Neutral Citation Number: [2018] EWCA Crim 454

Case No: 2016/0947/C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE MORRIS
T20147606

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2018

Before:

LORD JUSTICE TREACY
MR JUSTICE KING
and
MR JUSTICE ANDREW BAKER

- -

Between:

Regina	**Respondent**
- and -	
Kamil Dreszer	**Appellant**

- -
- -

Mr T Badenoch QC and Mr P Jarvis (instructed by **Crown Prosecution Service**) for the **Respondent**
Mr A Jones QC and Mr M Henley (instructed by **Registrar of Appeals**) for the **Appellant**

Hearing date: 20th February, 2018

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Judgment Approved

Lord Justice Treacy:

Background

1. This judgment is subject to reporting restrictions until the conclusion of proceedings in the retrial ordered below.

2. This is an appeal against conviction, brought by leave of the full court: see [2017] EWCA Crim 1657. The case has a somewhat convoluted history.

3. On or about 21 September 2010 Andrezj Kulesza, a Polish national, was killed. His body was not discovered until 25 April 2011, when dismembered and decomposed remains were found by a member of the public in a field near Northampton. The body was so badly decomposed that experts could not identify the cause of death.

4. The Crown's case was that five men had been responsible for Mr Kulesza's death. They were (1) Grzegorz Misiak, (2) Artur Janik, (3) Daniel Koswoski, (4) Rafal Lapinski and (5) this appellant, Kamil Dreszer. Misiak, who was a drug dealer and owed money by Kulesza, was alleged to be the ringleader. Kulesza had been found and taken to a flat in London occupied by Misiak and this appellant. Kulesza was kept prisoner there and money was demanded. There was evidence that he had telephoned and texted his girlfriend, asking for money. One series of texts reads as follows:

> "I must have £18,500 or I am really fucked;"
>
> "For the last two days I have been tortured in some kind of attic;"
>
> "Sort it out please because they will kill me."

5. Misiak's girlfriend gave evidence about what she had seen in the flat between 19 and 21 September 2010. There was a sheet covered in blood which Misiak told her to tidy up. She had heard the appellant, amongst others, in the living room. It sounded as if someone was being beaten up in there. She had heard Misiak and the appellant dragging someone into the loft. She had heard what sounded like a man being beaten up and screaming.

6. On the morning of 21 September she saw the appellant with Misiak and others in the living-room with a man who looked as if he had been beaten up. When she returned home from work later that day the appellant and another man were removing things. They also started painting and cleaning the flat. When the property was forensically examined, two spots of blood belonging to Misiak were found on the inside of the door to the loft, and one spot of Kulesza's blood was found on the living-room side of the living-room door.

7. The appellant, when arrested, gave no account in interview of his involvement in these matters. Initially he lied and then he answered "no comment" to questions. He did not give evidence at either of his trials.

8. Misiak could not be put on trial because he was killed in a car accident in 2012. The other four men stood trial in 2013, along with a sixth man who was charged with stolen goods. On 6 August 2013 the appellant was convicted of murder, kidnapping, false imprisonment and preventing a lawful and decent burial of a body. Janik was acquitted of murder, but convicted of manslaughter, kidnapping, false imprisonment and preventing a lawful burial; Koswoski was acquitted of murder, but convicted of preventing a lawful burial; and Lapinski was also acquitted of murder.

9. The appellant appealed against his conviction for murder and on 28 November 2014 the appeal was allowed: see [2014] EWCA Crim 2426. At the first trial the Crown had wished the case to be left to the jury on the basis that the appellant, with others, had participated in the fatal attack upon Mr Kulesza. However, it also wished a second basis to be left, involving joint participation in the crime of false imprisonment with foresight that one of the others involved might intentionally kill or seriously injure Kulesza. The judge declined to let that second basis go before the jury. His reasons were pragmatic: he was concerned not to complicate matters unnecessarily for the jury in a multi-handed case with a range of different offences on the indictment. Accordingly, the judge summed up on the first basis. However, in the course of their deliberations, the jury asked a question, as a result of which the judge gave further directions which revived the foresight basis of liability, which was not something defence counsel had had an opportunity to deal with.

