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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 13 June 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

R E G I N A

FORID UDDIN FARHAD

SHIBBIR AHMED

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr N James appeared on behalf of the **Applicant Farhad**

Mr A Syed appeared on behalf of the **Appellant Ahmed**

J U D G M E N T

(Approved)

MR JUSTICE MARTIN SPENCER:

1. The applicant, Forid Farhad, seeks leave to appeal against conviction and sentence, having been convicted before the Crown Court at Snaresbrook on 31 May 2018 of an offence of conspiracy to possess a firearm with intent to endanger life, two charges of wounding with intent to cause grievous bodily harm and two charges of attempting to wound with intent to do grievous bodily harm. For these offences he was sentenced to a term of imprisonment under section 226A of the Criminal Justice Act 2003, being an extended sentence, comprising a custodial term of 12 years and an extended licence period of 3 years. Leave to appeal was refused by the single judge.

2. Mr Farhad's co-accused, Shibbir Ahmed, was granted leave to appeal against sentence by the single judge having been similarly convicted. He was also sentenced to an extended sentence of imprisonment comprising a custodial term of 18 years and an extended period on licence of 3 years. A third co-accused, who does not appear before us, Shamrat Hussain, was also convicted of the same offences and sentenced to an extended sentence of imprisonment comprising 14 years' custody and a 3-year extended licence.

3. These offences arose from events of 15 July 2016 when, at about 10.15 in the evening, a group of men (including the four victims or complainants) were in a caged play area outside a group of flats in East London. They were approached by the appellant and the applicant who had arrived by taxi. A single shot was then fired from a sawn-off shotgun towards the four complainants from fairly close range. All four of them were injured. Three of them required hospital treatment.

4. It was the prosecution case (accepted by the jury) that the three co-accused together with a further person, Mr Abedin, who died from a drug overdose before trial, conspired together to possess the firearm with intent to endanger life. Counts 2 to 5 on the indictment reflected the injuries caused or attempted in relation to the four complainants. It was the prosecution case that the appellant, Ahmed, and the applicant, Farhad, arrived in the taxi followed in convoy by the deceased (Abedin) and the third co-accused, Hussain. Ahmed fired the gun and then fled the scene with Farhad. A member of the public confronted them and Ahmed pointed the shotgun at that member of the public.

5. Leave to appeal is sought by Mr Farhad on two grounds. First, that the learned judge erred in admitting Mr Farhad's previous convictions into evidence pursuant to section 101 (1)(a) of the Criminal Justice Act 2003. Secondly, that the learned judge erred in admitting into evidence a covert recording of one side of a telephone call between Mr Farhad and the deceased, Abedin, this recording also being adduced by the prosecution as bad character evidence.

The First Ground

6. As far as the evidence of the applicant's previous convictions is concerned, the application to adduce this evidence was made shortly after the conclusion of the applicant's evidence at trial. It was in fact the last evidence that the jury heard. During the course of that evidence, that is the applicant's evidence on oath, on several occasions the applicant indicated that he was a young man in his late teens, living at home with his mother, for whom he cared and he now left there and got himself a job. Although he admitted to the jury that he was "no angel" and had a drug habit, which made him go out and source and buy cannabis for himself to smoke, he did not tell the jury that he also had previous convictions for violence recorded against him on two occasions.

7. When in cross-examination it was put to him that he was present at the scene, he categorically denied this and asserted he was "just a bony kid, how could I have helped?" meaning what use would he have been to the situation that had presented itself, with the co-accused who discharged the firearm being at the location for precisely that purpose.

8. Admitting the evidence of the previous convictions of violence, the learned judge stated that he had come to the conclusion that Mr Farhad had given a false impression of himself when he asserted he was "just a bony kid" and would not get involved in this violent incident. He referred to a passage in Blackstone's (paragraph 5F13.4) to the effect that an accused who produces evidence of his own bad character in order present himself before the jury "warts and all" may be held to have given a false impression if there are further discreditable revelations to be made. The learned judge held that the false impression had been created cumulatively by Mr Farad and that the "bony kid" comment had been

calculated to give that false impression.

