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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1686

Nos. 202202517 B5
202202519 B5

Royal Courts of Justice

Friday, 15 December 2023

Before:

LORD JUSTICE EDIS
MRS JUSTICE FARBEY
HER HONOUR JUDGE MORELAND

REX

v

(1) KASHIF RIAZ
(2) LUQMAAN AHMED

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MS B CAMPBELL KC and MR MYERS appeared on behalf of the First Applicant.

MS K BRIMELOW KC and MR D GOTTLIEB appeared on behalf of the Second Applicant.

JUDGMENT

MRS JUSTICE FARBEY:

1 On 15 July 2022 in the Crown Court at Manchester, before His Honour Judge Field KC and a jury, Mr Kashif Riaz was convicted of one count of encouraging terrorism contrary to section 1 of the Terrorism Act 2006 (count 2) and four counts of dissemination of a terrorist publication contrary to section 2(2)(d) of the Terrorism Act 2006 (counts 4, 7, 8 and 9). Mr Luqmaan Ahmed was convicted of one count of encouraging terrorism (count 2) and two counts of dissemination of a terrorist publication (counts 3 and 6). Mr Ahmed was acquitted of one count of encouraging terrorism (count 1) and one count of dissemination of a terrorist publication (count 5). On 2 December 2022 the Judge imposed community sentences. They each now renew their applications for leave to appeal against conviction following refusal by the Single Judge.

Facts

2 The applicants, both then aged 16 years, came to the attention of the authorities as a result of a referral from their headteacher and their school safeguarding officer who had received a report from another pupil that the applicants were talking of their intention to travel to Syria to fight against the Syrian Government and against ISIS. A trial took place between 8 February and 16 March 2021 at which the applicants faced a 15-count indictment. Mr Riaz was acquitted of one count of dissemination of a terrorist publication on the direction of the trial judge after a successful submission at the close of the prosecution case. He was acquitted by the jury of two further counts of dissemination. Mr Ahmed was acquitted of two counts of encouraging terrorism, and a further count of dissemination of a terrorist publication. The jury were unable to reach verdicts on the other counts. At a retrial in January 2022 the jury were discharged following delays caused by Covid. So it was that the applicants came to be tried before the Judge between 6 June and 15 July 2022.

3 Insofar as relevant to the present applications, the charge of encouragement (count 2) concerned posts that were made on an Instagram account jointly administered by the applicants. The dissemination charges (counts 3, 4, 6, 7, 8 and 9) concerned the sending of links to video material on YouTube (via WhatsApp) to others and to each other. Neither applicant denied making the posts or sending the links. Mr Ian Fenn, the headteacher at the applicants' school, and Mr Ali Shah, the school safeguarding officer, gave evidence. Mr Shah said that Mr Riaz had told him of his intention to travel to Syria when he graduated, and when he had enough money to leave for his parents. Mr Ahmed told Mr Shah he intended to travel to Syria to fight ISIS. Mr Fenn said that the applicants had told him that they were going to fight for HTS, which is a proscribed terrorist organisation. Mr Fenn initially assessed them both to be victims of grooming and considered them to be unaware of the implications of their actions.

4 The case for Mr Riaz was that he had been motivated to help the oppressed people of Syria who were suffering at the hands of the Assad Government and ISIS (whom he believed to be terrorists). He wanted to raise awareness of the atrocities happening in Syria. He did not know HTS was a proscribed organisation. His expressed desire to travel to Syria was never realistic nor would it have materialised. He accepted the evidence in the prosecution "Sequence of Events." He did not deny joint responsibility for the Instagram accounts and postings. He accepted sending three YouTube links to his friends across four occasions.

5 Mr Riaz did not accept that he had been radicalised or that he had extreme religious beliefs or views about other cultures. He accepted that he expressed himself intemperately or

immaturely on occasion. He denied in its entirety that he had the mindset ascribed to him by the prosecution.

