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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

25th February 2015

B e f o r e :

LORD JUSTICE DAVIS
MR JUSTICE STEWART
MR JUSTICE LEWIS

R E G I N A

- v -

GERARD OWEN CHILDS
STEPHEN JEREMY PRICE

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Mr R J Pratt QC appeared on behalf of the **Appellant Childs**
Mr N Johnson QC appeared on behalf of the **Appellant Price**
Mr G Cole QC appeared on behalf of the **Crown**

HTML VERSION OF JUDGMENT

LORD JUSTICE DAVIS:

Introduction

1. Jonathan Fitchett, a young man aged 22, was killed as a consequence of a fight in a retail park in Prescot, Merseyside on Thursday, 11 July 2013. The fight was a short-lasting one. It extended over a period a little over 15 seconds and less than 20 seconds. Much of it was captured on CCTV, although there were also in some respects eyewitnesses.

2. The two appellants, Gerard Childs and Stephen Price, were undoubtedly involved at various stages in the fight: albeit it should be made clear at the outset that no weapons of any kind were involved at any stage. Each of the appellants was, on 20 December 2013, convicted after a trial at the Liverpool Crown Court of murder. They were sentenced to terms of life imprisonment. A minimum term of 10 years was set in the case of the appellant Childs and of 11 years in the case of the appellant Price. Alternative counts of affray were left to lie on the file. They now appeal against their convictions by leave of the Full Court.

3. By way of initial overview, one might think from a bald summary of events that no issues of any great complexity would arise. Defences of self-defence and loss of control were raised at trial. They were rejected by the jury and are not renewed on this appeal. So on the face of it the only real issues left with the jury were that of intent and foresight of participation.

4. It is, of course, to be understood that for a count of murder either there must be an intent to kill (and no-one has ever sought to argue in this case that there was any intention at any stage to kill) or alternatively there must be an intention to cause really serious harm. Any lesser intent than that could justify at most a conviction for manslaughter, not murder. Very often in point of practice, in fist fights of this particular kind, speaking generally, manslaughter may well be the eventual verdict. But all these cases ultimately depend on their own facts and circumstances, which in the ordinary way are for the jury to assess.

5. The problem arising in this case is not one of law. Rather, it derives from the expert pathological evidence adduced at trial. A viewing of what happened, as shown on the CCTV, by any lay person would suggest that it was the combination of the blows, mainly in the form of punches, over the entire incident which caused the eventual tragic death of Mr Fitchett. But the critical point in this particular case was that that is not the position having regard to the medical evidence; medical evidence which was not disputed. That evidence was to the effect that only one such blow as was administered during the incident would or could have caused the particular fatal brain injury that occurred. The rest of the blows would or may have had no impact, in causative terms, on the resultant death. Furthermore, it was pointed out by the expert pathologist giving evidence in this regard that the fatal injury actually occurring in this case was both unexpected and a relatively rare occurrence in terms of its mechanism.

6. It is that point on causation which has given rise to the difficulties and which calls for close scrutiny of the sequence of events and of the appellants' respective roles during that sequence of events, as well as their states of mind at those stages at the time: in particular at the time when the fatal blow was administered, whenever that may have been.

Background facts

7. We would briefly summarise the background facts in this way, stressing that it is only a summary. On the morning of 11 July 2013, the appellant Childs along with the appellant Price and two others, men called Jennings and Kennedy, went to a cafe in Whiston. There they came across some friends of Jonathan Fitchett who may then have been made aware of their intention to go on to the Cable Retail Park in Prescot. At all events, that is where the four men in the car driven by Price then went. The car was a Ford Focus.

8. Much of what happened in the retail park is then caught on various CCTV cameras.

9. Three of the group were initially captured on CCTV going first to a JD Sports shop whilst Price stayed in the car. All of them, it might be pointed out, were wearing lightweight summer clothing and Price was not wearing a top of any kind. The three in the group left JD Sports at 13.29.04. Two of them got back in the car. However, Jennings then went into an adjoining B & M store, where he is shown on the CCTV buying what appears to be a large bag of dog food. In the meantime, Price had parked the car outside, having reversed into a parking space for the purpose.

