IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1112

CASE NO 202102028/B5

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 6 July 2021

LORD JUSTICE HOLROYDE

MR JUSTICE JAY

MR JUSTICE MURRAY

PROSECUTION APPLICATION FOR LEAVE TO APPEAL AGAINST A TERMINATING RULING UNDER S.58 CRIMINAL JUSTICE ACT 2003

REGINA

v

GRANT GARDNER

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MS L BLACKWELL QC & MR J KENNERLEY appeared on behalf of the Applicant.

MR B NOLAN QC & MR P CASSIDY appeared on behalf of the Respondent.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This is a prosecution appeal against a decision allowing a submission of no case to answer on a charge of murder. Section 71 of the Criminal Justice Act 2003 prohibits the inclusion in any publication of any report of the application or of anything done in relation to it, or of this hearing. We shall return to the topic of reporting restrictions at the conclusion of our judgment.
2. Connor Rumble and Grant Gardner are jointly charged on an indictment containing a single count alleging the murder of Adam Le Roi on 15 November 2020. Their trial began on 21 June 2021 in the Crown Court at Preston, before HHJ Cummings QC and a jury. On 28 June, the judge gave a ruling in which he acceded to a submission that Grant Gardner had no case to answer.
3. The prosecution, complying with all the procedural requirements of section 58 of the Criminal Justice Act 2003, have given notice of appeal against that ruling and have given the necessary acquittal undertaking in accordance with section 58(8). The application for leave to appeal has been referred by the Registrar to the full court. The Crown Court trial has been adjourned pending this court's decision. It is common ground that, whatever our decision, the trial of Connor Rumble will continue.
4. The relevant facts, in summary, are these. In recounting them we shall for convenience, and intending no disrespect, refer to persons principally by their surnames alone. On the night of 14/15 November 2020, the deceased Adam Le Roi visited the home of his friend Christopher Johnson. Johnson lived on the third floor of a block of flats. The two accused lived in Flat 16 on the first floor of that block. Johnson and Le Roi went to Flat 16, apparently aggrieved about something. There was a heated exchange but no violence.
5. Shortly after 2.00 am, Johnson and Le Roi returned to Flat 16. There was a scuffle, in which all four were involved. In the course of this, Gardner went to the floor and was kicked by Le Roi, who was pulled away by Johnson. Johnson and Le Roi then began to walk back to the lift which would take them to the third floor. To get there they had to walk along a short length of corridor, about 2.7 metres, passing through a fire door, and then turn left along another corridor for about 5.3 metres before reaching a second fire door to the lift area.
6. A CCTV camera in the lift area gave a view towards the fire door, which contains two glass panels, and the corridor beyond. The other corridor, on which Flat 16 is located, was not covered by CCTV.
7. Before he reached the lift, Le Roi was stabbed four times by Rumble, who had armed himself with a kitchen knife from Flat 16. All the knife wounds were in the area of Le Roi's left shoulder. One penetrated the axillary and pulmonary arteries and caused death.
8. At trial, Johnson gave evidence of what had happened. He described Rumble brandishing the knife at Le Roi and shouting, "I'm going to kill you". A number of residents in the block of flats gave evidence of hearing those words, though none had been in a position to see the incident.
9. A pathologist gave evidence that the four knife wounds could all have been inflicted in a second or two. It was not possible to say at which point in the sequence the fatal blow was struck. A forensic scientist gave evidence as to the interpretation of bloodstaining at the scene.
10. The CCTV footage was played to the jury. Each member of this Court has viewed that footage. The judge prepared a careful note of what it showed, which he agreed with counsel and which we accept as accurate. In summary:

As Johnson and Le Roi reached the area of the fire door leading to the lift area, Rumble could be seen coming into the camera's view, brandishing the knife. He stabbed at Le Roi's left shoulder.

Le Roi pushed Rumble back and the two men went into the corridor with the fire door closing behind them. Through the glass panels, some physical activity between the two men was visible. Johnson, who was in the lift area, went into the corridor to assist his friend.

As Johnson opened the door, the camera showed Gardner - who was wearing only his underpants - holding Le Roi. Johnson punched Gardner in the head, knocking him backwards away from Le Roi. Le Roi fell in the area of the doorway. Rumble, with his knife raised, advanced towards Johnson, who stepped back into the lift area and closed the door.

Gardner could then be seen kicking at Le Roi, who was on the floor. Rumble was close by him.

Johnson opened the door and stepped partially through to the corridor. Le Roi picked himself up from the floor, went into the lift area and stepped into the lift. Rumble was close to Johnson, and Gardner was moving towards him. Both Rumble and Gardner were pointing and saying something. Johnson closed the door and remained holding it closed for a short time. Through the glass panels, it could be seen that Gardner moved back along the corridor away from the lift area followed by Rumble. Johnson then went towards the lift.

