IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202302583/B4
NCN:[2024] EWCA Crim 557

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 17 April 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE HOLGATE

MR JUSTICE BOURNE

REX

V

VITOR MAZZER

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MR A WILLIAMSON KC appeared on behalf of the Applicant.

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**J U D G M E N T**

1. MR JUSTICE HOLGATE: On 2 March 2023, in the Crown Court at Inner London before HHJ Newbery, the applicant (then aged 21) was convicted of two offences of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was acquitted of count 1, also a section 18 offence and its alternative under section 20 (count 6). On 4 April 2023, he was sentenced to concurrent terms of 42 months' imprisonment. By the time of sentence, the applicant was represented by new counsel who appears before us today, Mr Alisdair Williams KC.
2. The applicant renews his application for an extension of time of 124 days for leave to appeal against conviction following a refusal by the single judge. Whether that extension should be granted depends upon the arguability of the proposed grounds of appeal. He also seeks leave, under section 23 of the Criminal Appeal Act 1968, to introduce fresh psychological evidence from Professor Farrell.
3. On New Years Eve 2019, there was a party in a house in Casewick Road, Southeast London. The party was organised by Pablo Gupta, a pupil at Charter School and was attended by a number of his friends, mostly aged around 17 or 18. The applicant and his friend, Gabriel Garland, attended the party having both been invited as they were also pupils at the same school. About 15 guests were expected at the party but as the evening progressed it was attended by a much greater number of people, possibly as many as 150.
4. Some people who arrived at the party were not let in. They were milling about in the street outside. Some were from different schools, including Kingsdale School, where there was a history of incidents with boys from the Charter School.
5. Shortly after midnight, Pablo's mother returned after receiving a call from a neighbour about the party. On one account, a brick had been thrown smashing one of the windows. When she returned, she asked people to leave and the party began to end. As the

applicant left the party he took a knife from a drawer in the kitchen. The prosecution case was that the applicant stabbed three young men in the street outside the party (counts 1, 2 and 3).

6. To prove its case, the prosecution relied upon firstly, evidence of Jonnas Oliveira (counts 1 and 6) He w.as a pupil at Dunraven School and heard that evening about the party. He said that he attended with a large group of people. He was not let in but was enjoying talking to people outside. Shortly after midnight he noticed a fight. He was with Alexander Ferri. He got involved in the fight because Alex had. He ran past the applicant to get to the fight. He threw a punch but then he felt a blow to his back. He turned round and saw a knife and so ran away but did not identify who had struck him. Jonnas turned out to have incised wounds to his back, face, arms and hands
7. Secondly, the prosecution relied on the evidence of Kuba Kozysa (count 2). He was aged 17 at the time of the incident. He found out about the party that evening but he too had not been let in. He was outside with friends just after midnight when people were kicked out of the party and a fight began. He and Alex Ferri chased Gabriel Garland. There was a faceoff between Alex and Gabriel around a car. Gabriel shouted for the applicant, who came towards him. He thought they were going to have a fight but the applicant punched him in the top of his leg. He did not see a weapon but then realised he had been stabbed. A CT scan showed multiple stab wounds to the left upper thigh.
8. Thirdly, the prosecution relied upon the evidence of Alexander Ferri (count 3). He arrived at the party at about 11.45 pm. He could not get in and so was hanging around in the street. He saw Gabriel Garland leave the party and became angry because of a previous incident involving Gabriel. He punched Gabriel, who began to fight back. He was pushed and began to walk away when he noticed he had been stabbed in the leg. He

had incised wounds to his chest wall and right thigh.

9. Fourthly, the prosecution relied upon forensic evidence. A knife was recovered from the scene. It was found to have blood staining on it that matched the DNA profile of Alexander Ferri and also blood that matched the DNA profile of Kuba Kozysa. It also had the DNA of the applicant on the handle.
10. Fifthly, the prosecution relied upon eyewitness evidence from a number of other individuals who were present.
11. The defence case was that any action taken by the applicant was in lawful self-defence. He gave evidence. At the time of the incident, he had just turned 18. He was a pupil at Charter School and was aware of a conflict between some of his friends at the school and people who went to Kingsdale. He said he was not involved in that conflict. But he had in the past been seriously assaulted by boys from Kingsdale who had attacked him with a baseball bat resulting in significant injury to himself and requiring treatment over a period of four days in hospital.
12. The applicant began to feel uneasy at the party as there was a large group of people outside. The front door was locked to prevent them coming in. He looked out of the window and saw people gesturing in a hostile manner before a brick was thrown at it. He said everybody was being asked to leave the party. He started to panic. Because he was scared, he took a knife from a kitchen drawer. He had no intention to use it but thought that, if he showed the knife, no-one would attack him.
13. The applicant said that outside the house ten boys started running towards him. He pulled the knife out and shouted, “Leave me alone”. He was aware of a commotion going on to his left and later learned that it was a fight involving Gabriel. He said he was attacked by a group of up to six boys, including one holding a plank of wood. He described being

punched, kicked and scratched. He waved the knife about, keeping it low, because he did not want to injure anyone too badly. His hood had been pulled over his face and he could not see much. He managed to run off and, as he ran, he dropped the knife. The defence also called evidence about the applicant's character from two witnesses, Joanne Garland and Paul Phillips.

