

Neutral Citation Number: [2020] EWCA Crim 1028

Case No: B4/2019/2730, 03089 + B4/02987, 02988 + 03184

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NOTTINGHAM
MR JUSTICE GOOSE
T20187421

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2020

Before:

LADY JUSTICE MACUR
MR JUSTICE JAY
and
HIS HONOUR JUDGE MARKS QC

Between:

CN, FN & DW
- and -
REGINA

Appellants

Respondent

Mr A Waterman QC and Mr A Vout (instructed by **Stephen Burdon Solicitors**) for the **1st Appellant (CN)**
Mr M Auty QC (instructed by **Messrs Bhatia Best**) for the **2nd Appellant (FN)**
Mr M Duck QC (instructed by **Johnson Partnership**) for the **3rd Appellant (DW)**
Mr P Joyce QC and Miss J King (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 23 July 2020

Approved Judgment

Macur LJ:

1. Esrom Ghide (EG) died in the late afternoon of 5 September 2018. He had been stabbed 17 times, to 12 different areas of his body. The fatal stab wound entered the left side of his chest and penetrated his heart. CN and FN were convicted of his murder, as was Daniel Williams (DW). Two other defendants were acquitted of all counts. CN and FN appeal their conviction, and if necessary, sentence with leave of the single judge. Their respective grounds of appeal against conviction criticise the judge's "approach" to accessory liability, his admission of their previous convictions and his decision to admit covert recordings of DW at trial, which implicated them both. DW also appeals sentence with leave of the single judge. All three contend that the sentences, detention at HM Prison with minimum terms of 15 years for CN and FN and 18 years for DW, were manifestly excessive.
2. Pursuant to s 45 of the Youth Justice and Criminal Evidence Act 1999, no matter relating to the appellants CN and FN shall, while they are under the age of 18, be included in any publication if it is likely to lead members of the public identifying them as persons concerned in the proceedings.

Summary of facts.

3. CN, FN and DW arrived together at the scene of the stabbing with one other youth; another youth joined them shortly afterwards. The deceased and others were already present. DW deliberately provoked a fight with EG. They fell to the ground together, whereupon the two appellants, CN and FN, kicked and punched the deceased while he was fighting DW. The other two youths in their group were shouting encouragement. When the deceased rose to his feet at the end of the fight it became obvious that he had been stabbed, although witnesses had not seen a knife or knives used during the fight, and no knives have subsequently been identified in the police investigation that followed as having caused the wounds. The deceased collapsed, bleeding profusely and died at the scene. CN, FN, DW and the other members of their group ran off.
4. The prosecution opened their case as follows: "Save that [DW] clearly used a knife to stab Esrom Ghide, it is not as clear how many of the others may have done as well, although it is clear that all five were involved in the fatal attack, either as stabbers or doing other violence to him or giving encouragement to the others. What is clear is that the prosecution case is that all these defendants shared the intention to attack and cause Esrom Ghide really serious harm, or to kill him."
5. Neither FN, DW or the two other acquitted defendants gave evidence and no evidence was called on their behalf. DW's case was that he was attacked by the deceased, a stronger man, who got the better of him in the fight. DW had a flick knife with him and stabbed the deceased in the left thigh acting in lawful self-defence. FN's case was that he punched the deceased, or kicked, at the same time as his brother. He was also trying to defend DW from the deceased, who appeared to be winning the fight. He did not see a knife; any wounds must have been caused by DW. CN gave evidence and accepted that he kicked the deceased in the head whilst he was on the ground, two or three times, because he was trying to lawfully defend his friend DW and distract the deceased's attentions. He denied that he saw or had a knife; any knife wounds must have been caused by DW. Both CN and FN admitted that they had lied about not being present at the scene when first interviewed.

