Case No 202300341/B4

Neutral Citation No [2024] EWCA Crim 165
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
His Honour Judge Aubrey KC

Royal Courts of Justice, Strand
London WC2A 2LL
Tuesday 6 February 2024

Before:

LADY JUSTICE ANDREWS
MRS JUSTICE CHEEMA-GRUBB

-and-
HER HONOUR JUDGE ROSA DEAN
(THE RECORDER OF REDBRIDGE)

REX
V
STEVEN McINERNEY

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Mr A Malik KC and Mr J Jones appeared on behalf of the Applicant.

J U D G M E N T

Lady Justice Andrews:

1. This is a renewed application for leave to appeal against conviction and for a three-day extension of time in which to do so. In the light of the explanation provided for the delay, which included the applicant moving to a new prison, we are prepared to grant that short extension. Mr Malik KC and Mr Jones, who represented the applicant at trial, have appeared pro bono, and we are very grateful to them for their lucid and succinct submissions, both in writing and those made by Mr Malik orally to us this morning.

2. The applicant, Steven McInerney, was convicted on 6 February 2023 of the murder of Michael Toohey, following a trial in the Crown Court at Liverpool before HHJ Aubrey KC and a jury. Three brothers, Keiron, Anthony and Michael Williams were also convicted of murder following the same trial, as was a 15-year-old youth (to whom we shall refer as "X").

3. An order was made in the Crown Court under section 45 of the Youth Justice and Criminal Evidence Act 1999, precluding the identification of X whilst he is under the age of 18. It is in these terms:

   "No matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings; in particular:

   (a) his name,
   (b) his address,
   (c) the identity of any school or other educational establishment attended by him,
   (d) the identity of any place of work, and
   (e) any still or moving picture of him."

   For the avoidance of any doubt that order remains in force.

4. The victim (aged 18) was set upon by a group of four men on 16 April 2022, at the rear of an Internet cafe in Monument Place, Liverpool. Police were called to the scene and found the victim unconscious on the floor and receiving CPR from members of the public. He was pronounced dead on arrival at hospital. The cause of death was blunt force trauma to his head and neck. He had injuries to the side of his face, which were consistent with being stamped upon with a shod foot, and injuries to the deep tissue of his neck which were consistent with neck compressions such as squeezing through an armlock or chokehold and/or impact via direct blows. He also had multiple bruises and abrasions on his head and neck as well as on his chest, abdomen, back, arms and legs.

5. Police reviewed CCTV coverage to retrace the victim's movements. This showed him getting off a bus in the London Road and meeting up with friends around half an hour before the attack. A little later, a white Golf car, driven by Keiron Williams, arrived at

the scene. CCTV footage showed the deceased running into the Internet cafe pursued on foot by Williams. Following some telephone calls between the brothers, Keiron Williams was joined by his brother, Michael, who arrived in a car with some companions, and by the applicant, who arrived on his bike in the company of Anthony Williams, who was also riding a bike.

6. The prosecution case was that the defendants took part in a premeditated attack on the deceased as part of a turf war relating to drug dealing, the Williams brothers having been tipped off as to the deceased's whereabouts by a telephone call made by X to Michael Williams. Keiron Williams was said to have been the principal aggressor throughout the incident.

7. The prosecution alleged that the applicant had accompanied the Williams brothers to the Internet cafe planning to confront the deceased, and had followed him into the rear of the cafe in order to attack him. That involved crossing a counter at the back of the premises. Four men had pursued the victim across the counter to the rear area where he had taken refuge, where they subjected him to a short and brutal attack. There was forensic evidence as well as eyewitness evidence that three of those men were the Williams brothers. The prosecution case was that the applicant was the fourth man.

8. The defence case was one of denial. The applicant did not give evidence. He accepted presence at the cafe, but it was submitted on his behalf that the prosecution had not demonstrated to the criminal standard, that this was a planned joint attack or that he had inflicted any violence. The issue for the jury was therefore whether they were sure that the applicant had jointly participated in the fatal attack.

9. The trial judge produced written legal directions for the jury which counsel had the opportunity to consider before they were perfected. These included the usual direction not to speculate about matters on which they had received no evidence. It is accepted that the judge gave a model direction in relation to the failure by the applicant and other defendants to give evidence.

10. As is now common practice, the judge summed up on the law before counsel's closing speeches. He properly directed the jury that the prosecution had to prove participation with a common purpose by the defendant they were considering, and that merely being present when a crime is committed does not amount to participation in a joint criminal offence. However, if a defendant intends by his presence to help or encourage someone else to commit the crime, for example, by contributing to the force of numbers in a hostile confrontation, or by letting that person know he is there to provide backup if needed, that would be sufficient to prove encouragement.

11. As regards the defence case for the applicant the judge directed the jury in these terms:

> "... he has not given evidence, and I will give you a legal direction as to your approach in that regard. It is submitted on the defendant's behalf that on the evidence that you have received, you cannot be sure he is guilty of murder or

> manslaughter. They say you cannot be sure that this was a planned, concerted joint attack. They… submit to you there is no evidence he inflicted any violence; he was only in the cafe for 1 minute and 11 seconds; there is no evidence, or no reliable evidence, against him other than presence, and simple presence is not enough."

Again, no complaint is (or could be) made about that summary.

