IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1002

No. 202202406 B1

Royal Courts of Justice

Tuesday, 25 July 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CUTTS
MRS JUSTICE TIPPLES

REX
V
ALISTAIR DICKSON

Computer-aided Transcript prepared from the Stenographic Notes of
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

Mr N. Edwards KC and Mr D. Webster appeared on behalf of the Applicant.
Mr J. Hallam KC appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE WILIAM DAVIS:

1 On the evening of 28 May 2021 Daniel Humble, a man in his mid-30s, was out with his partner, Adele Stubbs, in the village of Cramlington, a few miles north of Newcastle. Around midnight, they were on their way home when they encountered a group of seven young men, all aged around 17. The group predominantly came from Blyth which is a few miles from Cramlington. So far as we can identify from the evidence, none of the group knew Mr Humble or his partner. For whatever reason, Mr Humble and one of the group from Blyth (a young man called Soones) faced up to each other. There was some evidence that Humble hit Soones in that confrontation. Whether that occurred or not, Mr Humble was quickly surrounded by the group. He was knocked to the ground. Whilst on the ground, he was attacked by members of the group. The attack lasted only a few seconds.

2 Mr Humble suffered bruising to his chest and back from blunt impact trauma. No serious injury resulted from these blows. He also sustained bruising to the right side of the neck. The bruising had a distinct pattern, consisting of seven parallel bars. There was a similar pattern of bruising over Humble's lips. The most likely explanation for these injuries was a forceful stamp. The pattern was of a kind found on some brands of trainers. The stamping injury to the neck caused a tear in the right intracranial artery. This led to major bleeding within the brain. The brainstem was flooded, resulting in catastrophic brain failure. Mr Humble never regained consciousness. He died on 30 May 2021.

3 The seven young men from Blyth were charged with the murder of Mr Humble. They stood trial in the Crown Court at Newcastle. The trial commenced on 17 May 2022. At the conclusion of the prosecution case, the judge determined that two of the defendants had no case to answer. The jury remained in charge in relation to five defendants: Alistair Dickson, Owen Soones, Ethan Scott, Kyros Robinson and Bailey Wilson. On 5 July 2022, the jury convicted Alistair Dickson of murder. They convicted the other defendants of manslaughter.

4 Alistair Dickson now appeals against his conviction with the leave of the single judge. The single ground of appeal on which he has leave concerns evidence of footwear impressions. His argument is that evidence from the forensic scientist in relation to footwear marks was admitted when the substance of the evidence meant that it had no probative value in relation to any issue in the case. Since his conviction the appellant has obtained evidence from a different scientist with the same expertise. His secondary limb of the appeal concerns the application that this evidence should be received pursuant to section 23 of the Criminal Appeal Act 1968.

5 Today, the appellant has been represented by Mr Edwards KC and Mr Webster who represented him at trial. Mr Hallam KC has represented the respondent. We are grateful to all of them for their written and oral submissions.

6 At the start of the trial the evidence against each defendant consisted of their admitted presence and what was said by eye-witnesses who described the action of particular individuals and whom they thereafter identified. In the case of the appellant, he was identified by four eye-witnesses. Three of those witnesses could not be sure that the appellant played a particular part in the attack on Mr Humble. Their evidence took the prosecution case no further in itself since the appellant did not deny that he was with the group and close to the attack on Humble. One witness, Ryan Greenhough, identified the appellant as one of those attacking Mr Humble. He described the attack as a group kicking and punching Mr Humble.

7 Evidence of bad character emerged during the trial. The appellant was training, or serving,

in the Army. It was known to the prosecution that he had been subject to some form of disciplinary process by the Army relating to events not long before the events of 28 May 2021. Some disclosure was made. As a result of that disclosure, further disclosure was sought by those representing the defendant Scott. In his defence statement the appellant had alleged that Scott was the one responsible for knocking Humble to the ground and that Scott thereafter had been standing close to Mr Humble's head. Scott had met that with a counter-allegation against the appellant. Scott wanted material relating to the appellant in case it was of probative value in respect of the issue between them. Further disclosure then was given towards the end of May 2022. It established that the appellant on 1 May 2022 had become involved in an argument with another junior soldier. The appellant had punched the other soldier to the floor. He had kicked his head when he was on the floor. This behaviour had been admitted by the appellant. There was a finding to that effect at a summary Army hearing.

