

[2020] EWCA Crim 834
No: 201902760/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 19 June 2020

B e f o r e:

LADY JUSTICE CARR DBE

MR JUSTICE WILLIAM DAVIS

THE RECORDER OF SOUTHWARK

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

R E G I N A

v

IMRAN IBRAHIM

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rej@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr D Cox appeared on behalf of the **Appellant**
Mr R Sellers appeared on behalf of the **Crown**

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 26 June 2019 in the Central Criminal Court, the appellant, who is now 22 years old, was convicted after trial by a majority of 10 to 1 of attempted murder (count 1) and possessing a firearm with intent to endanger life (count 3). No verdict was given on count 2, causing grievous bodily harm with intent, which was in the alternative. On 12 September 2019 he was sentenced to an extended sentence of 26 years, pursuant to section 226A of the Criminal Justice Act 2003, comprising a custodial term of 21 years and an extension period of five years on the count of attempted murder and sentenced to a concurrent determinate sentence of five years' imprisonment on the count of possessing a firearm.
2. The appellant had several co-defendants. Tariq Crookes ("Crookes") was convicted of assisting an offender (count 4) and sentenced to four years' imprisonment. He was acquitted of counts 1 and 3. No evidence was offered against him on count 2. The jury was discharged from returning verdicts on Don-Juan Newman ("Newman"); he was to be retried for reasons and in circumstances which will become apparent. Daniel Higgins-McLeod ("McLeod") was acquitted of counts 1 to 3. Crosslom Davis ("Davis") was also acquitted of counts 1 to 3.
3. This is the appellant's appeal against conviction for which leave has previously been granted. For the purpose of today's hearing we have had the benefit of representations from Mr Cox for the appellant and Mr Sellers for the respondent, both of whom appeared below as well.

The facts

4. On Wednesday 31 October 2018, Daryll Okoe was in MMM Chicken, 150 Loughborough Road, SW9. Within the vicinity Crookes was driving his mother's Vauxhall Astra. The vehicle was seen on CCTV footage to come to a stop outside MMM Chicken. Four male passengers exited the vehicle. One of those males, wearing a mask or a hat with an orange wig attached, approached the doorway of MMM Chicken as Mr Okoe was leaving. The male produced a handgun and discharged it towards Mr Okoe, wounding Mr Okoe's right forearm. Mr Okoe ran from the scene. CCTV footage showed that he was chased by the other individuals who had decamped from the Vauxhall Astra. An eye-witness heard one of the males say, "shoot him, shoot him again". The males eventually abandoned the chase and returned to the vehicle.
5. Mr Okoe attended the Accident and Emergency department at King's College Hospital where he was observed to be bleeding quite heavily and screaming in pain. He declined later to assist the police or prosecution with their enquiries.
6. CCTV footage from 31 October 2018 showed the appellant in the company of his co-accused at Prince Food and Wine, Lambeth at approximately 10.10pm.
7. The prosecution case was that the appellant was the male wearing the mask or hat with an

orange wig attached. He produced the handgun and discharged it towards Mr Okoe. The appellant and his co-accused were associated with a gang called the Harlem Spartans. Some or all of the gang members had been engaged in serious gang violence and were part of the gang culture. On the day in question the group had travelled into rival gang territory by going to MMM Chicken, hoping to find a member of the rival 150 gang in order to retaliate for the death of one of the Harlem Spartans' gang members known as Latwaan Griffiths.

