No: 201804389/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2019] EWCA Crim 1510

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 15 August 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MRS JUSTICE CARR DBE

and
MRS JUSTICE ANDREWS DBE

R E G I N A
v

FORHAD ALAM

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Mr L Loughlin appeared on behalf of the **Appellant**
Ms G Ong appeared on behalf of the **Crown**

J U D G M E N T
(As Approved)

1. LORD JUSTICE HICKINBOTTOM: On 31 August 2018, in the Crown Court at Snaresbrook before His Honour Judge Southern and a jury, the Applicant Forhad Alam was convicted of violent disorder, for which, on 26 October 2018, he was sentenced by Judge Southern to one year eight months and one week's detention in a young offender institution. Through Mr Liam Loughlin of Counsel, he now applies for leave to rely on fresh evidence, under section 23 of the Criminal Appeal Act 1968 and, primarily on the basis of that evidence, for leave to appeal against conviction. He also requires an extension of time for the appeal.

2. We can deal with the extension shortly. The application was made 26 days out of time, as a result of delay in receiving and then reviewing a report of Lee Bottomley who interrogated the Applicant's phone after the trial. For reasons which will become apparently shortly, we consider it is in the interests of justice to grant an extension so the application is in time; and we grant that extension.

3. The facts giving rise to the charge against the Applicant are briefly as follows.

4. In the early evening of 2 March 2018, two incidents of violence occurred on the streets of East London. First, at about 6.30pm, Rubel Rana was visiting someone in Russia Lane, London E2. He drove there with his friend Mohammed Alom and, after he had parked, he left Mr Alom alone in the front passenger seat of the car. At about 6.40pm, the car was attacked by a group of about half a dozen youths with weapons: a sword or machete, other knives and a hammer. They were all more or less armed. Mr Alom locked the doors; but the car was subject to a violent attack with the back windows being smashed. As the youths tried to break the front windscreen, Mr Alom moved to the driver's seat with a view to driving away from the danger; but that proved impossible because the tyres had been slashed during the attack, and it was snowing. He therefore pressed the car horn, and people started to come out of nearby houses. The youths ran away, at first leaving behind two of their number who continued to try to smash the front windows of the car, until they too ran off.

5. Mr Rana saw the attack from a fourth floor window of the block of flats he was visiting, and he came running down to see the youths running away. He chased a few of them for about 200 yards, before going back to see that Mr Alom was okay and to wait for the police to arrive. A witness rang the emergency services at 6.44pm. and Mr Alom himself did so at 6.47pm.

6. The second incident was close by in Bethnal Green Road at 7pm, when a cyclist was assaulted, kicked, punched and stabbed by a group of youths.

7. CCTV footage identified a group of youths in the area shortly before these incidents; and, at about 8.40pm that day, the police attended Barnes House, where the Applicant lived and where they found him together with a number of his friends and associates. These youths (or at least some of them) were thought to have perpetrated the two assaults. The police handcuffed the Applicant because he refused to comply with their requests. They handcuffed no one else. Mr Alom and Mr Rana then arrived at Barnes House, where they generally identified the group as those who had attacked their car; and at least Mr Alom identified the Applicant whilst he was in handcuffs.

8. As a result of these incidents the Applicant together with Altaf Assad, Terry Mobbs, his brother Tommy Mobbs and Abu Rayhan were charged with (i) violent disorder in respect of the incident involving the car, and (ii) causing grievous bodily harm with intent to the cyclist. Assad and Rayhan were also charged with having an offensive weapon (a knife) in Bethnal Green Road as part of the assault on the cyclist.

9. Assad pleaded guilty to the three charges he faced. The charge in respect of the cyclist was dropped as against the Applicant because, after a review of the cell phone siting evidence and service of the defence facial mapping evidence, the prosecution accepted that the Applicant could not have been at the scene of the assault of the cyclist in Bethnal Green Road at 7pm. The other charges went to trial before His Honour Judge Southern at Snaresbrook Crown Court on 23 August 2018.

10. So far as the Applicant was concerned, he therefore faced the single violent disorder charge arising out of the attack on the car in Russia Lane. The key evidence against him was his positive identification by Mr Alom and Mr Rana at identification procedures which took place on 18 and 24 April 2018 at Hornsey Identification Suite.

11. At that procedure, when asked about the role the Applicant had played in the incident, Mr Alom said that he was the "attacker" and the one who provoked the others into attacking him. However, in his evidence at trial, he said that the youths who attacked the car largely had their faces covered; but he said he did not need to see a face to recognise someone and when he went to Barnes House he was looking at "body posture, aggression, intensity body language" for the purposes of recognition and thus identification.

