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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 9th July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CHOUDHURY

and

HIS HONOUR JUDGE FIELD QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

KEVIN DOWNTON

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Mr J Anders appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Tuesday 9th July 2019

LORD JUSTICE HOLROYDE:

1. In the early hours of 30th April 2017, two units on an industrial estate in East Dorset were burgled and property stolen. About two hours later, two masked men broke into a house situated about three and a half miles from the industrial estate. One was armed with a sawn-off shotgun. The householders were told that they would be shot if they did not do as they were told. They were ordered to lie down on the floor whilst the burglars collected valuable jewellery and other items. They were then ordered to open a safe. One of the householders took that opportunity to activate an alarm. The other, Mr Hedger, was then shot in the chest and fatally injured. The burglars left with the stolen property.

2. The applicant, Jason Baccus and Scott Keeping were jointly charged with the murder of Mr Hedger, the aggravated burglary of the house, possession of a firearm with intent to cause fear of violence and two offences of burglary of the commercial units on the industrial estate.

3. The applicant pleaded guilty to one of the commercial burglaries. At the conclusion of a long trial before Jay J and a jury, he was convicted of the other four offences. Baccus was convicted of all five offences. Keeping was acquitted of all offences, as was his wife who had been charged with offences of assisting an offender. The applicant was sentenced for the offence of murder to life imprisonment, with a minimum term of 34 years. Concurrent determinate sentences of fifteen years, ten years, one year and one year's imprisonment were imposed for the other offences.

4. Following his trial, though not during it, the applicant expressed dissatisfaction with his legal representatives and dispensed with their services. He prepared grounds of appeal against his convictions, but did not seek to appeal against his sentence. His grounds of appeal were set out in a number of lengthy documents, all of which have been read by this court. In view of the criticisms which he made of his legal representatives, he waived legal professional privilege and we have seen the responses of trial counsel and solicitors to the criticisms which the applicant made of them.

5. Prosecuting counsel prepared a detailed Respondent's Notice.

6. The single judge refused leave to appeal. The applicant renewed his application for leave. He was two days late in doing so and therefore seeks the necessary short extension of time.

7. The renewed application for leave was listed before the full court on 22nd May 2019. Shortly before that hearing, however, the court was informed that Mr Anders of counsel had been instructed to consider the merits of an appeal. At the hearing on 22nd May, Mr Anders informed the court that he did not feel able to support or to present arguments in favour of any of the grounds of appeal composed by the applicant. He had, however, been given instructions about a further point in respect of which he sought an adjournment so that it could be fully considered. That adjournment was granted.

8. Mr Anders now seeks an extension of time and leave to amend the grounds of appeal so as to pursue two further grounds. No formal Notice of Abandonment has been lodged in respect of the applicant's original grounds. The court must accordingly consider both the renewed application for leave on the original grounds, which we treat as an application by the applicant acting in person, and the new application made by Mr Anders for an extension of time and for leave to

advance fresh grounds of appeal.

9. The principles relevant to the consideration of the latter application were set out by this court in *R v James (Wayne George)* [2018] EWCA Crim 285, [2018] 1 Cr App R 33.

10. The prosecution case was that the three male defendants had initially driven to the area of the burgled house at about 23:35 on 29th April 2017. They had driven there in a dark coloured Ford Focus and remained parked in David's Lane, near the house, until about 00:40, when it was said that they had driven away because they had been seen by a man who was walking his dog. The prosecution alleged that the men then travelled to the industrial estate, where a car, said to be the Ford Focus, was captured on CCTV between 00:45 and 01:57. During that period it was alleged that the men entered the premises of Undersea Limited and Apple Snacks and stole property from both. They then returned in the Ford Focus to the area of the house which they were to burgle. They arrived there at 02:18. It was alleged that the applicant was the gunman and Baccus was the other man who entered the house. Mr Hedger was murdered shortly before the surviving victim made a 999 call at 03:03. CCTV footage was relied on as showing the Ford Focus leaving at 03:04.

