[2019] EWCA Crim 2141
No: 201801933/B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Sitting at Manchester Crown Court Courts of Justice
Crown Square, Manchester, M3 3FL

Wednesday, 5 June 2019

B e f o r e:

PRESIDENT OF THE QUEEN'S BENCH DIVISION

(SIR BRIAN LEVESON)

MRS JUSTICE CUTTS DBE

SIR PETER OPENSHAW

R E G I N A
v
DORIAN ALIX GRAHAM

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Mr J O'Byrne QC appeared on behalf of the **Appellant**
Mr I Unsworth QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. PRESIDENT OF THE QUEEN'S BENCH DIVISION: On 9 April 2018, in the Crown Court at Manchester, before the Honorary Recorder (His Honour Judge Stockdale QC), Dorian Alix Graham was convicted of the murder of Jordan Ross and the attempted murder of Christopher Smith. He had previously pleaded guilty, in circumstances to which we shall return, to wounding Christopher Smith with intent to cause serious body harm. He was sentenced to imprisonment for life, the minimum term specified, pursuant to the provisions of section 269 of the Criminal Justice Act 2003 (in relation to the offence of murder) was 26 years less time spent on remand and the minimum term (in relation to the offence of attempted murder) was specified at 10 years.

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

3. In the early hours of Saturday 30 September 2017 violence broke out in The Suburbia Nightclub in Manchester city centre. A large number of people became involved in what was described as "a mass brawl". During this incident, Jordan Ross, a 24-year-old man from Birmingham, who was in the club with a group of friends also from Birmingham, sustained a fatal wound to the neck. Although he was able to walk out of the club and to receive medical assistance, he died in the street a short time later. In a separate accident, moments after Ross sustained his fatal injury, another male in the club, Christopher Smith, sustained multiple stab wounds. It was not in dispute at the trial that the appellant was responsible for stabbing Smith.

4. As a result of the police investigation into this serious disorder the prosecution decided to proceed to trial with the Manchester associated defendants being tried on a first indictment which included the allegations of murder and attempted murder. It was also agreed that the Birmingham associated defendants should be tried thereafter for the offence of violent disorder. Those defendants included a man by the name of Jordan Brown, who had refused to assist the police in connection with the investigation into the fatal attack.

5. In the event, this appellant was arrested on 2 October 2017 and charged with murder. He was sent for trial on 4 October and arraigned on 20 December when the trial was fixed for 5 March. Meanwhile, on 23 January 2018, Jordan Brown was arrested for violent disorder. His telephone was seized the following day and sent for forensic examination. The significance of these features to the case will emerge.

6. In short, the prosecution case relied principally upon CCTV and other video footage to prove the intent to kill or cause really serious injury; it relied on medical evidence as to the location of depth of the wound and the force with which it was inflicted. It was submitted that there was no other credible candidate for Ross' attacker. This was not a case of the victim being wounded by flying glass - someone had wielded a handheld sharp weapon. The prosecution contended that the weapon was a knife.

7. The defence argued that it could have been a shard of glass. There was no glass found in the wound and no other injury or mark to the neck. The appellant was seen on CCTV with a blade in his hands moments before entering the area where the deceased sustained his injury. On the appellant's own admission (made in circumstances to which we shall return), he attacked Christopher Smith with a knife, stabbing him repeatedly with intent to do him really serious injury. This was seconds after the attack on Ross and demonstrated a propensity to attack with a knife. All those pieces of evidence were sufficient to make the jury sure that the appellant was the person who stabbed the deceased and inflicted the fatal injury. To prove intent to kill in relation to attempted murder, the prosecution relied on the repeated stabbings with the sharp knife and the location of the wounds in vital areas namely the head, neck and abdomen.

