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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 22 March 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE GOSS

HER HONOUR JUDGE WILLIAMS
(Sitting as a Judge of the CACD)

R E G I N A

v

LESLIE PETER BAINES

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Mr P Harrington QC appeared on behalf of the **Appellant**
Mr P Lewis QC appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

1. LORD JUSTICE DAVIS:

Introduction

This appeal against a conviction for murder, brought by leave of single judge, is essentially based on an argument that the trial judge gave inadequate directions to the jury as to the inadmissibility as evidence of certain materials which had been referred to at an earlier stage of the trial. In addition, certain complaints had been made as to a procedural and disclosure matter which had occurred during trial. However, those particular complaints have not been pursued formally as a renewed ground of appeal today, the single judge having rejected that ground on the papers.

Background Facts

2. The background position is this. On 26 April 2018, after a trial in the Crown Court at Mold before Lewis J and a jury, the appellant was convicted of murder. In due course he was sentenced to life imprisonment, as required by law. The judge specified a minimum term of 26 years less time spent on remand in custody.

3. There had been a co-accused at the trial, a man called David Woods. On the fourth day of trial, after the opening speech of the prosecution and after some aspects of the prosecution evidence had been adduced, he pleaded guilty to the count of murder. He had previously also pleaded guilty to a count of doing an act intending to pervert the course of public justice. He having pleaded guilty during the trial to the count of murder, the judge formally required the jury to convict him, which they did. Woods was himself sentenced to custody for life and in his case a period of 27 years less time spent on remand in custody was set by the judge.

4. The background facts, very briefly summarised for present purposes, are these.

5. On 29 May 2017 Matthew Cassidy, who was aged 19, was stabbed in the stairwell of a block of flats in Connah's Quay. It was likely, given the evidence, that he was initially stabbed on the ground floor and was then chased by his assailants into the building and up the stairs. He was stabbed at least nine times, with the fatal knife injury penetrating his heart causing internal bleeding.

6. There were no eyewitnesses to the fatal attack. However, two men had been seen by a neighbour leaving the block moments before the deceased was found.

7. Woods was arrested on 1 June 2017. He provided a prepared statement denying any involvement in the murder. He was charged with murder and remanded into custody at HMP Altcourse. He then became the subject of covert surveillance. In the course of conversations in which he participated whilst in custody, as recorded, the first being on 12 June 2017, he made admissions that he had been involved in the murder. He also, however, made statements which implicated the appellant. Later, during that summer, Woods contacted the police stating that he had evidence that would show that it was the appellant who had committed the murder; and he provided a telephone purporting to show calls made by the appellant which would indeed incriminate the

appellant. However, subsequent forensic examination revealed that that telephone evidence had in fact been fabricated at the behest of Woods. That was to lead to the count relating to perverting the course of justice.

8. So far as the appellant was concerned, he was arrested on 24 June 2017. He at that stage provided a prepared statement denying that he had been involved in the murder. He was released on bail but was re-arrested on 10 October 2017 and was then charged with murder.

9. In interview, he admitted that he had seen Woods on the night in question. He said that that was at the address of a woman called Tinson, where a number of people had assembled in order to purchase drugs. He said that he had been buying drugs from Woods. He said that Woods had been injured to his hand (as indeed he had been) and had admitted stabbing "the lad". The appellant was also to say that he himself had been to the block of flats a number of times in the past.

The trial

10. The trial started on 11 April 2018. The prosecution was represented, then as now, by Mr Paul Lewis QC, leading Ms Owen. In the course of his lengthy opening speech, Mr Lewis made express and quite extensive reference to the covert recordings of Woods whilst in prison. At that stage the jury bundles also included transcripts of the recorded conversations in which Woods had, among other things, purportedly implicated the appellant in the murder. Furthermore, Mr Lewis made brief reference to the defence case statement of Woods which was to similar effect.

11. The prosecution case was that the two men seen leaving the block were the appellant and his co-accused, Woods. The motive for the attack lay in a dispute about the sale of Class A drugs in the local area, Cassidy being identified as being involved in drug dealing in the local community. In effect this had been the upshot of a turf war. There was undoubtedly extremely strong evidence against Woods. That included CCTV footage of his movements, telephone call data linking him to drug dealing and to other significant parties, and DNA material linking him to knives which had been used in the attack and which had been subsequently retrieved. There also was, amongst other things, evidence showing his efforts to obtain hospital treatment at the time for injuries to his hand.

12. So far as the case against the appellant was concerned (and again for present purposes we put it very shortly) the prosecution in particular relied upon CCTV footage showing the movements of both the deceased and Woods, evidence of a man called Wright about purchasing drugs from Woods and descriptions of him, and the eyewitness evidence of the neighbour, a Mr Power, indicating that two men had been seen leaving the scene. Further, reliance was placed on scientific evidence providing "moderately strong" support for a link between a pair of the appellant's trainers and footwear marks in the blood and mud left at the scene. Further, DNA material had been recovered from the upper surface of the trainers that matched with the DNA of his co-accused, Woods. There was also CCTV footage showing that the appellant was in the area close to the flats where the murder took place. Further there was CCTV footage

showing the appellant returning to his mother's home almost immediately after the incident and emerging twice from that home having changed his clothing on both occasions.

13. The defence case, in a nutshell, was that the appellant had not been present or involved in the attack on the deceased by Woods. It was unsurprising that his movements were in the locality, because that is the locality where he lived. As for the change of clothing, that was because it had been raining heavily and he had become wet. He had seen Woods after the assault and had bought drugs from him; and that would explain the DNA material on his shoe linking him to Woods. Further, it was said that Woods had been boasting at Ms Tinson's house about how he, Woods, had "done him". Moreover, the neighbour's description of the two men, whilst reasonably accurate so far as Wood was concerned, so far from identifying the appellant as being one of the men in fact contained positive and significant discrepancies between the man that Mr Power had described and the actual appearance of the appellant. Indeed Mr Power never claimed to have seen either of the two men from the front. Moreover, the defence were in a position to point out that there was no DNA evidence of any kind linking the appellant to the deceased or to the knives or to the scene of the killing.

14. A submission of no case to answer was made at the end of the prosecution case. That was rejected by the judge; and no challenge to that decision of the judge to reject the submission of no case to answer has (understandably) been pursued by way of appeal, although Mr Harrington QC (appearing then, as now, for the appellant) has asserted to us that the case was not a strong one. The jury thus were left to decide whether the appellant had been present and participated in the attack on the deceased with the necessary intent.

15. The appellant himself gave evidence setting out his own position in some detail. He was to say, amongst other things, that he had not known Cassidy and had never heard of him. He entirely denied having anything to do with the killing of Cassidy. He also described how, amongst other things, at the subsequent meeting with Woods and the other drug users Woods had a tea towel wrapped round his hand which was bleeding and how Woods had told him that he had been slashed when he had "done someone".

16. The defence therefore was one of denial of presence and of involvement. It is plain, however, from the verdict of the jury that the jury had not believed the evidence of the appellant and had been made sure of guilt on the evidence presented by the prosecution.

17. There, it might be thought, matters would have rested. The responsibility of deciding on guilt was that of the jury and the jury; had shown what they had made of the evidence by the verdict which they pronounced.

18. However, complaint is made as to the judge's directions as a result of what happened after Woods had pleaded guilty on the fourth day of trial. What is said is that the judge failed sufficiently to instruct the jury as to what they were to do with the statements which had been made in open court prior to Wood's guilty plea. As we have said, Mr Lewis, in his opening speech, had made quite extensive reference to the transcripts of the conversations as recorded on the part of Woods whilst in prison: and part of those

transcripts indicated comments by Woods that the appellant had been implicated in the killing of Cassidy.

19. The position was this. When Woods indicated his change of plea there was consideration, inevitably, as to what would then ensue. Mr Lewis, very fairly, informed Mr Harrington at the time that he would not oppose any application for discharge the jury and for a retrial. The judge himself had made preliminary enquiries in this respect and it was indicated that a fresh jury panel could be convened in Mold Crown Court for the following day. However, having considered the position, the defence team (with the concurrence of the appellant) took the decision, a tactical decision, that no application to discharge would be made. The trial accordingly proceeded as against the appellant alone, in front of the same jury.