8. To prove the case, the prosecution relied on the following matters:
 - (1) Witnesses to the incident giving evidence that a car had pulled up outside MMM Chicken, a gunshot being heard and people from the car following a male down the alleyway. One witness heard a male shout "shoot him". Some of the males from the car had their faces covered;
 - (2) Body worn camera footage of Mr Okoe in hospital. Mr Okoe described his assailant as a light-skinned black male who had a scarf over his face and was wearing a black jacket;
 - (3) The officer in the case who gave evidence of the police investigation. The combination of CCTV, ANPR and mobile telephone evidence was used to reconstruct the movement of the appellant and the co-accused;
 - (4) The evidence of PC Adam Barr, an expert on gangs, as to the connection between the death of a member of the Harlem Spartans gang, as already mentioned, and the shooting of Mr Okoe;
 - (5) Telephone evidence and cell site analysis. The prosecution attached particular weight to evidence that during the crucial period on the evening of 31 October 2018, the mobile telephones of the appellant and his co-accused, with the exception of Crookes, was silent;
 - (6) The gun which was recovered in March 2019 from a block where a man called Ian Gualavasi lived. The gun had a partial DNA match for Mr Gualavasi, a member of the Harlem Spartans gang. There was evidence of telephone contact between the appellant and Mr Gualavasi on more than 70 occasions in the two months leading up to 31 October and included contact in the early hours of 1 November 2018, only hours after the shooting in question;
 - (7) CCTV footage from within Prince Food and Wine appearing to show Newman carrying a red wig;
 - (8) The appellant's previous convictions showing a propensity to get involved in gang violence with weapons.
9. All the defendants apart from Crookes ran alibi defences. The appellant's defence case was that he had been with Davis and McLeod earlier that evening at Davis' house. He left the property for approximately half an hour in order to visit a drug dealer but then returned to Davis' house. The three of them had been together, along with Crookes and Newman, at Prince Food and Wine later some way from the scene of the shooting at about 10 pm. This was supported by CCTV evidence of them at that location. The appellant denied presence at MMM Chicken.
10. Newman ran a discrete alibi defence. Whilst all the accused denied presence at MMM

Chicken, Newman relied upon an alibi witness, Miss Diakite, who gave oral testimony in support of his defence. She said that Newman was with her and attending a party.

11. As for the appellant and the other co-accused, they gave evidence backing each other up as to where they were together at the material time.

Rulings on discharging the jury

12. The trial commenced on 20 May 2019 and lasted just over four weeks. On 12 June 2019, midway through the defence case and after the appellant had given evidence, a member of the jury ("Juror 3"), provided the judge with a note. He stated that he had been on the same bus as Newman's alibi witness, Miss Diakite, after she had finished giving her evidence on Friday 7 June. He said that he had overheard her talking on her mobile telephone. Juror 3 said in effect that he had heard her say that she had been lying in her evidence.
13. Juror 3 was isolated immediately from the other jurors. He was brought into court and questioned by the judge. He maintained that while he had said to other jurors that he had heard Miss Diakite on the mobile telephone, he had not passed on the substance of the telephone call to other jurors. Counsel's opinions were sought. All defence counsel took the view that the whole jury should be discharged. The point was made that if only Juror 3 was discharged the other 11 jury members would inevitably conclude that it had something to do with what he had told them.
14. The judge ruled that it was necessary to discharge Juror 3. However, the trial would remain fair with the remaining 11 jurors who would be given a warning to focus their attention on the evidence, as they were.
15. However, very shortly afterwards the judge received another note, this time from another juror ("Juror 1"), which read:
 - i. "Judge, just to make you aware, the juror did disclose information which he reported to you to other jury members. I don't know the extent and detail of what was reported and to whom. I was advised of the incident on the bus and overhearing a witness during the recess."
16. Juror 1 was brought immediately into court and questioned by the judge. She said that another juror had brought it to her attention, not Juror 3. She was told that Juror 3 had overheard Miss Diakite on the bus saying that she had lied to the court. Juror 1 said that there was a group of four jurors present who were aware of what was being said by Juror 3. Juror 1 confirmed in terms that she was still able to deal with the evidence and be objective.
17. The judge proceeded to hear from all the jurors one by one in open court and in the presence of the defendants and their counsel. Juror 2 confirmed that Juror 3 had told him of what he had overheard Miss Diakite saying while on the bus. Juror 4 was aware

that Juror 3 had overheard a conversation of Miss Diakite whilst on the bus, but he did not know any details. Juror 5 said he overheard Juror 3 talking about a person having a conversation on a mobile telephone on a bus. He did not listen any further. Juror 6 was aware that Juror 3 overheard a conversation on the bus. He knew who Juror 3 was talking about. He said, reading into Juror 3's mannerisms, that Juror 3 did not believe the person he was talking about. Juror 7 said he heard something about a conversation on a bus from one of the other jurors but did not know any details. Juror 8 had not spoken with Juror 3 about a conversation on a bus but was aware that Juror 3 had heard something. Juror 9 said that Juror 3 did tell him that he had heard Miss Diakite on the bus and that she looked at him. Juror 10 had not heard anything. Juror 11 had heard from another juror that Juror 3 had seen a witness on the train, but she was on her telephone and seemed to recognise Juror 3. Juror 12 had not heard anything.

