

Reporting Restriction section 45 of the Youth Justice and Criminal Evidence Act 1999

Other restrictions no longer apply following BHV's acquittal on 9 January 2023

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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1690



No. 202203429 B1

Royal Courts of Justice

Tuesday, 6 December 2022

Before:

LORD JUSTICE EDIS
MRS JUSTICE CHEEMA-GRUBB
SIR NICHOLAS BLAKE

REX
V
BHV

**REPORTING RESTRICTIONS APPLY:
Section 71 of The Criminal Justice Act 2003,
Section 45 of The Youth Justice and Criminal Evidence Act 1999
Section 4 of The Contempt of Court Act 1981**

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MS S BEATTIE KC and MR B CAMPBELL appeared on behalf of the Applicant.

MS C GOODWIN KC and MS L J MILLER appeared on behalf of the Respondent.

JUDGMENT

Reporting Restriction section 45 of the Youth Justice and Criminal Evidence Act 1999
Other restrictions no longer apply following BHV's acquittal on 9 January 2023

LORD JUSTICE EDIS:

- 1 Reporting restrictions apply to the judgment we are about to give. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public in writing, in a broadcast or by means of the internet including social media. Anyone who becomes aware of the contents of this judgment is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. By virtue of those provisions no publication may include a report of these proceedings save for the specified basic facts until the conclusion of the trial. In addition, there is in force a crown court order under the Contempt of Court Act 1981 restraining reporting of these proceedings until the conclusion of the trial. Finally, there is an order under section 45 of the Youth Justice and Criminal Evidence Act 1999 which protects the identities of young people involved in these proceedings including BHV, who will reach his 18th birthday in February of next year. When the judgment is published after the conclusion of the trial, he should be anonymised unless the Crown Court has made a different order. NOTE: BHV was acquitted at his trial on 9 January 2023 and the only restriction which applies from that date is that under section 45 of the Youth Justice and Criminal Evidence Act 1999.
- 2 This is an appeal by the prosecution against a terminating ruling made in the crown court. The appeal lies with leave under section 58 of the Criminal Justice Act 2003. It is accepted that all procedural formalities have been complied with so that the appeal is properly before us for decision. We give leave.
- 3 The respondent, BHV, is currently standing trial at Newcastle Crown Court with two other young men who are co-accused with him. Mohammed Rabani is aged 19 and Robbie Batista is 18. They are together indicted on Count 1 on the indictment which alleges murder. The allegation is that they acting together murdered Nathaniel David Wardle on

20 June 2022. Each of them also faces an allegation of possession of an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1953. In the case of BHV that allegation finds itself in Count 4 on the indictment. It is alleged that on 20 June 2022 without lawful authority or reasonable excuse he had with him in a public place, namely Saint Hilda's Avenue, Wallsend, an offensive weapon namely an axe. This count arises out of the same incident as Count 1 and the allegation is that BHV took an axe with him to the location where Nathaniel Wardle was fatally stabbed by the co-defendants. He has pleaded not guilty to both the counts he faces. Counts 2 and 3 relate to the two co-defendants taking knives to the scene of the fatal stabbing. They have pleaded guilty to those offences but not guilty to murder.

4 The trial began on 15 November 2022 before Mr Justice Andrew Baker. Shortly before the close of the prosecution case, when all relevant evidence which required consideration for the purposes of these submissions had been adduced, counsel for BHV submitted that there was no case to answer on both of the charges that he faced. This included a submission that there was also no evidence fit to go to the jury in respect of the alternative verdict of manslaughter which technically would be open on Count 1.

5 On Tuesday, 22 November 2022 in a careful written ruling, the trial judge decided that there was no case for BHV to answer on the allegation of murder. He rejected the submission that there was no case to answer on Count 4. He also ruled that contrary to the submissions made on behalf of BHV, it was properly open to the jury on the evidence then adduced to return a verdict of guilty in respect of manslaughter on Count 1. The only issue before us on this prosecution appeal against a terminating ruling relates to the judge's determination that there was no case to answer in respect of murder.

