



Neutral Citation Number: [2019] EWCA Crim 2271

Case No: 201900906 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT PRESTON
MR JUSTICE HOLROYDE
T20137023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2019

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE FULFORD)
MR JUSTICE SPENCER
and
MR JUSTICE WILLIAM DAVIS

Between:

Damien Paul Gorman
- and -
Regina

Appellant

Respondent

Joel Bennathan Q.C. (instructed by **Hadgkiss Hughes & Beale Solicitors**) for the **Appellant**
Nicholas S Clarke Q.C. (instructed by **CPS Criminal Appeals & Review Unit**) for the
Respondent

Hearing dates: 28th November 2019

Approved Judgment

Lord Justice Fulford:

Introduction

1. The following order was imposed by Mr Justice Holroyde on 13 February 2013 at the Crown Court at Preston:

“Pursuant to Section 46 Youth, Justice and Criminal Evidence Act 1999

It is ordered that:

In order to avoid substantial risk of prejudice to the administration of justice in these proceedings (or pending or imminent proceedings) there should be no report published or broadcast which refers to:-

The name, address, and place of work Crystal Hill, of which includes any still or moving pictures.

Until further order.

The purpose of making the order is to protect the fairness of the proceedings from the publication of the material referred to, which, if published might have a substantially adverse effect on the fairness of the proceedings (or pending or imminent proceedings).”

2. It is clear that the order should have been made under section 4 (2) Contempt of Court Act 1981. It was not an order made to protect a witness, given there was no reference to the risk that the quality of the evidence or the level of cooperation on the part of the witness would be diminished if the order was not made. Furthermore, if it was an order to protect the witness, it should have been made for her lifetime. Instead, it was made, until further order, to protect the fairness of the proceedings or pending or future proceedings.
3. The proceedings then pending never occurred (see paragraph 49 below). In those circumstances, it is in the interests of justice to dispense with the entirety of the restriction on reporting.
4. On 12 June 2013 at the Crown Court at Preston before Holroyde J and a jury, the applicant was convicted of murder (count 1), and three counts of attempted murder (Counts 2 – 4).
5. On 13 June 2013 he was sentenced on count 1 to imprisonment for life (33 years was specified as the minimum term under section 269 (2) Criminal Justice Act 2003), and to 24 years’ imprisonment on each of counts 2, 3 and 4, concurrent with each other and with the sentence imposed on count 1.
6. He stood trial with a number of others. Dale Cregan pleaded guilty to four counts of murder (counts 1, 6, 10 and 11), three counts of attempted murder (counts 2 – 4) and one count of causing an explosion with intent to endanger life (count 8) and was sentenced to imprisonment for life with a whole life order. Luke Livesey was convicted of murder (count 1) and three counts of attempted murder (counts 2 – 4) and was

sentenced to imprisonment for life (minimum term 33 years). Anthony Wilkinson was convicted of possession of a firearm with intent to endanger life and murder (counts 5 and 6) and was sentenced to imprisonment for life (minimum term 33 years). Jermaine Ward was convicted of murder (count 1) and sentenced to imprisonment for life (minimum term 33 years). Mohammed Ali was convicted of assisting an offender (count 9) and was sentenced to 7 years' imprisonment.

7. Leon Atkinson, Ryan Hadfield and Matthew James were acquitted of murder and attempted murder (counts 1 – 4). Francis Dixon was acquitted of murder, attempted murder and causing an explosion with intent to endanger life (counts 1, 2 and 8).
8. Before this court, the applicant applies for an extension of time of 2066 days in which to apply for leave to appeal against conviction after referral to the full court by the single judge. He seeks to rely on fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968 and this application has also been referred to us. There is no criticism either as to the way in which the trial was conducted or the judge's summing up, and the latter, for a trial that began on 4 February 2013 and concluded on 12 June 2013, is a model of brevity and clarity. It was delivered over only four days and it is a paradigm as to how to sum up a multi-handed case (10 defendants), focussing on the main issues and evidence, in a way that will best assist the jury.

