IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA CRIM 1297

No. 202000381 B4

Royal Courts of Justice

Thursday, 29 July 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER
HIS HONOUR JUDGE MICHAEL CHAMBERS QC

REGINA
V
REECE BURTON

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J U D G M E N T

NOTE: this is the final revised version of the judgment and replaces the unrevised version previously published in error, which has been withdrawn.

MR JUSTICE SPENCER:

1 The applicant seeks to pursue an appeal against his conviction for attempted murder and possessing a firearm with intent to endanger life. Following refusal of leave by the single judge, the applicant renewed his application for leave to appeal. However, on 14 May 2021, after an abortive listing of that renewed application before the full court and in advance of a further listing of his application, the applicant signed a Form A abandoning all proceedings in his appeal. He now applies to have this abandonment treated as a nullity. It is therefore necessary to set out the history of the appeal and the relevant chronology in more detail.

The procedural history

2 On 11 December 2019 at the Central Criminal Court the applicant was convicted by the jury of attempted murder and possessing a firearm with intent to endanger life. On 17 February 2020 he was sentenced by Her Honour Judge Munro QC to imprisonment for life with a specified minimum term of 12 years, less 237 days spent on remand.

3 On 29 January 2020 the applicant lodged his appeal against conviction with grounds of his own composition. On 21 September 2020 leave to appeal against conviction was refused by the single judge (Edis J). On 2 November 2020 the applicant renewed his application for leave to appeal.

4 We should add that on 21 May 2020 the applicant had been transferred from prison to Broadmoor Hospital under s.47 of the Mental Health Act 1983. It appears that he was returned to prison on 21 October 2020.

5 The renewed application for leave was listed before the full court on 18 February 2021. There was an application to vacate the hearing so that the applicant could receive legal advice. New solicitors had obtained limited legal aid funding for new counsel to advise.

6 On 16 February Males LJ agreed to vacate the hearing and directed that any revised grounds of appeal be lodged by 5 March 2021. On 4 March 2021 the applicant wrote to the Registrar asking to be produced at the next hearing before the full court:

> "... so I am fully in the loop. So far this has not been the case."

7 On 12 April 2021 new counsel, having provided negative advice, informed the Registrar that he would not be lodging grounds of appeal or representing the applicant further. We do not know whether counsel warned the applicant that he risked a loss of time direction if he pursued the renewed application for leave, but we think it likely.

8 The case was relisted for hearing before the full court on 20 May 2021. On 19 April 2021 the applicant wrote again to the Registrar saying he had no solicitor to represent him at the hearing and would have to act for himself:

> "I cannot do that from prison so if I cannot be produced to court, I would not want to go ahead with the appeal at this time due to the unfairness of it."

Whether that indicated an unequivocal intention to abandon the appeal for all time is doubtful.

9 On 10 May 2021 Andrews LJ refused permission for the applicant to attend the hearing listed for 20 May. On 12 May 2021 the applicant's mother emailed the Criminal Appeal Office saying that the applicant had previously written to the court:

> "…requesting to withdraw his application for his renewed hearing for appeal against his conviction. Please could all correspondence stop as he no longer requires this service."

10 On 13 May 2021 the Criminal Appeal Office emailed the applicant's mother informing her that if the applicant wished to abandon his application for leave to appeal, he would need to complete an abandonment form and return it to the office before the listed hearing date, failing which the case would go ahead. Form A was attached to the email and it was indicated that a copy of the form would be sent to the prison via email.

11 On 13 May 2021 the applicant's mother replied to the Criminal Appeal Office asking whether she could sign on the applicant's behalf as she feared he would not receive the form before the hearing date. The office replied that the applicant needed to sign the form himself and that the form had been sent to the prison. It was duly emailed to the prison that day:

> "...for the prisoner to sign and return."

The email explained that the applicant's mother, who was assisting him with his application, was very concerned he would not receive the paperwork.

12 On 14 May 2021 at 10.03 a.m. the Form A, signed by the applicant, was returned to the Criminal Appeal Office and processed the same day. The listing for 20 May was, accordingly, vacated.

