

NCN: [2018] EWCA Crim 2536
No: 201803386 C1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 19 October 2018

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE JULIAN KNOWLES

and

HIS HONOUR JUDGE WALL QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

M L

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Mr R Hearnden appeared on behalf of the Applicant Crown

Mr G Carse appeared on behalf of the Respondent

J U D G M E N T

LORD JUSTICE SIMON:

1. This is a prosecution application under section 58 of the Criminal Justice Act 2003 for leave to appeal against a ruling made at the close of the prosecution case. That application has been referred by the Registrar to the full court.

2. The respondent, ML, stood trial at Croydon Crown Court before Mr Recorder Peart QC on an indictment containing a number of charges: having a bladed or pointed article, contrary to section 139(1) of the Criminal Justice Act 1988 (count 1); wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861 (count 2); and, alternatively, unlawful wounding, contrary to section 20 of the 1861 Act (count 3).

3. The trial started on 6 August 2018. On 8 August, at the close of the prosecution case, the defence submitted that there was no case to answer on counts 2 and 3.

4. In order to understand the Recorder's ruling in which he acceded to the defence submission, it is necessary briefly to set out the evidence.

5. On 2 January 2018, police officers in Sutton, Surrey responded to a call that a man had been robbed at knife-point in a local graveyard. The victim was picked up by officers and driven around the area to see if he could identify the attackers. ML was seen outside a nearby hostel and was thought by the police officers to be a potential suspect. He ran away carrying a rucksack in his hand. An officer pursued him, shouting on two occasions for him to stop. He also made it clear that he was a police officer, and that ML was to be detained for the purposes of a search. ML continued to run, still holding onto the rucksack. He ran through the foyer of a Morrisons supermarket which led out onto the high street.

6. Other officers had driven to the high street and ran towards the Morrisons' doorway. As ML came through the doors, he was confronted by Police Constable Nawol who tackled him and brought him to the ground. In the course of doing so, the officer sustained an incised wound. ML was then arrested by other officers.

7. The incident was recorded on three closed-circuit television cameras, as well as by a body camera worn by one of the officers. This body-worn footage showed a knife sticking out of the rucksack as it lay on the ground. The knife had a blade of about 20cm and was partially serrated. It was inside a sock.

8. PC Williams gave evidence that she saw ML swing the rucksack towards PC Nawol as they came together. In cross-examination, she accepted that she could not have seen ML swing the rucksack in the light which could be seen from the CCTV footage and because the incident was not in her line of sight.

9. The jury heard, in the form of an admission, that ML had been assessed as having an IQ of 56, putting him in the bottom 0.3 per cent of the population. This information came from an intermediary report of Janet Chambers.

10. In his ruling, the Recorder described the prosecution case in relation to count 2 (the section 18 charge) as being based on the evidence of PC Williams. He said that the CCTV footage demonstrated conclusively that she was still in her vehicle when the collision between ML and PC Nawol took place. Furthermore, her evidence that ML stretched his arm away from his body to swing the bag at PC Nawol was inconsistent with the CCTV footage. In fact, neither the CCTV footage, nor the body-worn camera footage showed ML deliberately swinging the rucksack. Her evidence was also inconsistent with that of PC Nawol and PC Heal (another

officer who witnessed the incident). The evidence of PC Williams was tenuous and suffered from inherent weakness. No jury properly directed could be sure of ML's guilt and therefore count 2 would be withdrawn. There is no appeal from that ruling.

11. The Recorder noted that, in relation to count 3, the prosecution submitted that it would have been foreseeable to anybody who chose to run away from the police that, on being apprehended, the knife might come through the rucksack and injure someone. He noted that it had been submitted on behalf of ML that, so far as foreseeability was concerned, the focus should be on the split second between ML seeing PC Nawol and turning to avoid him, rather than the moment when he chose to run away. The Recorder referred to the evidence of ML's IQ. He had tried to run away from the officer and, in the moment immediately before the injury was sustained, he had turned away from the officer, rather than hit out at him. The Recorder ruled that no one, let alone someone of ML's limited intellectual ability, would have been likely to have anticipated or foreseen that, in turning away from PC Nawol, he might cause an injury to him as a result of the knife piercing the bag that he was carrying. Further, and given ML's limited intellectual abilities, the Recorder was sure that ML did not foresee that outcome, and there was no proper evidential basis for the jury to conclude that he did. Accordingly, there was also no case to answer on count 3.

12. On the present application, Mr Hearnden submits on behalf of the prosecution that the Recorder was wrong to rule that ML could not have anticipated or foreseen that he might cause the injuries that PC Nawol actually sustained. By focusing on the actual injury caused and the way in which it was caused, the Recorder applied too narrow an interpretation of what constituted foreseeability. He should have considered whether some injury might have been caused by ML's conduct. He argued that the Recorder also erred in accepting that the only relevant period of time in which ML had the opportunity to foresee the consequences of his

actions was during the brief moment in which he chose to turn away from PC Nawol. The Recorder should have accepted that, in running away from the officers in the first place, knowing that he had a knife in his rucksack, he had created a foreseeable risk of an injury being caused.

