Neutral Citation Number: [2020] EWCA Crim 292

Case No: 201902538

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT HARROW**
**His Honour Judge M Tregilgas-Davey**
**Case Ref T20190075**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

**Before:**

**LORD JUSTICE IRWIN**
**MR JUSTICE GARNHAM**
and
**HER HONOUR JUDGE MUNRO QC**

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**Between:**

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| **Christal Ngoie** | **Appellant** |
| **- and -** | |
| **Regina** | **Respondent** |

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**Mr T Bass** (instructed by **Powell Spencer & Partners**) for the **Appellant**
**Mr TS Forster** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 27 February 2020

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# Approved Judgment

## Lord Justice Irwin:

1. On 14th June 2019, in the Crown Court at Harrow (H.H.J. Tregilgas-Davey), the appellant was convicted (by a majority of 11 to 1) of Counts 1 and 2 below.

   On 21st June 2019 (before the same Judge), he was sentenced as follows:

| COUNT | OFFENCE | SENTENCE |
|---|---|---|
| 1 | Possessing a Controlled Drug of Class A (Heroin) with Intent | 5 ½ years' imprisonment |
| 2 | Possessing a Controlled Drug of Class A (Crack Cocaine) with Intent | 5 ½ years' imprisonment (concurrent) |

**TOTAL SENTENCE: 5 ½ YEARS IMPRISONMENT**

2. He was ordered to pay a surcharge in the sum of £170. An order was made for the forfeiture/destruction/disposal of the drugs seized and five mobile phones.

3. Takyle Clarke was convicted on Counts 1 and 2 as well as for the further offence of Possessing Criminal Property (Count 3). He was sentenced to a total term of 4 years detention in a YOI.

4. The appellant was represented under a Representation Order by solicitors and Counsel (Mr. Bass).

5. He appeals against conviction by leave of Phillips J.

6. On 27 February 2020 we dismissed this appeal. We now give our reasons.

## The Facts

7. On 12th May 2017, around 17:30, three police officers observed a stationary Mercedes vehicle parked next to two possible drug users, who were on foot, in Langley Park, London NW7. Of the three officers, only P.S. Martin was available to give evidence at trial. The Body Worn Video footage from all three officers was, however, played to the jury. This showed the two suspected drug users standing side-by-side and bending towards the nearside window or windows of the parked Mercedes. We return to the detail of this below.

8. The officers approached the vehicle. Sitting in the driver's seat was Abraham Sossongo; the co-accused, Takyle Clarke, was sitting in the front passenger seat; and the appellant was sitting in the rear nearside passenger seat. The front and rear nearside windows were both open to varying degrees. Having initially refused to open the door, Sossongo attempted to run from the police, but was ultimately detained. The two pedestrians made off on foot. The other two defendants were detained at the scene.

9. A total of 1.644 grams of heroin (Count 1) and 1.785 grams of crack cocaine (Count 2), wrapped in street deals, were found in the footwell of the driver's seat and also down between the front passenger seat and the passenger door. Sossongo was found to be in possession of £110 whilst Clarke was in possession of £700. Sossongo subsequently

pleaded guilty in the Magistrates' Court to two offences of Possession of Class A Drugs with Intent to Supply.

10. No drugs or cash were recovered from either the appellant himself or from the rear of the vehicle where he was sitting. Next to him on the rear seat, however, was a mobile phone, which was one of several recovered from the car. The phone, which was unregistered, contained a deleted message, sent to a number of contacts, that read: "Finally bak on and delivering 4 for 25 or other deals available. Ace." There was agreed expert evidence that the message could be indicative of drug supply. The message was not dated or time stamped but other innocuous messages recovered from the phone were dated 12th May 2017. There were no incoming messages to the phone requesting heroin or cocaine. Found in the contacts list of the same phone was a number saved under the name, "C Probation". The number saved was that of the appellant's probation officer, Humayun Choudhury. The appellant was known as 'C'. The phone was examined for fingerprints with a negative result.

