

No: 201902334 B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

NCN [2020] EWCA Crim 267

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 14 February 2020

B e f o r e:

LORD JUSTICE LEGGATT

MRS JUSTICE CHEEMA-GRUBB DBE

THE RECORDER OF CROYDON
(HER HONOUR JUDGE ROBINSON)

R E G I N A

v

BEN DRUMMOND

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Mr M Holland QC & Mr M Fraser appeared on behalf of the **Applicant**

J U D G M E N T

1.

MRS JUSTICE CHEEMA-GRUBB: We have heard a renewed application for permission to appeal and for a representation order on behalf of Ben Drummond after they were rejected by the single judge. Mr Drummond, who is aged 20, wishes to appeal against his conviction for murder on 29 May 2019 in the Central Criminal Court. Mr Holland QC has presented the application. The applicant further requires an extension of time of three days to be allowed to renew.
2. Counsel appears at his own expense and without expectation of any fee. We are grateful for his submissions and the professional commitment that this attendance demonstrates. If we were persuaded to grant permission for Drummond's appeal to proceed, we would adjourn the hearing of the appeal so that the Crown can be represented.
3. The circumstances that led to Mr Drummond and the co-applicant, Isaiah Popoola, being tried at the Central Criminal Court can be summarised briefly. Drummond was charged with violent disorder and murder and convicted of both offences. Popoola was charged with two counts of murder, two counts of section 18 Offences Against the Person Act 1861, and violent disorder. He was convicted of one murder, one manslaughter, one offence of section 20 Offences Against the Person Act as an alternative to one of the section 18s, and violent disorder. He was acquitted of the other section 18 charge.
4. They were sentenced on 9 July 2019. There is no application for permission to appeal against sentence, but we record that a mandatory sentence of custody for life was imposed pursuant to section 269(2) of the Criminal Justice Act 2003 on Drummond, with a minimum period of 23 years minus 364 days served on remand, with three years' detention concurrent for the violent disorder.

The facts in summary

5. Over a two hour period on the evening of 20 February 2018 there was a series of violent incidents across North London, at the end of which two young men lay unlawfully killed and another wounded. The applicants both live in Camden, North London. A possible background motive for the events of 20 February arose from the murder of a young man called Lewis Blackman in Camden two days earlier. A shrine to Mr Blackman was created on the Peckwater Estate. At about 7 o'clock on 20 February in the evening, a group of males was seen in that area. Two of them seemed to be wearing white masks and one light coloured gloves.
6. There was telephone contact between Messrs Drummond and Popoola earlier in the day

and during the earlier part of the evening. Cell site evidence could show that the telephone attributed to Drummond was in the NW5 area at about 7.45 that evening, and it moved east thereafter. That movement was consistent with automatic number plate recognition captures of a stolen Mercedes transit van, which appeared to be travelling in convoy with another stolen vehicle, a BMW 3 series. Both of those vehicles were captured on CCTV arriving at the Peckwater Estate at about 7.50.

7. At about 8.30, witnesses saw a large group of males on the estate. They seemed to be in an excitable condition. They were overheard discussing where they should go. Tottenham and Hackney were suggested. A group of 12 to 15 males from that group climbed into the van, which had been spray painted black. Others got into a car, and both vehicles left together. A witness told police that the group was black, with one exception, a white male who was smaller than the others. Some of them had their faces covered. Others had their hoods up. The BMW, as it left that area, was noticed by an unmarked police car. The four occupants appeared to have their faces covered.
8. We come to the first of the four incidents. This happened about three quarters of an hour later in Aldenham Street, NW1. At 8.15 the BMW was captured by CCTV in that area. Then the incident was also captured. Two young men were chased and attacked by two men wearing dark clothing and carrying knives. A man called Said was stabbed in the middle of his back. He and the other man with him declined to cooperate with the investigation. Popoola was convicted of a section 20 Offences Against the Person Act offence for his involvement in this first incident.
9. The next incident, which also gave rise to a charge against Popoola, happened less than 15 minutes later, just before 8.30 in Bartholomew Road, NW5. A 16 year-old boy called Hassan was captured on CCTV being followed by the BMW moments before he was stabbed to his chest and his back. As he lay on the ground, the Mercedes van was seen driving past. He died at the scene. Popoola was convicted of manslaughter on Count 3 in relation to this.
10. Incident 3, again less than an hour later, happened in Dalston, E8. At 9.15 the Mercedes van was seen at Penbury Circus, E8. Seven men armed with machetes and knives got out of the van and ran towards a group of men. One of those men was caught, surrounded by the group and attacked. The group was disturbed and returned to the van and left. The victim appeared to escape serious injury. He has not been identified. The violent disorder charge arose out of this, in respect of which both applicants were convicted on Count 4.
11. Finally, about an hour later, we come to incident 4 at Belsize Park and the Chalk Farm area. At about 10 o'clock the Mercedes van was seen to screech to a halt. Four men jumped out, apparently running after two young men who had walked along the road

shortly before. At 10.15 or thereabouts, CCTV footage showed two men being chased by four apparently masked men who were armed with bladed weapons. One of the two being chased evaded the group by hiding. However, the other, Sadiq Mohammed, continued running, eventually seeking refuge in a car being driven by members of the public. Those people, the driver and passenger, panicked and froze. The car was stationary and the victim was dragged from the car and repeatedly stabbed as he lay on the road. He suffered multiple penetrating stab wounds, from which he later died. Shortly thereafter a dark coloured van was seen to drive past the victim with the rear doors open. Partial registration numbers were noted or recalled by various witnesses. All of these were consistent with the vehicle being the Mercedes van from the earlier incidents and the estate. This murder was Count 5, of which both applicants were convicted.

12. The vehicles were then taken away. At about 10.20 the Mercedes van was driven and parked at Fletcher Court, the home address of Ben Drummond's mother. There was then telephone contact between Drummond and other co-accused. The last of those telephone calls was at 22.53, and the telephone that Drummond used was not then used again. At 7.30 the following morning, 21 February 2018, the Mercedes van was set alight. Earlier two men had been seen approaching that vehicle with petrol cans. Later that day, a telephone attributed to Popoola and found in his possession on arrest was moving in such a way as to be consistent with his driving the BMW 3 series to his home address.
13. Popoola was arrested on 22 February. Evidence was gathered at the scene, in particular the key fob for the BMW, which he had thrown out of his window. The BMW was also seen and searched. There was a rucksack inside, which linked Popoola to a black face mask. A mobile telephone attributed to Drummond was in the console of that BMW. Blood from Abdikarim Hussain, the victim in the second incident, was found on the bonnet and the rear seats of the BMW.
14. In interview Popoola gave prepared statements, indicating that he had been to the estate for a gathering in respect of his murdered friend, and he had stayed there until 10.15 at night.
15. Drummond was not arrested until a week later. When questioned he gave a prepared statement, saying that he had been at home with his mother and his brother at the time of the four incidents. His mother confirmed that he had been at home, but she said that she had fallen asleep and she could not vouch for his whereabouts after about 8 o'clock.
16. The Crown's case was consistent with the charges as we have described them. Drummond, was said to be the smaller white male involved in the later incidents in which the murder and violent disorder offences were committed. The evidence against him can be summarised in the following list of topics. First, telephone contact with Popoola on

the afternoon of 20 February.

17. Second, cell site evidence demonstrating that a phone the prosecution attributed to him had been in the vicinity of incident 2 earlier in the evening before the group had gathered on the Peckwater Estate.
18. Third, CCTV and ANPR recordings which showed the movement of both vehicles at a number of points; most significantly for today's purposes, the attack on Sadiq Mohammed. CCTV captured the groups from the vehicles, including during the attack, one obviously shorter man. The applicant is a short white young man. The shorter man in the footage in respect of Count 5 was labelled suspect 6, and it was the prosecution's case that the applicant was a candidate for suspect 6. This male was wearing on the CCTV a distinctive white head covering which meant that the colour of his skin could not be seen on the footage. The other members of the chasing group did not have full face coverings on throughout and were identifiable as black males.
19. Most significantly for his application to this court, the Crown relied on evidence of a number of eyewitnesses in support of the allegation that Drummond was one of those involved in the murder of Sadiq Mohammed. The witnesses provided descriptions of the assailants, which varied in relation to height, build, and to some degree skin colour. A summary of this evidence was read to the jury. We will return to it. In short, the witnesses broadly agreed that a group of men, most said four, armed with knives jumped out of the dark van and chased the two men. One of the van group, said to be Drummond, was significantly shorter than the others. This shorter man was wearing a distinctive white covering. It was contended that this was to conceal that he was white whereas the other men were black. Mr Drummond was the only white accused.
20. Fifth, the fact that the Mercedes van was found burnt very close to his home address.
21. Sixth, his DNA on the telephone handset recovered from the BMW.
22. Seventh, the fact that he made telephone contact with co-defendants, including Popoola, after the murders and tried repeatedly to contact Popoola in the early morning of 21 February.
23. Eighth, WhatsApp messages and telephone calls that he made to two young women in the period after the murder. He was recalled by them to have said that he needed to leave the country and that he needed to drop something off which he would pick up the following day.

