

Neutral Citation Number: [2008] EWCA Crim 2861

Case No: 2008/2702/B5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand

London, WC2A 2LL

Date: Tuesday, 18th November 2008

B e f o r e:

LORD JUSTICE KEENE

MR JUSTICE BEATSON

THE RECORDER OF BRIGHTON AND HOVE

(HIS HONOUR JUDGE BROWN QC)

(Sitting as a Judge of the CACD)

R E G I N A

v

ABDUL JAMA

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(Official Shorthand Writers to the Court)

Mr R English appeared on behalf of the **Appellant**
Mr C May and Mr J Keal appeared on behalf of the **Crown**

J U D G M E N T (As Approved by the Court)

1. 1.LORD JUSTICE KEENE: This is an appeal against conviction by leave of the single judge. On 29th April 2008 the appellant and his three co-defendants were convicted at Woolwich Crown Court before His Honour Judge Moore of violent disorder, contrary to section 2 of the Public Order Act 1986. He was subsequently sentenced to a four month detention and training order.
2. The trial was one of three trials before the same judge and at the same court dealing with an episode of violent disorder which had taken place on the afternoon of 27th June 2007 in Charlton, South East London. It was formally admitted at this trial that 12 individuals identified by name had already been convicted of violent disorder in respect of the events in question. So there was really no issue that violent disorder had occurred. The real issue in respect of this appellant was whether he had participated in it.
3. There was evidence that the violent disorder followed very soon after an incident of wounding with intent which had taken place in a convenience store called Kam's. That had led to the police arriving on the scene. The violent disorder which followed very soon after that took the form of a confrontation, or perhaps more accurately two confrontations separated very briefly in time, between a group of some 15 to 20 young black males and the police officers.
4. The Crown's case was that this group was associated with the four young men who had been responsible for the attack inside the shop and that these four defendants and others had travelled from Woolwich to Charlton with violence in mind. Three of them accepted that they had travelled on the same No 422 bus. They arrived at the same time as others who had come on a No 53 bus (also from Woolwich). This, said some of the defendants, was a coincidence. All then were said by the Crown to have become an unified and cohesive group who threatened unlawful violence towards the police at the service road just outside Kam's store and who were followed and arrested in a nearby street. The Crown was not in a position to identify individual overt acts that could be attributed to any particular individual defendant, but it was submitted by the Crown that the behaviour of the group as a unit was such that if the jury was satisfied that the defendant was present and part of the group an obvious and proper inference to be drawn was that that defendant was individually participating in the group's hostile behaviour towards the police.
5. There was also evidence about this appellant's mobile phones having stored on them the phone numbers of a number of those already convicted of participating in this violent disorder - some six individuals in all. Indeed the appellant had made or received calls from one of those six, Saaed Abdi, earlier that same day and to a co-defendant, Ali Suleiman Mohammed.
6. The appellant's case was that he was not involved in any pre-planning, that he had been present after the start of the incident but did not participate in it and that he ran because others ran. He did not see any weapons and there was not any evidence linking him to any weapons.
7. The appellant had been arrested at the scene. He was aged 16 at that time. He was interviewed at Plumstead Police Station on 28th June in the presence of his solicitor and an appropriate adult. He gave a short prepared statement stating that he had not committed any offence. He did not thereafter answer any police questions.

- 8 . When the evidence was given about this at trial by a police officer, the officer in the course of cross-examination by counsel on behalf of the appellant agreed that the reading of a prepared statement followed by no comment answers was not unusual; indeed he agreed that twice in the course of the questions put to him. The judge then intervened at this stage saying to the appellant's counsel:

"Mr English, if it makes your task any easier I will be reminding the jury in very clear terms that a young fellow of 16 being advised by a lawyer invariably will do what the lawyer tells him."

Mr English expressed his gratitude and ceased his cross-examination of that officer. All of this, we should say, was done in the presence of the jury. So from that point on the jury would have known, in effect, that they should not hold what happened at interview against the appellant because that was the gist of the judge's intervention.

- 9 . When it came to the summing-up, the judge early on referred to the fact that the appellant and another co-defendant had given a statement to the police and that the other two defendants had given interviews. He then referred to the fact that three of them had given evidence at trial and said that they had:

"... adopted their account to the police. Therefore those aspects of their account which they have adopted becomes evidence in the case as a whole and you are entitled to consider it as a whole during your deliberation."

The judge was there drawing no distinction between those who had produced prepared statements to the police and those who had given answers in the course of interviews.

