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No: 2015 00195 C1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 10 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

HIS HONOUR JUDGE PICTON

R E G I N A

v

MICHAEL FURNISS

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd Lower Ground, 18-22
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Non-counsel application

J U D G M E N T
(Approved)

1. **LORD JUSTICE HOLROYDE:** This applicant seeks to appeal against his conviction on 10th December 2014 of the murder of Andrew Dosiuk on 11th November 2013.
2. It is sufficient for present purposes to summarise the facts very briefly. Dosiuk was shot dead in his own home. He had been involved in drug dealing and was awaiting trial for drugs offences. He had been putting increased pressure on James Stacey to repay a drugs debt. It was the prosecution case that Stacey, acting through a mutual friend Andrew Hall, had engaged the applicant (a former soldier) to kill Dosiuk. All three men were charged with murder on the basis of a joint enterprise.
3. At trial the prosecution relied on circumstantial evidence, including evidence relating to phone contact between the three accused, the use and movements of mobile phones, the use and movements of the applicant's car, the applicant's burning of his clothing on the day of the murder, evidence connecting the applicant to the murder weapon (which was a self-loading pistol) and prison conversations in which it was alleged that the applicant had been complaining about Stacey's failure to pay him for the job he had done. The prosecution also relied on the applicant's failure to mention in interview a number of matters on which he relied at trial.
4. All three accused gave evidence, the applicant being first on the indictment. His case was that he did not know Dosiuk and was not involved in the murder. He said that Hall had been using his car on the day of the murder, and he put forward innocent explanations for the various circumstances on which the prosecution relied against him. He admitted taking the gun into his possession after the killing, but said he had only done so because his co-accused had asked him to use the skills which he had learned in the army to clean the pistol and then to hide it.
5. The trial lasted several weeks, and the jury were in retirement for a number of days. After an appropriate period of time they were given a majority direction. They subsequently sent a note, which the judge, Haddon-Cave J, discussed with counsel. The note indicated that the jury had been able to agree verdicts in relation to two defendants but could not agree in relation to the third. Having considered submissions from counsel, the judge asked the jury to consider whether "there is any realistic prospect of reaching agreed verdicts on all three defendants if you are given more time". The jury retired to consider that question, and a short time later sent a further note stating that they would not reach a majority verdict on the third defendant. However, when the jury were then brought back into court, they in fact returned verdicts on all three accused. The applicant was convicted by a majority. The other two accused were acquitted.
6. The applicant had been represented at trial by experienced leading counsel, junior counsel and solicitors. On their advice application was made for leave to appeal against conviction, on the grounds that the prosecution had failed to disclose relevant information and that the judge had erred in the direction he gave in response to the note from the jury

relating to their inability to agree verdicts in relation to all three accused.

7. Leave to appeal on those grounds was refused by the single judge on 20th May 2015. The application for leave was renewed to the full court and was listed to be heard on 13th October 2015. Shortly before that hearing, however, the applicant gave notice of abandonment of his appeal. Some months later, he applied for that notice of abandonment to be treated as a nullity, on the grounds that he had not wished to abandon his appeal, but rather to change the grounds of the appeal, and that he had been wrongly advised as to how he should go about doing so. On 15th November 2018 the full court granted that application. The applicant, now acting in person, subsequently applied for leave to vary his notice of appeal and to rely on different grounds of his own composition. Directions were given on 17th September 2019.
8. By that rather complicated route, this court is now asked to grant leave to appeal against conviction on the ten grounds which the applicant has composed. He does not formally seek to renew either of the two grounds originally drafted by counsel, though there is an element of overlap between those grounds and some of his new grounds.
9. The application is before the court on a non-counsel basis. The applicant has drafted his grounds with considerable care and has provided the court with a number of documents on which he wishes to rely, all of which we have considered. He is to be commended for the clarity with which he has put forward his case.
10. Having carefully considered all that the applicant has said we are satisfied that none of the grounds of appeal is arguable. Our reasons, in summary, are as follows.
11. Ground 1 relates to the evidence which Hall gave at trial, in which he put forward an explanation for his own movements around the alleged time of the killing and said that the applicant had confessed that he had killed someone. These matters had not been mentioned in Hall's defence statement. The applicant argues that his trial was unfair because he had no opportunity to call evidence in rebuttal of Hall's explanation. He suggests that the prosecution may have known that Hall intended to give evidence which departed from his defence statement, but failed to disclose that information to the applicant.
12. In considering this ground of appeal, it is important to note that before Hall gave evidence the key features of his case had been put to the applicant in cross-examination by Hall's counsel. Thus, the applicant was alerted to any important matters which had not been mentioned in Hall's defence statement. The applicant therefore had an opportunity to call witnesses, if he felt he was in a position to adduce evidence contradicting the case which was now being put forward on behalf of Hall. That was not done. There does not