20. One factor, as Mr Harrington has told us, which influenced that decision was that the behaviour of Woods thus far during the trial had apparently been appalling. That may well have caused the jury not at all to associate themselves with his position and it was considered that that might in turn redound to the advantage of the appellant - a perfectly understandable tactical consideration. We will come on in a moment to what else seems to have prompted the defence team's thinking.

21. At all events, the matter had been discussed with the judge in the absence of the jury. He was told that there was no application to discharge. By the following morning all the materials, relating to Woods, including transcripts of what Woods had said in prison and the Defence Case Statement, had been removed from the jury bundle. The judge then addressed the jury in the following way:

> "Well good morning members of the Jury, thanks again for being so prompt. We are now ready to continue with this trial. As you know you found Mr Woods guilty yesterday, but the Co-Defendant, Mr Leslie Baines, is still in your charge and we have to continue the trial that we have already started. We'll carry on now with the evidence.
>
> You may notice that some of the material in the bundle that you had has been removed because they related to Mr Woods and they do not relate to Mr Baines, so we have taken that out. So if you are wondering why there are gaps that is the reason why. The index will be amended in due course.
>
> So now we are ready to carry on with the evidence in trial of Mr Baines ..."

No one requested the judge to say anything more than that at that stage and no further or supplemental direction was requested by counsel to be given by the judge. The trial then proceeded.

22. In the course of his closing speech to the jury Mr Harrington then made an allusion to the appellant having first come under suspicion on 12 June 2017 as a result of the recorded conversation of Woods. As we gather, Mr Harrington had not explained in

advance to judge or prosecution that he had been proposing to make this reference in this way as he did.

23. In the absence of the jury, Mr Lewis then made objection to what Mr Harrington had said. First, in point of fact, the appellant had come under suspicion on 1 June and not only after the 12 June. Secondly, objection was made that Mr Harrington, in saying what he had said, had relied on matters which were in truth not in evidence: because at no stage during the trial had the recorded telephone conversations of Woods been adduced in evidence before the jury. Indeed, the transcripts had been entirely removed from the jury bundle and, rightly, those conversations had not been referred thereafter in evidence.

24. This matter having been raised before the judge there was then some detailed discussion. Ultimately, a form of wording was agreed between judge and counsel. The judge, faithful to that form of wording as agreed, then when he came to sum-up on the evidence towards the end of his summing-up included this passage in the agreed form:

> "Finally, Mr Harrington also made submissions to you saying that Mr Baines was not a suspect in the police investigation into the murder of Mr Cassidy until such time as David Woods mentioned Mr Baines' name to his family and friends during conversations that were covertly recorded in prison visits at HMP Altcourse. Mr Harrington also said that thereafter Mr Baines only became a suspect because of what David Woods had then said about him.
>
> In making those submissions, Mr Harrington was in error. It is accepted by everyone that Mr Harrington submissions, although wrong, were inadvertent and were made in good faith. Nonetheless, it is important that the position is corrected and you do not proceed to consider the evidence upon an erroneous basis.
>
> So, that members of the Jury, is the summary of the main points of the evidence."

The judge then made some brief concluding remarks and the jury retired.

25. A few minutes after the jury retired they sent in a note. This was, quite rightly, discussed by the judge with counsel. The question in the note was as follows:

> "Is the conversation reported in Altcourse, of David Woods, available in evidence?"

The judge having read that out to counsel, the judge's comment was "and the answer is no": with which Mr Harrington and Mr Lewis agreed. The judge then said:

> "Because it is not. So I will just say, no, no they have heard all the evidence. And that was not in evidence, so the answer is no. OK, do you want to bring the jury in..."

26. No further direction was suggested to the judge as being appropriate and no supplement to what he had indicated that he would say was requested. In fact, the judge went a little further than what he had just said because when the jury came in the judge said this. Having referred to the note and set out its terms, he then went on:

> "And the answer is, no, it is not. It is, as you probably knew, it was not adduced in evidence, and you have simply got to go on the evidence that you have heard in this Court. But thank you for sending me the note, but the answer is, no, it is not in evidence. And now you go back and carry on your deliberations."

