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[2021] EWCA Crim 1587

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202003050/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 6 October 2021

LADY JUSTICE SIMLER DBE
MR JUSTICE SPENCER
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY QC
(Sitting as a Judge of the CACD)

REGINA
V
DALJIT KUMAR CHAND

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MISS D MANSON appeared on behalf of the Applicant

J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for a lengthy extension of time in which to apply for leave to appeal against conviction following refusal by the single judge.
2. On 27 February 2020 in the Crown Court at Isleworth, the applicant, now 52 years of age, was convicted by the jury of two offences: sending a communication conveying a threatening message, contrary to section 1(1)(a) of the Malicious Communications Act 1988 (count 1) and criminal damage (count 2). There was a long delay before he was sentenced owing to the pandemic. On 5 November 2020 he was sentenced by the trial judge, Mr Recorder Ramasamy QC, to a 12-month community order with a 15 day rehabilitation activity requirement. A restraining order was also made.
3. The applicant requires an extension of 251 days to pursue this appeal. Miss Manson has very frankly accepted that the fault resulting in that delay was entirely hers because she was under the impression that the time for appealing ran from the date of sentence rather than from the date of conviction and the appeal was lodged within 28 days of the date of sentence. That, of course, is not a good reason for the delay, grateful as we are for her frank concession, but it certainly is not any fault of the applicant himself. We have therefore considered the merits of the application for leave to appeal aside from any question of the extension.
4. We are grateful to Miss Manson for her written and oral submissions. The sole ground of appeal is that the judge wrongly admitted as bad character evidence some Facebook posts. It is said that this error renders the convictions unsafe.
5. To put that ground of appeal in context, we need to explain briefly how the prosecution case was put. The offences arose from the alleged conduct of the applicant towards his brother-in-law, Mr Sukhwinder Kumar and his wife Anuradha Jassal. At the time of the offences the applicant's marriage was in difficulty. His wife had left him with two of their three children. The third child, a 12-year-old boy, had remained with his father, the applicant. Mr Kumar, the complainant, is the applicant's wife's brother.
6. The prosecution case was that there had been a series of incidents between August and October 2018 in which the applicant had demonstrated hostility and behaved aggressively towards the complainants, culminating in a threatening phone call on 10 October (count 1) and a visit to the complainants' home on 21 October when bricks were thrown through their window (count 2). The applicant denied any such conduct.
7. The first episode in this series of incidents, however, was not the subject of a count on the indictment, but by agreement was adduced by the prosecution as relevant background evidence. This was an incident in August 2018 when the applicant was in hospital recovering from a stroke. On 4 August the complainant visited him in hospital. The applicant told them that because he was not working he needed money to support his family and asked the complainant, his brother-in-law Mr Kumar, for £600. Mr Kumar said he could only let him have £200. At this the applicant became angry and started to swear at Mr Kumar, threatening to kill him and his wife and their child if he was not given the money. The applicant's case was that no such threats had been made, although it was accepted there had been a visit by the complainants to him whilst he was in hospital.
8. Some two months later on 10 October the complainants were out shopping with their child. At around 10.30 am Mrs Jassal received a call on her mobile phone from an unknown number. The caller asked to speak to her husband. She recognised the caller's

voice as that of the applicant, but because she was frightened she told the caller he had the wrong number. The caller then said that if she did not hand the phone to her husband and make him talk, he would kill her, her husband and their child.