The Background

9. Just before midnight on 25 May 2012, Dale Cregan, got out of a stolen Ford Focus wearing a balaclava, and walked into the Cotton Tree Public House, Droylsden, armed with a self-loading pistol. He shot and seriously injured John Collins, Ryan Pridding and Michael Belcher. He shot and killed Mark Short (he died the following day).
10. Two weeks later, Dale Cregan killed David Short, Mark Short's father, by shooting him repeatedly whilst chasing him through his home and throwing a military grenade at him.
11. The motive for all this violence was a previous incident in which the mother of one of the applicant's co-accused, Leon Atkinson (who was acquitted) had been slapped by Raymond Young, who was an associate of the Short family. As a result, Atkinson desired revenge of an extreme kind and, the prosecution alleged, organised for the shootings to be carried out.
12. Cregan then went on the run and lured two unarmed police officers to the house where he was staying. When they arrived, he opened the front door and shot at PC Fiona Bone and PC Nicola Hughes multiple times, killing both of them.
13. The prosecution case was that the applicant assisted Cregan in the events of 25 May 2012. It was contended that he was in the Ford Focus, along with Luke Livesey, that took Cregan to and from the Cotton Tree Public House, and they used the applicant's former home to clean up after the event.
14. Given the arguments raised on these applications, it is necessary to consider some of the detail of the case against the applicant. There was evidence from a variety of sources – indeed, it was undisputed – that the applicant, Cregan, Livesey and Ryan Hadfield had spent the afternoon together at a succession of public houses, ending up in

Stalybridge. In the early evening, the applicant spoke with Cregan on the telephone. Around 8 pm, the applicant moved location to the New Inn Public House in Hollingworth, a few miles away. Following a telephone call from Matthew James to Cregan to confirm that the Short family were in the Cotton Tree Pub (James gave evidence to that effect), Cregan, Livesey and Hadfield were picked up by a taxi at a public house in Stalybridge at approximately 10 pm, and they collected the applicant from the New Inn, Hollingworth at 10.12 pm. The driver stated that he knew the applicant as a regular customer called “Damo”, a man who had a distinctive scar on his face. The four men were dropped off at various places in Droylsden. When first interviewed, the applicant lied about having made this taxi journey. We interpolate to observe that it was undisputed that the applicant had been with two of the men involved in the shooting at the Cotton Tree less than two hours before this happened (Cregan admitted that he was the person who used the gun and Livesey was convicted of murder (count 1) and attempted murder (counts 2 – 4)).

15. Before the events in counts 1 – 4, Cregan, Livesey and the applicant all stopped using their mobile phones.
16. At 11.49 pm, a stolen Ford Focus was captured on CCTV pulling up outside the Cotton Tree Public House in Droylsden and Cregan got out. He went into the pub and started shooting, killing Mark Short and seriously injuring three others. He then jumped back into the passenger side of the Ford Focus, which immediately sped off. It travelled to Hollingsworth, where it was set on fire and destroyed, close to 12 Moorfield Terrace (the applicant’s former home).
17. The three men who had been in the car were captured on CCTV walking to Moorfield Terrace. The prosecution case was that they were Cregan, Livesey and the applicant and that they went to 12 Moorfield Terrace to clean up and change their clothes. The fingerprints of Cregan and Livesey were found on the window of the kitchen at 12 Moorfield Terrace. It is contended by Mr Bennathan Q.C. for the applicant that this indicates they needed to break into the house and that the applicant was not involved because he had a key to the premises (he went back to the house from time to time to collect post). However, as Mr Clarke Q.C. for the prosecution points out, there was no reason for the applicant to have been carrying the key to his former home on the day of the shooting. There was inconsistent evidence on this issue that is unnecessary to analyse for the purposes of this judgment. The DNA of Cregan and gunshot residue associated with the shooting in the public house was found on clothing left in a bag in the garden at the address. When Livesey was arrested in June, he had a piece of paper down his sock on which two telephone numbers were written, one of which was for the applicant.
18. Evidence that was more direct in nature was provided by Crystal Hill and her daughter, Nikita. Crystal Hill testified that she lived at 14 Moorfield Terrace and had been immediate neighbours with the applicant and Sarah Clarke. She alleged that the applicant was involved in Class A drug supply with the Flanagan family and he was “not a man to be messed with”.
19. She gave evidence regarding an incident on 2 February 2012 when Ms Clarke told her that she had to look after a number of items of stolen property, as Ms Clarke was worried the police were going to search number 12. Ms Clarke said the applicant would

be unhappy if Ms Hill did not cooperate. Ms Hill showed these items to a prosecution witness, Mr Brettle, who came to her address the same day to fit a panic alarm because she was scared of the applicant. Mr Brettle was concerned at what he had seen and immediately reported the matter to the police.

