

Case No: 201207230 B4

Neutral Citation Number: [2014] EWCA Crim 690

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM REFERENCE BY THE CRIMINAL CASES
REVIEW COMMISSION S9 CAA 95

HALLETT J

T20027191

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2014

Before:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE CRANSTON

and

MR JUSTICE STEWART

Between:

REGINA

Respondent

- and -

OMAR BENGUIT

Appellant

Nigel Lickley QC and Stephen Climie (instructed by CPS) for the Respondent
Ragveer Chand (instructed by CLP Solicitors) for the Appellant

Hearing date: 25th March 2014

Judgment

Lady Justice Rafferty:

1. The appellant, Omar Benguit, 41 years old, originally faced trial in 2003 with Nicholas Gbadamosi for:

Count 1	Murder of Jong-Ok Shin	Appellant
Count 2	Rape of BB	Appellant and Gbadamosi
Count 3	Assisting an offender	Gbadamosi
Count 4	Rape of BB	Gbadamosi

2. The jury failed to agree on Benguit, and on Gbadamosi for assisting an offender, but acquitted Gbadamosi of both rapes. At a retrial in 2004 the jury acquitted Benguit of rape and Gbdamosi of assisting an offender but failed to agree on murder. At the second retrial in 2005 in the Crown Court at Winchester Benguit was convicted of murder and sentenced to imprisonment for life, with a minimum term of 20 years. On 12 July 2005 his appeal against conviction was dismissed.
3. He appeals against conviction upon a reference by the Criminal Cases Review Commission (“CCRC”) under s.9 Criminal Appeal Act 1995 on the following grounds: Inconsistent post trial accounts further undermine the credibility of the main prosecution witness BB; and fresh evidence indicates that Danillo Restivo may have been responsible for the murder. His application for leave to appeal on a ground not related to the CCRC Statement of Reasons, expert evidence as to CCTV, has been referred by the single judge.
4. At approximately 0250 on 12 July 2002, 26 year old Korean language student Miss Jong-Ok Shin was stabbed on Malmesbury Park Road in Bournemouth walking home from a night club. She was sober, no-one witnessed the attack, and the knife was never recovered. Miss Shin told police and medical staff in poor English that her attacker from behind was a man in a mask who ran off. She had been stabbed in the back three times. On 22 August 2002 Benguit was arrested on suspicion of her murder.
5. Residents of Malmesbury Park Road said they heard on the street in the early hours of 12 July 2002 voices, arguing between a male and a female, piercing screams, a disturbance, and then a woman’s voice moaning. Some heard Miss Shin falling against a car. Two found her supine asking for help. She said she had been attacked by a man.
6. Dr Anscombe post mortem found no defensive injuries, no signs of a prolonged struggle and in his opinion she was stabbed unsuspectingly from behind. If the three stab wounds were in quick succession, there would have been little opportunity for the attacker to have been contaminated with blood. The blade was likely to have been single edged and at least 14 to 15 centimetres long.

