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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1687

CASE NO 202101130/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 14 December 2023

Before:

LORD JUSTICE COULSON
MRS JUSTICE McGOWAN DBE
MR JUSTICE SWIFT

REX
V
KHAYAM KHURSHID

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MR J DEIN KC appeared on behalf of the Applicant

J U D G M E N T

LORD JUSTICE COULSON:

1. Introduction

1. The applicant is now 31. On 26 March 2021 in the Crown Court at Manchester (Yip J and a jury), the applicant was convicted of murder and possession of a firearm with intent to endanger life. He was sentenced to life imprisonment with a minimum term of 27 years. His co-accused, Kamran Mohammed was also convicted on both counts and received the same sentence. Mohammed Khan was convicted on both counts and received a minimum term of 24 years. Another man, Raheem Hall, was sentenced to four years' imprisonment for assisting an offender.

2. The applicant sought permission to appeal against his conviction on the ground that the identification evidence against him was so weak that the judge should have withdrawn the case from the jury. That application was refused by the single judge. It is now renewed to the full court. In addition, Mr Jeremy Dein KC, who did not appear at the trial, now seeks to amend the grounds of appeal to add a fresh ground of appeal which in turns seeks to rely on fresh evidence.

3. We propose to summarise the evidence at the trial before going on to consider, first, the original ground of appeal and, second, the application to amend the grounds, which itself involves a careful scrutiny of the application to adduce fresh evidence. We are very grateful to Mr Dein for his assistance this morning and his clear and concise submissions.

2. The Trial

2.1. The Facts

4. The background to the murder of Cole Kershaw, aged just 18, on 12 August 2020, lies in the bad blood between Kamran Mohammed and his associates (including the applicant) and a man called Spencer Woods and his associates, which included Cole Kershaw. In April 2020, Woods was the victim of an attack by a group of masked men which he said included both Mohammed and the applicant. They pulled up in a BMW motorcar armed with baseball bats and machetes. They blocked him in, dragged him from the car and attacked him, leaving him with significant injuries. The applicant was arrested in connection with the attack and subsequently released on bail.

5. It is clear that Kamran Mohammed had access to a gun. On 8 August 2020 he attended the house of a woman called Laci Tobin who had at different times been both his girlfriend and the girlfriend of the applicant. He produced what she believed was a gun and threatened her with it. It appears that the threats were in connection with Tobin's relationship with Woods.

6. In the early hours of 12 August 2020, there was a flurry of communications amongst and between the two groups. At the time Woods was with Tobin at her home. Kamran Mohammed had shown up and was driving around the street outside Tobin's house. In the end there was a verbal altercation between Woods and Mohammed.

7. During the course of the day of 12 August, the applicant had been driving around in a dark BMW 1 Series, along with another man called Harris Hussain. The applicant was in

fairly regular telephone contact with others in his group, including the co-accused Khan. That regular contact continued until about 20.54. Thereafter the applicant's phone was not used for the next hour or so because, said the Crown, he was with Mohammed and Khan. By the time it was used again Cole Kershaw had been murdered.

8. At around 21.15 the BMW 1 Series was captured on CCTV in the relevant area. The vehicle movement evidence showed it to be in close proximity to a BMW 5 Series. It was the Crown's case that the applicant parked the 1 Series and joined Mohammed and Khan in the 5 Series. Just after 21.30, the 5 Series went past the address of a woman called Tia Mawdsley, a friend of Cole Kershaw's. At that time Woods and some others (including Kershaw) were present at Mawdsley's property. Telling Mawdsley to lock the door behind them, they left in a Mondeo. The BMW 5 Series followed the Mondeo. At one point two shots were fired from the BMW. What had become a chase ended when the Mondeo was unable to pass another vehicle and the BMW collided into the back of it. The occupants of the Mondeo alighted and a third shot was fired from the BMW, hitting Kershaw in the chest and killing him.

9. The BMW 5 Series left the scene. It went from Bury to Norden. At about 21 45 two people, Mohammed and Khan, were seen walking away from where the car was parked up. At about 21.50, the BMW 1 Series was seen nearby.

