IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 1203

CASE NO 202202216/B3-202202219/B
202202366/B3-202202343/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 4 October 2023

Before:
LADY JUSTICE MACUR DBE

MRS JUSTICE MAY DBE

MRS JUSTICE HEATHER WILLIAMS DBE

REX

V

JORDAN FOOTE
JABARI FANTY
RICARDO MELULEKI NKANYEZI

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MR B COX KC & MR F EDUSEI appeared on behalf of the Applicant Foote.
MR G HUSSAIN KC appeared on behalf of the Applicant Fanty.
The Applicant Nkanyezi did not appear and was not represented.

J U D G M E N T

1. LADY JUSTICE MACUR: Jordan Foote, Jabari Fanty and Ricardo Nkanyezi were convicted of conspiracy to possess a firearm with intent to endanger life, conspiracy to possess ammunition with intent to endanger life and conspiracy to supply a controlled drug of Class A. In addition: Jordan Foote and Jabari Fanty were convicted of attempted murder; Jabari Fanty and Ricardo Nkanyezi were convicted of murder; Jabari Fanty was convicted of possession of a bladed article; and, Ricardo Nkanyezi was convicted of possession of an unlawful firearm.
2. Jordan Foote was sentenced to a total of 30 years' detention in a young offender institution for attempted murder, with concurrent sentences imposed in relation to the other offences. Jabari Fanty was sentenced to custody for life, with a minimum term of 35 years less time spent on remand for murder, with concurrent sentences imposed in relation to the other offences. Ricardo Nkanyezi was sentenced to custody for life, with a minimum term of 32 years less time spent on remand for murder, with concurrent sentences imposed in relation to the other offences. There were other co-accused whose cases do not concern this Court.
3. Jordan Foote, Jabari Fanty and Ricardo Nkanyezi renew their applications for permission to appeal against conviction and Jordan Foote, his application for permission to appeal against sentence, after refusal by the single judge. Jordan Foote is represented *pro bono* by Mr Bryan Cox KC, Jabari Fanty is represented by Mr Gul Hussain KC and Ricardo Nkanyezi is unrepresented. We are grateful to Mr Cox and Mr Hussain for their appearance, their written submissions and amplification orally today. The prosecution has submitted a Respondent's Notice but are not represented at the hearing today.
4. There is a common ground of appeal against conviction alleging jury irregularity by

reason of the use of a magnifying glass introduced into the jury room without the prior knowledge of the trial judge or counsel. Ricardo Nkanyezi, in written submissions drafted by counsel, also asserts that the trial judge was in error to refuse his application of *no case to answer* at the close of the prosecution case.

5. The grounds of appeal against sentence, in relation to Jordan Foote, are that the sentence failed to give account to his age, which was 18 at the time of the offences, his intellectual limitations, his lesser role, his lack of previous convictions and an alleged disparity of sentence imposed in relation to the attempted murder, when compared with his co-defendants.

6. The facts of the case are set out comprehensively in the Court of Appeal (Criminal Division) Office summary, which has been served upon the parties and to which no exception has been taken. It is only necessary therefore for us to give a summary of the same.

7. Between October and November 2020, a series of firearms incidents occurred across South Yorkshire. On 4 October 2020, a Mr Abdul Omar was chased down a street by two men who shot at him before stealing his BMW motorcar. On 19 October 2020, three men discharged firearms outside a fish and chip shop. On 31 October 2020, a Mr Ali Al-Humaikani was shot at least five times in a local park. He suffered serious injuries but survived. On 2 November 2020 a shootout occurred between the passengers of a taxi and the passengers of a Skoda motorcar. On 16 November 2020, Mr Ramey Salem was shot dead in his home. There was an obvious connection between the firearms and drugs discovered during police investigations.

8. The evidence against the three applicants in relation to the offences relied variously upon CCTV footage, albeit some was of poor quality, in which figures wearing items of

clothing which also were exhibited in due course appear, cell site evidence, ballistics evidence, which linked the firearms used in the attempt murder with those used in the murder, evidence of association linking a co-defendant, Yanbak, with Ricardo Nkanyezi shortly before the murder, and items seized during the investigation including firearms and clothing, some of which was contaminated with gunshot residue, and was said to be "similar" to the clothing worn by figures captured on CCTV in the geographical and temporal vicinity of the offences.