7. At the appellant's second retrial, BB's evidence was that she funded her addiction by prostitution, drug dealing and other crime. In the summer of 2002 she had known Benguit for about a year. She was a regular visitor to a crack house 47 St Clements's Road, where she got her drugs from Joan Sheridan.
8. Between a day and a week before the murder, she was in the Richmond Arms Public House with a group that included Benguit and Gbadamosi (not another man as she had said previously). They talked generally about Korean girls being pretty and having 'tight pussies' and about a particular Korean girl they wanted to 'fuck'.
9. In the early hours of 12 July 2002, she dropped another addict on Charminster Road. As she pulled away she heard shouting, and saw Benguit, Gbadamosi, and Woolry, a Jamaican national. They flagged her down and hitched a lift to the crack house.
10. As she drove down Malmesbury Park Road, she saw a small figure walking and Benguit shouted out from the window 'Look at the arse on that.' The men told her to pull over because they wanted to get the woman to party with them. She stopped a little way down the road, all three went in the direction of the girl. They were not away long. She did not hear any sharp loud screams, but her window was half closed.
11. When they returned they had been running and were sweating, shouting, swearing and arguing. Gbadamosi asked Benguit 'What the fuck have you done?' and they told her to drive off and to turn off the lights. They were agitated, had all taken crack, and Benguit was very drunk. Gbadamosi was very annoyed, saying to Benguit 'You can't handle your drink. Every time you get yourself into trouble.' He was also worried about being stopped by the police.
12. Benguit had small patches of blood on his t-shirt and she assumed a fight. He removed his t-shirt, used it to wipe blood from his arm and put it in a creamy carrier bag. Something else was in the carrier bag, wrapped in the t-shirt. He put the bag under the passenger seat.
13. The men did not want her to park outside the crack house. Benguit and Gbadamosi said a handbag snatch went wrong and they got into a scuffle. The men were wound up, stressed out, desperate for crack and, once they smoked their pipe, wanted another lift. (In previous witness statements, she said the men smoked a pipe in the car.) She did not feel able to refuse them. The creamy carrier bag had blood on it so the t-shirt was transferred to a white carrier bag. She took them to a cul-de-sac where she claimed they raped her. Then they went to a flat where Benguit bathed or showered, and changed into a beige t-shirt. She dropped him outside another flat and took Gbadamosi and Darius to the river at Ifford. She parked, they went off with the carrier bag and she did not know what they did with it.
14. She claimed she was petrified by what happened that night and knew all three carried knives. She thought she might be stabbed or killed, as might her daughter. Having been on drugs for so long, she did not trust the police. However, following her arrest for shoplifting in August 2002, she began giving hints to police about who was responsible.
15. She said she had not realised she would be asked about the rape allegations and did not want to go through them again. She maintained her account of rape in the car, a

Volvo or a Renault. She was scared, could not get away, did not know what to do and could not call the police. She was also raped by Gbadamosi about a month later when she delivered crack to him. Although she had previously been raped by him, she went to his house because she did what she had to do. In a previous statement, she said that this rape took place on 15 August 2002, but at that time she had a drug habit and was muddled about the dates.

16. Once she began speaking to the police, she did not tell the truth initially though her account was not a pack of lies. Her first, untrue, account was that Ricky Thompson was responsible. She gave further conflicting accounts and named Mike Big, a false name for Gbadamosi. She also indicated Omar Hussain was involved, a false name for Benguit. She claimed to think the police would work out who she meant because there was only one Omar with a glass eye. She said all sorts of other things that were untrue so as to give the police an idea of what happened without admitting that she was with the people responsible.
17. When video interviewed, she finally told the police everything. Although in a previous witness statement she described a police chase on the night of the murder, there was none. She had not enquired about a reward. She was put on a witness protection programme as a result of her disclosures. She said she thought she might have been part of the murder because she gave the men a lift. She felt guilty and as if she had done something wrong. She was scared that if the men thought she was going to turn against them, she would have been in real trouble, so she cooperated.
18. She had never benefited as a result of her involvement.
19. Several addicts gave evidence that Benguit attended the two crack houses (flats in the same building) in the early hours of 12 July 2002.
20. Joan Sheridan who ran one of them remembered 12 July 2002 because it was the Orange Day parades. During the early hours Benguit and Gbadamosi were in her flat. Benguit had blood on his hands, and was looking for a change of clothes.
21. Searches and science did not link Benguit to the murder.
22. To a female addict Benguit said he had stabbed a student in Charminster. The woman found a top splashed in blood and he said something had gone wrong.
23. Shaun Phipson a taxi driver ruled out his having given a lift to Benguit and Leanne Mayers on the night of the murder.
24. Benguit's telephone call from prison to his brother was alleged to be an attempt to secure a false alibi.
25. In his interview on 22 August 2002 the appellant's account was that by the early hours of 12 July 2002, alone, perhaps walking home, he saw police cars at the scene and heard about the murder the next day. He did not know Miss Shin, and had not spoken to, commented on or discussed Korean girls. His account on 23 August 2002 was that he did not know anyone who could provide him with an alibi. He was not involved in the murder and did not go to 47 St Clements Road in the early hours of 12 July 2002.