11. It was submitted on behalf of Gardner that there was no case for him to answer. Mr Nolan QC referred to R v Jogee [2016] UKSC 8 and R v Childs & Price [2015] EWCA Crim 665. He submitted that there was no evidence of any plan or agreement between the two accused to cause death or really serious injury. The most the prosecution could show was that Gardner was present at the scene at a point close in time to the killing. It was clear from the footage that it was Rumble who had inflicted the knife wounds. The fatal injury had been inflicted before Gardner kicked Le Roi. Those kicks had not caused or contributed to Le Roi's death.
12. The submission was resisted by Ms Blackwell QC on behalf of the prosecution.
13. The judge gave a detailed written ruling, in which he correctly identified his task as being to determine whether there was sufficient evidence on which the jury could properly find Gardner guilty of murder. After rehearsing the evidence, he made the following assessment of it:

> He was satisfied that the jury could properly find that all of the stabbing, including the fatal injury, was inflicted during the short period when Le Roi and Rumble were in the corridor behind the door.
>
> The jury would be entitled to conclude that Gardner, in the prepared statement

he had put forward before making no comment when interviewed under caution, had deliberately omitted any mention of his own conduct in going to the scene and kicking Le Roi. They could regard that as indicative of concealment by Gardner of his reprehensible or criminal conduct, but could not take it as evidence that he must be guilty of murder.

The sole cause of death was stabbing. There was no suggestion that Gardner had used a knife. The prosecution accepted that there was no evidential basis on which the jury could find that any force used by Gardner, including any kicking, could have contributed to Le Roi's death.

It was therefore necessary for the prosecution to be able to prove either a plan or agreement between the accused to kill or to cause really serious injury to Le Roi and/or Johnson; or assistance on the part of Gardner; or encouragement on the part of Gardner.

There was no direct evidence as to what, if anything, Gardner had done between the point when Johnson and Le Roi left Flat 16 and the point when Gardner was seen on the CCTV footage.

There was in his judgment simply no evidence from which the jury could infer any plan or agreement between the accused, or any incitement by Gardner, prior to the point at which Rumble could be seen on the footage brandishing the knife. Nor was there any evidence that would enable the jury properly to conclude that before that point, Gardner had said or done anything to communicate support to Rumble.

The jury could properly find that Rumble had started the initial violence at Flat 16 and that Gardner had immediately joined in. The jury could infer that Gardner would have been equally prepared to join in at the later stage. However, until Rumble armed himself with the knife, there was no evidence that either accused had any intention to kill or cause really serious injury. The judge drew a distinction between an agreement between the two men and a unilateral decision by Gardner, uncommunicated to Rumble, to join in with whatever Rumble did.

The jury could properly find that certainly by the time he arrived at the scene, and very possibly before he decided to go to the scene, Gardner had seen that Rumble had a large knife and heard him shouting his intent to kill. Further, the jury could properly find that Gardner went to the scene of the stabbing with the intention of assisting and/or encouraging Rumble in killing or grievously injuring someone.

It was accepted by the prosecution that Gardner's kicking of Le Roi could not provide any evidence of encouragement or assistance at or before the material time, because it occurred after the stabbing was over. There was no evidence

of actual, as opposed to intended, assistance by Gardner before the stabbing was complete.

There was no evidence on which the jury could be satisfied that Rumble was aware of Gardner's presence or approach before the stabbing was complete.

14. The judge summarised his conclusions as follows:

> "In my judgment, the position is therefore that there is no direct evidence that Grant Gardner entered into an agreement before the event, or said or did anything by way of encouragement or assistance before the stabbing was over, such as could make him a party to murder. Nor is there, in my judgment, evidence from which a jury could properly infer any of those things from the surrounding evidence. Miss Blackwell, in submissions, relied on the overall sequence of the available evidence, including her contention that Grant Gardner, on arrival at the scene, straightaway 'got stuck in', with what the jury could properly find was hostile intent, as enabling the jury properly to conclude that there must have been some prior agreement or understanding between him and Connor Rumble, or at least that he must have said or done something by way of encouragement or assistance before the stabbing was over. I am afraid that I cannot agree. As to the first proposition, there is simply no evidence from which a jury could properly infer that Grant Gardner must have come to the scene pursuant to an earlier agreement or understanding that he would assist Connor Rumble in an attack with a knife. The simple fact of Grant Gardner's attendance is at least equally consistent with his having made his own independent decision, uncommunicated to Connor Rumble, to go to the scene in order to attack the man who a short while earlier had kicked him in the face and been on top of him on the floor of Flat 16. As to encouragement or assistance, there is no evidence on which a jury could properly be sure that Grant Gardner said or did anything amounting to either before the stabbing was over (by which time the fatal injury necessarily must have been inflicted)."