10. This court held that the appeal must be allowed and stated at [30]:

> "However, the result of the way in which the issue developed after the jury had retired led to confusion and contradiction in the way they had been instructed. It also deprived the defendant of the benefit, through Mr Bott, of addressing the jury on what became the basis upon which they were told they could convict. In those circumstances, on this ground alone, the appeal must be allowed."

11. A re-trial was ordered on the count of murder. After a trial which had to be aborted, the re-trial resulted in the appellant's conviction for murder on 21 January 2016. The indictment in the re-trial charged the appellant with murdering Mr Kulesza, together with Misiak. It is that conviction which is the subject of these proceedings.

12. There is only one ground of appeal before the court. That relates to the judge's directions on the issue of secondary liability. The judge's directions included directions giving the jury alternative ways of finding the appellant guilty. One basis was that the applicant intended as part of a joint plan that Mr Kulesza should be assaulted with intent to kill or cause really serious injury. The alternative was that the appellant realised that there was a real possibility that someone in the course of a joint plan might assault Mr Kulesza with intent to kill or cause him really serious injury. That latter alternative was based upon the mistaken understanding of the law as to accessory liability which was corrected by the Supreme Court in *R v Jogee* [2016] UKSC 8, [2016] 1 Cr App Rep 31.

The Judge's Directions

13. The judge gave legal directions to the jury, a written copy of which was provided. He then provided a route to verdict.

14. The judge's legal directions included the following:

> "1…It is for you to determine whether there was a joint plan and, if so, the scope of it and whether the defendant was participating in it at the time Andrezj Kulesza was killed. The prosecution say the joint plan was to carry out serious and repeated assaults on Andrezj Kulesza, with the intention of causing him at the very least really serious injury…in the offences of murder and manslaughter, the principal party is the party who actually carried out the criminal act or acts which caused the death…A secondary party is one who willingly and knowingly participated in a joint plan which caused the death
>
> 2. Murder/manslaughter. A person is guilty of murder as a principal party if he unlawfully kills another person and, at the time of doing so, he intended to kill that person or cause him really serious injury…
>
> It is not necessary for the prosecution to prove who the principal was, the precise time of the killing or the precise means by which it was carried out. In this case it is not possible for the prosecution to prove any of these things. The prosecution, therefore, invites you to consider the case against the defendant as a secondary party.
>
> 3. Secondary party murder, count 1. For the defendant to be guilty of murder as a secondary party, the prosecution must prove so that you are sure:
>
> (a) there was a joint plan with Misiak, in the course of which Andrezj Kulesza was murdered by the principal party.
>
> (b) the defendant agreed to participate and was participating in the joint plan at the time of the killing.
>
> (c)
>
> (i) He either intended that at least one of those participating in the joint plan would assault Andrezj Kulesza in the course of it, with intent to kill him or cause him really serious injury, or
>
> (ii) realised that there was a real possibility that, in the course of the joint plan, at least one of those then participating in it might assault Andrezj Kulesza, with intent to kill him or cause him really serious injury.

> I deal with (a) and, in particular, the requirement that, in the course of the joint plan, Andrezj Kulesza was murdered by the principal party. Was the principal party guilty of murdering Andrezj Kulesza?
>
> You cannot convict the defendant of murder as a secondary party unless you are sure the principal party, whoever he was, was guilty of murder."

