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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100052/B3

[2021] EWCA Crim 1111



Sitting at Mold Crown Court
Law Courts
Mold
CH7 1AE

Wednesday 23 June 2021

LORD JUSTICE HOLROYDE

MR JUSTICE SWEENEY

MR JUSTICE PICKEN

REGINA

V

TRENE COLECOZY-ROGERS

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MISS N GRAHAME QC appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 8 December 2020, in the Crown Court at Liverpool, this applicant was convicted of the murder of Dre Estridge. He was later sentenced by the trial judge, His Honour Judge Watson QC, to detention for life with a minimum term of 13 years 201 days. His application for leave to appeal against conviction was refused by the single judge. It is now renewed to the full court.
2. For present purposes the relevant facts can be summarised very briefly. In June 2020 the applicant's mother attended a party hosted by the mother of the deceased. She became intoxicated and in the early hours of the morning the applicant, then aged 17 years eight months, was asked to come to the house to collect her in a taxi. Whilst there, the applicant became involved in an argument with the deceased, who was then aged 16 years 11 months. The deceased suffered a single stab wound to the heart which caused his death.
3. This incident occurred in a bedroom in which only the two young men were present. A prosecution witness at the trial gave evidence that she heard arguing and heard the applicant threaten to "poke" (that is stab) Dre Estridge, who replied that the applicant should do what he felt he needed to do as a man. Neither she nor anyone else witnessed the inflicting of the fatal wound.
4. The applicant raised the defences of accident, self-defence and the absence of any intent on his part to kill or to cause really serious injury. He said in evidence that he had seen his mother emerging from the bedroom in a distressed state. He then saw Dre Estridge getting up from the bed and adjusting his trousers. He asked what had happened and Dre Estridge made an insulting remark about the applicant's mother. Dre Estridge then swung a punch and reached for a knife which was on the windowsill, but the applicant snatched it first and held it out towards Dre Estridge to warn him off. Dre Estridge lunged at the applicant and the knife went into his chest.
5. The defence applied to adduce evidence of the bad character of the deceased pursuant to section 100(1)(b) of the Criminal Justice Act 2003. The application was allowed in part by the judge. Agreed facts were placed before the jury to the effect that the deceased had over a number of years behaved in an aggressive, violent and volatile way; had been convicted in 2015 of an offence of battery committed against his younger sister; and had been convicted in October 2019 of an offence of battery committed against his mother and an offence of criminal damage to the family home.
6. In response to that application, the prosecution applied pursuant to section 101(1)(g) of the 2003 Act to adduce evidence of the applicant's previous convictions for two offences of robbery committed when he was aged 15. That gateway is opened where a defendant "has made an attack on another person's character". Miss Grahame QC on behalf of the applicant realistically accepted that the defence had made an attack on the character of the deceased and that section 101(1)(g) was accordingly engaged. She submitted however that the evidence should be excluded on grounds of fairness pursuant to section 101(3), which provides:

"The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

7. The judge granted the prosecution application. He observed that the fact that the applicant was only 15 when he committed those offences was important, but the relevant context was that the robberies were committed 19 and 20 months before the killing of Dre Estridge. He referred to the defence submissions that to admit evidence of those convictions would be disproportionate and would not assist the jury, but concluded that if the jury were to consider the background of the deceased then "...they should also consider by way of balance the background of the other person involved, particularly in the circumstances in which they are considering the background of the deceased, namely the defence's wish for them to do so." The judge went on to say that he was satisfied that he could give directions which would ensure that there would be no adverse effect on the fairness of the proceedings.
8. In the light of that ruling, further agreed facts were placed before the jury in the following terms:

"Trene Colecozy-Rogers has pleaded guilty to and been convicted of (a) an offence of robbery committed on 22 October 2018 and (b) an offence of robbery committed on 11 November 2018. The facts of the offences are that on both occasions Trene Colecozy-Rogers was one of a group of young males who were in the city centre of Liverpool. They approached young men and caused them to hand over cash using intimidation and threats. Trene Colecozy-Rogers was a part of the group and by his presence assisted or encouraged the principal offenders."