- 10 . A little later during the summing-up counsel for the appellant (in the absence of the jury) suggested that there should be an express direction against drawing an adverse inference from the appellant's no comment replies in interview, though counsel then added (at our transcript page 46):

"I suppose it can be dealt with by saying nothing at all."

The judge agreed with that comment, emphasising that he had not referred in any way to adverse inferences. He added:

"What would concern me is -- in actual fact, if one does refer to do not draw any adverse inference, in actual fact it can be often considered counter-productive".

The reason, he added, for that was that it would be very imprudent to start dealing with not drawing adverse inferences when there had been no reference to adverse inferences at all. That was factually correct. The Crown had not contended for any adverse inference to be drawn and the appellant had not been cross-examined about any failure to mention facts at interview.

- 11 . What the judge did say to the jury in due course in a lengthy summing-up was to remind the jury that the appellant had made a prepared statement to the police. The judge made no reference to the "no comment" answers which then followed. But he added this:

"... you may well think that in actual fact a 16 year old boy will invariably do what his lawyer suggests, and perhaps that is something that you would wish to take into account."

12. The absence of a specific direction to the jury not to draw an adverse inference from the appellant's failure to answer questions at interview forms the basis of the main ground of appeal, both as seen by the single judge and indeed as recognised by the appellant's counsel. The power to draw an adverse inference in certain circumstances derives from section 34 of the Criminal Justice and Public Order Act 1994. Mr English on behalf of the appellant rightly draws attention to this court's decision in the case of McGarry [1999] 1 Cr.App.R 377 where it was said that where a judge had concluded that the requirements of section 34 of the 1994 Act had not been satisfied and that therefore it was not open to him to leave the possibility of drawing adverse inferences to the jury, it was incumbent on him positively to direct them that they must not in any way hold against the accused his failure to answer questions. At page 383 of that decision, Hutchinson LJ giving the judgment of the court said:

"If this is not done, the jury will be left without any guidance as to how they should regard the defendant's refusal to answer: and that may be seriously prejudicial to the defendant."

13. Mr English submits that the omission was in this particular case seriously prejudicial. In his commendably succinct submissions to us he argues that there should have been a clear direction not to draw an adverse inference. It is submitted that the failure to give such a direction in the terms indicated in McGarry amounted to a misdirection and that the conviction is consequently unsafe. It is argued that the appellant would have been helped rather than hindered by such a direction.

14. There has been, as has been pointed out on behalf of the Crown in its written skeleton argument, a certain amount of authority since McGarry on this topic. McGarry is not the final word. Several of those decisions have emphasised the inescapable fact that this court is concerned with the safety or otherwise of the conviction and that the effect of omitting a McGarry direction will vary from case to case depending on the facts - see Francom [2001] 1 Cr.App.R 17 where Lord Woolf, CJ, attached importance to the fact that the trial had been conducted on the basis that no adverse inference should be drawn - see paragraph 49; Muunganirwa [2001] EWCA Crim. 925, another case where the Crown had not sought at any stage to rely upon the drawing of inferences and where the court emphasised Hutchinson LJ's words in McGarry that leaving the jury without guidance "may" be seriously prejudicial to the defendant; Low [2007] EWCA Crim. 833 and Hussain [2007] EWCA Crim. 859. The clear message from these authorities is that this court has to consider in the light of the facts about the trial and the whole of the summing-up whether there is a real risk of prejudice to an appellant from the absence of a McGarry direction and the effect of that on the safety of the conviction.

15. But the matter goes somewhat beyond that. It may sometimes be the case that no misdirection at all has occurred, despite the absence of such a direction, especially because in some circumstances more prejudice may be caused to a defendant by giving such a direction than by omitting it. This was suggested in Muunganirwa at paragraph 34. If there has been no reference in the summing-up to the interviews or no suggestion of an adverse inference, it may properly be open to a trial judge to conclude that the interests of

justice are better served by drawing no attention to the defendant's failure to answer questions in interview than by doing so. This consideration was referred to in the important case of Scott Thomas [2002] EWCA Crim. 1308, by Lord Woolf, CJ. That was a case where this court held that the absence of a McGarry direction did not amount in the circumstances of that case to a misdirection at all, as can be seen from paragraph 17. The court emphasised that directions to the jury are designed to achieve a fair trial and it said this at paragraphs 14 and 15:

"The whole case was conducted by counsel, and was going to be summed up by the judge to the jury, on the basis that this was not a case in which an adverse inference should be drawn in consequence of the interview which took place between the police officers and the appellant. In those circumstances to have given a direction as Mr Hinton suggested before us in our judgment would be a mechanistic exercise which had no merit and which we would regard as an unnecessary precaution.