15. A little later the judge gave a direction as to secondary party manslaughter in these terms:

> "If you are sure of (a) and (b) above but not (c), you should consider the offence of manslaughter. For the defendant to be guilty of manslaughter as a secondary party the prosecution must prove so that you are sure:
>
> (d) There was a joint plan with Misiak and/or Janek in the course of which Andrezj Kulesza was unlawfully killed.
>
> (e) The defendant agreed to participate and was participating in the joint plan at the time of the killing.
>
> (f) The defendant realised that at least one of those participating in the joint plan might assault Andrezj Kulesza in the course of it, as a result of which he might suffer some injury, but you consider that he did not realise or may not have realised that such an assault would be carried out, with intent to kill Andrezj Kulesza or cause him really serious injury.
>
> If you are sure of (d), (e) and (f) above your verdict will be guilty of manslaughter."

16. The route to verdict was in the following terms:

> "1. Are you sure that Andrezj Kulesza was unlawfully killed in the course of a joint plan? If no, your verdicts are not guilty on counts 1 and 2. If yes, go to question 2.
>
> 2. Are you sure that the defendant was participating in the joint plan at the time of the killing? If no, your verdicts are not guilty on counts 1 and 2. If yes, go to question 3.
>
> 3. Are you sure that the principal party murdered Andrezj Kulesza? If yes, go to question 4. If no, go to question 5.
>
> 4. Are you sure that, in participating in the joint plan, the defendant either
>
> (a) intended that at least one of those then participating in it should assault Andrezj Kulesza, intending to kill him or cause him really serious injury or

> (b) realised there was a real possibility that at least one of those then participating in might assault Andrezj Kulesza, intending to kill him or cause him really serious injury? If yes, your verdict is guilty of murder. If no, your verdict is not guilty of murder, and go to question 5."

17. Question 5 was a modified version of question 4 relating to the alternative verdict of manslaughter.

18. After retirement, the jury sent a note seeking clarification as to whether the appellant should be classed as a principal party or a secondary party. The judge answered the question by directing the jury that they could not find the appellant guilty of murder unless they were sure that Misiak had murdered Mr Kulesza. The jury therefore was to consider the appellant's liability as a secondary party, as set out in the directions.

The Appellant's Submissions

19. The core submission of Alun Jones QC is that there was a misdirection in relation to the approach to the appellant as a secondary party in the light of the Supreme Court's decision in *Jogee*. The application for leave to appeal was lodged in time and on the day judgment was handed down in *Jogee* by the Supreme Court. Accordingly, the question of giving leave out of time in accordance with the principles laid down in *R v Johnson* [2017] 1 Cr App Rep 12 does not arise.

20. Mr Jones submitted that the part of the directions relating to foresight was clearly wrong in the light of *Jogee*, a proposition which we accept. He argued that the jury may well have convicted on the basis of foresight as opposed to intention. He contended that there was an ambiguity at paragraph 1 of the route to verdict in the use of the words "unlawfully killed in the course of a joint plan". That might mean either unlawfully killed in furtherance of a joint plan or unlawfully killed during the execution of a joint plan. The judge clearly intended the second interpretation, otherwise there was no need for paragraph 4(b) of the route to verdict. Mr Jones complained that the directions provided no guidance as to whether the principal might have exceeded the plan or whether the secondary party withdrew from it and urged that the directions implied that once a defendant had foresight of serious harm, no matter when he acquired that foresight, then he is guilty of murder. Fundamentally, he submitted that by leaving the scope of any joint plan to which the appellant was privy open, and including Question 4(b), the judge was directing the jury, for example, that they could convict if they were sure only of: a joint plan to kidnap, to which the appellant was party; murder by Misiak during the carrying out of that joint plan; foresight on the part of the appellant that Misiak might kill the deceased or cause him really serious injury whilst carrying out the joint kidnap plan.

21. He further argued that the Crown's putting of the case on the alternative basis of foresight was inconsistent with its approach to the safety of the conviction taken at the first appeal which was to concede that it could not be argued that the conviction was safe, notwithstanding the misdirection on joint liability. This was said to be an abuse of process, compounded by the fact that the first Court of Appeal had accepted the Crown's concession.

