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2018/03231/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 12th December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

and

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

JAMES RATCLIFF

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Mr B McGrory QC appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Thursday 12th December 2019

LORD JUSTICE HOLROYDE:

1. On 28th June 2018, in the Crown Court at Newcastle (sitting at Teesside), the applicant was convicted of an offence of conspiracy to possess a firearm and ammunition with intent to endanger life. His application for a short extension of time in which to apply for leave to appeal against conviction was refused by the single judge on the basis that none of the three proposed grounds of appeal was arguable. The application is now renewed to the full court. We are grateful to Mr McGrory QC and to his junior, Dr Okewale (who has not appeared today), for the written and oral submissions which between them they have made on behalf of the applicant. We are particularly grateful because they have acted *pro bono* on this renewed application.

2. The applicant stood trial with four other men on an indictment which contained a number of counts. The applicant, Tony Trott and Lee Barnett were convicted on count 2 (conspiracy). Stuart McDonald was found not guilty of that charge following a successful submission of no case to answer. It is unnecessary to say anything about the other counts, but it is relevant to note that on a separate indictment Trott pleaded guilty to conspiracy to supply cocaine.

3. For present purposes the relevant facts may be summarised briefly. We shall for the most part refer to persons by their surnames only. We do so for convenience, and intend no disrespect.

4. In the early hours of Monday 12th September 2016 it was alleged by the prosecution that the applicant, Trott and Barnett drove to Craigshaw Square in Sunderland in two cars. The applicant ran up to number 7 Craigshaw Square and discharged a firearm a number of times through one of the windows. There were people in the room into which the shots were fired. The three men then immediately left the scene. One of the cars they had used was found burnt out a few days later. The other was scrapped. The prosecution case was that the shooting was a response to a burglary and theft of money and drugs which had taken place the day before at the home of McDonald. McDonald was a close friend of Trott and Trott had used McDonald's house to store drugs.

5. Craig Winch (an associate of the applicant and of Trott) was a key witness for the prosecution. He told the police that a few days after the shooting the applicant had told him that he (the applicant) had fired the shots in Craigshaw Square. The applicant also told him that later on the morning of the shooting he had gone to a spa at the George Washington Hotel ("the hotel") in order to cleanse himself thoroughly of any gunshot residue. Winch also gave evidence against Trott, to the effect that Trott had admitted planning the shooting and providing the handgun with which the applicant had carried it out.

6. Trott and a number of others were arrested in connection with the shooting on 16th September 2016. The applicant was not arrested until 14th June 2017. Following his arrest, he refused to leave his cell to be interviewed under caution. When police officers tried to question him through the door of his cell, he remained silent. He did not provide a defence statement until a few days before his trial, in May 2018.

7. At trial, the prosecution relied on the evidence of Winch and also on evidence relating to contact between mobile phones (albeit unaccompanied by any precise cell-siting analysis), communications between the applicant and his co-accused at important times, and some CCTV footage.

8. The applicant did not give evidence. The case put forward on his behalf was that the

evidence of Winch could not be relied upon, and that Winch was a man of previous bad character who had lied in an attempt to obtain help from the police for himself, his mother and his sister.

9. Winch had indeed been heavily involved in drug dealing and other crime over a number of years. In 2015 he had been registered as a police Covert Human Intelligence Source for a period of a few months. On 14th September 2016 he approached the police seeking to take up an invitation, which had previously been made and declined, to become an Assisting Offender under the Serious Organised Crime and Police Act 2015 ("SOCPA"). On 21st September 2016 he was informed of that that role would involve. Winch did not on that occasion give any information about any crimes, but he made a passing reference to the recent shooting in Craigshaw Square, saying that the people with whom he associated were prepared to use extreme violence and had shot out the windows in that incident.

