

Neutral Citation Number: [2005] EWCA Crim 1953
IN THE COURT OF APPEAL
CRIMINAL DIVISION

No: 2005/1037/B1

Royal Courts of Justice
Strand
London, WC2

Tuesday, 12 July 2005

B E F O R E:

LORD JUSTICE LATHAM

MR JUSTICE BENNETT

HIS HONOUR JUDGE RICHARD BROWN DL

(Sitting as a Judge of the CACD)

 R E G I N A

-v-

OMAR BENGUIT

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MR A DONNE QC appeared on behalf of the APPELLANT

MR N PASCOE QC and MR N LUCKLEY appeared on behalf of the CROWN

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

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1. LORD JUSTICE LATHAM: On 31st January 2005 at the Crown Court at Winchester, this appellant was convicted of murder and was sentenced to life imprisonment. He appeals against that conviction by leave of the single judge.
2. The prosecution of this appellant has an unusual history in that the trial at which he was convicted was the second retrial after two juries had disagreed in relation to the count of murder. At the first trial the appellant was tried with a co-defendant Gbadamosi who faced two counts of rape of a girl, Beverley Brown, who was the most important witness in the murder case and one count of assisting this appellant in relation to the evidence which was said to implicate the appellant in the murder. In relation to the charges of rape, one of those was a charge which he faced together with the appellant. So far as the first jury was concerned, it acquitted Gbadamosi of both counts of rape which he faced but failed to agree on the count of assisting an offender. As far as this appellant was concerned, it failed to reach a verdict on the count of murder, as we have indicated, and the single count of rape which he faced.
3. A retrial was ordered; and at the retrial the jury acquitted the appellant of the rape of the girl Beverley Brown and acquitted Gbadamosi of assisting an offender, but again, as we have already indicated, failed to reach a verdict on the charge of murder and were duly discharged.
4. The prosecution then gave consideration to the question of a second retrial and submitted to the Director of Public Prosecutions reasoned argument in favour of such a retrial. The Director received in turn a reasoned argument from the appellant's lawyers to the effect that it would be unjust to order a retrial. In the event the Director indicated that he considered that a retrial was appropriate; and it was in those circumstances that the retrial was commenced before Mrs Justice Hallett who first, before the trial commenced, considered but rejected a submission that the retrial would constitute an abuse of process and was oppressive, vexatious or unjust. The first ground of appeal relates to that ruling and it is submitted on behalf of the appellant that the judge was wrong.
5. During the course of the second retrial the prosecution sought to put before the jury the evidence of two witnesses, a Miss Mayers and a Mr Cutting, which were the subject of objection by the appellant's then counsel in circumstances to which we will return in detail. That evidence was admitted by the judge; and that forms the subject matter of the second ground of appeal.
6. Turning then to the underlying facts, we deal with them by setting out relatively shortly the evidence which was adduced at the second retrial and resulted in the appellant's conviction.
7. The case that the prosecution presented was that this appellant had in the early hours of Friday 12th July 2002 stabbed to death a Miss Jong-Ok Shin, a Korean language student, who was on her way home from a nightclub. A number of local residents heard her scream; but none of them actually witnessed the incident. The murder

weapon was never recovered. There was no evidence to show that she had been subject to any robbery and there was no evidence of a sexual assault.

8. After the screams had been heard one of the local residents went out to find the unhappy girl lying on the pavement. She was still alive at that time and said that she had been attacked. When taken to the hospital she told a police officer that the person who attacked her had been wearing a mask. She died from blood loss caused by three stab wounds to the back, two of which were to a depth of 15-centimetres and 14 centimetres respectively, damaging the lungs and a major vein. The third wound was of similar depth but was a flesh wound only. The blade of the knife was likely to have been a 6-inch blade, single edged, tapering to a point at the tip. Sadly the cause of death was blood loss. The stab wounds indicated that the attack had been from behind.
9. The main evidence against the appellant came from Beverley Brown. She gave an account of having been with the appellant on an occasion when she had heard him talking about Korean girls and indicating a desire, in relation to one of them, to "fuck her". She was an admitted drug addict and part-time prostitute and obviously spent time in the company of others like her. Indeed, many of the witnesses who were called were admitted drug addicts.
10. On the evening in question she was driving a car having taken one of those drug addict friends of hers out to enable him to steal items or money to fund his drug habit. She had in fact dropped him off when she came across the appellant, Gbadamosi and a third man. She agreed to give them a lift to what is known as a 'crack house', clearly where they were hoping to obtain drugs.
11. As she was driving them there she saw a small figure walking along the pavement. The appellant shouted: "Look at the arse on that". The men were very rowdy and they were planning to persuade the woman that they had seen to go back with them to party. Beverley Brown was asked to stop, which she did. The three men got out. She also got out but she did not know where they had gone. They then came back shouting at each other. Her evidence was that Gbadamosi said to the appellant: "What the fuck have you done?" She then drove them to the crack house. The appellant appeared to be very drunk and it was clear that Gbadamosi was very annoyed with him and said: "What have you done? You cannot handle your drink. Every time you get yourself into trouble." She thought that the appellant seemed to have blood on the left side of his t-shirt. He took his t-shirt off and put it in a carrier bag. There was something else in the bag and the t-shirt was wrapped around it.
12. The appellant and the others when they got to the crack house went upstairs. There was a conversation there and eventually they left. It was after they left that she alleged she was raped by both the appellant and Gbadamosi. They went to another flat. The appellant there seemed to have a bath or a shower and obtained a new t-shirt. She then took the other two men to the River Stour where it was suggested that they threw the items, that is the t-shirt and whatever was with it, into the river. Her evidence was that she was extremely frightened. She was terrified of those who were involved in the drug world. They carried knives and in that category she included the appellant.