22. Additionally, Mr Jones argued that even if it were permissible for the Crown to seek to maintain the conviction on the basis that the evidence showed that the conviction was safe on conventional grounds, there were other factors which made the verdict unsafe. Firstly, it is said that the judge's description of the jury's question as "bizarre" provided an uncertain basis for claiming that a jury properly directed on an intent basis would inevitably have convicted. Secondly, he submitted that the evidence at the second trial was weaker than in the first since the Crown did not introduce evidence of a double hearsay confession at the second trial. Thirdly, he relies on the fact that at the second trial the jury were not made aware of the acquittals of two of the defendants in the first trial.

The Crown's Submissions

23. For the Crown, Mr Badenoch QC pointed out correctly that the directions given at the time of trial were in accordance with the law as it was then understood. It did not follow from the fact that the foresight direction should now be regarded as incorrect that the conviction was unsafe. In his submission, the outcome in this case would have been the same. He made reference to *Johnson* at [3] where the court said:

> "In approaching appeals in respect of convictions prior to the decision in *Jogee*, consideration has to be given to the extent to which the verdict could only properly be interpreted in accordance with the common law principles of joint enterprise (two or more people setting out to commit an offence, crime A, or intending to encourage or assist in the commission of that offence) rather than parasitic accessorial liability."

24. This case was not a parasitic accessorial liability case. The jury had been directed to consider the scope of the joint plan and whether Misiak was guilty of murder as the principal, before turning to the question of the appellant as a secondary party. Before convicting the appellant of murder, the jury had to conclude that Misiak was the principal killer, with the requisite intention for murder and that the appellant was participating in the joint plan at the time of the killing.

25. He drew attention to the observations of Lords Hughes and Toulson in *Jogee* at [78]:

> "As we have explained, secondary liability does not require the existence of an agreement between D1 and D2. Where, however, it exists, such an agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. A long established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent, is an example of the intention to assist which is inherent in the making of the agreement."

26. By entering a joint plan with Misiak which had at its heart an agreement between them that Kulesza should be caused at least really serious harm the appellant had encouraged Misiak to cause really serious harm to Kulesza. The appellant's own intent was also demonstrated because by entering into the agreement he intended that Kulesza should be caused really serious harm.

27. By answering question 1 in the route to verdict in the affirmative, as the jury must have done, it must have been sure that Kulesza's murder was within the scope of a joint plan, agreed between Misiak and this appellant, to assault Kulesza with the intent to kill or cause really serious harm. Question 2, with its reference to "at the time of the killing" catered for the possibility that the appellant might have withdrawn from the joint plan before the fatal act took place. The jury must have answered this question in the affirmative, thus showing that they were sure the appellant did not resile from the joint plan at any time before Kulesza was killed. Question 3, which, after the judge's further direction, identified Misiak as the principal, shows that the jury must have been sure that he murdered Kulesza.

28. Once the jury was sure of those three matters there was sufficient for them to find the appellant guilty of murder. Those conclusions necessarily meant that the elements of ordinary accessorial liability for murder were made out. In particular, the findings showed

    i) that Misiak and the appellant were parties to a joint plan, that at least one of them should intentionally inflict really serious harm on Kulesza;

    ii) Misiak as principal had murdered Kulesza in the course of putting that joint plan into effect;

    iii) the appellant was still a party to that joint plan at the time of Kulesza's murder.

29. In those circumstances, it would not as a matter of law have been necessary for the jury to proceed to question 4 on the route to verdict and so the misdirection did not render the conviction unsafe. Mr Badenoch submitted that there was nothing in the other points raised by Mr Jones and that the verdict should be upheld as a safe one.

