

Regina v Shuayb Mahmoud

[2019] EWCA Crim 667

Before: The Vice President of the Court of Appeal Criminal Division (Lady Justice Hallett DBE) Mrs Justice Andrews DBE and Mrs Justice Russell DBE

Wednesday 3rd April 2019

Representation

Mr J Sidhu appeared on behalf of the Appellant.
Ms J Bickerstaff QC and Mr M Hardy appeared on behalf of the Crown.

Judgment

Wednesday 3rd April 2019 Lady Justice Hallett:

Background

1 The appellant appeared for trial accused of murder with four co-accused, Fisher-Dixon, Gray, Stephens and Mohamed. The trial judge, Edis J, granted an application for the appellant to be assisted by an intermediary throughout the 23 day trial. He ran a cut-throat defence with two of his four co-accused. All five accused were convicted of murder on 25th June 2018 in the Crown Court at St Albans.

2 The appellant appeals against conviction by leave of the single judge. He has leave on grounds 1 and 2 only. Ground 1 relates to a challenge advanced by counsel for Gray, Mr Rouse QC, on the appellant's need for an intermediary, and ground 2 relates to the judge's directions on the use of an intermediary in the light of that challenge.

The Facts

3 In summary, the case against the appellant was that he had lent himself to a pre-planned ambush of Jacob Abraham in an alley in the area of Waltham Cross. The victim was stabbed in the legs, probably by the use of at least two knives, one from the front and one from behind. He had no defensive injuries.

4 The prosecution case, as advanced by Ms Bickerstaff QC, was that all five defendants were present and intended to cause at least really serious harm. Fisher-Dixon was said to be responsible for luring the victim to the location, but the Crown were unable to say who was actually responsible for the stabbing and who participated as secondary parties, supporting and encouraging the attack.

5 The Crown relied upon CCTV footage and an analysis of telephone use to connect the accused to the murder. Images were recovered from Fisher-Dixon's phone depicting various accused holding weapons, wearing face masks and making hand gestures. One image featured both the appellant and Gray making what Ms Bickerstaff asserted were pistol gestures. A phone recovered from the appellant's sister contained a photograph of the appellant and another male making the symbol for the Albany Park Gang. Police officers gave evidence about gun culture in the area, including the assertion that Dem Africans and Get Money Gang were the two main rival gangs in the area. The Albany Park Gang was a subset of the latter gang.

6 The appellant was arrested on 19th December 2017. Save for a broken lock-knife, nothing of evidential significance was found at his home.

7 In interview the appellant, who had a solicitor and appropriate adult present, made no comment in response to all questions. At the conclusion of the interviews, he produced a prepared statement in which he stated: "I did not stab anyone."

8 The defence case was that, although he admitted non-accidental presence, the appellant played no role in the killing and had no prior knowledge that others were armed with knives. The appellant and Fisher-Dixon alleged that the co-accused, Gray and Stephens, were solely responsible for the stabbing.

9 Much bad character evidence was admitted at the behest of various accused. It largely related to incidents of violence at school. The appellant had no previous convictions or cautions, but he had been excluded from school for allegedly attacking a teacher. Gray, Stephens and Mohamed each had a previous conviction for possession of a knife in 2017. All five accused were under the age of 16 at the time of the offence.

The Use of an Intermediary

10 On the first day of the trial, Mr Jo Sidhu QC, who appeared for the appellant, made an application that the appellant be assisted by an intermediary. The application was supported by an intermediary report from Jemma Wayman, dated 22nd February 2018. She reported that the appellant: (1) needed extra time to process lengthy sentences and would require additional support to read and write; (2) had a limited attention span; (3) had significantly limited under-

standing of the court process and legal terminology; and (4) would need an intermediary to explain the trial process, to request regular breaks, to summarise arguments, to offer support with any written materials present and to ensure that he was granted extra time to process information. Her recommendations for questioning included avoiding tagged/suggestive questions and keeping sentences short and simple. She was of the opinion that in this way any tendency the appellant may have to be suggestible would be avoided.

11 No objection was made to Mr Sidhu's application and the judge granted the use of an intermediary throughout the entirety of the trial. A grounds rule hearing was held to establish the terms of the intermediary's role and the nature of the questioning.

12 The judge directed the jury on the use of an intermediary in accordance with the standard directions provided by the Judicial College.

13 When counsel for Gray (Mr Rouse) cross-examined the appellant, he acknowledged the ground rules and that he was bound by them as to the formulation and content of the questions he could ask. Nonetheless, he repeatedly breached the rules by asking lengthy, leading or tagged questions, which prompted intervention from the intermediary. Mr Sidhu and Ms Bickerstaff have helpfully provided an agreed list of fifteen such instances where inappropriate questions were asked. However, it is also right to note that when the intermediary did intervene, Mr Rouse re-formulated his question appropriately.

14 Nonetheless, given the nature of the questioning both of the appellant and the co-accused, Mr Sidhu expressed his concern to the trial judge about Mr Rouse's approach. In his questions Mr Rouse appeared to challenge the need for an intermediary for the appellant. The judge accepted that, in light of those questions, a further direction about the use of an intermediary was required. He explained how he intended to direct the jury. First, the jury had to decide the case on the evidence and the presence of an intermediary was not part of the evidence. Second, there was some evidence about the appellant's abilities from his friends, and the jury be able to form their own inexperienced impression of him. Third, the jury had to ignore the fact that there was an intermediary in the case. Fourth, they should neither conclude that the appellant was a person who suffered from communication difficulties because there was an intermediary, nor that he was a person trying to manipulate the court process. The judge informed Mr Rouse that he was entitled to comment on the appellant's intellectual ability, but not entitled to rely on the presence of the intermediary, save to the limited extent that he had not been able to test the appellant's evidence in quite the same robust way as other evidence was tested.

15 In his closing speech, Mr Rouse reminded the jury that Fisher-Dixon had given evidence that the appellant was the 'smartest' of the group, but that he had nevertheless been given an intermediary "by his lawyers through the court". Mr Rouse said that the appellant thereby had the advantage that he could avoid

tough questions. He conceded that the appellant was entitled to apply for an intermediary and that it was the court that had granted the intermediary, but he commented that "it would be a little intemperate for a judge to refuse it where a report had been written for the defence" justifying the grant of one. Mr Rouse asserted that the appellant did not seem to need an intermediary when conducting his school exclusion appeal, or in police interview, or at any other time, save when he was being cross-examined in court, when counsel could be stopped in their questions. He admitted that there was no secret as to the scepticism held by those acting for Gray for the need for an intermediary. He described the appellant as "cunning", "streetwise" and "devious". He also observed that the jury had seen no report to suggest that the appellant had any major issues that needed the level of support he had been given. He commented that the jury may think, having seen the appellant and heard from the others, that the appellant did not need the support of an intermediary in the case.

16 Given that content, not surprisingly, during a break in the speech, Mr Sidhu again raised his concerns about Mr Rouse's comments. Mr Rouse stated that he had tried to stay within the parameters of the guidance given by the judge as to the role of the intermediary. He apologised if he had strayed beyond them, but he stood his ground in terms of criticising the presence of the intermediary. The judge confirmed with Mr Rouse that he intended to say no more about the intermediary and stated that he would give a direction about the intermediary in due course.

17 However, Mr Rouse did return to the issue. He told the jury that it was the court that considered an application for an intermediary; that it was the court that decided whether it was appropriate to grant one; that that judgment was unimpeachable; and that the decision to grant an intermediary in the present case was not criticised. The presence of the intermediary in court was not evidence and it was irrelevant that the intermediary was there. Nonetheless, Mr Rouse then went on to invite the jury to consider whether, having seen the appellant and heard from other accused about him, he was someone who needed an intermediary, like, for example, a 6 year old child or someone who suffered from a form of mental illness.

18 Nothing was said at that time, but in his summing-up the judge gave the jury the direction that he had indicated and to which we shall return at paragraph 21.