20. Ms Hill said that on 25/26 May 2012, between midnight and 1am, she was at home when there was a knock at the door. She looked out of a first-floor window and saw the applicant. She opened the front door and noticed he looked flustered and very pale. He told her not to worry, that he was going into number 12 and that she was to let him know if the police came. She thought she saw the shadow of at least one other person outside but was unable to say who it was. She heard people moving around upstairs and talking for 15-20 minutes in number 12, one of whom was the applicant, and then it went quiet. In cross examination, she accepted that she had not mentioned the people in the shadows in her statements to police or there having been more than one person at number 12 that night. She said this was because further details had come back to her over time, and that when interviewed she was “not herself”, as she was unwell and afraid. She variously described the applicant as wearing a black hooded top (during the door-to-door enquiries) and a vest (her evidence at trial). Immediately after he had left, she told her daughter, Nikita Hill (then aged 13), and her friend, Kelsey Childs-Berry, that the applicant had been the man at the door.
21. Nikita Hill gave evidence about this incident. She said that she was upstairs in her mother’s house on the night of 25/26 May 2012, when her mother shouted loudly that someone was in their back garden. She looked out of the window and saw some shadows moving about in the garden of number 12. She then heard a knock at the door, which her mother answered. When the visitor had gone, her mother called her downstairs and told her that it had been the applicant who told her to let him know if the police came (her mother indicated this had been said in a menacing way).
22. Kelsey Childs-Berry was at number 14 that night. She recalled the incident of a man coming to the door and shortly after he had gone, Crystal Hill indicated it had been “Damo” (which was a description of the applicant).
23. Nikita and Crystal Hill gave evidence of friends of Richard Hill (Nikita’s brother) Dale Beresford and Andre Naylor arriving a little afterwards, early on 26 May 2012, and telling them that a car nearby was on fire. Crystal Hill testified that she said “Oh my God, Damo’s just been here. I wonder if this has got anything to do with him again”. There was also a message on Facebook about a shooting. The next day they saw clothes in the back garden of number 12.
24. Andre Naylor confirmed that when he arrived, having heard the news about an incident in Droylsden, Crystal Hill told him she had heard people climbing over the fence and noises were coming from next door that she thought might be her neighbour. Liam Pritchard, a friend of Richard Hill, also agreed that he was at number 14 early on 26 May 2012 (his birthday). They were talking about the burnt-out motorcar when Ms Hill said she had heard a noise in the back garden and that “Damo” or Damien (the applicant) had knocked on her door. She thought he had broken into number 12. This was before the police started making their enquiries.

25. Crystal Hill testified that later the following day, the applicant returned to her house and took her into the side alley, where he threatened her. He accused her of speaking to people and told her not to say anything to the police. He told her that she did not want a “one-eyed Scotchman coming to her door” (a reference to Cregan, who had lost an eye). This was witnessed by Andre Naylor who got a glimpse of the man. Crystal Hill told him that it was the applicant.
26. There was a further occasion, when Crystal Hill was at Andrew Haynes’ house, when the applicant again threatened her and her children and told her to keep her mouth shut.
27. Ms Hill described a final occasion when she was threatened, on 1 June 2012, the incident which gives rise to the application to introduce fresh evidence. She went into a park in Hollingworth (not far from her home and not far from The Organ Public House) at about 5 pm with Tinaya Clarke (Sarah Clarke’s sister) when Sarah Clarke approached them from Water Lane. Ms Clarke threatened her and her children and warned her not to put the applicant in prison. Ms Hill then saw the applicant standing nearby and he drew his finger across his throat as if to say, “you’re dead”. This account was first given to the police in a recorded interview on 4 June 2012 (at the same time that Ms Clarke gave her account of the events on the night of the shootings).
28. Nikita also gave evidence regarding the incident with Ms Clarke in the park on 1 June 2012, at which she said she had been present. She saw her mother and Tinaya Clarke enter the park, followed by Ms Clarke. Ms Clarke spoke to them and she then noticed the applicant was nearby (she varied between “I’m pretty sure he was there” to “I know it was [him] I saw the scar” (the applicant has a noticeable scar on his face). Her mother later told her that she had been threatened.
29. Crystal Hill conceded that the police frequently attended at her house as a result of complaints; there had been one occasion when she was very drunk, “lost it” and ended up being arrested. She also acknowledged that she smoked cannabis and had stored class A drugs for the Flanagans, about whom she had provided information to the police. She had been served with a Child Abduction Order in the past in respect of a young girl called Kayleigh who lived with her for a while, but she blamed this on Kayleigh’s father wanting to get back at her for reporting him to Social Services. She denied that she had tried to persuade Tinaya to live with her or that she had given her any drugs (she claimed this was the responsibility of Mr Haynes, the applicant and Ms Clarke). She had made an unverified allegation about a neighbour that he had buried two AK47 rifles on a farm. Liam Pritchard said he considered Ms Hill to be a compulsive liar whom he did not trust.
30. She denied that the applicant and Ms Clarke had moved to a new house because of her behaviour towards Tinaya Clarke. She also disputed the applicant’s version of the meeting in the park, reiterating that he had been there and the conversation with Ms Clarke had been anything but amicable. She maintained she was telling the truth and was not making up a false allegation against the applicant. She said she was petrified of him.