10. It was the Crown's case that the applicant had been in the BMW 5 Series at the time of the shooting and had then gone back to the BMW 1 Series. From this point the applicant's telephone became active again, including calls to Mohammed. It was also the Crown's

case that, subsequently, Mohammed told Tobin that Kershaw "deserved it". Mohammed then made a call to Raheem Hall, who drove him to purchase some petrol, and the BMW 5 Series car was subsequently set alight.

11. Shortly after the murder the applicant went to the Netherlands. He was arrested in Amsterdam on 18 August. He agreed to be extradited and returned to the United Kingdom on 27 August. He was charged with murder and possessing a firearm with intent to endanger life. His response was that he was not in the BMW 5 Series, but outside the Best One shop at the relevant time. His defence case statement reiterated that alibi. It said that his evidence of alibi would be supported by the people he was with. He included a list of names of these people in his defence case statement: Jordan Fenton, Natasha Fenton, Dane Blaney, Malik Khan and Harris Hussain.

12. The applicant accepted that he drove the BMW 1 Series on 12 August and he accepted that the mobile phone was correctly attributed to him. He accepted leaving the jurisdiction. He said that he had been told that a friend of Spencer Woods had been shot and killed and, because he had been arrested for allegedly assaulting Spencer Woods earlier in the year, and there were social media posts that claimed he was involved in the shooting, he panicked and fled the jurisdiction.

13. The prosecution case against the applicant relied on a number of separate strands of evidence. We identify each of them.

2.2. The Identification Evidence of Spencer Woods and Owen Tyrrell

14. In evidence, Woods said Cole Kershaw came into Mawdsley's property and said "they" were outside. At first he only mentioned “Khayam” (the name by which Woods knew the applicant), but then referred to both Mohammed and Khan being present as well. They were in a BMW. Woods said that he, Kershaw and some others got into the Mondeo and gave chase. He said that he thought the driver was the applicant, but accepted he was wearing a blue mask and could not be sure. After the crash, he left the Mondeo and took a quick glance over his shoulder. He said he thought the driver was the applicant: he was the same shape as the applicant. He could not "say 100%" but he thought that the driver of the BMW 5 Series was the applicant.

15. Owen Tyrrell said that Kershaw came into the house and said that the applicant was outside in the car. Tyrrell said he saw a dark grey BMW with the applicant in the driver's seat wearing a blue Covid mask. He saw a gun later when the windows were wound down. He saw two people in the car. He could not fully see the driver and could not make out who they were at that point. After the crash, he saw the driver of the BMW aiming at his group. He was definite that the shooter was not Mohammed based on the man's size. He could not fully say who had the gun, but if he had to say someone he would say it was the applicant.

16. During his cross-examination, Tyrrell accepted that he could not say for sure that the driver was the applicant, but he said he could "almost say for certain". After the crash, he got out and began to run. He ran around about half the length of a football pitch before he glanced back and saw the shooter wearing a mask. At this point he was almost certain it

was the applicant, as he saw him with his own eyes, he said. He also said it was not really a possibility that he had mistaken someone else for the applicant, although he said it was possible.

2.3. The Number of Occupants

17. An independent witness, Mark Nabb, saw the two cars during the chase. He heard the crash and saw the BMW reverse away. He said there were three people in the BMW. He was pretty sure there were two people in the front and one rear seat passenger. In his own evidence, Woods said that after the collision he saw both the front and the back passenger doors of the BMW open (which again indicated three people).

18. Another witness, Sam Adesanya, who was in the Mondeo, saw "two passengers" in the BMW. He identified two people in the front. He also said at a different time in his evidence that there were two people in the car, and there was other evidence to that effect.

2.4. Telephone Evidence

19. The Crown relied on telephone evidence. During the day of 12 August, there was plenty of telephone contact between the applicant, Mohammed and Khan. After the call with Khan between 20.54 and 20.56, when the phone was in the area of the Best One Shop in Chesham Fold Road, there was no contact to or from the applicant's phone until after the shooting. Moreover, cell site evidence was also consistent with the applicant's phone being in the area which included the Best One Shop between 21.43 and 21.47. At 21.46, 11 minutes after the shooting, Khan made a 32 second voice call to the applicant.