9. On behalf of the applicant it is sought to be argued that the offending answer given by Mr Farhad in cross-examination was unspecific and insubstantial, falling well short of saying he was not a violent person and this was a fragile basis upon which to admit a robbery conviction from 8 years previously when the applicant was only 16 years old. It is submitted that no false impression was created. All the applicant did was deny being involved in the offence. The previous convictions were not for like or similar offences and having been discharged from hospital the previous day, the applicant was not at his best and it was unjust to conclude that a false impression had been given and to admit the convictions.

10. Refusing leave to appeal the single judge said this:

"... the judge's conclusion that you had given a false impression of yourself was not confined to your statement in cross-examination that you were 'just a bony kid, how could I have helped', but it was based on the overall impression that your evidence made... the judge correctly considered and applied the approach indicated in Blackstone ... where a defendant seeks to give a 'warts and all' account of his character, but has not disclosed further discreditable conduct. Thirdly, your illness during the trial is not relevant to the decision to admit the evidence of bad character."

11. The single judge further indicated that, in his view, the case of Ovba, referred to in the grounds of appeal, does not assist where there is not the same context of the overall tenor of the evidence.

12. Representing the applicant today, Mr James has expanded upon the submissions which were made in writing. He has submitted that the discussion in Blackstone in relation to "warts and all" disclosure was not the basis upon which the evidence was allowed in, nor was it a proper basis. He submitted that the applicant had told the jury about his involvement in cannabis for the purposes of explaining his presence at the scene and that it was part of his defence. It was not for a warts and all purpose. He submitted it was put in either as directly relevant to an issue in the case or was a direct response to what had been said in the trial. He submitted that cannabis was central to where he found himself with Ahmed and was set out in the defence statement. There was also evidence in relation to an insurance scam and it was relevant to get evidence about this because of the evidence of text messages before the jury which suggested that money was changing hands and there had been cross-examination by Ahmed's counsel in relation to this.

13. It was submitted that the evidence in relation to the cannabis and insurance scam was not a proper basis for ruling that the applicant had given a false impression. Mr James said that he had three principal submissions.

1. Firstly, the words: "I'm just a bony kid, how could I have helped?" was a denial of what was being put to him in cross-examination to the effect that he was there as "the muscle". He reminded the court that gateway (f) is not to be overused.
2. Secondly, he repeated the submission in writing that it is far from clear that what Mr Farhad said amounted in fact to saying: I am not the sort of the person to be involved in violence.
3. Thirdly he submitted that if that is in fact what he is to be interpreted as saying, this was right in the circumstances given the judge's ruling already made, there having been previous applications by the Crown under section 103(1) of the Criminal Justice Act. He submitted that where the prosecution have applied to adduce convictions and the judge has ruled out such convictions, on the basis of propensity,

then those convictions cannot be adduced later in the context in which they were.

14. Although Mr James made his submissions extremely well and they were as well presented as they could have been, we have decided that we cannot accept them. In the end, we agree with the conclusion of the single judge and the reasons that he gave. In our judgment, the learned judge was entitled to conclude that the applicant, by his evidence, as a whole, including not just the words: "I'm a bony kid" but the previous evidence he had given, was giving a false impression in relation to his character. That false impression being bolstered by only partial admissions to previous wrongdoing and the jury were entitled to know the full extent of the applicant's previous convictions in those circumstances. This ground is therefore rejected.

The second ground.

15. The second ground of appeal sought to be argued is that the learned judge erred in admitting into evidence a covert recording of one side of a telephone call between Mr Farhad and the deceased, Abedin. The defence had argued that the evidence should not be admitted because it was hearsay evidence but Mr James has rightly not pursued that argument before us. Alternatively it is argued that it was bad character evidence and the judge should have exercised his discretion to exclude it because the defence would be unable to cross-examine Mr Abedin about the meaning of the words being used.

16. Having heard argument, the learned judge admitted the evidence on the basis that the jury could conclude that it amounted to misconduct and reprehensible behaviour within section 98 of the Criminal Justice Act 2003, being evidence of a disposition towards misconduct on the part of the defendant other than evidence which has to do with alleged facts of the offence charged or evidence of misconduct in connection with the investigation or prosecution of the offences charged. The learned judge found that a jury could draw the reasonable inference or conclusion that in this conversation Mr Abedin was discussing with the applicant a particular firearm which they both knew about. The learned judge said this:

"I have come to the conclusion that, in the circumstance of this conversation, as we see it here in front of us, I have come to the conclusion that it can amount to misconduct and reprehensible behaviour to be involved in a discussion about a handgun the two parties have got common knowledge of and where one party is telling the other that they will tell the person who it it to contact him to explain to him where it."