14. The applicant was convicted on 2 March 2023. The judge then adjourned sentence for a pre-sentence report. She also suggested that the defence might consider obtaining a report by a psychologist in relation to the issue of immaturity. She did not refer to PTSD. The transcript records her saying:

> "Despite the character references reporting [the applicant] as mature, he struck [the court] as immature when giving evidence."

15. Sentence was to be passed on 14 April 2023. Mr Williamson was instructed on 27 March. In McCook correspondence, the trial firm of solicitors says that the applicant first raised PTSD after conviction. They instructed Dr Vicky Hoggard to see the applicant at their offices on 11 April to address maturity and also whether the client suffered from PTSD or mental health issues at the time of the offence. This was partly to see whether an appeal could be brought against conviction. However, the applicant did not attend that meeting on 11 April. He rang to say that he had instructed different lawyers. Professor Farrell saw the applicant on 12 April 2023, and he produced his initial report on the following day. We note that it does not set out his instructions. His opinion was that the applicant was suffering from PTSD linked to the serious assault he had suffered in 2018, when he was hit repeatedly with a baseball bat and hospitalised.

16. The applicant was sentenced on 14 April 2023. At that hearing Professor Farrell's report was relied upon and the judge treated the finding of PTSD as a mitigating factor in the

sentence she imposed.

17. We turn to deal with the fresh evidence application. After sentence, Professor Farrell provided an updated report on 3 July 2023. The applicant seeks leave to rely upon this report as fresh evidence under section 23 of the 1968 Act, in support of his application for leave to appeal against conviction. In the report Professor Farrell confirms his diagnosis of PTSD and goes on to discuss how the condition could have affected that applicant's behaviour. We note in particular the two following passages from the updated report. The professor stated:

> "It my view, that Mr Mazzer's PTSD prior to the events of 2019/20 would have influenced his reactions in the circumstances of the scheduled offence, and secondly, would account for his deferential nature."

18. Secondly, he says:

> "An existing condition of PTSD would, in strong likelihood, result in miscalculation of threat level, appraisal of current situation, a more heightened perception of threat, which can result in more extreme reactions and engagement in safety behaviour.
>
> In my professional opinion, this provides a plausible explanation in accounting for Vittor Mazzer's behaviour in providing testimony afterward the events of 31st December 2019/1st January 2020."

19. The applicant seeks to criticise his trial lawyers for failing to adduce psychological evidence during the trial. To that end he has also made an application for the court to receive a number of witness statements, namely an undated statement of Alabama Phillips, who was the applicant's girlfriend; an undated statement of Zahida Umer (Alabama's mother); a statement of Paul Phillips (the father of Alabama); an undated statement of Harry Peachey, a friend of the applicant and a statement dated 26 July 2023 of Mark Peachey (Harry's father). It was accepted that the admissibility of this material

depended upon whether the report of Professor Farrell is admissible and the applicant is granted leave to appeal against conviction.

20. In view of the criticisms made of trial counsel and solicitors, the applicant was invited to, and did, waive his privilege. Mr Williamson then contacted trial representatives setting out the nature of the criticisms being made and the material upon which they were based. We have read the exchange of communications between Mr Williamson and the lawyers previously representing the applicant in April 2023 and also a sequence of emails between the same people.

21. In paragraph 26 of his Perfected Advice, Mr Williamson says that for the purposes of the application for leave to appeal, the issue is confined to the alleged need for psychological evidence to have been given during the trial on the applicant's PTSD. However, it is significant that the trial solicitors say that both the applicant and his mother used to ring the firm to "sing the praises of trial counsel and express gratitude for her hard work". That conflicts with the assertions in several of the new witness statements that the applicant's will was overborne by counsel and that he ended up crying because of that. There is no witness statement from the applicant's mother, Vivienne Mazzer, who was regularly involved during and after the trial. Not surprisingly, the prosecution say that if this matter should go any further, they would wish to cross-examine those additional witnesses.

22. We are grateful to Mr Williamson who appears *pro bono*. We are grateful to him both for his written and oral submissions. In summary, he submits that the convictions on counts 2 and 3 are unsafe by reason of the failure to put before the jury evidence of the applicant's PTSD. Secondly, he submits that the convictions on counts 2 and 3 are unsafe by reason of the trial judge's failure to direct the jury on an additional defence that

the force used by the applicant was in defence of another, as an alternative to self-defence.

23. We have also considered the Respondent's Notice filed on behalf of the prosecution. In relation to ground 1, they say that it is not in the interests of justice to admit Professor Farrell's report as fresh evidence, and they cite the responses of the trial lawyers as to why they did not obtain that evidence for the trial. They submit that, even if the issue of PTSD had been in evidence before the jury, the convictions would still remain safe, as the central focus of the jury's consideration was that of the credibility of the witnesses and not whether the force used by the applicant was reasonable in the circumstances or not.