9. The following day, 11 October, Mrs Jassal attended the police station and reported that incident. Her evidence and that of her husband was that shortly after that they saw numerous Facebook posts from the account of the applicant's 12-year-old son containing various derogatory allegations and comments about the complainants, casting aspersions on their immigration status and suggesting that they had married on false papers. It is these Facebook posts that were the subject of the contest over admissibility.
10. On 21 October, some two weeks after this, the complainants were at home with their child when three bricks were thrown through the windows. The complainants did not see who was responsible but heard a male shout: "I am Daljit Chand and I am going to kill you". The complainants gave evidence that they recognised the voice as that of the applicant.
11. The defence case was that the allegations were all untrue. The applicant gave evidence that he had not threatened the complainants in any way whilst he was in hospital, he had not made the threatening phone call on 10 October and he was not responsible for breaking the windows at the complainant's house on 21 October; he had been at home with his mother at the time and because he was still recovering from his stroke he was immobile and would have been unfit to attend and do what was alleged in any event. He called his mother as a witness to support his alibi.
12. In his police interviews the applicant accepted that he had created at least some of the Facebook posts in question which were indeed sent from the account of his 12-year-old son. He could not remember, at least by the time he gave evidence, which of the posts he had sent. He said that he had done this in effect in retaliation for unpleasant comments about him which had been posted on Facebook, although (as he accepted in evidence) not necessarily by the complainants.
13. The prosecution sought to rely upon this evidence of the Facebook posts as part of the background of animosity on the part of the applicant towards the complainants. The evidence had been served in good time; the evidence was in the form of screen shots of the Facebook posts in question taken by the complainants on their phone. There was also evidence that on 11 October the phone had been taken to the police station and the police had been shown the Facebook posts at the time. There was no precise date of the posts but the complainants' evidence was that they had first seen them after they reported the threatening phone call on 10 October.
14. The offensive nature of the Facebook posts meant that if it was indeed the applicant who was responsible for posting them, then potentially this amounted to evidence of his bad character in that it was evidence of, or of a disposition towards, misconduct on his part, misconduct including "reprehensible behaviour" (see s.98 and s.112 of the Criminal Justice Act 2003). However, the prosecution contended that the evidence of these Facebook posts did not fall within the bad character regime of the 2003 Act at all because it was evidence which "has to do with the alleged facts of the offence with which the defendant is charged" within the meaning of s. 98 of the Act. Accordingly, so the prosecution contended, the evidence was relevant and admissible without reference to the gateways in s. 101 of the Act. Alternatively, the prosecution contended that if the evidence did not fall within section 98 it was in any event admissible through the

gateway in s. 101(1)(c) as important explanatory evidence.

15. The judge heard legal argument at the start of the trial before the case was opened and gave a very full and detailed ruling. He considered the relevant case law and in particular the guidance from this court in R v Tirnaveanu [2007] EWCA Crim 1239, [2007] 2 Cr.App.R 23. In that case it was held that there must be some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seeks to adduce. The court held that the application of s. 98 is a fact-specific exercise. The court also emphasised that there was a potential overlap between evidence that has to do with the alleged facts of the offence and evidence that might be admitted through one of the gateways in s. 101 of the Act. The court said that in practice nothing of any legal significance depends on which of these two routes it is by which the evidence comes in.
16. Although the precise dates of the Facebook posts were not clear from the documents themselves, the evidence was that the complainants had reported them to the police on 11 October 2018. The judge was satisfied that the inference was that they were posted around that time, in other words between the dates of the two offences, 10 October and 21 October. Unsurprisingly, the judge therefore concluded that the necessary temporal nexus was made out for the purposes of s. 98.
17. As to the relevance of the evidence, the judge accepted the prosecution's submission that the Facebook posts helped to show why the applicant would have acted in a way hostile to the complainants because they demonstrated ill-feeling towards them which was tantamount to motive. The judge also said in his ruling that the Facebook posts would in any event be admissible through the gateway in s.101(1)(c) as important explanatory evidence of a continuing background of ill-feeling on the part of the applicant towards the complainants.
18. It was submitted at trial by Miss Manson for the defence that if the evidence of the Facebook posts was admissible the judge should nevertheless exercise his discretion to exclude the evidence under s. 78 of the Police and Criminal Evidence Act 1984 because of the adverse effect it would have on the fairness of the proceedings.
19. In the summing-up the judge gave a direction of law as to how the jury were entitled to use the evidence of the Facebook posts. There is no complaint about that direction, but we observe that if anything it was over-favourable to the applicant because it effectively required the jury to ignore the evidence unless they were satisfied that it demonstrated a propensity to commit the offences in question. In reality the potential probative value of the evidence went further than that because it illuminated the background of hostility.
20. Both complainants gave evidence about the Facebook posts and were cross-examined. The applicant also gave evidence about the posts, disputing that he sent all of them but confirming he sent some of them, although he could not remember which.
21. In the grounds of appeal, Miss Manson contends that the judge was wrong to find that the evidence of the Facebook posts was "to do with the facts of the alleged offences". She says that there could be no certainty of the required nexus in time. She did not pursue these points any further in her oral submissions, but in her written submissions she said one of the Facebook posts referred to the applicant having suffered a stroke and must therefore have been created after his hospitalisation on 3 August 2018. That apart, however, Miss Manson contended in the grounds that the posts could have been created at any time between 3 August and 10 or 21 October, the dates of the two offences,