12. In the course of his summing-up on the law, the judge considered the position of the applicant and three other defendants who had not given evidence. He directed the jury, in normal terms, that it was the right of each defendant to choose not to give evidence, but it does have consequences. The defendant had not given evidence in the trial to contradict or to undermine the evidence of the prosecution witnesses. The judge had asked each advocate whether the defendant was going to give evidence and each advocate had told the court that the defendant understood that if he failed to do so, the jury would be entitled to draw inferences from that failure. In other words, they would be entitled to conclude that the defendant did not feel that he had an answer to the prosecution case that would stand up to cross-examination. He said:

> "It is your decision whether or not the defendant's failure to give evidence should count against him. You can only hold the failure to give evidence against the defendant if you are sure that the Prosecution case is so strong that it calls for an answer, and you are sure that the true reason for not giving evidence is that the defendant did not have an answer that he believed would stand up to questioning.
>
> You must, however, at all times remember it is for the Prosecution to prove the guilt of the defendant, and whilst his failure to give evidence can provide support for the Prosecution's case, you cannot convict the defendant wholly or mainly because of the failure by him to give evidence."

13. In the course of his closing speech Mr Malik said this to the jury:

> "You know, I can't tell you the reason why Steven McInerney did not give evidence. That would be me giving evidence which I cannot do and will not do. The defendant cannot tell you why he hasn't given evidence. This is not a guessing game and you just mustn't speculate. So here's the big question: how do you decide whether you are sure that Steven McInerney's silence can only be sensibly attributed to his having no answer or none that would stand up to cross-examination? Well, consider these two matters and here they are, first, what are the reasons there may reasonably be for the defendant exercising that right to give evidence? What are the reasons? Second, in the way that the evidence has developed, just look at the strength of the prosecution case.

> Two things: the stronger the prosecution case, the more powerful the reason for a defendant to give evidence and the safer the conclusion that the defendant has no answer or none that would stand up to cross-examination in a powerful case. The weaker the prosecution evidence is, the less powerful the reason to give evidence. And really it's dangerous to conclude that the defendant in those circumstances has no answer or none that would stand up to powerful cross-examination."

14. Thus far, Mr Malik had said nothing of which any complaint could be made. However, he then went on and said this:

> "Now, let me just deal with that first point. What other reasons can there be for a defendant to exercise his right not to give evidence? Well here are just a few and a few possible reasons, there can be many why a defendant who is not guilty of murder may choose not to give evidence in a trial. Reason Number 1. It's tempting to use the word 'strain'. Think about how difficult it is for some people to speak in public. Some people lack confidence, they lack the ability to express themselves well."

15. At this point, the judge courteously interrupted counsel and said:

"... aren't you beginning to speculate?"

Mr Malik said he was not, and that these were possible reasons that could be put forward. There was then a discussion in the absence of the jury. Mr Malik said he was not giving evidence but setting out possible reasons why his client would not give evidence, which he described as a matter of common sense. The judge ruled that counsel was entitled to say that the Crown's case was so unreliable that it did not call for an answer, but that exploring possible reasons why his client did not give evidence was inappropriate. Mr Malik's complaint is that the judge precluded him from addressing the jury in relation to what he described as two further common sense reasons as to why a defendant might not give evidence, and that this was unfair.

16. In our judgment, there is no substance to that complaint. As the single judge put it when refusing leave, suggesting to the jury that there might be reasons for the applicant not to have given evidence, when there was no evidence of the reasoning behind his decision and no independent evidence from which the jury could conclude there was a particular basis for it, (for example, evidence of a medical condition which might have a bearing on the matter) transgresses the rules as to what properly can be said on his behalf. It invites speculation as to something not covered by the evidence, and about which the jury could not make a proper assessment.

17. As was pointed out in the course of oral argument, section 35 of the Criminal Justice and Public Order Act 1994 enables a defendant to argue, before the judge makes an adverse inference direction, that there are good reasons why the direction should not be given in the first place: see *R v Dixon* (*Jordan)* [2013] EWCA Crim 465; [2014] 1 WLR 525. That is the appropriate juncture to raise with the judge specific reasons why it would be unjust to give the direction. However, once a decision has been taken that it *is* appropriate to give the direction, the model direction strikes a very careful balance between on the one hand, stressing to the jury that there is a right to remain silent, which has only been encroached upon by Parliament to a certain extent, and that it is still for the prosecution to prove the case to the criminal standard and, on the other hand, explaining to them that within certain bounds and certain constraints they are able to draw adverse inferences from the fact that the defendant has chosen to exercise that right.

18. The one thing that defence counsel cannot do is to make a comment which invites the jury to speculate about reasons for a defendant remaining silent when there is no evidence, and the jury has already been properly directed by the judge that they must not speculate about matters on which they have heard no evidence.

19. Therefore, although Mr Malik may feel a little aggrieved by the fact that he was unable to put what he describes as a common sense reason before the jury, the line is very firmly drawn where the judge drew it and so, for those reasons, there is no substance in the complaint.

20. We would add that in any event, there was sufficient evidence to support the safety of this conviction, which is set out in the Respondent's Notice. Mr Malik drew our attention to the fact that this included evidence that the applicant was wearing dark clothing. He said that another defendant who was present at the scene (one of those who were acquitted) was also wearing dark clothing. He also said that one of the co-accused at one stage in his evidence, told the jury that it was this applicant who had gone behind the counter with the Williams brothers but, in their closing speech, the prosecution had said expressly that they did not rely on the evidence of that particular co-defendant.

21. However, even if one discounted what the co-accused had said, there was evidence of the applicant's close association with the Williams brothers, and of his cycling to the scene in the company of Anthony Williams following the call from X to Michael Williams and further calls between the brothers, and there was evidence from the owner of the café that four men were involved in the violence, the fourth of whom was dressed in dark clothing, as the applicant was. There was therefore sufficient evidence to leave the matter to the jury, and leading counsel was able to make any points that he wished to make about the strength or weakness of the prosecution case as to the identity of the fourth attacker in his closing speech.

22. For all those reasons, this renewed application is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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