11. The prosecution relied on circumstantial evidence, including, in summary, the following:

> 1. The black Ford Focus had been bought by Baccus and Keeping a few days earlier.
>
> 2. Property stolen from Undersea Limited and Apple Snacks was found in its boot.
>
> 3. Also found in the Ford Focus was gunshot residue of the same kind as that recovered from the deceased.
>
> 4. Significant findings were also made in a Vauxhall Astra belonging to the applicant. In a concealed compartment in the roof lining there was a SIM card for a mobile phone number ending 6051, which was attributed to the applicant. The SIM card had been removed from the handset in which it had previously been used at 04:29 on 30th April 2017.
>
> 5. Also in the concealed compartment were a balaclava, gloves and a head covering (or snood) on which were very high levels of gunshot residue, again of the same kind as that recovered from the deceased Mr Hedger.

The prosecution also relied on evidence relating to the use of mobile phones; on evidence of cell siting of those phones; on CCTV footage from various sources; on the evidence of the man who had been walking his dog; and evidence of neighbours who had heard noises around the time of the shooting of Mr Hedger.

12. When interviewed, the applicant initially denied any connection with the 6051 phone. He later admitted that it was his phone, but said that it had been loaned to Baccus at the material time. He also asserted that his snood had been loaned to or used by someone else.

13. The applicant pleaded guilty to the burglary at Apple Snacks. His case at trial was that he had committed that burglary, but was not one of the two men captured on the CCTV footage inside the premises. He said that he had travelled to the industrial estate alone in an Audi car and had not been in the Ford Focus at all that night. He asserted that after he had burgled Apple Snacks, he met Baccus, who was also at the industrial estate, although there had been no plan or

arrangement for them to meet there. He had shown Baccus a safe which he had stolen from the premises. Baccus then went into the premises of Apple Snacks, and the applicant disconnected the CCTV.

14. The applicant's case was that he then left the industrial estate on his own. He took with him the stolen safe and noticed, as he did so, that there was someone sitting in the passenger seat of the Ford Focus in which Baccus had arrived. The applicant denied any involvement in the burglary of the premises of Undersea Limited or any involvement in the aggravated burglary and murder. His case was that after he left the industrial estate, he had driven alone to a secluded place where he spent some time unsuccessfully attempting to open the stolen safe, and had then driven home.

15. The applicant gave evidence at the trial in his own defence. Each of his co-accused also gave evidence. In particular Baccus gave evidence at trial of two conversations between him and the applicant when they were in custody together. Baccus alleged that after a hearing at a magistrates' court, the applicant said that he would have to accept the charge. Then on a later date, when they were in a prison, Baccus said that the applicant had "smugly admitted" to shooting Mr Hedger.

16. We consider first the grounds of appeal drafted by the applicant himself. They can be summarised as follows. It is said first, that the prosecution failed to disclose documents in a timely manner; secondly, that the police officers investigating the case were corrupt, that they gave unreliable evidence, and that CCTV evidence was tampered with in order to corroborate the prosecution case as to the movements of phones between cell sites; thirdly, that the cell site evidence proved that the applicant was not at the scene of the murder and not in the Ford Focus; fourthly, that evidence relating to items of clothing provided no direct link either to him or to the murder scene; fifthly, that despite directions given by the judge, the jury would have ignored the true facts and evidence because of the prejudicial evidence given by his co-accused; sixthly, that although cigarette butts were found near the scene of the murder, from which DNA matching that of Baccus and Keeping was recovered, there was no such evidence, and no other evidence, linking the applicant either to the Ford Focus or to any of the stolen property; and lastly, that the applicant's trial was unfair and the resulting convictions unsafe.

17. We have considered each of these grounds of appeal, the detailed Respondent's Notice responding to them, and the observations of the trial lawyers. We do not think it necessary to address in detail all of the many points which the applicant made in his lengthy written grounds. It is sufficient for us to consider a number of broad arguments which emerge from the material before us.

18. First, it is by no means unusual for police officers investigating a crime to find that relevant CCTV footage gathered from more than one camera system displays different times. The simple explanation usually lies in the fact that the time setting of one or more of the camera systems is inaccurate, so that the time displayed on the footage is consistently a fixed period ahead of, or behind, the correct time. In such circumstances, it is commonplace for the prosecution to adduce evidence which explains the reason for the inaccuracy and corrects it as accurately as possible, and to prepare a time line of relevant events on which, for the assistance of the jury, events are recorded in the correct chronological sequence, even if the time displayed on some of the images is wrong.