13 On 18 May 2021, only four days after signing the Form A, the applicant wrote to the Registrar saying there had been a misunderstanding. He wanted his appeal to proceed. He thought that in signing the document he was simply agreeing not to be produced at court on the day of the hearing. He said he did not understand the meaning of certain words owing to his mental health and "reading issues."

14 On 19 June 2021 the applicant wrote to the Registrar again and in more detail. He said that when his application to be produced for the hearing was refused by the judge, a prison officer had come to speak him and explained that if he "abandoned", the hearing would go ahead in his absence. He therefore agreed, because he wanted the full court to look at his conviction. In the letter he said that if things had been explained to him properly, he would never have abandoned the appeal. He was misguided and had gone to the wrong people for advice. He asked that the court should "pick up from where it left off". He wanted the appeal to go ahead without him being present. He was just listening to the prison officer's advice. If he knew then what he knows now, he would never have signed the paperwork.

Should the abandonment be treated as a nullity?

15 A notice of abandonment of appeal is irrevocable unless the Court of Appeal treats it as a nullity. The test was set out by a five-judge court in *R v Medway* [1976] 62 Cr App R 85 and confirmed in *R v Smith (Paul)* [2013] EWCA Crim 2388. To treat the abandonment as a nullity the court must be satisfied that it was not the result of a deliberate and informed decision. In other words, for an abandonment to be effective the mind of the applicant has to go with his act of abandonment. A notice of abandonment will not be regarded as a nullity merely because there are arguable or even cogent grounds in support of the

abandoned appeal. In such circumstances the remedy is to make an application to the Criminal Cases Review Commission.

16 With some hesitation, we are prepared to treat the notice of abandonment in this case as a nullity. We think there is some uncertainty as to whether the applicant's mind went with the notice which he signed. He undoubtedly wanted to attend the hearing before the full court in person to see that his appeal was properly pursued. We do not consider that his letter of 19 April can be regarded as an unequivocal indication of an intention to abandon.

17 It is true that the Form A is clear in its terms as a document. The box he signed (Part 1 on the form) states in bold capitals:

> "I abandon all proceedings in the Court of Appeal."

However, we bear in mind the applicant's literacy issues. We also bear in mind that there is some history of mental disorder, demonstrated by his transfer to hospital the previous year during his sentence. We do not know precisely what he was told when he was handed the form. We note in particular that only four days after signing the notice of abandonment he was writing to the Registrar explaining there had been a mistake. We have no evidence from the prison as to what the applicant was actually told and by whom, but he says that he genuinely misunderstood the true significance of the document he was signing. He says that he genuinely thought he was merely signing to confirm that he would not attend the hearing which would then proceed in his absence.

18 On the material before us, we are satisfied that his act of abandonment was not the result of a deliberate and informed decision. We therefore treat the notice of abandonment as a nullity.

19 The consequence is that the status of the application is restored as if there had been no interruption. It follows that it is open to us to proceed today to deal with renewed application for leave on its merits. We see no reason not to do so. There is no indication that the applicant wants to obtain further legal advice or wants more time to prepare. As we have said, the request in his letter was that the court should "pick up from where it left off." He says in his letter that in signing the documentation he wanted the appeal to go ahead without him being present.

The merits of the proposed appeal

20 We therefore turn to the merits of the renewed application for leave. The applicant requires an extension of time of 20 days, which we grant.

21 The stark facts of the offences can be very shortly stated. On 17 June 2019 at around 11.30 in the morning, Ayrron Charles was shot through the neck outside his mother's address in Birch Grove, Leytonstone. The prosecution case was that the applicant fired that shot. Although the victim was shot through the neck, the bullet missed vital airways and blood vessels and, fortunately, he survived. There was a co-accused, Kenneth Busumbru, who was jointly charged with the same offences as a secondary party. He was acquitted by the jury.

22 Unbeknown to the applicant and his co-accused, the victim of the shooting was himself under surveillance by the police at the time of the shooting and about to be arrested on suspicion of robbery. PC Barnes-Weston was carrying out observations from a car parked nearby. He recognised the applicant and the co-accused, having had dealings with them in the past. The officer saw the victim leave his mother's address and make his way towards Leytonstone High Road. As the victim reached the end of Birch Grove, the officer saw the

applicant appear on his bicycle from behind the last house on the road. He watched the applicant approach the victim, raise his right hand so that is was fully extended, and shoot the victim before cycling off at speed towards Leytonstone High Road. There was CCTV footage of the applicant and the co-accused cycling away from the scene. The victim staggered back to his mother's house. The officer called for backup and medical assistance and then went into the house. On 21 June, four days later, the applicant was arrested and interviewed. He answered no comment to all questions.