31. In cross-examination, Nikita Hill agreed that her mother smoked cannabis and many young people came to her mother's house and smoked drugs there. She denied that her mother sold drugs or gave any drugs to Tinaya.
32. The applicant was arrested on 12 June 2012. He provided a prepared statement denying involvement and stating that Crystal Hill was a liar. He did not say where he had been at the time of the shooting on the night of 25 May.
33. He was bailed, but was then arrested and interviewed again on 7 August 2012. He relied on his previous prepared statement, but added that he had not taken a taxi on the 25 May and had not gone to Droylsden.
34. His case at trial was that he did not know the Atkinson family or the Short family and had nothing to do with the attack at the Cotton Tree pub. He was not in the Ford Focus at the time of the shootings and did not go to his former home in Moorfield Terrace afterwards. He also denied having threatened Ms Hill at any time. He described how he fell out with Crystal Hill. He said she played loud music, had many visitors and supplied drugs to children. He had threatened to report her to the police for supplying cannabis to Tinaya Clarke, and it was through Ms Hill that Tinaya had become involved with Andy Flanagan, who was a local drug dealer. He said that due to the problems with Ms Hill, the applicant and Ms Clarke moved out of 12 Moorfield Terrace in March 2012. His account was confirmed by Mr Rostron, the letting manager responsible for 12 Moorfield Terrace, who said that the applicant and Ms Clarke had moved out because of their concerns about Ms Hill dealing drugs. The applicant disputed Ms Hill's evidence that Ms Clarke had asked her to hide stolen property on his behalf.
35. As to his movements on 25 May 2012, he drank in various pubs with Cregan, Livesey, Hadfield and others. He agreed that he went to the New Inn around 8pm, leaving Cregan, Livesey and Hadfield in Stalybridge. There was some telephone contact between them, and they eventually picked him up from the New Inn in a taxi.
36. He maintained that they travelled back to Stalybridge and he alighted behind a branch of JD Wetherspoon with Cregan and Livesey. Hadfield continued on to Droylsden. Cregan then indicated he wanted to go to Glossop and they got in Livesey's car, but the applicant asked to be dropped off at the New Inn. He claimed he turned his phone off around 10.30 pm, as he was getting repeat telephone calls from his partner telling him to come home and he did not want to hear from Cregan and Livesey again that evening.
37. He maintained that at the time of the shootings, he was in the New Inn Public House. He drove home, getting in around ten past midnight. He denied being one of the three men in Moorfield Terrace. He said he still had a key for the property and would not have needed to break in. He suggested that Ms Hill was a liar and that her evidence regarding him knocking at her door on the night of the shootings was simply untrue.
38. He denied that the clothing found in the garden of 12 Moorfield Terrace was his, but he accepted various other items did belong to him including the balaclava. He said these were thrown away when he and Sarah Clarke moved out. He explained how he had been severely injured in an unrelated shooting seven to ten years before, and for that reason he would not get involved in incidents such as the present. Although he had not

mentioned that he had been at the New Inn in either of his interviews, he denied having concocted a story to fit the evidence and he denied lying to police. He said he had not stopped using his telephone for a sinister reason and it had simply run out of credit. He declined to answer the questions that were asked of him.