19. That is what happened in this case. A police officer who gave evidence about the time line explained the manner in which he had corrected times which were not accurately shown on the imagery. Some of the images shown to the jury were specifically marked "approximate time". The evidence of this officer was not challenged: there was no basis on which it could be.

20. Contrary to the submissions made by the applicant, we see no evidence of any sinister or improper steps being taken by any person to alter a correct time so as to strengthen some aspect of the prosecution case. No such allegation was made at trial, and nothing in the applicant's written submissions begins to provide any foundation for his allegations of corrupt and dishonest practice on the part of the police.

21. Nor is there any basis for the applicant's assertion that his own legal representatives were in some way involved in altering evidence so as to strengthen the case against him. The applicant is troubled by the fact that prosecution and defence counsel were members of the same chambers. There is no basis for that concern. Although members of the independent Bar share chambers, and in that way share in the expenses of maintaining appropriate premises, clerks and other staff, each is a sole practitioner whose duty is to represent his or her client. It is not unusual for two or more barristers who are members of the same chambers to represent different parties in a case. The fact that they do so does not begin to provide any foundation for a complaint of improper collusion between counsel.

22. We would add that, having seen the responses of the applicant's former legal representatives, it is apparent to us that he had the benefit of good representation. We note in particular that in relation to one of the matters mentioned in the applicant's documents, namely an unsuccessful application by the prosecution to recall witnesses in relation to an aspect of the cell siting evidence, the judge in his ruling specifically referred to the skill with which Mr Feest QC (the applicant's leading counsel) had cross-examined those witnesses. In rejecting the prosecution's application, the judge concluded that it would not be right to give the Crown an opportunity to shore up a gap in their case which Mr Feest has skilfully exposed.

23. That leads us to another matter which is dealt with at length in the applicant's documents, namely, his repeated assertion that the cell siting evidence proves that he was not in the Ford Focus when it drove to David's Lane and not present at the scene of the murder. The applicant is correct to emphasise the importance of the evidence as to his presence at or absence from those locations. But he is not correct to think that the cell site evidence positively exonerated him. We shall return to this point when we address the additional grounds which Mr Anders seeks leave to advance.

24. Another aspect of the applicant's submissions relates to his complaints that disclosure of documents by the prosecution was made late and that his legal representatives therefore had insufficient time to prepare. We have considered these complaints, but can see nothing in them which casts any doubt on the safety of the convictions. The applicant's experienced trial representatives do not themselves suggest that late disclosure caused them any significant problems in preparing or presenting the applicant's case.

25. The applicant then makes a number of points to the effect that there was an absence of evidence linking him to the crimes, or that the evidence relied upon against him was insufficient to prove guilt. In particular, he makes a number of points about his clothing and footwear on the night, and the clothing described by witnesses. We can understand why these points may seem important to the applicant. But we have no doubt that he is over-optimistic in his assessment of them. There were legitimate jury points which could be made on his behalf about the adequacy of the evidence; but there was, rightly, no submission that there was no case to answer at the conclusion of the prosecution evidence. At the end of the trial, when all the evidence had been heard, it was for the jury to decide whether the evidence as a whole enabled them to be sure of the applicant's guilt.

26. The applicant also complains that he suffered unfair prejudice because of evidence given by

his co-accused. The applicant would no doubt much have preferred that evidence not to be before the jury. However, this was, properly, a joint trial of persons accused of joint participation in very grave crime. The evidence which the jury heard was all properly admissible. The judge gave impeccable directions as to the distinction between what one defendant says about another during a police interview and what one defendant says about another when giving evidence at trial. The judge coupled those directions with a clear and appropriate warning that when considering what one defendant said about another, the jury should bear in mind the possibility that the defendant making the statement may have had interests of his own to serve. We have seen nothing which supports the applicant's complaint that his trial jointly with the other accused was unfair.

27. We can express our conclusions about the applicant's own grounds of appeal shortly. His complaints against the police and his own legal representatives are wholly unsupported by evidence. His other points relate to matters which were properly before the jury and which it was for the jury to evaluate. There was cogent evidence which the jury were entitled to find did prove that the applicant was the gunman. There is nothing in his grounds of appeal, whether viewed individually or collectively, which casts any doubt on the safety of the convictions. Had we thought otherwise, we would readily have granted the short extension of time which would have been necessary. As it is, none of the applicant's grounds of appeal has any prospect of success and accordingly no purpose would be served by extending time for them.