18. The judge indicated that in his preliminary view nothing had happened such as to affect the jury's view of the evidence. Upon being told that there was a contrary view held by counsel, he stated that he had not closed his mind.
19. The following morning, 13 June 2019, legal argument on the question of jury discharge was heard. Defence counsel submitted that the contamination was of such a degree that there could not be a fair trial. The agreed defence position across all defendants was that the entire jury should be discharged. Counsel for the prosecution were neutral on the issue.
20. The trial proceeded for the rest of the day with enquiries being made into the bus journey, until later into the afternoon and after the jury had been sent home. The judge then ruled that a fair trial could be had for all of the defendants. Juror 3 was "quite a young man, very diffident and inarticulate and lacking in maturity". The idea that Juror 3 had said anything that exercised influence over the "sensible" others was quite fanciful in the circumstances of the case. The judge did not perceive any risk of injustice on the particular facts of the case. He did not think any fair-minded person would think there was a risk of injustice having heard all that had been said and done and the issue of contamination could be met by a direction, although he did not consider one was necessary at that stage. He concluded by saying that given the ongoing enquiry in relation to the bus ride, he would keep the matter under review and did not rule out any course, including discharge of the jury in respect of Newman only.
21. Following an overnight police investigation into the incident on the bus, it was confirmed the following day that Juror 3 and Miss Diakite had indeed been on the same bus, as CCTV footage available later on 17 June 2019 showed.
22. At the beginning of the next day, 14 June 2019, the jury issue was revisited. The judge indicated that he was considering severing off Newman in order to "make the best of a bad situation". Counsel for the prosecution submitted that the prosecution's case was that it was a joint enterprise; the appellant and the co-accused were "all in it together". The prosecution's case was to invite the jury to go backwards from there inferentially. Severing off the co-accused Newman still had some difficulties impacting on the other

defendants. However, the prosecution did not positively support discharge of the entire jury.

23. Counsel for the defence were of the combined view that the jury should be discharged. The point was made that the defendants had a common defence and the whole tenor of the prosecution's case was that the defendants were "all in it together". It was inevitable that the jury would conclude that the reason Newman had gone would be linked to Miss Diakite's evidence.
24. The judge ruled that the jury would be discharged from giving a verdict on Newman, but there was no prejudice to the other defendants which could not be managed by a direction. He had faith in the other 11 jurors.
25. He then proceeded, with the jury back, to give a clear direction to those 11 jurors when informing them of the discharge in respect of Newman:
 - i. "But you will not be surprised to hear me say now, I remind you about the importance of dealing with the evidence presented in court from the witness box, or on the DVD, when everyone is present so the evidence can be fairly tested and evaluated. The system depends on that. You will not allow this little interlude to affect your view about the guilty or innocence of other defendants. That would be really unfair. Okay? I want you to recognise that. And in the course of your discussions when you retire, you will be vigilant to safeguard the interest of other defendants on that issue. I can see you have got the point ... "
26. The judge declined the invitation at the end of his ruling to revisit his decision. On the following Monday, 17 June, the CCTV footage of the bus was played to the judge and counsel in the absence of the jury, showing Juror 3 and Miss Diakite both with headphones on and close to each other for about 12 minutes. Again, the judge's position was unchanged.

The summing-up

27. The judge gave a full and fair summing-up of which rightly no criticism is made. The jury was directed to consider the case for and against each defendant on each count separately. Further, a full false alibi direction was given in the following terms:
 - i. "These defendants have relied on evidence of alibi in different forms, and here is another golden rule. It is for the prosecution to disprove the alibi so that you are sure, [it is] not [for] the defendant to prove it, and remember also, a defendant may sometimes make up a false alibi to bolster up a true defence. That happens quite frequently. If that is so, put the lies to one side.
 - ii. If you thought the defendant had tried to put up a false alibi, do not even then rush to convict."

