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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 5th March 2019

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE JEREMY BAKER

and

MRS JUSTICE ANDREWS DBE

R E G I N A

- v -

MOHAMMED SHAID

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Mr C Sherrard QC appeared on behalf of the Appellant

Mr O Glasgow QC and Miss D Heer appeared on behalf of the Crown

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J U D G M E N T
(Approved)

Tuesday 5th March 2019

LORD JUSTICE GROSS:

Introduction

1. On 13th July 2018, following a re-trial in the Central Criminal Court before His Honour Judge Katz and a jury, the appellant, now aged 28, was convicted of murder. On 23rd July 2018, the same judge sentenced him to imprisonment for life, with a specified minimum term of 30 years (less 395 days spent in custody on remand).

2. There were three co-accused: Shah Rahman, Foyzur Rahman and Mozur Ahmed. Each was convicted of manslaughter (the alternative offence) and sentenced respectively to twelve, ten and nine years' imprisonment.

3. The appellant appeals against conviction by limited leave of the single judge.

4. The ground of appeal for which limited leave was granted goes to the refusal by the trial judge to allow the defence to adduce sufficient relevant bad character evidence relating to the deceased.

*The Facts*5. In short summary the facts are these. On 13th May 2017, at 4.29pm, the police were called to Eagling Close in Bow, London. Brenton Roper (the deceased) was found lying in the front yard of number 6. He had been shot in the back and stabbed five times to his left side and buttocks. There was no evidence of defensive injuries. The cause of death was shock and haemorrhage caused by a gunshot wound to the chest.

6. Mr Roper was 41 years of age at the time of his death. He lived together with his partner and their children in a flat at 4 Eagling Close. He was addicted to the drug "Spice", a synthetic form

of cannabis. It was accepted that this drug made him act erratically and aggressively. He was also known to dislike hard drugs after his sister developed an addiction and began to commit crime to fund it. He was known to object to people dealing drugs in the local area.

7. Mr Roper had convictions recorded against him. By agreement, the jury were told of his conviction at the Central Criminal Court on 24th January 2011 for an offence of perverting the course of justice. He was acquitted on the same date of attempting to murder or to wound Anton Ekpriko. The incident involved Mr Roper being handed a gun (which he did not fire) and then walking away with it and later hiding it under a Portaloo at a friend's building site, from where it was later recovered by the police.

8. It was the prosecution case that the appellant and his co-accused Shah Rahman had gone to Eagling Close armed with a loaded gun and a knife and had deliberately shot and stabbed Mr Roper, causing his death. The reason for the attack on Mr Roper was said to be his argument earlier in that day with the occupants of a black Audi driven by Foyzur Rahman (the third defendant) and in which the appellant and Mozur Ahmed (the fourth defendant) were present. It was accepted that Foyzur Rahman was in the Audi dealing drugs on that day.

9. One of the issues in the trial was the reason for the initial confrontation between Mr Roper and the appellant and his co-accused. It was the prosecution case that Foyzur Rahman had been dealing drugs on the street where Mr Roper lived and that this was the reason for his hostile reaction to seeing Foyzur Rahman's car.

10. The defence case was that, while it was accepted that the appellant and Foyzur Rahman were in an altercation with Mr Roper, the gun actually belonged to Mr Roper and that he was stabbed by the appellant with a penknife that happened to be to hand in order to stop Mr Roper

using the gun. In the event, Mr Roper was shot by accident by the appellant during the course of the brief but ensuing struggle.

11. The issue for the jury was whether they were sure that the appellant had not stabbed Mr Roper in self-defence and/or shot him by accident. Particularly within the context of the fatal shooting, the critical issues for the jury to determine were as follows:

(1) Who brought the gun to the scene?

(2) Who was the aggressor in the incident?

(3) Whether, if he was under the influence of Spice, Mr Roper would have been more likely to be the aggressor and/or to use or threaten to use the gun.

12. We are most grateful for the assistance provided today by Mr Sherrard QC for the appellant and Mr Glasgow QC for the Crown (the respondent). As became clear during the course of the argument today, it is issue (1) that was central: who brought the gun to the scene, which, in turn, relates to the question of who might have had access to a gun.

