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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1108



No. 202100689 B4

Royal Courts of Justice

Thursday, 26 May 2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE GOOSE
MR JUSTICE BOURNE

REGINA
v
GURPREET SINGH

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MR O POWNALL QC and MR T SINGH appeared on behalf of the Appellant.

MR D MASON QC and MR A J JACKSON appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE HOLROYDE:

- 1 On 27 January 2021, after a retrial in the Crown Court at Birmingham before HHJ Drew QC and a jury, this appellant was convicted of the murder of his second wife, Sarbjit Kaur (“Sarbjit”). He was sentenced to life imprisonment with a minimum term of 19 years, less the days he had spent remanded in custody. He now appeals against his conviction by leave of the full court.
- 2 The facts of the case are quite complicated. We summarise them as briefly as is appropriate.
- 3 The appellant, a successful businessman, was first married to Amandeep Kaur (“Amandeep”). They had two children and lived in a large, detached house in Wolverhampton (“the house”). The front gates to the house were electronically operated. They could be controlled from within the house, or opened from the outside either by entering the appropriate code into a keypad or by using a fob.
- 4 Amandeep died in India in December 2014. The cause of her death was recorded as a brain haemorrhage. The prosecution have at no stage alleged that the appellant had killed her.
- 5 In 2015 the appellant married Sarbjit. She lived with him and the children at the house. She ran a business as a seamstress, working from a sewing room at the house.
- 6 It was the appellant's case that Amandeep's brother, Bikramjit Singh (“Bikramjit”), and his wife (“Sukhdip”), were angry with the appellant because of the speed with which he had remarried, and became hostile towards him. That hostility was said to have increased after 2016, when the appellant prevented Bikramjit and Sukhdip from having further contact with his children.
- 7 On the afternoon of 16 February 2020 the appellant telephoned the police to report that he had returned from work to find his wife's dead body in the sewing room. She was wearing her night clothes. The cause of her death was strangulation, probably manual. She had bruising to her arms, consistent with having been held, and had suffered blunt-force trauma to her head. Red powder, thought to be chili powder which had been used to incapacitate her, was found on her face and body and on the floor. The state of the house was suggestive of burglary.
- 8 In the course of the police investigation, CCTV footage recorded by a camera at a neighbouring property was recovered. From that, and other sources, the following sequence of events emerged. At 07.52 the appellant left the house to take the children to school. At 07.54 Sarbjit rang a former work colleague whom she had arranged to meet at 08.00, but received no answer because the lady concerned was still asleep. At 08.02 the appellant returned. Between 08.09 and 08.14 Sarbjit was engaged in her last active phone call. Thereafter, no calls were made from or answered by her phone. At 08.13 an unknown person wearing a parka with the hood up and carrying a bag, thought to be a woman, arrived at the property. There was an inference that she entered through the electronic gates, though they were not covered by the CCTV. At 09.01 the appellant left the house. At 09.07 the unknown woman left the house. There was no CCTV evidence of anyone entering or leaving the house from that point on until 16.04 when the appellant returned from work.
- 9 It was the prosecution case that the appellant, assisted by the unknown woman, had murdered his wife and then staged a burglary to provide an apparent explanation for someone else having murdered her.