appear to be any basis for the suggestion of non-disclosure by the prosecution. In short, the fact that Hall gave evidence which was damaging to the applicant's case does not give rise to any arguable ground of appeal.

13. Ground 2 relates to a request made by the applicant's representatives during trial for disclosure in relation to the speed with which the applicant was arrested after the murder. The applicant suggests that his name must have been put forward by someone who was involved in the murder, and on that basis, he contends that there was disclosable material which was neither disclosed nor made the subject of a public interest immunity ("PII") ruling.
14. When this point arose during the trial, the judge heard evidence and submissions from the prosecution in camera. Having done so he gave a very short ruling in open court, in which he said:
 - i. "I am quite satisfied that there is no material to disclose which assists any of the defendants or which tends to undermine the prosecution case."
15. Each member of this court has read a transcript of the proceedings held in camera. We have no doubt that the judge was correct in his ruling. The applicant is mistaken in thinking that the absence of any PII ruling indicates that there has been a material error. A PII ruling may be made where there is material which satisfies the disclosure test. Here, the judge was rightly satisfied that there was no material which met the disclosure test. Accordingly, no question arose of withholding material from disclosure on grounds of PII.
16. Ground 3 alleges a failure by the prosecution to comply with their continuing duty of disclosure as the trial took its course. We can see no basis for this. No application was made for specific disclosure, and the applicant's submissions do not identify any basis on which such an application might have been made. In our view, the points raised in support of this ground are speculative, and there is no arguable ground of appeal.
17. Ground 4 relates to a note, said to have been sent by the jury, asking what had led the police to arrest the applicant. It is said that the judge answered the question by saying that there was no evidence of any reason for the arrest other than "police work".
18. We are not clear about the stage of the trial at which the applicant says this happened, but for present purposes we accept that his recollection is accurate. In our view no legitimate criticism could be made of the judge's use of the phrase "police work", which the applicant himself says had been used by prosecuting counsel in submissions to the judge. There is no basis for suggesting that the jury, having heard that phrase used by the judge,

would be prejudiced against the applicant.

19. Ground 5 relates to the manner in which the judge dealt with the jury's notes about their inability to reach a verdict in relation to one of the accused.
20. The judge, having presided over the trial and having listened to submissions, was in the best position to decide how best to answer the first of those notes. It is apparent from the transcript that the note gave an indication of the present division between the jurors in relation to the third accused, though of course the judge was not able to disclose that information to counsel. The judge quite rightly posed the question as to whether, given time, the jury would be able to reach verdicts on all three accused. He rightly asked them to retire to consider their answer to that question: it would not have been appropriate to expect them to do so immediately, in open court, without any opportunity for discussion amongst themselves. We see no legitimate basis for criticising the terms in which the judge did this. When the jury sent their further note, he rightly arranged to reassemble the court, with a view to taking the two verdicts which the jury had reached and discharging them in relation to the third accused. In the event, it transpired that the jury had in fact been able to reach verdicts in respect of all three. That may have been unexpected, in view of the note sent only a short time earlier, but such developments in jury trials are by no means unknown. It is not, in our view, arguable that any material irregularity occurred.
21. Ground 6 raises an issue as to the procedure which was adopted by the court associate when the jury were asked for their verdicts. The transcript shows that the associate began by asking whether at least ten of the jury had reached a verdict in respect of the applicant. The foreman indicated that they had, the verdict was taken, and a similar procedure was then followed in respect of Hall and Stacey. The applicant contends that the process should have commenced with an enquiry as to whether the jury had reached verdicts on which they were all agreed.
22. This ground is based on a misunderstanding. At an earlier stage of their retirement, the jury had rightly been asked whether they had reached verdicts on which they were all agreed as a preliminary to the giving of the majority direction. The procedure which the court associate adopted at this later stage met the requirements of Part 26Q of the Criminal Practice Direction and there was no material irregularity. In relation to each of the accused in turn the foreman stated the verdict of the jury in unambiguous terms and without any objection from any other juror. In those circumstances, whilst it may not have been expected that three verdicts would be returned, there was nothing ambiguous about any of them.
23. Ground 7 contends that the evidence of a prosecution expert witness was inadmissible. There is nothing in this point. No application was made or could have been made to