13. We add this, before proceeding further. There is necessarily considerable material before us relating to the unattractive features of Mr Roper's character. We make plain that, however unattractive he may have been, it is not a justification for the incident which took place. Of course, if the appellant's case prevails, Mr Roper was shot and killed by accident. But if the Crown are correct – if the appeal is dismissed – we should make it absolutely plain that, however difficult, aggressive, or volatile Mr Roper may have been, that is not a justification for the violent death which befell him.

14. In more detail, the facts were developed as follows. CCTV footage captured Mr Roper's reaction to seeing Foyzur Rahman's car on the street where he lived. There followed an exchange with the local garage owner, Mr Jubayer Ali Ahmed, who gave evidence but on whom very little reliance could ultimately be placed. He was called by the Crown and eventually treated as hostile.

15. Mr Roper could be seen to confront the occupants of the vehicle from which Foyzur Rahman was dealing drugs, and in which the appellant was present, and then to chase the vehicle as it drove away. Mr Roper behaved aggressively towards Jubayer Ali Ahmed and others who stood with him outside the garage. Three local residents who knew Mr Roper overheard his threats. His behaviour was described as "very angry and confrontational". He was heard to shout, "If you want a fight, I'll fight you under the bridge, no weapons" or "I'll come with my fists, no weapons".

16. Jubayer Ali Ahmed apparently tried to calm him down. He realised that Mr Roper was referring to a customer of his, namely Foyzur Rahman. Mr Ahmed called Foyzur Rahman and asked what had happened between them. When he asked whether Rahman had threatened to shoot Mr Roper, Rahman answered "Yes". However, thinking that the threat was not a serious one, Mr Ahmed returned to work. At trial, Mr Ahmed gave a different account in which he said that Mr Roper wat the person who made the threat. As already indicated, he was treated as hostile by the prosecution.

17. The earlier confrontation, we were told, concluded at around 4.05pm. At 4.24pm the appellant returned to Eagling Close driving a VW Golf with his co-accused, Shah Rahman, in the front passenger seat. About 30 seconds later, he and Rahman were seen on CCTV walking

with their hoods up along Rounton Road, before disappearing from view in Eagling Close.

18. A Miss Khan, who was in a house at the cul-de-sac end of Eagling Close, saw one man being chased by two others who were wearing hoodies pulled down over their faces. She recalled that, as the first man ran, he was saying "I'm sorry". He was chased to the yard in front of 6 Eagling Close. She then saw the two men in hoodies run off again in the opposite direction.

19. A Mrs Duberry heard a gunshot and looked out of her bedroom window on to Eagling Close, where she described seeing two men dressed in dark clothing, wearing hoodies, bent over near a bin outside 6 Eagling Close. Shortly afterwards, they stood up. One of them pushed a gun into his pocket before running away.

20. A Miss Mirza was in the kitchen of her flat when she heard the sound of her front gate opening, then a thud which sounded like her bin being moved against the wall. She opened the front door. She saw Mr Roper lying on the ground. It was clear that he was badly injured. She made an emergency call.

21. The consultant pathologist, Dr Fegan-Earl, said that it was possible for Mr Roper to have been able to run for a short time after being shot. It was not possible to say from the pathology the order in which his injuries were inflicted.

22. The appellant was later identified as one of the two hooded men who had been seen to chase the deceased along the street and one of whom had been seen with a gun.

23. The following day, 14th May 2017, the appellant and Shah Rahman flew to Bangladesh using tickets bought that day in cash by Shah Rahman's brother. They returned to the United

Kingdom on 20th May 2017. On 8th June the appellant and Mozur Ahmed flew to Saudi Arabia on a pre-booked trip. They returned on 24th June. They were arrested at the airport.

24. The appellant was interviewed under caution. He gave "no comment" answers.

25. The appellant gave evidence at his trial. He accepted presence in the Audi car at the time when it was approached by Mr Roper. He admitted that Foyzur Rahman had been dealing drugs. The appellant accepted that he had lied in his first defence statement in which it was asserted that he had not been present at the time of the killing. It will be recollected that his conviction came in the course of a retrial. In the first week of that retrial, the appellant served a new defence statement in which he admitted responsibility for the killing, but now relied upon self-defence or accident. In between, he had accepted presence but not involvement in the shooting. He accepted that he had shouted abuse at Mr Roper, which had aggravated Mr Roper to the point where he chased away the Audi. He said that it had been Mr Roper who had said that he would shoot them. Foyzur Rahman had then received a call from Jubayer Ahmed while he was still in the Audi. After that call, Foyzur Rahman told him that Mr Roper had been complaining to Jubayer Ahmed and had threatened to burn down the garage and shoot people, unless he received an apology for the abuse. Foyzur Rahman was angry with him (the appellant) for what he had shouted at Mr Roper and blamed him for Mr Roper's behaviour to Jubayer Ahmed.

