[2019] EWCA Crim 1266

No: 201801507/B4-201801509/B4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

4 July 2019

Before:

Lord Justice Irwin
Mr Justice Kerr
HIS HONOUR JUDGE Patrick Field QC
(Sitting as a Judge of the CACD)

Regina
and
Paul Dwyer

Mr A Alty appeared on behalf of the **Applicant**

Mr G Baxter appeared on behalf of the **Crown**

Mr Justice Kerr

On 23 March 2018, before the Crown Court at Liverpool before His Honour Judge Cummings QC, the applicant was convicted, following a three-week trial, of wounding with intent (count 1) and false imprisonment (count 3). The jury were discharged from returning a verdict on an alternative count of unlawful wounding (count 2). On 26 March 2018, before the same judge, he was sentenced on both counts to an extended sentence of imprisonment, under section 226A of the Criminal Justice Act 2003, of 18 years, comprising 14 years' imprisonment and an extended period of licence of 4 years. The applicant was also ordered to pay a victim surcharge in the sum of £170. The court further directed that 63 days would count towards sentence as a qualifying curfew under section 240A of the 2003 Act. Four co-accused were acquitted on all three counts. Of those four it is only necessary to name one, Dylan Gleeson.

The applicant renews his application for leave to appeal against conviction and sentence and for a representation order following refusal by the single judge. Newly instructed counsel, Mr Alty, who did not appear below, also applies to vary the grounds of appeal against conviction and sentence.

The facts, briefly, were these. On Saturday 8 October 2016, at about 11.15 pm the complainant, Kenneth Murphy, was driving along Felmersham Avenue in Liverpool when his vehicle, described as an expensive Audi A4, was struck and hemmed in by two other cars, a Ford Focus and a Volvo, one in front and one behind. About six men wearing balaclavas alighted from the two cars and then set upon the complainant and broke his car window with a crowbar. The complainant was then struck in the face with some sort of solid implement, possibly the crowbar or a large hammer (count 1, grievous bodily harm) and was dragged from the driver's seat and bundled into the boot of his Audi which was then driven to the Kirkdale area of Liverpool about 3 miles away (count 3, false imprisonment).

Due to the way the Audi was being driven the police were alerted to it and a short chase ensued. The Audi was abandoned after it crashed into a metal fence still with the complainant in the boot. Two men fled the scene of the crash and the complainant was rescued by police and given urgent medical attention. Police found the two

cars used in the attack nearby and recovered two crowbars, a hammer, bloodstained handcuffs, cable ties and a pair of pliers. The applicant was arrested with the co-accused Gleeson and another co-accused, Clarke. At Gleeson's home address, near where the Audi was abandoned, a top worn by the applicant was found in a washing machine at that address.

The prosecution case was that the applicant had been correctly identified as being part of the gang who carried out the joint attack on the complainant with the crowbar or hammer and caused him grievous bodily harm. The use of a weapon of this nature meant that the applicant and the group must have intended that serious bodily harm would be inflicted. The applicant and the group then falsely imprisoned the complainant in the boot of the car as part of a carefully planned joint enterprise.

The prosecution relied on the articles found and the evidence that the complainant had been followed by two other vehicles before the attack to show the careful planning of the offences. The applicant was said to have arrived on the scene in the Ford Focus and then exited the scene in the Audi.

To prove the offences and that the applicant had been a willing participant the prosecution further relied on the following circumstantial evidence:

> (i) CCTV evidence showing the two cars following the Audi in convoy before and after the attack;
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> (ii) telephone traffic between the applicant and co-accused consistent with planning the offence;
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> (iii) the applicant's attempt to dispose of incriminating evidence after the attack including putting the top he had been wearing at the time of the attack on the complainant in the washing machine at the address where he was arrested;
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> (iv) forensic evidence that the top in question was saturated in the complainant's blood;
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> (v) forensic evidence that a crowbar found in the passenger footwell of the Ford Focus where the applicant had been sitting contained both the applicant's DNA and the complainant's blood;
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> (vi) cell cite evidence obtained from the applicant's mobile phone consistent with the prosecution case that he had been following the complainant before the attack;
>
> (vii) police evidence that one of the males fleeing the abandoned Audi matched a description of the applicant;
>
> (viii) the applicant's arrest in close proximity in time and distance to the abandoned Audi and
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> (ix) forensic evidence that a second crowbar found in the Ford Focus in the rear offside passenger side, that is behind where the applicant was sitting, where, according to the applicant “a mutual friend” of himself and Mr Murphy was sitting had glass fragments on it that matched those of the Audi's broken driver's window.