8 The judge admitted this evidence as evidence of propensity on the part of the appellant to use his feet to inflict violence. He also concluded that the evidence supported the identification evidence of Greenhough. Greenhough identified someone as being involved in kicking a man on the ground who less than a month earlier had kicked someone who was lying on the ground. The judge's ruling was made following an application by the prosecution pursuant to section 101(1)(d) of the 2003 Act. The application was supported by Scott. The judge did not rule on the question of whether the evidence was of probative value as between Scott and the appellant.

9 The facts relating to this incident were put into a written admission. We set all of that out because the admission of this evidence was the subject of a further ground of appeal in respect of which leave was refused by the single judge.

10 The appellant now applies for an extension of time of approximately five-and-a-half months to renew his application for leave to appeal on that ground. We shall return to that issue at the conclusion of our judgment.

11 Prior to the start of the trial, evidence in relation to footwear had been disclosed as unused material. This consisted of streamlined forensic reports from a scientist named Stephen Forth. They indicated a "potential match" between the appellant's training shoes and the pattern of bruising on Mr Humble's neck. Mr Forth also said that there was no pattern match between the training shoes recovered from other defendants and the bruising on Mr Humble's neck.

12 At the start of the trial those representing Scott indicated that they had instructed their own expert on footwear marks. This position was made known to all parties. Scott's reason for wishing to investigate the position vis-a-vis footwear related to the case as between him and the appellant. The disclosed material appeared to support the proposition that the appellant was responsible for the stamping. As such, it was relevant to an issue between the appellant and Scott. Other defendants wanted the exculpatory findings of Mr Forth placed before the jury. At this stage the prosecution took no steps to investigate the position further with Mr Forth or to serve his reports as evidence. The judge made his ruling in relation to bad character on 1 June 2022.

13 Following that, the prosecution decided to call Mr Forth as part of their case. They had already served his streamlined reports as additional evidence. They had determined that the totality of his evidence supported the prosecution case against the appellant. They had recognised that were they not to call Mr Forth, he would inevitably be called by one of the defendants. Those representing the appellant objected to the calling of Mr Forth. They argued that his evidence had no probative value in relation to the prosecution case. The fact

that other defendants might call him provided no basis for the prosecution adducing his evidence as part of their case.

14 On 7 June 2022, the judge ruled that the footwear evidence was probative of the prosecution case. The evidence had to be considered in the round. Mr Forth said that the appellant's training shoe could have created the pattern of bruising. Though he went no further than that in relation to the appellant's footwear, he excluded the footwear recovered from the other members of the group as being a potential source of the bruising. Since other evidence established that only the defendants were in a position to have caused the injury to Mr Humble's neck, the exclusion of the footwear of all the other defendants was relevant evidence against the appellant. The judge took account of the late stage in the trial at which the evidence had been served by the prosecution. However, he noted that the issue of expert evidence about the footwear had been flagged up at the start of the trial and the appellant's legal team were in a position to obtain their own expert advice.

15 The defence instructed Mr Baker. He and Mr Forth prepared a short joint report dated 10 June 2022. They agreed on all points. The essence of their agreed position was as follows. It was not possible to disassociate the footwear recovered from Mr Dickson at the time of his arrest with certain marks resembling short parallel shapes on the deceased's neck. When reporting a case of this type the forensic scientist would typically utilise one term from a series of terms based upon a verbal scale. These terms related to the evidential strength of any possible association or exclusion when considering alternative propositions. These propositions ran from "no support" to "conclusive support". Any possible association between the footwear of Mr Dickson and the marks on the deceased's neck was less than limited. There were other marks on the victim's neck which could not be attributed to any specific item or surface, including the footwear submitted.

