IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202102149/B4 & 202104057/B4

[2024] EWCA Crim 320

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 12 March 2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MRS JUSTICE MAY DBE
HIS HONOUR JUDGE LICKLEY KC

REX
v
AJAYPAL SINGH

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MR J DEIN KC and MISS L COLLIER appeared on behalf of the Applicant

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J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: On 10 June 2021, after a trial in the Crown Court at Snaresbrook before Her Honour Judge Lees and a jury, this applicant was convicted of robbery. The robbery was committed on 1 May 2020 during the first Covid lockdown. In October 2020, before he was arrested for the robbery, the applicant committed an offence of possession with intent to supply of seven kilograms of cannabis and an associated offence of possession of a bladed article. He pleaded guilty to those offences.
2. On 29 November 2021 he was sentenced to two years' imprisonment for the cannabis offence with four months' imprisonment concurrent for the associated offence. Consecutive to that two-year sentence the judge imposed an extended sentence of 25 years, comprising a custodial term of 20 years and an extension period of five years for the robbery.
3. Following refusal by the single judge the applicant now applies for extensions of time to renew his applications for leave to appeal against conviction and leave to appeal against sentence.
4. The prosecution case against the applicant was that he had been one of the organisers of the robbery, which was carried out by four masked men: Christopher Sargeant, who pleaded guilty; Anthony Lascelles, who also pleaded guilty; a man called Fogaca, who fled to Portugal soon afterwards and has not yet been brought to justice; and a man who was not identified. At trial, the prosecution accepted that a man called Gallimore may also have been involved in organising the robbery.
5. The victims of the robbery were Mr and Mrs Hawkins and their children, a son aged 11 and a daughter aged nine. At about 9.30 pm on the night in question, Sargeant, wearing the uniform of a UPS delivery driver, pretended to be delivering a parcel. As

Mr Hawkins picked it up, Sargeant kicked him in the head and forced his way into the house, quickly followed by the other three men, all of whom were carrying knives. One robber held a knife to the throat of Mrs Hawkins and forced her upstairs to a bedroom in search of valuables. Another held a knife to the boy's throat, threatening to kill him if valuables were not handed over.

6. Mr Hawkins scuffled with one of the robbers and was stabbed in the head. He briefly lost consciousness. Three of the robbers then fled. When Mr Hawkins recovered consciousness, he and his son ran upstairs to look for Mrs Hawkins, but were encountered by the fourth robber running down. The prosecution case was that this was Lascelles. He had armed himself with a shotgun lawfully owned by Mr Hawkins. Two shots were fired, causing serious injury to the arm and shoulder of the 11-year-old boy.
7. When interviewed under caution the applicant provided a prepared statement and made no answer to any of the questions asked.
8. The applicant stood trial together with Lascelles, who had pleaded guilty to robbery but faced further charges reflecting the allegation that he had shot the young boy.
9. At trial, the prosecution presented a circumstantial case against the applicant, which included evidence of telephone contact between the accused, and cell-siting indicating the approximate location at material times of the phones attributed to them. The prosecution case was that the applicant had access to two phones, one ending 8800 which was said to be shared with others and operated as a drugs line, and one ending 8547 which was said to be his personal phone.
10. It was contended that the evidence pointed to the robbers having been at or near the applicant's home before and after the robbery. The prosecution also adduced evidence that shortly after the robbery the applicant had booked and paid for a taxi which collected

Fogaca near the scene of the robbery and took him to the area of the applicant's home.

11. The applicant denied any involvement in the robbery. He explained his phone contact with the other accused as relating to his business of supplying drugs, an explanation which he sought to support by relying on his subsequent drugs offence. He accepted that he had arranged a taxi for Fogaca, but said he had merely been doing a favour for a friend without knowing what had happened.
12. The applicant's evidence was that the 8547 phone was a drugs phone which was shared with others and was usually only available to him after 6.00 pm. He did not at that stage make any reference to having a different phone for his personal use.
13. In cross-examination he said that his defence statement had been produced after seeing the prosecution evidence relating to mobile phones, and he accepted that he knew the significance of the numbers attributed to him.
14. In re-examination the applicant referred for the first time to a phone number ending 3311. He said that that was his personal phone, the other two phones both being used as drugs lines.
15. Lascelles gave evidence that the robbery was organised by Gallimore, that the applicant had nothing to do with it, and that phone contacts between him and the applicant related to the purchase of cannabis.
16. The judge in summing-up identified the issue in the applicant's case as being whether the jury were sure that the applicant was an organiser of the robbery. She directed the jury that they did not need to be sure he was the only organiser.
17. The judge referred to the points made by the prosecution about the applicant's failure to mention in interview or to say in his defence statement that 3311 was his personal number. She reminded the jury of the applicant's evidence that he acted on the advice of

his solicitors not to answer questions in interview because the police had not made adequate disclosure, and of the defence submission that in any event it was difficult for him to remember matters which had happened months before the interview. The judge directed the jury in writing:

> "... you will need to consider with care those explanations. If they are or they may be true reasons why the defendant failed to mention these facts, then, of course you will not hold his silence against him. In relation to the interview, a solicitor's advice is, of course, an important consideration but it is not something which a defendant can hide behind or use as an excuse to give himself time to think. Having considered the defendant's explanations, it is open to you to conclude that the only sensible reason for these omissions changes is that at the time of the interview he had no answer to questions put to him or at least none that would stand up to scrutiny. If that is your conclusion, then you may also conclude that the defence now put forward in respect of what happened that night is a later invention, so invented after the interview and false and so, invented only after he knew what the whole of the evidence was against him and he had had time to think about how best to meet it. In relation to the omission from and qualification from the defence statement, if you reject his explanations, then you may conclude his account was altered at trial because it was a false account. It is for you to decide whether the defendant's silence in his interview and omissions from his defence statement should count against him in the way that I have explained. You should only reach an adverse conclusion if you are sure it is fair and proper to do so. In relation to the interview, you must be sure that the prosecution case was sufficiently strong to require an answer; that the defendant could reasonably have been expected to mention the facts and matters on which he now relies; and that the only sensible explanation for his failure is that he had not yet thought up his defence as it is now presented to you. Remember that you must not convict the defendant unless you are sure he committed the offence he is charged with. You should not convict just because or even mainly because he failed to mention these facts in the interview or omitted parts of his defence statement. His failure to do that is one factor which you are entitled to consider when you are deciding who has told you the truth, remembering that you must be sure of the prosecution case before you would convict."

18. The judge in summing-up gave an oral direction in substantially those terms, but included these words:

> "In relation to the interview, a solicitor's advice is, of course, an important consideration but it is not something which a defendant can hide behind or use as an excuse to give himself time to think."

19. The jury convicted the applicant as we have said. They could not agree any verdict on the charges against Lascelles. He was later retried on those charges. By that stage the prosecution had charged Gallimore with the robbery, and he stood trial together with Lascelles. Both were acquitted.

20. Following conviction and sentence, Mr Murphy (the advocate who had represented the applicant at trial) lodged grounds of appeal against both conviction and sentence. His applications were refused by the single judge, Cutts J, who gave clear and detailed reasons for her decision.

21. Fresh counsel were then instructed by the applicant, who renewed his applications for leave and sought to advance additional grounds. The renewed applications were to be heard in April 2023 but the hearing was vacated at counsel's request. Directions were given that any new ground of appeal must be lodged by 2 May 2023, and a skeleton argument provided by 9 May 2023 in which all the applicant's submissions were set out. Counsel then instructed put forward an additional ground on 1 May 2023 and filed a skeleton argument on 15 May.

22. Thereafter, counsel who now represent the applicant, Mr Dein KC and Miss Collier were instructed. They have filed an application to vary the notice of appeal, and final consolidated grounds of appeal which are said to replace all previous grounds.

23. Throughout this long procedural history, the respondent has filed a series of Respondent's Notices and submissions replying to the various iterations of the grounds of appeal.

These have culminated in a skeleton argument in reply to the final consolidated grounds.

24. We have been assisted by the written submissions of Mr Dein and Miss Collier on behalf of the applicant and by Mr Dein's helpful oral submissions to the court this morning. They submit that the conviction is unsafe and seek to advance the following five grounds.

Ground 1

25. The jury should not have been permitted to draw an adverse inference from the applicant's failure to mention matters in his defence statement, because he had not been asked during his evidence why those facts were omitted. The jury should have been directed not to draw any adverse inference.

Ground 2

26. The judge gave a confusing and inadequate direction under section 39 of the Criminal Justice and Public Order Act 1994.

