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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Neutral Citation Number: [2024] EWCA Crim 291
CASE NOS 202103817/B2 & 202200599/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 1 March 2024

Before:

LORD JUSTICE LEWIS
MR JUSTICE GOOSE
THE RECORDER OF LIVERPOOL
HER HONOUR JUDGE MENARY KC
(Sitting as a Judge of the CACD)

REX
V
SHELDON POMMELL

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DR F GERRY KC appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE LEWIS: On 4 November 2021 in the Crown Court at Woolwich following a retrial, the applicant Sheldon Pommell was convicted of attempted murder. The jury were unable to agree a verdict on a second offence of possession of a firearm with intent to endanger life. On 26 January 2022 the applicant was sentenced to 26 years' imprisonment.
2. The applicant was refused leave by the single judge to appeal against conviction and sentence. He renews his application for leave to appeal both against conviction and sentence today. He also seeks leave to amend his grounds. He seeks leave in addition to adduce fresh evidence in the form of a number of witness statements. He has been represented today by Dr Gerry KC who has very fully developed the original grounds and the amended grounds by reference to a wide range of materials.
3. The facts can be stated shortly. On the evening of 24 August 2019 (a Saturday) a private event was taking place at a nightclub in Rupert Street, Soho, London. The applicant and another man, Richard Palmer, attended the event. They arrived at 00.30 on the morning of Sunday 25 August 2019. A fight broke out. During the course of that fight an individual was stabbed. The event was closed down and everyone was required to leave the venue.
4. Outside the venue Palmer ran down the street and shot the victim twice in the back. Palmer was charged with attempted murder. The prosecution case was that Palmer did not act alone. It was said that Pommell had assisted and encouraged Palmer. That was count 1 on the indictment. The prosecution also alleged that Pommell had had the gun in his possession at some stage during the night. That formed the subject matter of count 2 on the indictment.

5. There had earlier been a trial in relation to this incident. At that earlier trial three men were accused of various charges. First, Pommell and Palmer were charged with attempted murder. Secondly, Pommell and Palmer were charged with possession of a firearm, a .22 Beretta pistol. Thirdly, Pommell, Palmer and a third man, Roberts, were charged with transfer of a prohibited firearm. Palmer had initially pleaded not guilty to all the charges. On 10 October 2020 Palmer changed his plea and pleaded guilty to attempted murder. On 14 January 2021 he pleaded guilty to possession of a firearm with intent to endanger life. At the earlier trial Pommell pleaded not guilty to attempted murder and possession of a firearm. The jury could not reach a verdict at that earlier trial hence the need for a retrial on those two counts.
6. In relation to the third count, transfer of a prohibited weapon, this was an allegation that in the evening of 24 August 2019 Pommell, Palmer and Roberts had been together at a house in Coleridge Drive and Roberts had handed the Beretta pistol to the others. Roberts had never been at the nightclub so any transfer of the gun from him to the other two must have happened before Palmer and Pommell got to the nightclub. All three defendants were acquitted of the count of transfer of the prohibited weapon.
7. Turning to the retrial, which is the subject matter of this application, Pommell was charged with attempted murder and possession of a firearm with intent to endanger life. As indicated, the prosecution case was that Palmer was the shooter, that he did not act alone and Pommell was a secondary party as he encouraged or assisted Palmer in the attempted murder. The prosecution also alleged that Pommell had been in possession of the gun that evening in the nightclub and he (Pommell) had handed it over to Palmer outside the club.

8. The prosecution relied upon a number of strands of evidence. Among them was CCTV footage from inside and outside the nightclub and video footage from dash board cameras from cars in the street. The prosecution said that the footage showed Pommell and Palmer standing by Pommell's car and showed Pommell pointing up the street, Palmer running up the street, stopping, looking back to Pommell, Pommell pointing and then Palmer shooting the victim twice. The prosecution also relied upon Pommell's failure to give evidence at trial as evidence supporting their case.
9. The defence case was that the applicant knew nothing of any planned violence. He did not participate or direct or encourage Palmer to shoot anyone. He was not aware that Palmer had a gun. He relied on a number of witnesses. These included the co-host of the party who was standing by Pommell outside the nightclub later. That person said he did not see the applicant with the gun and that he did not consider the applicant had encouraged Palmer to shoot anyone.
10. Critically, Palmer (the man who admitted shooting the victim) was also called as a witness on Pommell's behalf. He gave evidence that he had shot the victim and that Pommell was not involved. Palmer said that he (Palmer) had bought the gun because he was worried for the safety of his family as he owed money for drugs. He refused to say where or from whom he had obtained the gun. He said the gun was in his bag which was in Pommell's car. He said that he and Pommell had been standing together by the car and they had got into the car at one stage prior to the shooting as he (Palmer) wanted a cannabis grinder. Palmer said that when they were standing by the car subsequently, Pommell was pointing and was saying something like: "Look, there's something going on." Palmer said that he then run up the street, saw a friend of his fall to the ground, was told the friend had been stabbed and so he shot the victim thinking that the victim had