16 Mr Forth gave evidence on 13 June 2022. He said that he had been able to compare the pattern of bruising, consisting of rectangular bars, with the sole pattern of various pairs of training shoes. Only one pair of shoes had a sole pattern consistent with the pattern of bruising. That was the pair of shoes recovered from the appellant. However, there was nothing which allowed him to say one way or the other whether those shoes in fact had made the marks. He could align some of the rectangular bar markings on the appellant’s shoes with the marks on the neck but no more than that. He said that a rectangular bar pattern on the training shoe is not uncommon. He said that the other shoes could be excluded because they did not have such a pattern.

17 When the judge came to sum up this part of the evidence, he said:

> "What about the trainers? Well, you have had expert evidence on that from Steven Forth ... It comes to this, doesn't it, the trainers that Mr Dickson admits wearing could have caused the mark to Mr Humble's neck. The trainers the police supplied to Mr Forth as being worn by the other, at that stage six defendants, can be excluded as having caused the stamp mark over the site of the single impact that, in [the pathologist's] opinion, caused the fatal injury.
>
> Mr Forth said, 'We look at two mutually exclusive propositions: One, the shoe made the mark on the neck. Two, the shoe did not make the mark on the neck.' And his conclusion was there is 'No support' for either of those propositions. And he said, 'I can neither include, or exclude, those shoes from having made the mark.' He said, 'In my experience it is not uncommon to find a series of parallel lines arranged in a row on the soles of other unknown footwear, or

> indeed other items and surfaces.' So, there was nothing to exclude Mr Dickson's trainers, and then he showed you how the lines on an image of the injury to Mr Humble aligned with the trainer he was provided with as having come from Mr Dickson. He said he could exclude the other pair[s] that had been sent to him.
>
> Now, there was some challenge to Mr Forth, the forensic scientist, on one aspect. It was suggested the finding of no support was the very bottom of the scale, and he said, 'Well, no as that's the middle of the scale, if you the scale stretches one way ... -- can I identify the trainer as having caused the injury, but it also stretches the other way so you cannot exclude it.' Well, it is perhaps a slightly academic debate, whether it is the bottom of the scale or the middle of the scale, as long as we understand what Mr Forth is, and is not saying."

18 The judge went on to deal with the main factual challenge on the appellant's behalf relating to training shoes, namely that the jury could not be sure that the police had seized the right trainers from all the other defendants. Police officers gave evidence that they had compared the shoes recovered with what they could see on CCTV footage and that they were confident that they had seized the shoes worn on the night of 28 May 2021 by the various defendants. When the other defendants gave evidence they said that the police had taken the shoes they had been wearing at the relevant time. One defendant, Robinson, was challenged about this on behalf of the appellant. Robinson said he had left the shoes he was wearing at his mother's house which is where they had been seized by the police.

19 In writing, Mr Edwards, on behalf of the appellant, argued that the footwear evidence should not have been admitted at all since it was not probative of any issue in the case whether as between the prosecution and defence or between the defendants. It is said that there was a significant procedural failing in that the prosecution did not serve a full report from Mr Forth. Rather, they relied on the streamlined reports. This was contrary to what was said in *R v T* [2011] 1 Cr.App.R 9 at [109]. Further, the prosecution were permitted to call Mr Forth even though there was an agreed statement with the defence expert. The evidence should have been put before the jury in agreed form. Criticism was made of the judge's summing-up of the expert evidence. When the judge said that the effect of Mr Forth's evidence was that the appellant's trainer "could have caused" the bruising on Humble's neck he was overstating the effect of the evidence. This error was compounded by the judge's reference to "middle of the scale" which would have led the jury to think that the evidence of Mr Forth had a greater weight than, in fact, it did.

20 These were the submissions which were considered by the single judge. We consider that, whether taken together or individually, they provide no basis for undermining the safety of the conviction. Mr Forth at no point purported to say that the appellant's footwear positively could be associated with the bruising. The effect of his evidence was that it could not be excluded as having caused the patterned bruising.