10. There followed on 4th October 2016 a scoping interview in which Winch gave further information about the shooting, but did not mention the applicant's assertion that he had visited the spa. A long series of interviews then ensued. In all, Winch was interviewed 115 times about crimes in which he had been involved and crimes about which he had information through his many criminal associates. The contents of all these interviews were disclosed to the defence long before the applicant's trial. The record showed that it was not until 16th November 2016 that Winch first referred to the visit to the spa.

11. The police visited the hotel on 16th March 2017, after Winch's information had been put into a formal witness statement. At trial, it was common ground that there had been CCTV coverage of relevant parts of the hotel but that any such footage would have been recorded over, or deleted, after 28 days (that is, by 11th October 2016).

12. By the time of the trial, Winch had already given evidence for the prosecution in two trials and was due to give evidence for the prosecution in further trials at later dates. As to his own criminality, he had made admissions to many crimes and had pleaded guilty to nearly all of them. He had not yet been sentenced. Two matters in respect of which he had made admissions remained under investigation and so had not yet been the subject of any pleas. The first, known as "Operation Everest", related to the importation by sea of 50 kilograms of cocaine. It involved a large number of suspects in this country and abroad. Winch had admitted involvement in that importation.

13. The second related to an attempt by Winch to pervert the course of justice in relation to the investigation and prosecution of an offence of arson. As to this, Winch admitted at this trial that he had been involved in the arson and that he had endeavoured to bolster a lying defence by deleting from his Facebook account certain communications which would have undermined the false story he had intended to give. Part of Winch's account in relation to that matter related to the involvement or otherwise in the attempt to pervert the course of justice of a man called Thompson, who was employed by a firm of solicitors. This latter investigation was a very sensitive matter because it involved allegations against that representative of a firm of solicitors who were acting for some of the defendants in some of the trials in which Winch would be giving evidence.

14. An application was made on behalf of the applicant for the proceedings to be stayed as an abuse of the process. The judge, Her Honour Judge Sherwin, refused that application. In her ruling she referred to the large amount of information which Winch had provided to the SOCPA officers and the consequent need for interviews to continue over a lengthy period to cover all the evidence which Winch could give. At paragraph 24 of her ruling, she continued as follows:

> "… Given that Mr Winch's accounts are recorded in the SOCA interviews that were served upon the defence with proper disclosure of all material that would assist the defence or undermine the prosecution case I am satisfied that the balance between the need for a trial to take place as soon as possible (and whilst the defendants' memories are as fresh as possible) was struck appropriately in this trial. The defence are in a position to inform the jury that there are matters outstanding and make appropriate submissions with regard to this and have done so. They have been in a position to highlight any inconsistencies in Mr Winch's evidence to the jury and I am satisfied that there has been no detriment to any defendant as a result of final decisions not having been taken with regards to the two outstanding investigations. I am further satisfied that Mr Winch has publicly admitted his guilt of all matters to all practicable extent in the SOCPA interviews that have been served upon the defence. I note that there appears to be no statutory provision requiring guilty pleas to have been entered to all matters prior to evidence being given by the Assisting Offender although it may be that, in most cases, that is the effective way of demonstrating the admission of guilt. It is clear under the statute that any discount in sentence can only be applied where the Assisting Offender has pleaded guilty to the matters he is to be sentenced for – section 73(1)(a). Thus if Mr Winch denies any allegation and is convicted of it he would not be entitled to any reduction in sentence for those offences."

The judge went on in her ruling to find that there had been no bad faith or serious fault on the part of the police in the timing of their investigations at the hotel and that, in any event, any relevant CCTV footage would have ceased to exist before the police became aware that the applicant was said to have visited the spa.

15. Even before Winch gave evidence, the judge in some initial remarks had given the jury a warning about him, saying:

> "You will obviously need to examine Mr Winch's evidence with some care as you will need to ask yourselves whether what he is saying is the truth, or whether he has some end of his own to serve, such as eventually receiving a lesser sentence. You will also need to consider what other evidence exists in this case and whether that gives any support to what he had to say about any matters."

