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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 504



No. 202101006 B2

Royal Courts of Justice

Friday, 25 March 2022

Before:

LADY JUSTICE WHIPPLE
MR JUSTICE JEREMY BAKER
HER HONOUR JUDGE WALDEN-SMITH

REGINA
V
ELIJAH MORGAN

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MR M. SHERRAT QC appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE WHIPPLE:

Background

- 1 On 12 March 2021, in the Central Criminal Court in front of HHJ Rafferty QC, the applicant, who was then aged 20, was convicted unanimously of one count of murder (Count 1) and one count of possession of a bladed article (Count 2).
- 2 On 19 April 2021 the applicant was sentenced to custody for life with a minimum term of 28 years, less the 408 days he had spent on remand. That was on Count 1. He was sentenced to 30 months' detention in a Young Offenders' Institution on Count 2 to be served concurrently. His co-accused, Jedaiah Param, was convicted of murder and possession of a bladed article and was sentenced to custody for life with a minimum term of 28 years.
- 3 The applicant, Mr Morgan, now applies for an extension of time of six days in which to renew his application for leave to appeal against conviction following refusal by the single judge. We are satisfied that a reasonable excuse has been demonstrated for the late filling of this application to renew and we extend time for that purpose.
- 4 The facts in brief are these. In the early hours of Friday, 6 December 2019, Crosslon Davis (the deceased) and his friend Elhaj Diarrassouba, travelled to Deptford in London and met a group of men. Jedaiah Param was part of the group.
- 5 At approximately 2.41 am, Mr Diarrassouba booked a taxi for Param and another man. Param and the other man got into the taxi. As the taxi started to drive away, the deceased approached the taxi, opened the door and tried to attack the other male passenger with a mallet. The taxi driver attempted to drive away. He drove a short distance before Param and the other man got out and ran in the direction of the deceased. Moments later, four men surrounded the deceased and stabbed him to death before fleeing the scene.
- 6 The prosecution case was that the applicant was the man in the taxi with Param and that he and Param were two of the four men who stabbed the deceased to death. Part of the evidence relied on by the prosecution was dash-cam footage from the taxi showing two men approaching the vehicle. Param accepted that he was one of the men in the footage, the man on the left. The designated CCTV officer stated that the other man wore distinct trainers that were the same as the trainers owned by the applicant. The prosecution also adduced evidence from PC Barton, a police officer who stated that he recognised the applicant as the man on the right in dash-cam footage.
- 7 The defence case put forward by the applicant was that he was not present at the scene and was not the person shown on the dash-cam footage. He did not give evidence at trial.
- 8 The issue for the jury was whether the applicant was present at the scene and whether he was therefore one of the four men who murdered the deceased.

PC Barton's Evidence

- 9 The prosecution relied on evidence from a PC Barton that he recognised the applicant as the second man in the dash-cam footage. PC Barton stated that he had attended a homicide team handover meeting on 9 December 2019. Shortly before the meeting, he had been informed that the applicant had been identified as a person of interest. He believed that the applicant's name sounded familiar, so he conducted a search of the police database to confirm the applicant's identity but did not at that stage view any photographs.

- 10 Following that search, he attended the handover meeting. It was during the course of this handover meeting that he saw the dash-cam footage for the first time. His evidence was that he immediately recognised the applicant, having had numerous dealings with him, including one incident in April 2016 where he had detained the applicant. PC Barton then obtained a copy of the dash-cam footage and, whilst alone, viewed it again and compared it to the applicant's custody photograph and, following this exercise, he became sure that it was indeed the applicant in the dash-cam footage.
- 11 In the course of the trial, the judge was asked to rule on the admissibility of PC Barton's identification evidence. Counsel for the defence, Mr Sherrat QC, who appears before us today, submitted that PC Barton's evidence should be excluded under s.78 of the Police and Criminal Evidence Act 1984. Counsel for the prosecution submitted that the evidence should not be excluded on that basis.
- 12 In a detailed ruling dated 11 February 2020, running to 47 paragraphs, the judge ruled in favour of the prosecution, and admitted the evidence. The judge referred to *Attorney General's Reference (No 2 of 2002)* [2002] EWCA Crim 2373. She noted that PC Barton was giving evidence that he recognised the applicant and that it was for the jury to assess the reliability of that evidence. She thought the footage, although short, was of sufficient quality to permit an identification: she referred to characteristics of gender, skin colour, facial features, approximate height, build, age and gait, all of which characteristics were visible in the footage. Further, the footage was well lit by the lights of the taxi. She said that she would direct the jury that they needed to exercise caution in relation to identification evidence. She noted that PC Barton said he recognised the applicant when he first saw the dash-cam footage during the course of a police briefing on 9 December 2019 and that he had met the applicant on numerous occasions, referring to the arrest in 2016 and then contact between 2014 and 2018 when PC Barton was the gangs officer in Lewisham. The judge noted that PC Barton could be cross-examined on the extent of his previous acquaintance with the applicant and, indeed, on the process he adopted to research the applicant and confirm the recognition of him. She recognised that there were issues about failure to comply with the PACE codes of conduct, but in her judgment those failings went to weight and not to admissibility. She referred to *R v Yaryare* [2020] EWCA Crim 1314, which supported her approach. For those reasons, she refused the defence application to exclude PC Barton's evidence.
- 13 The first ground of appeal before us is that the judge was wrong in refusing this application and that PC Barton's evidence should have been excluded under s.78.
- 14 At the close of the crown's case, a submission of no case to answer was made on behalf of the applicant. The defence argued that the dash-cam footage was of poor quality and that PC Barton did not interact with the applicant for over three years. Taking these and other elements of the recognition together, it was submitted that PC Barton's identification was based on a fleeting glance and an old memory and that it was not sufficiently cogent to support any conviction by the jury. It was said that PC Barton was unable to identify any distinguishing features that triggered his recognition of the applicant and that PC Barton's "DIY" facial mapping by comparison with the custody photo carried no weight, because PC Barton was not an expert in facial mapping. It was further suggested that the identification procedure was in breach of PACE Code D in particular, and that the necessary safeguards intended to protect against mistaken identification were absent. It was noted, as indeed it has been before us, that another witness had been able to identify Param, but was unable to give an opinion on the other man shown in the dash-cam footage. In summary, the defence argued that the supporting evidence was not sufficient to allow this case to be left to the jury. The cell site evidence was consistent with the applicant being at his home and