10. Jonathan Fitchett by this time was at the retail park. The circumstances in which he came to be there are not entirely clear, although it is said that he had been asked by his girlfriend to buy some items. His presence is

caught on the CCTV. It is there shown that he then approached the car in which Price and the others were sitting. The evidence clearly indicated that Fitchett's arrival was not expected by those in the car.

11. For various reasons, which we do not need to set out in any detail, there was bad blood between Childs and Fitchett. It appears that amongst other things Fitchett had been angry that Childs was, at least according to Fitchett, accusing Fitchett of being a grass; there were other such matters: and indeed there was evidence of Fitchett having in the past made threats against Childs.

12. According to what the appellants were subsequently to say in interview, when Fitchett came over to the car he was to say to Childs, who was sitting in the front passenger seat, that he wanted to speak to him about these matters and that Childs was to get out of the car. Price was to say that he had been attempting, whilst sitting in the driver's seat of the car, to defuse the situation. The CCTV would indicate that the conversation between Fitchett outside the car and Childs inside the car, along with Price and Kennedy, lasted some 27 seconds.

13. .The CCTV then shows that Childs, having got out of the car, at 13.31.27 followed Fitchett to a spot a few meters away. They then faced each other and spoke to each other, Childs having his back to the parked Ford Focus. They remained in the same position, seemingly remonstrating with each other, between 13.31.44 and 13.32.08. At that stage there was no evidence of any kind that Price was in any way urging Childs on or indeed any evidence that Childs could have been aware that Price had got out of the Ford Focus car.

14. What had happened was that in the meantime Jennings had returned to the Ford Focus with the dog food which he had bought in the store. Price, it would appear, had then got out of the car. It was said that he had done so in order to help open the boot and enable Jennings to put the bag into the boot. Be that as it may, Price at this stage was certainly out of the car at this time and standing by the boot, as the evidence indicates, along with Jennings and also Kennedy.

15. One particular witness said that at this stage he heard one of the three men in the group standing by the boot of the Ford Focus say words to the effect: "It's going to go off now": which that man thought were in fact words directed to him as he passed by.

16. As shown on the CCTV, there was no prior indication of any physical squaring up, as it were, between Childs and Fitchett. They were talking to each other, as we have indicated, plainly remonstrating. However, at 13.32.09 Childs suddenly directed a blow with his right fist to the left side of Fitchett's face. As it appears on the CCTV at least, there would be suggested a firm contact; and indeed one eyewitness described hearing a loud smacking or cracking noise at this time, albeit Childs subsequently was to claim that it was only a "skimming" punch.

17. Price was not present at that stage where Fitchett and Childs were standing. But the CCTV then shows him coming up from off screen, as it were, swiftly to the scene: it is plainly to be inferred that he was coming from the rear of the parked Ford Focus. This was all done within around 1 second, he being shown to be at the scene of what was going on, according to the CCTV, at 13.32.10. Thereafter, the CCTV and still photographs show Price pulling Fitchett away; and he then was directly involved in the ensuing violence. Both he and seemingly also Childs can be seen punching and on occasion kicking at Fitchett, who retreats or is pulled in a direction away from the camera towards the car park at the rear. The CCTV, at least, is suggestive of Price at this stage administering the more forceful of the blows, which also included some kicks, albeit, as we have said, only lightweight summer shoes or flip-flops were worn.

18. As shown on the CCTV, Fitchett then collapsed. This is timed at 13.32.23. The expert pathological evidence was such that by then (that is to say, when Fitchett collapsed) the fatal blow had already been administered; although it has to be recorded that further punches were then, most unpleasantly and gratuitously, administered to Fitchett as he lay unconscious on the ground by the appellant Price. One witness said that he heard Price say at this stage: "You won't do that again, will you?". Others said that they heard him say: "That's how you knock somebody out, lad" as he left the scene. The entire fight had lasted little more than 15 seconds.

19. Others then came up to help Jonathan Fitchett. He was entirely unconscious. He never recovered consciousness and was certified dead the following day.

20. As to the appellants, they did not stay. On the contrary, they left the scene with the other two in the Ford Focus. The car registration number had been taken, however, and in due course they were arrested and interviewed and subsequently charged jointly with murder.