28. We turn to the additional grounds which Mr Anders seeks leave to advance, namely, that the convictions are unsafe because of two significant material irregularities during the trial. First, it is submitted that the evidence of a witness, Mr Cass, a forensic image analyst who gave evidence identifying vehicles shown on CCTV footage as being, or possibly being, a mark 1 Ford Focus, was not presented accurately to the jury. Secondly, it is said that the judge failed adequately to sum up the defence case.

29. In support of these grounds, Mr Anders points to evidence given by a prosecution witness, Mr Robinson, who dealt with matters relating to cell siting. Prior to 02:50, the 6051 phone could be linked to the Furlong mast, which on Mr Robinson's evidence did not cover either David's Lane or the burgled house. At 02:50, the 6051 phone was cell sited in the area of David's Lane and the burgled house; it remained there until 03:01. It was next cell sited at 03:15 in Upton – an area which could only have been reached by that time by driving at high speed from the scene of the murder.

30. As we have indicated, the prosecution case was that after the burglaries at the industrial estate, the applicant and others had travelled in the Ford Focus to David's Lane. Accordingly, there was clearly an important point which could be made, and was made, in the applicant's favour. As the judge put it in his summing-up (at page 24D-E):

> "Given that phone 6051 remained connected to the Furlong mast until 02:51 or 02:50, it follows that if the cell site evidence is 100 per cent reliable and accurate, the phone could not have been in any car arriving at David's Lane at 02:18 or 02:19.
>
> The way that Mr Robinson expressed this point in cross-examination was to agree that the cell site evidence was inconsistent with the proposition that the phone was in a car arriving at David's Lane at 02:18 or 02:19. Now, how you interpret that answer is a matter for you, but that is the evidence before you. So, this is, or appears to be, a problem for the Crown's case if the proposition being examined is that phone 6051 arrived in a vehicle,

> the Crown says the Ford Focus, at about 02:18 or 02:19. The Crown points out that at 02:50, phone 6051 is cell sited within the range of David's Lane and Castlewood, [and] remains there until 03:01 if not later."

31. It was in relation to this aspect of the evidence that, in the course of the trial, the judge had refused the prosecution application which we have previously mentioned, namely, to recall witnesses in order to address the apparent problem which the prosecution faced.

32. Building on that point, Mr Anders, in his written submissions, referred to the evidence of Mr Cass. In this regard, in reliance on instructions received from the applicant, Mr Anders submitted that the evidence of Mr Cass was wrongly understood to refer to the Ford Focus having left the scene of the murder at 03:04, when in fact the correct time, allowing for an inaccurate display on the relevant CCTV system, was 03:11. The significance of the later time, submitted Mr Anders, is that if the applicant had been in the Ford Focus when it left the scene, he could not have reached Upton in time to be cell sited there at 03:15.

33. We are satisfied that this latter point was based on a misunderstanding of the evidence. It appears that the applicant's instructions to Mr Anders were that the time displayed on the CCTV footage was one hour out. In fact, the unchallenged evidence of the witness Mr Stacey showed that it was 53 minutes out. It was, therefore, correct to say that the car which Mr Cass's evidence identified as a Ford Focus was leaving the scene at 03:04, and incorrect to suggest that his evidence fixed the time of its departure as 03:11. Although the difference is only seven minutes, that is an important difference in terms of the coherence of the case presented by the prosecution.

34. In his oral submissions this morning, based upon instructions which we understand were given in conference with the applicant today, Mr Anders sought to address this aspect of the case by pointing to further features of the evidence in respect of which he submitted that the applicant could not have been where the prosecution alleged he was at some of the times indicated and that some of the CCTV timings were consistent with the applicant's account of his movements.

35. These further submissions – not, we are bound to say, entirely easy to follow in some respects – did not seem to us to add anything of significance to the substantial defence point clearly identified by the judge in his summing-up.

36. We are also satisfied that there is no substance in the points made by Mr Anders as to the terms in which the judge summed up the evidence upon that point. We reject the submission that the passage which we have quoted undervalued or diminished the defence point. In our view, the point was presented entirely fairly for the consideration of the jury, who can have been in no doubt as to the importance which the defence attached to it. It was, however, only one aspect of the overall evidence which the jury had to consider.

