

Neutral Citation Number: [2020] EWCA Crim 273

No: 201902057/C3

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Tuesday, 18 February 2020

**B e f o r e:**

**LORD JUSTICE HOLROYDE**

**MR JUSTICE SPENCER**

**HIS HONOUR JUDGE WALL QC**  
**(Sitting as a Judge of the CACD)**

**R E G I N A**

**v**

**CAINE GRAY**

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**Non-Counsel Application**

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

1. LORD JUSTICE HOLROYDE: This is a renewed application, following refusal by the single judge, for a short extension of time to make an application for leave to appeal against a conviction for murder.
2. The facts of the case can for present purposes be summarised briefly. Jarvin Blake had been selling class A drugs. He and his friend Declan Maw had each been seriously assaulted and threatened in recent incidents. On 8 March 2018, they were in a residential area of Sheffield with Devon Walker. They turned a corner and saw the applicant and two other men, Lewis Barker and Josiah Foster, waiting for them. Fearing, rightly, that they had been set up, Blake and Maw began to run. Maw fell and was attacked with a paving slab by Walker. Blake was then caught and attacked by two men, one of whom stabbed him with a knife, inflicting fatal injury.
3. The applicant, Walker, Barker and Foster were all charged with murder. The prosecution case was that they had planned to ambush Blake and stab him. Walker had led Blake to the scene, maintaining contact by phone with the other accused who had travelled by car. The prosecution were unable to identify who had inflicted the fatal stab wound, but alleged that all four accused were jointly involved in the killing.
4. Before the trial, Barker pleaded guilty to murder. His conviction was before the jury when the other three accused stood trial in April 2019 in the Crown Court at Sheffield before the Honorary Recorder of Sheffield, His Honour Judge Richardson QC and a jury. The applicant's case was that he had been present at the time of the killing, but had not participated in any violence and had not intended to harm Blake. He gave evidence to that effect, putting forward an innocent explanation for his movements and phone contacts around the relevant time. He implicated Foster in the killing.
5. Foster gave evidence in which he said he had remained by the car throughout, but had seen Barker and the applicant running after Blake and Maw and had seen the applicant near Maw at the location where Maw was attacked and injured.
6. Walker did not give evidence.
7. The jury convicted the applicant of murder. They found Foster and Walker not guilty of murder but guilty of manslaughter.
8. The sole ground of appeal against conviction is that the conviction is unsafe because the judge wrongly permitted the prosecution to adduce evidence of the applicant's previous conviction in 2011 for an offence of unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861.

9. The applicant was 26 years old at the date of the killing. His offence of wounding had been committed when he was aged nineteen-and-a-half. The agreed circumstances of that offence were that the applicant had seen in the street a man whom he had only met on one previous occasion. The applicant went briefly into a nearby house, then approached his victim, took a knife from the waistband of his trousers and stabbed his victim in the face. The wound penetrated through the full thickness of the victim's cheek.
10. The prosecution applied to adduce evidence of that offence and of the conviction, pursuant to section 101(1)(d) of the Criminal Justice Act 2003, contending that it was capable of showing a propensity to use a knife to commit a violent offence. They also sought to adduce evidence of an earlier conviction arising out of an occasion when the applicant, as a schoolboy, had been in possession of a knife. Counsel for the applicant resisted these applications.
11. It should be noted that similar applications were made to adduce evidence of previous convictions for violent offences on the part of Walker and Foster.
12. The judge ruled that evidence relating to the schoolboy incident should not be admitted against the applicant and we need say no more about that.
13. In relation to the wounding offence, the judge was reminded of the familiar authority of Hanson [2005] 2 Cr.App.R 21 and of the three-stage approach put forward in that case. It was submitted on behalf of the applicant that the prosecution application failed at all three stages. First, whilst it was acknowledged that a single offence may in principle be sufficient to show a relevant propensity, it was not possible in this case to infer any relevant propensity from a single offence of violence which was committed more than seven years before the killing, when the applicant was a teenager, and which did not involve any intention to cause really serious injury. Secondly, having regard in particular to the passage of time since the wounding offence, any propensity which it might be capable of showing did not make it more likely that the applicant was guilty of the present offence. Thirdly, admission of this bad character evidence would be unjust and would render the trial unfair.
14. The judge in a careful ex tempore ruling reminded himself that decisions relating to the admission of bad character evidence are necessarily fact-sensitive, and that crimes committed in youth may not be a reliable indication of how the offender would behave as an adult. He also reminded himself of the provisions of section 101(3) and (4) of the 2003 Act in relation to exclusion of evidence on grounds of fairness. He concluded that the 2011 wounding offence was capable of showing a propensity to commit a crime of violence and that it would not be unfair for the jury to hear of that offence. He also admitted bad character evidence against the other accused who, as we have said, were

ultimately found not guilty of murder.

15. The written advice and grounds of appeal reiterate the submissions made to the judge. It is argued that the evidence of Maw at trial was inconsistent and unreliable and that Foster's evidence included important points favourable to the applicant's case. It is submitted that the evidence of the applicant's previous conviction did not pass the test of admissibility. Emphasis is placed on the judge's direction that the jury, when considering the intention of a defendant who had not been proved to have stabbed Blake, may feel that his knowledge prior to the incident of the existence and potential use of the knife was of crucial importance. In those circumstances, it is submitted, evidence of the previous conviction was hugely prejudicial to the applicant and should therefore have been excluded on grounds of fairness, even if it was admissible.
  
16. We have considered those submissions and the written submissions in the Respondent's Notice. We accept that particular care was needed in considering whether to admit, as evidence of a relevant propensity, a single previous offence committed more than seven years earlier. We are however satisfied that the judge exercised that care. Whilst it is accurate to describe the applicant as a teenager at the time of the relevant offence, it must be remembered that he was a young adult. Although only a single offence was relied on, its circumstances, involving as they did an unprovoked attack on a man who was hardly known to the applicant, were clearly capable of showing a propensity to commit serious violence using a knife. In the context of a trial in which the main issue was as to the participation in the killing of each of the three accused, that propensity could properly be regarded as making it more likely that the applicant was a participant in the killing. Insofar as the applicant was relying on a submission that the prosecution was seeking to use bad character evidence to bolster a weak case, we reject that submission. The judge clearly directed himself correctly in law and took into account all relevant factors. The evidence was undoubtedly prejudicial to the applicant, but the judge was entitled to conclude that it was not unfairly so. We note finally that no criticism is or could be made of the terms in which the judge later directed the jury.
  
17. For those reasons, which are essentially the same as those given by the single judge, we are satisfied that there is no basis on which it could be argued that this conviction is unsafe. If we had thought that the ground of appeal had merit, we would have been willing to grant the necessary extension of time. As it is, however, no purpose would be served by extending time for an appeal which has no prospect of success. This renewed application is accordingly refused.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk

