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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO: 2022 00072/74 B2
NCN [2022] EWCA Crim 1808

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 11 October 2022

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE

MR JUSTICE DOVE

MR JUSTICE BOURNE

REX

v

KYLE NEIL SMITH
BERNIE PETER SMITH

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MR IGNATIUS HUGHES KC appeared on behalf of the Applicant Kyle Smith
MR MARK FENHALLS KC appeared on behalf of the Applicant Bernie Smith
MR JEREMY BENSON KC & MR TIM HARRINGTON appeared on behalf of the Crown

J U D G M E N T
(Approved)

THE VICE-PRESIDENT:

1. This case involves the application of principles relating to joint enterprise. It also provides a reminder of the importance of the time limit for giving notice of an appeal against conviction.
2. Kyle Smith and his younger brother Bernie Smith were convicted of manslaughter following a violent incident in which Craig Robins was stabbed to death by a young man called Gavin Brown. They contend that their convictions are unsafe because the judge declined to direct the jury that Brown's stabbing of Mr Robins was capable of being regarded as an 'overwhelming supervening act' which relegated the conduct of the applicants to history so as to be outside the scope of any joint enterprise.
3. Their applications for extension of time to apply for leave to appeal against conviction have been referred to the full court by the single judge.
4. The incident occurred many years ago, on 30 October 2006. Kyle Smith was then aged 18; Bernie Smith was approaching his 16th birthday. They had attended a large party, at which word spread that an armed man was driving around the area. That man was Mr Robins, who had travelled from his home some miles away and had told various passers-by that he was looking for members of a gang who he believed had damaged his car. He said that he had a knife and a gun. A machete could be seen in the car, either beside him or on his lap.
5. Bernie Smith and others of a similar age were outdoors. Kyle Smith and others went out to join them. Kyle Smith approached the car and asked why Mr Robins was threatening the "kids". Mr Robins said that he would shoot people. Kyle Smith then punched him, and both brothers kicked at Mr Robins either through the car window or an open door. Milligan, a fourth member of the group, opened the passenger door and swung his legs into the car to kick Mr Robins. Brown then grabbed the knife, which Mr Robins had in his possession, and stabbed him with it at least four times.
6. Mr Robins survived but lost a great deal of blood. In consequence of his injuries, he was in a vegetative state for many years.
7. The four accused initially stood trial in 2007, when Mr Robins was still alive. Brown

pleaded guilty to attempted murder. The applicants and Milligan pleaded guilty to violent disorder.

8. Mr Robins died on 18 March 2019, having developed sepsis. Brown was then charged with murder, to which he pleaded guilty. The applicants and Milligan were charged with manslaughter. Milligan pleaded guilty; the applicants contested the trial. There was no issue as to the medical causation of Mr Robins' death.
9. Both applicants gave evidence. Kyle Smith's defence was that he was acting in self-defence and defence of others. His evidence was that he was trying to prevent any violence taking place and to protect his brother. Mr Robins said he had a gun and made a movement which Kyle Smith feared was reaching for the gun. Kyle Smith admitted hitting Mr Robins, but denied having any involvement in Brown's stabbing of Mr Robins. He relied on evidence given by a prosecution witness to the effect that Kyle Smith had pulled Brown away from the car, shouted words of rebuke at him, and then walked away shaking his head.
10. Bernie Smith's defence was that he had not participated in any violence. His evidence was that he did not remember punching or kicking anyone.
11. Both applicants gave evidence to the effect that they had only pleaded guilty to the charge of violent disorder in 2007 in order to get out of custody.
12. In the course of submissions of no case to answer, it was argued on behalf of each applicant that Brown's stabbing of Mr Robins was an overwhelming supervening act which could not have been anticipated by the applicants or anyone else. The judge, Her Honour Judge Montgomery KC, rejected the submissions. Directing herself in accordance with the decision of this court in R v Tas [2019] 1 Cr App R 26; [2018] EWCA Crim 2603, she concluded:

"The court is enjoined to make an assessment of the evidence in the case so as to establish whether the defendants participated in an assault of escalating violence in which some harm to Craig Robins was bound to result or whether the harm that befell Craig Robins was as a result of an act that 'nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his conduct to history'. The submission raised by Mr Hughes QC relies on a distinction without a difference to that test. In my view Gavin Brown's conduct was an escalation of violence and not an 'overwhelming supervening act'. It is worth noting

that even had I concluded that Gavin Brown's conduct was capable of amounting to an 'overwhelming supervening act', whether or not the evidence supported that conclusion would remain a matter for the jury."

13. Later in her ruling the judge said:

"The evidence is not completely consistent, and not every witness entirely credible. However, there is a clear theme to the evidence: The attack on Craig Robins was launched by a group of men who came from the direction of 60 Lomax Road. The defendants were part of the group that approached Craig Robins' vehicle. What happened at the car was short lived and furious, and Craig Robins was badly injured in the course of it. The group quickly dispersed, not to return. In relation to the participation of each of the defendants, there is witness evidence of each issuing blows to Craig Robins and an admission by Kyle Smith to the same."

14. Consistently with her ruling, the judge in her later directions to the jury made no reference to any issue of an overwhelming supervening act. Her declining to do so is, as we have said, challenged in the grounds of appeal. No complaint is now made about any of the judge's other rulings; and it may be noted that her direction about the jury's approach to the 2007 guilty pleas to an offence of violent disorder was more favourable to the applicants than the law required.

15. In submissions to this court, counsel for the two applicants argue that the facts of the present case are unusual, that the case of R v Tas can be distinguished on its facts, and that the judge was error in concluding that Brown's conduct could not be an overwhelming supervening act. They submit that even the evidence adduced by the prosecution suggested that Brown's stabbing had been spontaneous, unforeseeable and contrary to each applicant's wishes, so that the jury would have been entitled to conclude that any unlawful act by either applicant had been relegated to history.

16. The point is made that the evidence at trial was to the effect that Craig Robins had come to completely the wrong area in his apparent search for whoever may have damaged his car. On that basis, it is argued there was no history of ill-will between those at the party and Mr Robins, and therefore no reason to anticipate any violence, still less the use of a weapon. The point is further made that a distinguishing feature of the circumstances here is that the weapon used to inflict injury was in the possession of Mr Robins. There was no evidence suggesting that anyone at the party was carrying any weapon of any form.

17. Those submissions are opposed by the respondent. Counsel for the respondent emphasises that the defence of both applicants involved a denial of using unlawful violence rather than any reliance on an overwhelming supervening act. The point is made that the defence of Kyle Smith (namely, that he was acting in defence of himself or another) was rejected by the jury, who found him to have participated in unlawful violence. The defence of Bernie Smith was that he did not participate at all; but again, the jury rejected that and were sure that he did.
18. It is submitted that if the law is as R v Tas makes clear, that there may be guilt of manslaughter where a weapon is picked up in the course of an attack by one of a number of persons acting as a group, it is all the more readily anticipated that a weapon held by the eventual victim will be turned against him. Such an event, it is submitted, is by no means unusual. The evidence of the applicants shows that when they went outside to the car and took part in the attack on Mr Robins, they knew that he had a machete.
19. As to the applications for an extension of time, counsel for the applicants frankly accept that there was a collective oversight by all defence counsel at trial of the need to give notice of an appeal against conviction within 28 days after conviction even if, as happened in this case, sentencing does not take place until a later date. They emphasise that no blame for this oversight can be attached to the applicants themselves, who should not be prejudiced by it.
20. We are grateful to all counsel, whose written and oral submissions to this court have been, if we may say so, admirably focused and concise.

The Procedural Issue

21. In the experience of this court, legal representatives sometimes do fall into the error of thinking that the time for appealing against conviction does not begin to run until after sentence. We therefore take this opportunity to emphasise that that is not the position. By section 18(2) of the Criminal Appeal Act 1968:

"Notice of appeal, or of application for leave to appeal, shall be given within twenty-eight days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence

was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order."

Rule 39.2 of the Criminal Procedure Rules is to a like effect. It follows that it is incumbent upon the legal representatives of a convicted person to take the necessary action within 28 days after conviction whether or not sentencing has been adjourned.

22. Regrettably, all defence counsel fell into that error in this case. We of course accept the apologies which have been offered, and we accept that the applicants should not be prejudiced by the error.

The Merits of the Grounds of Appeal

23. The judge helpfully provided the jury with a written route to verdict in which she rightly posed a number of questions. It is in our view clear that the jury could properly answer those questions in terms which led to the guilty verdicts which were returned. There was ample eyewitness evidence to support the conclusion that each applicant participated in the attack upon Mr Robins by using force upon him and/or by intentionally assisting or encouraging Brown to do so. In addition, the applicants accepted that they had pleaded guilty in 2007 to a charge which involved the use or threat of unlawful violence; and by section 74 of the Police and Criminal Evidence Act 1984 each of them was to be taken to have committed that offence unless the contrary was proved, the burden being on the defence to prove the contrary on the balance of probabilities.
24. In Kyle Smith's case, the jury were entitled to reject his evidence and to be satisfied that he was not acting in reasonable defence of himself or another. In relation to each applicant, they could properly conclude that they were sure he had participated in an assault which carried a risk of some harm being caused to Mr Robins. Indeed, as the judge noted, no one had suggested that the assault on Mr Robins could have been viewed by any reasonable person as being without risk of harm to him.
25. It follows that the convictions are safe unless it can be said that the judge erred in her decision not to allow the jury to consider whether the stabbing by Brown was an overwhelming supervening act. The core submission on behalf of the applicants is that there was a crucial omission of a final step which the judge should have included in the

route to verdict, it being open to the jury on the evidence to consider whether Brown had acted in a way which neither the applicants nor anyone else could have anticipated.

26. In considering this issue the starting point must be the decision of the Supreme Court in R v Jogee [2017] AC 387; [2016] UKSC 8. The Supreme Court was there concerned with issues relating to joint enterprise. At §33 Lord Hughes and Lord Toulson, with whom the other Justices agreed, referred to the general principle that a person who takes part in an unlawful attack which results in death will be guilty of murder or manslaughter according to whether he had the necessary intention for murder. They added that previous case law had recognised that "... there could be cases where the actual cause of death was not simply an escalation of a fight but 'an overwhelming supervening event'".
27. Later in their judgment Lord Hughes and Lord Toulson returned to those principles, saying at §96-98:

"96. If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm ..., he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: R v Church [1965] 1 QB 59, approved in Director of Public Prosecutions v Newbury [1977] AC 500 and very recently re-affirmed in R v F(J) & E(N) [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective ...

97. The qualification to this (recognised in R v Smith (Wesley), R v Anderson, R v Morris and R v Reid) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

98. This type of case apart, there will normally be no occasion to consider the concept of 'fundamental departure' as derived from R v English. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. ..."

28. The application of these principles to a factual situation which was in many ways similar to the present case was considered by this court in R v Tas. Sir Brian Leveson, President of the Queen's Bench Division, giving the judgment of the court observed at §37 that one of

the effects of Jogee was that knowledge on the part of the secondary party of the weapon which was used by the principal to kill "impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder".

29. Sir Brian went on to say (at §38 and 39) that where there is a joint enterprise to participate in an attack on another, and one of those involved goes further than to inflict "some harm", then "consistent with the principles identified in the authorities and the modern approach to knowledge of a specific weapon, there is no reason to distinguish the case where the victim is kicked to death or killed with a weapon either that is picked up off the ground or brought by the principal to the scene".

30. At §41 Sir Brian said:

"We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency."

31. In the light of those authorities, there is in our judgment no basis on which the judge's ruling in this case can be challenged. The applicants took part in a joint attack in which they used violence. Although none of the attackers had brought any weapon to the scene, the applicants knew when they approached the car that they outnumbered Mr Robins and that he was armed with a machete. It was not beyond the contemplation of the participants in the attack that one of their number would gain control of the machete and use it against Mr Robins. Brown's action in doing so was certainly an escalation of the joint enterprise, but the judge was clearly entitled, and in our view correct, to rule that it was not of such a character as to relegate to history the applicants' actions moments earlier. Her ruling does not even arguably render the convictions unsafe.

32. If we had thought that the ground of appeal was arguable, we would have granted the

necessary extension of time. As it is, no purpose will be served by granting that extension as an appeal could not succeed.

33. The applications for an extension of time and for leave to appeal against conviction accordingly fail and are refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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