Regina v Zahid Hussain

[2018] EWCA Crim 2673

Before: The President of the Queen's Bench Division (Sir Brian Leveson) Mr Justice Phillips Sir John Saunders

Thursday, 11 October 2018

Representation

Mr R Atkins QC appeared on behalf of the Applicant.

Judgment

The President:

1 On 25 May 2017 in the Crown Court, at Birmingham before Sweeney J and a jury, this applicant, who is now 30 years of age, was convicted of the offence of making preparation for terrorist acts contrary to section 5(1)(a) of the Terrorism Act 2006 .

2 On 9 November 2017 he was sentenced to imprisonment for life with a minimum term of 15 years being specified pursuant to the provisions of section 269(2) of the Criminal Justice Act 2003 . A hospital and limitation direction under section 45A of the Mental Health Act 1983 , such that the applicant was removed and detained at the Tamarind Centre and subject to special restrictions set out in section 41 of that Act, was also made, as was a forfeiture order.

3 He now seeks to renew his application for leave to appeal against conviction and sentence following refusal by the single judge.

4 Having regard to the nature of the case, unusually, it is appropriate to set out the facts in rather greater detail than would be necessary on a renewed application of this sort.

5 The applicant lived at his family home in Birmingham. On 9 August 2015 he was seen by two local residents to be behaving suspiciously, as a result of which the police were called. Officers approached him when he attempted to run inside his house. From behind a wall on which he was sitting the police recovered a crowbar and a knife. He was arrested and from his person were seized pieces of paper which contained, among other things, a list of chemicals in his handwriting and a map the Alum Rock area, along with a green fairy light with protruding wires.

6 A search was conducted of his home and amongst the items recovered from his

bedroom were bottles of hydrogen peroxide; numerous fairy lights, some modified; a modified wireless doorbell; a modified mobile phone; five modified empty pen cases; and a pressure cooker packed with a white powder and shrapnel.

7 The map found on the applicant included a cul-de-sac which bordered the London to Birmingham railway line. The location of one manhole cover was marked on the map. The occupiers of another premises in that road reported to the police there is a second manhole cover in his garden had been disturbed. CCTV footage from the address showed that on three occasions the applicant had entered the garden at that address in the early hours of the morning and on the third occasion was seen to be lifting the manhole cover and entering the drain beneath.

8 A book on guerilla warfare was also recovered from his home address marked at a section dealing with attacks on railway lines. Other books on guerilla warfare were also recovered.

9 A list of chemicals seized from the applicant contained a recipe involving three chemicals which, when combined, produced a primary explosive known as HMTD. Evidence showed that the applicant had researched and purchased each of these three chemicals. The hydrogen peroxide that had been purchased had been further heat-treated so as to increase its concentration to nearer that which was required by the recipe. The quantities set out in the recipe would have produced a significant quantity of HMTD. A further column of ingredients contained on the paper appeared to contain the constituent parts for the manufacture of two further explosives, TATP and ANFO.

10 The pressure cooker at the address was found to contain 3.8 kilograms of powder which consisted of urea mixed with an accelerant such as diesel. Although urea could be used in the manufacture of explosives, its combination with a fuel as in the present case would not have formed an explosive. Urea could be used in coolpacks, of which the applicant had purchased a number during 2015. Coolpacks, however, sometimes contain ammonium nitrate, that being a substance that could be mixed with diesel to form a viable explosive. It was this combination that featured in the recipe for ANFO contained on the list seized from the applicant. The cooker also contained a total of 1.6 kilograms of metal objects such as screws and nails.

11 Four fairy lights found at the applicant's house had been modified in such a way that the surrounding casing had been filled with a mixture of chlorate-based match-head substance and sugar which formed a low explosive which would ignite if exposed to a heated element. The modified fairy lights were intact and constituted viable explosive igniters. Sufficient match-head or sugar composition was found in a separate box to create in excess of 60 igniters. One of these igniters could have been connected to the modified wireless doorbell to create a viable means of remotely initiating the igniter which could in turn be used to

initiate certain types of explosive.