9. The judge provided the jury with written copies of his directions of law. He reminded them that the defence relied on the agreed facts about the deceased's character as supporting the applicant's claim that it was the deceased who had started the incident. In relation to the deceased, the judge directed the jury:

"The fact that he has those previous convictions or behaved in this manner previously, of course does not mean that he must have acted aggressively or used unlawful force on this occasion, but it is something you may take into account when you are deciding whether or not you are sure that it was Trene Colecozy-Rogers and not Dre Estridge who started the violence and that Trene Colecozy-Rogers' use of force was unlawful."

10. The judge at page Y14 A to G then gave the following directions about the applicant's previous convictions:

"Now the reason you have heard about those convictions is because it was he who alleged that Dre Estridge was the aggressor and threatened him, acted in an aggressive violent way on earlier occasions and so you are entitled to know about the character of the person, that is Mr. Colecozy-Rogers, who is making those

allegations and you do that when you decide whether or not those allegations put forward by Trene Colecozy-Rogers about Dre Estridge are true. The prosecution say that no-one else has described Dre as being moody, let alone violent or aggressive on this particular night the 26th. The prosecution say that the defence, the defendant has latched on to this piece of Dre Estridge's past and has used it to try and bolster his defence of self-defence. They remind you that when Trene spoke to Denzil Estridge on the 'phone at eleven minutes past six, he never mentioned Dre being aggressive and having to act in self-defence. Rather, he denied any knowledge that Dre had been stabbed. Of course the defence say that this evidence can be used for a different purpose. They say that Dre Estridge was a man who had issues, who could be volatile, could act aggressively and with great hostility, without any real warning or trigger, and not just that; that he would act in this way towards his own friends, members of his own family, not just outsiders and although his family were supportive of him, that does not mean that his aggression was all in the past.

Please remember that just because Mr. Colecozy-Rogers has previous convictions for robbery, which involve dishonesty, and that is in the third part of the agreed facts with those dates of those offences, this does not automatically or necessarily mean that Trene Colecozy-Rogers is telling lies. The defence point out that he actually pleaded guilty to those two offences. He admitted his guilt, in other words. You must decide whether these convictions help you when you are considering whether or not Trene Colecozy-Rogers is telling the truth, but you must not convict him of either murder or manslaughter just because he has been convicted of two robberies in late 2018, 19 or 20 months prior to the events you are concerned with."

11. The jury, as we have indicated, convicted the applicant of murder.
12. In her written and oral grounds of appeal, Miss Grahame points out that the applicant's previous convictions were not put forward as evidence of a propensity to violence. Nor had it been suggested by the prosecution that they were admissible under section 101(1)(d) of the 2003 Act as showing a propensity to lie. The convictions were therefore admitted simply to assist the jury to decide whether the applicant was lying to them. She submits that was not permissible. Relying on a passage in the judgment of the court given by Moses LJ in R v Hearne [2009] EWCA Crim 103, she submits that evidence of the applicant's bad character should only have been admitted if it could provide the jury with material on which they could form their judgment as to whether the applicant was any more worthy of belief than the person whose character he had attacked. That means, she submits, that the only legitimate purpose of admitting evidence of the applicant's bad character would be to assist the jury to make a comparative analysis. Since that was not possible, because De Estridge was dead, the evidence of previous convictions should