- 10 Following the appellant's arrest for the murder of Sarbjit, Bikramjit and Sukhdip told the police that they believed the appellant had also murdered Amandeep. Bikramjit said that the appellant and Sarbjit had been having an affair for months before Amandeep's death.
- 11 Bikramjit also told the police that Jagjeet Uppal ("Jagjeet") had reported to him that in 2013 the appellant had solicited Jagjeet's brother Heera Uppal ("Heera") to murder Amandeep. It was said that Heera had had no intention of killing Amandeep, but had taken the money offered by the appellant used it to travel to India. Jagjeet confirmed this account to the police. So too did Heera, who came back to the United Kingdom in October 2018.
- 12 The appellant first stood trial in April 2019. The indictment contained two counts. Count 1 charged him with the murder on 16 February 2018 of Sarbjit. Count 2 charged him with soliciting Heera, in 2013, to murder Amandeep. Bikramjit and both Uppal brothers all gave evidence relating to that second count.
- 13 At the conclusion of the first trial the jury found the appellant not guilty on Count 2, but were unable to agree a verdict on Count 1. They were discharged, and a retrial of Count 1 was ordered.
- 14 At the retrial, the prosecution relied on circumstantial evidence in support of their allegation that Sarbjit had been murdered by the appellant, who had come to regret marrying Sarbjit, and his accomplice the unknown woman. The prosecution relied, amongst other things, on evidence supporting the inference that Sarbjit must have been killed soon after her 08.09 phone call, and on what was said to be the absence of any evidence that anyone else had entered the house after the appellant, and a few minutes later the unknown woman, had left. There was no evidence of any burglary, and although some rooms appeared to have been ransacked there were features which pointed to a family member being involved. Sarbjit's failure to return the unanswered calls which were made to her phone during the morning was said to be uncharacteristic. The appellant's actions during the day were said to show the laying of a false trail to exculpate himself, and he was said to have affected a show of grief after he claimed to have found Sarbjit's body. These, and other circumstances relied upon, were all disputed by the defence, who put forward alternative explanations for each of them.
- 15 It was made clear during the prosecution case that the defence suggested that Bikramjit was responsible, either directly or indirectly, for the murder of Sarbjit. In support of that case, Mr Pownall QC – then as now representing, together with Mr Talbir Singh, the appellant – wished to cross-examine Bikramjit, and to adduce evidence with a view to showing that Bikramjit and Sukhdip had been hostile to the appellant and had displayed their hostility in various ways. In large part the course which Mr Pownall wished to take was agreed with prosecuting counsel (then as now Mr Mason QC and Mr Jackson). The prosecution did not call either of the Uppal brothers to give evidence and did not wish to adduce any evidence-in-chief from Bikramjit, but were willing to tender him so that he could be cross-examined about the matters which were accepted as relevant.
- 16 In addition to those matters, however, Mr Pownall wished to cross-examine with a view to showing that Bikramjit had put the Uppal brothers up to making a false allegation against the appellant in relation to the soliciting to murder which had been alleged in the previous Count 2. He wished to refer to certain events in that regard, which the defence wanted to suggest showed a pattern of behaviour by Bikramjit at critical times. He wished to advance the case that Bikramjit had done so because he hated the appellant, and wanted to divert the attention of the police away from any investigation of Bikramjit's own role in the killing of Sarbjit. Mr Pownall also wished the appellant's acquittal on Count 2 of the first trial to be before the jury. The prosecution objected.

- 17 Mr Pownall applied to the judge for leave to cross-examine and to adduce evidence on this issue. He submitted, first, that he was entitled to put forward the evidence against Bikramjit because it was evidence which had to do with the alleged facts of the offence with which the appellant was charged, and so was excluded from the statutory definition of bad character evidence and admissible by virtue of s.98 of the Criminal Justice Act 2003. In the alternative, he submitted that the evidence, if it did come within the definition of bad character, was admissible by virtue of s.100(1)(a) and/or (b) of the 2003 Act.
- 18 For convenience, we shall from here on refer to provisions of the 2003 Act simply by reference to their section numbers.
- 19 The judge refused the application. He held that the bare fact that the appellant had been acquitted on Count 2 was neither relevant nor admissible at the retrial of Count 1. As for the application made in reliance on s.98, he held that the proposed evidence was not admissible under either limb of that section. In his detailed ruling he said:
- "Section 98(a) does not apply because this evidence does not have 'to do with the alleged facts of the offence with which the defendant is charged', that is the murder of Sarbjit. At its highest this evidence 'has to do with' a separate allegation that is to be made against Bikramjit (that he encouraged the Uppals to give false evidence) ... Section 98 (b) does not apply because the alleged misconduct (which for these purposes I am required by s.109 CJA 2003 to assume is true) was not undertaken in connection with this investigation, nor in furtherance of the prosecution of this offence; it relates to an entirely separate allegation. I appreciate that the defence have sought to try to make a connection between the two allegations, by suggesting that the false allegation of solicitation to murder was made in order to distract the police from investigating Bikramjit, but in my judgement that stretches the meaning and intention of the statute beyond breaking point."
- 20 As for the alternative application pursuant to s.100, the judge held that the proposed evidence was not admissible through either gateway (a) or (b). He accepted for the purpose of his ruling that the evidence could go to the issues of Bikramjit's motive for killing Sarbjit and his overall credibility and that these were issues of substantial importance. But, he said:
- "This evidence is not of substantial probative value in relation to those matters in issue. The content of the evidence is, so far as the defence are concerned, only tangentially relevant to the issues in the case, in that it forms the basis for making speculative allegations made against Bikramjit, in relation to a satellite issue, for which there is no evidential support. In my judgement this evidence cannot be said to have substantial probative value in relation to the case as a whole."
- 21 The trial proceeded. Mr Pownall of course conducted the defence case in accordance with the judge's ruling. The appellant when he gave evidence also complied with that ruling. Very early in his cross-examination however, Mr Mason asked questions about the suggested motivation of Bikramjit, and pointed out that when the appellant was first spoken to by the police, as a witness, he had said that to his knowledge Amandeep's family were not bad people, adding "They are good. I cannot blame them". That early statement was of course at odds with the assertion of Bikramjit's hostility towards the appellant, but the appellant said by way of explanation, "I had no evidence then". Mr Mason responded by asking "What is the evidence that has changed?"

22 Mr Pownall intervened and, in the absence of the jury, submitted to the judge that answering that question raised the possibility that the appellant would need to contravene the earlier ruling. The judge did not at that stage adjudicate on that submission, because the prosecution on reflection decided not to pursue that line of questioning. The cross-examination then continued without further incident.

23 As Mr Pownall was approaching the end of his re-examination, he asked the judge to rule on whether he could ask the appellant to identify the evidence which had changed his view about Bikramjit and his family. Mr Pownall expected that if asked the appellant would wish, amongst other things, to refer to the false allegation made by the Uppal brothers and Bikramjit's part in that. He submitted that the appellant should be permitted to do so and should be permitted to tell the jury about the evidence given at the first trial and the acquittal on Count 2. The prosecution opposed that submission.

24 The judge refused the application. He said that on the face of it:

"There is an extremely powerful argument for saying that, having asked this question, 'What has changed', the prosecution have opened up that as a route for the defence arguing that the defendant can only properly answer the question by giving him the opportunity to include all his explanation."

But, the judge said, he could not see how any of this could actually assist the jury. The issue was what actual evidence there was of Bikramjit being hostile towards the appellant, not the appellant's belief as to Bikramjit's motives. The jury had already heard a substantial body of evidence of hostility between Bikramjit and the appellant. The appellant's present state of mind, based on what may have happened at the first trial, was not an issue of any substance: on the contrary, he said, it was a distraction. The judge concluded:

"In those circumstances, although I am sympathetic to the defence submission that the Crown have or may have opened the way to this line of cross-examination, in my judgement, allowing re-examination which will include an examination of all those matters -- which essentially, as I say, are simply a vehicle for the defendant to express his opinion about what took place -- is, in my judgement, a distraction and it would not assist this jury and, in all the circumstances, would go behind the ruling that I made at the start of this trial, causing many of the issues and problems that I identified at the start of this trial to resurface, creating very great difficulties for this jury, acting as a significant distraction to them in resolving this case."

The judge therefore ruled that Mr Pownall could not re-examine on that particular point.

25 The grounds of appeal challenge each of those rulings. They contend that the conviction is unsafe because the judge erred in ruling that questions about the bad character of Bikramjit required the leave of the court (Ground 1); in refusing to permit cross-examination of Bikramjit pursuant to s.100 (Ground 2), and in refusing the defence application to introduce material in re-examination (Ground 3). The full court refused leave to appeal on a fourth ground, and we need say no more about it.

26 We have been assisted by the written submissions and skeleton arguments on both sides and by the oral submissions of counsel, for all of which we are grateful.