26. Once he had been dropped off, the appellant decided to go back to Eagling Close to (as it was put) confront Mr Roper. Shah Rahman went with him. The appellant had with him a penknife belonging to Shah Rahman as it was on his car keys. He said that when he saw Mr Roper in Eagling Close, Mr Roper was immediately aggressive and came towards him, as if to attack him. Mr Roper had his telephone in his hand. He moved it from his right to his left hand.

He then reached into his pocket and the appellant believed that he was trying to take out a weapon. Initially, he thought that Mr Roper had a knife, but it turned out to be a gun.

27. The defence case was, it may be noted, that after the earlier shouting incident, Mr Roper had returned to his flat and armed himself with the gun.

28. The appellant and Shah Rahman grabbed Mr Roper to stop him. The appellant thought that Mr Roper was still going for his weapon, so he took out the penknife and stabbed Mr Roper with it to stop him. At that point, Mr Roper became free and his weapon dropped to the floor. The appellant saw that it was a gun. Both he and Mr Roper went for the gun. The appellant managed to reach it and pick it up. There was a struggle, which led to Mr Roper pushing him backwards and turning towards Shah Rahman. It was at this point that the gun went off by accident. Mr Roper was hit in the back. Mr Roper then ran towards the cul-de-sac before collapsing in the yard of number 6. Shah Rahman ran after him, followed by the appellant. It was accepted that the appellant and Shah Rahman ran away from the scene. While running away, the appellant discarded the gun.

The Judge's ruling

29. We turn to the judge's ruling as to the admissibility of the evidence of the bad character of Mr Roper. The prosecution conceded that Mr Roper's association with firearms was a relevant issue and agreed in discussion with the judge that his conviction for perverting the course of justice, to which we have already referred, might be of assistance to the jury in determining who had been in possession of the gun which had been used during the fatal attack.

30. The judge noted that there was no dispute that Mr Roper was a Spice addict and that the drug made him aggressive. The CCTV footage supported the proposition that he was behaving aggressively in the hours before he was shot. Evidence on this issue was contained in the

statement of Jubayer Ahmed and in the unused statement from Mr Roper's mother and his son, Jayden Roper. The best way to put such evidence before the jury was by agreed facts.

31. The defence applied to admit Mr Roper's conviction on 24th February 2017 at East London Magistrates' Court for an offence under section 4 of the Public Order Act 1986. It was reported that Mr Roper's threatening utterance shouted at the staff of the Job Centre was: "*You lot are a bunch of wankers. I'm dangerous. You'll see what I can do … I've just come out of prison for a drive-by shooting … I will come back and shoot you guys*".

32. The judge refused to admit this conviction into evidence as he could see no relevance of Mr Roper's conduct, albeit criminal, in a Job Centre after his release from a substantial sentence. In any event, what he had said about his conviction had been untrue. The jury would hear about the conviction involving the gun by way of the agreed facts. There was no relevance to the generality of Mr Roper's criminal record. The assertion that due to his Spice addiction and his connections to that world he carried a gun because he had a price on his head was largely hearsay and of no relevance. It is further to be noted that the judge's ruling excluded various hearsay passages of material to which Mr Roper's mother had been referred about the threats that he had made with regard to the use of a firearm.

The rival cases

33. We turn to the rival cases. In the grounds of appeal, Mr Sherrard submitted, as we have already indicated, that the judge erred in his refusal to allow the defence to adduce sufficient relevant bad character evidence relating to the deceased in order to address the sole issue in the appellant's case. Mr Sherrard's particular focus was on the refusal to omit the Public Order Act conviction, together with the threatening utterance. That conviction was relevant in so far as any reference by Mr Roper to guns or to shooting supported the defence case. Moreover, his previous behaviour or actions demonstrated a propensity to threaten and use violence with

special reference to firearms. Furthermore, it was relevant to the issue of whether the appellant was telling the truth when he stated that Mr Roper threatened to shoot the occupants of the Audi. This was an important issue between the parties.

