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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

[2024] EWCA Crim 1223

ON APPEAL FROM THE CROWN COURT AT LEEDS
(HIS HONOUR JUDGE KEARL KC [T20227052])

Case No 2023/03306/B4

Friday 6 September 2024

B e f o r e :

LORD JUSTICE POPPLEWELL

MR JUSTICE HOLGATE

MRS JUSTICE YIP DBE

R E X

- v -

SHERAZ HUSSAIN

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Miss E Marshall KC appeared on behalf of the Applicant

Mr J Sandiford KC and Mr G Hazel-Owram appeared on behalf of the Crown

APPROVED JUDGMENT



LORD JUSTICE POPPLEWELL:

1. On 13 July 2022, following a trial in the Crown Court at Leeds before His Honour Judge Kearl KC and a jury, the applicant was convicted by a unanimous verdict of murder. Also convicted of the murder were his brother, Hamad Hussain ("HH") and Tabish Ali ("TA"). The victim, Jamal Need, who was sitting in a stationary car, was shot in the head at close range by a shotgun fired from another vehicle. The Crown's case was that this was a planned shooting as part of a continuing gangland feud and that the applicant, HH and TA had planned and been present at the shooting, although it was not known which of the three had fired the gun.

2. The applicant's application for an extension of time (408 days) in which to seek leave to appeal against conviction has been referred to the full court by the single judge. No criticism is made of the judge's handling of the trial, of his directions or of his summing up. The sole ground of appeal is based on fresh evidence which it is sought to adduce in relation to the audio content of a CCTV recording which is said to support the applicant's defence of alibi.

The Prosecution Case

3. The shooting took place at about 9.10 pm on Saturday 19 December 2020 when the victim was sitting in his car outside his mother's house at 32 Ripon Avenue, Huddersfield.

4. Three motor vehicles were used in the murder and in the aftermath: a Nissan Juke and a Vauxhall Insignia, both of which were stolen vehicles, and a Ford Focus which was insured to, and used by, TA. The Vauxhall Insignia was used to conduct reconnaissance of the victim's address the day before the shooting. The Nissan Juke was used on the evening of the shooting, and the fatal shot was fired from that vehicle. The Nissan Juke was discarded and set on fire within about ten minutes of the shooting. The Insignia was then used to continue

the getaway from the burnt out site of the Juke. During the getaway, the Insignia was seen to travel in convoy with the Ford Focus.

5. The case against the applicant was based upon evidence of gang association and the feud; and upon CCTV and mobile phone cell site evidence of his movements and contacts on and around the day of the murder.

6. As to the former, the Crown's evidence was that the applicant, HH and TA were closely associated with each other and with the gang referred to at the trial as "the dealer line group", which had operated a drugs line in Huddersfield for several years. That evidence came from a police expert on local organised crime groups. The applicant had two convictions for Class A drug dealing which were before the jury and relied on as evidence of his involvement in drug dealing and gang activity. There was compelling evidence that the applicant, TA, HH and their associates in the dealer line group had been involved in an ongoing violent feud with another gang called the Fartown Boys. There were some 12 incidents of gang violence, which included throwing petrol bombs at, or discharging firearms towards, addresses associated with the homes of gang members, and incidents of individual gang members being targeted and attacked or shot, which involved the use of shotguns, modified firearms, axes and machetes. The sequence of violent events continued from 11 November 2018 for two years and until after the murder with which we are concerned. They included a gang attack on the family home of the applicant and his brother HH, in which their nephew had been shot at, and involved HH being severely injured by machetes. Prior to the murder, in April 2019, the applicant had provided information to the police about the victim, which included that he was an enforcer for the rival gang. The Crown's case was that the shooting of the deceased was another act of "tit for tat" violence in this ongoing feud, which provided a compelling motive for the murder, including a compelling motive for the applicant's involvement in it, his home having been subject to an attack and his brother having been seriously injured in the

violence.