23 The issue for the jury was the correctness of the police officer's identification of the applicant as the gunman. In his defence statement the applicant asserted that he had been in the area at the time of the shooting with the co-accused smoking and selling cannabis. They were in the car park of the Lime Tree Surgery rolling a cannabis joint when they heard gunshots and left the area immediately. It was accepted that PC Barnes-Weston was correct in his identification of them generally, but he was wrong in saying that the applicant and the co-accused were paying particular attention to 84 Birch Grove (the victim's mother's address) and wrong in saying that the applicant approached the victim and shot him.

24 There were other eyewitnesses in properties overlooking the scene. Some of them gave live evidence and the statements of others were read by agreement, but none of them identified the gunman. An employee of the Lime Tree Surgery, Emma Godbold, heard the sound of gunshots and saw two males cycling from the area of the shooting past the surgery and down the alleyway connecting Birch Grove to Leytonstone High Road. Her description of the men matched the applicant and the co-accused. She was able to say that the two men did not come from the area of the surgery car park, thereby contradicting the applicant's contention in his defence statement. There was cell site evidence and evidence of call data between the applicant and the co-accused, but this went only to support their admitted presence at the scene.

25 The judge allowed the prosecution's application to introduce bad character evidence, but only to the limited extent of (1) the finding of a stab vest at the applicant's home address and (2) his previous convictions for possession of a bladed article and wounding with intent in 2012, and possession of a bladed article in 2015.

26 It was an agreed fact that the bullet had either entered the victim's neck from the rear and exited from the right side of the neck or the bullet had entered through the right side of the neck and exited from the rear. The evidence was equivocal.

27 There was no half-time submission on behalf of the applicant that there was no case to answer. The co-accused did make a submission of no case which the judge refused. Neither the applicant nor the co-accused gave evidence.

28 The judge provided the jury with oral and written legal directions, which were agreed with counsel in advance of closing speeches. In particular, the judge gave a comprehensive *Turnbull* direction on identification. She directed the jury that there was no dispute that PC Barnes-Weston had correctly identified both defendants at Birch Grove. The evidence that was disputed was his identification of the applicant as the gunman. The judge identified for the jury the evidence which was capable of supporting the correctness of that identification. First, there was the applicant's admitted presence at the scene confirmed by cell site and CCTV evidence. Second, there was the evidence of the applicant's previous convictions and the finding of the stab vest.

29 The judge gave a comprehensive and impeccable direction on the permissible approach to the bad character evidence of the finding of the stab vest and the applicant's two previous convictions. She told the jury that this evidence was relevant to the issue of whether the

officer's identification of the applicant as the gunman was correct. The convictions and the stab vest might establish that he had a propensity to engage in violence.

30 The judge also reminded the jury that the officer had seen the applicant's photograph occasionally since 2016 in what the officer described as "briefings." No evidence had been given as to the subject matter or content of the briefings. The judge warned the jury not to speculate about their content or to hold it against the applicant. The evidence had been given solely to establish how it was that the officer knew the applicant.

31 The judge's summary of the evidence in her summing-up was commendably succinct. The jury retired on the morning of Wednesday, 11 December. They returned unanimous verdicts the same afternoon, finding the applicant guilty and the co-accused not guilty.

32 The applicant lodged his own grounds of appeal supplemented with further letters to the registrar dated 16 January and 2 March 2020. The grounds may be summarised as follows.

1. Judicial failings/errors:

(i) the bad character evidence was not relevant and its admission was prejudicial;

(ii) the summing-up was biased, and

(iii) the judge incorrectly admitted hearsay evidence.

2. Disclosure:

(i) the police withheld evidence that would have supported the applicant's case of mistaken identity, and

(ii) the prosecution failed to serve relevant material and presented false information to the jury.