6. A forensic scientist gave evidence that she had examined the deceased's clothing. In her opinion, the stab cuts observed on the T-shirt and jeans were caused by multiple actions and it was possible that more than one bladed implement was used to cause the stab cuts. There was no blood recovered from any clothing or item belonging to CN or FN which linked them to the deceased.
7. Mr Waterman QC and Mr Auty QC have common cause in the appeal, and sensibly agreed that the submissions would be led by one, on behalf of both. At the outset of his address to us, Mr Waterman QC identified the "core of the appeal" to be: "(1) the lack of clarity about the Prosecution case: and (2) the means deployed by the judge to obviate the difficulties when he came to sum up to the jury." The judge made knives the central issue and the trial took place in a "febrile media atmosphere highlighting the use of knives by young men". They submit that the judge's decisions in allowing evidence of CN and FN's previous convictions for the possession of knives and the covertly recorded conversations of DW when on remand, which implicated CN and FN in the use of a knife, were wrong. What is more, they say, the direction he gave in relation to joint liability was deficient.
8. In view of the issues raised in the appeal we think it is necessary to refer in some greater detail, than would usually be the case, to the eyewitness evidence and to reproduce the relevant sections of rulings and the summing up. We take the factual detail, which Mr Waterman QC and Mr Auty QC agree to be accurate from the summing up.
9. CN, FN and DW were identified by eyewitnesses as present at the scene and involved in the fight. Three eyewitnesses agreed that DW had provoked the fight and that CN and FN had joined in. Unsurprisingly, their evidence was not identical in all respects but neither, we find, was it contradictory. Significantly, one of the witnesses, Duane Mullins, saw something passed from CN or FN to DW during the fight, and then saw DW with a bloodied knife. He said, "I cannot say when the stabbing happened, but I saw the guy with a knife and blood on it. It was [DW] who had that knife. When I was pushing and punching them off, one of the twins threw something to [DW] under my leg. I thought it was a knife and when I saw [DW] with a knife and blood on it, I realised it must have been a knife. Before that, I had not seen [DW] with a knife." In cross-examination he accepted that he: "didn't see that it was a knife. Something was passed through and next I saw the knife in DW's hand, with blood on it. I saw something go through my legs from behind, which I thought must have been a knife. I felt something go through my legs. ... Everyone joined in, including those two. I stepped in to throw them off and when I turned round, I saw that [EG] had been stabbed. [DW] and the twins were the main characters."
10. The same witness also gave evidence about an incident that had occurred approximately two weeks before the stabbing on 5 September. He had seen the twins and the deceased at a distance. He could not see what was happening, but they walked towards him. He described the deceased as "shaken up". He saw the twins; the taller one [identified as CN] held a knife and the other one, [FN], said the witness should, 'Talk to your boy, man's going to get shanked up.' Duane Mullins was dealing cannabis and took the knife in exchange for two bags of weed. He later gave the knife to a police officer. In his evidence at trial, CN denied that he or FN had a knife. He said they had argued with the deceased about two to three weeks earlier. The deceased was not shaken up and FN had not told Duane Mullins that the deceased would be

“stabbed up.” The incident was “over”; he and his brother got on “all right” with the deceased.

11. Another witness, Robert Ryan said that the group of five surrounded the deceased. He saw the deceased being kicked and punched when he was tussling with DW on the ground. He saw DW strike the side of the deceased's body. He thought that it was punches to the left side of his belly, but he saw they were stab wounds after the deceased got up. The punches were in the same area as three of the wounds. He said: “I could tell from the atmosphere that something was going to happen when the group arrived. It looked like it was planned, the way they arrived.” He said the fight happened quickly. There was a lot of noise and shouting. He did say there was more than one person stabbing but clarified that he was describing a male “punching, which I thought was stabbing, but I didn't know that [the] male was stabbing him. He was punching him in the ribs, which I thought was him stabbing the deceased. ... I didn't actually see a knife being used by anyone.”
12. Cordell Somersall-Heath saw one of the twins throw two punches to the body of the deceased in the midriff “left side, I think. The other, [FN] punched. ...[CN] kicked him to the head. The whole fight lasted about 90 seconds. I did not see the stab happen, nor did I see a blade.” The kick was “half-hearted” to the head. The witness actually indicated the right side of his body when describing the location of the punches.
13. CN and FN each have two previous convictions for carrying a knife. Covert recordings of DW's conversations with family members, whilst he was on remand contained admissions, but also implicated CN and FN. Mr Waterman QC and Mr Auty QC objected to its admissibility. Subsequently, CN in evidence, confirmed that he had previous convictions for carrying a knife in 2017 and 2018, but denied that he had carried a knife thereafter for fear of imprisonment if arrested. When cross examined about DW's comments, he denied knowing in advance of DW or anybody else carrying a knife or carrying one himself on the relevant day.
14. We agree with Mr Joyce QC, who appeared on behalf of the prosecution below, that this was a ‘fast moving’ episode. We think it would be remarkable if all three had the same perspective or had said that they had seen exactly the same as any of the others. Mr Joyce QC declined to give “further particulars” at the outset of the case or to indicate how he put the case specifically against CN and FN. The judge was required to rule and did so in terms:

“Whether CN participated by repeatedly kicking the deceased's head whilst he was on the ground or by passing a knife to DW, these are examples of participation as a secondary party and are not essential elements of the offence. The jury do not have to be sure whether it was one or the other. The prosecution is not, therefore, required to elect which witness' evidence they prefer where there is inconsistency, provided that the evidence is capable of proving one way or another active participation in the violence with the necessary intention.”

15. We agree with the judge's determination. There can have been no prejudice to CN or FN in advancing their defence. Their case would remain the same. The trial process provided the necessary opportunity for their counsel to cross examine the witnesses and to highlight any differences in closing speeches to the jury.
16. In their extensive skeleton arguments/advice and grounds of appeal, Mr Waterman QC and Mr Auty QC seek to establish that commencing the trial on such an imprecise prosecution basis, caused and contributed to consequent erroneous rulings and deficient directions which undermines the safety of the convictions. The oral submissions have realistically conceded that, "on reflection" some of the criticisms they levelled in writing are not applicable and can be "glided over". However, whilst they attempt to argue the appeal by incremental steps, we consider that in doing so the effect is to artificially dissect the court process, rulings and summing up to an unhelpful and inappropriate extent. So, we identify the issues that we need to address in this appeal against conviction to be:
 1. Was the judge wrong to admit evidence of CN and FN's previous convictions for possession of a bladed instrument? If so, was his subsequent direction to the jury satisfactory?
 2. Was the judge wrong to admit the transcript of the covert recording of DW? If so, was his subsequent direction to the jury satisfactory?
 3. Was the judge's direction on accessory liability deficient?

Bad character:

17. In ruling on the Prosecution application to admit CN and FN's previous convictions, the judge referred to the evidence of the pathologist and forensic scientist regarding the wounds inflicted upon EG and said:

Taken together, this evidence is capable of leading to a reasonable inference that more than one knife or knives were used in the attack upon the deceased. DW has admitted that he used a knife, but only to stab the deceased in the left leg in the act of self-defence. There remains, therefore, a real issue as to whether other defendants took knives to the scene which, in a fast moving and violent attack, were used by them or passed to a co-accused for use in stabbing the deceased... this evidence is relevant for the jury to consider whether CN and FN had a knife at the scene which they used in the attack. Although it is properly observed that no witness describes seeing them use a knife or knives, the injuries to the deceased and damage to his clothing will permit the jury to draw a proper inference that more than one knife or knives were used in this attack.

18. The appellants' submissions on this point seek to restrict the judge's parameters to consideration of individual eyewitness accounts, rather than assessing the evidence globally, including that which may reasonably be inferred from the scientific evidence. Looking at the evidence as a whole, including CN and FN's alleged

threatening behaviour towards the deceased two weeks before and the arrival of the three convicted defendants together at the scene and their participation in the violence, we do not consider this to have been “a weak case” which the prosecution sought to “bolster” or otherwise to “prejudice the mind of the jury” by introduction of the previous convictions for possession of a bladed article. The judge’s decision to admit the evidence is well reasoned. We consider he was justified as seeing this as probative of a central issue in the case namely the use of a knife or the provision of a knife to DW.

19. Thereafter the judge’s direction to the jury in relation to the appellants’ previous convictions was measured and correctly identified the issues to which the evidence of propensity, if the jury so found it to be, could be used. Viz:

If you are sure that these convictions do provide evidence of a propensity to carry a knife, then it may lend support to the prosecution’s case.

The prosecution argue that this is relevant to the issue as to whether CN and/or FN produced a knife to threaten the deceased, in the presence of Duane Mullins (“Flash”), about two weeks before the deceased was killed. Also, they argue that it is relevant to the issue of whether they carried a knife at the time of the killing and when they joined in the violence, when the deceased received 17 incised wounds to 12 areas of his body.

The defence for CN and FN say that these convictions do not provide evidence of a propensity or tendency to carry a knife: they are two offences only and both defendants were very young at the time; at the age of 13 and 14 events that happened 4 months and 9 months earlier are significantly more distant in time than for an adult. These defendants also argue that no threats were made to the deceased two weeks earlier and there is no witness who has described seeing either CN or FN with a knife at the time of the killing.

Therefore, the way you should approach this is step by step:

Firstly, decide whether you are sure that the convictions do establish a propensity or tendency in CN and FN to carry a knife or blade in public. If you are sure, then it’s for you to decide whether and to what extent that propensity helps you to decide guilt of the offences you must consider. If you are not sure that CN and/or FN has such a propensity, then put aside the fact of these convictions.

Secondly, it is for you decide how much this evidence assists the case against these two defendants. It is important that you consider it with all the other evidence.

It is also important that you should not convict the defendant solely or mainly on the basis of the previous convictions.

20. We do not agree that “by directing the jury in this way, the judge was “inviting the jury to use the bad character evidence to establish that the applicant had carried a knife on the day of the killing of the deceased.” He made clear that even if the jury decided that the convictions did establish a propensity to carry a knife, it was important to consider with “all the other evidence”. In other words, the jury were being carefully directed that whether either appellant in fact used a knife or passed one to DW was to be determined by considering all the evidence in the case, and was by no means limited to propensity.

Covert recordings:

21. The covert recordings made of the conversations between DW and persons visiting him in custody, was evidence against him. It was not evidence against any other co-accused. We agree with the judge that

“contrary to the submissions made on behalf of CN, the fact that a co-accused may speak about the role played by others in their absence, does not necessarily mean that a fair trial is impossible. Such conflicting evidence in the course of a multi-handed case is inevitable and I am satisfied that no unfairness will be caused to CN or any other defendant, with a proper direction being given to the jury.

...This evidence is admissible against the co-accused, [i.e. DW] and therefore must be heard by the jury. ... None of this evidence can be admissible against CN, FN or any other co-accused.”

22. It is inconceivable that DW should be tried separately from his co-defendants. Some very limited editing may have been possible but, in the circumstances was unnecessary. We reject Mr Waterman QC’s submissions that this evidence should have been regarded as different from the interviews of co-accused by reason of the safeguards and disclosure requirements surrounding the interview procedure. We struggle to understand why he requested disclosure of the materials to which DW’s visitors had access, or to what purpose he would have used them in this trial. DW did not give evidence. The interview record, these covert recordings, or any co-accused statement in whatever form in the absence of the person s/he implicates or accuses is hearsay evidence and inadmissible against them. As with an interview, the questions/comments of others are irrelevant and are not evidence in the case, and only evidence against the interviewee in so far as s/he accepts the proposition made. Mr Waterman QC and Mr Auty QC agree that the judge did give a clear direction that the covert recordings were not evidence against CN or FN. Mr Joyce QC reminds us that the written directions to the jury emphasized the oral directions on this point, by bold print. We assume, as is appropriate, that the jury follows the legal directions of the

judge. It therefore follows that the jury would disregard this evidence save in the case of DW. The defence had no need to ‘deal with it.’

23. We do, however, agree that CN should not have been cross examined by specific reference to the covert recordings. We have been supplied with an agreed note of the discussion between counsel and the judge in the absence of the jury about the expressed intention of Mr Joyce QC to cross examine CN on the transcript. However, the note is unclear on the point. Mr Waterman QC said he objected to any specific reference to the covert recordings, whilst recognising that Mr Joyce QC was at liberty to ask questions derived from the information, albeit bound by the answers. Mr Joyce QC does not agree that this was the outcome of the discussions and maintains that he was entitled to do so.
24. We do not consider it necessary to resolve the difference between Counsel’s recollections on this point. Mr Waterman QC has referred this court to the case of *Lobban [1995] 1 WLR 877*, although it was not available for the trial judge. We agree with Mr Waterman QC that the prosecution should have been prevented from referring to the covert recording in cross examination of CN, lest it suggest any probative value. However, as we remarked in discussion with Mr Waterman QC, having read the note of the cross examination on this issue, CN made no concessions whatsoever as to its accuracy. In the event we do not consider that this error has undermined the fairness of the court process nor the safety of the conviction.

