No: 201901589/C5 & 201901593/C5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA CRIM 196

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 7 February 2020

B e f o r e:

LADY JUSTICE SIMLER DBE

MR JUSTICE LAVENDER

SIR PETER OPENSHAW

R E G I N A
v
BRUNO PATECO-TE

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss Clare Wade QC and Mr Christian Wasunna appeared on behalf of the **Applicant**

J U D G M E N T
(Draft for approval)

LADY JUSTICE SIMLER: These are renewed applications for leave to appeal against both conviction and sentence after refusal by the single judge. The applicant was convicted of murder (count 2) and violent disorder (count 1) in the Central Criminal Court on 3 April 2019 and was sentenced on the same date to life imprisonment with a minimum term of 27 years, less credit for days spent on remand, and a concurrent 30-month term in relation to the violent disorder.

The facts can be summarised as follows. The violent disorder occurred sometime after 11 pm on Sunday 13 November 2017. Shortly before, the applicant's Honda moped arrived to join a white transit van parked up in a residential cul-de-sac in Burnett Close, Chingford. The van had been stolen and was carrying false number plates. The van then travelled to Orwell Court estate in Hackney with at least six occupants. Two male cyclists were targeted by the van and six occupants jumped out of it, chasing those cyclists. One of the men in the chasing group was brandishing a large knife and all had their faces covered. The cyclists managed to escape unhurt and the van continued with its occupants into Monteagle Way in Hackney. Just before midnight that evening, three men were sitting in a parked car on the Nightingale Estate in Monteagle Way. The white transit van drove past them and the occupants of that van appeared to the men in the car to be workmen wearing high visibility vests. One of the men in the car, Kaan Aslan, then aged 20, got out to fetch something from another car at which point he and his two friends, Ishmael William Thomas and Daniel Silver, were set upon by the occupants of the van which had reversed at speed to get to them. There were at least five men, possibly more, all wearing face coverings and armed with swords and knives. They repeatedly said words to the effect "Where you lot from?" The two men in the car managed to escape the scene, but

Kaan Aslan was unable to do so. He was stabbed repeatedly and suffered a deep 12-centimetre stab wound which entered his heart. He also suffered a deep wound to his back which passed through part of his spine and there was a fragment of bone missing from his forearm. He tried to get away from the group and was screaming out in pain. A blood trail from the scene led to a grass area 30 feet away where he lay down.

Eye witness accounts described the horrific attack and members of the public tried to help Kaan Aslan. Despite that, and the efforts of emergency services who attended at the scene, Kaan Aslan died from the catastrophic injury to his heart. After the violence, CCTV footage showed the van returning to Burnett Close and the Honda moped travelling back from there to the applicant's home address.

The prosecution case was that the applicant murdered the deceased and took part in both violent disorders as part of a joint enterprise with the unidentified occupants of the white van. The violence was said to have been done to assert gang superiority and retribution for an earlier attack on the applicant's younger brother who had been stabbed seven times in Rectory Road in Hackney, the territory of a different gang, the Stokey/16 gang. The Crown relied on that earlier attack which occurred on 6 November 2017 as evidence of motive, the applicant's younger brother being a member of the E9/Niners gang.

In terms of the evidence relied on by the Crown to establish that the applicant was the rider of the Honda moped and was present in the van at the material times, there was CCTV footage at 8.30 pm showing the applicant filling up his moped with petrol; there was a receipt for the petrol found on a search of his bedroom; CCTV footage captured the moped travelling to the cul-de-sac where the van was parked later that evening; cell site evidence linked the applicant and his mobile phones with the journey taken by the moped rider and then the transit van to the scenes of both the first violent disorder and then the second

episode of violence and the murder; periods of inactivity on the phones corresponded with the timing of the attacks. There was also evidence of a crash helmet and gloves similar to those seen on the CCTV footage being worn by the moped rider found at the applicant's home and containing his DNA; and evidence linking the applicant to the transit van, including DNA evidence linking him to two high visibility vests recovered from the van in November 2017.

The applicant gave no comment interviews and failed to mention to police a number of important facts relied on in his defence at trial, from which the jury were told they could draw adverse inferences. There was also bad character evidence in the form of CCTV footage of the applicant participating in a violent altercation whilst held on remand at HMP Belmarsh when he used a plastic tray as a weapon to support his younger brother or cousin who was involved in a fight during visiting time, admitted as evidence to correct the impression, wrongly given by the applicant during evidence, that he would not go to the assistance of his brother if circumstances such as a violent disorder of the kind here occurred.