34. It was further submitted that the difference in Mr Roper's account of his previous conviction was relevant, as Mr Roper was identifying himself as part of the drive-by shooting that took place, rather than simply the person who disposed of the gun. That was relevant to the issue of who brought the firearm to the scene and who potentially would have access to guns.

35. In contrast, the appellant had no relevant previous convictions and none for the possession of any weapon or firearm.

36. In his written grounds, Mr Sherrard furthermore focused on the evidence of Mr Roper's mother. She had described an earlier incident involving Mr Roper's son and an unknown man, when Mr Roper threatened to "blow their mum's face off". In yet another separate incident involving an unknown Asian man who asked Mr Roper whether he was going to get a knife to "do him", Mr Roper replied that he was going to get a gun and "blow [him] away". Mr Sherrard accepted that the status of arrests or intelligence was not that of convictions. However, he submitted that all these items passed the test of substantial probative value – the relevant test for the admissibility of this evidence.

37. In his oral submissions today, Mr Sherrard highlighted that the question for the jury was: who had brought the gun to the scene? Accordingly, character evidence as to the deceased was fundamental. It was capable of changing the balance of the evidence in the case. The CCTV evidence did not cover the key passages in the fatal incident; circumstantial evidence was key. The jury knew all about the appellant, but they had much more limited knowledge of Mr Roper.

Although the Crown put bad character evidence of Mr Roper before the jury, that had been "self-serving", albeit, to be fair to Mr Sherrard, he did not advance that submission in any way critically. His complaint was that the Crown did not put relevant features concerning the deceased before the jury. Those relevant features were to be found in the excluded evidence. Admittedly, this was a question of judgment for the judge, but in assessing the position as a whole, it should not be underestimated how much damage Jubayer Ahmed's unreliable evidence may well have caused to the appellant. The section 4 offence yielded relevant probative material and Mr Roper's mother had been an impeccable source who would have balanced Jubayer Ahmed's unreliable evidence.

38. As to the safety of the conviction, this was a single issue case. If the judge had erred in excluding the character evidence, it followed that the safety of the conviction was irretrievably undermined.

39. In their written grounds, the Crown submitted that the relevant features of Mr Roper's bad character were indeed before the jury – much of it called by the prosecution. That included Mr Roper's previous conviction that was related to firearms, his drug addiction and its effect upon his behaviour, his reputation for dishonesty and his aggressive and volatile temper. The judge had considered all the relevant material and was correct to conclude that much of what the defence wanted to put before the jury lacked the necessary substantial probative value.

40. In his oral submissions, Mr Glasgow focused particularly on the issue which had been highlighted: access to a gun and who brought it to the scene of the incident. Mr Glasgow submitted that nothing about the events at the Job Centre (that is, the Public Order Act offence) assisted. Mr Roper, when arrested, was not found in possession of a gun; nor was one found at his home address. Similarly, so far as concerned the evidence of Mr Roper's mother, all that was

entailed were threats. No firearm had been found and no charges brought. Many of the same considerations applied to the yet further incident where there was a threatened use of firearms. There was ample material before the jury as to Mr Roper's character and temperament. In Mr Glasgow's submission, the excluded material fell short of demonstrating any substantial probative value to the key issue in the case. It was, in any event, a matter of judgment for the judge and we should not intervene. If the judge had indeed erred (which Mr Glasgow disputed), then the safety of the conviction remained. In particular, Mr Glasgow drew attention to: (1) the changing nature of the defence; (2) the fact that the appellant had been clearly identified as having returned, hooded, to the area; and (3) the appellant's behaviour in the aftermath of the incident. He said that, even if the judge had erred, we could be satisfied that the conviction was safe.

Discussion

The Judge's Ruling

41. There was and is no dispute as to the test for the admissibility of the evidence in question. It is contained in section 100(1)(b) of the Criminal Justice Act 2003 ("the CJA 2003") and it means what it says. Is the evidence of "substantial probative" value in relation to a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole?