28. The jury deliberations lasted over 28 hours.

Grounds of appeal

29. Mr Cox for the appellant submits that the judge should have been discharged in its entirety and not just released from considering the case against Newman. It was a long time before Juror 3 came forward. By the time he did, it appears that there had been a considerable degree of discussion between the jurors. Even now it is not clear precisely what was said and that in itself is unsatisfactory. Further, it was dangerous for the judge to speculate that Juror 3 would not have influenced other juror who were "sensible". This assessment was based on very little and Juror 3 of course was found to be correct about the bus journey. Further, even the prosecution conceded that, if the jury considered Newman's alibi to be false, that could impact on the case against the other defendants.
30. Mr Cox also submits that the position taken that the jury should be discharged in its entirety was one taken by all defence counsel from the very beginning. None on the defence side were taking a different view. Moreover, this was not a case of tactics on the part of the defendants, who at the very early stages of these developments did not want discharge of the jury at all.
31. Mr Cox submits that it is important to remember the nature of the case against the appellant. The appellant and his co-accused were said to be friends "in it together" and acting in what was said to be a joint, well-planned enterprise. It was common ground that if one co-accused's alibi was not believed, it would adversely affect the view taken of the others. The alibis were effectively directly tied up. Whatever direction was given by the judge, submits Mr Cox, it would be impossible for a jury or jurors to put out of their minds a fellow juror saying he had overheard a witness admit giving false testimony to the court on a crucial subject. As a matter of human nature it would be inevitable, submits Mr Cox.
32. Mr Cox goes on to submit that the jury should not have been discharged in relation to returning a verdict upon Newman. This was a step which made an already difficult situation worse. It gave credence to what Juror 3 had said about the alibi witness having admitted lying in the witness box. The judge's decision to sever Newman indicated that he must have recognised that there was some difficulty or indeed an impossibility of the jury putting out of its mind what had been said about the alibi witness. The judge's comment that he was making "the best of a bad situation", as well as the prosecution's acceptance that if the jury thought there was a false alibi it could impact on others, were strong indications of the unsatisfactory way in which this was dealt. All of this led to unfairness and to the submission that the convictions of the appellant were unsafe. Of all of the accused, the appellant was the most liable to suffer if Newman's alibi witness was doubted or not believed by the jury because the appellant's defence relied wholly on the jury accepting that he was not present outside MMM Chicken. The other defendants could also rely on the fact they did not have sufficient knowledge of the presence of the gun.

33. Mr Cox goes on to attack the submission that there was a particularly strong case against the appellant on the merits in any event and made a series of points in that regard.

Grounds of opposition

34. Mr Sellers resists this appeal. He submits that the jury irregularity should not have caused the entire jury to be discharged. The judge was directed to and followed the relevant Practice Direction appended to the Criminal Procedure Rules (CPR PD 26M). The view arrived at by the judge that a fair trial was still possible was reasonable and certainly not plainly wrong, such that this court should interfere with those findings, even if this court might have come to a different conclusion.

35. Mr Sellers submits that the prosecution rightly took the stance that the irregularity might impact upon the case of all the defendants to a degree, as there was a common link from the alibi of Newman to the other defendants. However, the prosecution invited the judge to balance the prejudice with the requirement of a fair trial, bearing in mind the potential directions that could be given. The view taken by the jury of the alibi of Newman was not automatically and unequivocally fatal to the alibis of the appellant, or McLeod or Davis. There was a balancing exercise to be carried out between the fact that this was joint enterprise offending and looking at the direct effect of the developments with the jury on the alibis.

36. There was here a discrete alibi for Newman. Removing Juror 3 and Newman was a solution that met any prejudice caused. Mr Sellers makes the points that the judge's directions to the jury were adequate. He also makes the point that the acquittal by the jury of Higgins-McLeod and Davis demonstrates just how assiduously the jury was following the judge's directions. He emphasises that the judge's decisions at every stage were not a knee-jerk reaction. He had time to reflect. He gave reasoned judgments after hearing developed arguments. Mr Sellers goes on to submit that the prosecution's case against the appellant as the shooter was particularly strong.

Analysis

37. A jury should not be discharged unless a high degree of need arises and whether to discharge is a matter for the judge's discretion: see for example R v Winsor [1866] Law Reports 1 QB 289. In circumstances where, as considered further below, the judge faithfully followed the relevant Practice Direction, the question for us is whether or not it can be said that his decisions were plainly wrong or, to put it another way, irrational such as would render the conviction unsafe.