The defence case was that the applicant was at home throughout the time when the incidents took place. Another man, Mr Israel Ogunsola, who died on 4 April 2018, had come to the applicant's house that evening to borrow one of his mobile phones because it was a line used to sell cannabis, together with his moped, helmet and other items. He later returned with the moped, phone and other items, except the high visibility vests. He appeared to be flustered, said there had been "a madness" and then left. Since his death the applicant felt able to explain what had happened. The applicant in due course gave evidence at trial consistently with that defence. He explained that he had given a no comment interview on the advice of his solicitor and he relied on cell site expert evidence to rebut the prosecution

evidence concerning his mobile phones.

The issue for the jury at trial was whether they could be sure that the applicant was one of the men who attacked the cyclists in the violent disorder earlier in the evening and then went on to murder Kaan Aslan as part of a joint enterprise with the other occupants of the van.

At the conclusion of the evidence, but before speeches and summing-up, the applicant's leading counsel, Ms Clare Wade QC, invited the judge to direct the jury that a finding of manslaughter was available as an alternative verdict to the count of murder and should be left to the jury. Although the applicant's defence was that he had not been party to any agreement to commit any of the offences and had been at home at all material times, it was open to the jury to reject that account and Ms Wade submitted on his behalf that there was a clear inference that the occupants of the van had agreed to commit a violent disorder in the second part of the evening, just as they had in the first part. For example, some had engaged in conduct such as banging knives or swords on the bonnet of the cars in Monteagle Way, consistent with conduct intended to cause fear as opposed to conduct intended to kill or do really serious harm. She relied on the absence of any witness to the stabbing of the deceased and also on the fact that the Crown's pathologist, Mr Robert Chapman, said that "a single knife could have accounted for all the injuries" but was unable to say if one or more than one knife was used. She submitted that if there had been an agreement only to commit violent disorder, then given that some or all of the occupants of the van were armed with knives it was reasonably foreseeable that some harm would occur and manslaughter should therefore be left to the jury as an alternative possible verdict.

The trial judge, Her Honour Judge Poulet QC declined to direct the jury on the possibility of an alternative verdict of manslaughter. The jury had an alternative to murder in the form of a

finding of violent disorder which carried a less serious penalty than the offence of manslaughter. There could therefore, be no unfairness to the applicant if manslaughter was not left to the jury. The trial judge concluded that leaving a further alternative of manslaughter would have been confusing. In those circumstances, the jury were directed that if they were sure the applicant was present but did not intend to cause really serious harm to the deceased, they could consider as an alternative to murder a conviction of violent disorder.

On this renewed application for leave to appeal against conviction, there is one ground only now pursued by Ms Wade who appears with Mr Christian Wasunna, on the applicant's behalf. They argue that the conviction of murder is unsafe because the jury was not directed that the alternative verdict of manslaughter was open to them on that count. Ms Wade accepts that the directions given on violent disorder as an alternative verdict were proper directions, but disputes that this achieved the broader aim of meeting the interests of justice in this case as set out in R v Coutts [2007] 1 Cr.App.R 6. In this case, by contrast with Coutts, a manslaughter direction was specifically requested at the close of the evidence and in circumstances where the Crown could not say whether the applicant was a principal or a secondary party in so far as the fatal injuries were concerned. Furthermore, as she did below, Ms Wade relies on the pathologist's evidence and the inability to say that more than one knife had been used, or that more than one person had caused the injuries. She submits, given the evidence of the banging of weapons, which was consistent with unlawful violence or threats of unlawful violence such as to cause fear, the evidence lent itself to the inference that the applicant had participated in an attack consisting of violence falling short of an intention to cause really serious harm or kill. She relies on the fact that the applicant was not a member of a gang and would not therefore necessarily have

foreseen that one of the participants would have stabbed the deceased. The alternative of violent disorder is not the alternative contemplated by section 6(2) of the Criminal Law Act 1967. Moreover, in circumstances such as these, R v Jogee (at paragraph 96) supports the conclusion that manslaughter is the appropriate alternative envisaged. Critically she submits, an alternative of violent disorder simply did not give the jury a realistic choice in the circumstances of this case. It was too trifling an offence that did not reflect the full consequences of what occurred and the fact that a death had resulted.