24. Ninth, the fact that after Popoola's arrest Drummond had travelled out of London to Bedford.
25. Tenth, an image found on his telephone which showed someone with a white head covering, similar, said the prosecution, to the man caught on CCTV cameras on the previous evening.
26. Eleventh, his no comment interview.
27. Drummond gave evidence in support of his alibi defence. The telephone contact between him and Popoola was to do with drug dealing. On 20 February he had intended to go to the vigil on the estate, but he had fallen asleep. He was therefore at home and asleep at the time of the incidents in Counts 4 and 5. He woke at some time before 11 that night to find a message from Popoola asking to meet. He met him shortly after 11. Popoola said that someone had been stabbed. No men's names were mentioned, nor was the fact that anyone had died. Thereafter he was engaged in dividing and bagging drugs. He then got into a taxi with Popoola and others and was dropped off at his home address at 1.45 in the morning.
28. He had given Popoola the phone that was recovered from the BMW because it was a drugs phone and he intended that Popoola would sell cannabis in order to raise money to pay for the dead friend's funeral. He contacted Popoola later that morning to make sure that he had got home safely with the drugs. The 12 contacts between 6.07 and 6.42 on 21 February were because he was keen to tell Popoola that there were people who owed him money for drugs.
29. Drummond also said that he had travelled to Bedford after the events, but this was not to escape the police investigation but to visit his cousin in prison, and to help family members decorate a house. He did not think he had told anyone he needed to leave the country, but he had been in a panic about being found with drugs, and what he wanted to drop off was drugs and drugs paraphernalia.
30. It follows that the principal issues for the jury in Drummond's case were whether he had been correctly attributed as the shorter man on the CCTV footage involved in the murder and the violent disorder and his alibi.
31. We return to the summary of witness evidence in respect of Count 5 that was read to the jury. It consisted of a précis of the relevant evidence from nine witnesses who said that

they had seen something of the chase relevant to Count 5 prior to the footage on CCTV. They had provided statements. Those statements could have been read pursuant to section 9 of the Criminal Justice Act 1967 and part 16 of the Criminal Procedure Rules, but indeed the document that was prepared and read to the jury summarised the majority of the statements, although it did also include some verbatim passages.

32. The relevant contents for this appeal were, in respect of a witness called Rowlands, he said that four men jumped out of the van. One of them was shorter than the two young men he had seen earlier on. He assumed they were wearing balaclavas or hoods as he could not see their faces.
33. A witness called Hird recalled seeing three men running along the relevant road. He said:
 - i. "I thought that they were a group of black males."
34. A man called Robinson had his statement summarised. He described five to seven men chasing after one man and he said the group varied in height from about 5 foot 8 inches tall to 6 foot 1 inches tall. They were all of slim build and had hoods up. He said that apart from the last male, who was definitely black, he could not describe their ethnic origin. He saw their hands. They were either black males or were wearing gloves.
35. A witness called Feiner said that she saw a group of three or four males emerging from an alleyway. She could not recall in any detail descriptions of the persons in that group except that they appeared to be between 15 and 25 years old and were all of slim build. She described the first person and gave his height, 185 to 190 centimetres tall. This person was wearing a dark coloured fabric type material across his lower face that covered his nose and mouth and a grey long sleeved hoodie. She could not say his ethnicity, only that he was not white. The second person was 170 to 175 centimetres tall. He had a darker skin, but she could not say what his ethnicity was. The third male was 185 to 190 centimetres tall. Again, from the colour of the skin around his eyes, she said she could tell he was not white. The skin tone was too dark. Those are the only people she described in the group in that level of detail.
36. A man called Cameron said he saw two or three males running in the middle of a road followed by a group of four males. Of the group before, one appeared to be a tall male, about 6 foot tall, and there was a short male, maybe 5 foot 4 inches tall. The other two males were somewhere in between. That witness gave no description of ethnicity.
37. Another witness called Zeka described a group of three to four males and described hoods. The men did not appear to have white faces. They had a darker facial skin tone, which she described as brown in colour.