8. Here again, as with Jordan Brown, Mr Smith did not assist the police in connection with the investigation.

9. The defence case was that the appellant was not responsible for the injury to the deceased. It was pointed out that he was not seen on CCTV to have stabbed him. He is visible and in sight of cameras from very different angles at all times except for less than a second. He was seen moving away from the area where the injury was sustained, with his hands down to his side, at which time his body language and the position of his hands and arms was not indicative of someone just having inflicted a fatal stab wound. The injury could well have been caused by a shard of glass whether flying or handheld. They also relied upon remarks that Jordan Brown had made outside in the street who, when asked what had happened, recorded by the police was: "It's a bottle. It was a bottle". In any event the appellant was not the person who caused the injury.

10. As to the injuries inflicted upon Christopher Smith the appellant initially argued that he was acting in defence of another but in circumstances to which again we shall refer, he later admitted wounding with intent by denied intention to kill.

11. It is not necessary to rehearse the key prosecution evidence in any detail, either in relation to the eye witness evidence or the forensic evidence from the pathologist or forensic scientists.

12. The fundamental basis for this appeal concerns the events which occurred after the Crown had closed its case. The appellant then commenced to give evidence in-chief and effectively, on Wednesday 21 March, had concluded in-chief. Having concluded his evidence the prosecution asked the court for time to investigate further evidence that had only, at that moment, come to light. That evidence consisted of filmed footage taken in the club at the time of these events which had been sent to the telephone of Jordan

Brown. The footage revealed, as the court was later informed, the movements of the appellant across the premises into the location where, on the prosecution case, the deceased sustained fatal injury. It also depicted the appellant stabbing Christopher Smith multiple times, beyond that to which he had admitted and undermining his account of self-defence of another.

13. This evidence came to the Crown in this way. We have recorded that it was the 24 January that the mobile phone of Jordan Brown was submitted for analysis. The work was characterised as routine, not least because it was being researched essentially, but not necessarily entirely, for the purposes of investigating the allegations of violent disorder in respect of which Jordan Brown had been arrested. On the basis that it was in connection essentially with that enquiry it was only on 2 March that a mobile data examiner within the Greater Manchester Police examined and downloaded the data from the telephone. Unfortunately, it became apparent that it was not possible to extract all third party application data which was missing from the download. Thus, that material had to be reviewed manually. The relevant officer responsible for undertaking such a manual review was at that time on annual leave. She returned on 11 March but was immediately then seconded to assist in what was then a current murder inquiry.

14. So it was that at about the same time that Dorian Graham began to give his evidence DC Parry began her review of the material downloaded from Jordan Brown's phone. That included videos that had been sent to him by a third person. Their relevance to the murder trial was immediately apparent. The officer in charge of the murder investigation was informed who then told Mr Ian Unsworth (counsel for the Crown) and thus the application to adjourn was made to the court. What happened thereafter is also important.

15. On the following day, Thursday 22 March, the downloaded material was disclosed to the court and the material was then viewed on that day or the following day (the Friday) by Mr Andrew O'Byrne and Mr David James, counsel for the appellant. They had the benefit of seeking expert assistance on the review of the video, that expert having been available to give evidence during the course of trial in any event. The appellant, in the meantime, was kept in ignorance of this developments until Monday 26 March, when instructions were taken from him after he had had sight of the video evidence.

16. Before the judge an argument was then mounted that the Crown should be permitted to re-open its case and adduce this evidence. That submission was resisted and it is against the judge’s ruling that this appeal is mounted. Before dealing with the argument, to conclude the chronology, on 27 March the judge delivered a reasoned decision admitting the evidence and permitting the Crown to re-open its case. Evidence was then called both as to the video and the circumstances in which it had been downloaded before the jury.

17. The appellant then gave further evidence in-chief, during the course of which he admitted

the offence of wounding with intent on the basis that the video revealed a clear excess of self-defence. He explained the new evidence in this way as summarised by the judge to the jury:

> i. "He said that until he saw the new footage he did not remember stabbing Christopher Smith so many times. That was because it happened so quickly. He had not run away and it was simply that he was bleeding and he needed medical attention... He said he thought he had stabbed Christopher Smith twice and that was not because that was on the video then available. He was not fitting his account into what could be proved and he said he was shocked by the new video that came to light in the course of the trial. He said that he could not see anyone else stabbing Christopher Smith, so far as he could recollect, but he did not know that he had stabbed him so many times."