7. As to the applicant's movements and contacts, the CCTV and mobile telephone cell site evidence included the following. On 18 December 2020, the evening before the shooting, the stolen Vauxhall Insignia motor vehicle was used to conduct a reconnaissance of Ripon Avenue (the location of the shooting) and the surrounding streets. The telephone data showed that the applicant was in contact with his brother, HH around the time of that reconnaissance trip.

8. On the afternoon of the shooting, the applicant was in contact with both HH and TA, and there was evidence that the three of them met up in Bradford. It was the prosecution case that this was for final planning and preparations for the murder.

9. By eight o'clock on the evening of the murder the applicant was at 43 Stirling Wood Close, Ainley Top, Huddersfield, the home of his partner, Charmaine Clavin. This was common ground.

10. At 8.16 pm TA was on the move in his Ford Focus motor vehicle and in telephone contact with HH. The evidence demonstrated that TA travelled to Ainley Top, where his phone connected to a mast which served the home of Ms Clavin at Stirling Wood Close. Whilst in that area, TA called the applicant at 8.36 pm. Within a minute of that call, at 8.37 pm, the applicant was captured on CCTV walking from the direction of Ms Clavin's home, past a neighbour's house, towards a ginnel leading towards Weatherhill Road. He was captured retuning about two minutes later, at 8.39 pm. There was no dispute that the person captured on each occasion was the applicant. During the time when he was out of sight of the CCTV camera, there was a telephone call between HH and TA.

11. One minute and 42 seconds after the applicant had returned to Ms Clavin's home, at 8.41 pm, a male who had the same general appearance as the applicant was captured on CCTV footage coming from the direction of Ms Clavin's home, putting on a coat and running towards Weatherhill Road. This male was identified by Detective Constable Yau as the applicant.

12. Within a minute of that happening, TA called HH. The cell site evidence was then consistent with TA's phone travelling from the Ainley Top area to the vicinity of the murder at Ripon Avenue, where it co-located with the phone being used by HH.

13. From this evidence the prosecution invited the jury to conclude that TA had travelled to the area of Ms Clavin's home and had called the applicant; that the applicant had then gone out to meet him in Weatherhill Road; that whilst the two of them were together, HH had called TA; and that, having returned to Ms Clavin's home, the applicant had shortly thereafter left at 8.41 pm, and had met TA again nearby in order for TA to drive him to the vicinity of the murder where they had met HH and gone on to commit the murder together.

14. During this period the applicant's mobile telephone continued to connect to a mast at Ainley Top which provided service to the home of Ms Clavin at Stirling Wood Close. However, during that time the applicant's number received only inbound calls, the longest of which was of nine seconds duration and which appeared to be unsuccessful as the caller then tried to call again without success. That cell site evidence concerning the applicant's phone was consistent with the applicant having left his phone at Ms Clavin's home during the murder, whether deliberately or otherwise.

15. After the murder, getaway and abandonment of the Juke and the Insignia motor cars, cell site and CCTV evidence supported the conclusion that TA had driven back to the vicinity of

Ms Clavin's home at Ainley Top, where his car was seen in CCTV footage at 9.36 pm. It was the Crown's case that the applicant was with TA and was driven back by him, to be picked up by Ms Clavin. The Crown's case was not that TA dropped the applicant back at Ms Clavin's address (which might unhelpfully for both of them have been caught on CCTV footage), but rather that she collected him from nearby. CCTV footage showed a black Mercedes leaving her home at 9.55 pm, when it was common ground that she and her 2 year old son were in the vehicle. The next sighting of the applicant was with Ms Clavin in the Mercedes in a McDonald's at Birstall at 10.08 pm. At 11.23 pm, the applicant and Ms Clavin visited a service station near Pontefract.

16. On the day after the murder, the applicant exchanged various telephone calls with his co-defendants, shortly after which his telephone number became permanently inactive.