26. His account in interview on 26 November 2002 was that at about 03.00 on 12 July 2002 he got a taxi with Leanne Mayers. They stopped at 47 St Clement's Road to buy crack and at about 05.00 spent 20 minutes at his house where they smoked it with the driver. He then walked into town. BB might have lied for the reward or because she needed a scapegoat.
27. He told the jury he did not murder Miss Shin. He did not know BB well, and had never been out with her socially. He had never made sexual comments about Korean girls. He was not with Miss BB on 12 July 2002 and had never travelled in a Volvo or Renault with her. He had never gone to a local flat with blood on his hands and t-shirt, or asked to wash his hands or for a change of top. He had not told a female addict that he stabbed a student in Charminster, nor did she find his top with blood on it. He could not be sure where he was on the night of 11/12 July 2002 because his memory had been affected by drug-taking. He gave a detailed account largely foreshadowed in his third interview. In his telephone call to his brother from prison he was not trying to create a false alibi but coming off drugs and anxious to work out his whereabouts.

Grounds of appeal

28. Ground 1 Fresh evidence that inconsistent post-trial accounts further undermine the credibility of BB
29. In 2007 in a magazine article about her involvement BB claimed to have seen Benguit stabbing Miss Shin and to have contacted the police four or five days later. In 2008, she appeared on the Jeremy Kyle Show and repeated that, adding that she saw Benguit with the knife when he returned to the car. She gave other details none of which had been part of her earlier accounts or her evidence at three trials. In 2012 she told police that payment for the magazine article was £500, there was none for the Jeremy Kyle show. She said she knew that she had not seen Benguit stab Miss Shin but had come to believe that account over time.
30. There were already numerous credibility issues at trial arising from her lifestyle, admitted lies, changes and inconsistencies in her account. However the submission is that her post-trial false accounts went to the incident itself and were qualitatively different. Had the jury known of them it is likely to have regarded her evidence with significantly greater circumspection and might not have relied upon her. Without her the balance of the evidence was insufficient. The material relating to the media exposure should be admitted as fresh evidence under s.23 Criminal Appeal Act 1968.
31. Ground 2 Fresh evidence that Danillo Restivo may have been responsible for the murder
32. On 12 September 1993, sixteen year-old Elisa Clapps disappeared the day she had arranged to meet Restivo outside a church in Italy. He was subsequently convicted of perjury in relation to her disappearance. On 17 March 2010, her body was found in the loft of the church. Restivo was subsequently convicted of her murder in absentia in Italy.
33. On 21 May 2002, he took up residence in Bournemouth. On 12 November 2002 Mrs Heather Barnett who lived opposite him was murdered in her home in Bournemouth. In June 2011 he was convicted of her murder.