21 Had that evidence stood alone, in all likelihood it would not have been of probative value. Its value came from the fact that there was a limited group of training shoes which could have caused the bruising. It was at least highly likely that it had been caused by a shoe worn by one of the group which surrounded Mr Humble. The evidence, not least that of the appellant himself, established the identity of each member of the group. The training shoes seized from each member of the group, other than the appellant, were excluded as a potential cause of the bruising. That meant that the very limited association between the appellant's footwear and the bruising had a probative value which it would not otherwise have had.

22 The judge's summing-up accurately reflected the position. The appellant's training shoes

could have caused the bruising in the sense that they were not excluded in the way that the footwear of the other defendants was. When the judge referred to the evidence about "middle of the scale", he did not do so in order to emphasise the weight of Mr Forth's evidence. Rather, he reminded them of the exchange with counsel in order to point out that the use of the term was academic. What mattered was a proper understanding of the effect of Mr Forth's evidence. That was as set out in the earlier passage of his summing-up.

23 The significance of the exclusion of the other defendants' training shoes from being responsible for the patterned bruising was dependent on a jury being satisfied that the police had seized the shoes being worn on the night of the attack. This was acknowledged by the judge. He summed up the evidence of the relevant police officers and of the other defendants. He summed up the cross-examination by the appellant of the defendant said by the appellant to be responsible for the stamping. What the jury made of this evidence was a matter for them. All we can say is that it cannot be argued that the evidence did not justify the conclusion that the training shoes examined by Mr Forth were those being worn by the defendants at the time of the attack.

24 The lack of a full report from Mr Forth might have been of significance if he had been making positive assertions about particular items of footwear. In *R v T*, the expert had provided a likelihood ratio for the footwear in question having caused the mark without providing proper detail of how he had calculated that ratio. It was in that context that the court emphasised the need for a full and transparent report. Here, Mr Forth simply said that various items of footwear could be excluded because the pattern of bruising did not match the pattern on the soles of the footwear. One item of footwear had a pattern on the sole which could have caused the pattern of bruising. The streamlined reports made it quite clear how he reached that very limited conclusion. A full report would have added nothing.

25 It would have been inappropriate for the judge to prevent Mr Forth from being called to give evidence. The trial had to be fair for all parties. The other defendants were entitled to require Mr Forth to give evidence so that they could underline the exculpatory effect of his evidence in relation to each of them. The evidence given by Mr Forth went no further than the material set out in his report. Complaint is made of the fact that he gave a demonstration in the course of his evidence. He did so when he was being asked about a particular aspect of the comparison he had made between the bruising and the shoe pattern. What Mr Forth did was to overlay one pattern over the other. The appellant has categorised that as "a novel evaluation and a surprise demonstration". We consider that to be an exaggerated description. Mr Forth's demonstration, in our view, was no more than might have been expected in the course of such comparison evidence about footwear. No complaint was made about it at the time albeit we understand the difficulties of making observations when a witness is giving evidence via a video link. The reality is that Mr Forth's demonstration in no way added to the evidence that was already before the jury and about which the defence were fully aware. It follows that there is no sustainable complaint about the demonstration.

26 In those circumstances we are in no doubt that the criticisms of the judge, whether by reference to the admission of Mr Forth's evidence or the summing-up, have no substance.

27 After the single judge considered the application for leave the appellant served evidence from Dr Sarah Jacob, an expert in the comparison of footwear marks. It is said that this is fresh evidence and should be received by this court. Dr Jacob's first report was dated 1 December 2022. She examined the appellant's training shoes and at least some of the training shoes recovered from other defendants. She compared the pattern on the soles of those shoes with the pattern of the bruising. Her report was lengthy and discursive. However, she quoted the significant parts of Mr Forth's reports and agreed with what he had said. She did give different emphasis to the angles of the markings within the bruising. She

described the effect of the findings when she said:

> "Since it is not possible to exclude the markings from having been made by the shoes relating to Alistair Dickson, it can be said that the markings could have been made by the shoes. However, to do so is, in my opinion, misleading as it implies a stronger connection between the shoes and the markings than there actually is. It must be remembered that whilst there is no evidence to exclude the markings from having been made by the shoes, there is also no evidence to reliably link the markings and the shoes. The markings could have been made by many other items, including items of footwear. A better way of phrasing the results of the footwear comparison is to say that the findings should be regarded as inconclusive."

