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IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 2020/01439/B3

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 14 September 2021

LADY JUSTICE CARR DBE

MR JUSTICE MARTIN SPENCER

MR JUSTICE BUTCHER

REGINA

V

DAVID ELLIS FERGUSON

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NON-COUNSEL APPLICATION

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. The applicant is 51 years old. On 2 November 2000 in the Crown Court at Maidstone he was convicted of murder. He was sentenced to life imprisonment with a minimum period of 20 years. This is his renewed application for an extension of time of over 19 years and leave to appeal against conviction. He also seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968, to introduce fresh evidence relating to the DNA and alibi evidence adduced at trial.
2. We can deal with the applications succinctly. That should not however mask the fact that we have read the detailed and voluminous papers in full and independently, including the applicant's rebuttal comments on the Court of Appeal Office Summary and his written response to the Respondent's Notice.

The Facts

3. The deceased, Susan Kent, a 33-year-old mother of two, was last seen alive on CCTV from the Hempstead Valley Shopping Centre, Kent, at around 10.40 am on 24 November 1999. She did not attend work as planned at 11.30 am and calls to her home went unanswered. The alarm was raised when she did not pick up her daughter from school later that afternoon.
4. She was found dead at home, lying on her bed, covered in blood. She had multiple stab wounds to the chest, her throat had been slashed and there was evidence of blunt force trauma to her face. Her body appeared to have been deliberately posed. Her blouse was ripped open revealing her breasts, she was naked from the waist down (save for a pair of stockings), and her hands were handcuffed behind her back. She had been raped vaginally and anally. Time of death was not known. Other than in the bedroom, there was no sign of a disturbance or of any forced entry suggesting that the deceased had known her attacker.
5. The prosecution case was that the applicant, who was known to the deceased, had an obsession about rape and had murdered the deceased. It relied on amongst other things:
 - (1) Investigation of the applicant's alibi given in police interview;
 - (2) Discrepancies in his account as to why he had received letters in the deceased's name;
 - (3) Telephone records demonstrating that the applicant had telephoned the deceased on the day before the killing;
 - (4) Evidence from two previous partners (heavily challenged by the applicant) suggesting that the applicant was obsessed with rape;
 - (5) A number of items found at the applicant's home address demonstrating his interest in sexual assault including photographs, a sketch and the contents of his computer;
 - (6) A scabbard for a hunting knife, which was also found at the deceased's home address. According to the pathologist, the missing knife was of a description capable of having caused the deceased's injuries;

- (7) A pair of ladies' stockings similar to those found on the deceased, again found at the applicant's home address;
- (8) A key found in the applicant's car which matched the handcuffs found on the deceased;
- (9) Components which matched the applicant's DNA profile and were recovered from semen found on external, anal and vaginal swabs (DAR/6 and 8) taken from the deceased. These samples were submitted for SGM+ DNA analysis. The results obtained indicated the presence of a mixture of DNA from at least two people. Some of the DNA components matched the deceased's DNA profile (obtained from a blood sample taken from her (DAR/28)); the remaining matched the applicant's DNA profile and were likely to have come from the semen that was present. It was estimated that the chance of obtaining such a match was in the order of 1: 1 billion if the DNA had come from an unknown person unrelated to the applicant.

Grounds of Appeal

6. The applicant relies on the following grounds of appeal which we summarise as follows:
7. The prosecution knowingly exaggerated the DNA match statistics and withheld forensic material that undermined the prosecution case. It is in this context that the applicant seeks leave to adduce fresh evidence from Caroline Crawford, a forensic scientist. She prepared a report dated 10 October 2017 and concluded:

"The DNA detected in sample 85366707 from DAR/6&8 could be as a result of a mixture of DNA from Susan Kent and [the applicant]. There was no indication of the presence of DNA from any other individuals in this sample."