The pathological evidence

21. We turn to the expert pathological evidence. That was given by Dr. Johnson, an experienced Home Office pathologist called by the Crown. There was an amount of cross-examination; but in truth there was no real challenge at all either to his findings or to the opinions which he expressed based on his findings. He said, and this was not controverted, that the cause of death was blunt force head injury. That caused a traumatic tear to an artery at the base of the brain and in turn caused a subarachnoid hemorrhage leading to a rapid loss of consciousness and death.

22. His unchallenged evidence was such that in due course the trial judge sensibly and realistically advised the jury to accept his evidence. Amongst other things, Dr. Johnson had said that an injury of this kind was uncommon, something a pathologist might see once every 2 years or so. Indeed, at one stage in evidence he described it as a "very rare injury".

23. In that sense, this death of Jonathan Fitchett was a tragic mischance: although it might also be reflected that death can always be the consequence of fist fights of this nature. There is always a risk involved.

24. The pathologist carefully went through in his evidence the details of the injuries found. Some were identified as bruises and abrasions caused by the fall of Jonathan Fitchett to the ground. There was, however, a displaced fractured jaw to the left side of the face, together with swelling and extensive bruising in that area. There was also extensive bruising on the right side of the face. Both areas of injury were, as Dr. Johnson said, consistent with "significant" force being applied. He also explained that the displaced fracture evidenced on the left side was not necessarily the consequence of a blow to the left side but could in fact have resulted from a blow to the right side of the jaw.

25. As to the evidence of the injuries, he said this: "From a pathological point of view, the evidence showed with certainty only two separate blows": albeit the CCTV evidence would indicate a significant greater number of blows than that. As in due course summed up to the jury by the judge, the pathologist went on to say this:

> "'Normally collapse happens immediately after the blow that has caused the tear. Standard teaching is that collapse is almost always very rapid. The victim will collapse as if he has been poleaxed and profound unconsciousness follows very rapidly.
>
> In some cases, however ... there can be a delay between the end of an altercation and the collapse of the victim,' and he mentioned, in particular, two cases he had had in his own personal experience, where there was a short delay
>
> Now, in this case, Dr Johnson said he cannot tell you which of the two separate areas of impact injury, the one on the left or the one on the right side of the head, was responsible for the tear to the artery which caused bleeding and led to Mr Fitchett's death. 'It is,' in his opinion, 'one of those injuries that caused the tear,' but he cannot say whether it was one or the other or both. 'There is sufficient damage to both areas,' he said, 'for either or both of them to have been responsible'.
>
> 'In this case, the blows which fractured the left side of the jaw, with surrounding bruising and swelling, or which resulted in the deep bruising around and below the right jawline, were heavy enough to have precipitated the vascular tearing ...' ."

26. Dr. Johnson went on to say in terms that it could not be assumed that the final blow before Mr Fitchett's collapse was the fatal blow. In short, his evidence was clear that it could have been one blow which could have caused the fatal injury, not (and this is to be emphasised) necessarily a combination of blows. As to when that fatal

blow was administered, he could not say. Although he rather favoured it having been towards the end of the incident, just before Mr Fitchett collapsed, he could not say that for sure. He expressly accepted that it could have been caused at the beginning of the altercation or at the end just before Mr Fitchett collapsed or anywhere in between. But of one thing he could be reasonably clear and that is that the blows or punches to Mr Fitchett after he was lying collapsed on the ground had not caused the death.

The trial

27. In the light of this evidence, the prosecution case could not be that the resulting death had been caused by a combination of the blows administered by each and both of the appellants during the whole course of the incident. The prosecution case at trial rather was that "from start to finish" this was a joint enterprise attack with each appellant participating and playing his part. The prosecution did not seek to prove, indeed was in no position to prove, which of the two appellants had administered the fatal blow. It sufficed, it was said, that both had played their part, each having the intention to cause really serious injury and each foreseeing that the other one likewise had participated having the same intention. Overall, therefore, it had to be a necessary part of the prosecution case, given the pathological evidence, that the joint plan was formed prior to the first blow being inflicted by Childs. That had to be so because the pathologist was unable to exclude that first blow as being the fatal blow.