6 The trial is currently paused and the jury is waiting to return to resume and conclude the case. This decision is therefore required now and it is necessary for the court to give its ruling and its reasons quickly. The judge will need to know the basis on which this court

has reached its conclusion in order to be able to sum the case up in accordance with our decision.

7 Our decision does not, in our judgment, establish any new law. It depends upon the decision of the Supreme Court in *R v Jogee* [2016] UKSC 8.

The facts

8 The prosecution alleges that in the afternoon of 20 June 2022 at about 20 past two in the afternoon Nathaniel Wardle was stabbed in the front garden of his home address by Mohammed Rabani and by Robbie Batista. Each of them had, as they have admitted, taken a knife to that location. It was the wound inflicted by Mohammed Rabani which proved fatal. It penetrated Mr Wardle's heart, causing his very rapid collapse and death. It appears that the wound inflicted by Robbie Batista was inflicted after that blow. The prosecution is able to formulate this account of what happened in the garden with such specific clarity because the incident was captured by CCTV cameras and there is highly relevant video and audio footage of it. This was played carefully to the jury and we have each had the opportunity to review all the CCTV footage in the same form as that which was placed before the jury. It is, therefore, possible to give an account of the context in which that fatal stabbing occurred. There is CCTV footage showing the approach of the three defendants to the Wardle household. They made a specific journey together to that place by bus and then walked for an appreciable period of time together towards their destination. When they arrived at it, all three of them entered the garden. BHV spent some of the time during what followed on the pavement but he did himself enter the garden with the other two for a period of time. While they were in the garden, they challenged the occupants of the house. There was clear evidence that their purpose was to attack one of the sons of Mr Wardle, who was in the house. His name was Leon. It is relevant to observe that he is one of four brothers. Mr Wardle himself was not in the house at the time of this confrontation, as we shall explain. It went on for a significant period of time. There is some audio recording of things which were said and there is some witness evidence about

what happened, to which we shall shortly turn.

- 9 While all this was going on and at a time when BHV was standing on the pavement outside the garden, Mr Wardle was on his way home with a small child. He can be seen approaching. From his behaviour it may be inferred that he became aware of what was happening at his front door, namely that at that point two young men armed with knives were threatening an attack on at least one of the occupants. He ran quickly into the garden, no doubt to intervene to protect his family. He was very rapidly stabbed, in the way that we have described, and killed. As he approached, BHV was walking away from the garden, but before long, he returned to the gate and then joined in with the other two, as the three of them ran away. They were pursued by at least two young men who had been in the house, who from the CCTV footage, appeared by then to have armed themselves with bladed weapons. No further violence ensued that afternoon and the pursuers were seen to return shortly afterwards to the house.
- 10 The prosecution's case was that these three defendants had attended at that house, each of them armed with a bladed weapon in order to attack Leon Wardle who was then aged 17.
- 11 In addition to the CCTV and audio evidence, which is as we have said extensive, there were two witnesses who gave evidence adding somewhat to the overall picture. Catherine Wardle is Nathaniel Wardle's mother and Leon Wardle's grandmother. She was in the house at the time when the defendants arrived at it. The front door had been left open. She heard someone call out asking if anyone was in. It appears that Mohammed Rabani entered the property at that stage saying, "Send Leon out for a fair one on one fight."
- 12 Another witness, a neighbour, gave evidence which was not challenged, saying that she had heard the three defendants speaking or shouting immediately before the stabbing and also heard things said as they ran away. On their approach she overheard one of the young men saying, "I'm in your street. Come out to your door." She then heard one of them saying, "Are you going to record me doing it?" She then heard the commotion in the garden and

saw the three defendants running back away from the house, down the road past her. She then heard Rabani shouting, "Fuck, I have done it, I have done it."

- 13 The prosecution relied on interviews in which BHV gave an account of what had happened. He said that Rabani was to have a one-on-one fight with Leon Wardle. He said that until they produced their knives, he had been unaware that Rabani and Batista had been armed. He did, however, accept that he himself had had at the material time an axe. He said that that had been given to him by Rabani for "protection". It was open to the jury to interpret this as meaning that he had the axe with him for use in any fracas which the defendants might cause by their action in approaching the house and challenging Leon to a fight. If they did then this would be evidence that he intended to use a lethal weapon if necessary, otherwise than in lawful self-defence.