11. The appellant had two previous convictions relating to the possession of heroin and crack cocaine with intent to supply in August and September 2015. He had pleaded guilty to both offences.

12. In interview the appellant made no comment.

13. The Crown case was that the appellant was part of a joint enterprise with Clarke and Sossongo to supply class A drugs. They could not specify what particular role he played in the common enterprise. However, the messages found on the mobile phone that was beside him did indicate there had been drug dealing. The heart of the case was that the messages on the phone, in combination with the drugs found in the car, the money found on the co-accused, and the scene with the appearance of class A drug users leaning to the side of the car occupied by the appellant in the rear and his co-accused in the front, meant that the jury could be sure the appellant was guilty.

14. The defence case was that the appellant was not involved in selling drugs and was unaware of the presence of the drugs or money in the car. He had been given a lift as an associate of the other men but had no part in what they were doing. He acknowledged his previous convictions. Part of counsel's submissions to the jury included the proposition that Sossongo, who had pleaded guilty to being a drug dealer, would not have been concerned in conducting drug deals in front of the appellant because the appellant's history would mean he would not inform on Sossongo to the police.

15. The critical points for the purpose of the appeal arise from the evidence of PS Martin, from comment to the jury from defence counsel in closing and the response to that comment by the judge.

16. The evidence in question derived from two sources: the evidence of Sargent Martin and the bodycam video footage showing the scene. Giving his evidence in chief, PS Martin said the following:

> "Q. Just deal, first of all, with the people on the pavement.
>
> A. Yes, sorry.

Q. What were they doing?

A. They were reaching in towards the car.

Q. Were they standing up, bending down? You help us.

A. They were bending over the car, towards the front passenger window.

Q. When you say 'they' it's just important that if they were doing something different you tell us, but were they both bending forward?

A. I can't say for certain.

Q. No?

A. No.

Q. You're saying at least one of them?

A. At least one of them, yes.

Q. When you say towards the front passenger window, could you see how close they were to that passenger window?

A. Literally stood less than a metre away; literally right next to it.

Q. Could you at that point see any of the occupants of the car?

A. Not at that point.

Q. Why not?

A. Because we're from the rear, approaching the rear of the car.

Q. Yes?

A. Yes.

Q. Was there anything about the glass that prevented you from seeing anything?

A. Not that I can remember."

17. Later in his evidence, PS Martin was assisting as the jury looked at the bodycam footage from PC Bateman. As the footage was replayed, the officer was questioned and answered as follows:

"*[Body worn footage replayed]*

Right, pause there.

A. Yes, you can just see the two people stood next to the car. As you get a little bit closer you can see a little bit better them leaning in.

Q. I'll try …

*[Body worn footage replayed]*

That may be as good as we get before we get past it.

A. Yes."

18. A little later in his evidence he said:

"*[1st body worn footage replayed]*

Can you just point out what you can see?

A. Yes, again, they're both stood next to the window. At that stage I can't see if it's open or not obviously, but there's clearly dialogue going on between the people on the pavement and people in the car."

19. The Appellant's counsel Mr Bass asked no questions of the witness.

20. In the course of his closing speech to the jury, Mr Bass made comments in two passages relevant to this issue. They were short passages within a full and properly structured speech, but given the nature of this appeal it is appropriate to reproduce them from the transcript:

"Now that may be that they left too soon, but the fact is, we haven't found – the police haven't found any drugs on them, and yes, it's suggested by the Crown that some sort of transaction takes place through the window, but the body worn footage doesn't seem to capture that. I mean there does appear to be someone leaning down towards the window, but I don't think, from my recollection of watching it, you actually see any transaction take pace. So your answer may be [We can't be sure it is a drugs transaction', but even if you say 'Well, no, I can, yes it is', what is Mr Ngoie doing? Not a lot, you may think.

…

Secondly, it's not Christal Ngoie, is it, that is in any sort of discussion; or possible transaction with two pedestrians.