6 The case for Mr Ahmed was that his purpose when making and sharing the social media postings had been to raise awareness of the atrocities of the Assad regime and to show his hostility to ISIS. The material shared was widely available on the internet. He relied upon the comments he made to his headteacher when the school received information of the applicants' supposed plans to go to Syria. He had argued with the teachers and referred to his research activities when told that the producer of one video, HTS, was a proscribed terrorist organisation. He denied any actual or real intention to travel to Syria rather than fantasy. He denied any intention to encourage terrorism.

The Trial

7 At the close of the prosecution case the applicants submitted that there was no case to answer. The written and oral submissions advanced on behalf of Mr Ahmed were adopted by Mr Riaz. The defence submissions fell into two principal parts. First, the applicants relied on both of the familiar limbs of *R v Galbraith* [1981] 1 W.L.R. 1039 to submit that there was no evidence of the offences charged or, alternatively, the evidence relied upon by the prosecution was so tenuous that a properly directed jury could not convict.

8 Secondly, it was submitted that the continuing prosecution would amount to a disproportionate interference with the applicants' rights under Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) of the European Convention on Human Rights. The applicants submitted that the prosecution evidence amounted to two children venting their emotions about horrific events in Syria. It was important to pay particular regard to their rights to manifest their religion and express their political beliefs. There was a risk that the conviction of the applicants would amount to breaches of Articles 9 and 10.

9 In rejecting these submissions, the Judge ruled that there was a sufficiency of evidence on all counts and that it was not a disproportionate interference with the applicants' rights for the trial to proceed. He acknowledged the need for carefully crafted directions and stated his intention to proceed accordingly.

10 The issue for the jury in respect of count 2 was whether the material posted on Instagram was likely to be understood by a reasonable person as direct or indirect encouragement to some or all people to commit, prepare, or instigate acts of terrorism. The jury were directed to consider each applicant's state of mind and whether he intended to encourage terrorism or whether he was reckless about encouraging terrorism.

11 In respect of the dissemination counts the jury were directed to consider whether the material in question amounted to a terrorist publication at the time each video or web link was sent in early 2018. They were to decide whether the video was likely to be understood by a reasonable person as direct or indirect encouragement to commit, prepare or instigate acts of terrorism. They were to have regard to the contents of the video as a whole and to the circumstances in which the link to it was sent.

Grounds of Appeal

12 Against that background it is convenient to turn first to the grounds of appeal advanced by Ms Kirsty Brimelow KC who appears with Mr David Gottlieb on behalf of Mr Ahmed. The first ground of appeal is that the Judge erred in law in refusing the submission of no case to

answer. He was wrong in law to conclude that there was sufficient evidence of terrorist intention for the jury to convict on counts 2, 3 and 6. He was wrong to rule that there was sufficient evidence that the video entitled the "Battle of Abu Dhur" was capable of being a terrorist publication (count 3).

13 We do not agree. The Judge's ruling is careful and detailed. It is not suggested, nor could it be, that he misdirected himself in law. He was of the view that the objective test of encouragement should be applied to the Instagram posts as a whole and in context. He held that, on that objective approach, it would be open to the jury to be sure that there was at least an indirect encouragement to the reader of the posts to engage in armed and violent activity with the aim of overthrowing the Syrian regime. In our judgment the Judge's conclusion was impeccable and is not open to challenge.

14 In relation to the dissemination of each of the videos named in counts 3, 4 and 6, the Judge decided that there was sufficient material for the jury to conclude that these were all terrorist publications. The videos either glorified the actions of a terrorist organisation or glorified terrorist activity. They included propaganda videos that glorified armed insurrection against the Syrian Government with the purpose of encouraging the viewer to do the same. There is no arguable challenge to this aspect of his ruling.

15 In relation to the applicants' states of mind across the counts on the indictment, the Judge concluded that the jury would properly be able to infer from the evidence of the surrounding circumstances that the applicants intended to encourage each other and others to travel to Syria to fight against the Government there, or that they were, at the very least, reckless about encouraging others to commit acts of terrorism. In our judgment the Judge was unarguably entitled to reach these conclusions. We regard this ground of appeal as an attempt to re-argue matters that were raised at the trial and rejected by the Judge for good reason.