2.5. Movement of Vehicles

20. The evidence was that around 21.15 hours, the BMW 1 Series which the applicant had been driving, and the BMW 5 Series, were in close proximity to one another. The BMW 1 Series passed a CCTV camera at 21.18 but it then remained out of sight until it was seen after the murder at 21.49, near the Best One Shop. At the trial, the defence did not dispute that the vehicle movements and timings were such that they could have provided the applicant with the opportunity to transfer from one car to the other shortly after 21.15. As the judge was to put it in her ruling on the application of no case to answer:

> "It would be a surprising coincidence for those vehicles to be travelling so close to each other on routes that do not appear to represent obvious thoroughfares."

21. Following the shooting, the BMW 5 Series travelled to Shelfield Lane in Rochdale. Mohammed and Khan were sighted by the vehicle at 21.46 which was the time at which, after the lack of telephone activity, Khan called the applicant.

2.6. The Applicant's Actions After the Shooting

22. As we have said, the applicant fled to the Netherlands in consequence of the shooting and made arrangements through his sister to travel to Dubai. He was arrested in Amsterdam before that could happen.

2.7. Summary of Evidence Against the Applicant

23. It was the Crown's case that the eyewitness identification evidence, the evidence as to there being three people in the car, the telephone evidence, the vehicle movement

evidence and the flight abroad, when taken together, comprised a clear and cogent case against the applicant based on joint enterprise. In response, although the applicant called one of the witnesses referred to in his defence case statement (Natasha Fenton whose evidence we address below), he did not call any of the others on the list attached to his defence case statement. He did not give evidence himself. He was convicted by a majority of 11 to 1.

3. The Current Ground of Appeal: the Application of No Case to Answer

3.1. The Original Application

24. At the close of the prosecution case, it was argued on behalf of the applicant that there was insufficient evidence to leave the case to the jury; It was submitted that there was no case to answer. That application relied wholly or substantially on the identification evidence, so the guidance in *Turnbull* (1977) QB 224 at 228-231 was relevant. It was said that the identification evidence against the applicant was very weak, and the Crown's position was complicated by the fact that Mohammed had admitted manslaughter and said he was both the driver and the gunman.

25. The Crown's principal response was to say that the identification evidence was only one part of the case against the applicant. They referred to, not only the eye witness evidence of identification, but also the independent evidence as to the number of people within the BMW 5 Series, the telephone evidence, the movement of the vehicles, the applicant's movements post-shooting, the decisions to flee the jurisdiction and the background facts, which included of course the alleged attack on Woods in April 2020.

3.2. The Judge's Ruling

26. The judge refused the application of no case to answer in a detailed written ruling which ran to 43 paragraphs. The judge noted that, whilst it was fair to acknowledge that the evidence of Woods and Tyrrell was "not the strongest of identification evidence", necessitating a robust *Turnbull* direction, the jury was well placed to consider the deficiencies in that evidence. She also referred to the independent evidence as to the number of people in the car, the telephone evidence, the movement of the vehicles (in respect of which she said the proximity between the vehicles in time and space "is striking"), and therefore the reasonable inference open to the jury that the applicant met the BMW 5 Series. She also referred to the background and the conduct after the shooting. She concluded as follows:

> "41. When these threads are put together, they provide support for the identification of Khurshid as one of those in the BMW 5 series at the time of the chase and shooting. That is not to ignore the fact that there are multiple points that the defence can make as to the strength of both the identification evidence and the other supporting evidence. I recognise the need for particularly careful direction to the jury in relation to the case against Khurshid. Ultimately though the assessment of the weight to be given to all the strands of evidence upon which the prosecution rely is a matter for the jury.
>
> 42.As in *R v Holmes* [2014] EWCA Crim 420, I consider it appropriate to leave the case to the jury notwithstanding that there are clear points for the defence to make as to the reliability of the identification. That identification is central to the case but it is supported by circumstantial evidence which does lend some support to it. In those circumstances I am not persuaded that the evidence against Khurshid is so weak that no reasonable jury properly directed could convict.
>
> 43. It follows that the submission that there is no case for him to answer must be refused."

