IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01466/B4

Neutral Citation Number: [2023] EWCA Crim 82

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 27th January 2023

**B e f o r e:**

**LORD JUSTICE LEWIS**

**MRS JUSTICE McGOWAN DBE**

**MR JUSTICE HOLGATE**

---

**R E X**

**- v -**

**ENES ULAS**

---

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

---

**Mr G Green** appeared on behalf of the Appellant

**Mr H Common** appeared on behalf of the Crown

---

**J U D G M E N T**

---

Friday 27th January 2023

**LORD JUSTICE LEWIS:**

1. On 21st April 2022, following a trial in the Crown Court at Kingston Upon Thames, the appellant, Enes Ulas (then aged 23), was convicted of three offences: wounding with intent (count 1); possession of an imitation firearm, with intent to cause fear of violence (count 2); and violent disorder (count 3). He was sentenced to a total of ten years' imprisonment.

2. He now appeals against conviction with the leave of the single judge.

3. The facts of the offence can be stated shortly. On 7th August 2020, CCTV captured a white BMW being driven into Potters Close, Mitcham, South London and the incident that followed. The CCTV footage shows three males entering the estate. One male, referred to as "Suspect 2", was carrying a large knife. He charged towards one of the friends of the victim. The victim, Jayson Berrett, pulled Suspect 2 away. Another of the males, referred to as "Suspect 3", pulled out a blue plastic bag with the shape of a handgun. Suspect 3 pointed it at Jayson Berrett who tried to grab the gun. There was a tussle, during which Suspect 3 stabbed the victim to the head. "Suspect 1" was Daniel James, the appellant's co-accused. He admitted that he had been present and pleaded guilty to possession of a knife and violent disorder.

4. The prosecution case was that Suspect 3, who produced the imitation handgun and stabbed the victim, was the appellant. The appellant denied that he was present at the scene and denied that he was involved in the incident in any way. He said that he was elsewhere at the time of the incident, probably working in his uncle's fish and chip shop. The identification of Suspect 3, and whether the jury could be sure that the appellant was suspect 3, was, therefore, a critical issue at the trial.

5. The prosecution case was that the appellant, Daniel James and the other male (Suspect 2) went to Potters close armed with weapons and intent on threatening and using violence against a group of men who included Jayson Berrett. The prosecution said that Daniel James had helped to isolate the victim and that the appellant had pursued him with a firearm and a knife before stabbing him.

6. The prosecution relied upon the following evidence. First, they relied on CCTV footage from the scene which they said showed that Suspect 3 was the appellant. Secondly, they relied on the fact that the appellant's DNA had been found in the white BMW. Thirdly, they said that Suspect 3 was wearing a distinctive top and shoes which matched ones which were found at the appellant's home address.

7. In addition, the prosecution relied upon evidence from PC Christie. That evidence was to the effect that on 11th August 2020 he had been on duty and had viewed photographs from the incident. He said that he had viewed those images on his own and in accordance with Code D under the Police and Criminal Evidence Act 1984. Pausing there, Code D is a code of practice for the identification of persons by police officers. PC Christie said that he recognised and could identify one of the men, namely Daniel James.

8. Two days later, on 13th August 2020, PC Christie had been on duty with another police officer in Mitcham and had seen a white BMW connected to James, with half a dozen males standing nearby. One of the males was Daniel James. He and the group of males ran into a nearby block of flats, Churchill House. The group went into Flat 21. PC Christie said that he and the other officer gained access to the flat, arrested Daniel James, and took him to the police car. One of the other males in the group who had entered the flat walked up to PC Christie and said that Daniel James had his phone and he wanted it back. PC Christie refused

to hand over the phone and the man walked away. The man looked back, and PC Christie said that he instantly recognised him as the suspect he had seen in the photographs he had viewed on 11th August 2020, as he had a beard which was distinctive around the lip and jawline. The man made off.