exclude the evidence, and in any event the expert evidence was consistent with the evidence which the applicant himself gave.

24. In ground 8 the applicant expresses high regard for most of the summing-up but contends that the judge made some errors in summarising the evidence. It must, however, be noted that experienced trial counsel did not raise any of these points at the time. Other points were raised, and any appropriate factual corrections were promptly made by the judge. We are satisfied that in relation to the matters now put forward, either the judge was in fact correct in what he said, or any error was so minor that experienced counsel saw no reason to ask for it to be corrected.
25. Ground 9 is effectively an application to rely on fresh evidence, in the form of a statement by a man who was in prison with Hall. This man says that Hall spoke of a robbery at Hall's mother's house and said that Dosiuk had been killed because of that robbery. Hall is also reported as saying that he had got away with murder by blaming the applicant after the applicant had tried to blame him. The applicant links this proposed fresh evidence to a suggestion that there must have been a failure of disclosure by the prosecution in relation to the robbery.
26. One of the criteria for the admission of fresh evidence on an appeal is whether it appears that the evidence may afford a ground for allowing the appeal: see Criminal Appeal Act 1968 section 23(2)(b). We are satisfied that the applicant cannot meet that criterion, and that accordingly there is no prospect of the court receiving the proposed fresh evidence. The possibility of an additional or alternative motive for Hall's wanting to kill Dosiuk would add nothing to the applicant's case. Taken at its highest, the evidence as to what Hall said to his fellow prisoner is entirely consistent with the prosecution case of a joint enterprise involving both Hall and the applicant, and it cannot be regarded as a confession to murder by Hall without the involvement of the applicant. As with other grounds advanced by the applicant, we see no basis for the suggestion of non-disclosure.
27. Finally, ground 10 criticises the applicant's former representatives for failing to call either a woman called Sophie Yearl, or an expert witness as to mobile phones and cell siting, to give evidence for the defence.
28. We are satisfied that the trial representatives took careful instructions from the applicant about the evidence, including potential defence evidence, and gave him sensible advice about the merits of calling or not calling particular evidence. Sophie Yearl was seen by the applicant's solicitors, who subsequently prepared a statement for her, but she refused, or at any rate failed, to sign it. It seems clear that she was unwilling to give evidence. Moreover, the contents of her unsigned statement make it clear that there was ample scope for her to be cross-examined in such a way that her evidence could not provide any meaningful support for the applicant. It is therefore not surprising that no action was taken to bring Sophie Yearl to court, and we can see no basis for thinking that her

absence materially weakened the applicant's case.

29. As to the suggested expert evidence, it is clear that the possibility of calling such evidence was discussed in some detail, and that the applicant accepted advice that his case could not be helped and might well be harmed by calling defence expert evidence. Leading counsel in his closing speech dealt with the prosecution expert evidence as effectively as was possible. We can see no basis for any legitimate complaint about the conduct of the trial representatives.

30. For those reasons we are satisfied that none of the grounds of appeal casts any doubt on the safety of the conviction and that none of them is arguable. This renewed application for leave to appeal against conviction is accordingly refused.

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

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