The judge's ruling

- 14 The judge rejected a number of defence submissions and ruled that there was a case to answer against BHV on manslaughter within Count 1 and on Count 4, possession of an offensive weapon. BHV has no right of appeal against those decisions at this stage.
- 15 He began his conclusions as follows:

"10. In my judgment the prosecution has led ample evidence from which the jury properly directed could sensibly find themselves sure that the defendants were engaged on 20 June 2022 upon an agreed plan to threaten with knives and if possible to inflict unlawful violence with them upon Leon, one of Mr Wardle's older sons. There are four Wardle boys in all. The prosecution case is that the target of whatever the defendants were up to that day is Leon, who is the second of the four by age. That he was their target is indeed, I think, the only conclusion that could sensibly be drawn from the evidence the prosecution have led."

- 16 In relation to Count 4 the judge expressed his conclusions as follows:

"12. ,,,,,,,,It was, therefore, an offensive weapon on 20 June 2022 only if in having it with him BHV intended it to be used for causing injury. The conclusion I have just identified that the jury could properly reach would be a conclusion that BHV had that intention. If that was his intention the jury could readily find that there was no lawful authority or reasonable excuse for having the axe with him even if that was for the prosecution

to prove."

- 17 The basis on which the judge held that there is a case to answer on manslaughter is as follows:

"13. Furthermore, directed as to the ingredients of an unlawful act manslaughter following *Goodfellow* (1986) 83 Cr App R 23, in my view, the jury could properly consider that Mr Wardle's death was caused in the course of carrying out an obviously dangerous and unlawful joint endeavour of threatening Leon with blades and using them on him if the chance arose. That is sufficient for my rejection of the argument that there is no case to answer on manslaughter. As the Supreme Court noted in *Jogee* [2016] UKSC 8 at [96] 'If a person goes out with armed companions to cause harm to another any reasonable person would recognise that there is not only a risk of harm but a risk of violence escalating to the point at which serious harm or death may result'."

- 18 In expressing his conclusion rejecting the prosecution submissions in relation to Count 1, the judge addressed the prosecution case which was that although Leon Wardle was the target of the joint enterprise, those involved in it also had a conditional intent to inflict really serious harm on anyone who "got in the way". The judge rejected that saying that to impute any such conditional intention to BHV on the evidence before the jury would involve an exercise in speculation and that there was no evidence from which such an intention could properly be inferred.

Jogee [2016] UKSC 8 and *Anwar* [2016] EWCA Crim 551

- 19 In *Jogee*, as the judge rightly recognised, the Supreme Court gave significant guidance to courts dealing with cases such as the present. At paragraph [96] the Supreme Court identified the basis on which a conviction for manslaughter may ensue where a violent attack causes death where an individual defendant does not have an intention to assist in causing death or really serious harm. In paragraph [83] the Supreme Court identify the continuing relevance of foresight of what might happen in cases of joint enterprise homicide. The court said this:

"83. Fourthly, in the common law foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence, but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule,

which results in over-extension of the law of murder and reduction of the law of manslaughter. Murder already has a relatively low mens rea threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The Chan Wing-Siu principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so. It savours, as Professor Smith suggested, of constructive crime."

20 The court's analysis of conditional intent is an important part of its reasoning and also an important part of the prosecution case in the case before us. This was set out in paragraphs [92] to [94]:

"92. In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.

94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances."

21 The decision of the Court of Appeal (Criminal Division) in *Anwar* is, in our judgment, of some significance to the outcome of this appeal. In it Sir Brian Leveson, President of the Queen's Bench Division giving the judgment of the court, explained that the decision in *Jogee* is unlikely to affect the outcome of submissions of no case to answer in cases of this kind. Of course, it has a significant impact on the way in which juries will be directed in cases where a case to answer is found.