Now the evidence is that if there's a conversation, a conversation was taking place through the front passenger window. That's the

> eye witness accounts from the officers and that's what we see on the body worn footage. They are standing at the front of the car, by the front passenger window. So if, and again, it's a big if, if anything was passed by the occupants of the vehicle to the two pedestrians, it wasn't Christal Ngoie that did it, because he's in the back, that's not where they are."

21. Mr Bass makes no general criticism of the judge's summing up, but he does suggest that the judge was in error concerning the dialogue with those on the pavement and, as we shall see, failed to make a necessary correction in his summing up to the jury.

22. The judge first dealt with this point as follows:

> "You know that at about 5.30pm on 12 May 2017 police officers wearing Met Police vests in an unmarked police car stopped the Mercedes in Langley Park. Three occupants: Sossongo, who was in the driver's seat; Clarke, who was in the front passenger seat; Ngoie, who was in the rear passenger seat. You heard from Sergeant Martin. He was in the front passenger seat with two other police officers. He said the reason they stopped that vehicle was because when they were in Bunns Lane, and you have got the map, they saw a [inaudible] and dishevelled male and female, he said people who looked like class A drug users, standing next to the Mercedes in Langley Park. He said they were bending down and leaning in to the passenger side of the car.
>
> One thing I must correct about something that Mr Bass said, he said that the evidence was they were leaning in to the front window. That is not the evidence. The evidence from Sergeant Martin was that they were leaning down and in to the passenger side of the car."

23. Concerned at the point, after the summing-up Mr Bass sensibly began by listening to the tape of the evidence of PS Martin. We have reproduced the words that he will have heard. As a consequence, he suggested to the judge that the judge's correction of his closing comments in his closing speech were in error. The point he had made was, as he paraphrased it, "if this was a drugs transaction, whatever conversation was taking place it was taking place through the front passenger window".

24. The judge rejected that as being the effect of the evidence. There then developed a fairly extended dialogue between the bench and the bar. In the course of that, Mr Forster for the Crown agreed that the point made by defence counsel was "technically correct" and that the evidence from the co-defendant Mr Clarke had been that the people who had been speaking to him through the front window were "about 1 metre away, or certainly within touching distance". The prosecution suggested that the point was not material since, on their case, the Appellant must have been fully aware of what was going on in any event. The judge suggested that the comment had gone "too far" and that there had been a seizing upon one phrase by PS Martin at the expense of the thrust of most of his evidence. There was interaction at the side of the car generally. As the judge phrased it, "you cannot just throw out the rest of his evidence". The rest of his

evidence was generally they were leaning towards the side of the car. The judge also pointed out that the prosecution case being put to this appellant was that the appellant's window was down before the police arrived as well, a point the appellant rejected. The judge declined to address the matter again to the jury and thus they were left with his earlier description of the evidence, including the correction, as he put it, of counsel's comment.

25. Before us, Mr Bass emphasised what he suggests is the importance of this point. This could, he said, have been the critical point in the appellant's favour. Moreover, in failing to correct his erroneous criticism, the judge wrongly undermined the authority of counsel in the eyes of the jury.

26. Mr Forster for the Crown repeated the submission that the point was really immaterial to the substance of the case. A number of mobile phones had been recovered from the car but the only phone to contain anything of note was the Samsung phone which had been found beside the Appellant on the rear passenger seat. The video footage shows when the Appellant was taken from the car by police that the phone was almost beneath where he had been sitting. This telephone contained an identical text which had been sent out to several contacts within the address book. That part of the Crown's case was that this was in effect an advertisement for the sale of class A drugs, reading "finally bak on and delivering 4 for 25 or other deals available. Ace". One of the contacts stored within the phone was that of the Appellant's probation officer. Moreover, when the Appellant was searched and his property removed at the police station he had no other telephone on his person.