27 In relation to Ground 1, Mr Pownall submits that the evidence he wished to adduce during the prosecution case was not bad character evidence as defined in the 2003 Act and so did not require leave. It was relevant and admissible on common law principles. He submits

that in the very unusual circumstances of this case, both limbs of s.98 were engaged, though in oral argument he particularly relied on limb (b). In that respect he relies on the decision of this court in *R v Apabhai & Ors* [2011] EWCA Crim 917 as to the application of s.98(b), pointing out that in the first trial the jury were directed that if they convicted the appellant on Count 2, they could use his guilt of that offence as supporting the prosecution case on Count 1. He argues that the circumstantial evidence which the defendant wished to adduce went beyond a mere assertion that Bikramjit had caused the Uppal brothers to make a false allegation. The fact that other evidence was before the jury showing Bikramjit's hostility was not a reason for excluding this evidence.

- 28 On Ground 2 Mr Pownall no longer seeks to rely on s.100(a), but says that the evidence was of substantial probative value and should have been admitted under s.100(b). He relies on what he submits were striking similarities between the circumstances of Sarbjit's murder and the false allegation said to have been made by the Uppal brothers in relation to the death of Amandeep.
- 29 On Ground 3 Mr Pownall suggests that the offending question was given particular significance by the prosecution because it was asked at the beginning of cross-examination, and must have been thought by the prosecution to have been a question on a relevant matter. He makes clear that there is no suggestion that the prosecution would deliberately try to take advantage of the judge's ruling in order to make an unfair point, but submits that the question was ill-advised and put the appellant at an unfair disadvantage.
- 30 In over-arching submissions, Mr Pownall submits that the conviction is unsafe. He points out that in the first trial the jury were unable to agree upon a verdict; and he submits that the circumstantial case presented by the prosecution at the retrial was, if anything, weaker than their case at the first trial, because of the emergence of certain evidence casting doubt on the reliability of the CCTV footage as a guide to who had entered and left the house. Mr Pownall asks, rhetorically, what had changed between the first trial and the retrial to have a justifiable result that evidence which the appellant was able to deploy without objection at his first trial was prohibited at the retrial.
- 31 For the respondent, Mr Mason submits in essence that each of the judge's rulings was correct. He submits that the evidence which the defence wish to adduce was neither relevant nor admissible on any basis. Even if it was relevant to any issue in the case, it was not admissible either under s.98 or under s.100. He submits that the line of questioning which Mr Pownall wished to pursue was based on speculative allegations and did not have substantial probative value. He further submits that leave to re-examine was rightly refused because it would have added nothing which could assist the jury. In his written submissions Mr Mason had pointed out that Mr Pownall could have invited the judge to give a specific direction to the jury to ignore the question, but did not do so.

- 32 Having reflected on those submissions, our views are as follows.

Ground 1

- 33 Section 99 of the 2003 Act abolished the common law rules governing "the admissibility of evidence of bad character in criminal proceedings". Evidence of bad character is now admissible only through the gateways permitted by s.100 in relation to persons other than the defendant and s.101 in relation to the defendant. The meaning of the evidence of bad character in this context is, however, limited by s.98, which provides:

"References in this Chapter to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which —