9. At the conclusion of the prosecution case Ricardo Nkanyezi made a submission of *no case to answer* in relation to the charge of murder, on the basis that the relevant CCTV footage was of such a poor quality that it was not possible to identify him and, in any event, at most, showed two figures, purportedly himself and Yanbak, walking in the area.
10. The prosecution resisted the application, submitting that the jury could infer from the CCTV evidence that Yanbak and Ricardo Nkanyezi were in the area at the time of the murder. There was unchallenged evidence that "Ricks" was in the company of "A-Zee" on the evening before the murder, and it was open to the jury to conclude that A-Zee was Yanbak and Ricks was Nkanyezi. Seized clothing suggested that Yanbak was one of the men on the CCTV footage, and it appeared that one of the males had a "very distinctive" hairstyle that matched Ricardo Nkanyezi. There was also evidence, it was submitted, from which the jury could conclude that Nkanyezi and Yanbak were involved in a shooting on 2 November 2020, and therefore consequently could infer "evidence of complicity between them when they consider the murder and vice versa", especially as the same firearm was used on both occasions.
11. The judge agreed with the prosecution, the trial continued. None of the applicant's gave evidence at trial.

12. The trial was conducted during pandemic restrictions and the courtroom was used as the jury retirement room. The jury had been provided with a sterile laptop to review the CCTV footage, in accordance with Criminal Procedure Direction 6.26l.3. The computer programme allowed jurors to slow down footage and increase the size of an image. On the first and second day, the jury requested to have various items of clothing, attributed to Jordan Foote, which had been exhibited during the proceedings and were in evidence. In Jordan Foote's case there were also images of clothing recovered from his home address, some of which had borne gunshot residue and clothing that had been depicted, it seemed, as similar to that in some of the CCTV images. Immediately before the commencement of the third day of their deliberations a magnifying glass was found which obviously had been brought to court the previous day, at least.

13. The discovery of the magnifying glass was raised with the trial judge. Leading counsel for Ricardo Nkanyezi suggested that there could be a "problem", because it could be used to magnify what were indistinct CCTV images. Mr Cox KC encouraged the trial judge to remind the jury not to conduct their own enhancement of the available evidence. The judge directed the jury accordingly, indicating that the magnifying glass had been found and had, he assumed, been used during the course of their deliberations. The judge went on to say that he did not need to know, and did not want to know, whether the magnifying glass was being used because the person in question had a visual difficulty, or whether it was a device used to try to enhance material, that is other words "as a scientific aid to viewing material", however, that was something that they should not do. He said:

> "You should not seek to use that device in order to try and work things out from the material that you have, because no-one has had the opportunity to know precisely what you are doing or will have that opportunity, and it is not your job to do that. You are to make your decisions on the evidence that you

> have been provided with and not seek to conduct your own experiments in relation to the materials that you have. Do you understand? It would be like, for example, bringing in a microscope to look at something if it was scientific evidence or some form of enhancing device, you just do not do it."

14. The judge went on to remind the jury that they were not detectives and they had to decide upon the evidence that had been placed before them, so that they were satisfied, if they were, that they were sure that the defendant whose case they were considering was guilty of the relevant offences. Counsel made no representations in relation to the directions given, despite an invitation to do so. The magnifying glass was removed.

15. The applicants were convicted, and the judge proceeded to sentence. Jordan Foote had been 18 at the time of the offences. He had previous convictions for possession of a bladed article and of controlled drugs, but the judge attached no significance to them. He accepted that the psychologist's report served suggested that he, Jordan Foote, had an extremely low IQ. However, he commented that he had observed him during the trial and Jordan Foote appeared to follow the evidence.

16. Jordan Foote had committed some of the offences whilst being released under investigation, but the judge accepted that he was not a leading figure in amongst the other defendants. The judge categorised the attempted murder as category 2A, since it involved the use of a firearm that caused serious physical harm although there was insufficient evidence of any permanent or long-term effect; it was a planned offence, in a sequence of shootings and furtherance of serious criminal conspiracies. The starting point therefore was 30 years' detention with a range of 25 to 35 years. The judge sentenced Jordan Foote without a pre-sentence report. We have regard to section 33 of the Sentencing Act 2020 and agree that it was unnecessary to obtain one in the circumstances. We have not found it necessary to obtain one to determine the extant

application.