27. In the result, as we have said, the jury convicted.

Grounds of Appeal

28. As part of his background complaints, Mr Harrington had to some extent protested about the procedure that had been adopted with regard to identifying precisely when the appellant had first come under suspicion. At one stage he seemed to criticise the prosecution for not having given disclosure prior to trial of the date on which the appellant first came under suspicion, although he has throughout always been moderate in any criticism which might be made.

29. However, we agree with Mr Lewis that there was no failure on the part of the prosecution in this regard, of any kind, and there is no criticism available. The date on which the appellant first came under suspicion was not a matter which of itself would tend to advance the defence case or undermine the prosecution case. Mr Lewis further said, and of course we accept it, that had the defence only asked, at any stage, about the time at which the appellant had first come under suspicion then of course the defence would have been told. But no such request was made; and Mr Harrington said what he said in his closing speech, as Mr Lewis submitted, simply on the mistaken assumption that suspicion had first fallen on the appellant on or after the 12 June, without first checking that with the prosecution.

30. In those circumstances there can in our view be no criticism of the procedure which the judge adopted. Some complaint was, however, made as to the ensuing discussion with and disclosure to the judge (in the absence of the jury) with regard to the date on which the appellant first came under suspicion. It is sufficient to say that all that happened was done openly; the judge was at no stage incorrectly informed as to the correct date on which the appellant first came under suspicion; and no injustice of any kind was occasioned to the defence by the way in which the matter was - relatively informally - dealt with, in the absence of the jury, by the judge. Indeed, as we have said, it resulted in the judge giving a further direction to the jury in the summing up in agreed form.

31. Before us today Mr Harrington has placed considerable emphasis on what he says is the impact of this point upon the defence's prior decision not to seek a discharge of the jury. He has said that had the defence team appreciated from the outset that the suspicion had fallen on the appellant on the 1 June 2017, that would have influenced

them in deciding to seek the discharge of the jury; and it is more than likely that such an application, if made, would have been acceded to by the trial judge. He says that a wrong decision on the part of the defence in this regard was made; and that should not be visited upon the appellant himself.

32. With all respect, we do not think that that is a point now open to the appellant. The tactical decision was made at the time not to seek to discharge the jury. One reason for that given, namely the manner and demeanour of Woods during the trial, was an entirely understandable part of the thinking. But Mr Harrington has sought to say that another part of that thinking was the perception of the defence that they could make something out of the fact, as they thought it was, that the police had only felt they had a potential case against the appellant as a result of what Woods had said in prison and where Woods plainly was now identified as a man whose word could not be relied upon in any respect.

33. With respect, we do not think that would have been a legitimate line of reasoning. What Woods had said in prison could only be material if it was in evidence. It was not in evidence. True it was that it had been referred to by Mr Lewis in his opening speech. But Mr Lewis had at the time made clear, as the judge also subsequently made clear in a general direction in the summing up, that nothing that counsel said in speeches was evidence. The trial throughout certainly was conducted on the footing, quite rightly, that those conversations never became evidence. It follows, therefore, that it is difficult to comprehend how it was that such conversations in prison could be used as a basis for influencing the decision whether or not to apply for a discharge. In fact, since they were not in evidence Mr Harrington strictly could and should not subsequently have relied upon them or referred to them at all in his closing speech: precisely the point about which Mr Lewis, understandably, complained at the time.

34. At all events, if this perception of matters did impact upon the defence decision not to seek a discharge, that was simply one of the consequences of the stance that they took. But in it certainly was not through any misleading by the Crown; and, on the contrary, this was simply based on the defence's own assessment of the position. This court cannot go behind a tactical decision not to apply for a discharge at this stage in those circumstances. It would be wrong in principle to do so. In any event, if it be relevant, just because the jury subsequently convicted does not mean that the decision necessarily was a wrong one.