Forcefully and cogently as this ground was advanced on the applicant's behalf, like the single judge we do not accept that it raises any arguable case that the applicant's conviction of murder is unsafe. We are quite sure that it was neither necessary nor in the interests of justice on the facts of this particular case for an alternative verdict of manslaughter to be left to the jury. Our reasons in summary are as follows.

The central issue for the jury was not one of intent on the evidence but whether they were sure that the applicant was present in the van on Monteagle Way that night. There was compelling circumstantial evidence that he was. There was also compelling evidence, not least from Ishmael William Thomas and Daniel Silver, that all of the attackers from the van were armed with knives and/or swords capable of inflicting fatal violence. There was evidence of repeated attempts made to stab Ishmael William Thomas through the window of the car and both men gave evidence that they were in fear for their and each other's lives. The cumulative effect of the evidence of these witnesses and the other evidence was that all of the attackers were armed and that the ferocity of the attack was such that it could properly be inferred that the group was intent on causing at least really serious bodily harm

To convict the applicant of manslaughter, the jury would have had to be sure that he intentionally

participated in an offence in which Kaan Aslan died and that a reasonable person would have realised in the course of that offence that some physical harm might be caused. Neither factual scenario was consistent with his case which was that he was not in the van and had not been present at the scene of the attack at all. That meant that before any consideration could be given to manslaughter, the jury would have had to dismiss his account as a lie and then, without any realistic evidential basis for doing so, attempt to guess at his state of mind. In this case we are quite sure that the alternative verdict of violent disorder catered for the possibility that the jury were sure that the applicant was present in Monteagle Way but not sure that he intended at least really serious harm should be caused to Kaan Aslan. That was a suitable lesser alternative that specifically addressed the unlikely conclusion that the jury were sure only that he had taken part in the general violence without the necessary intention.

As R v Coutts makes clear, before any requirement to leave an alternative verdict arises it must be obviously raised by the evidence. That is, it must be an alternative verdict which a jury could reasonably come to. The obvious alternative here was violent disorder. Manslaughter was not obviously raised by the evidence. Once the jury were satisfied that the applicant was in the van and therefore either participating in or encouraging the violence that evening, there was compelling evidence that entitled the jury to conclude that he intended at least really serious harm should be caused. The judge expressly directed the jury that this was required and by their verdict reached unanimously, it is clear this is what they concluded. Accordingly, in our judgment it was not necessary for the judge to leave the alternative of manslaughter to the jury and this conviction is not arguably unsafe.

We turn to the application for leave to appeal against the minimum term of 27 years imposed in respect of the murder conviction. Two particular points are emphasised by Ms Wade in

contending that the sentence was manifestly excessive. First, she submits it could not be said that the applicant had an intention to kill since there was no evidence that he was the person who inflicted the injuries on Kaan Aslan. This was a statutory mitigating factor but the sentencing judge made no finding in this regard and her sentencing remarks indicate that the only mitigating features she identified were the applicant's age, she observed he had only just turned 23, and that he was not alleged to be a member of any gang. Secondly, she submits that there should have been greater weight afforded to those mitigating features in any event. There is a third point raised in oral submissions: that there was an element of double-counting by the judge in that she regarded the offence as aggravated by the fact that others were armed but this was catered for in any event by the starting point of 25 years.

We do not accept those submissions. The offence, as Ms Wade concedes, fell within paragraph 5A of schedule 21 of the Criminal Justice Act 2003 as a murder in which knives or similar weapons are taken to the scene. That meant a starting point, before taking into account any additional aggravating features, of 25 years. As far as aggravating features are concerned, there was significant planning involved. It was group violence - these participants went mob-handed and armed. In our judgment the judge was amply entitled to treat that as a separate aggravating feature beyond simply the paragraph 5A circumstances. The weapons taken were capable of inflicting fatal violence. The offence was a revenge attack involving rival gangs. There was the use of a stolen van to transport the attackers to two separate rival locations in search of victims - a search that was persistent and sustained - and efforts were made to conceal the identity of those involved. The offence took place on the streets at night with two others on Monteagle Way narrowly escaping serious injury and in addition, the murder followed the earlier violent disorder

that evening.

As for mitigating features, although not dealt with expressly in her sentencing remarks, in our judgment there was ample evidence entitling the judge to find an intention to kill proved on the evidence of motive and given the nature and ferocity of the attack. In these circumstances, an increase of two years from the starting point was not arguably manifestly excessive after mitigating the term to reflect the applicant's age and that he was not alleged to have gang membership.

For all these reasons, both applications are refused.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk