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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202001167/B1
NCN: [2020] EWCA Crim 1687

Royal Courts of Justice
Strand
London
WC2A 2LL
Tuesday 1 December 2020

Before:

LORD JUSTICE DAVIS
MR JUSTICE JAY
MR JUSTICE FOXTON

REGINA
V
"A"

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MS C CARBERRY QC appeared on behalf of the Appellant.

MR P PANAYI QC appeared on behalf of the Crown.

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**J U D G M E N T**

1. LORD JUSTICE DAVIS: Reporting restrictions under section 45 of the Youth Justice and Criminal Evidence Act 1999 apply to this judgment on the same terms as set in the court below, prohibiting identification of any of the young persons involved.

## Introduction

2. On Sunday 21 September 2019, at a park in Slough, a 15-year-old boy (whom we will style "E") was stabbed three times in the region to the left chest and shoulder. He died in consequence very shortly thereafter. The appellant, "A", who was also aged 15 at the time and indeed was a good friend of E, admitted the stabbing. The issues at his subsequent trial at the Reading Crown Court before HHJ Norton and a jury were self-defence and intent.
3. By unanimous verdict of the jury A was convicted of murder on 20 March 2020. In due course he was sentenced to detention at Her Majesty's Pleasure and a minimum term of 9 years' detention was specified, less time spent on remand in custody. He was also sentenced to a short concurrent term on a count of possession of a bladed article to which he had previously pleaded guilty.
4. A now appeals against conviction by leave of the single judge. No challenge is or could be raised against the accuracy of the legal directions and the summary of issues and evidence contained in the summing-up. The primary grounds of challenge relate to certain of the judge's prior rulings whereby she had refused to be adduced in evidence what was said to be evidence of bad character pursuant to section 100(1)(b) of the Criminal Justice Act 2003. The essential argument on behalf of A was, and remains, that the proposed evidence had "substantial probative value" in relation to a matter which was a matter in issue in the proceedings and was of substantial importance in the context of the case as a whole.

## Background Facts

5. The background facts, shortly put, are these.
6. A and E had been friends for some time. On the evening of Sunday 21 September 2019, they were in Salt Hill Park in Slough. They were part of a group of youths totalling 11 in number. They had previously been in the town centre and had been to a McDonald's food outlet before travelling onto the park either by foot or by bicycle. We should make clear at the outset that in this case there is absolutely no suggestion whatsoever of gang activity or anything like that.
7. There was a body of evidence to show that all these young people were conducting themselves in the park in a perfectly acceptable way. At some stage, some of the group snapped off stems of a long Pampas grass and engaged in a kind of play-fighting with those stems. Some of all this was caught on the iPhone of a young boy sitting nearby with family members and also on an iPhone of E.
8. Following this horseplay with the Pampas grass there was a confrontation between E and A. E seemed to be irritated by the use of the Pampas grass. There was no direct evidence from any of the other bystanders as to how this confrontation had occurred although A himself, as well as another witness on his behalf, was to give evidence on the point. At all events the young boy had heard E starting to swear and make threats at A and others in the group. Those threats, amongst other things, included a request to "back off" and also threats of violence: although the boy was to say he had not taken that at all seriously.
9. One further point raised by A at trial was to suggest that E may have been smoking cannabis shortly before the incident but there was no direct evidence of that and very

little in the way of pathological evidence of that either.