22 He expressed the conclusions of the court in paragraphs 20 to 22 of that decision:

"20. Before analysing the facts of this case, the recent seminal decision of the Supreme Court requires some consideration. In his judgment, the learned judge refers to *Jogee* on no fewer than four occasions, but it is important to underline that it was common ground before us that the decision did not advance the argument about whether or not there was a case to answer in respect of any of these respondents. Suffice to say, for our part, we find it difficult to foresee circumstances in which there might have been a case to answer under the law before *Jogee* but, because of the way in which the law is now articulated, there no longer is. In addition to sufficient proof of encouragement or assistance, what is required is an intention, perhaps conditional, to encourage the commission of the relevant offence: see [90]. It is clear that any defendant must have knowledge of existing facts necessary for the principal's intended conduct to be criminal and knowledge, if such there be, that any particular weapon is carried by the principal will be evidence going to the jury's assessment of the defendant's intention: see [9], [16], [26].

"21. The jury will, of course, continue to look at the full picture or factual matrix in order to determine whether the relevant and necessary intent can be inferred. Thus, Lord Hughes and Lord Toulson emphasised (at [93]) that juries frequently decided questions of intent (and conditional intent) by a process of inference from facts and circumstances proved (using the notation of that case): "whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did and committing crime B if the occasion arose. They went on (at [94]) in these terms:

'If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D gave his assent and intentional support. But that will be a

question of fact for the jury in all the circumstances.’

“22. Thus, the same facts which would previously have been used to support the inference of *mens rea* before the decision in *Jogee* will equally be used now. What has changed is the articulation of the *mens rea* and the requirement that to prove (in the case of *Jogee*) the crime of murder it is not sufficient that D2 foresaw that D1 might intentionally cause grievous bodily harm or kill if the circumstances arose. What is now required is that D2 intended that D1 cause grievous bodily harm or kill if the circumstances arise. Thus, the evidential requirements justifying a decision that there is a case to answer are likely to be the same even if, applying the facts to the different directions in law, the jury might reach a different conclusion.”

23 The judge, in giving his ruling, identified a passage in the Crown Court Compendium under the section on joint enterprise liability. He said that it correctly represents the law.

24 That passage is as follows:

"3. D is liable as an accessory (and not as a principal) if D assists or encourages or procures another person, P to commit the offence and D does not, by D's own conduct, perform the actus reus. The offence occurs where and when the principal offence occurs. It is not necessary that D's act of assistance or encouragement was contemporaneous with the commission of the offence by P. D's acts must have been performed before P's crime is completed. There is no requirement that D and P shared a common purpose or intent. It is immaterial that D joined in the offence without any prior agreement. D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim."

25 The judge relied on the last sentence of that extract. That is the only sentence in the extract for which no authority is cited in a footnote. It appears to us that it is an attempt to encapsulate in the Compendium the principle dealt with in *Smith Hogan and Ormerod's Criminal Law Sixteenth Edition* at page 217 that:

"D is not liable if P intentionally changes victim/target of crime X".

26 We will not set out the analysis with which the authors establish that proposition. We observe, however, that it is a more nuanced proposition than the single sentence in the Compendium might suggest. The references in *Jogee* to conditional intent, which we have already mentioned, plainly require some analysis in the context of a proposition of the kind

described in that sentence in the Compendium on which the judge relied.

27 It is perhaps worth recording that at paragraph 1.2 under the heading “The Purpose and Structure of the Compendium”, its authors say this:

"There is first a section headed 'Legal Summary'. These summaries are intended as no more than brief introductions to or reminders of the areas of law concerned. References will be found to the relevant passages in Archbold and Blackstone's and in any case of complexity the law must be researched through these works."

28 That is a helpful reminder from the authors of the Compendium that the excellent legal summaries which they provide for the assistance of trial judges are to be regarded as just that: summaries.

Discussion and decision

29 For our purposes the starting point is that this is a prosecution appeal against the judge's decision that there is no case to answer on murder. The question of whether he was right to conclude that there was a case to answer on manslaughter and on Count 4 is not subject to any appeal at this stage. In the event of conviction for either of those offences, the respondent BHV will have a right of appeal in the usual way. Nothing we say here can bear on the merits of any such appeal, but we start from the starting point that the judge's conclusions in respect of those offences were correct. For our purposes, we are content to do so.

