

IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA CRIM 1184



No. 202202454 B1

Royal Courts of Justice

Friday, 15 September 2023

Before:

LADY JUSTICE SIMLER
MRS JUSTICE MARTIN MAY
MRS JUSTICE STACEY

REX

V

TYLER MOORE

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Mr. R. Menon KC appeared on behalf of the Appellant Moore.
Ms. J. Bickerstaff KC and Mr. S. Rajput appeared on behalf of the Appellant Makengo.
Mr. T. Smith KC and Mr. N. Berman appeared on behalf of the Appellant Bangash.
Mr. H. Davies KC and Mr. L. Oakley appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1 Following a trial at the Central Criminal Court before HHJ Durran and a jury on 7 July 2022, Tyler Moore (then aged 21) was convicted of murder. On the same date others also before the court were acquitted of murder but convicted of manslaughter. We do not, however, need to refer in detail to their cases, or indeed, to the cases of co-accuseds who were tried at an earlier trial between August and October 2021 before HHJ Joseph KC, also at the Central Criminal Court.

The facts

2 The case concerned the joint enterprise killing of Mohammed Usman Mirza (then aged 19), on 19 November 2019. He was killed in a pre-planned revenge attack by friends or associates of a man called Atiq Rahimi. Rahimi, together with Jawad Naseri, was sitting in a car in the early hours of 28 September 2019, when he was shot at point blank range by a group of masked men. Mirza, the victim of the index offence, was a suspect in that attack and was wanted by the police for questioning. It was suggested that the intended target of the attack on Rahimi was Bangash, a co-defendant in the trial, who received a threat to life warning from the police after the shooting.

3 The circumstances leading to the attack and the facts of the attack itself are clearly set out in the Criminal Appeal Office summary and in the detailed sentencing remarks and written ruling given by the judge. It is not necessary for us in those circumstances to deal with those details in any further detail.

4 The prosecution's case was that Moore's role was to assist and/or encourage the attackers and it was alleged that he was present at the murder scene.

5 In police interview, having been arrested, Moore answered "no comment" to all questions asked. He did not give evidence at trial and his defence case, in summary, was a denial of any involvement in the planning or the killing of Mirza. It was said that the co-location

of telephones relied on by the prosecution as between him and another offender, Thompson, was a consequence of the friendship between the two and the proximity of their home addresses. Involvement in the theft of vehicles, communication and association between Moore and others after the killing did not mean knowledge of the attack. Mirza did not name either Moore or Thompson as being involved in the attack and given Mirza's criminal lifestyle there may have been others who had a motive to attack him.

6 At trial Moore did not serve an alibi notice but maintained the denials and that he was at his home address at the time of the stabbing and was not the exclusive user of the second phone attributed to him.

7 As part of their case, the prosecution applied to adduce the convictions for the murder of Mirza of the co-defendants tried during the first trial. They applied to adduce those in the second trial, pursuant to section 74 of the Police and Criminal Evidence Act 1984 ("PACE"). Mr Menon KC, who was defence counsel on behalf of Moore and has continued to appear on his behalf on this application, objected. He relied on section 78 of PACE primarily in relation to the conviction of Thompson. He argued that Thompson's conviction in circumstances where the prosecution case against Moore and Thompson was that they were together all day, would close off Moore's ability to contest issues that the jury would need to decide and drive them to the irresistible inference that because Thompson was guilty of murder, the applicant must also have been. Although it was not disputed then and Mr Menon has accepted now that the convictions were technically admissible under section 74, to admit them in those particular circumstances would be too damning a course of action to take and would be grossly prejudicial.

8 The judge ruled that the evidence was admissible. She considered the authorities identified by counsel in the case and in particular *R v Stevens* [2020] EWCA Crim 280, where this court adopted the test identified in *R v S* [2007] EWCA Crim 2105 as follows:

"39. Where evidence of X's conviction is in principle admissible pursuant to section 74 and the real issue is whether that evidence should

be excluded pursuant to section 78, the important question will be whether, and if so to what extent, X's conviction imports complicity in the crime on the part of the defendant. As Hughes LJ put it - in words which we think are a convenient test of whether an issue would be closed off by evidence of X's conviction - it is necessary to consider whether X could not or scarcely could be guilty of. The offence unless the present defendant were also guilty. This, obviously, will be a fact specific decision in each case. *O'Connor* provides a stark illustration of circumstances in which a defence may be unfairly closed off by evidence of the conviction of another. But as the decisions in *S* and *Denham and Stansfield* show, there may well be no unfairness in using section 74 in cases involving an allegation of joint enterprise in which there is no substantial issue as to whether the crime was committed and the main issue for the jury is whether the defendant was party to that crime."