18. Both before the judge and in this court Mr O'Byrne has argued that to permit the prosecution to re-open its case after the appellant had given evidence in-chief, was an incorrect exercise of the discretion that the learned judge undeniably had. It was unfair because the Crown had been in possession of the footage for some time and had failed to act upon it in an expeditious manner. The further delay of four days of the examination in-chief put the appellant in a difficult position. He was then precluded from consulting with his lawyers and it was to his detriment that he was placed in such a stressful position having then to face cross-examination by leading counsel for the Crown. Finally, it was argued that the learned judge had failed to identify or adequately identify or properly balance the substantial prejudice occasioned to the defendant in the highly unusual circumstances and timing of the identification and introduction of the new evidence. In short, Mr O'Byrne said the normal rule that the defendant in a criminal trial is entitled to know the case he faces at the close of the Crown's case should have been followed and that as a result these convictions are unsafe.

19. In response, Mr Ian Unsworth argues that the authorities including Criminal Procedure Rule 25.9(2)(i) make it clear that a party may introduce further evidence if it is admissible, and he referred to the paragraphs in Blackstone's Criminal Practice 2019 (F.62 - F6.11) as providing examples. The learned judge also had referred to this part of Blackstone and indeed to Archbold Chapter 4 section 402, and observed:

> i. "The situation which arises in the present case does not fit squarely into any one of the three exceptions but calls for some consideration of all three."

20. Those exceptions are where the evidence was not previously available, where there has been a failure to call evidence by reason of inadvertence or oversight or where evidence is called in rebuttal of matters *ex improviso*.

21. Suffice it to say that the learned judge noted the circumstances in which the police had obtained the evidence and observed that when its significance was known had acted swiftly. He also observed that the appellant had been given the opportunity exceptionally to consult in the middle of his evidence in-chief with leading and junior counsel.

22. It is clear that the learned judge has a discretion whether or not to admit evidence after the close of the prosecution case. It is a discretion to be exercised with care and caution, not least because nothing must be done to encourage the belief that sloppy police practice can be overcome by late admission of evidence. Nothing we say undermines the significance of the general rule that all the evidence upon which the prosecution intend to rely as probative of the guilt of an accused should be called before the close of their case: see, for example, R v Rice [1963] 1 QB 857. Having said that however, there are indeed exceptions. In the context of this case the learned judge accepted the account provided by the prosecution witnesses as to the circumstances in which this evidence came to light and either directly or by inference recognised that it was reasonable that the characterisation of the analysis of this phone was appropriate as routine. This was on the basis that it was not essentially intended to be concerned with the murder trial at all but with the violent disorder. Thus, there was no question of inadvertence or oversight. It might have been argued that the evidence arose *ex improviso* but that is not the basis upon which the judge ruled. Essentially, he concluded that this was evidence not previously available although there were elements of *ex improviso* in the case.

23. What is abundantly clear is that the judge had well in mind the prejudice to this appellant in having to deal with this material after he had given evidence in-chief and at a time when the trial strategy had long since been fixed but then had to be disrupted. However, the interests of justice, both to the Crown and to the defendant certainly were sufficient to give the judge sufficient discretion to exercise it in the way that he did. In reality of course, had he discharged the jury, the material would have emerged at any retrial and the fact that the defendant had only then admitted multiple stabbings after having seen this new evidence would equally have been relevant (and admissible) in connection with the charge of attempted murder.

24. To that extent, save for the stress to the appellant and the difficulty which Mr O'Byrne undeniably had to deal with in the way in which this evidence came out, there was no reason why the trial should not proceed. Whether there was sufficient prejudice to the defendant to justify rejecting the evidence or discharging the jury was eminently for the judge. He analysed the position accurately and with care. In our judgment, he reached a conclusion that was entirely open to him on the material which he considered without in any sense creating a precedent that this type of late evidence is to be encouraged. This appeal is dismissed.

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