28. The appellants at trial gave evidence. They were entirely to deny any such intent or any foresight of the conduct of the other. (We need not dwell further on the issues of self-defence and loss of control rejected by the jury and not repeated in this court.) What the appellants said at trial was that what happened was unplanned, was spontaneous and was unintended. They said that there was no intention to cause really serious injury. In this regard emphasis was placed on the shortness of the incident, the speed with which everything happened and the entire absence of any weapons or stamping.

29. At the close of the prosecution evidence, it was submitted on behalf of Price that there was no case to answer on the count of murder, which at that stage was the only count on the indictment. In essence, it was said that the pathological evidence was such that the jury could not safely or properly rule out the very first punch (that is to say, the one administered by Childs) as being the fatal punch causative of the death of Mr Fitchett. As we have said, Dr. Johnson had expressly accepted that that might be the case. The argument thus went on that at the stage of that first punch Price was not present and there simply was no sufficient evidence from which the jury could infer any encouragement by Price, or prior plan on the part of Price and Childs, that such a punch with intent to cause really serious injury would be administered by Childs. It necessarily had to be conceded that after Price came up, that is to say within the 1 second, there thereafter was ample evidence of a joint enterprise assault. The point made, however, was that by that stage the jury could not conclude so that they were sure that those subsequent blows, with whatever intent they were administered, were the cause of the death. That had to be so, it was said, just because of the pathologist's unchallenged evidence.

30. The judge gave a written ruling in response to the submission made on behalf of Price. The essence of it is to be found in paragraph 18 of her ruling, which reads as follows:

> "Having regard to all the evidence, in particular the very fast speed at which this incident developed, the proximity of Stephen Price and the speed with which he arrived on the scene and participated directly in the violence, it is in my judgment open to a reasonable jury, properly directed, to infer on all the evidence that this was from the outset a joint attack; that Stephen Price was involved in conduct amounting to assistance; that he had an intention to assist; and that he had knowledge of an intention to inflict at least serious harm on the deceased."

31. We might add that in due course, and with the encouragement of the judge, counts of manslaughter and of affray were added to the indictment.

32. When she came to sum up the case to the jury, the judge had conscientiously prepared detailed legal directions in writing which, of course, she had previously discussed with counsel. These written directions included written route to verdict documents relating both to Childs and to Price, although essentially in identical wording. Thus,

with regard to Childs, the first question posed was this: "Has the Prosecution made you all sure that Gerard Childs was involved in a joint enterprise in the course of which the fatal blow was inflicted? ... If no, your verdict should be not guilty of Counts 1 and 2". Then at question 3: "Has the Prosecution made you all sure that at the time Gerard Childs was involved in the joint enterprise that resulted in the unlawful killing of Jonathan Fitchett he either (a) intended to cause really serious harm, or (b) foresaw as a reasonable possibility that Stephen Price would inflict the fatal blow with the intention of causing really serious harm?" In addition there was provided to the jury a written document headed Legal Principles. This started, under the heading Joint Enterprise, in the following way:

> "Now, as I say, the Prosecution say in this case you can be sure on the evidence that both of the defendants were, from the very start, acting together, either jointly inflicting punches or kicks on JF, or encouraging each other in the acts of violence being done to him, in the course of which the fatal blow was inflicted by one of them.
>
> In such circumstances, can either or both of the defendants still be guilty of murder or manslaughter? The answer is 'yes' but only if you are sure that whichever defendant inflicted the fatal blow they were both at that time acting together with a common criminal purpose."

33. Pausing there and taking these documents together, it may be noted that the instruction related to a joint enterprise "in the course of which the fatal blow was administered" and that the necessary intent was established "at the time the particular defendant was involved in the joint enterprise" resulting in the unlawful killing. That, to some extent, is reflected in the legal principles: but at all events is at least suggestive of the jury being presented with a scenario whereby in effect either both were to be convicted or both were to be acquitted. It has to be said there is not entire clarity in the written documents, when taken together, in this regard. At all events, the judge in due course incorporated those written documents in her summing-up. At page 11 of the summing-up, she also said:

> "Now, in this case, each defendant denies that he inflicted the fatal blow, and the Prosecution do not seek to prove, on the evidence, that it was one defendant rather than the other who inflicted the fatal blow
>
> But the Prosecution do not seek to prove that it was one defendant rather than the other because they say you can be sure that this was, from start to finish, what is known in law as a 'joint enterprise'."