Thus the judge admitted the evidence on the basis that it showed "a shared interest" in firearms. He also ruled that the evidence did not amount to hearsay.

17. Having admitted the evidence, Mr Farhad, when giving evidence himself, said that he thought the conversation was a reference to the shotgun which the defendant Ahmed used in the shooting. Thus, by that point, it was not bad character evidence at all but evidence of the applicant's involvement in the offences with which he was charged. However, Mr James submits that it was originally admitted in evidence on the basis of bad character, and what Mr Farhad went on to say about it is irrelevant if it ought not to have been admitted in the first place. He submits that the learned judge erred in admitting the evidence of bad character where in fact nothing was said or done by him, that is the applicant Mr Farhad, despite being an out-of-court statement, by an unreliable witness who was not present at trial.

18. Refusing leave the single judge said that first, the judge was correct not to deal with the evidence on the basis of hearsay. He then said:

"... at the time of the admission of the evidence, it was evidence of reprehensible conduct and thus admissible. I note too that, on your own case, you accepted that the conversation in fact related to the actual firearm used in the shooting and so would have been admissible under s 98 of the Criminal Justice Act 2003. The judge's conclusions on admitting this evidence are not arguably wrong."

Again, we find ourselves in agreement with the single judge. A conversation between the applicant and the deceased, whether about the shotgun used in the shooting or about a handgun was, in our judgment, plainly admissible against the applicant in relation to the issues which the jury had to decide. We therefore find there is no substance to the second ground.

The application of Mr Farhad in relation to sentence.

19. Mr Farhad further seeks leave to appeal against the finding of dangerousness by the learned judge and the passing of an extended sentence of imprisonment.

20. In this regard the learned judge said in the course of his sentencing remarks this:

"The test for dangerousness is only satisfied in respect of an offender if the court is of the opinion that it carries a significant risk to members of the public of serious harm, occasioned by the commission by him of further specified offences. I have concluded that in respect of each of you that test is satisfied. Anyone prepared to engage and participate in a plan to possess such a lethal weapon as this was with no other intention than to endanger life and then play a part in a joint enterprise to discharge that firearm into a group of individuals with complete disregard for their safety or the safety of others does, in my opinion, represent the clearest significant risk to members of the public of serious harm being caused by each of you in the future.

The reasons for coming to the conclusion is that you all have previous convictions. I have looked at your personal circumstances, your drug and crime and gang related, pro-criminal views and associations, the fact that this was a premeditated offence, the fact that it was in a public area, the fact that you gained access to a firearm and the fact that that firearm was actually discharged, all indicate, in the clearest terms, as I have said, that you represent a risk of serious harm to the public in the future."

21. The learned judge did not consider that the seriousness of the offence was such as to justify the imposition of a sentence of imprisonment for life but that an extended sentence of imprisonment was appropriate given the conviction of a specified offence and the significant risk to members of the public of serious harm.

22. Refusing leave to appeal the single judge said:

”It is not arguable that the judge erred in reaching his conclusions which led to the imposition of an extended sentence. The pre-sentence report at pages 6 and 7 concluded that you posed a medium-high risk of re-offending giving rise to a high risk of serious harm towards the general public. Then in his sentencing remarks the judge gave both detailed consideration to the content of that report and then went on to exercise his own judgment based on the (very serious) facts of the case and your background. He expressly took account of your personal mitigation, including telling signs of change. That would have included, in your case, what had happened in the two year period since the offences were committed. The concern that the pre-sentence report was addressing only ‘the next two years’ is not relevant. The assessment of dangerousness is to be made at the time of sentence, and not at some unidentified point further in the future, whether upon release or otherwise.”

23. Again, we agree with the single judge. Furthermore, we note that having presided over the trial in this matter, the learned judge was in the best position to assess the issue of dangerousness and it cannot be reasonably argued that he misdirected himself in any way, whether as to the test to be applied or as to the relevant circumstances to be taken into account. Not only, in our view, is it not reasonably arguable that the learned judge erred in finding the applicant dangerous, but, in our view, he was plainly right to do so. Furthermore, there is no way in which it can be argued that the learned judge erred in deciding an extended sentence of imprisonment was necessary for the protection of the public.