9 The judge then considered the statement identifying the issues so far as Moore was concerned, and in particular, that the nature of his defence was: (1) the defendant did not stab Mr Mirza; (2) the defendant was not party to the stabbing of Mr Mirza; (3) the defendant did not assist or encourage the stabbing of Mr Mirza; (4) at or about 10.20 p.m. on 19 November 2019, when Mr Mirza was stabbed, the defendant was at his home address, namely 1 Lawson Close, Ilford IG1 2NQ.

10 The judge went on to say:

"16. It is only fair to observe that in my judgement Mr Moore's defence statement is lacking in any material detail. There is nothing to address association between defendants, attribution of mobile phones, anything to address the prosecution assertion of cars being stolen and disguised for the purpose of an attack on Mr. Mirza or Mr Moore's knowledge of this, nothing in relation to the events of the 19th November 2019 including reces of relevant locations, save that at 10.20pm he was at home and finally nothing in relation to any of the assertions set out above in relation to specific linking of cell site data between Mr Thompson and Mr Moore. Mr Thompson's conviction going before the jury does not individually or collectively address these issues or deny those who represent Mr Moore the opportunity to explore these aspects of the evidence where they touch on Mr Moore.

17. The conviction of Mr Thompson does not absolve the jury of considering if (a) Mr Moore was at the scene of the attack on Mr Mirza or whether the phone evidence in relation to him is consistent with him being at home, (b) if he was there, if he participated in the attack or (c) if he was there, whether he encouraged or assisted the attack on Mr Mirza or (d) if he was there and played a part, whether or not he had the requisite intention to be guilty of the offence of murder.

18. In my judgment the admission of Mr Thompson's conviction does not unfairly close off a range of considerations by the jury.

19. As is recognised in Stevens the court has to consider the fairness of the trial and not simply the interests of the defendant. The evidence is admissible and the admission of it does not prevent those who represent Mr Moore challenging a number of aspects of the prosecution's case. There would in my judgement be an unfairness in requiring the Prosecution to effectively re-prove those defendants' guilt.

20. In concluding that the conviction of Mr Thompson is admissible and there is no unfairness from the admission of it, it follows that Mr Menon QC's secondary argument is not engaged."

11 It is also relevant, in light of the submissions made, to refer to the fact that in the course of giving evidence reference was made to the acquittal of Aman in the first trial. That should not have been done, but it occurred. Later, in the course of their deliberations, there was a jury note requesting clarification regarding the outcome of the earlier trial for Aman. Counsel were invited to consider how the question should be answered. On behalf of the prosecution, it was submitted that the jury should be informed there was no evidence of what happened to Aman and they should not speculate. It was thought that informing the jury of Aman's acquittal may have led them to come to false conclusions as to why a different jury reached its verdict, given the difference in evidence, including for example, the content of Aman's interview.

12 Against that, counsel for the defendants questioned what harm would be caused in the jury being told the truth about Aman's acquittal and that it had little or no significance to the issues in the case. It was said that the jury being informed of Aman's acquittal would remove the possibility of speculation which might have been adverse to the remaining defendants and that it would not be prejudicial to the prosecution for something to be said along those lines. It was emphasised that but for the COVID-19 pandemic, all eight defendants would have been tried together by the same jury, and that any potential unfairness arising from the fact that there were now separate trials should be addressed in order to avoid such unfairness by informing the jury of that factor.

13 The judge ruled that there was no prejudice to the defendants from the jury not knowing that the prosecution case did not result in a conviction against Aman. Whilst the COVID-19

pandemic was an exceptional event, the fact of separate trials in this case did not amount to such an exceptional feature as would displace the orthodox principles of admissibility, and she concluded that knowledge of the acquittal might result in speculation and might cloud the jury's judgment of the issues that required resolution. They would not have known that the previous jury heard other evidence which might have explained the difference in verdicts. Accordingly, the judge adopted the course suggested by the prosecution.