3.3. The Ground of Appeal

27. The original and perfected ground of appeal was that the judge should have allowed the application of no case to answer because she "did not take into consideration the state of [Woods' and Tyrrell's] evidence at the end of cross-examination." In addition, it was said that there was no consideration of a central weakness in the Crown's case, namely that the Crown on the one hand was adducing evidence that the applicant was the driver and the shooter, whilst at the same time adducing evidence that Mohammed was the driver and shooter. It was said that these two positions were irreconcilable.

3.4. The Single Judge

28. The single judge rejected the application for permission to appeal on this basis. He noted that there was no argument that the judge did not apply the correct test in law. The only issue was whether there was sufficient evidence that the applicant was in the BMW 5 Series car which was involved in the chase, collision and shooting. He too noted that there was not simply the identification evidence from Woods and Tyrrell, but the other strands of evidence to which we have referred. He concluded that there was sufficient evidence for the case to go to the jury.

29. The single judge also dealt with the complaint that the judge did not take into consideration the state of the identification evidence of Woods and Tyrrell at the end of their cross-examination. He rejected that: he said that the judge had fairly summarised the evidence of both witnesses in her ruling, including some of their doubts which were elicited in cross-examination. He also said that the judge correctly concluded that the evidence of Woods and Tyrrell placed the applicant in the car at the relevant time, and

that that was the critical issue, rather than whether or not the applicant was the driver. He observed that, in so far as there was a degree of uncertainty expressed in relation to the identification by both witnesses, that did not lead to an acceptance of the submission of no case to answer. It was not necessary for every individual strand of evidence to be proved beyond reasonable doubt; the jury had to consider the evidence as a whole.

30. Finally, the single judge addressed the point that the identification evidence had to be considered in the light of the evidence that Mohammed had said that he was the driver and the shooter. The single judge pointed out that at the time of the submission of no case to answer, no such evidence had been given. Furthermore, he noted that in any event, that admission could not affect the sufficiency of the evidence against the applicant because the prosecution had, all along, been based on joint enterprise. The prosecution had been careful *not* positively to contend that Mohammed was either the driver or the shooter, nor were they required to do so. The single judge therefore rejected that final strand of this ground of appeal.

3.5. Analysis and Conclusion on the Original Ground

31. Mr Dein has made careful submissions in support of this ground of appeal. He has also provided a helpful written submission in which he sets out the reasons why he says that the identification evidence was central and, because of its weaknesses, the case should have been withdrawn from the jury.

32. We start the analysis with the law. As is well known, ***Turnbull*** is authority for the

proposition that:

> "When in the judgment of the trial judge the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

33. The effect of that proposition and its relevance in cases where there is an application of no case to answer was dealt with by this court in *R v Goddard and Fallick* [2012] EWCA Crim 1756 at paragraph [36]:

> "We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the 'classic' or 'traditional' test set out by Lord Lane CJ in *Galbraith*. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether ***a*** reasonable jury, not ***all*** reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that ***a*** reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

34. Applying that approach to the evidence in this case, we agree with the single judge. We consider that there are two answers to the first and original ground of appeal.

35. First, although the identification evidence in this case plainly raised *Turnbull*-type concerns (as the judge expressly found), that needs to be put in context. There were not one but two witnesses who gave positive identification evidence in relation to the

applicant, and neither was solely restricted to what is sometimes referred to as "a fleeting glance". It was a matter for the jury how they assessed that identification evidence as a whole. Furthermore, that identification evidence was supported by the independent evidence that there were three people in the car. Because of the uncertainties, fairly accepted by both Woods and Tyrrell in cross-examination, the need for a robust *Turnbull* direction was recognised by the judge. She subsequently gave such a direction and there is and can be no complaint about it. So this was not a case in which the identification evidence, even viewed in isolation, with so weak as to require the case to be withdrawn from the jury.

