



Neutral Citation Number: [2011] EWCA Crim 1256

Case No: 2010/04801/B5

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2011

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

MRS JUSTICE RAFFERTY

and

MR JUSTICE HOLROYDE

Between :

R

- v -

Gary Dobson

Mr Mark Ellison QC and Miss A Morgan for the Applicant
Mr Timothy Roberts QC and Mr S Moses for the Respondent

Hearing dates : 11-12th April 2011

Approved Judgment
FOR PUBLICATION

The Lord Chief Justice of England and Wales:

1. On 22nd April 1993 just after 10.35 in the evening, a young man, Stephen Lawrence, then 18 years old, was waiting at a bus stop at Eltham with a close friend of the same age, Duwayne Brooks. As they waited peacefully for the bus, a group of white youths crossed the road towards them. One of the youths used abusive racist language. This was followed by a sudden and immediate attack, as the group converged on or charged at them. Duwayne Brooks managed to make his escape, but Stephen Lawrence was felled. He was stabbed twice to the upper torso, one wound tracked vertically downwards from 10cm to the right of the mid line, and the second tracked more or less horizontally, but in an upward direction, from the outer aspect of the left shoulder. Major blood vessels were severed. The injuries were fatal. The position and angle of the wounds suggested that the torso may have been upright at the time when the knife wounds were inflicted. Apart from the stabbing wounds, the only further injuries noted at post mortem were an incised injury to the left side of the chin and abrasions to the cheek and the back of the right hand. Mortally wounded, Stephen Lawrence managed to get to his feet. He ran after Duwayne Brooks, but after a little while, he collapsed on the pavement. He died shortly afterwards in hospital.
2. The murder of Stephen Lawrence, a young black man of great promise, targeted and killed by a group of white youths just because of the colour of his skin was indeed a calamitous crime.
3. Stephen Lawrence's parents began a private prosecution and, in April 1996, Gary Dobson, Luke Knight and Neil Acourt were tried for murder at the Central Criminal Court before Curtis J and a jury. Following the judge's ruling that purported identification evidence was not admissible, there was insufficient further evidence to justify the continuation of the prosecution. The jury was directed to acquit the defendants. Not guilty verdicts were entered .
4. This is an application by the prosecution for the acquittal of Gary Dobson to be quashed and for a re-trial to be ordered under section 76 of the Criminal Justice Act 2003. No application to quash the acquittals of Neil Acourt and Luke Knight is before the court, but another suspect, who was not a defendant at the earlier trial, David Norris, was arrested in September 2010 and charged with murder. His trial will take place at the Central Criminal Court in November 2011. If the acquittal of Gary Dobson is quashed and a re-trial ordered, the prosecution propose that he and David Norris will be tried together.

The statutory criteria

5. Until Part 10 of the Criminal Justice Act 2003 (the 2003 Act) came into force the ancient rule against double jeopardy represented an insuperable barrier to a second prosecution of any of those acquitted at the Central Criminal Court in April 1996. The rule has been subject to limited statutory abrogation in relation to a number of qualifying offences, of which murder is one.
6. Section 78 of the 2003 Act provides:
 - “(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person...

- (2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted...
- (3) Evidence is compelling if –
 - (a) it is reliable,
 - (b) it is substantial, and
 - (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.
- (4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted...”

7. Thus “compelling evidence” for the purposes of section 78 is defined in the section itself. It does not mean that the evidence must be irresistible, or that absolute proof of guilt is required. In other words, the court should not and is certainly not required to usurp the function of the jury, or, if a new trial is ordered, to indicate to the jury what the verdict should be. Our attention has been drawn to the observations of the Vice President, Lord Justice Hughes, in *R v (G), B (S)* [2009] EWCA Crim 1207 where the proposed new evidence, of a co-accused who had been convicted at the original trial, did not satisfy the test of reliability. At para 5 of the abbreviated judgment, the Vice President observed that it is “only where there is compelling new evidence of guilt, of the kind which cannot realistically be disputed, that the exceptional step of quashing an acquittal will be justified”. The purpose of this observation, as para 9 makes clear, was to highlight that the quashing of an acquittal is an exceptional step, which indeed it is, and can only be ordered if the statutory requirement in relation to the “reliability” of the new evidence is clearly established.

8. However the legislative structure does not suggest that availability of a realistic defence argument which may serve to undermine the reliability or probative value of the new evidence must, of itself, preclude an order quashing the acquittal. It must, of course, be carefully analysed, and given its proper weight. If the argument, or indeed any defence evidence, leads the court to conclude that the new evidence is not, after all, as reliable or substantial as it was thought to be, or that it no longer appears to be highly probative of guilt, then the court cannot be satisfied that the statutory test has been met. That is a fact specific decision. In the end, there are three defined elements: provided the new evidence is reliable, substantial, and appears to be highly probative, for the purposes of section 78 it is compelling: otherwise it is not.

9. Section 79 of the 2003 Act addresses the separate question which arises once the court is satisfied that new and compelling evidence as defined by section 78 is available. It provides:

“(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order...