9. On 16th August 2020, PC Christie attended an identification parade and identified the appellant as the man who had approached him outside Churchill House on 13th August 2020 and had stated that Daniel James had his phone.

10. The appellant applied to have PC Christie's evidence excluded either on the basis that it was not admissible, or that it should be excluded under section 78 of the Police and Criminal Evidence Act because of its adverse effect on the fairness of the trial.

11. In view of some of the grounds of appeal, it is necessary to summarise the application and the ruling. Counsel for the appellant submitted to the trial judge that there was no evidence that PC Christie had acquired special knowledge, skill or experience through observing the CCTV over many hours. Consequently, it was submitted that PC Christie was in no different position from the jury who would in due course be invited to look at the CCTV images and compare them with images of the appellant when he was in custody and still had his beard.

12. In his detailed ruling, the trial judge held that the evidence of PC Christie was admissible. He set out the factual background. He set out the evidence of PC Christie, to which we have referred. He referred to the decision of this court in *Attorney General's Reference No 2 of 2002* [2002] EWCA Crim 2373, [2003] 1 Cr App R 21. The third category of cases identified in that case, where evidence is admissible, is where a witness who does not know the individual defendant spends a substantial time viewing and analysing the

photographic images, thereby acquiring special knowledge, which the jury did not have. As to what amounted to "substantial time viewing and analysing the photographic images", the judge said that that would depend on the specific facts of each case. Where there was large-scale riots or disorder, where lots of individuals were involved, an officer may have to spend several hours, if not days, trying to identify each individual involved in unlawful activity. In the instant case, where one individual was unknown to the police, much less time would need to be spent analysing the photographic images. No minimum period was required. The judge said that he inferred from the statement of 11th August 2020 that PC Christie undertook an analysis of the photographic images to see if he could identify individuals, and he therefore fell within the third category in the *Attorney General's Reference* case. He had spent time viewing the material and, as such, had acquired a degree of special knowledge. The evidence was therefore admissible.

13. The judge went on to consider whether he should exclude the evidence under section 78 of the Police and Criminal Evidence Act 1984. He considered that there was supporting evidence. A distinctive top and shoes which matched those worn by the person on the CCTV footage were found at the appellant's home address. The appellant's beard, as shown in the custody images, was shaped in the same way as the beard of the person on the CCTV images. The appellant accepted that he was an associate of James, and his DNA was found in the white BMW seen on the CCTV footage. This was in addition to the identification procedure evidence. Further, the jury would be able to compare and contrast the custody images of the appellant and the CCTV images, accompanied by an appropriate judicial direction. The judge therefore declined to exclude the evidence.

14. Two other matters occurred during the trial. First, in response to a question as to why the police were still outside Churchill House, PC Christie said that they had found a firearm there. Counsel for the appellant applied to have the jury discharged. He submitted that that

information had been improperly disclosed and was highly prejudicial in a case where identification was central. Having heard the officer's evidence about the presence of a firearm in a flat where the appellant had gone, inevitably the jury might think that he was connected in some way with firearms and must be the person in the CCTV image holding the firearm. Counsel relied on *R v Docherty* [1999] 1 Cr App R 274. He submitted that the appellant could not have a fair trial in the circumstances; that the material was so prejudicial that no jury direction could overcome that prejudice.

15. In his ruling, the judge considered that the question of identification – i.e. who was the man who can be seen holding the firearm in the CCTV images – was an important question in the case. The evidence of the appellant's presence in a flat where a firearm was found related to that issue. Secondly, the material had been improperly disclosed. While the officer had not acted in bad faith and had not done anything wrong in answering the question as it was put to him, the evidence was potentially prejudicial to the appellant. The judge said that something had to be done about the improperly disclosed information and it could not simply be left because of the very real risk of prejudice. He considered the matters which might cause the jury to link the presence of the firearm and the appellant and to use it to answer the question of whether or not they could be sure that Suspect 3 in the CCTV images was the appellant. The judge said that it seemed to him that the jury would have to be discharged, unless he could be satisfied that a sufficiently robust judicial direction would remedy the situation. He considered that the matter was remediable by way of a direction. He therefore decided not to discharge the jury but gave them a direction which was in substantially the following terms. The judge said that towards the end of PC Christie's evidence, PC Christie had said that a firearm had been found at Flat 21, that he should not have said it, that it was irrelevant, and that it had no bearing on the issues in the case. There was no evidence to connect the firearm in the flat to the incident on 7th August. There was no evidence to connect the firearm to either of the defendants in the trial. There was no evidence that either