A little later on at page 12, she said this:

> "Now, as I say, and you can follow this as I am giving you the directions, the Prosecution say in this case that you can be sure on the evidence that both of the defendants were, from the very start, acting together, either jointly inflicting punches or kicks on Jonathan Fitchett, and I have just initialised to save repetition, or encouraging each other in the acts of violence being done to him, in the course of which the fatal blow was inflicted by one of them.
>
> In such circumstances, can either or both of the defendants still be guilty of murder or manslaughter? Well, the answer is 'yes' but only if you are sure that whichever defendant inflicted the fatal blow they were both at that time acting together with a common criminal purpose."

Discussion

34. Overall, we have to say, having regard in particular to the pathological evidence and the issue on causation, that we have problems with the approach adopted. As we have indicated, the jury could not on the expert evidence exclude the first punch (that is to say, the punch administered by Childs when Price was not present) as the fatal punch. To talk, rather broadly, of "from start to finish" rather masks this central point. If both the appellants could properly be convicted, the jury would at least have to be sure that before the first blow was administered by Childs there was already in place the necessary joint enterprise with the necessary intent. They would have to be sure of that because they could not be sure to the criminal standard that the fatal blow was not administered at

that stage.

35. But where, then, was the evidence for there being a pre-existing plan before that first blow was administered by Childs? There certainly was no direct evidence of any such kind. Thus it had to be a matter of inference. For this purpose such an inference could only safely and properly be drawn if all other inferences to the contrary could safely and properly be excluded (see, for example, the decision of a constitution of this court in the case of R v G & F [2012] EWCA Crim 1756, in particular at paragraph 36 of the judgment of Aikens LJ).

36. In the present case, however, there was nothing in the evidence to suggest that such a plan was being hatched whilst Fitchett was talking to Childs in the car with Price in the driving seat. Indeed, that would be an entirely implausible suggestion nor is it consistent with Childs following Fitchett away from the car and then remonstrating with Fitchett for a number of seconds. It can certainly be accepted that Price at some stage then got out of the car and was standing by the boot of the car along with Jennings and Kennedy. But the words that were heard to be said, if said by Price at all (which was not clear): "It's going to kick off now", were not suggested by anyone to have been said by way of encouragement to Childs to hit Fitchett. Furthermore, Mr Cole QC, for the Crown, expressly accepted before us that the fact that Price may have anticipated trouble and may have been ready to come to the support of his friend if necessary was not in itself enough to show the existence of a joint enterprise plan to attack Fitchett with the necessary intent. Nor could mere presence nearby, by the boot of the car, of itself suffice.

37. Ultimately, as we see it, the inference of any plan (and, really, the joint enterprise for this purpose had to be cast in the form of some kind of plan) has to come from the speed with which Price came to the scene once Childs had administered the first punch.

38. In this regard, all three members of the court have carefully studied the CCTV evidence. Quite simply, we do not think that such an inference can safely or properly be so drawn. The speed at which Price arrived is just as consistent with him anticipating possible trouble ("It's going to kick off now") and then of his own accord coming up to help his close friend as soon as that trouble flared up. It does not lead to a proper and safe conclusion that his coming to the scene is only realistically consistent with a joint enterprise assault of a section 18 nature pursuant to a plan already made.

39. We can accept that it may at first sight seem somewhat artificial to break down this altercation in this way. But, as was in substance accepted below, that was essential: precisely because of the unchallenged pathological evidence and the issue of causation that that threw up. Further, as we have said, simply to use the words "from start to finish" does rather mask, or at least potentially so, the crucial point: which is whether there was sufficient evidence to establish a prior plan *before* the first punch was administered by Childs.

40. We conclude that the judge ought to have acceded to the submission made on behalf of Price at the close of the prosecution evidence in this regard. We think, indeed, that the difficulty is thereafter reflected by the summing-up itself and the written route to verdict document and legal principles document provided to the jury. As left to the jury, with all respect, there was no real focus on the evidence, or indeed lack of evidence, as to the forming of a plan of the giving of any encouragement *before* the first blow was administered. In many respects the jury were positively invited simply to look at the incident as a whole.