stabbed his friend.

11. Palmer was cross-examined on a number of matters. These included the fact that he had been talking to Pommell by the car, that Pommell was pointing down the street, that Palmer had run down the street looked back at Pommell and then turned and shot the victim. It was put to Palmer that in his defence statement made prior to his change of plea to guilty to attempted murder, Palmer had said that he had taken drugs and alcohol and was paranoid. He had heard men screaming and shouting and so ran towards the noise and shot one of them. It was put to him that he had never said in his defence statement anything about him having shot the victim because he believed erroneously that the victim had stabbed his friend. He had never said anything about being told that his friend had been stabbed. He was also asked about the shooting itself. Palmer said that he had taken the gun from a bag he was carrying and he had shot the victim. He was asked when he loaded the gun. Palmer said that it had been loaded earlier in that evening before he had left the house and he had carried it loaded throughout the evening even though it did not have a safety catch. It was put to him that he was giving evidence now at Pommell's bidding in effect to exonerate Pommell but he effectively denied that.
12. At one stage the defence applied to admit evidence of the fact that Palmer had been acquitted at the first trial of the offence of transferring the gun. The judge refused leave to adduce the evidence of the acquittal.
13. On the attempted murder charge the issues for the jury were identified by the judge as follows:
 1. Were they sure that the applicant Pommell was aware that Palmer had a gun in his possession when he set off up the road?
 2. If they were sure that Pommell knew Palmer had the gun, were they sure that he shared

the intention with Palmer that the gun should be used to kill?

3. Did the applicant encourage or assist Palmer in the carrying out of the joint venture with the intention of killing the victim?

14. In relation to count 2 and possession of a firearm with intention to endanger life, the judge identified the issues for the jury as follows:

1. Did the applicant possess the Beretta pistol?
2. Did he intend at any stage during the night of 24/25 to endanger life?

15. The jury convicted the applicant on count 1, attempted murder, but were unable to reach a verdict on count 2.

16. The applicant was sentenced on 26 January 2022 to 26 years' imprisonment. It was agreed and the judge accepted that the case fell within Category A2 of the Sentencing Council Guidelines for attempted murder. The judge considered that the applicant was the prime mover and the motivator behind the attack. The judge also considered that there was a degree of planning as the gun was brought to the scene. She considered that the applicant did have a gun in his possession in the nightclub during the course of the night, notwithstanding the fact that the jury had been unable to reach a verdict on that matter. The judge noted that the applicant had no previous convictions for violence. The starting point under the recently issued guidelines was 30 years. The judge took into account that various matters had led to the sentencing of Pommell taking place after the introduction of those guidelines, whereas Palmer had been sentenced under earlier guidelines. She considered the sentence she had imposed in Palmer's case where she had taken a starting point of 24 years and then reduced that to reflect the particular mitigation in Palmer's case. She then imposed a sentence on Pommell of 26 years' imprisonment.

