant's trial advocate made a submission of no case to answer. The Recorder ruled that the matters raised by the application went primarily to the weight of the evidence. To withdraw the matter from the jury at that stage would have usurped the function of the jury.

Grounds of Appeal

15. The grounds of appeal on which the applicant now seeks to rely make no criticism of the Recorder or indeed of the prosecution. They relate entirely to the previous representative's conduct of the case. It is submitted that the applicant provided his solicitors with clear written instructions in a Proof of Evidence on 7 June 2021, in which he said that after he had returned to Mr Sukhwinder's flat with alcohol, Mr Sukhwinder told the applicant that "the other guy" (meaning Max) had stabbed him. Power called Max on his phone, Max answered and told Power and the applicant that Mr Sukhwinder was holding some scissors and was drunk. Max said that he had grabbed the scissors and stabbed Mr Sukhwinder because Mr Sukhwinder was trying to rob him. Max had then left the flat.
16. Mr Harounoff emphasises that the Defence Statement did not include these instructions. He has told us that, prior to giving evidence, the applicant was advised by his trial advocate not to blame Max for the wounding and arson as it would expose the applicant

to a bad character application by the prosecution. It is said that the applicant followed this advice and did not mention the conversation with Mr Sukhwinder or the telephone call with Max. As a result, evidence that he could and should have given was suppressed. This deprived the applicant of having his full defence investigated by the police and Mr Sukhwinder was not cross-examined in accordance with the applicant's full instructions.

17. Corroborative evidence from a neighbour, said to identify Max as having spent weeks bullying Mr Sukhwinder, had been uploaded onto the Digital Case System but it was neither utilised nor investigated by the applicant's previous solicitors. There was nothing to suggest that the solicitors had asked the prosecution to investigate.

Respondent's Position

18. The prosecution have lodged a Respondent's Notice but only in response to the grounds of appeal of the applicant's own composition, in which they resisted the application for leave to appeal. The prosecution was given the opportunity to respond to the application to vary the Notice of Appeal but did not wish to do so. We have not found it necessary to delay this application in order to seek further submissions from the prosecution.

Discussion

19. By reference to the documents that are now before the Court, we accept that the applicant instructed his trial lawyers on 7 June 2021 that Mr Sukhwinder had on the night of the attack blamed Max and that the applicant had overheard Max admitting to stabbing Mr Sukhwinder with the scissors. The Defence Statement is dated 11 June 2021. It does not mention either of these matters. However, it does mention that by the time the applicant and Power had returned to the flat after buying alcohol, Max had left the address. It mentions that Power telephoned Max in the applicant's presence and that he could hear what was being discussed about what happened before Max left.
20. We have been provided with a file note made by the trial advocate on 15 July 2021, saying:

“Advised of danger of implicating another as responsible for the offences. Risk of pre cons going in as evidence. I would prefer to keep them out as potentially prejudicial.”
21. Mr Harounoff criticises that advice on the grounds that evidence relating to the perpetrator of the offences charged on the indictment concerns the alleged facts of the offences and so would not have engaged any of the statutory gateways for the admission of bad character evidence. By email to the Criminal Appeal Office, dated 3 April 2023, the trial advocate confirmed that she advised the applicant of the risk of an adverse inference being drawn if his evidence was inconsistent with the content of his Defence Statement. Notwithstanding the emergence of these matters the only question for this Court on appeal would be whether the convictions are unsafe.
22. We are not persuaded that the proposed new grounds meet that test, even arguably. First, any difference between the Proof of Evidence and the Defence Statement has no arguable

bearing on the safety of the arson conviction. Max is not alleged by the applicant to have been in the flat when the fire was set, and no evidence has been drawn to our attention which suggests, or may suggest, that having left the flat, as the applicant claims, he later returned.

23. Secondly, irrespective of whether the Defence Statement expressly referred to Max as the perpetrator of the offences, it was open to the applicant's former solicitors to investigate, or cause to be investigated, the relationship between Mr Sukhwinder and Max. There was nothing to prevent the applicant from raising their failure to investigate, or to ask the prosecution to investigate, in his initial grounds of appeal. He has provided no adequate explanation as to why he did not do so. The solicitor's failure to investigate is, in our view, a very late afterthought and relies on what, at this stage, is undue speculation.
24. Thirdly, the jury were aware of the applicant's case that he was not in the flat either when Mr Sukhwinder was wounded or when the fire was set. But there were a limited number of other candidates. In order to convict the applicant, the jury must have been sure that it was the applicant rather than another candidate who both stabbed Mr Sukhwinder and set the fire, both of which required the perpetrator to be present in the flat. The jury must therefore have disbelieved the applicant's version of events, namely that he was absent at the material times. If he was not absent from the flat, his account of the phone call with Max makes no sense.
25. In short, the allegations against Max made in the Proof of Evidence do not in themselves rebut the prosecution evidence, albeit circumstantial, that placed the applicant in the flat at the time that the offences were committed. The trial advocate's advice fell within the boundaries of legitimate and proper tactical advice for a defendant whose bad character presented risks at trial under section 101(1)(g) and 106 of the Criminal Justice Act 2003, in light of the nature of the offences with which he was charged. The prosecution was on conventional principles entitled to put its case on the basis of circumstantial evidence. The assertion by the applicant that Max was the perpetrator comes only from him and cannot on its own, in our view, advance this application.
26. For all these reasons, despite the excellent submissions which we have heard today, we refuse leave to amend the Notice of Appeal which would serve no purpose, and we would refuse leave to appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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