12. At the identification procedure, when he picked out the Applicant, Mr Rana said: "Yep, yep, 100%". He said he was the person who stabbed the car, sliced the back window and tried to kill Mr Alom. In his evidence, Mr Rana said that he recognised some of the youths from the area, and gave details which he had not given previously such as the fact that one of the youths had "browny" hair and he chased "the fat one that lives in Barnes House". He described a man with a hammer as "a skinny, black skinned guy" who he

knew lived in Barnes House. He thought that one or two of the youths lived in Barnes House, and it was in the direction of Barnes House he chased youths. That is why, after the incident, with Mr Alom he made his way there.

13. The Applicant, of course, lives in Barnes House; but although, he accepted that he knew and associated with his co-defendant, he denied having anything to do with the assault on Mr Alom or the car. He said he was at home that day until about 7.15pm, i.e. well after the incident. He then went out to buy cigarettes. When he got back to Barnes House, he dropped something off at his flat and then went back out to see his friends who had gathered there. With them, there was no discussion of anything that happened that evening. His mother gave evidence to the effect that the Applicant was at home until about 7.15pm, although there were differences between her evidence and that of the Applicant, for example as to whether he had eaten before he went out and whether he had house keys.

14. The Applicant also, to an extent, relied upon cell site evidence, which was consistent with him being at home at the relevant time, although also consistent with him being in Russia Lane which is close by.

15. Evidence was obtained from the Applicant's mobile data provider, O2 on behalf of Giffgaff, which was served on the Applicant as follows. As we understand it, a schedule of data from O2, without any particular description, was served as unused material at the time of full disclosure. It was considered by the defence team, but was regarded as of little or no assistance to the Applicant because it appeared to be information concerning telephone calls, not data. Shortly after the service of the defence statement (in which an alibi notice was effectively given to the effect that the Applicant was at all material times in his own house) on 3 July, a statement of PC Privett was served in which he referred to these records as records of telephone calls. The evidence schedule to which we have referred was also served on the Applicant again three days before trial. When the defence team looked at the information again, they asked for confirmation that this was a schedule of telephone calls only, and PC Privett confirmed that to be the case. As the schedule showed no data usage at all, it was thought that they must be incoming calls only. The defence team did not follow this evidence up further at that stage.

16. However, the prosecution retained a cell site expert, Dominic Kirsten, who produced a report, but could not in the event attend trial. Another expert instructed by the prosecution, Richard Baxter, attended the trial and he confirmed the contents of the report.

17. Mr Baxter explained that, although mobile data events for the Applicant's phone had been recorded in the O2 schedule (which indicated that the phone was switched on), the mobile network was not used to send any data during the relevant period, i.e. during the whole of the day to 7.10pm. He said that that could be explained in a number of ways:

(i) the phone was not using data, (ii) the phone's mobile data had been turned off or (iii) the phone was using another data provider such as WiFi. There was no evidence as to whether the Applicant's phone had used a source of data other than the mobile data provider in the relevant period. When asked in cross-examination about data, Mr Baxter said he was unable to say from the evidence before him whether or not the Applicant's phone had been using (e.g.) WiFi at his home, and therefore could not from that evidence assist as to whether the Applicant might have been home at the relevant time. He was not prepared to accept the proposition that, as a phone that is switched on is likely to use some data, then the lack of mobile network data usage prior to about 7.22pm that evening, made it likely that the phone was on a WiFi network. He was only prepared to accept that that was simply consistent with a WiFi network being used.

18. For the purposes of the trial, neither the prosecution nor the defence interrogated the Applicant's mobile phone itself, which was held by the police. The phone – a smart phone – required a pattern, as opposed a password or PIN, to gain access to it. The police sought access to it, but it seems that the Applicant said that he could not remember the pattern. In any event, he did not give them the pattern. The Applicant himself did not seek any access to his own phone, nor did his defence team seek any such access.

19. After the trial, and the Applicant's conviction, the defence team retrieved the phone, and asked a telephone expert, Lee Bottomley of Leyson Data Limited, to interrogate it. For those purposes, it appears that the Applicant must have identified the pattern which enabled access to be gained. Mr Bottomley produced a report dated 26 September 2018. Later, the Crown also instructed experts, Kelvin Goodram and Alexander Eames of a company called Cyfor. On 27 and 28 June 2019, Mr Bottomley and Mr Goodram met and prepared a memorandum on matters upon which they were agreed. This included an agreement that the Snapchat multi-media messaging app on the phone had been in use between 6.15pm and 7.30pm on the relevant day (2 March 2018), with heavy file activity in the form of the creation and modification of pictures, videos and audio files almost every minute from 6.26pm to 6.55pm and 7.08pm to 7.11pm, as well as 17 further "stories" (i.e. compilations of snaps into chronological storylines) which were received earlier being viewed on that phone in that period. In addition, several Snapchat messages were sent at 6.44pm and 6.52pm, and others received at 6.55pm and 6.57 pm. The clock on the phone appears to have been aligned with that on the Snapchat servers. In other words, those timings appear to be reliable.