of the defendants knew of the presence of the firearm within the flat. There was no evidence as to who was the registered occupier of the flat. Nor was there any evidence that the flat was registered to either of the defendants or their families. The judge therefore said that the fact that PC Christie had said that a firearm had been found within Flat 21 was irrelevant, that it should not have been mentioned, that it should be ignored, and that the jury should put it out of their minds.

16. Finally, during the course of her evidence, the officer in charge of the case, DC Dawson, said that she had viewed the CCTV images and had come to the view that PC Christie's identification of the appellant as Suspect 3 was correct. The judge immediately directed the jury that she should not have been asked that question and should not have said what she did. The judge said that what DC Dawson had said amounted to no more than opinion evidence, and that it was not, save in very exceptional and tightly controlled circumstances, admissible. Her opinion evidence was inadmissible; it should be ignored and must play no part in the jury's deliberations.

17. The following morning defence counsel applied to discharge the jury. He submitted that the ruling on DC Dawson's evidence had had the effect of elevating PC Christie's evidence, which had been admitted. The judge gave a detailed ruling in which he rejected the application. He had regard, amongst other things, to the decision in *Docherty*. He accepted that identification was an important issue in the case. He concluded, however, that the statement of DC Dawson was not very significant. He considered that any difficulties were remediable by an appropriate judicial direction. He had already given such a direction the previous evening.

18. In his summing up the judge directed the jury that the issue was mistaken identity. The prosecution said that Suspect 3 in the CCTV images was the appellant. The appellant denied

being present and said that he had been mistakenly identified. The judge said that there were two sources of evidence: the evidence of PC Christie, and the CCTV images of the incident. The judge summarised the evidence of PC Christie. PC Christie had said that he did not know the appellant and on 11th August "he spent some time studying the footage and photographs of those involved". Two days later, on 13th August, PC Christie undoubtedly did see the appellant when he arrested James. PC Christie said that during that encounter he recognised the appellant as one of the men he had seen in the CCTV images. Specifically, PC Christie said that he was the man who pursued and stabbed Jayson Berrett with a knife, and who had a firearm.

19. The judge said that PC Christie's evidence could be considered by the jury. It was his evidence of identification from the CCTV images and it could be used to help the jury's own comparison of the custody photographs taken on 14th August 2020 and what they had seen of the appellant in court, with the CCTV images from the incident. However, the judge said that caution was required. PC Christie's identification may not be correct. The quality of the CCTV footage may hamper comparison, although there was an advantage in being able to study the footage several times. If the quality was not good enough, then the jury must ignore PC Christie's evidence and must not embark on a comparison themselves.

20. The judge said that the second source of evidence was the CCTV footage and the still images. The jury had been invited to compare those images with the appellant's appearance and his appearance in the custody photographs taken of him on 14th August, when he still had his beard, to determine if they could be sure that the man in the images was the appellant, or whether it was impossible or unsafe to do so because of the quality of the footage. The judge warned the jury that they should exercise caution. He identified specific factors which they would need to bear in mind. He warned them that similarity in appearance did not mean that the man in the images was the appellant. He said that other evidence, other than PC Christie's

identification, should be considered. The prosecution relied on a jacket and shoes found at the appellant's home which matched those that the person on the CCTV images was wearing. The appellant's beard appeared to match that of Suspect 3 shown in the CCTV image. There was also the appellant's DNA found in the BMW, and the appellant's admitted association with Daniel James.