16. Later in the trial, counsel for the applicant cross-examined the police officer who had visited the hotel in March 2017. The cross-examination suggested that the police had been at fault in failing to make that investigation more promptly.

17. Following that cross-examination, the prosecution served a further witness statement from a prospective witness, Detective Sergeant Grassie, in which Grassie said that investigating officers could not go to the hotel any sooner than they did because of a "firewall" which existed between the officers engaged in debriefing Winch and the officers who would conduct investigations arising out of Winch's account. Grassie's proposed evidence was to the effect that a firewall was in place when Winch first gave information about the shooting, because the police believed that there was a real threat to the safety of Winch and his family. Grassie himself had been given some confidential information about the suggested visit to the spa in December 2016, but he was not able to pass this on to other officers until March 2017.

18. Following service of that statement, an application was made on behalf of the applicant for disclosure of anything which might undermine a belief on the part of the police that Winch was at risk – in particular anything showing that Winch and his family were already under police protection at that time. It was submitted that, in the absence of such disclosure, the evidence should be excluded.

19. The prosecution opposed the application for disclosure, but agreed not to lead any evidence that the lives of Winch and his family were at risk.

20. The judge ruled that, subject to excluding that matter, Grassie's additional evidence was admissible. It was relevant to an issue which had been raised by the defence as to whether the matter had been properly investigated, and the prosecution's agreement to exclude one aspect of the evidence would ensure that there was no unfair prejudice to the applicant.

21. In her summing-up, the judge provided the jury with written directions of law which she read to them. The directions included a section headed "Warning re evidence of Craig Winch", in which the judge said this:

> "When considering the evidence of Craig Winch you should bear in mind that he is someone who has pleaded guilty to a number of different offences and in due course will be sentenced for those offences. You also know that he remains under investigation in relation to a conspiracy to pervert the course of justice along with Paul Thompson. Mr Winch also agreed to become an Assisting Offender and signed an agreement whereby, amongst other things, he agreed to give evidence for the prosecution against those people that he had named as being involved in criminal activity. It is suggested that he did this hoping to get a lesser sentence or to gain an advantage in terms of his and his family's safety. Because this is the situation you should approach Craig Winch's evidence with caution, knowing that he may have an incentive to give evidence against other people in the hope that this may paint himself in a better light. You should ask yourself whether in the case of any defendant Craig Winch has or may have tailored his evidence to implicate him falsely or whether you can be sure, despite the potential benefit to himself of giving evidence against them, he has told you the truth. This is something you will need to assess by comparing his evidence with other evidence in the case that you accept as being honest, accurate and reliable. If having considered all of the evidence you are sure that Craig Winch has told the truth, you may rely on his evidence."

22. The following section of the summing-up contained directions under the heading "Craig Winch – Bad Character", in which, amongst other things, the judge reminded the jury of Winch's admission that he had told lies in the past to other drug dealers and to his own family and reiterated the defence case that Winch was a dishonest man whose word could not be relied upon.

23. The next section contained directions in relation to "Evidence of confessions said to have been made to Craig Winch", in which the judge emphasised the need for the jury to decide whether Winch was telling the truth in his evidence of conversations in which the applicant and others had made admissions to him.

24. Finally, in a section headed "Evidence given by Craig Winch as to convictions [in] previous trials", the judge repeated an earlier direction to the jury to ignore an answer given by Winch in cross-examination about the outcome of the two previous trials in which he had given evidence.

25. As we have indicated, the applicant puts forward three grounds of appeal. Mr McGrory submits that all three raise important matters relating to the SOCPA regime and should be considered at a full hearing of an appeal. The first ground of appeal is that the judge should either have permitted the defence to cross-examine Grassie about the suggested justification for the failure of the police to investigate the hotel matter more promptly, or should have excluded any prosecution evidence about the existence of a firewall. Counsel accepts that it is part of the SOCPA regime that the police team which interviews the Assisting Offender and debriefs him as to the information he can provide is entirely separate from the teams which investigate the crimes to which the information relates. Counsel further accepts that that is, for the most part, an appropriate and good separation. Mr McGrory submits, however, that it should not be set in stone. He argues that when Winch made mention of the recent and very serious shooting incident, that matter should have been investigated without delay and that, to this end, Winch should immediately have been made available to the investigative team led by Grassie. What happened instead, counsel submits, is that there was unjustifiable delay which resulted in the loss of much potential evidence.