28 On 9 June 2023, Mr Forth and Dr Jacob prepared a joint statement. They set out a series of matters upon which they agreed, asserting that their agreement was in line with the views they had expressed in their respective reports. In respect of the appellant's training shoes, they said this:

> "We agree that there were features in the marks on the neck of Daniel Humble which appear to resemble short parallel shapes. Three of these shapes were similar and approximate spacing and length to the short parallel bars around the edge of the training shoes EP9 and EP10 (the training shoes of the appellant). Two further shapes showed differences in length compared to the bars on the training shoes. We agree that given the limited area and poor definition of the marks on the neck of Mr Humble it is not possible to say whether or not any of these observed similarities or differences are reliable. Therefore, it was not possible to either associate or disassociate the footwear from having made these particular marks."

They went on to say this at paragraph 17 of their joint statement:

> "We agree that in our opinion whilst there were no visible discernible features/marks that resemble the various pattern elements present on the soles of these four pairs of training shoes, the nature of the marks prevents us from completely excluding them from having been made by any of these four pairs of shoes entirely."

29 Dr Jacob's second report consisted of further commentary on the use of language and, perhaps surprisingly, discussion on the content of the respondent's notice in these proceedings. However, the core of her conclusions at page 6 of the report were as follows:

> "I agree that our evidence is essentially the same. The key point is that there are a number of technical disagreements on the best way to articulate the evidence. It is imperative that the terminology used needs to be explained to the jury correctly and not have the potential for misinterpretation by the jury. In particular, it is important that the jury understand that the poor quality and limited area of the mark(s) is such that the findings do not help in determining

whether the prosecution viewpoint that the mark(s) were made by the shoes or the defence viewpoint that the mark(s) were not made by the shoes is true."

Dr Jacob's reference to "our evidence" was her evidence and that of Mr Forth.

30 The appellant's argument is that Dr Jacob's reports demonstrate that "palpably wrong and entirely misleading evidence" was given at the trial. Had her evidence been available, the jury would have been provided with a quite different perspective in relation to the footwear evidence. The interests of justice require this court to receive the evidence. Particular reliance is placed on what was said in paragraph 17 of the joint statement.

31 We shall deal first with paragraph 17. Mr Edwards argued that this agreed position undermined the core proposition relied on by the prosecution, namely that the shoes of the other defendants could be excluded as having caused the bruising. On the evidence of the expert witnesses, those shoes could not be completely excluded entirely. We consider that it is instructive to consider what Dr Jacob said on this topic in her first report:

> "With regards to the other six pairs of footwear which Mr. Forth has compared to the markings on the neck, I have had the opportunity to examine four of these. The remaining two pairs corresponded in pattern and were similar in size to two other pairs of shoes amongst the four I have examined. I have therefore used test marks from these pairs of shoes to represent the arrangement of pattern elements on the missing two pairs of shoes. Comparison showed that there were no features visible in the marks which appeared to correspond to pattern elements on the soles of any of the pairs of training shoes."

In her second report she did not specifically address this issue again. However, she did say that she agreed with Mr Forth's overall conclusion. We do not consider that the passage in paragraph 17 of the joint statement has the significance ascribed to it by Mr Edwards. The experts necessarily were expressing caution because of the nature of the marks on Mr Humble. They were over a limited area and poorly defined. The fact remained that none of the other shoes had any parallel bar markings of the kind found on the appellant's footwear. That was the true substance of Dr Jacob's evidence as set out in her first report. Had the jury had all of the evidence now available, the factual position would have been the same. Each defendant with training shoes without parallel bar markings would have been able to made the point that those shoes had no features corresponding to the marks on Mr Humble. We note that no reference was made to paragraph 17 of the joint statement in the skeleton argument dated 19 July 2023. Had it been of the significance now asserted by Mr Edwards, we would have expected specific reliance to have been placed on it.

