



Neutral Citation Number: [2019] EWCA Crim 2491

Case No: 201802089

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
HHJ Catterson sitting in the
Crown Court, St Albans

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 25th March 2020

Before :

LORD JUSTICE GROSS
Mrs JUSTICE McGOWAN DBE

and

Mr JUSTICE BUTCHER

Between :

ASHLEY THOMAS

- and -

REGINA

Appellant

Respondent

Miss Becker (instructed by **the Registrar**) for the **Appellant**
Mr Shaw (instructed by **the CPS**) for the **Respondent**

Hearing date: 30 July 2019

Approved Judgment

The Hon. Mrs Justice McGowan :

1. On 17 April 2018, before HHJ Catterson and a jury sitting in the Crown Court at St Albans, the appellant was convicted of the possession of an imitation firearm with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1969 and two offences of possession of a controlled drug of Class A, cocaine and diamorphine, with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971. He was acquitted of attempting to rob, contrary to section 1(1) of the Criminal Attempts Act 1981, and the possession of an imitation firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968. The appellant appeals against his conviction by leave of the full court.
2. On 11 May 2018 he was sentenced to an extended determinate sentence of 8 years on the firearms offence concurrent to concurrent 5 year term on each of the drugs offences. The 8 year term was made up of a 3 year term with an extended licence period of 5 years.

The Factual History

3. On 22 November 2017 there were two incidents between the appellant and the complainant, Mr Hothi. The first incident took place in a residential area in Hemel Hempstead, and culminated in the appellant pursuing the complainant, each being in their respective cars, and then rummaging in the boot of the complainant's car. The second incident occurred outside a block of flats, Malins Court, there was an incident in which the appellant threatened the complainant with an imitation firearm. The appellant was subsequently arrested and found in possession of two lots of Class A controlled drugs. The gun was not recovered. At interview, the appellant denied that he attempted to rob the complainant, denied that he had any type of firearm in his possession, and denied that he was a drug dealer.
4. The prosecution case was that the appellant had observed the complainant move items from one car to another outside Malins Court, and formed a plan to rob him. He pursued the complainant in his own car and caused him to stop in a residential street. The prosecution case was that he threatened the complainant with an imitation firearm and rummaged around in the boot of his car hoping to find items to steal. The complainant threw his car keys into a nearby bush and tried to escape by running off. However, the appellant had pursued him on foot, threatened him with the imitation firearm, and struck him over the head with it.
5. The complainant telephoned his wife who dialled '999', the police attended and arrested the appellant. On arrest he was found to be in possession of several wraps of diamorphine and cocaine. It was the prosecution's case that the appellant was a drug dealer, and that the jury could infer this from his lavish lifestyle and lack of legitimate income to fund that lifestyle.
6. The defence case was that it was the complainant who had started the incident by threatening the appellant and causing a physical scuffle. During the scuffle the complainant dropped the drugs and these were picked up by the appellant. The appellant's case was that he did not have an imitation firearm and denied that he was a drug dealer.

The Trial.

7. The direct evidence that the jury had to determine was a simple conflict between the prosecution and defence. Of significance to this appeal was the financial position of the appellant. The prosecution case was that the appellant was a drug dealer and had funds in his possession which could not be accounted for by any legitimate explanation. They sought to rely on inferences to be drawn from the financial evidence to support their overall case on the drug dealing and the appellant's lack of credibility.
8. There are two grounds of appeal, both relate to the refusal of the judge to accede to applications to discharge the jury.
 - i) In cross-examination the prosecution sought to challenge the appellant to provide the PIN code to unlock a Samsung mobile telephone so the police could conduct a full investigation. When asked the appellant said he would try to provide access to the phone. When this matter arose, the defence objected and the judge ordered that there could be no further cross-examination on this topic. There was quite a lot of evidence given by the appellant about calls, or the absence of suspicious calls, made on another telephone by him prior to his arrest.
 - ii) When the appellant gave evidence, he produced screenshots of his bank account which showed a 'snapshot' of his financial status. When he was cross-examined the prosecution put to him further bank statements and sought to ask him about the source of the funds. The defence challenged that course and invited the judge to rule that the fairness of the trial had been compromised to such an extent that the trial should be stopped. She ordered full disclosure of the material before cross-examination proceeded any further.
9. The question of being asked to provide a code to unlock the phone came without proper notice. On the question of finance, the appellant should not have produced the screen shots of his account for the first time during the trial and not expected to be asked about the more general financial position. The prosecution should not have sought to cross-examine on his bank accounts without having first disclosed the material to the defence.
10. There was a testy exchange between the judge and prosecution counsel. Prosecution counsel should not have argued with the judge in an intemperate manner when she sought to ensure that full disclosure did take place. The judge was obliged to deal with these issues during the trial, they should have been resolved before the trial by proper case preparation.
11. The trial process allows for the judge to prevent further investigation of irrelevant or inadmissible material. Juries are directed that it is the role of the judge to resolve such questions and for them to concentrate only on the issues necessary to reach verdicts. The judge gave perfectly proper and appropriate directions to the jury about the disputed points of evidence.
12. It should be remembered that the appellant was perfectly well aware of the content of his own bank accounts, even if his counsel had been taken by surprise. Proper time

was given after disclosure had been ordered to allow the appellant to deal with the material.

Discussion.

13. The prosecution should have clarified the position as to the provision of the access code to any telephone before proceeding to cross-examine on the point.
14. The prosecution should not have responded to the appellant's late production of the screen shots by seeking to use material which they had not previously disclosed, even if disclosure had only taken place during the appellant's evidence. The proper course was to disclose the material to the defence and they could have asked for any time necessary to consider the material.
15. It is the function of this court to ensure that the conviction is safe. The learned judge was faced with a failure to comply with the duties of disclosure. The judge stopped the prosecution from asking any further questions about the Samsung telephone in issue. She prevented counsel from going any further in cross-examination on the financial background until the defence had seen the relevant material. She was obliged to order disclosure of the bank statements. She allowed the defence time to take instructions of it before cross-examination proceeded on the bank statements. The problems that arose through lack of proper disclosure were resolved without any undue or unfair prejudice to the appellant.
16. The issues for the jury in this case were whether they were sure about the credibility and reliability of the complainant when he gave evidence of the production of the imitation firearm. Further whether they were sure that the prosecution had proved the appellant's possession of the quantities of drugs and his intention to supply to others.
17. The judge gave the proper directions and warnings to the jury and, despite the unsatisfactory way in which the issues arose, the judge resolved them in fair and proportionate way. The verdicts returned by the jury accord with the evidence and there is no doubt about the safety of the convictions in this case. Accordingly, this appeal is refused.