37. Mr Anders then made a number of criticisms of details of the summing-up. He suggests that evidence as to the timing of the 999 call was unreliable, possibly because of a lack of clarity as to what happened when the alarm was activated in the house. He contends that the evidence of the neighbours who had heard noises around the relevant time was inadequately or incompletely summed up, thereby failing fairly to present points on which the defence relied as important.

38. Mr Anders criticises the judge for saying in the course of his summing-up that the evidence as to the timing of the 999 call and the evidence as to the timing of the CCTV footage was

"inherently more reliable than timings given by the neighbours" and "can be treated as robust". Criticism is also made of the terms in which the judge reminded the jury of the evidence of the dog walker and of the issue between prosecution and defence as to whether the clothing which the dog walker ascribed to a man sitting in the Ford Focus was consistent with clothing worn by the applicant on the night in question.

39. We have considered these points individually and collectively, and we have taken into account the yet further points added in the course of oral submissions, of which the respondent has had no notice and to which the respondent has accordingly been unable to reply. We are satisfied that none of the points casts any doubt on the safety of the convictions. In our view, the judge's observation as to the inherent reliability of the mechanical recording of time on the CCTV footage and records of 999 calls was entirely justified, particularly since this evidence was undisputed at trial for the simple reason that there was no basis on which it could be challenged. In any event, the judge had made clear to the jury that they should disregard any apparent view of his if they did not agree with it. Reading the summing-up as a whole, we have no doubt that it fully and fairly presented the defence case.

40. In any event, we reject the underlying premise of Mr Anders' submissions, namely, that the circumstantial case against the applicant was weak. It was certainly the case that the prosecution had a problem in relation to the cell siting evidence to which we have referred; and it is also true to say that the timing of the events at the bugled house and the cell siting at Upton left only a small window of opportunity for the applicant to have been involved in the murder of Mr Hedger. Notwithstanding those points, which were for the jury's consideration, there was, in our view, a very strong case against the applicant. He had admitted to committing the burglary of Apple Snacks, which could be linked to the murder by the black Ford Focus and other evidence. The jury would no doubt have been struck by the remarkable coincidence involved in the applicant's case that, as he emerged from committing that burglary, he met his friend Baccus who must, by chance, have decided to burgle the same premises at the same time. The applicant was firmly linked to the murder by the gunshot residue on the snood hidden in his car, and the jury were plainly entitled to reject his explanation that that highly incriminating item had been loaned to someone else at the material time.

41. The applicant was further linked to events by the 6051 phone, the SIM card for which was similarly concealed within his Vauxhall Astra, and about which he had told a succession of lies. Moreover, by the end of the trial, the jury had heard evidence incriminating the applicant from one of his co-accused. We have no doubt that there was an ample evidential foundation for the jury to be satisfied of the applicant's guilt of all the charges which he contested.

42. We return to the principles set out in *James*. That case makes clear that, as a general rule, all the grounds of appeal which a defendant wishes to advance should be lodged with the Notice of Appeal. If it is subsequently sought to advance fresh grounds, there must be an application to vary the Notice of Appeal, and that application should address in writing the relevant factors which the full court is likely to consider in determining whether to allow the variation and to grant any necessary extension of time. The decision in *James* also makes clear that the hurdle for a defendant seeking to vary grounds of appeal is a high one.

43. In our judgment, the present application for leave to vary falls well short of surmounting that hurdle. As we have indicated, the proposed new grounds of appeal were largely based upon a false premise as to the alleged weakness of the prosecution case. They were also based in a substantial part on a misunderstanding of the evidence as to the timing of the CCTV footage. The criticisms of the summing-up are without substance, and it is relevant to note that they did not result in any request by trial counsel that the judge should correct or add to anything he had said.

44. As we have understood the submissions made to us, the points now relied upon in support of the application were all points which were before the jury for their consideration at trial. If they were not, no satisfactory explanation has been given as to why they are being raised for the first time so long after the conclusion of the trial.

45. In those circumstances, the applications for extension of time, leave to appeal and leave to vary the grounds of appeal all fail and are refused.

46. Before leaving the case, we must express our gratitude to Mr Anders who, acting *pro bono* in the best traditions of the Bar, has clearly put a great deal of work and effort into his submissions on behalf of the applicant.

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

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