The defence case was that the applicant was at the scene to assist the complainant. He did not know the complainant but arrived at the scene in the Ford Focus as a passenger with two friends. The friends were going there to assist the complainant following some earlier telephone calls. The applicant's case was that he understood there might be some violence and once at the scene he attempted to help the complainant but was outnumbered and so fled the scene in the Ford Focus.

The applicant gave evidence in his own defence and was the only defendant who admitted presence at the scene. He maintained that the complainant was involved in drug dealing and had serious enemies which were consistent with the complaint that he, the complainant, had made to police earlier in October 2010. The applicant admitted that he had been wearing the top and maintained that blood had transferred to it when he was trying to assist the complainant. He put it in the washing machine, he said, out of panic. He also admitted picking up the crowbar at the scene and planned to use it for protection if needed.

The issue for the jury was whether they could be sure that the applicant participated in the group attack and false imprisonment of the complainant. As already stated, the applicant was convicted on counts 1 and 3 while the four co-accused were all acquitted on all counts.

Sentencing the applicant on 26 March 2018 the judge said as to the facts of the offences: they were clearly planned and very sinister given the articles found by the police; the offences had the hallmarks of drug related violence and the applicant was a willing participant who told a preposterous lie to the jury about attempting to come to the complainant's rescue.

The applicant had a bad record but his previous convictions were much less serious although they still aggravated these offences. He was 29 at sentence, had 50 convictions for 28 offences, spanning a period from 2006 to 2014 although he had received suspended sentences of imprisonment in 2010. This was his first sentence of immediate custody. The judge referred to the guidelines for count 1 as there were no guidelines for false imprisonment. The false imprisonment, he noted, was the main purpose of the attack but he had to take account of the guidelines from wounding with intent. Following those guidelines, he found that this was a sustained attack and that greater harm was caused, the offence was committed in a gang and the applicant had attempted to dispose of incriminating evidence. It was a category 1 case within the Sentencing Guideline as the applicant accepts. That carries a range of 9 to 16 years' imprisonment, with a starting point of 12 years. The judge took into account the mitigation in the form of character evidence but he had no doubt that the applicant was a dangerous offender. The appropriate sentence was an extended sentenced of 14 years with an additional licence period of 4 years.

In support of the appeal against conviction Mr Alty abandons the ground of appeal settled by trial counsel and seeks to advance the following contention that the judge erred in failing to give an appropriate " Turnbull Warning" (R v Turnbull [1977] QB 24). He submits that the issue as to whether the applicant was one of the two men who got out of the Audi after the police chase and with the victim in the boot of the car was important because, if accepted by the jury, it would destroy the value of his innocent explanation of the considerable forensic evidence against him, his presence at the scene and his presence in the house. Mr Alty submitted that the Crown's case relied heavily on the applicant's presence in the Audi. He points to discrepancies between the descriptions of the two men given by PC Helsby who drove the chasing police vehicle and the actual appearance of the applicant who is a taller and heavier man than PC Helsby's descriptions would suggest. He complains that the judge did not adequately warn the jury in accordance with Turnbull of the need to exercise special caution before convicting the applicant on the basis of identification evidence.

For the Crown, Mr Baxter defended the judge's directions to the jury. We need not set out his submissions in detail because we agree with them. He submitted, in brief, that there was no visual identification of the applicant as such. PC Helsby did not see his face. There was other evidence linking the applicant to the Audi. Furthermore, he said it was not essential for the prosecution case that the applicant was found by the jury to be one of the two men who got out of the Audi.

We do not think it is arguable that the judge failed adequately to draw to the jury's attention the identification evidence concerning the identity of two men who got out of the Audi. First, we consider what the judge said in his summing-up on the subject: it was a careful and detailed summing-up of the evidence. He pointed out:

> "You will want to consider in relation to this officer's evidence what sort of a view he got of the people abandoning the vehicle and to what extent any description he gave is consistent or not consistent with what the prosecution allege."

He then gave a full account of the incident from the prospective of PC Helsby and the descriptions he gave of the two men. He then told the jury to consider:

> "… his ability to give a description, what his description amounted to, whether it is or is not consistent with what the prosecution say, their contention being that these two figures were Paul Dwyer and Dylan Gleeson."