Ground 3

27. The judge failed adequately to summarise the evidence of the applicant and the defence witness Shamsah Rafiq.

Ground 4

28. There was a failure to disclose cell-site data in respect of phone calls between Lascelles and Gallimore on 30 April 2020, the date on which it was alleged that the robbers had carried out a reconnaissance of the scene.

Ground 5

29. An application is made to adduce, as fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968, a statement of Sargeant exonerating the applicant.

30. In addition, the applicant makes an application for a direction requiring Sargeant's former solicitors to disclose all notes and records of the instructions they received from Sargeant,

who has waived legal professional privilege in that regard.

31. All the grounds of appeal are opposed by the respondent, whose written submissions we have considered.

32. We have found it difficult to disentangle those aspects of the five grounds of appeal which were considered by the single judge from those which were not. It seems to us, moreover, that those grounds which could be said to have been before the single judge have been repackaged and presented in a different way. We shall however postpone consideration of the procedural aspects of the present applications. In fairness to the applicant, we begin by focusing on the merits of the five grounds of appeal against conviction.

33. In relation to ground 1, Mr Dein accepts that the applicant first mentioned the 3311 phone in re-examination. He submits, however, that if the prosecution wished to rely on the failure to mention that number in the defence statement, prosecuting counsel should have applied to reopen his cross-examination. As a result of the failure to do so, Mr Dein submits, the applicant had no opportunity to explain why he had omitted any reference to that phone, and the jury were accordingly unable to consider that explanation in deciding whether to draw any adverse inference. Mr Dein submits that in a circumstantial case, there was a particular need for the directions on matters affecting the applicant's credibility to be scrupulously fair.

34. We are unable to accept these submissions. The prosecution case throughout was that 8547 was the applicant's personal phone. In his evidence and in his cross-examination he denied that that was so; but he made no reference to any other personal phone, and he referred without qualification to what had been said in his defence statement about phones generally. He had therefore been able to put forward his case in relation to his

possession and use of mobile phones. It was only after the prosecution had concluded cross-examination, and at a time when it was no longer possible for billing records of the 3311 phone to be obtained, that he referred to that phone. If he wished to add to the account he had already given about his phones, and if he wished to explain why he had not mentioned 3311 previously, he had the opportunity to do so in his re-examination. That was not done. The applicant cannot now complain that he was denied an opportunity to explain because the prosecution failed to apply to reopen cross-examination. Nor, in those circumstances, can he complain that the only explanation the jury had to consider for his failure to mention matters in his defence statement was the evidence he had given in-chief and in cross-examination. We note moreover that when the judge was discussing her proposed directions with counsel, no submission was made by the defence advocate to the effect that the applicant had wrongly been denied an opportunity to put forward his explanation.

35. In his second ground, Mr Dein submits that the oral addition to the written direction, which we have quoted above, was highly prejudicial to the applicant and undermined the remainder of the direction. Moreover, he argues, the judge failed to refer back explicitly to the points which the applicant had made in his prepared statement, which included his explanation for his failure to answer questions in interview. Mr Dein submits that by dealing together with directions relating to failure to mention facts in interview, and failure to mention facts in the defence statement, the judge in effect fused two directions in one, with resultant confusion or at least lack of clarity.

36. Reflecting on these submissions, we note that the applicant had been asked in interview what his phone number was and whether he had multiple phones. Against that background we think that the detailed submissions in support of this second ground

somewhat oversimplify the correct approach to the drawing of an adverse inference from silence in these circumstances.

37. Be that as it may, we are in any event satisfied that the judge's direction to the jury was sufficient in the circumstances of the case. As Mr Dein realistically acknowledges, the judge was under no obligation to adopt the precise terms of the specimen direction helpfully provided in the Crown Court Compendium. We think it is unfortunate that she dealt compendiously with the issues of inferences from failure to mention matters in interview, and inferences from failure to mention matters in the defence statement. It would have been more helpful to the jury if she had dealt separately with those matters. In our view, however, the judge's direction covered all essential points. It is important to remember that the jury had written agreed facts which included not only the terms of the prepared statement given by the applicant at the start of his interview under caution, but also the precise terms of the disclosure which had at that stage been made to his solicitor and which it was said had been insufficient. The jury were therefore well aware that the applicant had said at the start of the interview that it was difficult for him to respond to the allegations against him because the prosecution had given only limited disclosure, and that he was acting on the advice of his solicitor. The judge made clear that it was for the jury to decide whether they felt it fair and proper to draw any adverse inference.