30 This means that it was open for the jury to conclude (1) that BHV was a party to a joint enterprise which resulted in the death of Mr Wardle. The joint enterprise was intended to result in the use of bladed weapons on Leon "if the chance arose". This was unlawful and obviously dangerous and caused the death of Mr Wardle. BHV was a joint principal in the unlawful act which caused the death, namely the taking of bladed weapons into the street intending to use them on a particular target. (2) That he himself intended to use the axe to cause injury to Leon if the chance arose.

31 Starting from that basis, the contentious issue which the judge had to resolve was, as he said in his ruling:

"Whether the jury could properly conclude that BHV intended anyone other than Leon in particular 'anyone who got in the way' to be attacked with relevant intent and deliberately gave assistance to any such attack."

32 The judge answered that question as follows:

"In my judgment the jury could not properly reach that conclusion on the evidence put before them by the prosecution. To ask the jury to move from BHV intending Leon Wardle to be seriously injured to a conclusion that he intended anyone else to come to harm, would be, I think, in this case, an invitation that they leap to a speculative conclusion rather than a request for them to consider drawing an inference that might reasonably be drawn.

In *Jogee* at [92] the Supreme Court noted as an illustration of the concept of a conditional but sufficient intent that '*the group of young men which faces down the rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.*' That does not mean that as a matter of law there is necessarily a case to answer of conditional intent to do really serious harm if resistance is met any or every time a young man involves himself in some plan to use violence. On the evidence presented to the jury in the present case, I do not think that there is a case for BHV to answer of such an intent."

33 We do not agree. We consider that the judge may have been misled by his reliance on the last sentence of the first extract from the Compendium set out above. The fact that the principal target of a joint enterprise attack is clearly identified does not mean that the joint enterprise cannot also include a conditional intention to attack anyone who gets in the way. There is no such legal principle. It is a matter for the jury to say whether that intention is proved or not. That is a question which, of course, has to be considered by carefully evaluating the evidence on which the prosecution relies.

34 In this case the jury will have to consider the following factors, among others:

- (1) There were three attackers.
- (2) They are attacking the house which contained an unknown number of other people, and like most houses, contained knives and other items which could be used as weapons.

The risk of encountering serious violent resistance was high. If they were not prepared to subdue it with serious violence of their own if the circumstances required, they would themselves be exposed to serious risk and their plan would be rapidly doomed.

- (3) Any sensible plan would therefore include a plan for dealing with a refusal of the occupiers to yield up Leon to his attackers and with the use of violence to repel them. These three defendants had been together for a long time on their way to the attack and had plenty of opportunity to consider what that plan should be.
- (4) The preparation for this attack included the provision of an axe to BHV "for protection". We consider that the jury may conclude that this is an important piece of evidence from which BHV's intention and his knowledge of his co-defendants' intentions may be inferred.
- (5) The nature of the weapons carried was such that it may readily be inferred that any unlawful use of them would be accompanied by an intention to cause at least really serious harm.

35 For these reasons we consider that the judge was wrong to reject the application of the line of reasoning to which he referred left open by the Supreme Court in *Jogee* at paragraph [92]. We do not consider that this involves a speculative leap. The proposition he rejected, namely that "*As a matter of law there is necessarily a case to answer of conditional intent to do really serious harm if resistance is met any or every time a young man involves himself in some if or plan to use violence*" is not one which must be accepted in order to find a case to answer against BHV.

36 The question is whether the prosecution evidence could properly justify a conclusion that a conditional intent of the kind alleged was proved against him. That of course requires a careful examination of the evidence, and for the reasons we have given, we conclude that the evidence does afford a proper basis on which the jury properly directed could find the alleged conditional intent to be proved.

37 Accordingly, we allow this appeal by the prosecution and we direct that the proceedings in the crown court should be resumed on Count 1 and continued in relation to Count 4 again BHV.

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CERTIFICATE

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