36. Secondly, the identification evidence does have to be looked at in conjunction with the other evidence. We have already referred to the separate evidence about there being three people in the car. Again, taken at its highest, that was directly supportive of the identification evidence against the applicant. And then are also the other elements of the evidence, going back to the attack in April 2020. There was also the telephone evidence, the movement of the various vehicles (to which the judge ascribed particular significance) and the applicant's original decision to flee the jurisdiction. When taken in the round therefore we consider there was a case for the applicant to answer.

37. As to the two specific complaints made about the judge's ruling - namely the failure to acknowledge the doubts expressed by Woods and Tyrrell, and the alleged failure to take into account what Mohammed said, we have already set out what the single judge concluded about those two matters and his answers to those two criticisms. We agree with those answers and cannot usefully add to what the single judge said.

38. For those reasons therefore we refuse the renewed application to rely on the first and original ground of appeal.

4. The Application to Amend the Grounds

4.1 The Law

39. The applicant is seeking to amend the grounds of appeal out of time and to rely on fresh evidence. As to the amendment, permission is required pursuant to the Criminal Procedure Rules 36.14(5), and Criminal Practice Direction IX.39C. As set out in *R v James* [2018] EWCA Crim 285 at [38], a court considering such an application should take into account (i) the extent of the delay; (ii) the reason for the delay; (iii) whether the issue/facts were known to the applicant's representative at the time he or she advised the applicant regarding any available grounds; (iv) the overriding objective of acquitting the innocent and convicting the guilty and dealing with the case efficiently and expeditiously; (v) the interests of justice.

40. Section 23(2) of the Criminal Appeal Act 1968 governs applications to rely on fresh evidence. The Court of Appeal must have regard to the following when considering such an application:

(a) whether the evidence appears to the Crown to be capable of belief;

(b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies or an issue which is the subject of the appeal;

(d) whether there is a reasonable explanation for the failure to adduce the evidence in these proceedings.

As is emphasised in *R v Vowles* [2015] EWCA Crim 45, [2015] 1 WLR 5131, the court should focus in particular on why the fresh evidence was not called at trial and whether it is in the interests of justice that it should be admitted, notwithstanding that failure.

41. We should say at the outset that, although some considerable time has elapsed between the conclusion of the trial and the making of the application to amend and to rely on fresh evidence, we do not consider that any delay should be held against the applicant. Mr Dein has explained how the delays have come about. We understand the difficulties faced by an applicant serving a lengthy prison sentence, such as is the case here, and the stresses and strains on his family. Accordingly, we do not make any adverse finding in respect of the delay in making the application.

42. As set out in paragraphs 39 and 40 above, there are two separate strands of principle and procedure that we have to follow. In our view, the correct approach in the circumstances of this case, with these combined applications, is for the court to consider, first, whether the fresh evidence is capable of belief; secondly, whether there is an adequate explanation for why that evidence was not adduced at trial; thirdly, whether the evidence may afford any ground for allowing the appeal; and fourthly, whether the overall interests of justice require the admission of the fresh evidence. Before we undertake that task, however, we should look first at the existing evidence about and the other material relating to the applicant's defence of alibi.

4.2. The Existing Evidence and Material Relating to the Applicant's Alibi

43. The applicant's defence of alibi was that he was outside the Best One Shop at the time of the murder. The applicant chose not to give evidence in support of that defence. However, he did call Natasha Fenton, who was the only one of the five people on the list in the defence case statement who did give alibi evidence.

44. Ms Fenton's evidence was that the applicant arrived outside the Best One Shop at around 21.15, and was still there when the shop was preparing to close just before 22.00. This evidence was inconsistent with the evidence of the vehicle movements, and in particular the fact that the BMW 1 Series was seen heading towards Bell Lane at 21.15 and seen driving away from the Best One Shop at 21.50. Those points were made by prosecuting counsel in cross-examination and again in his speech at the close of the trial. That prompted the applicant's then leading counsel to complain that Ms Fenton was being held to too high a standard of reliability, and she made comparisons with some of the evidence called by the Crown and its own unreliability. The judge made all those points in her summing-up. Clearly, by their verdict, the jury rejected the evidence of Ms Fenton.