17. We deal first with the application for leave to appeal against conviction. We start with consideration of the question of the safety of the conviction. The applicant originally applied for leave to appeal against conviction on two grounds. Leave to appeal was refused by the single judge. The applicant instructed fresh counsel and made a renewed application with additional grounds. The first ground is that the judge was wrong not to allow the defence to adduce details of Palmer's acquittal at the trial. In the first set of grounds, also adopted by Dr Gerry today, it was put on the basis that whilst it was proper to cross-examine Palmer on matters to do with the contents of the defence statement, it was correct and proper in that context to adduce the details of the first trial and the acquittal. In the revised grounds it is put on the basis that if the acquittal at trial of the applicant had been admitted in evidence it would have demonstrated that Palmer must have been believed by the jury.
18. Dr Gerry expanded on those submissions this morning. Her essential submission was that the prosecution had explored the possibility of the transfer of the gun in a number of ways during the trial and she submitted it was therefore relevant for the jury to hear about the acquittal on the transfer of the gun and secondly that it would have undermined the prosecution case and support Mr Pommell's case. On the second way of putting it, it is submitted that had the jury known of the acquittal of Mr Palmer that would or might have boosted his credibility in the eyes of the jury.
19. We see no basis in this ground of appeal. The first point to note is that the question of the acquittal in relation to the transfer of the gun concerned the question solely of whether the gun had been handed over to Pommell and Palmer by Roberts on the evening of 24 August 2019. Although Dr Gerry refers to parts of the summing-up at the first trial which records Mr Pommell's case that he denied having the gun at any stage in the night,

it is clear that the issue at the first trial must have included transfer prior to the nightclub because Mr Roberts never went to the nightclub. The first point to note then is that the acquittal related to the question of transfer from Roberts to Pommell and Palmer which logically is likely to have been at Coleridge Drive and not at a later stage in the evening.

20. Secondly, as a general rule, evidence of an acquittal is not admissible as it is not legally relevant. That is the position here. The fact that the jury in the first trial were not sure that the gun was handed over by Roberts earlier on in the evening of 24 August 2019 is not legally relevant to the events concerning the shooting in the early morning of 25 August 2019.
21. Thirdly, there is no question of the matter going to the credibility of Palmer. He did not give evidence at the first trial and there could have been no possibility of a jury having believed what he said in evidence for the simple reason that he did not give evidence.
22. The second ground of appeal in the original grounds was that the summing-up was unfair. That ground was essentially an assertion that the judge had focused not on what Palmer's evidence was but dealt largely or exclusively with the criticism of it by the prosecution. In the perfected original grounds attention is drawn to three particular comments made by the judge. Dr Gerry in oral submission this morning took us to other passages in which it is submitted that the judge gave an unbalanced and flawed approach which in effect prevented the jury from fairly assessing Palmer's evidence.
23. We have read the entirety of the summing-up. The judge very clearly set out the nature of the applicant's case early on in the summing-up. She said that the applicant through counsel and his witnesses said that he knew nothing of any planned violence. He said he did not participate, far less direct, organise or encourage Palmer or anyone else for that matter to do harm to anyone that night. The judge identified the critical issues in the

case. She then summarised the prosecution evidence. In relation to the fact that the applicant was pointing up the street, she reminded the jury of the evidence that others were also pointing. She dealt with the evidence called on behalf of the applicant, starting with Mr Sinclair and then the Entessania sisters. The judge then dealt with the evidence of Palmer. She explained why the jury had heard evidence of Palmer's criminal convictions. She summarised his evidence-in-chief including how he said that he acquired the gun. She reminded the jury that Palmer had said that Pommell had picked him up and Palmer had not told him that he, Palmer, had a gun. Palmer said the gun was in his bag and that was in the car. She reminded the jury that Palmer's evidence was that he saw his friend in a commotion, that the friend stumbled into the road and someone had told him that the friend had been stabbed. She reminded them of Palmer's evidence that at this point all that Pommell had said to Palmer was: "Look, what's happening." She reminded the jury that his evidence was that he (Palmer) then ran up the street and shot the victim because he believed the victim had stabbed his friend. The judge therefore fully set out Palmer's version of events. She explained that the thrust of the cross-examination was about what they, the jury, had to decide, that is what happened in Rupert Street and the nightclub. She itemised some of those issues: Why had Palmer chased anyone? Why did he get close enough to ensure that he would hit somebody? And why was his account now different from the account that he had initially given. The judge referred to other matters with which the cross-examination had been concerned.

24. We have read the passages about which particular complaint is made. We are satisfied that there is no justifiable basis for criticising the fairness of the summing-up. Both the prosecution case and the defence case were put to the jury. It was made clear that it was for them to decide what they were sure happened that night. The evidence of Palmer was

fairly summarised and the jury were left to consider the truthfulness of his account. This ground of appeal is not arguable.