10. So far as the actual incident itself was concerned, as we have said, no bystander saw or said how precisely it started. When the young boy saw the two actually fighting, he did not see anything in the hands of either of them. Evidence of other bystanders was to like effect. At all events E, whose back was to the young boy, then collapsed. The boy saw A with a knife or stick in his hand and seeming to be in a state of shock. Other bystanders had observed some of the prior play-fighting but attached no weight to it at the time, thinking that it was all horseplay.
11. In the result, most of the other boys who had been in the group proved subsequently to be mostly uncooperative in the subsequent investigation. Ultimately, two of those boys in the group were to give evidence for the prosecution, "S" and "R". Both were to say that they had not seen how the fight between E and A had actually started. In fact, all the members of the group had speedily left the park, some of them covering their faces with their hoodies, and only one, that is to say R, stayed behind. He commendably rang 999. The police arrived very shortly thereafter, at 6.33 pm. R was to say that he himself had seen no knife in E's hand as he lay on the ground.
12. As for A, he was observed by several people to discard the knife which he had been carrying into a nearby bush. That knife was later retrieved. It was a very large, Rambo-style, knife, with a 19-centimetre blade and 3.6 centimetres wide. It was subsequently found to have both A and E's DNA on it and blood identified as coming from E. The pathology evidence adduced in due course revealed three stab wounds, two of which had penetrated into the chest cavity, with a third wound to the back of E's left shoulder. All were clearly illustrated on the diagrams provided.
13. A, having thrown away that knife, then left the park on the handle bars of the bicycle of one of the other young people in the group. He was observed at that time to be accessing his phone. Further, it was seen that A had removed the jacket which he had been wearing and had put it at the time into a rucksack. Neither that jacket which he had been wearing nor the rucksack has ever since been retrieved. Further, A was subsequently to accept that he had in due course changed virtually all his clothing following the events of that evening. He was to say that he had hidden the jacket, and also a hoodie which he had been wearing, in a bush near the river after he left the park.
14. A was last caught on CCTV at 6.34 pm. He did not go home that night. Indeed he ignored frantic phone messages from his family who were, understandably, desperately trying to get in touch with him. This was at a time when news of E's death was being circulated over social media and by text. A was to stay, as he said, the night at a friend's house. That friend was not called to give evidence.
15. The following morning A was picked up by a cousin, with whom there had been contact. He was then taken to the house of one of his aunts. He there gave a brief account to her of what he said had happened. A's father then came to collect him. They then departed for a police station, amongst other things, carrying a black T-shirt with them. They drove to the police station and handed over that T-shirt. That was shown to have cuts in it, corresponding to two injuries assessed as superficial cuts to A's left shoulder and left upper back. The prosecution at trial did not accept that those cuts had been inflicted by E. Of course, the jacket and hoodie were not available for examination.
16. As we have said, A's phone has never been retrieved. He was later to say that he had left it with his aunt, together with the rucksack. Both the aunt and the cousin were to say

that they had not seen him with them; and at all events those items were never found at the aunt's house and indeed never found anywhere.

17. On 23 September 2019 A was interviewed under caution with a solicitor present. He made no comment to all questions asked. He was to produce a short prepared statement to this effect:

    i. "Me and [E] were at Salt Hill Park. [E] became angry and aggressive. [E] produced a knife and attacked me. I have two stabs wounds, one to the back of my left shoulder and one to the front of my left shoulder. He had hold of me round my collar. I said 'stop' while he was attacking me. He kept swinging towards my head or neck. I also had a knife. He was going to kill me. I had to defend myself. I acted in self-defence".