Discussion and Conclusion

30. We begin our consideration by rejecting the submission of an abuse of process. It does not appear that any such submission was made to the judge below, and there is no ground of appeal relating to this. In any event, the point is misconceived. The judgment in the first appeal shows that the basis for the court's decision derived from the judge's change of position in relation to the giving of a direction based on foresight. There was no concession by the Crown that the direction based on foresight was erroneous. Indeed, the Crown supported the direction as given, since it conformed with the law as then understood. The concession made by the Crown was that it would not seek to uphold the conviction as safe in circumstances where the way in which the judge's directions had developed had led to confusion and contradiction in the way the jury was instructed and had deprived the defendant of the benefit of dealing with the foresight issue in addressing the jury. Nothing occurred in the first appeal which would have precluded the Crown from advancing the case at retrial on a foresight basis before a judge who would be trying the matter free of the complications which had led the first trial judge initially to take the view that a foresight basis should not be left to the jury.

31. The trial judge's comment on the jury's question may or may not have been justified (it seems to have related to the fact that the question suggested the jury were wondering if the deceased was being characterised as somehow a party to his own

killing). It cannot assist this appellant. The judge gave the jury further directions which modified question 3 in the route to verdict. He directed them that the appellant could not be convicted of murder unless they were sure that Misiak had murdered Kulesza and that the appellant was also guilty by reason of being a secondary party. When granting leave for this appeal, this court refused leave on a ground relating to the judge's response to the jury question.

32. The assertion that the evidence in the second trial was weaker than in the first does not advance matters. Whilst the Crown did not seek to adduce evidence of a double hearsay confession, there was still a powerful case to be advanced. The appellant had been convicted of kidnap and false imprisonment of Mr Kulesza. The false imprisonment took place over a two-day period during which the appellant was seen and heard at various times in the room and with Mr Kulesza, whilst he was being assaulted and beaten. He had been heard dragging him into the loft. It would be open to a jury to draw inferences from Misiak's girlfriend's evidence that the appellant was a willing participant in the infliction of really serious harm to Mr Kulesza. There had been no explanation from the appellant either in interview or in evidence about his involvement in events. In our judgment, there was a strong evidential case available to the Crown and it would have been entitled to advance the case to the jury on the basis of the law as it was then understood.

33. A complaint that the trial was unfair because the jury was unaware of the acquittals of others formed the basis of another ground of appeal which was refused by this court when leave was granted: see [2017] EWCA Crim 1657 at [8] and [9]. In our judgment, it is not a relevant factor in the present arguments. Nor is a complaint that there was unfairness in the adducing of the appellant's convictions at the first trial for the other offences; no ground of appeal has ever been advanced in this respect.

34. We return then to the core question of whether the conviction has been rendered unsafe by reason of the mis-direction. In *Jogee* at [100] their Lordships said:

> "The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction."

35. In *Johnson* at [9] the court observed:

> "…even in relation to in time appeals, the fact that the jury were correctly directed in accordance with the then prevailing law does not automatically render the verdict unsafe."

36. Mr Badenoch's primary submission was that this court could be confident that the jury must have answered the first three questions on the route to verdict in the affirmative and that that was sufficient for a conviction for murder. Question 4 of the route to verdict was unnecessary and irrelevant. At one point in his submissions, he

seemed to suggest that the Crown had not sought to advance its case on the alternative basis of foresight as opposed to intent. It was acknowledged that, in the usual way, the judge had discussed his directions to the jury in advance with counsel and that they had seen the documentation he proposed to use. In those circumstances, it was plain that the judge proposed to leave the alternative basis of foresight as a route to a murder conviction and that prosecuting counsel must have assented to it.

37. It may be that the primary way in which Mr Badenoch advanced the Crown's case to the jury was on the basis of participation in a joint plan with intent to cause really serious injury, but the inescapable fact is that he permitted the case to go to the jury on a basis which was not limited to that and which opened up the possibility of a conviction for murder as a secondary party on the basis of foresight.

38. He submitted that in the route to verdict, which the judge had expressly said should be read subject to the directions he had given to the jury, the reference to a joint plan was clearly to be understood, and must have been understood by the jury, as a reference to the particular joint plan contended for by the prosecution, namely to assault the deceased with intent to cause at least grievous bodily harm. On that footing, the questions at paragraph 4 of the route to verdict were, with hindsight, otiose, but asking them did not render the conviction for murder unsafe.