16 Ms Brimelow submits that the Judge erred in allowing the trial to continue in breach of Articles 9 and 10 of the Convention. He was wrong to have ruled that the trial was not a disproportionate interference with those rights. Even careful directions might lead to the conviction of a person who is not a terrorist and who is exercising rights guaranteed by the Convention.

17 In support of this submission, Ms Brimelow submits that a key issue at trial and in this appeal is whether the dissemination offence under section 2 of the Act, as drafted, is so broad and unspecific that it has a disproportionately chilling effect on the practical implementation of individual rights under Articles 9 and 10 of the Convention. The proportionality exercise in relation to Articles 9(2) and 10(2) may fall to be conducted differently in the case of a child so that the compatibility of the statutory provisions with a child's human rights should be considered by this court on appeal. Authorities of this court, such as *R v Humza Ali* [2018] EWCA Crim 547, do not focus on children - whose lack of maturity and incomplete intellectual development have been recognised as important in other areas of the criminal law such as sentencing.

18 Attractively as these submissions have been made we do not accept that they are correct as a matter of law. On conventional principles it is open to Parliament to strike the balance between individual rights and the State's duties and obligations to protect people from terrorism. We have heard nothing to persuade us that section 2 of the Terrorism Act 2006 fails to respect that balance. We are not persuaded that section 2 cannot be read and given effect in a way which is compatible with Convention rights of children (section 3 of the

Human Rights Act 1998). The case specific nature of the proportionality exercise applies to children as much as adults, as the Judge in our view appreciated.

19 In reaching his conclusions on Articles 9 and 10 the Judge relied on a combination of Parliament's intention to strike a balance in the statutory scheme and the Judge's duty to give appropriate directions to the jury. We agree that the general legislative balance overlaid by the fact sensitive approach to be adopted by a trial judge in a particular trial is sufficient and apt to ensure the rights guaranteed by the Convention. We are not persuaded that the Judge ought arguably to have taken a different approach.

20 Next Ms Brimelow submits that, having acknowledged that careful directions were required to comply with Articles 9 and 10, the Judge failed to direct the jury in a way that preserved those rights. She submits that the jury should have been expressly directed that a person can express a personal belief and approval in an organisation that is a terrorist cause, or invite someone to share that belief or opinion, without committing a criminal offence (*R v Chowdry* [2018] 1 WLR 618). The jury should have been directed that supporting someone else's objectionable, controversial or offensive opinion does not amount to a criminal offence. The failure to give such directions was a disproportionate and unjustifiable violation of Mr Ahmed's rights under Articles 9 and 10 of the Convention.

21 This submission has no traction. The Judge's legal directions, provided in writing to the jury, made plain that the jury should not judge the applicants simply on account of their religious and political beliefs. He directed the jury in clear terms that the applicants were entitled both to hold those beliefs and to express them provided that the beliefs did not contravene the criminal law. In our judgment, the Judge's directions protected the applicants' human rights in accordance with the court's duties as a public authority under section 6 of the Human Rights Act.

22 The Judge received and considered submissions from counsel about the extent and content of his directions before he finalised them. We see no arguable flaw in the procedure he adopted and none is suggested. It is possible that other judges might have put the matter in a different way or phrased things differently but the Judge was the final arbiter of his own directions. He was not bound to accept suggestions from any party. He had the applicants' human rights in mind and his directions were sufficient to protect them.

23 We turn to Ms Brimelow's next ground of appeal which is that Mr Ahmed was not afforded a fair trial under Article 6 of the Convention. There are a number of elements to this ground. Ms Brimelow emphasises the extent and quantity of the "mindset" evidence in the Sequence of Events. She says that prosecution counsel made prejudicial comments and observations to the jury which implied that the mindset material gave rise to further offences for which the applicants had not been indicted. The prejudice arising from those comments could not be dispelled by the Judge's directions. She submits that the Judge's directions could not dispel prejudice in relation to how the jury should approach two specific videos and an Instagram account which had formed the subject of counts on which Mr Ahmed had previously been acquitted. The directions on mindset evidence were inadequate in light of the previous acquittals where (it is asserted) the jury had rejected that Mr Ahmed had a real intention to travel to Syria. Further, the jury should have been given clearer directions to approach the mindset evidence through the eyes of Mr Ahmed as a child.