41. Furthermore, on one view of the summing-up the case left to the jury was, in effect, joint enterprise homicide or nothing: either both of the appellants were guilty of homicide or neither were. But, we ask, why should that be so? Childs administered, undoubtedly administered, the first punch which may have been the fatal punch. If there was no prior plan or prior encouragement, then Price could not have been guilty. But it does not follow at all from that that Childs himself then necessarily must also be not guilty, contrary to the impression rather conveyed by the route to verdict documents. Childs had unlawfully struck Fitchett; and if his intent then and thereafter was to cause really serious injury, he stood to be guilty of murder: and this was so whether or not Price had been or become a participant. If, however, Childs' intent at the time he inflicted the first blow, which may have been the fatal blow, was not to cause really serious injury, then he stood to be guilty of manslaughter. But again that was not so with regard to Price.

42. Of course, looking at the position from the point of view of Childs, we bear in mind that the fatal blow might equally, according to Dr. Johnson's evidence, have been administered later in the fight: quite possibly by Price himself. But that can be no answer to Childs: because he plainly, on ample evidence and as the jury evidently had concluded, had participated in those latter stages of the fight by way of joint enterprise assault.

43. That then leaves the question of Childs' intent. On the face of it, of course, this was a matter of fact for the jury. But if the first blow may have been, as according to the expert evidence it may have been, the fatal blow, one then has to assess Childs' intent at that particular time: which was not a matter on which the jury had really been invited specifically to focus. True it is that the immediately subsequent conduct of Childs could cast light on his prior intent at the time he administered the first blow; but, as Mr Pratt QC pointed out, intent may change during the course of an incident (although the jury were not instructed on that) and in any event the CCTV evidence is, in fact, strongly suggestive of Price, after the initial punch by Childs, taking the lead role in the punching that thereafter occurred.

44. We look at it this way. Had the fight ended after the first punch administered by Childs with Mr Fitchett suffering no fatal injury, could proof of a section 18 intent realistically have been viable? In our view, it could not have been viable. Furthermore, as we have said, the jury had never been asked to focus on the intent of Childs alone at the time of the first blow because they were being asked to focus on the position of each defendant "from start to finish".

45. In such circumstances (circumstances which, we have to say, have at least some broad similarity to those revealed in the case of R v Simpson & Rose [2004] EWCA Crim 2622, even if all cases have their own facts), the conclusion we feel compelled to reach is that the case against Price of murder on the joint enterprise basis alleged was not one in respect of which a properly directed jury could properly convict, applying the criminal standard of proof, having regard to the pathological evidence and the other evidence. The submission of no case to answer in this regard should have been accepted. The appellant Price therefore has to be acquitted both of murder and of manslaughter.

46. As for Childs, there clearly, in our view, was a case for him to answer on homicide. Indeed, no submission of no case to answer was made on his behalf at trial. Mr Pratt before us today submits that it would not be fair or right for Childs now to have to face a scenario which was not the scenario specifically advanced by the prosecution at trial, or specifically addressed in the summing-up by the judge. But this position must have been, and indeed, as was acknowledged before us, had been, anticipated by all counsel at trial. Indeed it formed the bedrock, as we were told, of Mr Johnson's own closing speech to the jury on behalf of Price. Moreover, Mr Pratt told us, very fairly although we have to say unsurprisingly, that the trial so far as Childs was concerned would not have been conducted any differently had this alternative approach been expressly advanced at the outset by the prosecution or been put by the trial judge.

47. We think it would be a denial of justice for this court not to have regard to the position which squarely arises from the evidence that was adduced at trial and which the jury must have accepted. Put shortly, the fact that Price could not be held liable on a joint enterprise basis for homicide does not mean that Childs himself could not be liable for homicide so far as he was concerned.

48. As to intent, however, as we have indicated the position relating to Childs on this basis stands on a footing very different from that advanced to the jury in the summing-up. Indeed, it is of some note that the jury, even looking at the incident as a whole and "from start to finish", clearly had some issues with the question of intent to cause really serious injury: as is shown by their putting in a jury note in this regard after they had retired to consider their verdicts.