38. A witness called Francis saw four people attacking a man on the ground. She described Male 1 as wearing a hoodie which was light blue. The hood was tight to the face and his face was not visible. He was about 5 foot 11 and lean. Male 2 was 5 foot 11 and lean. Male 3 was 5 foot 11 and lean. Male 4 was 5 foot 11 and lean.
39. A witness called Ali said that a male was being attacked by four or five youths who ran away down the alleyway. They were all between 5 foot to 5 foot 5 inches tall, of medium build and wearing dark clothing. One was wearing a coloured balaclava. He did not see their faces or any part of their skin.
40. A witness called Hussein saw four men running down the road, all wearing dark hooded clothing with their hoods up. Three of the men were carrying long knives.
41. It is important to note that the summary, although agreed to be an accurate and fair summary of the statements, was not admitted as a set of agreed facts or read as agreed as to the contents pursuant to section 10 of the Criminal Justice Act 1967, and it is easy to see why. The descriptions varied. The prosecution could not have agreed that all of them were correct, and in any event the best evidence was that of the CCTV footage.
42. In his closing speech, Mr Holland QC for Drummond focussed on the evidence of these witnesses, in particular what was said about the skin colour and height of the members of the chasing group. This is not surprising. He did not remind the jury of the evidence that one of the group was shorter than the others. Again, that is a matter for counsel, and in the circumstances not surprising, but Mr Holland would have appreciated that the judge was likely to remind the jury of the evidence in a more balanced way, including those parts which did not assist his client. Equally, given the contradictory descriptions and the CCTV footage, it was inevitable that the judge would have to give the jury some assistance as to how to approach the evidence of descriptions.
43. The judge provided written legal directions. These were discussed with counsel. They refer to two aspects. Firstly, they included a full direction on the defence of alibi. The judge made it clear that the burden of disproving an alibi remained on the prosecution. He also made it clear that even if the prosecution succeeded in disproving the alibi, this was not a shortcut to conviction, and an innocent person who fears the truth will not be believed may also invent an alibi.
44. Secondly, the judge gave a full direction on the correct approach to circumstantial evidence. He included this paragraph, 68:
- i. "Please also bear in mind you need to look at the evidence in its

totality rather than at individual pieces of evidence in isolation from each other. Rather like a jigsaw, you may not think much of a piece of evidence looked at on its own, but it is the cumulative picture that you need to consider."

45. No direction was given, and we understand that none was sought, as to the approach of the jury to the incident 5 witnesses' evidence that we have referred to. When the judge came to deal with this evidence in his summing-up, he said this at page 65, paragraph D:
- i. "Staying with eyewitness evidence, I am going to turn next to the evidence that was read to you in regulation to Count 5, Malden Road, about which Mr Holland reminded you in some detail on Friday afternoon. You will recall the thrust of his submission was that the eyewitness evidence as to descriptions of Sadiq Mohammed's assailants was in no way consistent with the appearance of Drummond, a white man of around 5 feet 5 inches. And you will give his arguments the full weight which you consider they merit.
 - ii. You do though need to approach eyewitness evidence of this sort with a degree of caution for this reason; if half a dozen of you were to leave this building at lunchtime and independently to witness a road traffic accident or a brawl, a fight, and later to give witness statements about it, experience shows that there will invariably be widely divergent accounts of what happened, in particular about both detail and description, even although each of you was doing their best to recount what you believed you had seen.
 - iii. Why so? Well, there are a number of different reasons. Firstly, some people have much greater powers of observation than others. Secondly, some people have much greater powers of description than others. Thirdly, some people have much greater powers of recall than others, and that is particularly so if you are giving a statement some days or more after the event that you have witnessed.
 - iv. Fourthly, some people are very good at describing cars, if it is a road traffic accident that they witness. Others are hopeless. The last witness [and he referred to a witness called Anna Saydiyas] told you just that. The same applies to describing individuals and details of height and build. Fifthly, what is being described in a road traffic accident or in a very serious assault, and this was undoubtedly a very serious assault.
 - v. What is being described is unexpected, it is very shocking, and it is very fast moving. You will, for example, remember the evidence of ..."