- have been excluded. She submits, as a further argument to the same end, that in any event the attack was on Dre Estridge's propensity to violence and not on his credibility, so that again the necessary comparative analysis did not arise and was not possible.
13. Miss Grahame goes on to submit that there was a danger that the jury in those circumstances would wrongly treat the previous convictions as evidence of a propensity towards violence and/or untruthfulness, and the fairness of the trial was accordingly prejudiced. She submits that the judge's directions did not suffice to prevent such prejudice because the judge did not specifically direct the jury to exclude any consideration of either of those propensities. In so far as it could fairly be said that the judge's directions had substantially followed the wording suggested in the Crown Court Compendium, Miss Grahame questions whether that source of assistance correctly reflects the law, given that it does not refer to the sort of comparative analysis for which she contends.
 14. The respondent is not represented on this renewed application, but we have considered written submissions made in a Respondent's Notice.
 15. By section 101 of the 2003 Act, evidence of a defendant's bad character is only admissible if it passes through one of six gateways. As we have indicated, it is accepted by Miss Grahame that gateway (g) was open in this case. The issue therefore relates to the judge's decision not to exclude the evidence under section 101(3).
 16. We are unable to accept Miss Grahame's submission that evidence of the applicant's bad character should have been excluded because it could not assist the jury in a comparison of credibility as between the applicant and the deceased. Where evidence is admitted through gateway (g) it is admitted because it is relevant to the general credit of the defendant, and its purpose is to show that the defendant's evidence is not worthy of belief. Where there is a conflict of evidence between the defendant and a prosecution witness whose character he has attacked, as was the case in Hearne, then evidence of the defendant's bad character will be relevant to the jury's assessment of the credibility of the defendant in relation to that conflict. But it does not follow that the evidence can only be admissible for the purpose of making precisely that kind of comparison. The well-established principle that the gateway may be opened where the attack is on the character of a deceased person is inconsistent with the limitation for which Miss Grahame contends. Similarly, her submission would make it impossible for the prosecution to rely on gateway (g) where the attack was on the character of a person who had declined either to make a statement or to give oral evidence. We can see no reason of principle why a defendant in such a case should be able to attack the character of the absent person without the jury knowing of his own relevant bad character.
 17. Our view is consistent with what was said in R v Clarke [2011] EWCA Crim 939, where the court drew a distinction between the restrictive approach which is adopted where the prosecution seek to adduce evidence to establish a propensity for untruthfulness, and the approach to admissibility through gateway (g) where credibility is in issue. The court there referred to the underlying common law principle in terms which were approved by the House of Lords in Selvey v DPP [1970] AC 304:

"... if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgement whether the

accused person is any more worthy to be believed than those he has attacked. If a defendant is asking the jury to have regard to a witness's character when assessing that witness's evidence, so they should be entitled to consider his character when assessing his evidence."

18. The court in Clarke went on to say:

"Although the character is adduced initially for the purpose of allowing the jury to determine whether the particular attack is true, it will inevitably affect the jury's assessment of a defendant's credibility as a whole. The authorities demonstrate that under paragraph (g) all convictions are potentially relevant to assist the jury to assess the character of the accused, and it is not necessary, or at least not generally so, for detailed facts about the nature and circumstances of those convictions to be put before the jury."

19. We therefore see no basis on which it could be argued that the evidence of the applicant's previous convictions should have been excluded simply because it was not possible for the jury to perform the sort of comparative analysis to which Miss Grahame refers. The evidence was relevant and admissible on the issue of the credibility of the applicant in the evidence he gave.
20. Nor can we see any other basis on which it can be argued that the judge erred in declining to exclude the evidence pursuant to section 101(3). Where a judge makes a fact-specific decision of that nature, this court will not usually interfere unless the judge has made an error of principle or reached a decision which he or she could not properly have reached on the material before the court. In this case, the direction which we have quoted made it clear to the jury that they had heard about the previous convictions because they were entitled to know the character of the person who alleged that the deceased had been the aggressor, and that they had to decide whether that evidence helped them in considering whether the applicant was telling the truth. The direction was correct in law and in our view sufficient in the circumstances of this case. The judge might have added a specific direction concerning the propensities to which Miss Grahame has referred; but he was not required to do so, and it does not seem to have been submitted to him that he should.
21. For those reasons we agree with the single judge that there is no arguable ground of appeal against conviction. Accordingly, grateful though we are to Miss Grahame for her submissions, and the more so because she has been good enough to make them pro bono, this renewed application must be refused.

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