45. The jury also heard evidence, in the form of agreed facts, about a burglary at the nearby Community Centre which involved the theft of CCTV footage from a camera that pointed directly at the Best One Shop. It was an agreed fact that the applicant's uncle had returned to the Community Centre immediately after the burglary to ask if there was a back-up system for the CCTV. The prosecution asked rhetorically how it was that the applicant's uncle had known that there had been a burglary in the first place, and also noted that that uncle was the same man that the co-accused Khan had been trying to contact in the

moments after the shooting.

46. Wisely, perhaps, the judge did not make very much of that in her summing-up, recording only that the prosecution said that this incident (that is to say the burglary of the Community Centre) was "an odd coincidence which had to be taken into account when the alibi evidence was being considered."

47. In fact, unbeknownst to the judge and the jury, there was much more to the story of the burglary of the CCTV footage than they realised. Eventually Dale Blaney, one of the names on the list in the defence case statement who was proposed as a witness to support the applicant's alibi, but who was not called, pleaded guilty both to the burglary and to an offence of committing acts tending and intended to pervert the course of justice, namely the provision of a false alibi statement in support of the applicant.

48. When Dale Blaney was sentenced by Mr Recorder Shafi KC in the Crown Court in Manchester on 21 March 2023, the direct link to the applicant's purported alibi defence to the murder charge was made crystal clear. The learned Recorder said this:

> "The purpose in taking that CCTV was because that CCTV footage would have proved or disproved the alibi that you and others were later to offer in support of Khayam Khurshid who was then a suspect in the murder of Cole Kershaw. The alibi given, which forms the basis of count 1, was in effect that during the relevant period when Cole Kershaw was shot, you were outside a shop, together with others, providing the alibi and Khayam Khurshid was there in his motor vehicle. The CCTV footage from the community centre at Chesham Fold would have captured the presence of any vehicle during that period of time but, as I have said, the fact that you burgled those premises and took the CCTV meant that that evidence could not be corroborated or undermined.

> You, as I say, went on to give an alibi and provide a statement in support of Khayam Khurshid and by pleading guilty to that today (count 1), you accept that that was false. Khayam Khurshid was subsequently convicted of murder and so I take into account that, one, your offending, certainly as far as count 1 is concerned, cannot be described as being persistent, as far as these types of offences of perverting the course of justice are concerned and I am grateful to both counsel for providing me with the authorities ... Secondly and thankfully, the course of justice was not perverted and so the killers of Cole Kershaw were brought to justice and his family can have solace, in that your actions did not get in the way of securing justice for Mr. Kershaw and his family, but that is not to say that your offending was not serious. It was incredibly serious. Whilst it was not persistent, the fact that you not only agreed to give a false alibi, but then were prepared to go to the lengths I have set out of committing a burglary to secure CCTV to assist Mr. Khurshid does make this even more serious."

49. It is against that factual back drop that we turn to consider the fresh evidence on which the applicant seeks to rely.

4.3. The New Statements of Asghar, Abid and Brooks

50. In Ali Asghar's new statement, he refers to the fact that he had known the applicant for over 10 years. In fact, although the new statement makes no mention of it, he had previously told the police that they were close; the applicant called him 'uncle' and he called the applicant 'nephew'. Asghar has a previous conviction for possession with intent to supply Class A drugs for which he was sentenced to three years' imprisonment in 2017. He now says that, at about 21.30 on 12 August he saw the BMW 5 Series driven by Mohammed and he stopped to speak to Mohammed. There was one other passenger in the car, someone he described as Mohammed Izaarh. He said that there was no one else in the car.

51. As we have said, Asghar was spoken to by the police as part of the investigation into the murder. He now accepts that he gave them a different account to the one he gives now,

specifically admitting that, although he was asked on a number of occasions by the police if he recognised the men in the BMW 5 Series, he told the police that he did not. He now says that this was because he was frightened of the repercussions for himself and his family. He also said to the police that the meeting with the BMW 5 Series was between 20.30 and 21.00; now he puts it nearly an hour later at 21.30.