21. The judge referred to the factors relied upon by the defence. The defence relied on there being no image of Suspect 3 with his hood down, or of his head. PC Christie had no prior knowledge of the appellant. Nor was there any evidence as to how long PC Christie had viewed the footage and stills. While the appellant's DNA was present in the BMW, it could not be determined when that DNA got there. The jury were also warned about confirmatory bias.

22. As we have indicated, the jury convicted the appellant of wounding with intent, possession of a firearm with intent to cause fear of violence and having an offensive weapon. His co-accused was acquitted of wounding with intent and unlawful wounding. He had already pleaded guilty to possession of a knife and violent disorder.

23. In his clear, helpful and focused written and oral submissions, Mr Green, on behalf of the appellant, advances a number of grounds of appeal. As he said this morning, they fall essentially into three groups. First, grounds 1 and 2, 7 and 8 concern the identification made by PC Christie. Mr Green submitted that the judge misapplied the third category of situations where evidence of identification from photographic materials is admissible, as set out in *Attorney General's Reference No 2 of 2002*, and that the judge erred in admitting PC Christie's evidence. He submitted that the evidence did not show that PC Christie had any knowledge or skills capable of assisting the jury, and that PC Christie added nothing and was in no better position than the jury. Further, the judge was wrong to rely on the fact that PC

Christie could have given evidence at a voir dire. He submitted that the judge had erred in his summing up where he referred to the officer having spent some time studying the footage and stills. PC Christie's evidence was that he had not viewed the footage, but only the stills. Nor was there any evidence of the time spent studying the stills. Mr Green submitted that the judge was also wrong to say that PC Christie had had the advantage of viewing the stills several times.

24. The second set of grounds – grounds 3 and 4 – relate to the fact that PC Christie mentioned that a firearm had been found at Flat 21, Churchill House. Mr Green submitted that no direction would be adequate to address the prejudice of that material. Further, the judge had erred in relying on the fact that the officer did not act in bad faith, and on the consequences of delay to the trial.

25. The third set of grounds – grounds 5 and 6 – related to the comments made by DC Dawson that she agreed with PC Christie's identification. Mr Green submitted that the judge was wrong when he said that a direction could address the prejudice, that he failed to have regard to the real danger of bias, and that he again took into account an irrelevant consideration, namely the lack of malice on the part of the officer concerned.

26. We deal first with the admissibility of PC Christie's evidence of identification. The question of the admissibility of evidence as to identification based on photographic images taken at the scene of a crime was dealt with by this court in *Attorney General's Reference No 2 of 2002*. The court said this:

> "19. In our judgment, on the authorities, there are, as it seems to us, at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up, a jury can be invited to conclude, that the defendant committed the

> offence on the basis of a photographic image from the scene of the crime:
>
> (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (*Dodson & Williams*);
>
> (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this *( Fowden & White*, *Kajalave v Noble*, *Grimer, Caldwell & Dixon* and *Blenkinsop*); and this may be so even if the photographic image is no longer available for the jury (*Taylor v The Chief Constable of Chester*);
>
> (iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (*R v Clare & Peach*);
>
> (iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (*R v Stockwell* (1993) 97 Cr App R 260, *R v Clarke* [1995] 2 Cr App R 425 and *R v Hookway* [1999] Crim LR 750)."

27. In the present case, the jury was able to view the CCTV stills and compare them with photographs of the appellant at the time that he was in custody on 14th August 2020. That falls within the first category identified. Further, PC Christie was able to give evidence that one of the men in the photographs was Daniel James, as he knew him. That falls within category 2. This case, however, concerns PC Christie's identification of the appellant, whom he did not know. The question is whether the judge was entitled to conclude that the case fell within the scope of the third category in *Attorney General's Reference No 2 of 2002.*

28. The reference to a witness who does not know the defendant, but who spends a

substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, needs to be put into context. That category was derived from the decision in *R v Clare and Peach* [1995] 2 Cr App R 333, in which a group of football supporters had gone to a match in Bolton. They were filmed on their arrival at the stadium. After the match they went into the town centre where a fracas arose between them and rival fans. That incident was captured on three video cameras. As the court observed in that case, essentially the evidence upon which the Crown relied was the video recording, which was available to be played to the jury. However, because the incident was brief, and because there were many supporters and other members of the public milling about and creating a confused scene, what was actually being done and who was doing it could only be discerned by close study. A police constable had studied the film closely and analytically. He it was who, together with a colleague, had filmed the supporters arriving at the football ground before the match, had filmed them whilst they were in the stadium, and had filmed them as they left. Those colour films were of good quality. The video recordings made in the town centre were filmed in black and white. The police constable had viewed the recording of the incident about 40 times. He had been able to examine it in slow motion, frame by frame, and to rewind and replay as frequently as he needed. By studying the film in this way, he was able to follow the movements of individuals and see what actions they took. By comparing the individuals carrying out violent acts with the colour pictures taken before and at the match, the officer claimed to be able to identify not only the violent acts in the street, but also who was committing them. Accordingly, the Crown sought to adduce the evidence of the constable in order to elucidate for the benefit of the jury what could be seen on the video recordings. The judge ruled that evidence admissible. The defendant appealed. Having reviewed the authorities, the Court of Appeal considered that the constable had special knowledge which the court did not possess. In that case the officer had acquired the knowledge by a lengthy study of the photographic material. The court ruled that it was legitimate to allow the constable to assist the jury by pointing out what he said was

happening. He had taken the high quality colour film at the football ground. The appellants were clearly shown on that film. The officer was well qualified to assist the jury by saying that he knew what the appellant looked like and what he wore on the day and, having studied the black and white film, to identify him on that film. He had acquired special knowledge which could assist the jury. He had acquired that in the circumstances of that case by a careful study of the colour film and the black and white film. It was in that context that reference was made to spending substantial time viewing and analysing photographic images.

29. As we have indicated, in *Attorney General's Reference No 2 of 2002*, this court considered that where an officer did not know the individual beforehand, he could acquire special knowledge or skills in relation to those appearing in a video recording taken at the scene by the frequent playing and analysing of it.

30. In the appeal with which we are concerned, first, the judge was entitled, in our judgment, to infer that PC Christie had acquired special knowledge and skills by considering and analysing the CCTV images. In his statement he says that he was on duty. He viewed a collection of photographs – implicitly as part of his duty. He did so alone and in accordance with Code D of the Police and Criminal Evidence Act. That is the Code of Practice that officers must follow when seeking to identify persons. The judge was entitled to infer that the officer studied and analysed the photographs with a view to being able to identify persons on those photographs. As such, the judge was entitled to infer that he had acquired special knowledge and skill in the analysis of the images, with a view to identifying an individual by, for example, features such as the distinctive nature of the beard around the lip and the jawline, which could assist the jury when considering the CCTV images. It may have been preferable for the officer in his statement to have given more detail of the time spent and the nature of the exercise he performed; but, overall, we are satisfied that it was open to the judge to infer, as he did, that the officer had spent time viewing and analysing the relevant images

and in doing so had acquired a degree of special knowledge.

31. Further, the judge was right to say that the amount of time or study required to demonstrate the acquisition of special knowledge would depend on the particular facts of the case. There will be a difference where an officer has to consider a large number of images involving a number of different individuals. In the present case, the images involved three men. PC Christie recognised one of the three men and he had to consider also the images of the other two.

32. We do not consider that the other criticisms of the summing up in this regard are established. The judge referred to "some time" spent viewing footage and photographs. Mr Green submitted that there was no evidence of the time spent, and that it was only stills that were viewed, not footage. The reference to "some time" is not an error on the part of the judge. It is factually accurate. The officer had spent some time analysing the images. The reference to "footage and stills", rather than photographic images, is not material and cannot possibly cast doubt on the safety of the conviction. The key factor was that the officer had studied the photographic material from the incident and so had acquired special knowledge or skills relevant to the identification of the person in the images. Furthermore, it is clear from the summing up, read as a whole, that the judge properly directed the jury as to the caution necessary in cases of identification and the particular factors to which they should have regard when considering if they could be sure that they were able to identify the appellant as the man in the CCTV photographs.

33. We turn to the other two matters. The first – and in many ways the most significant – concerns the reference to the firearm in Flat 21, Churchill House. The judge was well aware that the material about the firearm should not have been given to the jury. He was well aware of the potentially prejudicial nature of that evidence in that, unless corrected, there was a risk

that a connection might be made between the fact that the appellant had been in a flat with a firearm and the question of whether he was the man with the firearm on the CCTV stills.

34. The judge accepted that he would have to discharge the jury unless he could be sure that he could give a direction which would prevent such prejudice occurring. In his ruling, he explained the risks of how the jury might impermissibly use the fact of the presence of the gun in considering whether or not the appellant was the person in the stills. He gave a detailed direction which not only told the jury to disregard the evidence, but explained in clear and unequivocal terms why that evidence had no connection and could not help them in addressing the issue which they had to decide, which was whether the appellant was the man holding the shotgun in the CCTV images. We have already set out the terms of the direction that he gave. As well as saying in general terms that the evidence was irrelevant and should be ignored, he explained why it was irrelevant. He said that there was no evidence to connect the firearm in the flat to the incident on 7th August. There was no evidence to connect the firearm to either the appellant or his co-accused. There was no evidence that either knew of the presence of a firearm within the flat. There was no evidence as to who was the registered occupier of the flat, and no evidence to suggest that it was registered to either of the defendants or to the family of either of them.

35. It is correct that some evidence that should not have been given may be so prejudicial that a judge's direction could not avoid the prejudice that arises. In the case with which we are concerned, however, we are satisfied that the clear, unequivocal and detailed direction was sufficient to avoid any potential prejudice to the appellant. It explained why the evidence would be of no value to them in considering the issues that they had to address.

36. We turn to the comment made by DC Dawson. The judge directed the jury in clear and unequivocal terms that that statement was inadmissible and should be disregarded by them.

In doing so, he did not elevate the evidence of PC Christie. The judge merely told the jury that the evidence of DC Dawson on this matter was inadmissible.

37. Having admitted the evidence of PC Christie, the judge then gave the jury proper directions as to how to approach the evidence of identification in his summing up. Reading the summing up as a whole, it is clear that the judge properly directed them as to the use they could make of the CCTV images, of the evidence of PC Christie, and of the need for caution in relation to identification issues.

38. The other matters of complaint do not establish any basis for considering that the conviction is unsafe. The judge did not make his rulings on the basis that either officer showed malice. In relation to the firearms matter, he noted that the officer was not motivated by malice; but, nevertheless, the information was so prejudicial that steps had to be taken to ensure that the appellant was not prejudiced. He was satisfied that a direction could achieve that. In the case of DC Dawson's comment, the judge was satisfied that the officer was not motivated by malice, but he considered that the comment was not significant and again could be dealt with by way of a judicial direction. Further, while the judge referred to the delay that would ensue if the jury were discharged, that was not the basis for his decision. His decision was based firmly on the view that he had formed, that the fairness of the trial could be ensured by appropriate judicial directions, and he then gave such directions.

39. The sole question for us is whether we consider that the conviction is safe. We consider that the conviction is safe. The matters referred to, whether viewed individually or cumulatively, do not give rise to any proper basis for considering that the conviction is unsafe.

40. Accordingly, this appeal against conviction is dismissed.

---

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk

---