25. We turn then to the new further grounds of appeal. It is said that the judge failed accurately to direct the jury and in particular failed to direct them on the law of commands and the need for a causative link, as Dr Gerry put it, between the order or the instruction that Pommell was alleged to have given and the actions of Palmer in shooting the victim.
26. We have had some difficulty in understanding this ground of appeal. We have summarised the issues that the judge set out already. They were that the jury had to be sure that the applicant, Pommell, was aware that Palmer had a gun, that they had to be sure that Pommell the applicant shared the intention with Palmer that the gun should be used to kill and that they had to be sure that the applicant encouraged or assisted Palmer in the carrying out of the joint venture. We note that the directions were agreed by the prosecution and the defence counsel at trial. The applicant's trial counsel has been asked for his comments on this matter and he confirms that the defence did not consider the directions to be deficient. Dr Gerry this morning put her case on this matter essentially in one of two ways. First, she submitted that in the way that she analysed the way the case had been put by the prosecution it was a critical part of the case that Pommell transferred the gun to Palmer and instructed or ordered Palmer to go and shoot the victim. The first way in which we understood Dr Gerry to put the case was that, given that factual matrix, the directions about encouraging and assisting were insufficient and there had to be directions tailored to Dr Gerry analysis of the case, that is what she described as the issues of command and causation. The second way that Dr Gerry put the case was that the directions the judge gave were simply incorrect as a matter of law. The thrust of that

submission appeared to be that on analysis the assistance and encouragement in this case did amount to commanding or procuring the murder and therefore the judge should, as a matter of law, have given the directions required as if the indictment had included a charge of procuring.

27. We have read the directions given by the judge. We do not accept the submissions of Dr Gerry. We do not see that the directions were in any way deficient. They made it clear that the question was whether the jury were sure that the applicant Pommell knew that Palmer had a gun, that Pommell intended the gun be used to kill someone and that Pommell encouraged or assisted Palmer in that enterprise. The case was not that the applicant procured the commission of the offence, it is that he participated in it with the necessary intention by encouraging or assisting the commission of the offence. This ground of appeal is not arguable.
28. Next it is said that the conviction is against the weight of the evidence and that the outcomes are inconsistent. We do not see any realistic basis for this argument. The verdicts are in fact perfectly consistent. The jury were sure that the applicant encouraged or assisted in the attempted murder by Palmer of the victim. They were not sure that Pommell possessed the gun with intent to endanger life. The verdict is not against the weight of the evidence.
29. For those reasons, we do not see that any of the grounds of appeal against conviction are arguable. For completeness we note that we have read the new evidence which the applicant seeks to adduce. We have heard submissions from Dr Gerry on the new evidence. We are not satisfied that it satisfies the criteria under section 23 of the Criminal Appeal Act 1968 and we would not admit it. The new evidence does not in any way event cast any doubt on the safety of the conviction.

30. Turning to sentence, the applicant was convicted of an offence of attempted murder. The judge correctly categorised this as a Category A2 case under the sentencing guidelines applicable at the time of the sentence. Those guidelines provided for a starting point of 30 years' imprisonment and a range of 25 to 35 years' imprisonment. The judge considered that the applicant was the prime mover in this crime. Palmer fired the gun and shot the victim. But the judge considered Pommell was the main motivator behind the attempted murder. We see no inconsistency with that conclusion and the finding that he was a facilitator in the sense of assisting or encouraging Palmer. It is perfectly possible to assist and encourage but in reality to be the main motivator behind the attempted murder. Having conducted the trial, the judge was well-placed to assess the relevant culpability of Palmer and Pommell. She was well-placed to assess the fact that the prime mover in this attempted killing of a man was the applicant Pommell.
31. We doubt that the judge was entitled to take into account her view that the applicant had a gun in the nightclub given that the jury had not convicted him of that offence and had been unable to reach a verdict on that offence. We do not think it was helpful of the judge to speculate as to why the jury were unable to reach a verdict on count 2. But having said that, the question for this court is whether the sentence is manifestly excessive. We do not consider that it was even arguably manifestly excessive. It was well within the guidelines. It was below the starting point. There was no inconsistency with Palmer. The starting point in his case was 24 years before the particular mitigation in his case was taken into account, rather than 26 years, and although he did the actual shooting the judge was satisfied that the applicant was the prime mover behind the attempted murder. A sentence of 26 years is well within the appropriate sentencing range and is a just and proportionate sentence for this offence of attempted murder. We refuse

permission to appeal against sentence.

32. For those reasons the applications for leave to adduce fresh evidence and the applications for leave to appeal against conviction and sentence are refused.

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

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