[2019] EWCA Crim 1158

No: 201802080/C4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

, 7 June 2019

Before:

Mrs Justice May DBE
RECORDER OF NORTHAMPTON
(HIS HONOUR JUDGE Mayo)
(Sitting as a Judge of the CACD)

Regina
and
Joseph Ramon Jacombs

NON-COUNSEL APPLICATION

Mrs Justice May

On 19 April 2018, following a retrial at Worcester Crown Court, Mr Jacombs was convicted by a 10:2 majority of a single count of committing an act outraging public decency. The jury at his first trial had been discharged after they failed to agree.

He was sentenced to a community order with unpaid work together with a rehabilitation activity requirement, all of which he has now completed. Nevertheless, he seeks to challenge his conviction and has renewed his application for leave following refusal by Davis LJ, sitting as a single judge of the High Court. Mr Jacombs also applies to adduce fresh evidence for the purpose.

The circumstances of the offence of which Mr Jacombs was convicted were as follows. On 9 December 2016, at approximately 4.30 pm, a lady boarded a bus in Birmingham with her 3-year-old daughter. She sat on the lower deck of the bus at the back in one of the rear facing seats. Her daughter was by the window with her mother beside her.

The prosecution case was that at approximately 5 o'clock in the afternoon the applicant (who was a police officer) drove alongside the bus whilst masturbating at the wheel with his trousers round his knees. He was the only person present in the car. The woman on the bus looked into the car. She saw a light on the driver's door which appeared to be a telephone screen and could see what was happening when the light flashed. She saw the event for about 10 seconds before the traffic moved. She noted the registration number of the car (C88 JOE) and reported the incident to the police on 13 December 2016. A PNC check was carried out on the vehicle which confirmed that the applicant had owned the car since February 2012 and he was the only male driver named on the insurance.

When the applicant was arrested his mobile phone was seized and examined. It was an agreed fact at trial that the phone contained a video recording of a man (not the applicant) driving alongside a bus and masturbating whilst a woman on the bus looked into the car.

The applicant gave evidence at trial and denied the allegations. The defence case at trial was that he was

driving his car in the vicinity of the incident on the date in question but could not say at precisely what section of the road his vehicle was at the time the woman in the bus saw what she said she had. His long-term partner, Susan Fallon, was in the car alongside him. He was not aware of the video on his phone and had never seen it. He said he made no comment in interview on the advice of his solicitor because he had been in a state of shock.

His partner Susan Fallon gave evidence at trial and confirmed on the evening in question that she had gone out for dinner with the applicant and they had gone in his car. Nothing unusual happened on the journey. No masturbation took place in the car. She confirmed that she had owned the applicant's mobile phone before she met him. She never lent it to anyone else and had never seen or downloaded the video.

Material said to be new evidence is the result of the applicant's analysis of the prosecution evidence disc showing times, the applicant says, when his phone was accessing the Internet using his home Wi-Fi at 5.04 and 5.12 in the afternoon. He seeks to rely on this as showing that he was at home, not on the road, at the time the woman said she saw someone masturbating. Also new, he says, is evidence about the complainant who was known to him and his ex-wife having taught their daughter some years before. That is the fresh evidence.

In addition to that Mr Jacombs says that there was a police failure to secure evidence from the complainant's phone of the note she said she made of the numberplate of the car. He complains that the police failed to check CCTV or APNR which would have shown that his car was not on the road at the material time. Next, he says that the summing-up was biased in favour of the Crown and that his counsel at trial omitted to put pertinent material before the jury and failed to challenge misleading information given by the prosecution regarding the location of the video found on his phone. He says it was in the video cache where it was unavailable to be viewed. Lastly, Mr Jacombs complains that there was a lack of continuity regarding the phone after it was seized by police.

The respondent has put in a notice and grounds of opposition and, following a waiver of privilege, we have also seen a response to the criticism of Mr Jacombs' defence counsel at trial. We have considered all this material most carefully. Having done so, we agree with the views of the single judge in refusing permission. He said this:

> “These grounds, whether taken singly or cumulatively, are untenable.
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> The so-called proposed new evidence leads nowhere. Whether the complainant knew the applicant or his family was immaterial (and, when asked, she said she had no recollection of meeting them). The point on continuity of evidence is also hopeless.
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> Sufficient material as to Wi-fi connections was properly disclosed before trial, and the applicant's present attempts to expand on that material lead nowhere in his favour. I note, in fact, that counsel then appearing has said that an informed tactical decision (and for a good reason) not to adduce further evidence was agreed [with the applicant] before trial.
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> I see nothing unfair or unbalanced in the summing-up at all.
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> There was ample evidence before the jury that the applicant had been in his silver Audi car (of which the complainant took the registration number) at the relevant time. There was also the very striking factor of the video showing a man in the car masturbating towards the bus, found on the applicant's mobile phone.
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> Trial counsel has provided a complete answer to the criticisms of him.
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> The police could hardly be strongly criticised for not getting CCTV footage of the area when the applicant initially had accepted that he was driving in the vicinity of the incident in his Audi.
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> I have considered all the numerous points raised. None is remotely arguable. This application is entirely devoid of merit.”

With respect we entirely agree and we refuse the renewed application for permission together with the application to adduce fresh evidence. We have considered whether we should make an adverse costs order, but in view of the submissions which Mr Jacombs has put in and taking account of the fact that he has been

representing himself, we decline to make any such order in his case.