24. In relation to ground 2, it is submitted that at no stage did the applicant suggest that he went over to where Gabriel Garland was and that his actions with the kitchen knife were in some way designed to defend another. Based on the evidence that was heard during the trial, it was clear that that defence did not arise.

***Discussion***

25. Mr Williamson has helpfully referred us to the decision of this Court in R v Press and Thompson [2013] EWCA Crim 1849. In that decision the Court accepted the potential relevance of PTSD to a defence of self-defence (see paragraph 36 to 44). If a jury should find that a defendant was not under attack, PTSD could be relevant to their assessment of whether the defendant genuinely or honestly believed that he was under attack or threatened so as to require a physical response, or may have done so. If so, that may also be relevant to the final and objective question for the jury as to whether the force used by a defendant was no more than reasonable. Their assessment of whether a defendant

honestly believed that he did no more than necessary to defend himself is not conclusive, but it is a relevant factor and therefore any effect of PTSD on that issue is also relevant.

26. But Press and Thompson also cross-referred at [40] to the important decision of this Court of R v B (MA) [2013] 1 Cr App R 36. That leads on to the judgment of Davis LJ, given on behalf of this Court in R v BRM [2022] EWCA Crim 385. These authorities were reviewed by Lady Carr LCJ in R v Jacobs [2024] 4 WLR 8.

27. In summary, an expert's report is not admissible unless *inter alia* it is sufficiently reliable (see the Criminal Practice Direction 2023, paragraph 7.1.1 and the Criminal Procedure Rules 19.4(h)). In that context it is usually necessary for the expert's report to be tethered to the evidence in the case about the events which took place, in particular, any account given by the defendant. Otherwise, it is likely only to confuse a jury. For example, it is unlikely to be helpful for a psychiatrist or a psychologist to give general evidence diagnosing a condition in a defendant saying that it was present at the time of the offence and what effects of the condition might have been without also saying how, in the opinion of the expert, that relates to accounts given by the defendant, and by any relevant witnesses, as to what took place. The report must also set out the expert's reasons for the opinions given.

28. Here, the evidence was that Pablo Gupta's mother returned about midnight, possibly after a brick had been thrown at a window. She asked people to leave. The applicant said that he took a knife out of the kitchen drawer when he saw a large crowd outside because he was scared. He said that he had no intention of using the knife but thought he would show it to deter any would-be attacker. Outside he said that he was attacked by a group of boys including one with a plank of wood. He was punched, kicked and scratched. He simply waved the knife around as he did not want to injure anyone too badly. He was not

jabbing. He did not stab anyone. In his evidence the applicant said: "… he later learned that [a commotion going on to his left] was a fight where Gabriel Garland was being attacked" (see the summing-up at pages 14 to 15).

29. We do not consider that Professor Farrell's report was tethered to the evidence as given by the applicant at the trial or indeed to other evidence. He does not even deal with the knife being taken out of a kitchen drawer. It is not suggested that the applicant would have given a different account if PTSD had been relied upon during the trial.

30. As the single judge rightly said when refusing leave to appeal, the applicant's case was that he was being seriously assaulted. He waved the knife around to deter others but with no intention to cause injury or serious injury. His defence was not based upon a miscalculation of a threat posed to him, or to anyone else for that matter, by people in the vicinity. Professor Farrell does not appear to give a view as to how any particular circumstance could have been viewed differently by the applicant because of PTSD and hypervigilance. The applicant said he was being punched and kicked. It was for the jury to decide whether that version of events may have been correct.

31. Accordingly, we do not consider the convictions are arguably unsafe on the basis of the first ground of appeal.

32. We note that in her sentencing remarks the judge said that because of the PTSD the applicant was hypervigilant and his experience of fear and threat was heightened at the time. The judge appears to have treated PTSD as a mitigating factor. However, she maintained that the circumstances of the incident were not as the applicant had recalled them. The judge said that the applicant was not under attack at all. No-one in the vicinity was armed with a stick. She said that the evidence at the trial did not support excessive self-defence: one victim was on his own and unarmed and the other had his

back towards the applicant.

33. In our judgment, on those findings, it could be said that the judge was generous to the applicant to have treated PTSD as a mitigating factor reducing the length of his sentence. However, it has not been shown that PTSD was arguably relevant to the applicant's defence or that it is arguable that the absence of evidence about the condition during the trial could otherwise undermine the safety of the conviction.

34. We turn to Mr Williamson's remaining submission. Given that the applicant never suggested in his account that during the incident he thought Gabriel Garland was under attack by others, not even that he held that view mistakenly, it is not arguable that the judge's directions were inadequate for failing to direct the jury on the use of force in defence of another person. Taking the evidence as a whole, the issue did not arise so as to require any such additional direction to the jury.

35. For these reasons, in our judgment, the fresh evidence of Professor Farrell does not, under section 23(3) of the 1968 Act, afford any arguable ground for allowing an appeal against conviction. It is not otherwise arguable that the convictions are unsafe. Accordingly, we refuse the application to extend time within which to apply for leave to appeal against conviction and we also refuse all the applications to adduce fresh evidence.