Direction on joint liability:

25. The judge’s direction on joint liability rightly referred to self-defence or defence of another, causation, and intent. Again, in view of the criticisms made, we set out the direction in its relevant terms:

“To be guilty of murder, the prosecution must prove so that you are sure that: 1, the defendant whose case you are considering ... used or participated; 2, in unlawful violence, which; 3, caused the death of the deceased; 4, intending to cause him at least really serious harm. Those are the elements of the offence of murder. ... The prosecution's case is that the violence inflicted upon the deceased was part of a joint attack by them. It started as a fight between DW and the deceased, after DW provoked him into fighting, with the other defendants joining in after the fight started. ... The defendants did not each act in the same way during the course of this incident. Some may have played more of a physical role, while others may not have done. How do you approach this? It is possible for a number of defendants to have acted together to achieve an intended result; not all of them need to do the same thing:

One or more may have used force by means of a knife or knives to stab the deceased.

Others may have used force by joining in the violence, whether by kicking, punching, or otherwise physically taking part,

whilst not possessing a knife but knowing that knives would be used.

Others may have stood to the side intending to encourage the violence and participating in it by encouragement, by cheering on or shouting “get him”, but not joining in with the attack physically, but also knowing that knives would be used.

In law each of these is a different form of participation in the use of force.

You must decide in respect of each defendant whether you are sure that they used force or participated in the attack upon the deceased knowing that knives would be used.

“Unlawful force”

... In respect of the defendant (whose case you are considering), you will have to decide if you are sure that the force used by him, or in which he participated against the deceased, was unlawful.

(A direction as to the meaning of self-defence followed, which is not impugned.)

If you are sure that this was, as the prosecution say, a joint attack by the defendants who (except for AB) each knew that knives would be used against the deceased, then you should look at the whole of the injuries caused to him and decide if you are sure that the defendant (whose case you are considering) participated in unlawful force. You do not have to decide who actually inflicted that wound, nor who actually inflicted any specific wound.

However, if you are not sure that this was a joint attack, but may have been a one on one fight between DW and the deceased in which the other defendants participated, not knowing that knives would be used by another, then you should look at what the defendant (whose case you are considering) actually did. Decide if you are sure that he participated in unlawful force or whether it may have been in lawful self-defence or defence of another.

Therefore, you must consider in respect of each defendant whether you are sure that they did not act lawfully, in defence of themselves or another.

“Caused the death”

Whilst the stabber who inflicted the fatal wound obviously caused the death of the deceased, anyone else who participated and intended to participate in the attack, knowing that knives

would be used, will also have caused the death. This is because, in a joint attack by a number of defendants who know that knives may be used, each of them plays a role in carrying out the attack and causing the death.

“Intending to cause really serious harm”

This means that you must be sure that the defendant (whose case you are considering) intended to cause really serious harm to the deceased, whether by himself, or by acting together with others. You might easily conclude that the 3 deep stab wounds (Incised 1 – 3) were obviously inflicted, intending to cause really serious harm. However, other wounds, taken individually or collectively may not have been inflicted intending really serious harm; they were described as superficial wounds by Professor Ruddy. In this case the intention to cause really serious harm for the offence of Murder, means that it must be proved that the defendant (whose case you are considering) knew that knives would be used by himself or another defendant to cause the injuries.”

26. We do not accept that the summing up in this regard was inadequate. Mr Waterman QC and Mr Auty QC’s arguments proceed on the basis that the eyewitnesses did give “very different” and inconsistent accounts of the scene and dissect the terms of this direction in the summing up, relying upon discrete text and sentences which, we find, are taken out of context or require a particular and unnatural construction. The summing up more than adequately catered for the possibility that the jury may determine this was a spontaneous or premeditated fight. What did matter and was rightly emphasized in the circumstances of this case is that the jury should be sure that CN and FN used or knew that a knife or knives would be used with the intent, at least, to inflict grievous bodily harm, and which was/were used and led to the death of EG. We reject the submission that there was no evidential basis upon which any jury could have been sure that CN and FN knew a knife or knives would be used. Such an assertion ignores the evidence as is indicated above. This direction was neither deficient nor failed to assist the jury. It fully encompasses the principles derived from *R v Jogee* [2017] AC 387 at [8] – [12], as restated in [88] – [98]. The direction was clear. This needed no addition. The “requirements of *R v Brown* [1984] 79 Cr App R 115,” were surplusage. The jury were directed that the prosecution must make them sure that the defendant, whose case they were considering, had acted unlawfully, as a principal, or accessory.

27. The convictions are not unsafe. We dismiss the appeals against conviction.

Appeal against sentence.

28. In sentencing DW, CN and FN, the judge expressed that he was satisfied that this murder was because of territorial and gang-related violence. He was sure that more than one knife had been taken to the scene and used to stab EG; although he could not be sure which of CN and FN had taken the knife, he was sure that both knew that it

was to be used. He could not reach a sure finding as to which of the three inflicted the fatal wounds, although DW appeared to be the protagonist in the events leading up to the start of the fight. Their culpability was substantially reduced because of their age and immaturity. Because of their ages, the starting point for the minimum term was 12 years. The most serious aggravating factor was that knives had been taken to the scene and there had to be a significant increase in the minimum term. Additionally, their antecedent history and the background of territorial drug and gang-related violence were aggravating factors. The judge found that there was a significant degree of planning but that this was largely subsumed in the finding that more than one knife was taken to the scene to challenge and fight the deceased. In terms of mitigation, the judge took into account their youth and background, particularly the difficult childhoods of CN and FN and that both had expressed remorse, and also there was no intention to kill, only to cause grievous bodily harm. Further, although their youth was largely reflected in the lower starting point, there should be additional adjustment because they were significantly younger than 18. CN and FN were 14 and DW was 16 at the time.

29. Although two years younger than DW, we note that CN and FN, now 16, were more heavily convicted. CN had three previous convictions for possessing a bladed article and two convictions of possessing Class A drugs with intent to supply. FN had a previous conviction for robbery and two convictions of possessing a bladed article. DW, now 18, had one previous conviction for possessing an offensive weapon for which he received a referral order.
30. We have reminded ourselves of the principles to be derived from the Overarching Sentencing Guideline for Sentencing Children and Young People, specifically that the seriousness of the offence will be the starting point but that the sentence must be focused on the young person rather than offence focused. We caution ourselves, that rather than make deduction of what would have been the appropriate sentence for an adult committing the offence, which would have been in excess of 25 years, we must take the appropriate starting point in determining the minimum term to be 12 years. (Criminal Justice Act 2003 Sched 21 para 7.)
31. Recognising the judge's advantage of presiding over the trial, we nevertheless come to the conclusion that as monstrous as this crime was and deserving of condign punishment, and albeit that the reductions we make will appear minimal, the sentences were manifestly excessive bearing in mind the age and circumstances of the three appellants. We also consider that Mr Duck QC, who appears on behalf of DW, makes good his submission that the sentence of DW as compared with CN and FN was disproportionately gauged. That is, on the judge's findings that either CN and/or FN had taken a knife to the scene and used it and he could not determine who had inflicted the fatal wound but was satisfied that it was not with the intent to kill, there is nothing to differentiate between the appellants. We take into account that DW started the violence on the 5 September, but he had not been present when CN and FN had threatened EG with a knife two weeks previously and CN and FN were considerably more heavily convicted than he was.
32. We bear in mind the "shocking fact" that the antecedent history of these young appellants should be seen against the background of territorial and gang related violence, but bearing in mind their significant youth and assumed lack of maturity, we consider that the least possible minimum term congruent with their welfare and

necessary rehabilitation should be, in relation to CN and FN 14 years, and in respect of DW 16 years. To that extent these appeals against sentence are allowed.