It is important that in situations of this kind we do not allow a position to arise where judges are left without any discretion as to when a particular form of direction is necessary or not necessary."

The court then added this about that exercise of discretion (as it was described) at paragraph 16:

"However, in a case such as this which has been conducted both by the parties and by the judge as one where no adverse inference should be drawn from the limited answering of questions, then the judge has to exercise his discretion as to whether or not it is a case where the interests of justice will be furthered by a direction as to the consequences of section 34 not applying. That is the approach which we recommend for the generality of cases."

In other words, contrary to the impression that some may have gained from McGarry, there is a degree of judicial discretion or perhaps more accurately judicial judgment to be exercised here, something to be exercised in the interest of a fair trial in the light of all the facts.

16. We therefore approach the present case on that basis. The judge was clearly alive here to the dangers of reminding the jury of the appellant's failure to answer questions. What we have to decide is whether he was clearly wrong in the approach which he adopted. We have concluded that he was not. First, this was not a case where the appellant had remained silent at interview. He had read a prepared statement as the jury were aware. Secondly, it was established by cross-examination of a police officer that this was a not unusual situation or procedure. Thirdly, the jury were being told at that stage in the trial that someone aged 16 in such circumstances would invariably do what his lawyer tells him. Fourthly, the trial had been conducted throughout on the basis that no adverse inference was to be drawn -- the Crown did not suggest one, nor was the appellant cross-examined to that effect. That is in our view an important consideration. Fifthly, in summing-up the judge drew no distinction between those defendants who had made prepared statements and those who had answered questions at interview. Sixthly, also in summing-up when the judge reminded the jury that the appellant had made a statement to the police and as a 16-year-old boy he would

invariably do what his lawyer suggests, the judge made no explicit reference at all to the "no comment" answers which then followed.

17. In all these circumstances we are quite clear that the judge was entitled to take the view that, if he started reminding the jury about those "no comment" answers and talking about adverse inferences, he might well cause more prejudice to the appellant's case than by refraining from doing so. That was a sensible judgment in the circumstances and well within his discretion. Like the court in Scott Thomas we would deprecate a mechanistic approach to the issue of a McGarry direction. All directions have to be tailored to the facts of the case being tried. The judge here did just that and there was therefore no misdirection.

18. The other ground of appeal, which is something of a subsidiary one and which the single judge would not have given leave to appeal on, had there not been the first ground which we have already dealt with, concerns a comment made to the jury by the judge during his summing-up. He said at one point on the issue of the appellant joining the group of young men in question:

"You may think that in actual fact the evidence is credible in relation to the weapons. Is it likely that innocent people will go across to a group when weapons actually are on show? It is a matter for you."

Mr English emphasises that the appellant's case at trial was that he had not seen any weapons. He argues that whether weapons were visible at this stage was therefore a live issue. The Crown's evidence had only referred to two or three weapons being carried and it was not therefore to be assumed that these weapons were visible to the appellant at that stage in the incident.

19. We are not persuaded that there is any merit in this particular argument. There was considerable evidence of weapons of some sort or another being seen - a golf club, part of a snooker cue, a shiny stick of some sort. Such evidence came both from police officers and from civilian witnesses. It included evidence from DS Wetherall that the weapons were being brandished and that at one stage the weapons were held above the heads of those carrying them. All that was referred to in the summing-up before the judge made the comment which is now criticised. Likewise, before that comment was made the judge had reminded the jury that each defendant had said that they saw no weapons. So they had been reminded of that. Given that the judge had explicitly told the jury that issues of fact were for them and that immediately before his comment about the likelihood of innocent people going across to such a group he had raised with them whether in actual fact the evidence was credible in relation to the weapons, we do not regard this comment as going beyond the proper bounds of judicial comment. The jury must have been well aware that they had to make up their own minds about the extent to which weapons were visible. Like the single judge we see no merit in this ground.

20. There was a lot of evidence which could properly lead the jury to conclude that this appellant's involvement in the hostile group was not pure coincidence and that he participated in the threatening behaviour at least by way of encouragement. We have earlier referred in this judgment to some of that evidence. We are consequently not persuaded that this conviction is unsafe and it follows that the appeal must be dismissed.