15. As we have said, this appeal is brought pursuant to section 58 of the Criminal Justice Act 2003. The powers of this Court are contained in section 61 of that Act, which so far as is material for present purposes provides:

> "**Determination of appeal by Court of Appeal**
>
> (1) On an appeal under section 58, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal

relates.

(2) Subsections (3) to (5) apply where the appeal relates to a single ruling.

(3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.

(4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—

(a) order that proceedings for that offence may be resumed in the Crown Court

(b) order that a fresh trial may take place in the Crown Court for that offence

(c) order that the defendant in relation to that offence be acquitted of that offence.

(5) But the Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order were made under subsection (4)(a) or (b).

..."

16. By section 67 of the Act:

"**Reversal of rulings**

The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—

(a) that the ruling was wrong in law

(b) that the ruling involved an error of law or principle, or

(c) that the ruling was a ruling that it was not reasonable for the judge to have made."

17. In her written and oral submissions on behalf of the prosecution, Ms Blackwell argues that the judge failed properly to apply the first limb of R v Galbraith 73 Cr App R(S) 124; failed to take account of relevant areas of the evidence; made decisions about what inferences could be drawn which were properly within the province of the jury and thereby usurped the jury's function; and made a ruling which it was not reasonable for him to have made. She stresses that the evidence of Johnson should be considered in the light of his clear distress, which made it necessary to approach with caution his account that he had no recollection of seeing Gardner when he opened the fire door to go to Le Roi's assistance. She emphasises that Gardner must have heard Rumble's shouts, which were audible to those inside other flats.
18. Ms Blackwell suggests that the judge fell into error by compartmentalising the evidence instead of looking at it as a whole. The reality, she submits, is that Gardner by his actions agreed to take part in the fatal offence, knowing that Rumble had a large knife and was shouting his intention to kill. Given the confined space and time within which the relevant events occurred, Rumble was aware of Gardner's agreement. The decision in Childs & Price was a decision on its own facts, which were very different from this case. Here, Gardner had himself been involved in the violence at Flat 16 only seconds before the fatal assault, was present at the flat when Rumble armed himself and must have heard Rumble's threats to kill.
19. Mr Nolan submits that the judge examined all the evidence and considered each of the possible ways in which it might in law be possible for Gardner to be found guilty of murder. He emphasises that Gardner cannot be seen on the CCTV footage at any time before the last visible use of the knife by Rumble. The judge identified a number of respects in which the jury could properly draw the inferences which the prosecution sought, but also identified areas where the evidence was insufficient to support the inferences for which the prosecution contended. Mr Nolan submits the judge did not thereby usurp the jury's role. The judge made no error of law or principle, and his decision was not unreasonable.
20. We have reflected on those submissions, which were of course much more fully expressed than we have indicated in our brief summary.
21. It is common ground that Gardner's own actions did not cause or contribute to Le Roi's death. The case against him is that he is guilty of conduct which in law makes him guilty of murder even though it was Rumble alone who caused the injuries which resulted in death.
22. It is not suggested by Ms Blackwell that the judge misdirected himself as to the relevant principles of secondary liability for criminal offences. Those principles were restated by the Supreme Court in Jogee, although that case was primarily concerned with the proper

approach to what had become known as "parasitic accessorial liability", an issue which does not arise here. The issue for us, therefore, is whether the judge correctly applied those principles to the circumstances of this case.

23. We reject at the outset the submission that the judge lost sight of the familiar principles in Galbraith.

24. In Childs & Price the accused were charged with murder. Their victim died of injuries sustained in a short fist fight in which Childs had struck the first blow and both the accused had thereafter been involved. The pathological evidence showed that the fatal injury could have been caused by a single blow. The prosecution could not prove who had administered the fatal blow, or when. The case against the accused was that they both acted "from start to finish" in pursuance of a joint plan, to inflict really serious injury, which they had formed before the first blow was struck.

25. Price submitted that he had no case to answer because he had not been present when the first blow was struck (although he had very quickly joined in the attack) and there was no evidence on which the jury could be sure of a prior plan or encouragement by Price. The judge rejected that submission, ruling that there was evidence from which the jury could infer that it was from the outset a joint attack. Both accused were subsequently convicted by the jury.

26. In allowing Price's appeal against conviction, this Court held that the judge had been wrong to refuse the submission of no case to answer. Davis LJ, giving the judgment of the Court, said at [37]-[39]:

> "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."

