IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101923/B1-202101949/B
NCN [2022] EWCA Crim 753

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 12 May 2022

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE SWEENEY

MR JUSTICE EYRE

REGINA
v
ANDREW MILNE
JACOB DAMON BARNARD

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MR J BENSON QC appeared on behalf of the Applicant Milne.
The Applicant Barnard did not appear and was not represented.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: At about 1.00 am on 10 July 2018 a fire was deliberately started at a house in Eastbourne by pouring petrol through the letter box and igniting it. The fire rapidly spread. Toby Jarrett, his partner Gina Ingles and her 4-year-old son, Milo, were trapped on the first floor. Gina Ingles and Milo died as a result of smoke inhalation. Toby Jarrett was badly burned and sustained other serious injuries. A CCTV camera nearby recorded two men leaving the scene. The prosecution alleged that these two applicants were the arsonists. At their trial before Whipple J (as she then was) and a jury in the Crown Court at Lewes, they were convicted of two offences of murder and one offence of attempted murder. Milne was also convicted of possessing a prohibited weapon, a Taser found when his home was searched. They were sentenced to life imprisonment with long minimum terms. Their applications for leave to appeal against conviction were refused by the single judge. They are now renewed to the full court.
2. We have been assisted by written submissions on behalf of both applicants and of the respondent, and by the oral submissions of Mr Benson QC on behalf of Mr Milne. We are particularly grateful to Mr Benson because he has been good enough to appear *pro bono*.
3. For convenience, and meaning no disrespect, we shall for most part refer to people by their surnames only.
4. The prosecution case was that Barnard was a drug dealer, living in Portugal; that Milne acted as a debt collector and enforcer for Barnard, using violence if necessary; and that the fire was started because Jarrett owed a drugs debt to a man called Saunders who was said to be associated with Barnard.
5. The prosecution relied mainly on circumstantial evidence, including evidence to the following effect:
    (a) A green plastic petrol container was found outside the front door of the house, and a lighter was found nearby. DNA was recovered from both items, linking Milne to the petrol container and Barnard to the lighter.
    (b) On 6 July 2018 Milne bought 15 litres of petrol at a local petrol station.
    (c) ANPR evidence showed movements of a vehicle owned by Barnard which were consistent with a reconnaissance two days before the fire.
    (d) ANPR recorded another vehicle owed by Barnard, a Mercedes, driving towards the scene at 0024 on the night of the fire and driving in the opposite direction less than an hour later. The Mercedes was driven out of the country on a car ferry later that day.
    (e) Milne is a Glaswegian. His phone number was stored in Barnard's phone under the name "Scotty". Milne's phone had Barnard's number stored in its address book and had sent texts from "Scottish".
    (f) The applicants' phones were in communication on 9 July 2018. They were cell-sited in close proximity to each other at 8.45 that evening. They were both disconnected from the network after about 11.00 pm until a time after the fire.
    (g) A later search of Milne's home found not only the Taser but also a number of knives and other weapons.
6. The prosecution also relied on evidence that Barnard had confessed to an employee in Portugal, namely Sherwood, that he had to get a Mercedes out of the country because it had been used in a crime. He said that he and "a Scottish guy" had poured petrol through

a letter box and set fire to a house in order to make an example of someone who owed him money.

7. Although it was not necessary in law for the prosecution to establish any particular motive, they sought to show that Toby Jarrett's drugs debt provided the motive for the applicants to have set his house on fire. The prosecution therefore applied to adduce evidence from a number of sources in support of that allegation. Their primary contention was that it was evidence which "has to do with the alleged facts of the offence with which the defendant is charged" and was therefore excluded from the definition of "bad character evidence" by section 98 of the Criminal Justice Act 2003. In the alternative they contended that it was admissible as bad character evidence under one of three of the subparagraphs of section 101(1) of the 2003 Act, on the basis that it was important explanatory, paragraph (c); evidence going to an issue in the case, paragraph (d); or evidence to correct a false impression, paragraph (g).
8. So far as is relevant to these applications, the evidence in respect of which the application was made included the following.
9. First, evidence that on 10 January 2019 Nicholas Mann was assaulted in his home by two men. In summary, it was alleged that the two men had gained entry to Mann's home by pretending to be working for DHL Delivery. There was no evidence of any drug connection, nor of any debt owed by Mann. Mann said he did not know why he was assaulted or who the men were, but a box which they had left behind contained a card on which Milne's fingerprint was found. Further, a pair of gloves later recovered from Milne were found to bear the DNA of at least three people, one of whom matched Mann's DNA profile. Mann, at first, refused to make a statement, and the prosecution initially sought only to adduce the contents of his 999 phone call, which was said to be admissible under the *res gestae* principle and was therefore one of the exceptions to the hearsay rule preserved by section 118 of the 2003 Act. Later however, Mann agreed to give evidence and was cross-examined.
10. Secondly, evidence from Wayne Dedman, a neighbour of Milne, to the effect that Milne had said that he was a debt collector and had offered him work. Dedman's account was that he was told that Milne intended to cut or brand a drug user in Eastbourne who owed money to Milne's friend in Portugal. Dedman was offered money to help by restraining the victim and anyone else who was present, an offer which he declined.
11. Thirdly, evidence from Terry Taberer, who said he received a threatening note relating to payment of a debt, followed by several from a man with a Scottish accent repeating the threats.
12. These applications were resisted by counsel for both applicants, though Barnard did not dispute that evidence showing him to be a drug dealer could be adduced. The judge, having listened to the recording of Mann's 999 call and considered relevant case law, was satisfied that the possibility of concoction or distortion of Mann's account that he had just been attacked by two men could be discounted, and that the contents of the call were admissible as *res gestae*. She accepted the submission that all the evidence was relevant to the alleged motive of the applicants for starting the fire and was therefore admissible pursuant to section 98. In the alternative, if it was bad character evidence, the judge held that it was admissible under either paragraph (c) or paragraph (d), though not paragraph (g), of section 101(1).
13. The trial proceeded accordingly. Both applicants gave evidence denying any

involvement in the fatal fire.

14. Milne called as a defence witness a girl (aged 15 at the time of the trial) who lived opposite the house which was attacked. She had been 12 at the time of the fire. She had given an account to the police, which was recorded on video, in which she said that she had seen a man dressed in black, with a green petrol can, who had been hunched over by the front door of the house opposite and who had then run off taking the petrol can. A short time later she had seen that the house was on fire. In answer to further questions she said she was not sure whether the petrol can was taken away. Her account was inconsistent with the prosecution case, which relied on the CCTV footage showing two men leaving the scene, neither of whom was dressed in black. She was not relied upon by the prosecution. She was however called as a defence witness, with her recorded statement standing as her evidence-in-chief, and she was cross-examined.
15. The grounds of appeal of both applicants challenge the judge's ruling admitting the evidence of Mann. On behalf of Milne, Mr Benson emphasises the absence of any evidence that the assault on Mann was connected to a drug debt or indeed any debt owed to Barnard. He submits that there therefore could be no basis for viewing this as evidence showing an example of Milne enforcing a debt on behalf of Barnard. The evidence accordingly could not be said to have to do with the facts of the case. It did not meet the criteria for admissibility as bad evidence under either paragraph (c) or paragraph (d), in particular because it was not necessary to explain other evidence and in any event related to an event months after the fire. Mr Benson argues in the alternative that even if it were admissible as evidence of bad character, the evidence should have been excluded on grounds of fairness because it was highly prejudicial.
16. The written submissions of counsel on behalf of Barnard add that, even if it were relevant to the case against Milne, the evidence could not in any way be linked to Barnard and was therefore purely prejudicial in his case.
17. Milne has a further ground of appeal relating to the young defence witness. Mr Benson submits that the judge should have given the jury some guidance as to their approach to an account given by a witness as young as 12, but instead summarised the evidence in such a way as to suggest that it was inherently unreliable. It is further submitted that the judge's summary of the evidence was unsatisfactory, for example, because it reminded the jury of the girl's assertion that the petrol can had been taken away but did not remind them of her later acceptance that she was not sure about that point.
18. In his oral submissions Mr Benson indicated that he no longer pursued a ground of appeal which had challenged the rulings admitting the evidence of Dedman and Taberer.
19. Counsel who represented Barnard put forward only the one ground of appeal to which we have referred. Barnard himself has however put forward further written grounds, to which he has added additional points helpfully passed to the court by his mother on his behalf. In summary, Barnard contends that:
    (a) The jury who returned majority verdicts were rushed into giving those verdicts.
    (b) Reference was wrongly made to an inquiry into a man called Eldridge who had been reported missing in Portugal.
    (c) Reference was wrongly made to Saunders owing a drug debt to Barnard, when there was no such debt.
    (d) Police officers in court influenced the jury.
    (e) Others should have been charged, but the judge wrongly directed the jury that they

could only consider the applicants as suspects.

(f) Prosecution evidence had been altered or tampered with.

(g) The jury were not shown all relevant material, for example, relating to the cell-siting of one of his phones, and matters had been covered up.

(h) Prosecution witnesses were untruthful or unreliable, and parts of the evidence were inconsistent or contradictory.

(i) His instructions were not followed by his legal representatives.

(j) The judge's summing-up was unfair.

(k) The trial was unfair because the applicants were not provided with iPads similar to those used by the jury.

20. We have reflected on all the arguments advanced on behalf of the applicants.

21. It is, in our view, important to keep well in mind the CCTV footage which showed two men leaving the scene and the scientific evidence which established a clear DNA link between the applicants and the petrol container and lighter found at the scene. The jury were plainly entitled to infer from that evidence that the applicants were the arsonists. The jury could also infer that those who started the fire intended to kill the occupants of the house and so find them guilty of the offences charged in counts 1 to 3. That was so whether or not the jury accepted the prosecution case as to the alleged motive. Similarly, whatever the jury made of the evidence relating to motive, they were entitled to accept Sherwood's evidence that Barnard had confessed to setting the house on fire. It was not necessary for the prosecution to prove the alleged or any motive.

22. In her ruling on the admissibility of the evidence relating to motive, the judge expressly adopted the approach that this was a borderline case in which it would be appropriate to consider the application, both on the basis that it was evidence excluded from the statutory definition of bad character and on the basis that it was bad character evidence admissible only if one of the provisions of section 101(1) was satisfied. We respectfully agree. We also agree with the judge that whichever approach be adopted, the fact that evidence related to matters occurring after the fatal fire was not in itself necessarily a bar to it being admissible as evidence of motive. In particular, the case of R v Sule [2012] EWCA Crim 1130; [2013] 1 Cr App R 3, which was relied upon in argument, does not impose such a bar. That case was concerned with whether, on the facts, it was necessary to establish a close temporal link between the alleged offence and the earlier events which were said to have provided the motive.

23. We see no basis on which the judge's summing-up of the evidence of the young witness can be criticised. The evidence was summarised briefly but fairly. The direction which is said to have been necessary was not set out in precise terms, but Mr Benson submitted that there should have been a direction modelled on one recommended in the Crown Court Compendium at section 10-29 in relation to a very young complainant giving evidence of a sexual offence. That model is appropriate in a case where the allegation against the accused is based on the evidence of a very young child who, by reason of age, may for example have little or no understanding of the significance of the conduct he or she is describing. There does not appear to us to have been any reason why an analogous direction was necessary in relation to a defence witness aged 12, describing the actions of a person at the door of a neighbour's house in the early hours of the morning. The jury would be well able to evaluate her evidence and to consider the significance of the fact that her account of one man leaving the scene was inconsistent with the CCTV footage.

It is, we think, significant that the judge was not asked at the time to give such a direction. That is not a matter of criticism; it is, on the contrary, a reflection of the fact that no direction was needed.

24. So far as the grounds of appeal put forward by Barnard in person are concerned, we understand of course that the points which he makes are important to him. However, we can see nothing in them which even arguably casts doubt on the safety of his convictions. Some of the points relate to matters which either were considered by the jury or could have been, but were not, raised before the jury. Others are based on a misunderstanding by Barnard of the relevant law or procedure. In particular, the applicant appears to have misunderstood the process by which the prosecution and defence are able to decide what evidence they wish to put before the jury, and for submissions to be made if the admissibility of evidence is in dispute. We note that the timing of the judge's majority verdict direction was specifically discussed with counsel, and there is no basis for criticising it.
25. We therefore turn, finally, to the grounds of appeal relating to the assault on Mann. The complicating features of his initial refusal to co-operate with the police, the application by the prosecution to adduce the content of his 999 call under the *res gestae* principle, and the subsequent willingness of Mann to attend court and give evidence, may well have had the unintended effect of diverting attention from the real issue, namely whether the incident at his home was of any relevance to the issues in the trial, and focusing instead on matters which could only be significant if the evidence were indeed relevant.
26. We cannot see that the incident was of any relevance at all. It was an assault 6 months after the fatal fire, on a man who was not shown by any evidence to be in debt to Barnard or to anyone else involved in Barnard's drugs business. At most, it was evidence of an assault for which no explanation was given. The judge in summing-up at page 71A concluded her reference to this evidence by saying:

> "There's nothing to link this assault directly with Mr Barnard. There's nothing to link this assault with any drug debt that might have been being enforced on Mr Barnard's behalf. It is just one assault in January 2019, some months after the fire. It is an example of violent behaviour. That is all."

27. With all respect to the judge, we see considerable force in the submission that she fell into error in admitting the evidence in those circumstances. The prosecution had been permitted to adduce the evidence relating to motive in order "to explain the relationship of Barnard as drug dealer and Milne as debt enforcer to show the motive for the setting of the fire". Evidence of an example of violent behaviour by Milne 6 months after the fire could not be relevant in that way. No application had been made to adduce evidence showing a general propensity to violence, unconnected with debt collecting or enforcement, and no such application could have succeeded. The judge was entitled to conclude, in relation to the 999 call, that there was no real prospect that Mann had fabricated his report of an assault; but the mere fact that he had been assaulted was of no relevance to the case against either applicant, and it could therefore have no probative value. It was merely prejudicial evidence of violent behaviour by Milne.
28. We have therefore considered whether, if that evidence should not have been admitted,

its wrong admission renders all or any of the convictions unsafe. We are satisfied it does not, even arguably, do so. At its highest, the evidence neither advanced the case for the prosecution nor caused any significant prejudice to the case against Milne. The jury were directed that there was no evidence connecting this incident to Barnard, and it therefore could not cause any prejudice to his defence. For the reasons we have summarised earlier in this judgment, there was a very compelling case against both accused regardless of any evidence as to their motive. Their own evidence that they had no involvement in the fatal fire must have been disbelieved by the jury.

29. For those reasons, grateful though we are to Mr Benson, these renewed applications fail and are refused.