20. We now have the benefit of Mr Goodram's report dated 3 May 2019 which sets out details of the Snapchat stories and messages. These show, for example, that various Snapchat stories, received minutes before, were viewed on the phone at 6.28pm, 6.29pm, 6.44pm, 6.48pm and 6.49 pm. At 6.44pm, a Snapchat message was sent from the phone, "Why does it say play at the bottom", with an open eyes emoji; and, at 6.52pm, a message was sent, "No you can't". The content of these messages, submits Mr Loughlin, is less important than the timings they were sent; but the message timed at 6.44pm, to which we will return, at least suggests the Applicant was then positively engaging with

the recipient.

21. Ms Loughlin submits that this evidence demonstrates that the Applicant's phone was being frequently and almost constantly used to receive, view and send stories and messages between 6.27pm and 6.54pm, i.e. the period of the attack on Mr Alom and his car, and also the period it is alleged the attackers including the Applicant were fleeing the scene of the crime. In particular, he focused on the message at 6.44pm to which we have referred, which was sent at the same time as the first 999 call when it is alleged the Applicant was fleeing the scene.

22. In the absence of any mobile data usage, Mr Loughlin submits that the most likely means by which the phone might have sent and received data was by connection to a WiFi network. In terms of access to such networks, the experts agree that the most recent activity was shown as a connection to a Sky WiFi network hub at 12.29am on 2 March 2018. No subsequent connections were identified. There was evidence at trial that the Applicant had access to a Sky network hub at his home, his mother produced a bill from Sky showing it as a WiFi service provider at his home address.

23. This new evidence, Mr Loughlin submits, points heavily in favour of a conclusion that the Applicant's phone was in constant use at the time of the offence and its aftermath, and it would be open to a jury to infer both that the most likely user was the Applicant and that he was using it on the WiFi at his home. That would support his defence of alibi and at least potentially undermine the prosecution case that he was one of those who attacked Mr Alom.

24. This evidence was not of course before the court at trial. Mr Loughlin consequently makes an application under section 23(1) of the Criminal Appeal Act 1968, under which this court may, if we consider it necessary or expedient in the interests of justice, receive any evidence which was not adduced in the proceedings from which the appeal before us lies. By section 23(2), in considering whether to receive any new evidence, the court is required to have particular regard to the following four matters:

    i. “(a) whether the evidence appears to the court to be capable of belief;
    ii. (b) whether it appears to the court the evidence may afford any ground for allowing the appeal;
    iii. (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal and
    iv. (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

25. Mr Loughlin submits that this new technical evidence is not only capable of belief, it is essentially agreed between the relevant experts. It would clearly have been admissible in the Crown Court. It would, he submits, render the Applicant's conviction unsafe. As to the explanation for the failure to adduce the evidence below, whilst the interrogation of the Applicant's phone which revealed the new evidence could have taken place before the trial, he submits that the prosecution, no doubt unwittingly, misled the defence team by telling them that the download of the mobile data provider's evidence concerned telephone calls and not mobile data, the fact that it related to the latter not becoming apparent until Mr Baxter was cross-examined. The Applicant did not tell them that he was using data at his home during the course of the day. Had he done so, Mr Loughlin says, then the defence team would no doubt have investigated that aspect of the case, including interrogation of the phone, earlier. Absent such an indication from the Applicant, he submits that the defence team acted entirely reasonably in not seeking to interrogate the mobile phone itself before the trial.

26. We are satisfied as to the credibility and admissibility below of the new evidence. As to the explanation of why this evidence was not adduced at trial, this is far from perfect. The Applicant relied upon the alibi of being at home at the time of the offence. If, whilst at home, he had been using his phone attached to his home WiFi network, that was something which could not be supported by the available mobile data records, but which could clearly have been supported by records held within the phone itself.

27. In respect of possible explanation as to why this evidence was not adduced at the trial, there is certainly no suggestion that the failure to interrogate (or allow the interrogation of) the mobile phone was taken as a tactical decision by the defence team – indeed, they appear to have been as surprised by the outcome of the interrogation as anybody. Nor is there any evidence that the Applicant himself considered that it was or could have been of a tactical advantage in the criminal proceedings not to allow access to his mobile phone. Adducing this evidence clearly had the potential of being highly beneficial to him during the course of the criminal proceedings; and it remains a mystery as to why the Applicant did not tell his defence team that he was using his mobile phone during the course of that day and, in particular, during the course of the period in which the relevant events occurred. Had be done so, then we are sure that the defence team would have investigated this, and adduced the evidence from the phone upon which the Applicant now seeks to rely.