Conviction

17. Mr Cox KC submits that there is a real risk that the jury used the magnifying glass to compare the images of the clothing and enhanced the CCTV footage which would amount to an improper investigation that the jury was directed against undertaking and which the prosecution had conceded it was not possible to do with any degree of safety. He cites and relies on various authorities, in particular, the case of R v Stewart and Sappleton (1989) 89 Cr App R 273. In his supplementary grounds of appeal against conviction, he submits that the single judge misdirected himself in relation to the authorities and "the dangers associated with the use of a magnifying glass in this case".
18. Mr Hussain KC submits, in similar fashion but more generally, that it was improper for the jury to have had a magnifying glass which may have been used to perform experiments. The judge did not ask the jury to explain their use of the magnifying glass. He has listed several authorities but has not developed his argument either in writing or orally by specific reference to them.
19. The advice on appeal submitted by and on behalf of Ricardo Nkanyezi reiterates the submissions made at the close of the prosecution case regarding the alleged paucity of the prosecution evidence in relation to the murder and, further, refers to a juror's possession or use of a magnifying glass as an improper aid to enhancement as a jury irregularity.
20. The Respondent's Notice defends the trial judge's ruling on the half-time submission and addresses the common draft ground of appeal in relation to the magnifying glass in terms that there was nothing inherently improper in the jury having a magnifying glass. The applicants are speculating that the jury used the magnifying glass improperly. The jury

had been directed at the outset of the trial that they must try the case on the basis of the evidence before them and were warned against carrying out their own private research. None of the applicants' counsel had invited the judge to consider any sort of inquiry of the jury at the time. The court had not received any communications from any jurors suggesting any improper behaviour on the part of any of their colleagues. None of the applicants had made any submission to the effect that the jury should be discharged once the magnifying glass had been discovered.

Discussion

21. We consider the case of R v Maggs (1990) 91 Cr App R 243 to be directly on point as regards the jury's use of a magnifying glass. That is, Lord Lane CJ, giving the judgment of the Court, confirmed that equipment that is required or designed to enable a jury to carry out unsupervised scientific experiments is not permissible, but that the use of a magnifying glass was different. Dealing with the case of Stewart and Sappleton, upon which Mr Cox KC places great reliance, Lord Lane described:

> "…the observations in that judgment with regard to a ruler or a magnifying glass are plainly *obiter*. In so far as that passage seeks to lay down a general principle, we think, with respect, that the words are rather too wide. Equipment which is required or designed to enable a jury to carry out unsupervised scientific experiments in their room, and scales in the drug case came clearly within that category, are not permissible. On the other hand, in our judgment, a magnifying glass or a ruler, or come to that a tape measure, do not normally raise even the possibility of any such experiments."

22. Further, in the later case of R v Asgodom [2012] EWCA Crim 2054, which Mr Cox KC argues supports the proposition that there are limits to the circumstances in which the use of a magnifying glass maybe appropriate, and specifically where there is a danger of the

jury using image-enhancing equipment to investigate matters that have not been the subject of argument or to reach a conclusion for which the prosecution had not contended and had not been subject to debate, the Court actually found at paragraph 14:

> "... provided images are properly before the jury by way of exhibit, the fact that some of them have not previously been debated or discussed does not mean to say that the jury is looking at new evidence when they examine them more fully within the privacy of their own retiring room (see paragraph 19). What happened in this case was that the machine that was furnished to them allowed them to have a greater opportunity to examine with greater clarity that which was already in evidence. Even if we were to assume, which we do not, that this showed a clearer image than had been seen before, that would be of no consequence since the CCTV was evidence properly adduced during the course of the time that the evidence was taken. The reality is no different from those cases where a jury was properly allowed to take, as they used to, magnifying glasses into the jury room to examine images on photographs."

23. We note R v APJ [2022] EWCA Crim 942, at paragraph 39 is to this same effect.
24. This draft ground of appeal is unarguable. We respectfully disagree with the trial judge's view that the magnifying glass had to be removed regardless that it may have been used merely to enhance images that were already in evidence. No counsel, perhaps sensibly, asked for further inquiries to be made, but none made submissions that the jury should be discharged.
25. The possibility of experimentation now raised on behalf of the applicants has not been particularised, despite the express invitation by this Court to do so. It is fanciful. We agree with and endorse the single judge's reasons. There was no error in his understanding nor his application of the relevant authorities.
26. Nkanyezi's other draft ground of appeal is unarguable. The judge was entitled to conclude on the evidence that there was a sufficient case to answer. Nothing more needs to be said on this point.

27. The renewed applications for permission to appeal against conviction are unarguable. They are therefore refused.

Sentence

28. The sentencing remarks made clear that the judge did take all relevant factors of age, maturity, role and relevant mitigation into account. The number and nature of the offences was bound to result in a significant term of detention. The draft grounds of appeal are, with respect, misconceived in seeking to, (i), isolate the sentence for the offence of attempted murder with a shotgun, from the other serious offending, and (ii), asserting disparity with the sentences of two of his co-defendants for the offence of attempted murder, when their lead sentences were imposed in respect of their murder convictions. This sentence is not arguably manifestly excessive.
29. This renewed application is also refused.

proceedings or part thereof.

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