32 In our judgment, the evidence of Dr Jacob should not be received. It is not fresh evidence in any real sense of the term. At the trial, the appellant had the benefit of an expert, Mr Baker. His view accorded with that of Mr Forth. Dr Jacob's expertise is precisely the same as that of Mr Baker. Section 23 of the 1968 Act is not to be used to substitute the evidence of an expert called at trial with a new expert. That would be so even if the evidence of Dr Jacob departed in some material way from the evidence given at trial. Even taking into account paragraph 17, we consider that it did not do so. She agrees with the opinion of Mr Forth. We consider that her reports demonstrate some lack of appreciation of the way in which the footwear evidence was used at trial. The prosecution did not argue that the scientific evidence showed that the bruising pattern was made by the appellant's training shoes by reference to comparison of particular marks and an assessment of likelihood. Rather, the prosecution case was that there was a defined group of people who could have stamped on Mr Humble. Of that defined group, all but one were wearing shoes which could not be matched to the bruising. The appellant's shoes could have caused the bruising. That was as

far as the scientific evidence went. Its significance was to be judged in the context of the evidence as whole.

33 The approach taken by the judge was correct. He did not overstate the position. The jury were not misled. Had the jury been presented with the evidence in the terms as set out in paragraph 17 in the joint statement, the terms of the judge's summing-up on the issue would have been amended. He would have said that the trainers worn by the other defendants had no discernible features, comparable with the marks on Mr Humble's neck albeit that the scientists could not completely exclude them from having made the marks entirely. In our judgment, that would not have made any difference at all to the jury's appreciation of the evidence.

34 It follows that the evidence of Dr Jacob should not be admitted. It cannot afford any ground of appeal.

35 We turn to the application to extend time to renew the application for leave to appeal in relation to the admission of bad character evidence. The first indication that any such application might be made came in the skeleton argument to which we have already referred. In that skeleton argument submissions were made in respect of the bad character evidence. It appeared to the court that those submissions were made on the assumption that the court would consider this issue as part of the appeal. This was in the teeth of a letter sent, and dated 24 January 2023, by the court to counsel for the appellant. That letter made it clear that any application to renew in relation to the ground on which leave had been refused by the single judge had to be made within 14 days.

36 In the absence of such an application, the ground refused by the single judge would be deemed to have lapsed. It was only on 21 July 2023 when the court inquired of counsel as to the position that it was indicated that leave would be sought. Nothing was said then about why an extension of time was justified. The written application we now have simply says that counsel overlooked the requirement to make an application to renew.

37 If there were any merit in the complaint that the judge erred in admitting the bad character evidence, we would have to consider whether the interests of justice required us to extend time. In our view the complaint is without substance. Less than a month before the fatal attack on Mr Humble, the appellant had kicked a man whom he had knocked to the ground. This behaviour, which was admitted by the appellant, was probative of the overall prosecution's allegation against him, namely that he had been part of a group surrounding Mr Humble on the ground and kicking him. The single judge properly described this as "powerful evidence". He went on to say that there had been a delay in making the application to adduce the evidence of bad character. This has been investigated by the trial judge. In the main, this was not the result of any fault or deleteriousness on the part of the prosecution. The single judge observed that there was no identifiable prejudice which flowed. We agree without reservation with those observations. He did not expressly refer to the proposition relied on by the appellant to the effect that the bad character evidence bolstered a weak case.

38 For the purposes of this appeal, we have to consider the position at the conclusion of the prosecution case. At that point, could the case against the appellant, absent the bad character evidence, properly be described as weak? It could not. The appellant had been identified by one witness as kicking and punching Humble. Other witnesses identified him as being close to the group which was attacking Humble albeit that they were not able to say with certainty what he had been doing. The appellant was wearing training shoes which could have caused the fatal injury in contradistinction to the footwear of other defendants. The case against the appellant was strong.

39 For all those reasons, we find there is no merit in the ground relating to the admission of the bad character evidence.

40 It follows from that that we dismiss the appeal on the ground on which the appellant had leave and we refuse to extend time to renew the application for leave to appeal on the ground where the single judge refused leave.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.