28. We accept that as a matter of principle a defendant has a general obligation to advance before the jury his whole defence including all evidence upon which he relies. However, the factors set out in section 23(2) are not preconditions for the receipt of new evidence, rather they are only matters to which this court must have regard – particular regard – when considering whether it is in the interests of justice to receive evidence not adduced or relied upon below. That is clear from the wording of the statute, but was confirmed by this court in Sales [2002] 2 Cr App R(S) 431 at page 437E. In particular, for the purposes of this application, the fact that there is no reasonable explanation put forward for the failure to adduce evidence at trial is not fatal to a section 23(1) application (see, e.g., Cairns [2000] EWCA 21 at [5]; [2000] Crim LR 437).

29. Moving to the fourth and final factor set out in section 23(2), namely (b), in this case we accept that, in all of the circumstances, this new evidence if admitted, whilst not necessarily being decisive, is or may be strongly supportive of the Applicant's case that he was not at the scene when the attack on Mr Alom and his car occurred but was rather at home.

30. In respect of where how new evidence fits in with the evidence at trial, as against the Applicant the prosecution primarily relied upon the identification evidence. It is not suggested that the judge's directions to the jury on identification were less entirely appropriate, e.g. he not only reminded the jury of discrepancies and inconsistencies in the evidence of Mr Rana and Mr Alom generally, he very properly specifically warned the jury in respect of the Applicant having been seen by at least Mr Alom at Barnes House in handcuffs shortly after the incident, and whether that might have informed his judgment as to whether the Applicant was one of the attackers in Russia Lane and thus tainted his identification of him as such.

31. However, as Judge Southern recognised, the identification evidence relied on by the Crown was not the strongest. The incident was short, quick, violent and frightening. Mr Alom appears to have accepted that, in identifying the Applicant, he relied on general characteristics such as gait and clothes rather than any facial recognition. Mr Alom also saw the Applicant at Barnes House in handcuffs with several of his co-defendants shortly after the incident. Mr Rana only saw the incident briefly from a fourth floor window, and then during a short chase. The perpetrators' faces were not clearly visible to him. The Applicant was already known to Mr Rana generally from appearance in the area.

32. In addition to this identification evidence, Ms Ong for the Crown submitted that the prosecution case was supported by the admitted association of the Applicant with his co-defendants, and inconsistencies between the accounts given by the Applicant and his mother as to matter such as whether he had eaten and whether he had keys to the house.

33. We have considered all of this evidence. However, on the basis of the new evidence, in our judgment, it would be open to the jury to conclude that, at the time of the assault on Mr Alom and his car and the flight of perpetrators, the Applicant was or might have been using the Snapchat application on his phone at his home. We do not consider that the prosecution evidence, including in particular the identification evidence but also the other matters relied upon by Ms Ong, is so strong that a jury could not come to that conclusion.

34. Therefore, whilst we accept the reasons for this new evidence not being sought and adduced earlier are far from entirely clear, in all of the circumstances and after particularly careful consideration, we have concluded that it would be unjust not to receive it now. Indeed, in our view, it is clearly in the interests of justice that we do receive it.

35. On the basis of that new evidence, for the reasons we have given, we consider it is inevitable that the conviction is unsafe. That is the test which we have to apply.

36. Therefore, having allowed the application for an appropriate extension of time, we allow the section 23 application and will receive the written evidence of Mr Bottomley, including his agreement with Mr Goodram, that we are asked to receive. Having done so, we grant the Applicant leave to appeal and, being satisfied that the conviction is unsafe, we allow the appeal and quash the conviction.

37. LORD JUSTICE HICKINBOTTOM: Ms Ong, what about a retrial? We know that the Appellant, as he now is, has effectively served the custodial part of his sentence.

38. MS ONG: Yes. So do I, and that is exactly what my instructions are. He has served his custodial part of his sentence and the Crown do not consider it in the public interest to have a retrial in this case.

39. LORD JUSTICE HICKINBOTTOM: The only orders will be those we have given, and in particular to allow the appeal and quash the conviction.

40. MR LOUGHLIN: Thank you my Lord.

41. LORD JUSTICE HICKINBOTTOM: Is there anything else required Mr Loughlin?

42. MR LOUGHLIN: No my Lord.

43. LORD JUSTICE HICKINBOTTOM: Ms Ong?

44. MS ONG: No thank you.

(The Registrar conferred with the Bench)

45. LORD JUSTICE HICKINBOTTOM: The clerk quite properly mentioned the section 45 order below restricting the identification of the Appellant, but that no longer applies because of his age.

46. MR LOUGHLIN: Yes, it is extinct because he is not under 18 anymore, and I do not seek to reapply.

47. LORD JUSTICE HICKINBOTTOM: So there is no extant section 45 order. Thank you very much.

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