34. On 12 May 2004, Restivo, in unseasonable clothing, hood pulled up round his face, was watching lone women from bushes near a path. His behaviour was so sinister that surveillance was abandoned and he was arrested on a pretext. A knife, scissors and a balaclava were found in his car but no further action taken.
35. Benguit's submission is that post-conviction similarities between the murders of Elisa Clapps Mrs Barnett and Miss Shin are such that a jury aware of them might not have convicted. He relies upon the following:
 36. All victims were female and attacked during an incident in which a knife featured. Each may have been attacked from behind. All lived near Restivo. All were murdered on the 12th day of the month. Restivo was arrested when watching lone women on 12 May 2004. He left clumps of cut hair with the bodies of Elisa Clapps and Mrs Barnett. A clump of hair was found near Miss Shin where she fell. Miss Shin and Mrs Barnett were murdered in a small suburb of Bournemouth within six months of Restivo's arrival. The absence of any scientific evidence in relation to Miss Shin's murder is consistent with Restivo's awareness of its importance, demonstrated by the lengths to which he went to guard against identification when murdering Mrs Barnett. Her murder was carefully planned, shown by his waiting until her children left for school. The murder of Miss Shin was prepared and planned, not opportunistic. The murderer waited until she was alone and wore a mask. Nothing was stolen in any of the three murders, pointing to gratuitous violence rather than to a robbery gone wrong. Miss Shin said her murderer was masked. For a Korean with only basic English, 'mask' might have meant 'balaclava'. Following arrest on 12 May 2004 Restivo had a balaclava.
 37. Benguit is obliged to concede similarities between the murders of Elisa Clapps and Mrs Barnett not shared with that of Miss Shin. Elisa Clapps and Mrs Barnett were mutilated, Miss Shin was not. There was highly distinctive interference with their clothing, none with hers. Equally, the murders of Elisa Clapps and Mrs Barnett were different the one from the other, albeit Restivo was responsible for both. Elisa Clapps was stabbed repeatedly, Mrs Barnett not at all. Although there were features in common, Restivo did not always adopt the same modus. Benguit submits that in addition to the similarities, other evidence suggests Restivo may have murdered Miss Shin. He has a marked foreign accent whilst Benguit's is English. We were told that local resident Mr Curtis heard a foreign-sounding male voice. However Mr Lickley QC had with him his note from the trial which read:

“Agitated not English voices foreign voices a male voice the other voice not determined.”
38. That does not in our view amount to “a foreign-sounding male”.
39. Also relied upon was Restivo's knife, said to be capable of having caused the fatal injuries, and scissors which could have been used to cut the hair found near Miss Shin but which belonged to a female resident of Malmesbury Park Road. Restivo had a history of surreptitiously cutting women's hair and at least one was unaware of him doing so.
40. His behaviour in relation to lone women prior to 12 May 2004 is said to raise the possibility of a preparedness to offend against women not known to him.

41. He was a proven liar by virtue of his conviction for perjury.
42. His partner Ms Marsango originally provided him with an alibi for Miss Shin's murder subsequently undermined by her lodger who said Restivo lived on the ground floor and Ms Marsango on a different floor. We deal with this briskly. The lodger explained the location of bedrooms, not necessarily where parties slept. Though Ms Jakes who claimed to be a close friend of Ms Marsango told the police soon after Miss Shin's murder that Ms Marsango said Restivo slept in the sitting room, as we pointed out in dialogue, that evidence sat behind more than one hearsay hurdle and was untested.
43. In the same recounted conversation Ms Jakes said Restivo said it must have been a 'big chef's knife which must have gone through her'. The knife had gone in to a depth of 15 centimetres, information Benguit relies upon as known only to the murderer. We are not impressed by this contention. Nothing about the alleged comment suggests more than a guess at the knife used and comes nowhere near establishing that Restivo knew the dimensions of the knife and must have been the murderer.
44. In Italy Restivo was convicted of harassing female students in 1995, said to prove a history of aggression towards female students. Although Elisa Clapps and Mrs Barnett were murdered inside and Miss Shin outside, Restivo's arrest on 12 May 2004 was strong evidence that he was capable of attack outside. Although he knew Elisa Clapps and Mrs Barnett and there was nothing to suggest he knew Miss Shin, the argument is that it is reasonable to infer he might have known her by sight as they lived a few hundred yards from each other.
45. By Benguit's trial Restivo was a suspect in relation to Elisa Clapps and Mrs Barnett. No disclosure was made after a public interest immunity application during which the judge was told there were no similarities between the three cases.
46. The evidence upon which reliance is now placed is said to be more compelling, not least because Restivo has now been convicted of the two murders. The argument is that a killer who targeted women lived close to Miss Shin and that had the jury been aware of evidence suggesting Restivo might have been responsible, its assessment of BB could have resulted in a different verdict.
47. Ground 3_CCTV undermines the credibility of BB
48. BB told the jury that in a Volvo or a Renault Megane shortly before the stabbing she picked up Benguit. She explained her route.
49. Miss Shin separated from her companion on Malmesbury Park Road at 0248 and the ambulance was called at 0255.
50. CCTV footage was separately analysed by two experts ignorant of the facts. One was given photographs of the Volvo and the Renault and instructed to compare them with cars on the CCTV between 0230 and 0305 on the night of the murder. He positively excluded both from 02.30 until the ambulance was called at 02.55 and from 02.55 to 03.05.