18. No one had noticed at the time of the incident any other knife lying near to where E lay. A search by the police at the time had found no such knife. But some time later an individual undertaking community service in the park found a black-handled kitchen knife with the blade half-buried in the ground in some undergrowth by a fence, a little distance away from where E had previously been lying on the day in question.
19. Further forensic investigations of that knife were, regrettably, made very late in the day. They indicated the presence of splattered blood spots of E on that knife, which must have been, as it was assessed, in close proximity to the event where E's blood had been shed, at a distance of no more than 30 centimetres or thereabouts. There was however, no blood or DNA attributable to A on that knife. Expert evidence was given on this: really to the effect that the position was inconclusive and scientifically the knife could not be linked to A.
20. A himself gave evidence at trial, as in practical terms he really had to. His case was that E had first attacked him with a knife. E had held him with his left hand, meaning he could not run away, and then stabbed at him with the knife in his right hand at his, that is to say A's, left shoulder. On that scenario A was not really able to offer an explanation as to how E, as the pathological examination had shown, had some three marks or nicks on his left hand, consistent, as the prosecution were to say, with defensive injuries and inconsistent, as the prosecution were to say, with E using his left arm and hand to hold A back. A was to say that he had been using his own knife to defend himself. He said that he could not remember actually striking the blows but it was all done in self-defence. In any event, there was no intent to kill or to cause really serious harm. As to his actions thereafter, he said that they were in effect born of panic. He was also, amongst other things, in the course of his evidence to say that E regularly would carry a knife, as A knew, and indeed that E recently had used a knife at a violent incident, in Slough, on 13 September 2019.
21. One of the other boys in the group, "J", was to give evidence for the defence. J had given initial accounts to the police denying that he had been present in the park at all. However, his evidence at trial was to the effect that not only was he in the park but that he had seen E pull a knife on A with his right hand and stab A in the shoulder. He said that A then had a Rambo-style knife which he had produced although he, J, did not see him stab E with it. He estimated that the whole incident had lasted around some 20 to 30 seconds. J was to say that he was scared and had run off, covering his face with his

hoodie. J was subjected to close cross-examination; and the reliability and credibility of his evidence was very much in issue.

22. That then is an outline, and we stress but a brief outline, of the respective cases.

a. Grounds of Appeal

23. There are four grounds of appeal and they are these:

i. "(i) The learned trial Judge erred in her approach to defence applications to adduce evidence of bad character concerning the deceased, [E], pursuant to section 100(1)(b)of the Criminal Justice Act 2003.

ii. (ii) The learned Judge was wrong to rule that questions the defence sought to put to the prosecution witness [S] were not permissible, on the basis that the likely answers, as recorded in his witness statement, amounted to inadmissible evidence.

iii. (iii) The learned Judge was wrong to rule that questions the defence sought to put to the prosecution witness [the aunt] were not permissible, on the basis that the likely answers, as recorded in her witness statement, amounted to inadmissible evidence; and

iv. (iv) That in all the circumstances, taking any of those matters above together or alone, in addition to the sequence of events that preceded the jury returning a guilty verdict, there is a lurking doubt about the safety of the conviction in this case."

24. We will take these grounds in turn.

i. Ground 1

25. At trial a previous caution administered against E on 2 September 2019 for possession of a knife on 20 June 2019 had been permitted by the trial judge to be put in evidence. Indeed, and no doubt in consequence, a like caution as against A himself for possession of a knife was also in due course admitted into evidence.

26. Overall what the defence were seeking to show was (i) a tendency on the part of E to carry a knife; (ii) preparedness on the part of E to use that knife; and (iii) a general tendency on the part of E to initiate violence and aggression. Overall, Ms Carberry QC, appearing for the appellant as she had at trial, said that the proposed evidence sought to be adduced would have “built up a character assessment” of E.

27. For this purpose the defence had sought to adduce evidence, amongst other things, that E had been removed from mainstream education for persistent violent behaviour and had then moved to a Special School. There were sought to be relied on a number of school reports relating to E, indicating that he had been disruptive and violent and aggressive on a number of occasions, albeit there was evidence that latterly E's behaviour at his Special School had improved. Further, the defence were seeking to adduce as propensity evidence details of the previous incident of 13 September 2019. Further, there was sought to be adduced evidence to the effect that E was known amongst his friends as "Elliott Stabber": in that regard, reliance was placed on a video, recently taken, of a number of boys together in a group, where one of the young people present (not

identified) had used that nickname apparently directed at E himself. It was said that this could then be used as indicative of E's habit of carrying a knife and his willingness to use a knife.

28. In addition the defence, latterly if not initially before the judge, also had placed reliance on the presumption set out in section 109 of the Criminal Justice Act 2003:

    i. "Assumption of truth in assessment of relevance or probative value

        (1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

        (2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true."