13. In his oral argument, Mr Hearnden developed these submissions. He argued that the court and the Recorder should have looked at all elements of what occurred: the running away through a town centre; not stopping when knowing that he was being pursued by the police; not throwing away the knife, but continuing with it in his rucksack; and then colliding. He submits that the Recorder failed to take into account these circumstances which had to be viewed together.

14. Mr Hearnden also criticised the Recorder for placing too much emphasis on ML's low IQ, without hearing any evidence in relation to how this might have affected his ability to appreciate risk. The Recorder should not have drawn any conclusions as to what ML would have been able to appreciate. He pointed out that ML had previous convictions in relation to a weapon.

15. In conclusion, Mr Hearnden submitted that what ML was able to foresee as the consequence of his actions was a matter for the jury and, irrespective of the Recorder's view of the evidence and ML's mental capacity, it was a case that should have been left to them.

16. In response, Mr Carse submitted that the Recorder was correct in his application of the law to the facts, which were not substantially in dispute. The Recorder had not limited his consideration to the split second in which ML turned to avoid PC Nawol, but taken into account the wider circumstances. However, the split-second decision was the paramount consideration and the proper focus of his ruling. He submitted that the Recorder did not place too much emphasis on ML's low IQ. He specifically stated that no one would have anticipated or foreseen

what occurred. Having seen the CCTV and body-worn camera footage and heard from the witnesses, the Recorder was entitled to apply his common sense in deciding the issue. He argued that the decision was within what was a matter for his discretion and one that was open to him on the facts.

17. So far as the assessment of facts is concerned, we agree. However, we do not agree that it was a matter for the Recorder's discretion. It was a matter of judgment.

18. Mr Carse submitted that the injury to the officer was plainly an accident and that the Recorder was entitled to reach this conclusion, having considered the evidence presented by the Crown.

19. The mental element (the *mens rea*) of a crime under section 20, unlawful wounding, derives from the element of the offence characterised by the words "unlawfully and maliciously". The "malice" in this context is subjective. In order to be guilty of the offence, the accused must either have intended or have foreseen that his unlawful act – in this case carrying a knife – might cause physical harm of the gravity implicit in a section 20 offence: see *R v Savage and DPP v Parmenter* [1992] 1 AC 699 at 752. In the words of Lord Ackner (at page 752G): "It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might be the result".

20. The question was the one that the Recorder posed to himself: whether in running away, knowing that he had a knife in his rucksack, and later when turning away from PC Nawol, ML should have foreseen that some physical harm, albeit of a minor character, might result. The knife was in a sock; and both knife and sock were within a rucksack. In our view, the Recorder was fully entitled to the view that no reasonable jury properly directed could convict the

respondent of the section 20 offence on the basis that when he ran away, or failed to stop, or indeed failed to throw away the knife, he should have foreseen that the knife might cause injury. He was running away from a confrontation. Nor are we persuaded that the Recorder was wrong in his view that by turning away from PC Nawol at the last moment, the respondent should have foreseen that his knife would cause some injury to the officer. The position might have been different if he had pushed the rucksack, even defensively, at PC Nawol. But that was not the evidence. Equally, it would have been different if the evidence of PC Williams, that she saw ML swinging the rucksack at PC Nawol, had been credible. It was not for the reasons given by the Recorder.

21. ML faced count1 (having a bladed or pointed article). If he were convicted of that offence, doubtless the fact that injury was caused would be relevant to sentence. However, we are concerned with the present application in relation to section 20.

22. We have concluded, for the reasons that we have set out, that the prosecution application fails. In these circumstances, we refuse leave.

23. Mr Hearnden, this is not a very happy position so far as the prosecution is concerned. This was a section 20 case. The section 18 case fell away due to the deficiencies in the evidence from an officer who appears not to have been telling the truth in front of the jury.

24. **MR HEARNDEN:** Indeed.

25. **LORD JUSTICE SIMON:** The matter then comes before us in relation to section 20. If this had been an evidential challenge, rather than the challenge that in fact is made, Schedule 4 to the 2003 Act would have applied, and precluded an evidential challenge by the prosecution

because section 20 does not fall within Schedule 4. Section 18 does. So we are slightly concerned as to why this has come before the court. We regard it as insufficiently strong even to grant the application, and it has taken up the time of the court and the energies of counsel. So, at some stage, we would like an explanation as to what has occurred.

26. **MR HEARNDEN:** Yes.

27. **LORD JUSTICE SIMON:** Are you able to give it now, or would you like to reflect on that?

28. **MR HEARNDEN:** I would certainly like to reflect on it and I shall speak to those who instruct me. Is my Lord saying something in the form of a letter?

29. **LORD JUSTICE SIMON:** Yes, a short letter. But we would like the assurance that this application was generated by the Crown Prosecution Service, rather than the Police.

30. **MR HEARNDEN:** I understand.

31. **LORD JUSTICE SIMON:** I do not think I need to develop that thought further. You will understand it.

32. **MR HEARNDEN:** Yes.

33. **LORD JUSTICE SIMON:** Thank you both for your submissions.