38. The judge followed all the proper steps once Juror 3 had sent his note about seeing Newman's alibi witness on the bus. He investigated matters with that juror. He then isolated him. Having considered the position the judge discharged that juror. Juror 3 had seen and heard an alibi witness on the bus. In his note, which he did not write until the third working day after the bus incident, he said that he felt that in what she was saying to the person on the other end of the telephone was that she was changing her story as to whom she knew and about whose party Newman was attending. There can be

no doubt that the judge was right to discharge Juror 3. Equally, he was entitled to conclude, as he did, that the trial could continue with the remaining 11 jurors, with a warning to focus their attention on the evidence.

39. Shortly thereafter, following a note from another Juror (1), the judge then conducted an investigation of the position vis-a-vis the knowledge of each of the other jurors and their ability to continue with their trial. Only Juror 2 purported to have been told by Juror 3 as to what the witness had said, and that juror's account was not specific. All of the jurors save for Jurors 10 and 12 were asked if they could continue to try the case fairly. All said that they could. Nothing in the substance of what they said should in our judgment have led the judge to do anything but take them at their word. Jurors 10 and 12 were not asked because they had no knowledge of events on the bus and did not know what the problem was.
40. The next morning, 13 June, the judge heard submissions as to what should be done with the remaining jurors. The defence argument was that the jury was so contaminated that a fair trial for Newman would not be possible. Given the responses received by the judge in the course of his investigation, it was entirely within the bounds of reasonable judgment to conclude that the case could continue with all defendants. The judge had had the benefit of observing the jury throughout the trial and seeing them separately and individually in court for the questioning, describing them as "sensible and mature". We agree that the judge's comments about Juror 3's character and speculation as to the likely extent of his influence were unfortunate. However, they were of no real relevance to the answers given by the other 11 jurors in court and played no real part in the judge's decision. Having decided that the case could continue, he told the jury in clear terms to concentrate on the issues in the case.
41. We then consider the impact, if any, of the judge's decision on the next day, 14 June, to remove Newman from the trial. Whilst we do not consider that it was necessary for him to have done so, we can understand his concern. There were hints of something having occurred in relation to Newman's alibi witness about which some of the jury probably were aware. To adopt one phrase he used, "out of an abundance of caution" he decided to take Newman's case away from the jury.
42. It can fairly be said that this step could have given credence to the notion that Newman's case was tainted in some way and to an extent undermined the assurances sought from and given by the jury to try the case fairly on the evidence. However, we have concluded that the decision was not irrational or plainly wrong when taken in combination with the judge's directions to the jury, such as to render the conviction unsafe.
43. First, the judge's direction to the jury emphasised that Newman's departure from the case was to be ignored vis-a-vis the remaining defendants. The jury was told in clear terms to deal with the case on the evidence and not to allow extraneous matters to intrude. Secondly, the judge in effect blamed Newman's counsel for the position. He said that the whole episode was a lot of fuss about nothing and told the jury that he was only

discharging Newman because "counsel had made such a fuss about it". Whilst somewhat unfair to counsel, this nevertheless took some of the sting out of the situation. Thirdly, Newman's alibi was not linked to the alibi being run by the appellant. Newman's case was that he was with his girlfriend between 8pm and 10pm in the evening. The appellant's case was he was with Davis and McLeod at Davis' house, apart from going out briefly to buy drugs. Fourthly, the eventual outcome was that two of the defendant co-accused, both of whom were running the same alibi as the appellant, were acquitted. The prosecution case was that this was a joint venture. The jury was self-evidently able to discriminate between defendants and able to put to one side anything to do with Newman and his witness. The appellant asserts that these acquittals do not weaken the basis of the appeal in any way because there was another basis on which the jury could have acquitted the two defendants, despite rejecting their alibis, on the basis of presence but insufficient knowledge of the gun. This is true, but in a case where those defendants, including the appellant, were running alibis which were intertwined, the fact of the acquittals is nevertheless significant when considering the fairness of the trial and the jury's approach. As Mr Sellers submits, it demonstrates that the jury was faithfully following the judge's directions. The appellant's case to the contrary involves inappropriate speculation.

44. In these circumstances, the question of the strength or otherwise of the case against the appellant does not fall for consideration. For all these reasons we would dismiss this appeal.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk