

Neutral Citation Number: [2019] EWCA Crim 2280

Case No: 201903114/B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Snaresbrook
HHJ Pounder
T20187809

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2019

Before :

LORD JUSTICE GREEN
MR JUSTICE SOOLE
and
HER HONOUR JUDGE WALDEN-SMITH

Between :

REGINA
- and -
N

(Transcript of the Handed Down Judgment.
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Mr William Chipperfield (instructed by **Caveat Solicitors**) for the **Applicant**
Mr Timothy Hunter (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: Friday 13th December 2019

Judgment
As Approved by the Court
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Lord Justice Green:

Introduction: Joint enterprise directions/the need for directions in writing

1. The appellant appeals with leave of the single judge against his conviction for wounding with intent contrary to Section 18 Offences Against the Person Act 1861. He was convicted at the Crown Court at Snaresbrook on 24th July 2019. He has, as of the date of this appeal, yet to be sentenced. The provisions of Sections 45 and 45A Youth Justice and Criminal Evidence Act 1999 apply in this case because of the ages of the victims and the appellant. Reporting restrictions therefore apply. The issue arising concerns the directions given to the jury about joint enterprise. It also concerns the need for written directions to be given to juries and the risk that oral directions in complex cases might create a risk of confusion as to material issues.

Facts

2. The facts of the case may be summarised briefly. The appellant was convicted of being party to an assault upon two boys, T and A. On the evening of 13th February 2018, they were walking along Densham Road in Newham. A white Ford pulled up beside them. Two masked males got out of the car. The driver stayed inside the car. The complainants were uncertain as to whether other individuals also remained in the vehicle. The two males approached and stabbed T and A repeatedly before getting back into the vehicle. T sustained injuries to his thigh and chest and A sustained injuries to his thigh, groin and arm. Both boys were found by police just before 11pm. They were bleeding heavily. They were transferred to the Royal London Hospital where they received emergency life-saving treatment.
3. The prosecution case was that the appellant was a member of the “Anyone Can Go” gang operating out of London, E6. It was alleged that on the evening in question the appellant was part of a “ride-out” whereby members of one gang would go into a rival area with the intention of seeking out individuals whom they could then attack. The prosecution case was that the appellant was either one of the two attackers or that he was in the vehicle to encourage or assist the attackers if the need arose.
4. In order to establish the offences, the Prosecution relied upon evidence from the complainants. Neither were able to recognise the males as they had their faces covered. However, T said that the attacker was a little bit taller than him. A said that one of the males was a black male, very dark skin, taller than him and was neither skinny nor fat and that the other male was a light skinned black male not much taller than him and very skinny.
5. The police also relied upon evidence of a subsequent search of the appellant’s bedroom. On the top of his wardrobe was found a key to a BMW X5 vehicle, a black puffer jacket inside a holdall, a large knife and a gold mask. Evidence was also tendered to the jury in relation to the gangs that operated in the London Borough of Newham. As part of that evidence, a drill video was produced which featured the appellant and included notes of lyrics from the appellant’s phone which appeared to describe him boasting about the attack upon T and A. CCTV and cell site evidence showed the vehicle driving to and from the scene of the attack and the movement of the telephone numbers attributable to the appellant and co-accused. In interview the appellant gave no comment to all questions posed. There was further agreed evidence

in relation to the appellant's previous convictions from July 2018 for possession of a bladed article and of an offensive weapon.

6. At trial the appellant accepted that he had been present in the vehicle on the evening in question. He denied having taken part in the attack. He denied knowledge of any plan to attack anyone in the area. The Anyone Can Go group was not really a gang but a mere association of friends. He had remained in the car throughout but had done nothing to assist or encourage the attackers. He had appeared in the drill video, but he had not written the lyrics. He denied that he was referring to the attack in the song. He accepted that the puffer jacket and the holdall that were found in his bedroom belonged to him, but the knife and gold mask belonged to his brother. He was trying to disassociate himself from the gang and he carried weapons purely for protection. He had no propensity to the carrying of weapons. When he was interviewed by police he had been scared of potential repercussions from the individuals involved and this explained why he gave "no comment" to the questions asked.

The Grounds of Appeal: Directions on joint enterprise post-Jogee

7. The appellant contends that the judge misdirected the jury in law in relation to the ingredients of joint enterprise. The prosecution case had initially been that the appellant was one of the attackers. However, by the close of the case the prosecution alleged an alternative based upon joint enterprise. This change by the prosecution was unfair. The judge erred in his directions to the jury in relation to joint enterprise. He failed to direct the jury that they could not convict the appellant solely upon the basis of contributing to the "*force of numbers*". His presence in the vehicle had to amount to deliberate help or encouragement to one or both of the attackers to commit the offences. The judge failed to make this clear. It is also argued that the failure by the judge to provide written directions created a significant risk that the jury were confused. As a result of these matters the convictions are unsafe.

The oral jury directions on joint enterprise

8. In order to determine this appeal, it is necessary to consider the directions given by the judge to the jury about joint enterprise.
9. In his oral summing up to the jury, the judge stated as follows:

"...in essence there are two ways in which the defendant can be guilty: first, he could be guilty if he is one of the two who went out and attacked the two together, and if you were sure that he was and deliberately stabbed and injured either one of those two then he would be guilty of this matter; or, in the alternative he would be guilty if he deliberately attended with a view to helping or encouraging the people who actually stabbed the two to do so, so he is there as part and parcel of this ride-out. The prosecution say to you that obviously the defendant is guilty either because he joined in the attack on both of the two and must therefore have either intentionally stabbed or injured either of the two persons or because he deliberately helped or encouraged either or both of the others to do so.

The defence case is that although he was present at the scene of the attack on both of those two he played no part in it and that when they were being assaulted he was in the car because he was not part of it. And, and as a matter of law, mere presence at the scene of a crime is not enough to make a defendant guilty of the crime, but if a defendant is there and intends by his presence to help or encourage another defendant to commit that crime by giving moral support or by contributing simply to the force of numbers then he is guilty.”

10. The judge did not address the jury on the position that would arise if the appellant had been present in the vehicle, had known what the two assailants had intended, but had not agreed with or supported or encouraged that attack. In the course of their deliberations the jury prepared a note which they sent to the judge. It focused upon the position of a person who was present at the scene of an attack, was aware that it was going to happen, but who did not participate in it. The note addressed the gap in the oral directions of the judge. The note was in the following terms:

“If the defendant was aware that the attack was going to happen but did not get out of the car is he guilty of the same charge or a lesser charge.”

11. The judge discussed the note with counsel. In the course of discussions, the judge referred to the issue raised as one of “*non-accidental presence*”. He articulated to counsel the answer that he intended to give to the jury. The oral direction I given later to the jury by the judge was in the following terms:

“[The appellant] accepts that he was there when T and A were stabbed. He said that although he was present at the scene he took no part in the assault and remained in the car throughout. His evidence to you was that he had no idea that what took place was planned in advance or even contemplated. Although the prosecution are not able to prove who it was who injured T or A, there are two ways in which you can find [the appellant] guilty on the counts he faces. First, [the appellant] would be guilty if he was one of the ones who deliberately stabbed and injured T and/or A, so he was the person doing the stabbing. Secondly, [the appellant] would be guilty if he deliberately helped or encouraged either of the others [to stab] either T or A. The prosecution say that [the appellant] is guilty because either he was involved in the attack on T and/or A and must have either intentionally stabbed and injured T or A personally, or at least he deliberately helped or encouraged the people who did do these stabbings. [The appellant], however, says that although he was present at the scene of the attack on T and/or A he played no part in it and that they were effectively assaults by the others.

As a matter of law, and this is why I am going to answer your question, merely being present at the scene of a crime is not enough to make a defendant guilty of the crime. But the

question that you would ask is: what if you are sure that [the appellant] knew that act was going to happen and chose to be present, would that make him guilty? Well, that by itself would not make him guilty. What you would have to do is look at his intention and if you come to the conclusion that he knew the attack was going to happen and chose to be present, he has to intend by his presence to help or encourage the others to commit the crime by either giving moral support to another or by contributing simply to the force of numbers involved. In those circumstances then he would be guilty. So in order for [the appellant] to be guilty in those circumstances he has to intend by his presence to help or encourage another to commit the crime by either giving moral support to another or by contributing to the force of numbers. If you are sure that was the case then he would be guilty.”

Conclusions

12. We turn to our conclusions. We do not in the circumstances of this case consider that the conviction is unsafe. There are four main points we would make.
13. First, when the judge initially summed up to the jury he did not clearly distinguish between, on the one hand, mere presence and knowledge that an attack might be planned by others, and, on the other hand, presence coupled to knowledge that an attack might be planned coupled further to an intention to participate in an appropriate way in the attack. On the facts this should have been explained to the jury because if the jury were of the view that the appellant was not one of the physical assailants and had remained in the vehicle but was aware of the planned attack, they needed to have a clear understanding as to the circumstances in which he could then be guilty upon a joint enterprise basis. Given that this was an analysis of the facts that was alive at the culmination of the evidence it needed to be addressed and the omission of a clear direction on this had, so it seems, led to confusion in the jury’s mind which then led them to raise the issue in a note.
14. Second, when addressing the note of the jury the judge did make clear: (i) that mere presence was not enough; (ii) that mere presence together with knowledge that others were planning an attack was also not enough; but (iii), that presence plus knowledge of what others intended to do coupled to an intention to assist in an appropriate way in the attacks to be perpetrated by those others *could* suffice to found joint enterprise. The answer to the jury cured the lack of clarity about this in the initial direction.
15. Third, it is said that the reference in the direction to “*contributing simply to the force of numbers involved*” was misleading and incorrect. That criticism takes the direction given by the judge out of its proper context. As is apparent from the transcript, the judge made clear that the appellant had not only to be present but had to intend by his presence to help or encourage the others to commit the crime by either giving moral support to them or by contributing to the force of numbers involved. In the judgment of the Supreme Court in *R v Jogee* [2016] UKSC 8 at paragraph [89] the Court made clear that the act of assisting or encouraging “*may take many forms*” and “*may include providing support by contributing to the force of numbers in a hostile confrontation*”. In paragraph [98] the Court stated that for a defendant to be guilty, he need not

encourage or assist “*a particular way of committing*” the offence. Nor is a person’s intention to assist in a crime of violence determined by whether he knew what sort of weapon a co-accused possessed. It is relevant that the Crown Court Compendium Part I (2019) also uses the expression “... *by contributing to the force of numbers*” in Example No 2 on joint enterprise and offers a specimen route to verdict to cover the situation. It is hence a recognised and accepted form of words to use.

16. In the present case the nub of the issue for the jury was whether the appellant assisted, for example, by being the driver whose role it was to assist in hunting down opposing gang members so that they could be attacked (by others) and/or in assisting in a quick getaway after an attack, or by being a passenger in the car ready and willing to join the fray if that should become necessary by way of back-up to the two actual assailants. These were all relevant possibilities on the facts falling within the scope of the direction given by the judge and which, in law, were capable of amounting to the sorts of assistance that could engage joint enterprise. They were factual matters for the jury and, having heard the evidence, they convicted the appellant. If and insofar as the appellant was therefore convicted on a joint enterprise basis no error of law arose
17. Fourth, the judge did not give a written direction to the jury. This is surprising. The defendants were charged with very serious offences capable of leading to substantial sentences if convicted. The law on joint enterprise is far from straightforward and clarity of expression was required. The Crown Court Compendium Part I (2019) Section 7.4 emphasises the complexity of the law of joint enterprise and the need for care. The Compendium (Section 1.9) also emphasises more generally the real utility of written directions and it cites from the Report of Sir Brian Leveson where it is said that judges “*should*” prepare written directions (Sir Brian Leveson: “*Review of Efficiency in Criminal Proceedings*”, paragraphs [307] and [308]). The Compendium says also that written directions “*must*” be discussed and preferably agreed with counsel.
18. We have not in this judgment cited the entirety of the judge’s direction in relation to joint enterprise. Some of it, including parts of the critical language under challenge in this case, is characterised by quite informal language. With respect it would have been far preferable for the judge to have devoted time to the preparation of the initial written directions and a route to verdict which should then have been shared with counsel for their due consideration and observations. Indeed, as the Compendium strongly indicates counsel should, if necessary, invite the judge to provide written directions and to assist if needs be. We note that the Court of Appeal is increasingly emphasising that the norm should be the provision of written directions: see e.g. *R v Atta-Dankwa* [2018] EWCA Crim 320, and *R v PP* [2018] EWCA Crim 1300. We anticipate that if that had occurred the judge would have used greater precision and clarity in his initial directions, the jury would have had valuable written guidance which they could have referred to as they worked their way through the various factual permutations which arose, there would have been no need for the jury to send a note, and this appeal might well not have arisen.
19. Fifth, counsel argues that the failure in and of itself on the part of the judge to give written directions to the jury renders the verdict unsafe in a case such as this. In circumstances in which an oral direction only is provided a conviction will, in normal circumstances, be quashed because that oral direction was wrong or materially confusing, etc. It will not be because of the mere omission of written directions. It

might be that the exercise of crafting written directions would have led to the errors being avoided but the errors remain those embedded in the oral directions and not in the mere fact that no written equivalent was given. We do not however rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner. And nor do we address the situation that occasionally occurs where the judge gives an oral direction which differs in a material respect from the written direction which is also provided.

20. Sixth, on the facts of this case we do not consider that the absence of written directions renders the conviction unsafe. It is clear from their note that the jury clearly understood the significance of the various permutations arising, hence the very specific factual situation described in the note. It is evident that the judge squarely addressed the situation which concerned the jury, albeit that he did this orally. He made clear to them that upon the hypothesis set out in the note the appellant would not be guilty. In one sense the judge was generous to the appellant and he received the benefit of the doubt. He did not refer to foresight. This is not an ingredient of joint enterprise but, as the Supreme Court made clear in *Jogee* (ibid paragraph [94]), it is capable of being one relevant piece of factual evidence which can go to whether the defendant had the requisite intention. As such a foresight direction is likely to be adverse to the interests of a defendant, and its absence from the judge's direction in this case is hence a factor which reduces the risk that any injustice occurred. The jury did not come back and seek additional clarification. We have carefully reviewed the transcript as a whole and conclude that on the facts there was no risk of the exclusively oral procedure having been unfair.
21. For the reasons that we have given, this appeal is dismissed.