29. The judge declined (over two rulings) to permit any of such evidence to be adduced. As to the school records, the judge found that they included no recorded instances of serious violence at school or of possession of weapons. Indeed she noted that his behaviour at his school had latterly been good. The judge was to say roundly that she regarded the proposed evidence as in effect mud-slinging and she indicated that she found that it did not have "substantial" probative value.
30. As to the incident of 13 September 2019, the judge declined to require the prosecution in effect to adduce evidence of that incident. Indeed, such evidence as there was available about that incident was highly confusing and, as we assess it, likely to come within s. 109 (2). But we need not deal with that particular point further, as Ms Carberry told us today that she no longer seeks to rely upon it as part of her appeal, given that the defence had in due course been permitted by the judge to adduce evidence of that incident as part of the defence case when A gave his evidence.
31. So far as the application concerning "Elliott Stabber" was concerned, the judge indicated that that involved unsubstantiated hearsay and was of no substantial probative value.
32. The judge gave detailed reasons for her rulings. We intend no disrespect to Ms Carberry's very thorough arguments by saying, and shortly, that the judge's reasoning was, in our judgment, entirely justified.
33. As to the school records, there was nothing in them of "substantial" probative value in relation to the issues in the case. Indeed, what was said there was not to be taken as proved and involved a degree of assertion - see for example R v Braithwaite [2010] 2 Cr App R 18. The judge, likewise, had adopted a correct approach with regard to the incident of 13 September 2019, although we need not elaborate further on that because, as we have said, Ms Carberry no longer sought to pursue that particular point. In fact, as we have also said, the judge had permitted A to give evidence about that previous incident himself.
34. So far as the application under section 100 (1) (b) with regard to E's alleged nickname of

"Elliott Stabber", in our view, the application was, with respect, completely hopeless. That use of that name was completely unexplained and it would have asked the jury simply to speculate as to what, if anything, that nickname connoted and on what particular basis that nickname, if it was a nickname attributable to E, had been acquired.

i. Ground 2

35. As to the second ground of appeal, we consider that the judge was entirely justified in refusing to permit the defence to cross-examine the witness S about certain matters which S had mentioned to the police. What he had said to a police officer, as recorded in that officer's report, was this:

> i. "...[S] was known as 'SLITZ' on Instagram or 'BANDIT SLITZ' or 'OFFICIAL SLITZ'. [S] said that he would talk to [E] via PS4 and advise him not to go out, but [E] did not listen and will go and hang around the town with those friends. [E] sometimes mentioned that his head hurts as he was fighting but he never told [S] why or with whom he fought. [S] says that he thinks [E] would take part in 'long-term fights' which meant that the problem was never resolved."

36. Ms Carberry has said today, before us, that it would not be proper to pursue the ground in so far as it related to use of the name "Slitz" - perhaps a slightly puzzling, even if correct, concession, in view of her enthusiastic pursuit of the point relating to "Elliott Stabber".
37. But as to the other matters there recorded, they again cannot possibly be treated as of substantial probative value. These were hearsay statements of what S said that E had told to S in circumstances, where S, as he said, knew nothing about them, knew nothing about the details of any fights, knew nothing as to how they come to be initiated or anything of that kind. It was plainly correct, having regard to the provisions of s.100 of the Criminal Justice Act 2003, to exclude questioning of that kind with S.