26. The second ground of appeal is that the judge was wrong in her decision refusing to stay the proceedings as an abuse. There are two aspects to this submission. First, it is argued that, as a matter of policy, no trial of any accused based substantially on accomplice evidence of this kind should be permitted to proceed until all potential criminality of the Assisting Offender and those impugned by him has been fully investigated and the information obtained thereby subjected to the disclosure test. The failure to comply with that policy, it is submitted, put the defence at a distinct disadvantage in challenging Winch's veracity.

27. Secondly, it is argued that the failure to act promptly when Winch first mentioned the shooting caused real and tangible prejudice to the applicant. It is submitted, in reliance on the decision in *R v Warren* [2011] UKPC 10, that the applicant could not receive a fair trial and that the proceedings ought, therefore, to have been stayed.

28. The third ground of appeal is that the judge should either have directed the jury that they should look for corroboration of Winch's evidence or should at least have directed them in stronger terms than she did as to the need for caution when considering Winch's evidence. It is submitted that there was, in fact, no evidence capable of providing any corroboration for Winch's evidence against the applicant. If the judge was not required to give a full corroboration

direction, she should at the least have directed the jury to look for some independent support before accepting Winch's evidence.

29. Each of these grounds has been opposed by the respondent in a Respondent's Notice.

30. We have reflected on these submissions. In relation to the first ground, we see no basis for challenging the judge's ruling. A police officer had been cross-examined on the basis of a failure to investigate with appropriate speed, and Grassie's further statement was clearly relevant as providing an explanation in that regard. Given that the prosecution agreed to exclude any reference to there having been a risk to Winch's life, there was no unfair prejudice to the applicant as a result of the jury hearing this evidence. Nor do we see any basis for criticism of the manner in which the judge dealt with this aspect of the case in her summing-up, when she directed the jury to take into account, when considering Winch's evidence, the fact that the applicant "has been deprived of the opportunity to have the evidence tested by an independent source, i.e. the CCTV footage".

31. In relation to the second ground, the applicant accepts that the burden was on him to show that he could not have a fair trial. The judge was entitled and, in our view, correct to conclude that he could not discharge that burden. It is important to emphasise that there was and is no suggestion that Winch was a participant in the shooting. He was not an accomplice in that crime. His evidence was, therefore, not about a crime in which he had or was suspected to have participated. It was evidence of confessions made to him by those who had participated in the crime. The proposition that he should have been treated as if he were an accomplice, because all those whom he implicated in the shooting were his criminal associates and had spoken to him about the matter in the belief that he could be trusted as a fellow criminal, is simply untenable.

32. So, too, is the submission that in any case in which the prosecution rely on the evidence of an Assisting Offender, the trial should not be permitted to proceed until all the potential criminality of the Assisting Offender and of all other persons whom he has incriminated has been fully investigated and all appropriate disclosure arising from that investigation has been made. Counsel has accepted that it is not possible to identify any provision in SOCPA itself, or in any case law which supports the existence of this suggested policy. There is, we are bound to say, an element of “chicken and egg” about the submission. If the Assisting Offender's allegation against A cannot be tried until after a full investigation of his allegations against B, C and D, it must surely follow that the allegation against B cannot be tried until after a full investigation of the allegations against A, C and D, and so on. Since the submission extends to the completion of any necessary disclosure exercise, it is difficult to see how the prosecution could proceed against anyone without offending against the suggested policy. Similarly, if the written submission were correct that the police owed a duty to the applicant to investigate this particular allegation by Winch without delay, it must follow that they owed a similar duty to everyone else who was the subject of an allegation by Winch to investigate promptly the allegations in respect of them. It is obviously not possible to prioritise every investigation. It is, of course, desirable to proceed with all appropriate investigations as quickly as possible. A failure to do so might, in some circumstances, give rise to prejudice. But the broad propositions advanced by counsel on behalf of the applicant cannot be accepted. They would deprive the SOCPA scheme of any value in the case of a prolific offender who had much information to give about many other criminals and many other crimes. They also, with respect, overlook the sensitivity which will often arise when the police are provided with information by a criminal and seek to investigate it without putting him at risk of reprisals.