13. There is no doubt that her evidence had to be carefully evaluated. She had made several inconsistent statements and indeed at first had named someone other than the appellant as the perpetrator of the murder. Her explanation was that she was frightened for the reasons that we have given and she was concerned that the police would not believe her because she was a drug addict.
14. As we have said, her evidence formed the main platform of the prosecution's case. There was, however, evidence to support it from five of the inhabitants of the crack house, all of whom spoke of the visit made by the appellant and others that evening and describing the appellant as being agitated and anxious; he wanted to wash his hands and change his top. In other words, each of them gave an account which was consistent with the appellant having been involved in an incident immediately before arriving at the crack house.
15. In addition there was evidence from Amanda Freeman who was living with the appellant at the time. She remembered on one occasion finding a top in a basket with blood marks on it. The evidence that she first gave was that she asked the appellant about the top and he said that something had "gone wrong". However it is right to say that in cross-examination she was not as clear about the circumstances in which that comment was made.
16. The case for the prosecution was not supported by any forensic evidence. It was however at the second retrial supported by the evidence of the two witnesses who were the subject matter of the application by the prosecution when the trial opened, namely the witness Leanne Mayers and the other witness John Cutting.
17. Leanne Mayers' evidence was to the effect that she had seen the appellant with a knife at the crack house in St. Clements Road. The knife was straight but curved at the end and was about six inches long. She was unclear as to when that was.
18. John Cutting gave evidence that at some time in about July, but he was unable to say after cross-examination whether it was before or after the murder, he saw the appellant in the bay window of a house appearing to sharpen the blade of a knife. He thought that the blade might have been more than four inches long but he could not be certain.
19. That evidence, that is the evidence of Miss Mayers and Mr Cutting, had not been called at the first trial. Application was made and granted at the first retrial to call the evidence of Miss Mayers. But in the course of giving evidence Miss Mayers behaved in such a way that it was considered appropriate to discharge her from giving evidence before she had referred to the matter of the knife. It was only at the second retrial that application was made to call the evidence of Mr Cutting.
20. The appellant when he was interviewed denied the murder. He simply said that he had been walking back from Bournemouth Town Centre to his house. He was not exactly sure where he would have been at that time. He denied any conversations about any attraction to a Korean girl or girls. He accepted that those in the drug world did carry knives, but denied that he had. In evidence he essentially repeated what he had said in

interview but in more detail. It was in those circumstances that the jury ultimately, after a summing-up about which no complaint is made, convicted this appellant.