8. The DNA readings in her opinion would match 1:3500 of the western male European population. Ms Crawford confirmed that the profiling provided supporting evidence for the assertion that DNA from the applicant was present in the sample.
9. (2) The prosecution withheld evidence that supported the applicant's alibi, specifically in relation to his assertion that he had collected a prescription from a chemist. The prosecution expert was a Dr Barratt, a computer security expert. Dr Barratt, Kent Police and the CPS are alleged to have colluded to prevent the applicant having a fair trial. The applicant seeks leave in this context to adduce fresh evidence from a Mr Steve Sinclair as set out in a document dated 20 June 2019. This purports to provide an analysis of a book published by Dr Barratt in 2004 about alibi evidence entitled "Traces of Guilt" which Mr Sinclair came across;
10. (3) The prosecution did not disclose evidence in the form of a knife (item MJ/15) found at the deceased's address either to the defence or the jury. The jury was misled to the effect that the murder weapon had not been found;
11. (4) The prosecution did not disclose, and continued to withhold, forensic evidence relating to a footprint which may have assisted the defence. The applicant's footprints were taken at the police station. The relevant custody record is said to have been withheld until after the appellant's conviction;
12. (5) The prosecution did not disclose telephone evidence which may have assisted the defence.

13. Overall it is said that, as a result of these failures, the prosecution misled the jury and the applicant was denied a fair trial.

Discussion

14. We deal with each ground in turn.

15. Ground 1: there is no evidence to support the assertion that the prosecution knowingly or otherwise presented false or misleading evidence in respect of the DNA evidence or improperly withheld the scientific working file from the defence. It appears that the scientist's working file was made available to the defence expert and the defence was in a position to instruct its own expert. However, the defence chose not to challenge the DNA evidence at trial; instead it sought to argue secondary transfer from a soft toy.

16. The fresh evidence of Caroline Crawford does not begin to undermine the safety of the conviction in the light of the strength of the evidence against the applicant as a whole. But in any event, as a preliminary matter, her opinions rest on the work of others whose reports have not been disclosed. Further, the contents of her report are summarised helpfully at paragraphs 25 - 27 of the Respondent's Notice. The short point is that, as the Single Judge commented, even if statistically Ms Crawford's match is less overwhelming than the percentage chance given at trial, it is still highly probative. It does not exonerate the applicant, indeed it implicates him. There remains evidence that the applicant's DNA is part of the mix of only two people's DNA, taken from the deceased's body and the only other DNA is that of the deceased. Even if the figures used at the trial could or should have been reduced, the fact remains that the evidence still proves that the applicant's DNA was recovered from the deceased's body.

17. Ground 2: there is no admissible evidence from Dr Barratt as to the basis of any of the assertions that he has made in his book. In any event, the reference in his book to the time of death appears to be a fundamental error. No time of death was relied upon at trial. Dr Rouse, the pathologist, confirmed to the applicant's solicitors in October 2018 that he would never have given a time of death. The alibi evidence on which the applicant relies was that he picked up a prescription at the time of the murder. However, the prescription was in fact picked up by his father, as his father's witness statement makes clear.

18. The fresh evidence of Mr Sinclair (whose precise qualifications are not clear but who describes his interest as being of an "amateur hobbyist nature" and who has set up a campaign website for the applicant) is no more than inadmissible comment or opinion.

19. Ground 3: the evidence relating to the knife found at the deceased's address was not withheld from the defence. The fact of the knife was disclosed. But in any event there was no evidence that it was linked to the killing.

20. Ground 4: there is no evidence to suggest that a footprint was found at the scene of the murder. The taking of the applicant's footprints at the police station would appear to have been a routine step taken upon his arrest and the custody record would have been

available to the defence. There was no comparison evidence or a footprint found at the scene.

21. Ground 5: the applicant admitted the use of the internet to access sites relating to rape and sexual assault. His telephone bill would have been available to him at the time of trial; indeed it was available as an exhibit having been referred to in Dr Barratt's report and the applicant himself would have been able to get his own telephone bill.
22. In summary, whether the applicant's complaints are considered individually or cumulatively, there are in our judgment no arguable grounds on which to contend that his conviction is unsafe, whether because of procedural unfairness, non-disclosure or otherwise.
23. There is in any event an insuperable hurdle to the granting of leave to appeal, namely the extraordinary delay in bringing this application. There are no good reasons for what is, on any view, extreme delay. Amongst other things, the applicant discovered the central matters of which he complains (apart from Dr Barratt's book), no later than 2 years after his conviction. The most compelling of merits would be needed in order to outweigh this sort of delay. The merits do not begin to reach that standard. It is not in the interests of justice to grant the necessary extension of time.
24. For these reasons the applications for an extension of time and leave are both refused.

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

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