The Defence Case

17. The applicant's evidence was that he was not a party to the killing of the deceased; he did not know the deceased; and nor did he know that he was a member of the Fartown Boys. He said that there was no feud between him and the Fartown Boys, and that he had no motive to kill any of the Fartown Boys. He said that he was not involved in dealing drugs at that time. He was not present at the scene of the shooting. The phone calls with his co-accused would likely have been about going to the gym, or about buying cannabis, or like matters. He was not involved in any reconnaissance trip and had no connection to the Vauxhall Insignia.

18. The applicant said that on the night in question he was with Ms Clavin at the Stirling Wood Close address at the time of the shooting. He accepted that he had left that address and returned to it between 8.37 and 8.39 pm. He said that that was because at about 6.15 pm he had been asked to get a takeaway curry to deliver to his friend Manzoor in Doncaster, and he had asked another friend, Omar Satter, to get it for him. He was, he said, at that time looking

for Mr Satter to see if he had arrived. He denied that between 8.37 and 8.39 pm he had met TA. He said that he had not left the address again. It was not him who was captured in the footage at 8.41 pm and the identification of DC Yau was mistaken. The applicant said that he remained at home until he and Ms Clavin left Stirling Wood Close together with their child in the Mercedes at 9.55 pm. He, Ms Clavin and their son all travelled in the car via the M62 towards Leeds. They stopped on the way at McDonald's and then set off towards Doncaster. The food was dropped off for Manzoor at 11.33 pm, after which they made the return journey home. Any telephone conversations he would have had with the co-accused on that day would have been about "everyday things". He denied that his phone had become inactive the following day for any suspicious reason. He explained that there had been an argument between him and Ms Clavin and so he had switched off his phone.

19. Ms Clavin also gave evidence in which she supported the applicant's alibi evidence that he had been with her at her home at the time of the shooting. In cross-examination she accepted that she had said a number of things which were not true, which she had said in order to protect the applicant.

The Fresh Evidence

20. There was CCTV footage which captured the Mercedes leaving Miss Clavin's house at 9.55 pm. It is this footage which gives rise to the single ground of appeal. It concerns the issue as to whether the applicant was in the car at that time. On the applicant's evidence, he was in the car; whereas on the Crown's case he was not, but rather waiting nearby to be picked up by Ms Clavin, having been returned from the shooting in TA's car.

21. The video camera from which the footage in question is taken was not aimed at Ms Clavin's property. The Mercedes is shown only briefly for a second or two after it leaves the home and drives away. It is not possible to identify from that footage who is in the car or

who is driving it. That video footage was part of the compilation served and relied upon by the prosecution prior to the trial. On 5 May, before the Crown's case had been opened, defence counsel asked for the original footage. On 6 May, defence counsel were told that it was available and said that they would collect it on the following Monday, 9 May. It was on 9 May that the Crown opened their case. In fact, the footage was not collected by defence counsel on that day. It was provided on a disc a few days later.

22. It was then apparent that the footage contained both audio and video recording. However, the only notable sound that could be discerned at the time that it was then listened to was that of a child or baby crying and of doors closing. That was consistent with both the Crown and the defence cases. The audio was not placed before the jury.

23. After the trial the applicant wished to have the audio expertly analysed. The audio was provided to him and sent to a digital imagery specialist, Mr Haldenby, to see whether he could assist in improving the clarity of the sound. He undertook various procedures to enhance the quality of the audio, and the enhanced version together with the original recording were sent on to Dr Richard Rhodes, a senior forensic consultant specialising in speech and audio analysis in order for him to undertake further voice analysis.

24. Having undertaken further analysis, Dr Rhodes and a colleague produced a "transcript" which reflected their joint views. Dr Rhodes also produced a separate report of his own. The transcript identified an utterance at one point which was given the attribution "(M)". The key explained that "M" and "F" meant unattributed male and female speech respectively, and that "(M)" (ie in parenthesis) meant male speech with lower confidence in attribution. The utterance was at a point in the footage about one minute and 48 seconds before the car appears briefly on the footage leaving the area. It is at about the same time as the sound of the child/baby and the sound of doors closing, and about ten seconds before the sound of an

engine starting.

25. Dr Rhodes' report can be summarised as follows. The enhancement process which Mr Haldenby had used can change speech sounds so that Dr Rhodes had relied primarily on the original recording. Dr Rhodes said that the utterance is very brief and recorded at very low level with low clarity. As such, it was not suitable (a) for voice comparison, or (b) for transcription. It would not be possible to identify what was said or who said it. Dr Rhodes' view was that it was probably an adult male, although he could not be sure of gender. His view was based on his impression of the audio, having listened to the recording; it was not the result of any form of scientific testing.

The Application

26. Section 23(1) of the Criminal Appeal Act 1968 provides that this court may receive evidence which was not adduced in the proceedings from which the appeal lies if it thinks it necessary or expedient in the interests of justice. Section 23(2) of the Act provides:

"The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to —

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

27. In relation to paragraph (d), it was suggested on behalf of the Crown that there was no reasonable explanation for the failure to adduce the evidence at trial. On behalf of the applicant it was suggested that, on the contrary, the prosecution was at some fault in not making the original recording available earlier and that in any event nothing was audible to the untrained ear of counsel, so that there was no fault in failing to seek an expert analysis at that stage. We do not need to recite the disclosure history more fully, or adjudicate upon those aspects of the rival submissions. Ultimately, the test is whether the admission of the material is in the interests of justice. In this case that turns upon whether it affects the safety of the conviction. If so, in a case of this seriousness, it ought to be admitted. If not, it cannot form a valid reason for quashing the conviction and consequently it would not be in the interests of justice in accordance with either section 23(1) or section 23(2)(b) for it to be admitted.

28. We have considered carefully the transcript and Dr Rhodes' report, *de bene esse*, and have ourselves watched and listened to the audio of the footage in question.

29. Despite the able and attractively presented submissions of Ms Marshall KC, we have concluded, without any real hesitation, that the new material does not affect the safety of the conviction. The view of Dr Rhodes that the utterance is a male voice is based on a brief noise on a low level, poor quality recording. It does not rely on the enhancement by Mr Hallenby and is based solely on an audible impression of the original recording, not any scientific analysis. The joint view of Dr Rhodes and his colleague expressed in the transcript document is that it is only with a lower degree of confidence that it can be attributed to a male. Dr Rhodes' own expressed view is only that it is probably a male, not that he can be certain that that is so. Importantly, there is nothing to suggest or establish that the sound comes from someone in or around the Mercedes. The CCTV footage comes from a camera located on a property adjacent to Ms Clavin's home, which is one of a cluster of approximately 30

properties in Stirling Wood Close. In other, unrelated parts of the footage, both visual and audio recordings of other people are picked up. The CCTV camera in question is adjacent also to a communal parking area, near to which there is the ginnel to Weatherhill Road, which would be used by those on foot who had no direct connection with the Stirling Wood Close properties. The sound on the footage could therefore equally well be someone else in the vicinity, whether a neighbour or a passer by. Moreover, it could have been from someone else at or close to Ms Clavin's home, who had some connection with Ms Clavin or with the applicant.

30. The applicant's alibi defence was, in our view, a weak one given the obvious improbability of his having ordered a curry takeaway before 8.15 pm to deliver to somebody in Doncaster at 11.30 pm. It also suffered from other weaknesses which were identified and exposed in paragraph 12.2.2 of the prosecution opening note, the detail of which we do not need to go into. By contrast, the circumstantial case against the applicant was a strong one.

31. In those circumstances the uncertain evidence of an unidentified male sound on the audio of the footage pales into insignificance.

32. Accordingly, we refuse the application to adduce fresh evidence and we refuse the application for an extension of time in which to apply for 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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