33. The correct position, in our judgment, is that adopted by the judge. A balance must be struck between the need to investigate all the Assisting Offender's allegations and make any

appropriate disclosure, and the need to bring other cases to trial within a reasonable time. In the present case we can see no arguable basis for saying that the balance struck by the judge was wrong.

34. We would add that no actual prejudice to the applicant has been identified. The trial process was well able to ensure – and did ensure – that there was no unfair prejudice. The applicant's advisers had a mass of material to assist them in their cross-examination of Winch. They were able to emphasise his bad character and his admitted willingness to tell lies. They were able to point to suggested discrepancies between his evidence in this trial and his evidence in earlier trials. They were able to point to the fact that he was yet to be sentenced for his own crimes and therefore had an interest of his own to serve. They were able to comment about the fact that two investigations remained outstanding, with the result that Winch had further interests of his own to serve, though it must be remembered in this regard that Winch had made full admissions of his part in those matters, even though he had not yet been charged with them.

35. Although it is submitted that much potential evidence was lost because of the delay, it has not been possible for counsel to identify that evidence, beyond submitting that CCTV footage might either have confirmed or disproved the applicant's denial that he went to the hotel on the day alleged. In our view, reliance on that point cannot assist the applicant, for the simple reason that any relevant footage would have been lost before Winch had even named the applicant as a person involved in the shooting. For that reason, this, in our judgment, is not a case in which it can be said that the prosecution had either failed to gather, or had lost relevant evidence. This is, we emphasise, nothing to do with the existence of any firewall. It is simply a product of the fact that Winch made only an initial and, as we read it, passing reference to the recent shooting incident at the end of his first formal contact with the SOCPA team and did not give any relevant information about the visit to the spa until a significant time after any CCTV footage would have been recorded over or deleted.

36. In relation to the third ground of appeal, the decision in *R v Makanjuola* [1995] 2 Cr App R 469 makes it clear that it is a matter for the trial judge's discretion what, if any, warning is appropriate in respect of an alleged accomplice. Where some warning is required, it will be for the judge to decide its strength and terms. The decision also makes clear that this court will be slow to interfere with a judge's exercise of this discretion, unless it has been exercised in a way which is unreasonable in the *Wednesbury* sense. Here again it is important to emphasise that Winch was not an accomplice in the crime of which the applicant was accused, and it is wrong to treat him as if he were. The judge was right to warn the jury of the need to approach his evidence with caution. She did so before Winch gave his evidence and she did so in her directions of law. Winch's credibility was attacked both by counsel for the applicant and by counsel for each of the co-accused. The jury can have been in no doubt about the fact that Winch had interests of his own to serve and they can have been in no doubt about the consequent need to adopt a cautious approach to his evidence.

37. It is, in our view, impossible to argue that the judge should have couched her warning in stronger terms than she did; still less that she should have directed the jury to look for corroboration of his evidence. The assessment of Winch's truthfulness, accuracy and reliability was a matter for the jury, and they were appropriately and sufficiently warned about their approach to that task.

38. For those reasons, we are satisfied that there is no arguable basis for saying that the conviction is unsafe. If we had thought otherwise, we would have granted the necessary short extension of time. As it is, however, no purpose would be served by extending time because none of the proposed grounds of appeal is arguable.

39. This renewed application is accordingly refused.

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