12 The computer seized from the applicant showed numerous Internet searches for materials that could be used in bomb making. There were purchases of books about warfare and visits to radical Islamic websites, to one of which he had made small donations several years earlier. Police divided the almost 2,000 significant images found on the applicant's future into three categories. These were ISIS related; injuries from Middle East conflicts; and other terrorist related imagery. There were also 1,851 occurrences of the word "Isdarat" on his computer history, this being an Islamic extremist television website.

13 Medical records showed that in 2015 the applicant wrote to his general practitioner, complaining of feelings of helplessness and uncontrollable anger. He stated that it had been a longstanding problem which he could no longer cope with. He attended an appointment a few days later and it was noted that he complained of a low mood and hearing voices. He was given an urgent referral to a mental health team but he did not attend that appointment.

14 In interview the applicant admitted to making the cooker pressure device a month or two prior to his arrest. He believed that it contained an ANFO explosive and was capable of causing "some devastation". He had not intended to detonate the bomb but instead was going to sell it to the Sun newspaper. It was not intended for killing British civilians or soldiers. He said that the modified fairy lights and doorbell were experiments. He had intended to put a fake detonator into the pressure cooker when selling it to the newspaper.

15 In regards to his mental state, he said he was on medication. He had become increasingly paranoid that ISIS, the UK Government and the CIA were after him. This paranoia had led to his strange behaviour. He had become "bedroom radicalised" watching material on the Internet, but did not support Islamic extremist groups. Since his early 20s he had suffered from anxiety, depression and paranoid schizophrenia which he had self-diagnosed by researching symptoms on the Internet.

16 Following the interview, the police contacted the Sun newspaper which denied that it had had any contact from the applicant regarding a pressure cooker bomb. On 26 June 2015 the paper had run a story about another man who had unwittingly attempted to recruit an undercover reporter in a plan to use a pressure cooker bomb in an attack on an armed forces parade. The computer evidence showed that the applicant had an association with that man, Junaid Hussain, through his Twitter account.

17 The prosecution case was that the evidence, in particular that found upon examination of the applicant's desktop computer, showed that he had been radicalised. He had the intention ultimately to commit an act or acts of terrorism. The preparation towards that end included acquiring viable recipes and ingredients for making high explosives; making a substantial pressure cooker bomb

which he clearly believed contained ANFO, a bomb that was not offered for sale to the Sun; making four viable improvised explosive igniters; and modifying a phone and a doorbell for use as a remote detonator.

18 The defence case was that aspects of the evidence, including his seeking help from his GP in 2015, were at odds with the applicant being a terrorist. His strange behaviour could be explained by him believing himself to be acting upon subliminal messages. There was nothing to suggest any specific target such as a railway line. An interest in Syria and ISIS did not mean the applicant was a terrorist and the jury should be cautious about reading too much into what he said in interview about becoming radicalised. It was not possible to say who had viewed some of the website material. There was no evidence that the applicant had ever tried to make any of the primary high explosives. None of the books in his possession was banned. Thus the Crown had failed to prove its case.

19 The applicant did not himself give evidence.

20 This trial started on 24 April 2017, and on Monday 22 May the parties' closing speeches were completed and the trial adjourned to Wednesday 24 May, due to the unavailability of a juror on the Tuesday. On the night of 22 May, however, the bombing of the Manchester Arena occurred.

21 Whilst the applicant himself had instructed his legal team not to seek to discharge the jury, the defence nevertheless invited the judge to consider whether a fair trial was still possible in the light of the immediacy of the Manchester bombing, its consequences, the press reports that a bomb with shrapnel in it had been used, and the similarities with what the prosecution asserted was the applicant's intention in this case. A number of authorities were relied upon in the course of that submission, including *R v Abu Hamza [2006] EWCA 2918; [2007] 1 Cr App R 27* .