Application for permission to appeal

- 14 The application for permission to appeal against conviction is advanced on a single ground that the judge was wrong to admit proof of the convictions of the defendants in the earlier trial, but more particularly proof of the conviction of Omari Thompson under section 74, and should have excluded that evidence.
- 15 The arguments in support of that ground have been developed in detail in writing and were succinctly and clearly advanced by Mr Menon by reference to eight separate points. It is unnecessary for us to set out in detail the eight points relied on. But in short, he contends that whilst there is no dispute that Omari Thompson's conviction was admissible under section 74, that is a provision that should be sparingly used. On the facts and in the particular circumstances of this case, the impact of admitting that conviction was to import the complicity of the applicant to such an extent that the evidence should have been excluded.
- 16 Particular reliance was placed on the fact that the prosecution's case against Moore and Thompson was that they were together all day, and to use the graphic description used at trial, "stuck together with glue". The case against Moore was based on association and telephone evidence, and although a conviction that was relied on simply to establish the fact of that conviction itself might be admissible, admission of the conviction in these circumstances went much further and was relied on in order to establish Moore's own culpability and involvement.

- 17 Mr Menon accepted that if he was right about the admission of Thompson's convictions, it would be difficult to see on what basis the convictions of the other three should not be excluded, although if there was a way to do that he would not have objected.
- 18 We have considered those submissions and the additional oral submissions made by Mr Menon with care, but do not consider that they disclose any arguable basis for concluding that Moore's conviction is unsafe.
- 19 In her admirably clear and concise ruling admitting the convictions of the defendants at this second trial, the judge applied an orthodox approach to this question. Although the case of *R v Stevens* does not create new law, it does reflect an orthodox approach to the principles engaged by section 74 and the balancing act to be conducted under section 78. It is a useful case in elucidating the way in which the principles are to be applied, and we can see no error by the judge in considering the case of *Stevens* in that way. This was not a closed conspiracy case or a case involving only two defendants. In *Stevens*, as in this case, the defence advanced by Moore remained open to him.
- 20 As the judge observed, the real question in this case was whether the evidence should be excluded under section 78. The judge dealt with that question in two stages. She first considered whether the conviction of Thompson would close off the jury's consideration of Moore's defence. She concluded that it would not do so. It would not absolve the jury from considering whether Moore was at the scene of the attack on Mirza or whether the phone evidence in relation to him was consistent with him being at home. It would not stop them from considering if he was there, whether he participated in the attack or encouraged or assisted the attack on Mirza, or indeed, if he was there and played some part, whether he had or did not have the requisite intention to be guilty of the offence of murder.
- 21 Having considered those features, and albeit that the task of the defence might have been rendered more difficult, the judge was amply entitled to conclude that it was and remained open to Moore to advance the various bases of defence identified in his defence statement,

and we can see no error in the judge's approach in reaching that conclusion. The jury would be able to consider that defence and the matters identified by the judge.

22 Having dealt with those considerations, the judge went on to consider the question whether admission of the evidence would prejudice the fairness of the trial. It seems to us that her conclusion that it would not prejudice the fairness of the trial, again, was one that she was fully entitled to reach. Had there been a single trial, the jury would have been fully entitled to take into account any guilty verdicts they had reached in respect of Thompson or any other co-defendant. The fact that the jury at the second trial reached this factual starting point under section 74 does not affect that principle.

23 We do not consider that there is any merit in the suggestion that Aman's acquittal was relevant and ought to have been referred to by the judge in directions to the jury. On the contrary, the fact of his acquittal was and remained irrelevant, and that did not change simply because one of the co-defendants referred to it in the course of giving his evidence. The judge in this case applied the relevant principles in relation to each of the questions she had to address in this regard accurately and properly, as reflected in the rulings she gave, and we can see no error of principle or approach.

24 Finally, no criticism is or could be made of the judge's summing-up. Her directions and route to verdict formed the basis on which the jury approached its task and properly addressed the use to which they could make of Moore's conviction.

25 For these reasons, which are in essence the reasons given by the single judge, with which we entirely agree, we have concluded that this application is not arguable, and accordingly we refuse it.