The judge then reminded the jury of the applicant's evidence on his own height and weight. The jury could see for themselves what the applicant looked like. The judge drew attention to:

> "… the physical distinction between him and Dylan Gleeson and these are points that are

relied on on behalf of both defendants …"

In our judgment, those directions were clearly sufficient to alert the jury to the need for care when considering whether to accept that part of the prosecution's case that one of men exiting the Audi was the applicant. It is not arguable that the judge was obliged to go further than he did on the facts of this case. Furthermore, it was not essential to the jury's verdicts that the applicant must have been one of the two men who got out of the Audi. The judge himself was not sure of that as he observed when sentencing. The forensic and other circumstantial evidence against him was very strong even if he was not the second man in the Audi. While it is not known whether the jury convicted him on the basis that he was or on the basis that it did not matter whether he was or not, we can find no arguable fault with the judge's directions to the jury on the issue of identification and we therefore do not grant leave to raise this new ground of appeal and refuse permission to appeal against conviction.

Turning to the appeal against sentence, the sole existing ground of appeal, for which the single judge refused leave, was that the judge had wrongly found dangerousness by reference to the offence and not the offender. To that ground, Mr Alty seeks to add two further grounds that the starting point of the determinate sentence was too high and that, even if it was correct to find dangerousness, the 4-year extension period was too long. In support of these points he submits as follows. He accepts that the wounding offence was in category 1 of the Sentencing Guideline because of use of weapons, the sustained nature of the attack and premeditation, but points out that the injuries were not very serious. He submitted that the judge should have started with the graver offence of unlawful imprisonment (count 3), for which there are no Sentencing Guidelines, rather than sentencing by adding to the starting point within the guideline range for wounding with intent (count 1). He submitted that the applicant had effectively been punished twice by increasing both sentences by reference to common aggravating features, in particular, the evidence of intent to hold the victim prisoner and inflict further and more serious violence on him. The judge, he said, took insufficient account of the applicant's criminal record of only relatively minor offending, his age and the fact that this was his first immediate custodial sentence. For those reasons, he argued that the custodial term of 14 years was manifestly excessive. He reiterated the contention of trial counsel, which the single judge did not allow, that the finding of dangerousness focused on the offences not the offender, adding that the judge should have placed more weight on the absence of serious similar offences in the past, that he should have obtained a pre-sentence report and the 4-year extension period was too long.

In our judgment, the learned judge sentenced the applicant within the range properly open to him. We reject first, the contention that the determinate part of the sentence was above the top of the range open to the judge. The 14-year custodial period was not excessive. There was no error of approach in taking account of the guideline for the wounding offence and adding to the normal starting point by reference to the graver offence of false imprisonment for which there are no guidelines. The judge consciously and conscientiously considered the question of criminality overall. He rightly sentenced at a point above the normal starting point for a category 1 wounding offence. We do not find the period of 2 years above the normal 12-year starting point to be arguably manifestly excessive. In doing so he took account of the limited mitigation afforded by the character references, balanced as it was by the limited aggravating feature of the previous relatively minor offending.

Next, we agree with the single judge that the sentencing judge was entitled to infer dangerousness from the facts of the offences which irresistibly pointed to deep involvement in drug related gang violence. We do not think he can be criticised for not obtaining a pre-sentence report. We do not know whether he was asked to obtain one. Nothing in the papers suggested that he was. We do not ourselves consider that a report is necessary. We recognise that a report might have been helpful but not that the judge was obliged to commission one. He had heard the evidence, including evidence from the applicant himself. He is a judge with great experience of the criminal law, who had presided over the trial and no one could have been in a better position than he to make an assessment of risk having heard the applicant give evidence, when there was before him clear evidence in the form of the articles found by the police, that but for the fortunate intervention of police the victim might well have suffered further and much worse violence.

We finally reject also the submission that the length of the 4-year extension period was arguably excessive. Mr Alty refers to the process of supervision that would need to take place during the licensed period after the halfway point of any custodial term. We see nothing to indicate that the judge overlooked this point. The risk assessment that would take place during the custodial term of 14 years could lead to the applicant's release two-thirds of the way through that period. The applicant will be entitled to be released at the end of the 14-year

term irrespective of any risk. We consider that the judge was clearly justified in setting the extended licence period at 4 years.

For all these reasons, we do not grant the application to vary the grounds of appeal against sentence and we maintain the single judge's decision to refuse leave.