Conclusion

49. In such circumstances, we feel compelled to quash the conviction of Price on the counts of murder and manslaughter. In the case of the appellant Childs, we quash the conviction for murder and substitute a conviction for manslaughter.

50. That then leaves the question of the count of affray, in particular having regard to the position of Price. The judge had wisely caused such a count to be added to the indictment; and it is open to us, as Mr Johnson accepts, to substitute a verdict in respect of the count of affray. Indeed, it would be little short of a travesty if Price was not to be convicted of anything, given his undoubted involvement in the serious violence which occurred and in which he played his part.

51. So far as Price is concerned, therefore, a conviction on the count of affray will be substituted in his case.

52. .We will proceed after the short adjournment to hear the submissions of counsel as to the implications with regard to sentence.

(Adjournment)
(Submissions regarding sentence)

53. LORD JUSTICE DAVIS: We now have to sentence the two appellants; so far as Childs is concerned now for manslaughter and so far as Price is concerned now for affray. Perhaps needless to say, it makes a very great difference in sentencing terms that they no longer fall to be sentenced for murder. But one thing remains unaltered: the life of Jonathan Fitchett has been taken away, nothing can now restore it and no part of this sentencing process can restore it either. What each of the appellants might at least care to bear in mind, and no doubt will bear in mind for the rest of their lives, is that they were involved in an incident in which by one way or another Jonathan Fitchett came to die.

54. We turn to the position of Childs. He has but minor convictions of no real relevance to this present offending. The fact remains that he administered the initial punch. In the view of this court it was a significant punch; and thereafter he played a full part in what then ensued, even if not perhaps quite as full a part as the co-accused Price. He has to take his share of the responsibility and he is the one who stands convicted of manslaughter because of his initial, and thereafter maintained, involvement.

55. We gain the impression that ultimately he has shown remorse, even though of course he can get no credit for a plea because he contested the matter at trial, as of course was his right.

56. This was, in its way, very serious offending, quite apart from the fact that a man died. This was in a public place. In many ways it was wholly unnecessary violence. The view we take is that Childs went out to have a discussion with Fitchett and thereafter boiled over and lashed out and then Price chose to come in to help his friend.

57. We have considered all the circumstances. We have considered all that has been said on behalf of the appellant Childs. We do, of course, bear in mind what must be the feelings of Jonathan Fitchett's family. We are, of course, constrained to have regard to various authorities and precedents in this field, acknowledging always that each such case turns on its own facts, but bearing in mind also the important point that there was no intent here either to kill or to cause really serious injury.

58. In all the circumstances, in the view of this court the appropriate sentence for the appellant Childs is one of 7 years' imprisonment.

59. So far as the appellant Price is concerned, he stands convicted of affray. This court is in consequence subject to constraints. It may well be that rather more serious counts than a count of affray could have been included on this indictment given the circumstances. But that is the count that was added: we express no criticism in that regard but that is the case. Accordingly, this court can only sentence for affray. It also follows that this court is subject to the statutory maximum which Parliament has seen fit to impose in respect of an offence of affray, and that maximum is 3 years' imprisonment.

60. This was a very serious offence of affray, as we see it. The appellant Price once he joined in played a full part and, as we see it, undoubtedly administered powerful and substantial blows to the unfortunate Mr Fitchett. It is a particularly unpleasant feature of the matter that when, on any view, Mr Fitchett was lying unconscious on the ground, the appellant Price then quite gratuitously punched him as he lay there helpless and then sauntered off

for all the world not caring one bit just what he had done: even though we can accept he did not appreciate that Mr Fitchett was then dying.

61. We also note, and it is an aggravating factor, that the appellant Price has a previous conviction for violence.

62. In our view, offending of this kind comes very near to the maximum available to this court: although we do bear in mind that this was a relatively short-lived offence and no weapons of any kind were involved.

63. In all the circumstances, and constrained as we are by the fact that the statutory maximum is 3 years' imprisonment, the sentence we impose on Price is one of two and a half years' imprisonment.