38. In those circumstances, we are not persuaded that the judge's direction gave rise to any unfair prejudice.

39. In support of the third ground, it is submitted that there was a "glaring omission" from the summing-up of any sufficient account of the evidence given and called by the applicant. We do not agree. The judge adopted an approach of summarising the various strands of the circumstantial case advanced by the prosecution, and incorporating the defence case

in relation to each strand as she went through them. Mr Dein acknowledges, realistically, that that was a permissible approach for the judge to take, and in our view it was a helpful way to approach the evidence in this case. The applicant's case could in truth be shortly stated: at the time of the robbery he was socialising with neighbours; it was difficult for him to recall details of events about which he was first asked some months later; but he had nothing to do with the robbery, and did not know anything about it until after Fogaca had asked his help in booking a taxi.

40. It was of course necessary for the judge to give a clear statement of the defence case, but in our view she did so. The jury can have been in no doubt as to the explanation which the applicant put forward in relation to the phone contacts which were said to be incriminating, and the cell-siting evidence also relied upon against him, nor can they have been in any doubt as to his assertion that the evidence pointed to Gallimore rather than the applicant being the organiser of the robbery.

41. As to the evidence of Shamsah Rafiq, the applicant's girlfriend at the material time, we accept the written submission of the respondent that the applicant was positively assisted by the judge's approach of saying little about that evidence. Miss Rafiq had substantially weakened the applicant's case by giving evidence that the 8547 phone, contrary to his assertion, was the applicant's personal phone and one on which she was able to contact him at any time of the day or night.

42. Ground 4 as we understand it was originally put forward on the basis that the respondent had not made any disclosure of cell-siting of the phones of Lascelles and Gallimore on 30 April 2020. That information, it was said, had only become known to the applicant when it was deployed by the prosecution at Gallimore's trial. The respondent pointed out however that Excel spreadsheets of calls to and from Lascelle's phone on that date had

been disclosed to those representing the applicant on 15 March 2021, well before the trial. It is now submitted that the disclosed material was "entirely illegible and unusable" and had therefore not been served in any meaningful sense, which it is suggested must be the reason why neither prosecution nor defence made any reference to it at the applicant's trial.

43. With all respect to counsel's careful submissions, we are unable to understand this. Mobile phone call data and cell-siting information is often stored, and initially presented, in a form which may be difficult to digest and may require specialist explanation. But even if that were the case here, the simple point is that further clarification could readily have been obtained if the applicant's legal representatives had wanted it. A glance at the Excel spreadsheet would identify that were occasions when calls were passing between Lascelles and Gallimore. If those representing the applicant were interested in those calls, further information could have been sought about them. The reality, as it seems to us, is that this was material which was available, but was not regarded by either side as significant at the time of the applicant's trial. It is not suggested, and could not be suggested, that the applicant's representatives were seriously deficient in their approach. It is far too late now for the applicant to seek to pursue a line of inquiry which could have been made at trial if it had been thought important.

44. There is in our view also a short answer to the fifth ground of appeal. One of the matters which section 23 of the 1968 Act requires this court to consider is whether there is a reasonable explanation for the failure to adduce the proposed fresh evidence at trial. It is clear, from the commendably thorough responses which Mr Murphy has given to the many enquiries made of him, that he actively considered whether to try to call Sargeant as a defence witness and decided against it. We can well understand why he took that

view. It is one which many defence advocates would have taken. We note moreover that the applicant himself had not asked if Sargeant could be called. It is too late now for fresh legal representatives to seek to take a different course, or to run a retrial in a way other than the original trial was run. We would add in any event that the statement provided by Sargeant is wholly unsatisfactory. In particular, Sargeant asserts that phone contact between him and the applicant at highly material times was about "something totally unrelated", but he conspicuously fails to explain what topic – other than the robbery in which Sargeant was admittedly involved – was engaging their attention at those important times.

45. For completeness, we see no merit in the application for an order directed to Sargeant's former solicitors. When they were sent Sargeant's notice of waiver, and asked to provide all their documents, they pointed out that the waiver had been signed more than a year earlier and asked for confirmation that it still represented their former client's instructions. That request, which in our view was entirely sensible and reasonable, appears never to have been answered.

46. In those circumstances, there is no prospect that the proposed fresh evidence could afford a ground of appeal and the application under section 23 of the 1968 Act must be refused.