39. He disputed having threatened Ms Hill. He repeatedly stated that there was CCTV in the park and on Water Lane and it would not support her account. He accepted Nikita Hill would recognise him, and said she also was lying about the incident in the park on 1 June.
40. Sarah Clarke was called by the applicant. She said that Ms Hill was a “horrible” neighbour for the reasons described by the applicant, and as a result, they ended up moving away. Ms Clarke accepted leaving rubbish in the alleyway next to the house when they left. She denied having taken stolen property to Ms Hill’s house in February 2012.
41. On the night of the shooting, she confirmed that she had been constantly ringing the applicant and he repeated he would come home but failed to return.
42. As regards the incident in the park with Ms Hill, Ms Clarke stated that she had been in the Organ Public House, when she saw Ms Hill and Tinaya walk into the park. She went to speak to Tinaya as she did not want her to be with Ms Hill. She said she did not threaten Ms Hill. The applicant had remained in the pub garden, where he could not be seen from the park, and he had not made a threatening gesture towards Ms Hill. She agreed that Nikita had also been in the park but was too far away to hear anything. She maintained in evidence that CCTV would prove her account.

Submissions

43. In support of these applications, Mr Bennathan observes that the case against the applicant significantly relied upon the evidence of Crystal Hill and her daughter, Nikita Hill. It is suggested that the fresh evidence – certain CCTV footage from “camera 4” at the Organ Public House, together with the analysis of it by an expert, Raymond Evans (considered below) – fundamentally undermines the credibility of both witnesses and therefore significantly weakens the prosecution case against the applicant. As early as 19 June 2012 the applicant said to a DC Boon that the CCTV from the Organ Public House should be checked because it would show he had not threatened Ms Hill. In the event, Mr Bennathan submits that once the footage was properly analysed, it demonstrably supports the applicant’s account as to the events of 1 June 2012 and undermines the case for the prosecution, most particularly as regards the credibility of Ms Hill and her daughter.
44. The CCTV footage had been in the possession of the Crown at least since 10 July 2012. On that date, PC Phillips rehearsed on the CCTV Full Viewing Log form for Operation Somerville that he had viewed all the relevant footage, concluding there were “no positive sightings of the applicant, Sarah Clarke or Taniya Clark”. The purpose of this exercise on 10 July 2012 was to look for evidence of the suggested intimidation of Sarah Clarke. Although Mr Bennathan suggested in his skeleton argument that there had been a failure by the prosecution to disclose this material at trial, by the conclusion of the submissions before the court this contention was no longer pursued. The officer’s

record (TPP/18) was disclosed on the relevant schedule to the defence in advance of the trial.

45. As set out above, the relevant external camera at the public house is camera 4. The camera sweeps round to give views in three separate positions each for a few seconds at a time. Although the footage is recorded in colour and for two of the three camera positions is described as being of good quality, PC Phillips makes the observation in the viewing log that recognition of individuals is dependent on their proximity to, and orientation towards, the camera. The CCTV reveals two individuals, a man and a woman, entering the garden of the Organ Public House before the incident involving Sarah Clarke and Crystal Hill occurs in Water Lane. The man remains in the garden, sitting mostly at a table, for the entirety of the relevant period, whilst the woman leaves for about 8 minutes at a time that would coincide with the incident relating to Sarah Clarke and Crystal Hill. It would have been impossible for the man to have acted as the applicant is alleged – watching the exchange between Sarah Clarke and Crystal Hill and drawing his finger across his throat – without the CCTV capturing him leaving and a period of absence from the garden.
46. The imagery expert, Raymond Evans, has analysed CCTV footage from camera 4 outside the Organ Pub on 1 June 2012, to compare the man and the woman with the applicant and his then partner, Ms Clarke. Under enhancement and close examination, Mr Evans was able to see a small number of broadly consistent features linking the man in the footage and the applicant. He concludes, as regards both individuals, that there are “no obvious differences” between the woman in the footage and Sarah Clarke, and there are “no demonstrable differences” between the man in the footage and the applicant. The images of the woman are of higher quality than that of the man, and the expert concludes there is “moderate support” to suggest that the woman is Ms Clarke and “limited support” that the man and the applicant could be the same person.
47. We have viewed the footage with care and although we entirely accept the evidence of Mr Evans, PC Phillips’ conclusions, based on what he saw with the naked eye, are entirely unsurprising. You have to look repeatedly at the footage to begin to discern that these two grainy figures may be the applicant and Sarah Clarke. As we have just noted, PC Phillips observed – we consider rightly – that the recognition of those shown in the footage is dependent on their proximity to, and orientation towards, the camera, and save fleetingly for the woman, neither figure is close to the camera or is orientated in a way that enables the viewer to see his or her face with any real clarity. The man is wearing a hood for a significant part of the relevant time. The defence did not view this material for the purposes of the trial to ensure that PC Phillips’ conclusions were accurate.
48. Mr Bennathan highlights that if the man on whom Mr Evans focussed was the applicant, this evidence self-evidently undermines Crystal and Nikita Hill’s account that he had made a threatening gesture during the incident in the car park for the simple reason that he had not left the garden of the public house. The prosecution accept that the court should proceed on the basis that if this footage had been seen by the jury, it is likely they would have concluded that the man and the woman were the applicant and Sarah Clarke. The convergence of evidence on this issue, including the strenuous suggestions by the applicant and Sarah Clarke, close in time to the incident, that the Organ Public