24 We do not accept that the prosecution should have been required to cut down the Sequence of Events, the contents of which had been agreed before trial. To the extent that Ms Brimelow submits that it was an abuse of process for the same evidence to be deployed in support of different charges, even after acquittal on some of those charges, we regard the

argument as founded neither on principle nor on logic. There was no bar which prevented the prosecution from relying on the same evidence in successive trials for different purposes. There are numerous circumstances in which a piece or pieces of evidence can have more than one probative effect. The use of overlapping evidence to prove different charges is orthodox and does not in itself give rise to an abuse of process; it all depends on the facts of the case. We are not persuaded that the applicants were the subject of any injustice.

25 The respondent's notice makes clear that the prosecution does not accept that it went beyond the proper deployment of the evidence, or beyond proper comment and observations on its own case theory. We see no need to resolve this dispute because it is not the function of this court to micromanage the trial judge. We have been directed to nothing that may suggest that the Judge failed to deal fairly and comprehensively with the mindset evidence.

26 We reject the criticism that the Judge did not direct the jury to consider the mindset evidence through the eyes of a child. The Judge directed the jury as to the relevance of age in a discrete section of his written legal directions. He returned to the applicants' age in his section of the directions dealing with the applicants' states of mind, both in relation to the encouragement offence and in relation to the dissemination offences. No arguable error of approach or unfairness arises.

27 Finally, Ms Brimelow submits that the verdicts of the jury convicting Mr Ahmed in the third trial were inconsistent with the earlier acquittals. We note that the jury were directed, with the agreement of all parties, that they must consider the evidence against each applicant and in respect of each count separately and return separate verdicts. If there had been any real doubt about the impact of an acquittal on one count on the jury's consideration of any other count, counsel could have been expected to raise it.

28 The submission appears to us to hinge on the assertion that the acquittals can only be logically interpreted as meaning that Mr Ahmed did not have real plans to travel to Syria. We agree with the respondent that although the respondent's case theory was that the applicants were planning to travel to Syria to fight against the Syrian Government, convictions on any counts on the indictment were not contingent upon the jury accepting this. The issue for the jury was whether the applicants intended to encourage the readers of the Instagram post or the recipients of the videos to commit, prepare or instigate acts of terrorism, namely fighting against the Syrian Government, or were reckless about this being an effect of their conduct. The various charges concerned different material, which the jury were entitled to treat differently. There is nothing in the nature of the charges that could suggest that the jury's verdicts were inconsistent.

29 We turn to the grounds of appeal raised by Ms Brenda Campbell KC with Mr Myers on behalf of Mr Riaz. As we understand her first ground, she submits that the Judge's legal directions on the mindset evidence were unfair and biased towards the prosecution. The Judge implied to the jury that the mindset evidence was a fait accompli which the jury could not disregard. The direction that the jury should not convict Mr Riaz solely on the basis of what was in the mindset evidence was deficient. It did not tell the jury that it should not convict the applicants' mainly on the basis of that evidence. The Judge had also fundamentally erred by failing to direct the jury that they would have to be sure that the mindset evidence demonstrated what the prosecution said it did before they could use it as additional strength for the prosecution case.

30 As we have already indicated, the Judge consulted counsel before finalising his directions. He considered all the points that were made to him on the extent and form of those

directions. His duty was to direct the jury on the law. That is what he did. The partial analysis of his legal directions presented before us does not reflect the Judge's overall approach which was, in our judgment, conspicuously fair. In the sections of the written directions on the applicants' states of mind the Judge repeatedly underscored that the jury must be sure of the applicants' intention or recklessness. Nothing in the summary of the evidence undermines the force of the written directions on the burden and standard of proof.

31 It is not correct that the Judge presented the mindset evidence as a fait accompli. The passage of the summing-up which Ms Campbell seeks to impugn is:

> "The things said by the defendants and the views expressed by them are only relevant, of course, to the issues that relate to what they intended and what they knew at the time."

There is nothing inaccurate or prejudicial in that direction which is a statement of the obvious.