21. In his submissions to us today and in the written advice that he gave in relation to appeal and the skeleton argument which he has provided to the court, Mr Donne, who appears before us on the appellant's behalf but who was not trial counsel, submits as we have said first of all that the judge was wrong to conclude that the second retrial should take place. He accepts that there is no rule of law which precludes the prosecution from seeking a retrial after there has been a failure on two previous occasions by a jury to agree. He says, however, that it is a longstanding convention that after a second trial at which the jury have failed to agree the prosecution offers no evidence. He accepts that the decision which he challenges, that is the decision of Hallett J, is a decision which essentially involved the exercise by her of a discretion to determine whether or not it would be vexatious, oppressive and/or unjust for the second retrial to take place. He accepts that she directed herself properly as to the issues which were relevant to her consideration. He accepts that she took into consideration all the matters that she should have done and did not leave out of consideration matters which she should have taken account of. His argument is simply that she was wrong in the conclusion to which she came.
22. The particular reasons which he points to centre to a large extent upon the fact that Beverley Brown's evidence was so unreliable that it was inappropriate to ask the jury to accept it on this third occasion. The jury at the first trial had not been satisfied by her evidence that Gbadamosi had raped her; the jury at the second trial had not been satisfied that the appellant had raped her or that Gbadamosi had been involved in assisting an offender and on neither of those two occasions had the jury been satisfied by the prosecution's evidence so that they could be sure of the appellant's guilt. Her evidence was inevitably unreliable because she was a drug addict who had clear difficulties in recalling matters sensibly. She had given a number of different versions about the offence. She lied in her first and second statements on her own admission and lied about the extent of her own involvement. There was no support of significant parts of her evidence; and the account that she gave in relation to what happened at the murder site was not consistent with the evidence of those who lived in the vicinity. She sought to identify where she said the items carried by the appellant had been disposed of in the river but no items were found; and her account of what happened at the crack house was not entirely consistent with the evidence of the other witnesses.
23. When all of those matters are taken together with the lack of forensic evidence and the fact that the evidence of those in the crack house was itself the evidence of those who were drug addicts and therefore suspect witnesses, it is submitted that the prosecution should not have been permitted to pursue a third trial. To that had to be added the fact that a delay of two-and-a-half years had by then occurred between the murder and the third trial.
24. The principles to be applied in this situation are those set out in the opinion of Lord Bingham in the case of Bowe v R [2001] UKPC 19 which was a case in which there was a second retrial in a capital murder case in the Bahamas. The passage in question commences at paragraph 37:

"[37] It is a common practice for prosecutors in England and Wales to offer no evidence against a defendant if two previous juries have been unable to agree (see Archbold, Criminal Pleading and Practice, 2001, para 4-440). But that is no more than a convention, as recognised by the Court of Appeal (Criminal Division) in *R v Henworth* [2001] EWCA Crim 120 (judgment, 19 January 2001). It may well be that the prosecuting authorities, having failed to obtain a conviction even by a majority on two occasions, judge that a further trial will not have a reasonable prospect of culminating in a conviction. It is in the first instance for the prosecutor to judge whether, taking account of all relevant considerations, the public interest is better served by offering no evidence or by seeking a further retrial. There is plainly no rule of law in this country which forbids a prosecutor from seeking a second retrial. In the present case the trial judge ruled that this was so in the Bahamas also, and her ruling on that point was not challenged in the Court of Appeal.

[38] There may of course be cases in which, on their particular facts, a second retrial may be oppressive and unjust. The Board judged *Charles v The State* [2000] 1 WLR 384 to be such a case" [a case in which there was a nine year delay]. "But it was there recognised (at page 390G) that the trial judge has a margin of discretion, and in *Persad and Jairam v The State* [2001] UKPC [2] (unreported, 24 January 2001) the Board remitted the issue of retrial to the Court of Appeal of Trinidad and Tobago treating it as relevant but not conclusive that it was a second retrial.

[39] Whether a second 'retrial' should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the defendant's interests, particularly where there has been long delay or he has spent long periods under sentence of death or if his defence may be prejudiced in any significant way by the lapse of time. Account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system."

25. The judge in the present case, as we have already indicated, clearly had in mind those principles. She took into account the fact that this was a case of the utmost seriousness, involving the murder of a defenceless girl in the early hours of the morning in a wholly unprovoked attack. The matters about which counsel complained before her, as Mr Donne has put it to us, relating to the evidential difficulties presented by the evidence of Beverley Brown were in her view matters which could fairly and properly be dealt with by the trial process. She accordingly concluded that she was not persuaded that it was in any way oppressive, vexatious or unjust to allow the Crown Prosecution Service to continue with the prosecution. In doing so she expressly took into account the fact that in her view the prosecution had behaved impeccably in the care with which they had approached the question, there had been a full submission of the reasons which justified the second retrial to the Director, as we have indicated, with the opportunity for the appellant's legal team to make appropriate submissions and representations

itself. It seems to us both in her general approach and the detailed consideration she gave to the submissions that were made, that she not only came to a decision which was well within the ambit of the discretion which she undoubtedly had, but bearing in mind the overall interests of justice, was the right decision. Accordingly, we dismiss that ground of appeal.