(2) That question is to be determined having regard in particular to –

- (a) whether existing circumstance make a fair trial unlikely;
 - (b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;
 - (c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition.
 - (d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.
 - (3) ...
 - (4) Where the earlier prosecution was conducted by a person other than a prosecutor, sub-section (2)(c) applies in relation to that person as well as in relation to a prosecutor.”
10. The interests of justice test requires attention to be focussed on the express statutory criteria provided in section 79, but these criteria, although wide ranging, are not exhaustive. They are partly directed to events during the original investigative and trial process, a requirement designed to avoid delay in the administration of justice as well as inefficiency and lack of direction which might result from a perception that what we shall describe as a second bite of the cherry may eventually become available to the prosecution. Thus if the new evidence relied on by the prosecution would have been revealed for use at the first trial by a competent investigative and/or prosecutorial process, then the interests of justice may, on this ground alone, lead to the application being refused. The interests of justice have also to be addressed in the context of the date when any new trial may take place, with particular emphasis on any failure of due diligence or expedition since the original trial and on the impact of any delay (whether culpable or not) on the fairness of the proposed second trial. However compelling the new evidence may be, it is elementary that any second trial should be a fair one. For this purpose the court will examine all the known facts, and consider any material drawn to its attention on behalf of the potential defendant, including any potentially prejudicial publicity attracted by the case, which may make it “unlikely” that a fair trial can take place.
11. If this court is satisfied that the requirements of both sections 78 and 79 are met, the order must be made: otherwise the application must be dismissed (see s77). In the context of the present application it should perhaps be highlighted that the legislative arrangements which abrogated the double jeopardy principle make no distinction between an acquittal following a prosecution by the Crown in the usual way, or an acquittal following a private prosecution. This approach to the legislation is reinforced by the continuing power of the Director of Public Prosecutions under section 6(2) of the Prosecution of Offences Act 1985 to take over the conduct of a prosecution begun by a private individual, and thereafter to serve notice of discontinuance, or alternatively, to ensure its more efficient conduct. Accordingly in the present application we cannot apply any less stringent test to the legislative

requirements merely because there was no realistic prospect that the private prosecution would succeed.

12. The present application depends on the reliability of new scientific evidence which by reference to the grey bomber jacket (LH/5) and the multi-coloured cardigan (ASR/2) closely links Dobson with the fatal attack on Stephen Lawrence. It does not and could not demonstrate that Dobson wielded the knife which caused the fatal wound, but given the circumstances of the attack on Stephen Lawrence, that is, a group of youths in a violent enterprise converging on a young man, and attacking him as a group, it would be open to a jury to conclude that any one of those who participated in the attack was party to the killing and guilty of murder, or alternatively manslaughter (a verdict which would, if there had been sufficient evidence, also have been available at the first trial). If reliable, the new scientific evidence would place Dobson in very close proximity indeed to Stephen Lawrence at the moment of and in the immediate aftermath of the attack, proximity, moreover, for which no innocent explanation can be discerned.
13. On behalf of Dobson, Mr Timothy Roberts QC, in a meticulously careful submission submitted that this evidence is unreliable and of no sufficient probative value, just because the results of the new examination of Dobson's clothing are likely to be the product of contamination over the years, that is, by contact with Stephen Lawrence's blood and his clothing. On this basis, even if scientific evidence is reliable, the apparent links are unconnected with Dobson's presence and involvement at the scene, but rather the result of outdated or incompetent storage or packaging or transporting arrangements, and therefore they are not probative at all, and certainly not highly probative.
14. Mr Roberts further highlighted that even if there was sufficient evidence to link his client with presence at the scene of the killing of Stephen Lawrence, it was unlikely that after the huge wave of constant publicity over the years, directly identifying some of those suspected of the murder with involvement in the crime, be a fair trial. The constant stream of adverse publicity will make it impossible for the jury to approach their responsibilities with the necessary level of open mindedness and fairness. There would be prejudice, either actual prejudice, or unconscious prejudice.
15. After conducting a detailed examination of a large body of evidence we have come to the conclusion that there is sufficient reliable and substantial new evidence to justify the quashing of the acquittal and to order a new trial. This decision means, and we emphasise that it means no more than that the question whether Dobson had any criminal involvement in Stephen Lawrence's death must be considered afresh by a new jury which will examine the evidence and decide whether the allegation against him is proved. The presumption of innocence continues to apply.
16. Our decision in relation to publicity is based on the material we have seen. The way in which publicity should be given to this judgment and indeed the subsequent trial must now be governed by the fact that there is indeed to be a new trial of a defendant who, we repeat, is presumed in law to be innocent. The proceedings are now active for the purposes of section 2 of the Contempt of Court Act 1981, and care should be taken to ensure that any further reporting of this case must avoid any risk to the administration of public justice and the fairness of the forthcoming trial. It would

probably be wise for any reporting of this decision to confine itself to the terms of the present judgment.

17. Subject to any further order, the full judgment of the court, which approaches 100 paragraphs in length, may be publicised in the usual way when the new trial is concluded.