39. We are unable to accept that submission. The judge's directions to the jury which preceded the route to verdict expressly stated that it was for the jury to determine whether there was a joint plan and, if so, its scope. True it is that the judge then stated that the Crown asserted that the joint plan was to carry out assaults with the intention of causing at least really serious injury, but it was for the jury to say whether or not that was correct. The judge then went on to discuss participation in a joint plan to assault (which he had defined as the unlawful use of force against another person) without in any way coupling that with the additional requirement that such assault took place with the intention of causing at least really serious injury. It is clear from the terms of the summing up that his directions did nothing to define the scope of the joint plan in that sense, nor was there any question at paragraphs 1-3 of the route to verdict which invited a jury to resolve at that stage the scope of the joint plan.

40. That is, in our view, why at a later stage of his directions, (as set out at paragraph 14 above), the judge directed the jury that they could convict the appellant of manslaughter as a secondary party if they were sure that he had realised that a participant in a joint plan to assault might assault Mr Kulesza, causing some injury.

41. At a later stage of the summing up the judge squarely put before the jury the issue as to the scope and content of any joint plan, reminding them of defence counsel's submissions that the joint plan did not involve more than kidnapping and false imprisonment with a view to getting money back from the deceased.

42. It seems to us that questions 1 and 2 of the route to verdict were designed to ascertain whether the appellant was guilty of any form of homicide, subject to considering his state of mind. They were clearly intended to be common to both the murder and manslaughter charges. The purpose of questions 3, 4 and 5 then was to draw the boundary between those charges so that the jury could consider whether the case was one of murder or manslaughter. Question 4 delineated the bases upon either of which

the jury, if sure, could convict of murder. Question 5 posed accurately the questions to ask, if it was not murder, before the jury could convict of manslaughter.

43. For those reasons, we are unable to accept Mr Badenoch's submission that affirmative answers to questions 1, 2 and 3 of the route to the verdict resolved the case so as to lead to a conviction for murder. On the basis of the judge's directions and, following his route to verdict, the jury had to answer the questions posed at question 4. Such a course clearly admitted of the possibility that the jury might not be sure that the jury had the necessary intention shown at 4(a), but did have the foresight shown at paragraph 4(b). Given that this was a case in which there was no witness to the actual killing and where the Crown could not specify what had caused the death or where it had occurred, the case depended on inferences which could be drawn from the evidence. In those circumstances, this was not the sort of case where we could have any confidence that the jury must have convicted on the basis of intention as opposed to foresight. Even though this was a case where the evidence available might well have led to a conclusion that the appellant participated with an intention that Mr Kulesza should be caused at least serious physical harm, the judge had considered it appropriate to leave the matter to the jury on the now forbidden foresight basis. He plainly had not ruled out such a possible basis of conviction and nor can we. In those circumstances, the misdirection of the jury cannot be overlooked and the conviction cannot be sustained as a safe one. Accordingly, the conviction for murder must be quashed.

44. At the end of the hearing, we indicated that we intended to reserve judgment, but invited submissions on a provisional basis as to whether, if we were to quash the murder conviction, we should order a re-trial. For the Crown, it was urged that, notwithstanding the history of the case, this was a very serious offence and that there was a strong public interest in a re-trial being ordered. For the appellant, such a course was resisted. Reliance was placed on the passage of time, the history of earlier trials, and the fact that the appellant had now served a period of time in custody which would be appropriate for a conviction for manslaughter. We were invited to quash the conviction for murder and substitute a verdict of guilty of manslaughter as the appropriate course to take.

45. Having considered the rival submissions, we have come to the conclusion that the interests of justice require a further re-trial for murder. The case appears to be evidentially strong and there is a strong public interest in there being a trial of a serious case such as this. Accordingly, we order a re-trial on the allegation of murder, with the indictment no doubt containing an alternative count of manslaughter, as it did at the trial. We will also give necessary directions to enable that trial to take place.