House CCTV would support their account, lead to this conclusion, with which we agree.

49. Following the applicant's trial, the prosecution initiated proceedings against Ms Clarke for witness intimidation in relation to the alleged threats to Ms Hill on 1 June 2012. The Crown decided not to proceed with the case against Ms Clarke as a result of the CCTV evidence. The applicant submits that if the CCTV undermined any realistic prospect of conviction in Ms Clarke's case, it also undermines the safety of his convictions.
50. Against that background, the main focus of Mr Bennathan's submissions is directed at the following contention: if Crystal and Nikita Hill are unreliable as regards the actions of the applicant on 1 June 2012, this undermines their evidence as to what they respectively saw and were told relating to the applicant's arrival at number 14 shortly after the shooting and after the stolen car had been set on fire. He argues that it not only renders them unreliable individually but it raises the spectre of collusion between mother and daughter or witness grooming by Crystal Hill. Mr Bennathan has not shied away from the importance of the alleged visit to number 12 shortly after midnight. Given the powerful link between the visit to number 12 and the shooting at the Cotton Tree Public House, if the applicant was the man who knocked on the door of number 14, this would provide powerful evidence of his involvement in the shootings.
51. Mr Bennathan argues that armed with this proof of a false claim against the applicant, counsel at trial would have dealt with both witnesses differently, and particularly Nikita Hill in that they would have had a proper and credible foundation for suggesting she, along with her mother, was deliberately lying. He contends that the CCTV evidence would have "totally changed the trial", and Crystal and Nikita Hill should have been cross-examined on the basis that the former had recruited the latter to tell at least two false stories about the applicant.
52. Mr Clarke Q.C. on behalf of the prosecution submits that although Crystal Hill was an important prosecution witness, the jury were only invited to rely on her evidence where it was supported by other evidence. Indeed, in the course of his speech to the jury, Mr Clarke said, *inter alia*:

"Gorman's primary concern during the course of the police investigation and this trial has been attacking Crystal Hill and her character. She takes cannabis and you may think she lets others share her stash, including the youngsters who come round. Her drug misuse and morals do not mean that she is not telling the truth about some aspects of this case. We do not suggest that you can safely act on her word alone. You will need to look at the surrounding circumstances and put what she said into context."
53. It is suggested there was a strong circumstantial case against the applicant, without the evidence of Ms Hill, including his association with co-defendants around the time of the shooting, the telephone evidence (in particular that Cregan, Livesey and the applicant turned off their telephones and the applicant deleted relevant text messages), the evidence of the taxi driver, the use by someone of the applicant's former home as a location to clear up and destroy evidence, the clothing with Cregan's DNA and gunshot residue found in Moorfield Terrace, the applicant's undoubted lies (e.g. concerning the journey in the taxi) and the lack of any mention in the interview of the alibi on which

he later relied (i.e. that he was at the New Inn at the relevant time). We are reminded that the evidence given by Ms Hill was supported by other witnesses, including Mr Brettle who fitted the panic alarm at her address, Nikita Hill, Kelsey Childs-Barry, Andrew Naylor and Liam Pritchard. The prosecution additionally relied on the bad character of the applicant, which included the alleged prior possession in 2004 of a firearm, which it was said he had brandished but which he denied.