46. And here the judge reminded the jury of the evidence of Bridget Marsh, where she said that having reviewed the CCTV footage on the stair, that part of the incident comprised six seconds, no more. He carried on:

- i. "Sixthly, the vantage point and the distance from which a person is viewing events may have a bearing upon the accuracy of a person's description, as may lighting.
- ii. Next, you may also conclude that trying to describe four people is a great deal more difficult than describing one, upon whom the entirety of your attention is focussed. Now Mr Holland began by focussing on height, understandably because his client is 5 feet 5. Whereas others involved in the incident were clearly a good deal taller.
- iii. Now, it is quite true that a number of witnesses have described all of the attackers as being tall, and of a similar height, round about 6 feet. But as we shall see, other witnesses describe males of very differing heights and much smaller, and very different estimates were given. It really bears out one of the points I have just been making.
- iv. The build of the males is described differently here, by different witnesses. As far as colour is concerned it is indeed the case that a number of witnesses say that the men were all non-white, but others were not able to say, no doubt you may think because of the fact that the men's faces were all partially covered. And so, whilst in no way seeking to denigrate Mr Holland's submissions, the force and the weight of which it is for you to evaluate, you do need to have regard to the wider picture and to the totality of the evidence and the difficulties inherent in evidence of this sort.
- v. So having made these general observations, let me remind you of what the witnesses said."

47. And he then did exactly that, and it is not suggested that he was inaccurate in his précis of what the incident 5 witnesses had said. At the end of that summary, page 70, the judge said this:

- i. "So, ladies and gentlemen, it is obviously a matter for to you evaluate that evidence and make of it what you think appropriate and to consider whether the submissions made by the defence or on behalf of the Crown are submissions which, in your view, have force."

48. Soon after this part of the summing-up, the end of the day had been reached and the judge sent the jury away until the morning, with only, he said, the defence evidence left for him

to summarise. Mr Holland for Mr Drummond immediately raised a concern, which he returns to in this application. He said it in this way:

- i. "My Lord, in relation to the directions about the summaries of the evidence, it may be that overnight I will need to find some authority on this, but I am aware, from recollection, that there are authorities dealing with the way in which agreed evidence must be dealt with. There are authorities that made clear that a tribunal of fact may not give lesser weight to agreed evidence that they had not heard, because they have not heard it and they therefore have no opportunity to assess it or decide what weight to give it. And the authorities suggest that it is inappropriate for a tribunal of fact in those circumstances to seek to use what we would submit might be the appropriate tools where they have actually seen the witness, such as the comments that my Lord has made."

49. Shortly afterwards, Mr Holland found the authority that he was referring to and read from a summary. He also complained that if the judge was going to include such passages, namely the précis of the incident 5 witnesses in his summing-up, he should have informed the defence of what he was going to say about them.

50. The judge invited further submissions in the morning. There was discussion thereafter about possibly calling the relevant witnesses to give evidence. We do not need to set out in detail what happened the following day, but it is correct to summarise it in this way: the judge contemplated allowing Mr Holland to call those witnesses, even at that late stage in the case, should the application be made. It was not. The judge gave a written ruling in due course. However the judge stated that he did not resile from the directions he had given, and he refused to direct the jury to give the descriptions from the incident 5 witnesses "full weight" unless they found a good reason not to. It is still not clear exactly what was meant by "full weight". The judge declined to give such a direction.