22 The judge ruled that it was his duty to ensure the applicant had a fair trial before an impartial jury. He had had the great advantage of observing the jury throughout the trial and seeing their obvious understanding of the importance of conducting themselves as impartial judges of the facts. To be absolutely sure, it had been agreed with counsel that two questions should be asked of the jury for each of them to answer in private and in writing after the judge had addressed them. These questions were:

> "1. You will all be aware of what happened in Manchester on Monday night. Have any of you any connection with those involved or affected by the incident? If so, please could you write down the nature of the connection.
>
> "2. You have all made an oath or affirmation to try the defendant faithfully and give a true verdict according to the evidence. Do any of you now feel, in the light of the events in Manchester, that you are unable to

abide by your oath or affirmation?"

23 Ten jurors answered "no" to both questions. Two elaborated to some extent, one in particular as to the first and the other as to the second. Both indicated in clear terms they were able to abide by their oath or affirmation and counsel, having seen their answers, agreed that they did not give rise to any concern and no further argument was addressed in relation to them.

24 Therefore, against the background of the judge's own experience over the years, of his observation of these particular jurors over a number of weeks, the answer to the questions, and in the light of the judge's confidence that they would be reinforced by the strong directions that he intended to give, the firm conclusion was reached that it would still be possible for the applicant to have a fair trial. He concluded that there was no doubt whatsoever that that would be the case. Thus the application to discharge the jury was refused.

25 It is worth including in this judgment the text of the judge's direction in this regard:

> "You will reach your decisions based only on the evidence that you have heard, and any common sense conclusions that you think right to draw from it. To state the obvious neither media nor Internet reporting nor speculation can have any part to play in your deliberations. Nor can emotion. Given recent events in Manchester, that is a vitally important direction which each of you must ensure that all of you follow through your deliberations. Nobody who's read or heard about the events in Manchester can be anything other than shocked, however they must play no part in your deliberations. They have nothing to do with the defendant or his case. They must be put out of your minds when deliberating and must not be allowed to have any influence or bearing on your verdict or verdicts in any way. I underline with all the emphasis that I possibly can, that what is required of you is a cool, calm, careful and dispassionate consideration of the evidence, and the courage to return a true verdict or verdicts whatever the consequences may be, anything less than that would be an abdication of your responsibilities."

26 The primary ground of appeal is that the judge erred in refusing to discharge the jury following the terrorist bombing in Manchester. It was argued that the enormity of that effect must have an effect on the jury, and thus the safest course of action would be to discharge the jury and order a retrial some months thereafter.

27 In refusing leave to appeal, the single judge made the further point that there was no suggested connection between this applicant's case and the Manchester

atrocity, and there was no evidence, despite the care taken by the judge, that the jury was improperly influenced.

28 We have no hesitation in concluding that the single judge was correct to reject this ground of appeal. Sweeney J conducted the examination of the issue with immaculate care and his attention to the risk cannot be questioned in any way. His approach to the jury was itself beyond reproach or challenge. It cannot be correct that the occurrence in some other part of the United Kingdom of a terrorist atrocity should, of itself, bring to an end a trial for terrorism in some other place. If it did so, it would be to encourage terrorism during the course of trials that take place. There is nothing in this ground of appeal and to that extent this application is refused.

29 Since the refusal the applicant has advanced a number of additional grounds of appeal relating to arguments and evidence not relied upon at trial. He also challenges the conduct of his solicitors. He waived privilege and we have had the benefit of a detailed response to his allegations from those solicitors.

30 To such extent as the applicant seeks to advance fresh evidence, there is no reasonable explanation for his failure to have adduced that evidence at trial. It is in any event contrary to admissions made in interview that he had become bedroom radicalised. The other grounds are the subject of response by the Crown in submissions dated 19 September 2018 which we find compelling.

31 In relation to the applicant's denial that he was following, contacting or retweeting messages from Junaid Hussain, the Crown relied on a piece of paper found in his possession on arrest which contained the message details of a number of isolated ISIS related individuals, including Junaid Hussain. There was evidence of moderate support from a handwriting expert that the note was written by the applicant. It could not be said, even if the applicant was right about his present submission, that it undermines the safety of the conviction. Similarly, in relation to his use of his computer and who had visited Isdarat television.