i. Ground 3

38. In essentials the same reasoning, in our judgment, applies to the third ground. In this particular instance the defence had wished to ask the aunt (when she gave evidence for the prosecution) about what A had told her that morning. She was in fact permitted to give evidence that A had told her that E had a "violent temper". The part of the evidence in her statement that the aunt was not permitted to mention was that A, according to her, had also in his talk with her referred to E having been to a Special Behavioural School. Quite what that could have added in substance is completely and utterly unexplained; it was in effect entirely irrelevant; and indeed to allow that to have been admitted would have gone against the judge's correct previous rulings.
39. We understand Ms Carberry's submission that having allowed to be admitted in evidence the entirety of the rest of what the aunt was to say A had said that morning, it was perhaps odd to exclude that one bit. But in truth, this exclusion was, as we have said, in line with the judge's previous rulings and in any event the exclusion did not in any way operate to distort the aunt’s evidence. The reality is that no proper use could have been made of such comment by the defence at trial if the provisions of the Criminal Justice Act 2003 were to be complied with it.
40. We do of course appreciate, as did the judge, that there is a distinction between bad

character going to matters such as propensity and bad character going to what a defendant knew or believed at the time of the incident in question. Consequently, the bad character of E, where known to A, might be capable in principle, if relevant, as to going to A's state of mind at the time when the altercation between him and E started. But it was A's own case (in what, on any view, was a very fast-moving incident) that E had come at him with a knife. It seems altogether extraordinary to say that A himself responded by way of use of a knife because he consciously, or subconsciously, had in his mind the previous incident of 13 September 2019 or because of some consciousness that E had been excluded from school for violent behaviour - that incidentally going back to 2015. The obvious point for the defence was that his response and belief at the time of this very fast moving incident was conditioned by, on his case, E having a knife and coming at A with it.

41. Viewed overall, the reality was that A needed to provide an explanation in the light of the prosecution case. He gave his explanation, giving oral evidence at some length before the jury. The jury clearly did not believe his account. The jury clearly did not believe J's account either. Given that there was no error in the judge's prior rulings, as this Court unhesitatingly concludes, there is no basis for this Court (as an appellate court) interfering with the jury's evaluation. The points which are sought to be pressed before us do not accord with a proper application of the provisions of section 100 of the Criminal Justice Act 2003.
42. We should also add that when an appeal focuses, as this one did, on certain particular grounds, it is easy to think that those grounds may have been the focus of the trial itself. But that simply cannot possibly be said in this case. In truth, these points were, realistically, peripheral sideshows.

i. Ground 4

43. As to her final ground, Ms Carberry did also submit that there was here a 'lurking doubt'. It is exceptional for an appellate court to interfere on such a basis - see R v Pope [2013] 1 Cr App R(S) 14, and we see no basis for doing so here. Ms Carberry among other things referred to the fact that the judge had given a majority direction to the jury after less than 6 hours of their having retired to deliberate. However, the circumstances at that particular time were becoming very difficult because of the developing situation relating to Covid-19; and at least one juror was expressing concerns about his position were the trial to run into the following week.
44. Ms Carberry, very fairly and rightly, accepted that, given the difficult circumstances confronting the judge, it was well within her discretion to decide to give a majority verdict direction at that particular stage. Moreover, we apprehend that the judge had by then received jury notes indicative of the potential state of play so far as the jury deliberations were proceeding. Nevertheless, Ms Carberry expressed concerns that the effect of the Covid-19 developments and the perceived possible impact upon the jury and the anxiety being expressed from at least one quarter, if deliberations were to carry on at some length, may have operated to put the jury under pressure swiftly to reach a verdict which they otherwise might not have reached.
45. In our view, that is pure speculation, with respect. The judge had previously made clear to the jury that they were under no pressure. We have no reason to think that the jury felt under pressure on that particular date. Indeed having been given a majority direction the jury thereafter returned, around an hour later, and gave a unanimous verdict of guilt on

the count of murder. Accordingly that ground also fails.

a. Conclusion

46. In the overall result, we are satisfied that this conviction is safe. There was no material error of any kind in the judge's rulings and the appeal is dismissed.
47. LORD JUSTICE DAVIS: Are there any points arising? Thank you very much indeed.
48. Ms Carberry, we would like to pay tribute to the very clear care and effort you have put in advancing your client's case. He has not succeeded but it is not through any want of effort or skill on your part.
49. Mr Panayi, thank you also very much indeed.

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