52. Mohammed Abid is the brother of the man who owns the Best One Shop. His brother told him that he had been approached by members of the applicant's family to enquire whether he would be willing to speak to the applicant's solicitor about what/who he had seen whilst at the Best One Shop on the evening of 12 August. This was before the trial. It appears that Abid, although he now says he can give relevant evidence, did not contact the applicant's family at the time. His evidence now is that he was helping out at the shop that night, and saw the applicant in a crowd of about seven or eight people outside the shop at around 21.30. He says he had the opportunity to go outside the shop at that point because it was the time at which the shop prepared to close.

53. Adam Brooks lives on Oram Street, close to where the murder took place. He says that around 21.30 he saw a BMW 5 Series near the house and saw two Asian males in the vehicle. He says that the applicant was not one of them.

54. As to the potential admission of this new evidence, we apply the various elements of the test to which we previously referred in paragraph 40 above. Applying that test, we conclude that there are four separate reasons why the application to adduce fresh evidence should be refused. In consequence, the application to amend the grounds of

appeal must also fail.

4.4. Is the Evidence Capable of Belief?

55. We consider that the fresh alibi evidence of Abid is incapable of belief. The applicant's attempt at a false alibi defence has already generated the burglary of the Community Centre (apparently to ensure that there was no CCTV footage of the location at which the applicant said he was) and a conviction for perverting the course of justice (because the statement that Dale Blaney gave, to the effect that the applicant was outside the Best One Shop at the relevant time, was admitted to be false).

56. Not unreasonably, Mr Dein makes the point that if this had all been known at the trial there would have been a certain amount of evidential difficulty about putting some of this material before the jury. We accept that. But of course, we are in a different position. This is now two years later, and we have to answer the question as to whether this evidence is capable of belief. We consider that it is not; indeed we have to say we consider it fanciful to suggest now that another witness coming forward to give the same evidence which Dale Blaney accepted was untrue could in any ever be capable of belief. There is a second, lesser reason to doubt Abid's evidence. He said that the shop was closing at 21.30. That directly contradicts the evidence of Ms Fenton, who did give evidence at the trial, that the shop did not close until half an hour later.

57. We also consider that Asghar's evidence too is incapable of belief. He admits that he lied to the police in his original statement, because contrary to what he said to them then, he now says he did know the people in the car. Accordingly, the evidence he wants to give

now would render his first statement untrue. Furthermore, he has a criminal conviction for a serious offence. We would therefore conclude that he lacks any credibility as a witness.

58. For those reasons we consider the evidence of Asghar and Abid to be incapable of belief. We accept that the evidence of Brooks, which is limited to the question of the number of people in the BMW 5 Series, is not capable of being dismissed for that reason.

4.5. Reasons Why this Evidence Was Not Adduced at Trial

59. We have concluded that there is no explanation at all, let alone a reasonable one, as to why these three witnesses did not give evidence at the trial.

60. First, there is Abid and his purported alibi evidence. We note he was not on the applicant's original list of those who could supply alibi evidence. Dale Blaney was and, as we have said, he now accepts that he lied when he said the applicant was outside the Best One Shop.

61. So we ask ourselves why was Abid not on that list, if he had seen the applicant at the time of the murder? There is no explanation as to why he was not even contacted by the applicant or his family or his solicitors, despite his presence on that list of people said to support his alibi. Moreover, as we have said, Abid not only knew about the murder but he also knew that his brother who owned the Best One Shop had been approached for help by the applicant's family. He was therefore a clear and obvious person to give evidence to help the applicant if he could. But he gives no explanation as to why he did not contact

the family to give this alleged evidence of alibi.

62. In relation to Asghar, there is no explanation as to why he did not offer to give this new evidence at the trial of the man he called 'nephew'. He refers vaguely to his fear of repercussion "for myself and my family from the community", but these repercussions or their source are unexplained. So too is his statement that, with Mohammed having been convicted, he can now say who he saw in the car. It would also appear that, if Asghar is to be believed, he deliberately refused to come forward to participate in the trial, and (save in exceptional circumstances) that can never amount to a reasonable explanation for a failure to give evidence.

63. As for Brooks, the murder happened very close to where he lived and he says in his statement that "we are a close community. What had happened was shocking and a tragedy so it was something we discussed." It seems to us that, if he had evidence to give in relation to the murder, he could have contacted the police at an early stage, and there is no explanation as to why he did not. We do not accept his statement that he did not realise until after the trial that three men had been convicted. On his own evidence, he would have known from talking about the “shocking tragedy” in his “close community” that three men were charged with and then standing trial for the murder of Cole Kershaw. There is no reasonable explanation for his failure to give evidence at the trial.

64. Accordingly, there is no explanation, let alone a reasonable explanation, as to why each of these three witnesses did not give evidence at the trial.

4.6. Does the Evidence Add Anything of Significance?

65. Finally, we have concluded that on analysis these new statements do not add anything (and certainly nothing significant) to the evidence that was already before the jury and the issues that they had to decide.

66. In relation to Abid, his evidence adds nothing to the evidence of Ms Fenton, even if one leaves to one side the clash between their evidence as to the timing of the closure of the shop. Ms Fenton's evidence was of course disbelieved by the jury. In the light of what we know about the burglary and Dale Blaney's guilty plea, we are in no doubt that the alibi defence, even if now supported by Abid, would fail again.

67. Slightly different considerations apply to Asghar and Brooks, because their evidence goes to the number of people in the BMW 5 Series. But of course that evidence adds nothing of significance because that was already an issue before the jury. In addition, there are reasons to conclude that that evidence adds very little, even when considered in isolation. Asghar said (in his original statement to the police) that his meeting happened between 20.30 and 21.00. The BMW 5 Series may well not have contained the applicant at that time: it was the Crown's case that he joined up with it at around 21.15. Asghar now says he was wrong in the time he gave to the police, and it was actually nearly an hour later but, leaving aside the credibility and difficulties with that change of story, even that does not significantly help the applicant.

68. As with the new evidence of Brooks, had the new evidence been adduced at trial, it

would not, in our view, have made any significant difference because there was already evidence from a number of different witnesses about the number of people in the BMW 5 Series. There was some evidence that there were three people, other evidence to say there were only two. So this would simply have been further evidence to support those who said there was only two in the car. That was already a matter that the jury had to grapple with, and we do not consider that the fact that these two witnesses might have said that there were two people in the car (adding to the cohort of those who said two as compared with the cohort of those who said three), would have made any difference.

69. We referred earlier to the fact that Brooks said the applicant was not in the car. That was based on his evidence that, although he did not know the applicant, he was a well-known face in the area. No further explanation for that is provided. If right, it provides another reason to question why Brooks did not come forward at the time of the trial.

70. For those different reasons, we consider that that further evidence does not add significantly to the evidence before the jury, and would not have affected the outcome of the issues which they had to decide.

4.7. The Interests of Justice

71. Finally, we need to consider whether the interests of justice require the admission of this further evidence. In our view, largely for the reasons we have already given, they do not.

72. This is a case where the applicant's alibi defence has already been rejected, and has

subsequently been found to have been supported by a burglary and the preparation of a false statement by Blaney. We can therefore see no way in which the interests of justice could be served by allowing the applicant to run the failed alibi defence all over again. In the light of the plea and sentence of Dale Blaney, we consider that the interests of justice point positively away from the admission of the fresh evidence of Abid.

73. As to the new evidence of Asghar and Brooks, this adds nothing to the material before the jury and the interests of justice do not require the matter to be opened up on account of their relatively limited contribution to the issue, which they could have made at trial, as to the number of people in the BMW 5 Series. In the case of Asghar, it would not be in the interests of justice to permit someone to give evidence which flatly contradicts what he had told the police at the time.

74. It is appropriate, as it always is in these cases, to stand back. We are in no doubt as to the safety of the applicant's convictions. There were a number of issues which the jury had to consider. Those were properly identified by the judge. The summing-up was full and fair. The applicant was properly represented and made various choices as to who gave evidence and who did not. His alibi, which was his principal defence at the trial, has been irrevocably tainted by the subsequent events.

75. In all those circumstances, the renewed application for permission to appeal against conviction, and the application to amend the grounds of appeal, 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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