32 In the circumstances, without condescending to each detail, having considered in depth what the applicant now asserts, the response from the Crown and his solicitors, there is no merit in any of these grounds. Thus the application to appeal against conviction is refused.

33 The applicant also seeks leave to appeal against sentence. When he came to sentence, the learned judge outlined the facts and concluded that, psychiatric issues aside, culpability in the applicant's case was extremely high as more than one explosion was clearly intended and the harm intended was loss of life or serious injury.

34 The starting point therefore, in accordance with the authorities, and in particular the decision in *Kahar [2016] EWCA Crim 568; [2016] 1 WLR 3156* , was one of life imprisonment. The applicant, said the judge, was clearly deeply

radicalised and over a period of at least nine months was strongly committed to what he was doing, aspects of which were quite sophisticated, albeit that the bomb made was actually inert contrary to his intentions. It was common ground that the offending was not a precise fit for any of the levels of offending identified in *Kahar* . In view of the findings of fact, however, the conclusion had been reached that he was a dangerous offender and that his offence was on the borderline between the bottom of level 3 and the top of level 4 identified in that authority.

35 The learned judge then went on to deal with the psychiatric issues and summarised the findings of the psychiatric evidence from Drs Maganty, Memon, Joseph and Cumming, the last of which was obtained following his conviction.

36 He summarised the matters that the court had taken into consideration as set out in the authorities and concluded that, by reference to all of the evidence, there was some doubt as to the genuineness of the applicant's mental illness such that, with the judge not being sure on that issue, he would proceed on the basis that he, the applicant, was suffering from paranoid schizophrenia at the time of the offence and continued to do so.

37 It was, however, certain said the judge, that his offending was not wholly attributable to that disorder, and the principal driver for his offending was voluntary bedroom radicalisation. He went on that even if the offence was in significant part attributable to the disorder, he was certain that against the overall background the disorder could be appropriately dealt with by a direction under section 45A of the Mental Health Act 1983 .

38 There was no sound reason for departing from the usual course of imposing a punitive sentence. The judge concluded that he was a dangerous offender and, in view of the level of the danger that he posed and the impossibility of predicting when it would come to an end, it was an appropriate case in which to impose a sentence of life imprisonment with a minimum term of 15 years.

39 The grounds of appeal argue that the judge, having sought the assistance of an independent court-appointed psychiatrist, Dr Cummings, should have followed his recommendation to impose a hospital order with restriction which concurred with recommendations of the two defence-appointed psychiatrists, but not that of Dr Joseph, whom the Crown sought to instruct but whom the applicant refused to see.

40 It is argued that an order under section 37 and 41 of the Mental Health Act 1983 would have offered greater protection to the public following the applicant's release, given that it would allow for his report to hospital for treatment in the event of a relapse or increased risk.

41 Furthermore, it was suggested that, given the judge's finding that the case was on the borderline between levels 3 and 4 on the *Kahar* scale, it was not necessary to impose a life sentence and a minimum term of 15 years fell

squarely within level 3 and was manifestly excessive.

42 In refusing leave to appeal against sentence the single judge, Cheema-Grubb J, acknowledged that this was not a straightforward sentencing exercise and concluded that the judge had a wealth of psychiatric opinion available to him, but was not bound by any particular psychiatrist's recommendation. He had heard the trial and she noted it was not disputed that a section 45A hospital limitations direction was available. She concluded that his determination that the applicant was a dangerous offender was unimpeachable.

43 We have considered these ground of appeal and the psychiatric evidence which is available in the papers in its entirety. We have no doubt that the learned judge had well in mind the guidance in *Kahar* , not least because he, as was the single judge, were parties to the court which reached the decisions explained in that case as to the guidelines in terrorism.

44 We have no hesitation in concluding that the learned judge's approach was neither wrong in principle nor manifestly excessive. This application is also refused.