35. We should also add that to the extent that Mr Harrington frankly engaged in a degree of self-criticism in this regard he confirmed to us, on our query, that he has felt able to continue to act on this appeal and that his client had confirmed his instructions to do so.

36. The actual ground on which leave was granted and which has been pursued before us nevertheless focuses on the way in which the judge dealt with the matter once Woods had pleaded guilty. We have already set out what the judge said to the jury at the time when the relevant documents relating to Woods had been removed from the jury bundle. As we see it, whilst some judges perhaps might have said more, the judge said enough at that stage. It is also noteworthy that no one requested him to give any more detail in his remarks to the jury at that stage. We add that Mr Lewis in his opening

speech, during which he had made extensive reference to the transcripts of the phone conservations as recorded of Woods whilst in prison, had himself also stated to the jury the (correct) proposition in law that anything said by one defendant in the absence of another defendant could not count as evidence against that other defendant. True it is that that was an observation from the Bar and not from the Bench; nevertheless, the fact is that that the jury had themselves been so told at that time.

37. Thereafter, when the judge came to sum-up, quite properly the judge made no reference to the contents of the telephone conservations until he came to the stage where he had to correct Mr Harrington's inadvertent mistake. On the contrary, in the earlier part of his summing-up, the judge had made quite clear that the jury were to focus only on the evidence before them. He also said this:

> "Now, as I explained at paragraph 11, there is no direct evidence here that Mr Baines committed the crime that he is charged with. There is no evidence from an eyewitness saying they saw him do it and there is no evidence that he confessed to the crime so what the Prosecution rely on is what is sometimes referred to as circumstantial evidence."

A little later on the judge said:

> "As I say, you must decide this case only on the evidence that has been put before you in this trial, there is not going to be any more evidence."

The judge, we add, had also given the jury detailed directions in law in writing and had given them a detailed written route to verdict. So the jury were left quite clear by the summing-up, if they had not already been clear, firstly, that there was no direct evidence against the appellant and secondly, that the jury could only rely upon the evidence adduced before them in court.

38. No criticism, in those circumstances, can be made of the summing-up in not saying more about the status of the telephone conversations of Woods; indeed it was entirely sensible and right that the judge should have steered clear of that to avoid drawing attention to a point which was not in evidence. The only occasion on which the judge referred to it was one which he necessarily was required to deal with, namely the correction of leading counsel's closing speech. It is in fact rather ironic that this criticism now made of the judge for failing to instruct the jury more specifically that such recorded conversations could not be relied upon at all as evidence against the appellant only arose because of defence counsel's own attempts to refer to such conversations in his closing speech.

39. Mr Harrington says: well that may be so, but the fact of the jury note, put in so shortly after they retired, showed that the jury may still be under a misapprehension and the point needed sorting out with the utmost clarity and specificity. We think it is in fact likely that the jury put in that note as and when they did just because the judge had been required towards the end of his summing up to refer to the conversations of Woods in the passage correcting what Mr Harrington had said in his closing speech. But the point remains that the jury were seeking confirmation in effect as to whether or not

those conversations were available as evidence; and they were told absolutely specifically by the judge that they were not. The jury could have been under no illusion to the contrary. In such circumstances, we do not accept Mr Harrington's submission that the jury may have relied on inadmissible materials and that the conviction is unsafe accordingly. In our view the judge had said entirely sufficient to make the position clear: and it is also noteworthy that neither counsel had asked him to say more. The jury would thus have well known that those conversations were not to be regarded as any form of evidence available to them to take into account in their consideration of the case against the appellant.

40. In such circumstances, whilst it may be that some judges might perhaps have said a little more at the first stage when this arose (that is to say, when Woods had pleaded guilty), the judge was not required to say at that time more than he did. The point thereafter was in any event put beyond doubt by the way in which he dealt with the jury note. In such circumstances, we do not see any basis for the various points and grounds of appeal advanced before us, skilfully and eloquently though they were put by Mr Harrington. We see no reason, overall, to doubt the safety of the conviction. The jury were not misdirected in any way. They, having heard the evidence, did not believe the evidence of the appellant and did accept the case of the prosecution.

Conclusion

41. We therefore dismiss this appeal.