47. It follows from what we have said that none of the proposed grounds raises any arguable basis for doubting the safety of the conviction.

48. The renewed application for leave to appeal against conviction therefore fails on its merits. We accordingly need not dwell on the detail of the procedural aspects. We cannot, however, pass over them without mention.

49. The procedural history which we have summarised is unsatisfactory. The single judge gave very clear reasons for rejecting the grounds which had been advanced up to that

point. In so far as any of those grounds is still advanced, they are no stronger now than they were then. As this court made clear in R v James [2018] EWCA Crim 285, the general rule is that all the grounds of appeal which an applicant wishes to advance should be lodged with the notice of appeal. The single judge stage of the process is important, and cannot be bypassed simply because lawyers instructed at a later stage would have argued matters differently from the trial representatives: hence the need for leave to be sought if an applicant wishes to advance fresh grounds which have not in substance been considered by the single judge. An applicant in that position faces a high hurdle. Here, the directions given in 2023 made that hurdle even higher in relation to any ground which had not been advanced by 2 May 2023. We note that, even now, there is simply no explanation for why an extension of 30 days is needed to renew the application for leave to appeal against sentence.

50. It must be clearly understood that, following refusal by the single judge of an application for leave to appeal, applicants cannot simply choose to augment or vary their grounds of appeal in any way they wish. If the high hurdle identified in James is to be cleared, compelling reasons must be shown why it is in the interests of justice to permit a variation of grounds. No such compelling reasons have been shown here. Instead, a great deal of the time of the Criminal Appeal Office and of this court has been taken up in pursuing shifting grounds of appeal which we have found to be without merit. That works to the detriment and unfair disadvantage of more meritorious applicants, whose cases are delayed. Applicants should also remember that the fact that an applicant acts on the advice of fresh legal representatives does not necessarily confer immunity from the making of a loss of time order.

51. We turn finally and briefly to the renewed application for leave to appeal against

sentence. The grounds are those originally put forward by Mr Murphy, namely that the custodial term of 20 years was manifestly excessive, and that the judge should not have found the applicant to be a dangerous offender and should not have imposed an extended sentence. It is submitted that the appropriate sentence should have been a determinate sentence within the category 1A range of the Sentencing Council's definitive guideline for Robbery (Dwelling) offences, which has a starting point of 13 years' custody and a range from 10 to 16 years.

52. The judge, who had heard all the evidence and was in the best position to assess the seriousness of the crime, concluded that it would be contrary to the interests of justice to follow the guideline in the particular circumstances of this case. That is a decision which she was entitled to reach. The guideline itself notes that "in cases of particular gravity reflected by extremely serious violence, a sentence in excess of 16 years may be appropriate." It lists seven factors as indicating category A high culpability. Five of them were present in the applicant's case: use of a weapon to inflict violence, production of a bladed article to threaten violence, use of very significant force in the commission of the offence, sophisticated organised nature of the offence and a leading role where the offending is part of a group activity. Four members of the family, two of them young children, suffered category 1 serious physical and/or psychological harm. Quite apart from the other effects upon them, the victims felt unable to remain in their family home which they had occupied for many years. The judge took into account the applicant's personal mitigation, but it could carry only limited weight against the seriousness of the offence. A custodial term of 20 years was at the upper end of the range properly open to the judge, but it was not even arguably manifestly excessive.

53. As to dangerousness, it is sufficient to observe that the applicant was convicted on the

basis that he was one of the men who organised a robbery in which four masked, armed men invaded a home at night, gaining entry by a carefully-planned strategy, and caused serious harm to the family within. The applicant had no recent or relevant convictions, but on his own account he was actively engaged in drug dealing, and he described himself as a serious organised criminal. The nature and circumstances of this offence, and the assessment contained in the pre-sentence report, provided an ample basis for the judge to make the finding of dangerousness and to conclude that an extended sentence was necessary to protect the public. In our view the contrary is not arguable.

54. Drawing the threads together, we are satisfied that there is no arguable basis for challenging either the conviction or the sentence. It follows that no purpose would be served by granting any extension of time or by granting leave to vary the grounds. We therefore refuse the application to adduce fresh evidence, we refuse the application for an order directed to Sargeant's solicitors and we refuse the applications for extensions of time and for leave to vary grounds.

55. Grateful though we are to Mr Dein for his careful submissions, the applications for leave to appeal accordingly fail.

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