27. The decision in Childs & Price predates the decision of the Supreme Court in Jogee, but the parts of the judgment which are relevant for present purposes are unaffected by that later decision. We agree with the judge that the facts of that case finds some echoes in the present case, and that Childs & Price illustrates the need for a strict analysis of the sequence of relevant events where that is material to issues of participation and causation.
28. The judge correctly considered first whether there was evidence on which a jury properly directed could properly find that, before the stabbing, Gardner had entered into a plan or agreement with Rumble to kill or to cause really serious injury to Le Roi and/or Johnson. If there was such evidence, then there would have been a case for Gardner to answer even if he arrived at the scene moments after the fatal injury had been inflicted.
29. We agree with the judge, however, that there was no such evidence. The preceding scuffle at Flat 16, whatever its rights or wrongs, provided in itself no evidence of any intention on the part of either accused to kill or to cause really serious injury, still less of any agreement between them to do so. Taking the prosecution case at its highest, the jury could properly infer that, after that scuffle, Gardner must have seen Rumble arm himself with the knife before following Le Roi and Johnson along the corridor and must have heard Rumble's shouts of his intention to kill. Those inferences could not however permit a further inference that Gardner must have shared that intention or that by that stage, the two accused had reached even a tacit agreement to acting together in killing or causing serious injury. Gardner's actions in following Le Roi, Johnson and Rumble were equally consistent with other explanations, including as the judge said an independent decision by Gardner to go after the man who had fought with him and got the better of him moments earlier.
30. The judge then considered whether there was evidence from which the jury could infer that before the stabbing was complete Gardner intentionally encouraged or assisted Rumble to attack Le Roi with requisite intent. In this respect, the judge accepted that the jury could properly find that Gardner went to the scene, knowing by that stage that Rumble was armed and intending to encourage or assist him to kill or cause really serious injury. He rightly pointed out that for that reason, the decision in Jogee did not present any difficulty for the prosecution. But he was also correct to rule that there was no evidence that before the stabbing was complete Gardner in fact did anything to assist Rumble. As was said in Jogee at [11], association and presence are likely to be very relevant evidence on the question of whether assistance or encouragement was provided, but neither is necessarily proof of those elements: it depends on the facts. In the circumstances of this case, Gardner's mere presence at the scene, whenever precisely he reached it, was not sufficient to provide sufficient evidence of assistance. Gardner's actions in kicking Le Roi after the stabbing was complete were good evidence of an intention on his part to assist, but could not help the prosecution to prove actual assistance.
31. As to encouragement, the judge correctly ruled that there was no evidence on which the jury could find that Rumble was at least aware of Gardner's presence or approach before the stabbing was complete. Although it would not be necessary for the prosecution to

prove that encouragement had a positive effect on Rumble's conduct or on the outcome (see Jogee at [12]), it was necessary for there to be evidence from which the jury could be sure that Gardner not only intended to encourage but did in fact encourage Rumble to attack Le Roi with the requisite intention. In the absence of any evidence capable of showing that, before the stabbing was complete, Rumble was even aware that Gardner was approaching, the prosecution could not prove actual encouragement.

32. We reject the submission that in reaching those conclusions the judge failed properly to consider the whole of the evidence. On the contrary, we are satisfied that he made a most careful and thorough assessment of all the evidence, and was rigorous in his application of the legal principles.
33. For those reasons, we are satisfied that the judge's ruling was not wrong in law. It involved no error of law or principle. There is no basis on which it could be said that it was not reasonable for the judge to have made that ruling. On the contrary, he was in our view correct to do so. We therefore refuse the application for leave to appeal.
34. The acquittal undertaking to which we earlier referred includes, by virtue of section 58(8) and (9) of 2003 Act, an agreement by the prosecution that Gardner should be acquitted if leave to appeal is not obtained. By section 58(12), where leave to appeal is refused by this Court, we must order that Gardner be acquitted of the offence concerned. We so order. Gardner is accordingly acquitted of the only charge he faces.
35. Although Gardner's part in this trial is now at an end, the trial of Rumble will now resume in the Crown Court. There is a clear risk of prejudice to the fairness of those proceedings if there is any publication of the matters discussed in this hearing or in our judgment. We do not think it practicable to publish a redacted version of this judgment. We therefore confirm that pursuant to section 71 of the 2003 Act there must be no reporting of this application, this hearing or this judgment. The order will continue until after the conclusion of the trial of Rumble and, if relevant, the expiration of the time for any notice of appeal. We direct the prosecution to notify the Criminal Appeal Office forthwith when that stage has been reached.

MR NOLAN: My Lord, I wonder whether your Associate would be good enough to send notice of acquittal to Preston Prison before the day is out.

LORD JUSTICE HOLROYDE: I am sure that will be done Mr Nolan.

MR NOLAN: Thank you.

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