The Grounds of Appeal

19 Ground 1 asserts that the repeated undermining of the need for an intermediary by co-defending counsel unduly impacted on the fairness of the appellant's right to a fair trial. Mr Sidhu took us through the Criminal Procedure Rules and the Criminal Practice Direction which provide for the proper procedure to be followed in appointing an intermediary and observed that it was followed to the

letter. Thereafter, the judge properly kept his decision under review as the trial progressed. At no point during the evidence did the judge indicate that the intermediary was no longer required. Mr Sidhu complained that, despite those facts, Mr Rouse sought actively and repeatedly to undermine the need for the use of the intermediary and linked it to the level of the appellant's intelligence. Mr Rouse asked each of the accused questions about the appellant being the 'brightest' of the group and elicited from them the fact that they had not seen him use the intermediary during the trial. His purported justification was that they knew him as a friend, that they had attended school with him, and that they could therefore comment on his intellectual capacity. Mr Sidhu contended that, on the contrary, the four co-accused were wholly unqualified to express an opinion about the appellant's intellectual functioning and certainly not in a way that would legitimately challenge the validity of the use of the intermediary at trial. They were no experts and their opinions were irrelevant. In fact, no expert evidence as to the appellant's intellectual functioning was called.

20 The clear implication of Mr Rouse's questioning and comments was to suggest that the appellant had acquired the intermediary in order to create a smokescreen and a shield for himself during cross-examination, and deliberately to misrepresent himself before the jury. Mr Rouse's comments and questions would have suggested to the jury that he was trying to deflect difficult questions by restricting the form in which they could be asked. Yet, Mr Sidhu properly observed, the appellant was not responsible for commissioning the intermediary report or for the judge's decision. Accordingly, it was Mr Sidhu's submission that the implication that the appellant had manipulated the proceedings by obtaining unwarranted support from an intermediary was entirely unfounded and misleading. In the context of a cut-throat defence, it was positively dangerous. Combined with the questions themselves, it would have undermined the principal issue that the jury had to determine in the appellant's case, namely, his credibility and his explanation for being present at the scene.

Ground 2

Inadequacy of the Judge's Directions to the Jury about the Intermediary

21 In the course of his summing-up, the judge made the following observations about the involvement of the intermediary for the appellant:

"If you think that you need to make any finding at all about whether Shyuayb Mahomud is less intellectually capable than his co-defendants, then you must do this on the basis of the evidence. That comes from your assessment of him, having seen him over a period of time in the witness box, and from the co-defendants who were asked by Mr Rouse for their impression of his abilities from their perspective, as his friend,

and in some cases classmate.

The fact that he had an intermediary is not evidence. It is simply irrelevant. An application can be made to the judge for an intermediary to assist a defendant who is said to require such assistance in communication during the hearing. You have not seen the evidence on which that application was based. There is nothing improper in such an application being made and granted. You observed the whole process of cross-examination of all five defendants. It has been suggested to you that the interventions of the intermediary in Shuayb Mahomud's case meant that he was protected from some questioning which might otherwise have been asked. You saw and heard what happened and are well placed to assess that submission. Remember always that you try the case on the evidence."

22 Mr Sidhu sought to persuade us that these directions were simply not strong enough in light of the damage done to the appellant's case by Mr Rouse. First, they left the jury with the wrong impression that they could revisit the judge's decision to grant an intermediary. Second, they provided legitimacy to the improper questioning of the co-accused that elicited what Mr Sidhu called the "inadmissible opinion evidence" about the appellant's intelligence. This was all done in the context of why the appellant needed the assistance of an intermediary. Third, in dealing with the appropriateness of the intermediary's interventions during the appellant's evidence, the judge invited the jury to assess for themselves the submission made by Mr Rouse that the intermediary's interventions unfairly protected him. Yet, Mr Sidhu observed – as we accept – that the intermediary acted properly throughout and there was no basis for Mr Rouse's submission. Finally, the attack on the need for an intermediary, as pursued by Mr Rouse, had implied some form of manipulation on the part of the proceedings. This was a wholly unjustified and improper criticism of the appellant and his lawyers, which required a robust response from the judge. None was given.