51. One was shown nothing and instructed to identify all cars between 02.30 and 03.05. He was unable to identify four between 02.43 and 02.55 and considered two others highly likely to be Vauxhall Cavaliers and another likely to be a Vauxhall Vectra. Thereafter he excluded both Volvo and Renault save in one sighting at 02.47 where he considered a car unlikely to be the Volvo but did not exclude it.
52. Ultimately, both concluded that neither car could be seen between 02.43 and 02.55, although they differed as to the period between 02.30 and 02.43. This evidence is said to show that BB's evidence was false and, had the jury known of it, her credibility would have been further undermined.

Discussion and conclusion

53. It is convenient to take Grounds 1 and 3 together. BB undoubtedly exaggerated her account to police, to the jury, and to Hampshire Constabulary's post-trial exploration of her media involvement when she claimed she saw the stabbing. She did not however exaggerate for monetary gain and she never resiled from her evidence at trial. Her credibility was fully explored before the jury who in our view was best placed to assess submissions that she was inconsistent, unreliable and lying.
54. In addition, the Crown could point to significant circumstantial support for her account from other witnesses and other evidence which aligned with Benguit as the murderer. He carried a knife. BB took him to 47 St Clements's Road in the period after the murder. On arrival, he had blood on him and washed. He confessed to stabbing a student in Charminster. He telephoned his brother and attempted to create a false alibi.
55. We are not persuaded, against that backdrop, that further cross-examination on her post-trial account would have altered the verdict. We are in no doubt that the jury reached a verdict consistent with the evidence and we have heard nothing in either of these grounds to make us doubt the safety of the conviction.
56. We take Grounds 2 and 4 together. The murder of Miss Shin was very different from those of Elisa Clapps and Mrs. Barnett. Restivo knew Elisa Clapps and Mrs Barnett, he did not know Miss Shin. He meticulously planned his attacks on Elisa Clapps and Mrs Barnett, he was forensically aware especially as to Mrs Barnett, whereas the attack on Miss Shin was on the evidence opportune rather than planned. Striking similarities between the murders of Elisa Clapps and Mrs Barnett did not feature in that of Miss Shin. Their bras were cut in the same place, their trousers partially lowered in the same manner and hair placed in their hands. Hair belonging to a stranger was placed in the hand of Mrs Barnett. Her own hair had been cut and placed under her other hand. Miss Clapp's hair had also been cut and left near her. They were murdered inside, reducing the risk of immediate discovery, Miss Shin was murdered on the street and her clothing neither damaged nor adjusted. Indeed the risk of discovery was greater, since she spoke to paramedics and doctors. Elisa Clapps and Mrs Barnett were murdered during the day, Miss Shin in the early hours and in darkness.
57. The differences between the murders of Elisa Clapps and Mrs Barnett, as compared to that of Miss Shin, do not persuade us that Restivo should be regarded as arguably a candidate for the latter.

58. Restivo's possession almost two years after her murder of a balaclava (which he did not wear during surveillance) was too remote to have significance. When observed watching women he was at an isolated location in stark contrast to the residential street upon which Miss Shin was murdered.
59. Neither are we persuaded of relevance attaching to the 12th day of the month. Only four occasions involved that number, far short of any figure which would begin to alert us to more than coincidence.
60. Although, had he been charged or convicted at the time of trial the PII exercise would have progressed on a different basis, on our analysis the material now relied upon as notionally going before the jury does not persuade us that a different verdict would realistically have been in contemplation.
61. As to the work done by experts on the cars shown on CCTV, the issue is simply disposed of. Neither excludes the cars in which Benguit was on the evidence travelling during a period in which he could have murdered Miss Shin.
62. Thus, for all the reasons given, we dismiss this appeal and reject the application for leave.