(3) Criticisms of legal representatives:

(i) the applicant's legal representatives did not follow his instructions, including in relation to making applications and calling witnesses;

(ii) they incorrectly advised him not to give evidence and ignored his mental health issues;

(iii) they ignored vital new telephone evidence;

(iv) they failed to adduce expert evidence that would have assisted;

(v) there were insufficient legal visits to prepare his case adequately

(4) Inconsistencies in the identification evidence:

(i) the eyewitness accounts describing the gunman contained inconsistencies: the applicant did not fit the description of the gunman;

(ii) the account given by PC Barnes-Weston to other officers contained errors, such as his claim that he saw the gunman running into an address;

(iii) the identification procedure was not correctly carried out;

(iv) PC Barnes-Weston was an unreliable witness who had previously made mistakes in relation to identification in another case.

33 In view of the criticisms of trial counsel and solicitors, the applicant was invited to waive privilege and did so. We have a detailed response from counsel and from the solicitors. We also have the applicant's comments on those responses. We have the benefit of a very thorough respondent's notice settled by prosecuting counsel at trial.

34 Like the single judge, we have considered carefully all the grounds of appeal and all the material submitted by the applicant. We agree with the single judge that the respondent's notice and the responses of trial counsel and solicitors refute convincingly the complaints raised in the grounds of appeal. Like the single judge, we consider that the only ground of appeal which comes anywhere near the threshold for granting leave is the admission of the bad character evidence. We shall return to that ground.

35 So far as the other complaints are concerned, we need deal with them only briefly. We reject the suggestion that the summing-up was biased. On the contrary, it was lucid, fair and to the point. We reject the suggestion that the judge incorrectly admitted hearsay evidence. This ground is not even properly particularised. We can see no substance in the applicant's suggestion that the police withheld evidence which would have supported his case or failed to serve relevant material. No such concern has been expressed by trial counsel or solicitors. The allegation is not particularised.

36 We consider that the criticisms of his counsel and solicitors are ill-founded. For example, the complaint that they failed to introduce expert evidence is plainly misconceived. Trial counsel explains in detail in his response why it was that the reports from three experts on specific issues were not relied upon, following discussion with the applicant. None of the reports would have advanced his case. There was a report from an expert which assessed sightlines, but the report merely confirmed (rather than disproved) that PC Barnes-Weston could have seen what he described seeing. Similarly, the expert medical report obtained by the defence in relation to entry and exit of the bullet merely confirmed the prosecution's medical evidence. We have already referred to the agreed facts in this regard.

37 It is plain that the applicant was carefully advised about the advantages and disadvantages of giving evidence. Very properly, the decision was left for him alone to make. The applicant was well aware of the consequences of not giving evidence. The judge gave the conventional warning when counsel announced that the applicant would not be giving evidence.

38 It is said that his legal team ignored his mental health issues. Prior to sentence, a psychiatric report was served which showed that the applicant had had very little engagement with the prison mental health team. On his own account, he had been taking spice two or three times a week whilst in prison. There is no evidence of his having any delusional ideas or abnormal perceptions. It is unclear in any event what bearing any mental disorder could have had on the narrow issue the jury had to decide.

39 There is a generalised complaint that the applicant's legal team failed to call witnesses and make applications. The missing witnesses are not identified. It may be that the criticism is that the prosecution did not read the statements of witnesses who the applicant thinks should have been called. Either way, there is no substance in the complaint. Trial counsel rightly points out that any application to adduce the bad character of the victim would have been unlikely to succeed and would have exposed the applicant's own character still further.

40 No half-time submission was made because counsel considered, perfectly correctly, that the evidence of the officer had provided a sufficient case to answer. Defence counsel successfully opposed part of the prosecution's application to adduce bad character evidence. Contrary to the applicant's assertions, it is plain that trial counsel and his solicitors spent ample time with the applicant in conference before and during the trial.

41 As to the inconsistencies in the identification evidence, these were brought out in cross-examination and fairly summarised by the judge in the summing-up. They were matters entirely for the jury to assess. It is contended that the officer was an unreliable witness, because he had previously made mistakes in relation to identification. This complaint has been addressed in the respondent's notice and in supporting witness statements from PC Barnes-Weston dated 8 July 2020 and from DC Mordon dated 6 July 2020.