24. In those circumstances, all the applications on behalf of Mr Farhad are refused.

Shibbir Ahmed - Sentence

25. The appellant, Shibbir Ahmed, was sentenced to an extended sentence of imprisonment, comprising a custodial term of 18 years with an extended licence of 3 years in relation to count 1. For counts 2 to 5 he received concurrent terms of imprisonment. Whilst Mr Farhad and Mr Hussain also received extended sentence of imprisonment, with the extension period being 3 years, their custodial terms were respectively 12 years and 14 years.

26. It is submitted on behalf of Mr Ahmed that the sentence imposed was too long and manifestly excessive and that there was disparity in respect of the custodial term imposed on the appellant by comparison with his co-accused, and that the learned judge was wrong to impose an extended sentence of imprisonment.

27. The single judge refused leave to appeal against the imposition of an extended sentence of imprisonment and for the reasons already expressed in relation to the defendant Farhad, he was right to do so. It is not reasonably arguable that the learned judge erred in making a finding of dangerousness and in imposing an extended sentence of imprisonment.

28. However, the single judge did grant leave to appeal on the first two grounds, namely that the sentence was manifestly excessive and that there was disparity with the sentences imposed upon the co-accused.

29. In his sentencing remarks the learned judge stated at page 3D, that he considered the defendant

Ahmed to have been “one of the prime movers behind this conspiracy”. He said:

”... I am sure you are all acting in concert under the guiding hand of the more experienced [Abedin]m but you [Ahmed] were the person who armed yourself, and you were the person who discharged the shotgun on the night.”

30. The learned judge referred to Mr Ahmed being 25 years at the time offence of the offence, an experienced drug dealer, with previous convictions for possessing offensive weapons, possessing a bladed article, threatening words and behaviour (on two occasions) including telling the victim to “come down and I’ll stab you”. There was also a conviction for common assault on a court enforcement officer who was executing a court warrant to recover money, when Mr Ahmed became angry, armed himself with a 12-inch kitchen knife and threatened the court enforcement officer with it.

31. At page of 8 of the sentencing remarks the learned judge dealt with each of the three accused before him and their particular circumstances. Having imposed the custodial term of 18 years on Mr Ahmed, the learned judge then dealt with Mr Farhad less severely by reference to his age and the fact that he was less heavily convicted than his co-accused. He said:

”... I find it appropriate and at least possible to impose a sentence which will be considerably less than imposed on Mr Ahmed.”

32. Similarly with Mr Hussain, the learned judge referred to the fact that he was not present at the shooting itself, although he played a part in driving Mr Ahmed away from the scene and in contradistinction to co-accused, Mr Hussain did not give evidence. The learned judge saying:

”You saw the sense but not troubling the jury with a spurious explanation and then being caught out lying as undoubtedly you would have... your decision not to give evidence, to some degree, lessens the term of imprisonment that I had in mind for you.”

33. In his sentencing remarks the learned judge referred to the leading case of *R v Avis and Ors [1998] 1 Cr App R 420* , and the questions a court should ask itself in determining where on the sentencing scale any particular case falls. He referred to the fact that the weapon used was a sawn-off shotgun. It was used in circumstances which were predetermined, calculated and utterly reckless as to the consequences for members of the public including any children who might have been present in the play area where the firearm was discharged, the fact that several people were exposed to danger by the use of the firearm and the injury that was caused. He considered that this all added up to a very serious attack on the public at large, the seriousness of the offence was added to by the fact that the firearm was possessed and used with a specific criminal intent to endanger life.

34. In those circumstances, it is our view that the custodial element of the extended sentence, namely 18 years, was not manifestly excessive but was within the range of sentences which the learned judge could reasonably pass. Nor, in our judgment, is there such disparity between the sentences passed on each of these defendants as to merit interfering with the sentence in relation to Mr Ahmed.

35. The learned judge, having presided over the trial, was well placed to assess the relevant parts played by each defendant and their relative culpability. He distinguished between them in relation to sentence, on appropriate grounds, taking into account not only their respective participation but also their ages and their antecedents.

36. In our judgment, there was no disparity between the sentences imposed upon these defendants of such a kind as to warrant interference with the sentence in relation to Mr Ahmed.

37. For those reasons the appeal by Mr Ahmed is dismissed.