27. The way the Crown puts the effect of the video evidence is as follows:

> "a. As the unmarked police car approached, the two suspected drug users could both be seen bending forwards towards the nearside windows of the parked Mercedes;
>
> b. Because of the angle (which meant the nearside of the Mercedes was out of sight), it was not possible to see whether there was any actual exchange going on and, if so, through which nearside window;
>
> c. Since the two of them were standing side by side, it followed that one would have been nearer the front of the parked car, the two pedestrians were now standing away from the car;
>
> d. By the time the police officers had stopped, left their vehicle and run around to the nearside of the Defendants' car, the two pedestrians were now standing away from the car;
>
> e. The front and rear nearside passenger windows of the Mercedes were both open (although Mr Bass suggests that the rear window was three-quarters raised, the Body

> Worn Video shows that it was actually mostly lowered)."

28. Mr Forster also makes the point that, although the phrase used by PS Martin "leaning into the front passenger window" might suggest that the prospective drugs purchasers (as the Crown has it) were leaning into or through the window, that is not in fact the evidence since one or both of the prospective purchasers was bending over the car towards the front passenger window less than a metre away. In effect the suggestion by the Crown is with both windows open conversation could easily have been with either or both of those sitting on the nearside of the car.

29. The Appellant's explanation for the fact that his probation officer's number was on the phone was that he had previously borrowed it in order to call his probation officer. He said he was known as "C". It was common ground that the Appellant had been on licence for some four weeks only from his previous prison sentence. The jury were aware of that. The Crown's case was that the reference to "C Probation" probably arose because the appellant's probation officer was a Mr Choudhury.

30. In conclusion, the Crown submit that although defence counsel was "technically correct" that PS Martin had said "front passenger window" and not just "passenger side", the learned judge was also correct in his suggestion that defence counsel had overstated the tenor of the officer's evidence. Since the case against his client was primarily based on a joint enterprise between the three individuals in the car, all of whom must have been aware that this was a drug-dealing expedition, it is submitted that who actually had the conversation with those on the pavement was of very limited significance.

31. In our judgment, the judge was unwise in declining to offer at least some qualification of the criticism he had made of the defence speech. It is a common-place of criminal trials that some details or emphases may be noted differently by perfectly careful and competent participants in the trial. Mr Bass took the proper approach in checking the recording of PS Martin's evidence before he raised the question with the judge. Given the unanimity from counsel as to what the witness had said, it would have been wiser for the judge firstly, if he wished to do so, to listen to the recording himself, or secondly to accept that the evidence had been given. It would still have been perfectly open to the judge and appropriate for him to direct the jury that they should consider whether it was of any significance. Given the viewpoint of the officer, how clear could he have been as to whether the speech was directed to the front window, as opposed to the rear window, or both? The judge could perfectly properly have set the context by reminding the jury that they were able to replay, or ask to be replayed, the footage which demonstrated the viewpoint of the police as they approached. If he thought it right, the judge could also have restated the comment that the jury should consider whether defence counsel was extending the point too far, given what they had heard and what they could see.

32. We should not be misunderstood as concluding this was anything like a serious error by the judge. In our judgment he was right that defence counsel, albeit perfectly properly, had made a tactical decision to emphasise this piece of evidence above others. In our judgment that was about the height of what happened here. By far the best evidence on the point, so far as the point was important in any event, was the video footage. We have had the opportunity to look at the video footage a number of times.

In our judgment there is strong evidence from the footage that the two pedestrians were standing slightly apart, side-by-side and to the nearside of the car. The fairest inference is that they would have been side-by-side each other facing both windows of the car. In addition, the jury would have been perfectly entitled, in our view, to conclude from the video footage that the rear window had been open all along.

33. We are also firmly of the view that, even taking this "error" at its height, it cannot possibly render this conviction unsafe. The judge was right to describe this as a minor point. In our view it was a very minor point. The remaining aspects of the case against this Appellant were very strong. We think it inconceivable that had the emendation or correction of comment by the judge been made, it would have made any difference to the outcome of the jury's deliberations.

34. For these reasons we dismissed this appeal.