54. We are told that the decision to offer no evidence against Sarah Clarke was a decision in relation to the proceedings against her and was not a concession that the evidence given by Crystal Hill at the applicant's trial was unreliable. At the hearing when the proceedings against Sarah Clarke were terminated, the CPS advocate said:

“Over the course of the past few months, CCTV evidence has come to light as far as the prosecution are concerned which the prosecution were not aware of. That CCTV evidence has been reviewed, together with all the other evidence in the case, and as a result of that careful review the prosecution has concluded that there is insufficient evidence to provide a realistic prospect of conviction, and therefore we intend to offer no evidence against Miss Clarke.”

55. Generally, Mr Clarke Q.C. submits the significance of the fresh evidence should not be exaggerated given it only relates to what he describes as a small, peripheral part of the evidence against the applicant. It is suggested that the jury would have been well aware of the doubts that existed as to Ms Hill's credibility. As to the strength of the case against the applicant, it is argued there is no other credible candidate for the third man with Cregan and Livesey. The case against the applicant was strong and whatever the court's conclusions on the new CCTV evidence, his conviction remains safe.

Discussion

56. This application has revolved centrally around the alleged visit by the applicant to number 14 shortly after the incident at the Cotton Tree Public House. If the jury were sure the applicant was the man who knocked on Crystal Hill's front door, the case against him was of considerable strength. This alleged visit was the reason for calling Crystal and Nikita Hill to give evidence. The evidence of the incident on 1 June 2012 in the park near Water Lane was inextricably linked to Ms Hill's allegation that he had called at number 14 shortly after the shooting, in that she said she was threatened because of the visit on 26 May 2012 and the applicant argued the two incidents were part of a false account Crystal Hill provided against him. Subject to the issue of admissibility (see below), the question we need to address is whether the fresh evidence renders the conviction unsafe because, by undermining the reliability of Crystal and Nikita Hill, it might reasonably have affected the decision of the jury.
57. The evidence introduced during the trial as to the character of Crystal Hill and her potential unreliability was extensive. By way of a partial summary, the police frequently called at her house following complaints. She had been arrested as a result of her drunkenness. She smoked cannabis and had stored class A drugs for the Flanagans, about whom she had provided information to the police. She had been served with a Child Abduction Order. She had made an unverified allegation about a neighbour that he had buried two AK47 rifles on a farm. Liam Pritchard who was a young visitor to her house said he considered Ms Hill to be a compulsive liar whom he did not trust. Mr Rostron contradicted her account of why the applicant left Moorfield

Terrace. This resulted in the prosecution making it clear that they only suggested she should be relied on if her evidence had independent support, in the sense that her word could not be trusted on its own.