42. Insofar as the evidence sought to be adduced is hearsay, regard may also be had to section 126(1)(b) of the CJA 2003 which provides, so far as relevant, that the court may refuse to admit hearsay evidence if satisfied "… that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence". Typically, a decision to admit or refuse to admit bad character evidence involves an exercise of judgment or discretion on the part of the trial judge – for present purposes, it matters not which – and this court will be slow to

interfere. Much hinges on the "feel" of the trial judge for the case.

43. As will already be apparent, there was or would be a plethora of evidence before the jury as to the deceased's addiction to drugs, dishonesty, his erratic and aggressive behaviour, his readiness to threaten others (possibly including with firearms) and his criminal record, in which his conviction for an offence involving a firearm loomed large. Quite apart from local residents and Jubayer Ahmed, there was CCTV footage of the day in question which showed at least something of the earlier confrontation. All this evidence went or was to go before the jury, essentially unchallenged by the Crown, save for aspects of Jubayer Ahmed's evidence after he was treated as hostile.

44. It is, importantly, against this background that the judge made his ruling. As to the exclusion of Mr Roper's conviction for the Public Order Act offence, at first blush Mr Sherrard's submission has attraction. However, upon analysis, we struggle to see what it would have added to the picture already squarely before the jury. It was, it might be said, yet another example of unacceptable behaviour on the part of the deceased. True, it involved a threat to shoot, but we are not at all persuaded that this threat was of any, let alone substantial, probative value in relation to the key issue. It demonstrated Mr Roper's readiness to threaten, not his access to firearms. Moreover, the claim as to his role in the crime to which his threat referred (that is, the earlier crime which was before the jury) did not accurately reflect his conviction and was apt to sew confusion, rather than assist the jury. It is to be underlined that the Public Order Act conviction itself, without the wording of the threat, would not have assisted the jury at all. In the circumstances, we are unable to accept the submission that the judge was in error in declining to admit this conviction into evidence. At most, it might be said that some judges would have admitted that evidence. But it does not follow from that that this judge in this case was in error in not doing so. The judge was entitled to exercise his judgment in drawing a line as to which

bad character evidence was admissible and which was not.

45. In our judgment, there was even less justification for admitting the other matters which the appellant sought to introduce. As to the unproven accounts contained in the material from the deceased's mother, they are examples of material readily likely to give rise to side issues or satellite litigation. They were far more likely to take up time, without adding anything of substantial probative value. Again, these are examples of threats. They do not go to access to weapons. We reiterate that before the jury was the evidence of Mr Roper's previous conviction, which squarely indicated access to weapons. We cannot help thinking that, given the material already before the jury, there would have been diminishing returns from all these additional matters, thus reinforcing the decision taken by the judge.

46. It follows that we are not persuaded that the judge was in error in refusing to admit the additional bad character evidence relating to Mr Roper.

47.

The Safety of the Conviction

48. If, contrary to our view, the judge was wrong to exclude the additional evidence (or some of it), then it is necessary to consider the safety of the conviction. If so, we entertain no doubt whatever that the conviction was safe. The matter does not admit the stark cut off which Mr Sherrard attractively postulated. The question here would be whether, if the additional evidence was not before the jury but should have been, it impacted on the safety of the conviction in the light of what was already before them and in the light of what was known about the defence case.

In our judgment, over and above the evidence as to the deceased's character and behaviour, which was already before the jury, the prosecution case against the appellant was overwhelming. As Mr Glasgow put it: first and foremost, there was the changing nature of the appellant's defence. It had begun by being a denial that the appellant was present. It had moved on to an acknowledgement that he was present, but a denial of involvement in the shooting. Thereafter, it was an admission of shooting, but the assertion that it was self-defence or accident. Such changes of account destroy credibility. In any event and even if plausible in theoretical pathology terms, Mr Glasgow was justified in categorising the account of the incident as advanced finally by the appellant as "palpable nonsense".

49. The second point in this regard is the return of the appellant to the scene. He chose to go back. As we understand his own account, it was to confront Mr Roper. We decline to accept that this was intended to be a peaceful, verbal exchange. If it was, it makes no sense at all that he and his co-accused returned dressed as they were.

50. Finally, the third point relates to the appellant's behaviour in the aftermath. He left the country very promptly indeed – the day after the incident.

51. With all these matters in mind, the difference made by the evidence which was excluded, even if it should not have been so excluded, does not, in our judgment, begin to cast doubt on the safety of the conviction.

52. For all these reasons, the appeal must be dismissed.

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