Ground 3

Finding of the lock knife

23 In his application for leave and written submissions, Mr Sidhu intended to argue a third ground: that the admission of the finding of the lock-knife at the behest of the Crown under section 101(d) of the Criminal Justice Act 2003 was wrong and unduly prejudiced the appellant. However, during the course of submissions this morning, the court raised with him the fact that the application made by Ms Bickerstaff had been supported by Mr Rouse. He would have been

entitled to have the evidence adduced as of right under section 101(g) . Mr Sidhu conceded the point and did not pursue it.

Conclusions

24 We shall take grounds 1 and 2 together. First, it is important to note the role of an intermediary. A trial judge will allow the instruction of an intermediary to a witness or a defendant to assist them in communicating and participating in the trial. The role of an intermediary is not to provide expert or professional opinion on the level of cognitive skills or intellectual functioning of a defendant or witness. Ms Wayman rightly declined to assess the appellant's IQ and "underlying emotional issues", as his solicitors had invited her to do, because they were "beyond her assessment skills". If evidence of cognitive skills or intellectual functioning is both relevant and admissible, it should come from an expert suitably qualified to comment. No such evidence was called. Thus, there was no evidence of the appellant's intellectual functioning, other than the jury's assessment of the appellant and the evidence of his co-accused. Mr Sidhu suggested that they did not know him well enough or were not expert enough to comment upon it. We disagree. In our view, they certainly knew him well enough to comment on his general level of functioning.

25 Thus, the fact that an intermediary had been granted carried with it no implications of the level of the appellant's intellectual functioning, as Mr Sidhu at one stage appeared to argue. The only implication was that he may need assistance in communicating and participating.

26 Second, in a cut-throat defence it is often the case that grave allegations are made by one accused against another. In this case, for example, the appellant alleged that the co-accused Gray was a murderer. It was the duty of Gray's counsel to do his best to challenge the prosecution case and to undermine that allegation. He was, therefore, bound to attempt to undermine the credibility of the appellant. He tried to do that in several ways, including by challenging the provision of an intermediary for him and linking that to his level of intellectual functioning. We accept both that he laboured the point, and in his closing speech (as was conceded by Ms Bickerstaff) contravened the judge's clear directions. He referred yet again to the issue of whether the appellant needed an intermediary and effectively invited the jury to re-visit the issue. He should not have done so. However, he was entitled to suggest that the appellant was sheltered from more robust questioning by the provision of an intermediary. That is a standard argument advanced and indeed this court has endorsed more than once that a judge should direct the jury that the effect of a special measure may mean that an advocate may not ask questions of the witness in the usual form. Mr Rouse was also entitled to ask questions about the level of the appellant's functioning, as we have indicated, provided that it was relevant to an issue in the case. Here

it was said to be relevant to the issue of his credibility.

27 Bearing those observations in mind, we have considered Mr Rouse's comments in their entirety. In our view, they were mild in comparison to some that are made during a cut-throat defence – and, indeed, those that were made during this appellant's defence. In addition, they were peripheral to the main issues in the case. Ultimately, Mr Rouse's comments were not supported by other counsel, even counsel for the co-accused whom the appellant also accused of murder. The judge corrected any wrong impression given by his clear and robust directions in his oral summing-up. The judge also gave the jury a written copy of his directions. The jury could, therefore, have been in no doubt as to how they should approach the role of the intermediary.

28 Balancing the interests of all the parties, the judge could not properly go any further. His directions were impeccable. Thus, accepting as we do that Mr Rouse crossed a line, we are satisfied that, in so doing, he did not cause the appellant the kind of prejudice that would call into question the safety of the conviction.

29 We have not rehearsed the detail of the case against the appellant, but it was a powerful one. For those reasons, therefore, we dismiss the appeal.