32 Ms Campbell is correct to say that the Judge directed the jury in terms that the applicants could not be convicted of any of the offences solely on what they said during the course of their online chats. We accept that it would have been preferable for him to say "solely or mainly." It is quite another matter to say that this Homeric nod makes any of the convictions arguably unsafe. There is nothing else raised in this ground that is arguable.

33 In support of these submissions Ms Campbell has provided us with a copy of a recent Direction on mindset material given to a jury in another trial by His Honour Judge Farrer sitting at Birmingham Crown Court. The Direction says:

> "1. You heard evidence relating to other material that the defendant received onto his mobile phones, some of which he sent on to other people. In addition you know that various documents were found in drawer 3 which researched particular topics of interest from different perspectives. The prosecution submit that this material demonstrates that the defendant held an extreme Islamic mindset and was sympathetic to the commission of acts of terror. They submit that if you accept that proposition this material is relevant in two ways. First, it will assist you when considering what he was thinking at the time he sent the videos reflected by counts 1 to 5 and in particular will assist you in deciding whether he would have appreciated the risk of those videos encouraging acts of terror. Secondly, the prosecution submit that it undermines his case that he was seeking to help the security services in combatting Islamic terrorism.
>
> 2. The defendant does not accept that he held an extreme Islamic mindset. His case is that he was involved in many chat groups and did not always agree with messages that were posted. He says that he was interested in different points of view upon Islamic matters and in that respect he conducted research and occasionally sought to fuel debate. It is argued that X would not have engaged with X as he says he did if held an extreme mindset as alleged by the prosecution.
>
> 3. When approaching these arguments you will first need to decide whether you are sure that this material does demonstrate that the defendant held an extreme Islamic mindset and was sympathetic to

> acts of terror. If you are not sure of this, the material is irrelevant and you should ignore it. If you are sure of this, the material is potentially relevant in the ways I have set out but you should bear in mind that this is the limit of its relevance and you must take care to ensure that you do not allow the nature of this material to prejudice you against the defendant."

34 Ms Campbell seeks to contrast the directions of the Judge in the present case, submitting that he ought to have given a discrete and focused legal direction identifying the mindset evidence, balancing it against the case put by the applicants, reminding the jury that, like other evidence in the case, it was a matter for them whether to accept or reject it and setting out its relevance. We agree that a discrete mindset direction in the terms we have quoted may be useful and valuable. We do not agree that it must be given in every case. All will depend on the issues in the case and the use to which the mindset evidence is put by the prosecution. In the present case the mindset material was deployed by the prosecution as supporting its case about the *mens rea* of these specific offences. The Judge's directions on *mens rea* are not open to criticism and the Judge's failure to give a separate mindset direction does not render the convictions arguably unsafe.

35 Ms Campbell's written grounds, supported to some degree by her oral submissions, made various other points by way of commentary on the Judge's approach to directing the jury about mindset. We do not think that these other points advance her application.

36 Under her second ground Ms Campbell submits that the prosecution case as advanced in closing was fundamentally different to the case set out in earlier stages of the proceedings in respect of Mr Riaz's intention to travel to Syria. The Judge failed to recognise that difference and failed to provide an adequate safeguard in the form of a legal direction to protect the unfairness and prejudice that this caused. The short answer to this ground is that the Judge considered this precise point with counsel in the absence of the jury during the course of his summing-up. In light of defence counsel's submission, he was willing (doubtless for pragmatic case management reasons) to make a minor amendment to the wording of his summing-up. We have heard nothing to suggest that he should have done more.

37 Having considered the relevant passages of the prosecution opening and closing speeches, as well as the transcript where this issue was ventilated at length before the Judge, it appears to have turned on a somewhat pedantic argument about how the evidence of the applicants' plans to go to Syria, and the degree to which any plan was in progress or was simply the subject of chat, should be presented to the jury. The Judge, who had heard the evidence, was in a good position to sum-up this element of the prosecution case. Any assertion of unfairness or imbalance in the summing-up is unfounded.

Conclusion.

38 In conclusion the applicants' grounds of appeal are not arguable, and their convictions are not arguably unsafe. These renewed applications are refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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