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

- 34 The effect of those provisions is that evidence of bad character (as defined) must meet strict statutory criteria before it may be admitted, whereas evidence falling within s.98(a) or (b) is admissible in accordance with common law principles.
- 35 The restrictions imposed by s.100 and 101 will be eroded, and their purpose impeded, if too wide an interpretation is given to paragraphs (a) and (b) of s.98: see in this regard the discussion *R v Byrne & Ors* [2021] EWCA Crim 107 at paras.131 to 133. Case law accordingly shows that to come within those paragraphs, the evidence concerned must not merely be relevant, but must have a close nexus with, the offence with which the defendant is charged; that is to say, the offence or offences on which a verdict or verdicts are to be returned. The cases further show that such a nexus may be established in a number of ways, including on the basis that the evidence concerned directly relates to matters contemporaneous with, or close in time to, the offence charged and closely associated with the alleged facts of that offence, or on the basis that the evidence concerned directly relates to the defendant's motive or reasoning for committing the offence charged. Where the necessary nexus cannot be shown, the evidence concerned may be admissible through one of the gateways in s.100 or s.101 provided it meets the statutory criteria for the relevant gateway. Where the evidence may be regarded as falling near the boundaries of s.98(a) and (b), judges will often consider admissibility both under those paragraphs and through one of the statutory gateways in s.100 or 101.
- 36 In considering Mr Pownall's submission that the judge should have admitted evidence and permitted cross-examination on the basis that it fell within s.98(a) or (b), it is important to keep in mind that the offence with which the appellant was charged was the murder of Sarbjit in February 2018. The evidence which the defence wished to adduce, however, related to the alleged fabrication by Bikramjit and the Uppal brothers of evidence purporting to show that the appellant had in 2013 solicited the murder of Amandeep. Far from relating directly to the offence with which the appellant was charged therefore, it related to what was said by the appellant to be a false allegation by others of an offence which he had not committed and with which he was no longer charged. Its indirect connection with the offence with which the appellant was charged was said to be that it provided support for the defence case that Bikramjit himself was or may have been responsible for the murder of Sarbjit, and was trying to avoid the consequences of that crime by falsely implicating the appellant in a suggested earlier crime.
- 37 We accept that, as *R v Apabhai* makes clear, the ambit of s.98(b) is not restricted to evidence of misconduct by the prosecution authorities. The evidence concerned must, however, be evidence of misconduct in connection with the investigation or prosecution of the offence with which the defendant is charged. In *Apabhai* the evidence was of misconduct by a co-accused who was jointly indicted with the appellant on the charge of conspiracy to defraud. The decision of the court in that case, that the judge was entitled to find that the evidence fell within s.98(b), does not in our view lend any support to this appellant's submissions relating to a very different factual context.

38 In those circumstances, we are satisfied that the judge was correct to rule that the proposed evidence did not come within s.98. For the reasons which the judge gave, it did not have to do with the alleged facts of the murder of Sarbjit and it was not evidence of misconduct in connection with the investigation of that murder. On that basis alone, Ground 1 fails.

Ground 2

39 Like the judge, we approach this ground of appeal on the basis that the issues of Bikramjit's alleged motive for killing Sarbjit, and his overall credibility, are matters which were in issue in the proceedings and were of substantial importance in the context of the case as a whole. The question for this court, therefore, is whether the judge was wrong to conclude that the evidence and cross-examination which the appellant wished to go before the jury did not have substantial probative value in relation to those matters. In that regard, it was necessary for the judge to have regard to the non-exhaustive list of factors in s.100(3) and any other factors he considered relevant.

40 Like the judge, we start with the well-established principle that evidence of a previous acquittal will generally be irrelevant and inadmissible because it is no more than evidence of the opinion of the jury in the previous trial: see *R v Hui Chi-Ming* [1992] 1 AC 34. That decision of the Privy Council recognised that there may in a particular case be an exceptional feature which makes the evidence admissible. An example which can be drawn from the reported case law is a situation in which a witness whose evidence at an earlier trial did not persuade the jury of that defendant's guilt is now giving evidence on a related matter in the second trial.

41 Mr Pownall submits that there is an exceptional feature in this case, because the acquittal at the first trial was proof that the Uppals were lying in their evidence at that trial. The problem with that submission, as we see it, is that the acquittal of the appellant on Count 2 of the original indictment cannot in our view amount to such proof. Indeed, we think that the circumstances in which an earlier acquittal can amount to such proof will be rare. Clearly the jury in the first trial were not satisfied that the prosecution had proved to the criminal standard all the requisite ingredients of the offence charged in Count 2; but the precise basis of their verdict is unknown, and no safe inference could be drawn that the jury must have found the Uppal brothers to be liars.

42 That gives rise to a further problem for the appellant. If evidence of the acquittal was inadmissible, as we are satisfied that it was, then the remainder of the evidence and cross-examination which the defence wish to go before the jury would, in our view, have served only to invite speculation by the jury.