58. Against that background, it is notable that the evidence against the applicant on the issue of the visit was not dependent on Crystal Hill, either alone or supported by the account of her daughter. Kelsey Childs-Barry also gave evidence that there was a late-night caller and that Ms Hill immediately said it was the applicant. At the time Crystal Hill told Ms Childs-Barry and her daughter it was the applicant she would not have known of the significance of this visit and had no reason to allege falsely that it was the applicant. As the judge commented during the summing up *“If you are sure this evidence is correct then the prosecution submit it is an important point; if it wasn’t in fact Mr Gorman who came to the door that night why would Crystal Hill immediately tell her daughter that it was?”*
59. To this needs to be added the evidence of Andre Naylor who confirmed that when he arrived having heard the news about an incident in Droylsden, Crystal Hill told him she had heard people climbing over the fence and noises were coming from next door that she thought might be her neighbour. Liam Pritchard testified that when the topic came up that night about the burnt-out motorcar, Ms Hill said she had heard a noise in the back garden and that “Damo” or Damien (the applicant) had knocked on her door. She thought he had broken into number 12. These discussions were before the police started making their enquiries.
60. It is clear, therefore, that critical support for Crystal Hill’s account is to be found in the fact that she immediately stated to others that the applicant was the person who knocked on her door. The immediacy of this statement, which she repeated on a number of occasions, provided considerable protection against concoction. This was *res gestae* evidence of significant strength. There was no challenge to its admissibility and it was introduced by agreement. It was powerful evidence because Crystal Hill’s statement identifying the applicant as the caller was not only contemporaneous with the visit but, as just noted, it occurred at a time when Crystal Hill (certainly at the time she spoke to Ms Childs-Barry) was wholly unaware that his presence at her door had any significance. Although this applies with somewhat less force to the evidence of Andre Naylor and Liam Pritchard, their accounts are consistent with the evidence of Ms Childs-Barry. That evidence – the immediate statement that it was the applicant at the door – would have been unaffected by the suggestion that Ms Hill may have lied about the threat by the applicant on 1 June 2019. Accordingly, even if the jury had concluded that Crystal and Nikita Hill had given an inaccurate or untrue account as to the events on 1 June 2012, and that Ms Hill may have influenced her daughter as to what was said about the applicant being at the door of number 14 in the early hours of 26 May 2016, that cannot sensibly apply to Ms Childs-Barry, Andre Naylor and Liam Pritchard. Mr Bennathan hinted in his submissions that if Crystal Hill had recruited her daughter, she may have been capable of suborning others, but not a shred of evidence has been advanced to suggest that occurred.
61. We have been addressed on a significant number of subsidiary issues, such as the way in which Ms Hill was questioned about the CCTV cameras that were in close proximity to the events on 1 June 2012, the time that the applicant turned off his telephone, the presence of an unknown third person’s fingerprints on the broken window at number

12, the position of the balaclava bearing the applicant's DNA and many other features of the case, which went to the respective strengths of the prosecution and defence cases at trial. Mr Bennathan additionally rehearsed various ways, in addition to the observations set out above, as to how the trial might have been conducted differently if this fresh evidence had been introduced. However, in our judgment the sole question that determines this application for leave to appeal against conviction is whether the CCTV evidence, together with Mr Evans's analysis of it, materially weakens the case against the applicant that he was the man at the door of number 14 shortly after midnight on 26 May 2016. For the reasons set out above, we do not consider that the compelling *res gestae* evidence against the applicant was undermined by the fresh evidence which demonstrated that Crystal and Nikita Hill may have lied about the presence of the applicant during the events on 1 June 2012 in the park.

62. It follows that in our judgment the verdict is safe and the appeal fails on its merits.
63. However, we have another concern. Although the position was unclear in advance of the hearing before this court, during submissions it became apparent that the existence of the CCTV footage had been disclosed to the defendants before the applicant's trial but it had not been viewed by him or his then representatives prior to his conviction. Instead, it was viewed after the conclusion of his trial by lawyers acting for his then partner, Sarah Clarke, during separate proceedings against her for an offence concerning interference with a witness on 1 June 2012.
64. We are highly doubtful that in those circumstances there is a reasonable explanation for failing to adduce the evidence during the trial (section 23 (2) (d) Criminal Appeal Act 1968). This material was properly disclosed and PC Phillips described his understandable conclusions as to whether it had relevance to the case. It is for the defence at trial to take decisions as to whether to use or act on the disclosed unused material, and a failure to inspect it is unlikely to justify a later application, following conviction, for it to be introduced as fresh evidence. This court has indicated that only in exceptional circumstances will evidence be admitted that could have been adduced at trial (see: *R v Solomon* [2007] EWCA Crim 2633; *R v Simon John Hall* [2011] EWCA Crim 4).
65. Notwithstanding this concern, as we have just indicated it was only during the course of submissions that it became clear that the existence and analysis of the CCTV footage (by PC Phillips) had been disclosed to the defence, and we have formed the view that bearing in mind the prosecution has accepted that the CCTV footage, and Mr Evans's analysis of it, meet the test for admissibility under section 23 Criminal Appeal Act 1968, the application should be resolved on its merits.
66. In these particular circumstances, we have exceptionally granted, first, the significant extension of time so that this evidence can be received, and, second, leave to introduce the CCTV evidence and the statement of the expert, Raymond Evans, in the interests of justice. We granted leave to appeal on the basis that, once admitted, the CCTV evidence and the accompanying analysis merited consideration by the full court.

67. For the reasons set out above, we dismiss the appeal because we do not consider the evidence might reasonably have affected the jury's verdict. As set out at [3], we dispense with the restriction on reporting imposed on 13 December 2013.