26. The second ground of appeal, as we have indicated, related to the evidence of Miss Mayers and Mr Cutting. At the first retrial when the judge, Sir Ian Kennedy, was asked for a ruling as to the admissibility of the evidence of Miss Mayers, he determined that it was proper for the evidence to be admitted both because it was admissible and that the probative value of the evidence outweighed the prejudicial effect. His reason for doing so was that as far as the evidence of Miss Mayer was concerned it essentially provided support for the prosecution's case that the appellant was a knife carrier. That was of course significant in the context of this murder because clearly the murder occurred at a place where there would have been no knife which could be picked up or in some which spirited out of the air; the person who committed the murder was a person who carried a knife. It was on that basis that the judge considered that it was relevant evidence and that it was sufficiently probative to justify its admission. That was particularly so because it tended to show that the defendant, contrary to what he was asserting in his interview and was to assert in his evidence, was a man who as he put it "did customarily carry a knife at and about the time with which we are dealing in."
27. When the matter was argued before Hallett J it was at a time when as this court held in R v Bradley [2005] 1 Cr.App.R 24 the provisions of the Criminal Justice Act 2003 relating to the admissibility of character evidence had come into force. However, it is clear from the transcript of the ruling which the judge gave, confirmed by what we have heard from counsel, that prosecution counsel determined that it would not be fair to apply the provisions of the Criminal Justice Act 2003 as this was a retrial, the reasoning being that the common law rules were considered to be more stringent than the rules under the Criminal Justice Act 2003. Be that as it may, the fact remains that the provisions of the Act being in force and since the Act makes it plain that evidence is only admissible pursuant to the provisions of the Act, it is clear that the Act was the appropriate legal basis upon which to determine at the time whether the evidence which the prosecution sought to put before the jury was or was not admissible evidence.
28. Hallett J concluded, as Sir Ian Kennedy had, that the evidence, applying the common law test, was both relevant and probative. She accepted that there it was prejudicial but that was outweighed by its probative value; and she accordingly allowed the evidence to be admitted.
29. On the appellant's behalf today, Mr Donne submits that the evidence firstly was not admissible but in any event the ruling was one which cannot be supported because the provisions of the Criminal Justice Act 2003 were not applied. He submits that the evidence was clearly, as he put it, bad character evidence; it went to the propensity of the appellant to carry knives and accordingly the structured tests required by section 101 of the Act should have been applied. The first question to determine accordingly was whether or not the provisions of section 101(1) permitted the evidence to be called, the only one of the (what have become known as) "gateways" which could apply is

subsection (1)(d) namely that "it is relevant to an important matter in issue between the defendant and the prosecution." It does not seem to us that there is any substantial argument that could be mounted to suggest that had that test been applied the evidence in this case would not have been admitted, save for the argument that the evidence of both witnesses was, it is said, insufficiently clear as to the circumstances and the dates upon which each witness saw the appellant allegedly carrying a knife to enable the evidence to meet the test of relevance. It is submitted it is only if the evidence could be connected properly to the date of the murder that it could therefore meet the requirements of this gateway. It is to be noted that the argument which Mr Donne uses to support his submission is precisely the same argument as would have been appropriate to the common law test which is also primarily one of relevance and was the test applied by Sir Ian Kennedy at the first retrial, and Hallett J at the second.

30. The second submission that Mr Donne makes is that even if that gateway has been passed, section 101(3) of the Act requires the court to exclude the evidence "if it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." In this context Mr Donne refers not merely to what might be generally called the prejudicial effect of the evidence, but also the fact that as far as that evidence was concerned the prosecution had not sought to put it before the first jury (although it was available), had only sought to put the evidence of Miss Mayers before the second jury and it was only accordingly as he would suggest as a last resort that the prosecution sought to put it before the third jury.
31. It seems to us that to this extent Mr Donne's submissions are undoubtedly correct, namely that the question of the admissibility of this evidence was at the time governed by the Criminal Justice Act 2003. We are also of the view, although the prosecution in their skeleton argument sought to persuade us to the contrary, that this evidence was indeed evidence of bad character. It was not evidence which under section 98 of the 2003 Act could be admitted because it "has to do with the alleged facts of the offence with which the defendant is charged." The basis upon which both Sir Ian Kennedy and Hallett J were asked to admit the evidence was not to establish so much that the appellant had the knife on him that day, but to establish that he was the sort of person who carried a knife. That seems to us to mean that it was evidence of bad character in a general sense and was insufficiently related to the actual offence itself as to be evidence admissible under section 98.
32. The question therefore is, given that the matter was not dealt with under the Criminal Justice Act 2003, has this evidence been admitted in circumstances which could justify the conclusion that a different answer might have been given had the matter been argued as it should have been? In our judgment the ruling by Hallett J makes it quite plain that her conclusion would have been that the gateway was passed and that it was proper in the circumstances to admit the evidence. The submissions that were made to her would undoubtedly have drawn her attention to all the prejudicial aspects of that evidence and she concluded that the probative value outweighed that. We can see nothing to justify the conclusion that had she dealt with the matter with the specific words of section 101(3) in mind she would have come to any different conclusion. The fact that it was dealt with in an inappropriate way accordingly in no way undermines

the safety of this conviction. In those circumstances we consider that this ground of appeal also fails and so the appeal is dismissed.