51. Mr Holland targets the proposed appeal on this single passage of the judge's summing-up. We begin our examination of his submissions by observing there is no criticism at all of the judge's conduct of the trial, his rulings, and his legal directions otherwise. Nor, with this exception, does Mr Holland assert any error in his summary of the evidence or his directions more generally to the jury. The arguments presented in writing and adopted before us are that the judge erred in directing the jury they should approach with caution the evidence of eyewitnesses which, it is said, exculpated the applicant as a stabber, because that evidence had been served under section 9 and had been summarised by agreement. It is said that it is arguable that in the absence of contradictory evidence, the judge should have directed the jury to give the exculpatory evidence full weight.

52. Secondly, the judge should have given the defence notice before the defence closing speech was completed that he intended to refer the jury to circumstances of observation that could undermine the weight of the read evidence. The judge also, it is said, erred in

suggesting that there was a potential cure to any disadvantage by the calling of those eyewitnesses for cross-examination, even at the stage of the summing-up and after the directions had already been given and the closing speech had already been made.

53. It is said it is arguable that in all these circumstances the convictions of Mr Drummond are unsafe.
54. Mr Holland relies, as did he before the judge, upon two authorities which in our judgment are entirely irrelevant. Merthyr Tydfil Car Auctions Ltd v Colin & Sandra Thomas [2013] EWCA Civ 815 is a case regarding nuisance in which the evidence of witnesses was read by agreement. The Court of Appeal held that the trial judge had been wrong to say, as the fact finder, that he attached little weight to their evidence because it was untested by cross-examination. We observe the jury was not told to attach little weight to the evidence of these witnesses. No reference was made to the fact that their evidence had been untested by cross-examination. This was simply not that kind of case at all.
55. Mr Holland also relied on Commissioners for HMRC v Pacific Computer Ltd [2016] UKUT 350. The Upper Tribunal in that case found that the First-tier Tribunal had erred in stating that it refused to give significant weight to evidence that had been read by agreement because witnesses had not been cross-examined. That was a case in which the respondents accepted the evidence was not in dispute. In those circumstances, it should have been given full weight. No doubt that is where this phrase came from.
56. Countering these cases in a respondent's notice, the Crown point to Lister v Quaipe [1983] 1 WLR 48, which establishes that read witness statement do not offer conclusive proof of the matters stated in them, with the result that the accounts of those witnesses were not akin to facts, and so the tribunal of fact had been entitled to prefer the evidence of a defendant over the accounts of the witnesses.
57. We are not persuaded that these grounds are remotely arguable. Mr Holland predicates his submissions on an unsafe basis. If the judge had been dealing with agreed facts or statements read as agreed evidence pursuant to section 10 of the Act, then the evidence would have the status Mr Holland argues it was deprived of by the judge. But this was not agreed evidence. It was evidence read by agreement, a distinction that is readily understood by criminal practitioners. It was the agreement of both the prosecution and the defence. If the defence wanted to have the witnesses called, they could have done so, but the status of the evidence would not have changed because, whether or not any cross-examination was undertaken by the prosecution or the defence, the accuracy of every detail was not accepted, and could not be, given the inconsistencies and inadequacies within the evidence and the nature of observation evidence, as the judge pointed out.

58. As the respondent succinctly points out in the respondent's notice, the account of a witness whose statement is adduced under section 9 is treated no differently than if that account had been given by witnesses from the witness box. In either case, the tribunal of fact is entitled to accept or reject the witness's account as it sees fit, and then by contrast, where an admission is made pursuant to section 10, that is conclusive of the matter stated and it is not open to the court to reject that fact.
59. It is quite clear that in this case the judge gave the jury proper and helpful directions as to their approach to circumstantial evidence. This was undoubtedly a case of circumstantial evidence, but as is well known and oft expressed by this court, circumstantial evidence can amount to a powerful case against a defendant in a criminal trial. We see the judge's summing-up in this case as a fair and balanced summary of the evidence, in which he included proper and appropriate directions, assisting the jury in how they should approach this evidence. Having listened to an understandably partisan approach from defence counsel, it was right for the judge to remind the jury in a fuller and more balanced way of the evidence, and this is what he did.
60. We find these proposed grounds to be wholly unarguable, and accordingly the application for permission to appeal is misconceived and must be rejected.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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