periods of nine-and-a-half weeks and 11 weeks respectively. Miss Manson submitted in her written grounds that those periods were too long to meet the test of a nexus of time in the authorities.

22. We reject that submission. It flies in the face of the clear evidence of the complainants that they only saw these Facebook posts after they visited the police station to report the first incident of threatening phone calls on 10 October. Their evidence was that they regularly looked on Facebook four or five times a day. They were sure that they would have seen the posts if they had appeared earlier than that. Indeed, we observe that the proximity in time of the finding of the Facebook posts to the threatening phone call the previous day itself provided powerful support for the relevance of the evidence to the commission of the offences.
23. In the alternative Miss Manson contended in the grounds and before us that if the Facebook posts were not evidence to do with the facts of the offence, there was no proper alternative basis to admit the evidence under s. 101 (1)(c) as important explanatory evidence. She pointed out that this gateway applies only to evidence where, without it, the jury would find it impossible or difficult properly to understand other evidence in the case and where its value for understanding the case as a whole is substantial: see s.102 of the Act. She submitted that this could not be said of these Facebook posts. The evidence in question simply filled out the picture; it was not the same as saying that the rest of the picture was either impossible or difficult to see without it.
24. In the course of argument this morning we suggested to Miss Manson that, in reality, if it was not s.98 and the evidence was to be admitted through one of the gateways under s.101, it was more appropriately the gateway under s.101(1)(d), that is to say, "relevant to an important matter in issue between the defendant and the prosecution". Very fairly and properly when confronted with that point Miss Manson conceded that the evidence would have been admissible on that ground and that had it been put in that way in the court below she would have been unable to resist the application. She said, however, that she would still have sought to exclude the evidence under s.101(3) of the Act which is akin to s.78 of the Police and Criminal Evidence Act 1984.
25. We have considered this submissions carefully. We think that the evidence, if not within s. 98, was plainly admissible under s.101(1)(d) as relevant to an important matter in issue between the prosecution and the defence. The prosecution presented a circumstantial case based partly upon the complainants' recognition of the applicant's voice in the phone call and at the house when the windows were broken, but also based on the surrounding circumstances, hence the admitted relevance of the incident in hospital on 4 August. It would have been quite wrong to deprive the jury of the evidence of the Facebook posts. It enabled the jury properly to understand the whole sequence of events which amounted to a campaign of hostility towards the complainants and was thus capable of supporting the accuracy of the voice identifications.
26. Miss Manson submits that the judge was wrong not to exclude the evidence under s. 78 of the Police and Criminal Evidence Act because its admission had a severe and adverse effect on the fairness of the proceedings. As we have explained, she also submitted that had the evidence been properly admitted under s. 101(1)(d) she would have wished to advance similar arguments as to why it should be excluded.
27. We cannot see where the unfairness was in refusing to exclude this relevant evidence. The applicant had every opportunity to deal with it in his own evidence and he did so.

The evidence did not give rise to any satellite issues. It did not distract the jury. It was not unfairly prejudicial.

28. In the end it seems to us the question is whether the admission of the Facebook posts, even if the judge fell into error in some way, rendered the convictions unsafe. We do not think for a moment that the judge was wrong to admit the evidence; he was plainly right to do so. But in any event, the real issue in the case was who was telling the truth - the complainants or the applicant? The jury heard them all give evidence; the summing-up was accurate, full and fair; the jury convicted unanimously; they were sure that the complainants were telling the truth on the key matters and sure that the applicant was not.
29. For all these reasons, we are entirely satisfied that there is no arguable ground of appeal. Accordingly, we refuse leave to appeal against conviction and refuse the extension of time which would be necessary to bring such an appeal.

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

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