42 The applicant had referred to a previous case in which PC Barnes-Weston was involved, but the applicant gave the wrong reference number. In fact, it seems that the case the applicant was referring to involved a defendant called Hamza Ul-Haq. The witness statements confirmed that in that case the officer had been invited to review CCTV footage of 12 males involved in an incident of disorder where a firearm was used. The officer viewed the footage and named five people he believed were involved. Of those five, four were arrested, charged and pleaded guilty to violent disorder. The fifth, Ul-Haq, was excluded following the obtaining of further clearer CCTV imagery. We cannot see how this evidence could have assisted the applicant at trial even if it was admissible, which we doubt.

43 We turn, finally, to the judge's decision to admit the bad character evidence. The prosecution contended that the applicant's convictions demonstrated a propensity to violence and were, therefore, capable of supporting the officer's identification of the applicant as the gunman. The judge granted the application only in part, admitting only two of the convictions. The first was for possession of a knife in 2012. The second was for an offence of s.18 wounding and possession of a bladed article in 2015. The judge accepted the defence submission that the other convictions were either too long ago or not sufficiently relevant to be admissible. The judge said she would give the jury very careful directions as to the use to which they could and could not put the bad character evidence. In due course, in the summing-up the judge did just that.

44 The prosecution applied to adduce evidence of the finding of the stab vest at the applicant's home address primarily under s.98 of the Criminal Justice Act 2003 as evidence to do with the facts of the offence. The judge accepted that submission, but said that alternatively she would have admitted it in any event under s.101(1)(d) of the Act as evidence relevant to an important matter in issue, namely, the applicant's propensity to violence.

45 As the single judge pointed out, previous convictions can in principle support an identification where a suspect is identified at a VIPER parade by a stranger. It reduces the chance of mistake if the witness happens to have picked out the only person who (a) was at the scene at the relevant time and (b) has previous convictions for violence.

46 Here the situation was different in that the identifying police officer knew what the applicant looked like from previous briefings and was already at the location in question for the purpose of keeping observation on the victim. He saw and correctly identified the applicant and kept him under close but intimate observation over about ten minutes from 11.21 am. The issue was whether the officer was truthful and correct in saying that four minutes later he saw the applicant shooting the victim.

47 As the single judge pointed out, in reality the case was about whether the police officer was telling the truth. We agree with the single judge that on this analysis there could be some force in the argument that previous convictions for violence and using a knife and evidence of the possession of a stab vest did not show a propensity to use firearms to commit murder, which was the issue for the jury. Nevertheless, we also agree with the analysis of the single judge that it is not arguable that any error that may have been made in admitting this bad character evidence could render the applicant's conviction for attempted murder unsafe.

48 First, the propensity, even if it was established, was weak and was unlikely to have played much part in the jury's assessment of the relevant evidence.

49 Second, evidence of the fact that the applicant was known to the police, and to PC Barnes-Weston in particular, was inevitably before the jury. It was a recognition case. The extent of the officer's previous observation of the appearance of the applicant was directly relevant. The judge was careful to direct the jury on the limitations of this. We agree with the single judge that in the absence of evidence of these limited previous convictions the jury would have been likely to speculate about the applicant's criminal record and might even have concluded that his history was worse than it was. Some defending advocates would have led evidence of his past offending for this very reason.

50 Third, these convictions were relied upon by the defence in closing submissions as grounds for bias on the part of the identifying officer, an additional point which could not otherwise have been made.

51 Fourth and finally, in assessing the safety of the conviction we agree with the single judge that the jury were likely to attach far more weight to the absence of any evidence from the applicant himself, and to his unwillingness to face cross-examination on his denial of responsibility, rather than to these previous convictions.

52 The reality of the case was that the applicant had given no account in interview nor had he given evidence in support of his denial that he was the gunman. The police officer was plainly reliable in identifying the applicant and the co-accused as being present in the vicinity. The sole issue was whether the officer was truthful and reliable in saying that he had seen the applicant approach the victim, produce a gun and shoot him. Inconsistencies in what the officer said he had seen were properly investigated in cross-examination but in the end the question was whether the jury believed the officer. By their verdict they plainly did.

Conclusion

53 For all these reasons, we are quite satisfied that there is no arguable merit in the appeal and we refuse the renewed application for leave.

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