43 We agree with the judge's analysis that the defence application was based on a circular argument. The appellant asserted that Bikramjit had killed Sarbjit, or been involved in her death, because he was hostile to the appellant and Sarbjit; because he had killed her, he had caused the Uppal brothers to make false allegations against the appellant; and the making of those false allegations is relied upon as support for the argument that it was Bikramjit who killed Sarbjit. In order to pursue that circular argument, the defence would be requiring the jury to embark upon satellite litigation as to whether Bikramjit had caused the Uppal brothers to make false allegations. We do not use the phrase "satellite litigation" pejoratively, and we accept Mr Pownall's submission that in all the circumstances it may not have added very much to the length of the trial; but we are entirely sure that, in the absence of any solid evidential foundation on which the jury could answer that question, they would inevitably have been drawn into speculation. Mr Pownall makes submissions as to a form of direction which he suggests the judge could have given and which would have been sufficient to eliminate this risk. We are unable to agree. The jury would, moreover, have

been distracted from the real issues in the case, namely whether the circumstantial evidence proved for sure that the appellant murdered Sarbjit.

44 We are also unable to accept the submission that the effect of the judge's ruling was unfair to the appellant because it prevented him from pursuing a line of evidence in the cross-examination which he had been permitted to pursue in the first trial. The short, but in our view complete, answer to that submission is that the jury at the first trial were considering Count 2, but the jury at the retrial were not. The evidence which was relevant and admissible at the retrial was, therefore, not necessarily the same as at the first trial.

45 For those reasons, Ground 2 fails.

Ground 3

46 With respect to Mr Mason, we think it unfortunate that the appellant was asked the question he was in cross-examination. Mr Pownall's very proper intervention prevented the cross-examination going any further and Mr Mason sensibly decided not to pursue his point. The question which had been asked nonetheless gave rise to a strong argument by Mr Pownall that the appellant should in fairness be permitted to answer by referring to, amongst other things, the allegations which he said were falsely made against him by the Uppal brothers and his acquittal at the first trial.

47 We see no substance in the written argument on behalf of the respondent that Mr Pownall could have asked the judge to give a specific direction to the jury to ignore that ill-advised question. Mr Pownall was faced with a difficult decision as to how to deal with a situation which had arisen unexpectedly. We see no ground for criticising the approach he took, which avoided the risk of drawing attention to the question wrongly asked. In his oral submissions Mr Pownall was concerned that it may be thought that he had been at fault. We disagree. He dealt with this unexpected issue in the way which very many experienced advocates would have dealt with it.

48 We do, however, agree with the judge that the effect of varying his earlier ruling would have been to create the problems which we have mentioned in relation to Ground 2, and which had successfully been avoided as a result of the judge's earlier ruling. The jury would have been drawn into speculation about a matter in respect of which there was an assertion of belief by the appellant, but no solid evidential basis on which the jury could reach the right conclusion.

49 The judge too was placed in a difficult position. He was entitled to take the view that the appellant would not suffer any real prejudice as a result of the jury hearing the question asked but not answered. The jury had other evidence to consider on the issue of whether Bikramjit had been involved in the murder of Sarbjit and, in our view, they are likely to have understood the appellant's answer in cross-examination, "I had no evidence then," as referring to all the evidence they had heard as part of the defence case. In those circumstances, the manner in which the judge dealt with the difficulty was not unfair to the appellant and was well within the proper scope of his discretion. It does not give rise to any doubt as to the safety of the conviction.

50 Ground 3, accordingly, fails.

51 Standing back, and reflecting on the grounds of appeal collectively, it seems to us that the jury had ample evidence upon which to assess the suggestion that Bikramjit was or may have been involved in the murder of Sarbjit. They lacked only the additional strand of material relating to whether Bikramjit had put the Uppal brothers up to making a false

allegation; but the appellant suffered no prejudice or unfairness as a result of that. The crucial difference between the two trials was that the appellant no longer had to defend himself against the allegation in Count 2. In circumstances where the appellant had no basis for making any affirmative allegation of murder against Bikramjit, we are satisfied that his conviction is safe.

52 For those reasons, grateful though we are for the great skill with which Mr Pownall has presented these arguments, the appeal is dismissed.

CERTIFICATE

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