there was no evidence of him being with Param at the time, noting that the fingerprint found on the black Volvo could not be dated.

- 15 Counsel for the prosecution resisted the submission and said the case could safely be left to the jury. They said that the footage was of sufficient quality to allow for identification. Given that PC Barton had experience in the gangs unit and had frequent contact with the applicant, the evidence of immediate recognition was capable of being both reliable and correct. The issues raised by the defence were matters of weight that could be properly assessed by a jury, along with the supporting evidence.
- 16 In another detailed ruling, this one dated 2 March 2021 running to 12 paragraphs, the judge ruled in favour of the prosecution. She allowed the case to be left to the jury. She said the footage was sufficiently clear and it was for the jury to assess it, and the evidence of PC Barton, along with all of the other evidence. This was a case, in her judgment, where the jury could safely convict on one view of the evidence.
- 17 The second ground of appeal before us is that the judge was wrong to reject the submission of no case and that the prosecution case, which included PC Barton's recognition evidence, should have been withdrawn from the jury.
- 18 In the event, the applicant did not give evidence. The judge directed the jury about the need for caution when it came to assessing PC Barton's evidence in terms which do not now give rise to any criticism. The jury returned guilty verdicts against the applicant.

The Grounds of Appeal

- 19 The applicant seeks to appeal to this court on two grounds already outlined. Putting them together, it is said that prejudice was caused by PC Barton's identification evidence. The prejudice was exacerbated by his comparison with the custody photograph in his "DIY" facial mapping exercise. As to the latter, the written grounds also assert that the jury sent a note querying why they had not been told of the applicant's previous arrests and this, it is said, is itself indicative of the prejudice caused to the applicant by allowing to be introduced at trial evidence relating to the applicant's previous engagement between the police and the applicant in past years.
- 20 By its written Respondent's Notice, the crown resists these grounds of appeal.
- 21 The single judge provided comprehensive reasons for refusing leave to appeal in this case, finding no arguable merit in the grounds of appeal. Mr Sherrat now in effect renews before us grounds one and two, as they were before the single judge who addressed them on the papers.
- 22 We have been greatly assisted by Mr Sherrat QC, who appears pro bono for the applicant this morning, and we thank him for the economy of his submissions.

Conclusions

- 23 We have considered the points raised by Mr Sherrat on behalf of the applicant with care. We should confirm that we have, more than once, looked at the dash-cam footage which lies at the centre of this appeal.
- 24 We are not persuaded that there is any reason to doubt the safety of this conviction. In brief, we agree with the answers to the various points that were given by the single judge: the trial judge was entitled to conclude that the evidence of PC Barton was admissible and she was right to reject the submission of no case.

- 25 We too are of the view that the dash-cam evidence was of sufficient quality to permit an identification. We reject the submission that this is a case of a fleeting glance. The dash-cam footage is several seconds long. It could be and it was reviewed by PC Barton multiple times. PC Barton knew the applicant already and this evidence falls squarely in the second category in *the Attorney General's Reference No 2*, i.e. where a witness knows the defendant sufficiently well to recognise him as the person depicted in the footage. We also note the other evidence which implicated the applicant in commission of this offence, which evidence supported the identification of PC Barton and tended to suggest that the applicant had indeed been close to the scene of the crime that night. Breaches in procedure went to weight and not admissibility.
- 26 That deals with grounds one and two.
- 27 We note that in her summing-up, the judge dealt with PC Barton's evidence very thoroughly. We note particularly para.81 – 98 of her directions to the jury. She reminded the jury of PC Barton's evidence that it was on seeing the dash-cam evidence during the course of the meeting that PC Barton recognised the man on the right as the applicant, a recognition of which he was 95 per cent confident at the time. It was only after that that he went and looked at images of the applicant held elsewhere and reviewed the dash-cam evidence again, at which point his degree of confidence increased. This was the evidence PC Barton had given and it was for the jury to consider it alongside all of the other evidence in the case.
- 28 The judge told the jury that there had been breaches of three paragraphs of the relevant Code of Practice. She noted, in particular, the failure to keep notes, the failure to keep records and the conduct in the “DIY” facial comparison exercise using custody photographs. She told the jury it was a matter for them to consider what effect those breaches of the Code had on their view of the reliability of PC Barton's evidence.
- 29 The judge reminded the jury of the defence case and of the alleged deficiencies in PC Barton's evidence and she gave them the usual detailed direction on the need for caution when considering the identification evidence that was put forward. That dealt satisfactorily with any risk of prejudice to the jury.
- 30 Although the point was not pressed at the hearing, we reject the suggestion that the jury was prejudiced by knowing that the applicant had come to the attention of the police before. The judge gave a very clear direction to the jury that the applicant's previous involvement with the police was relevant only to the issue of identification.
- 31 There is not, and not suggested to be, any deficiency in the legal directions.
- 32 In all the circumstances and having considered these matters carefully, we refuse permission to appeal this case.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.