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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 18 June2019

B e f o r e:
LADY JUSTICE HALLETT DBE
(VICE PRESIDENT OF THE CACD)

MR JUSTICE WARBY

MR JUSTICE PICKEN

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION UNDER S.9 OF THE CRIMINAL APPEAL ACT 1995

R E G I N A
v
ANDRE JOHNSON-HAYNES

Mr M Birnbaum QC appeared on behalf of the **Appellant**
Mr D Atkinson QC appeared on behalf of the **Crown**

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J U D G M E N T
(Approved)

THE VICE PRESIDENT:

Background

1. On 8 July 2009, at the Central Criminal Court, the appellant was one of seven defendants convicted of murder. On 4 September 2009, when he was then aged 18, he was ordered to be detained at Her Majesty's pleasure with a specified minimum term of 12 years, later reduced by 1 year on review.

2. The verdicts in respect of the appellant and his co-accused Samantha Joseph, Andre Thompson, Michael Akinfenwa, Tyrell Vito Ellis and Don-Carlos Ellis were by a majority of 10 to 2. The verdict in respect of his co-accused Danny McLean was unanimous.

3. Three of those convicted, including the appellant, have previously applied for leave to appeal their conviction but all were refused.

4. The appellant now appeals against conviction upon a reference by the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995. He is represented by fresh counsel, Mr Michael Birnbaum QC.

5. The grounds for the reference are that there has been a change in the law of joint enterprise - for which see R v Jogee; Ruddock v The Queen [2016] UKSC 8 - and the trial judge's directions on the necessary intent to prove murder were therefore flawed.

The prosecution case

6. On 3 July 2008, shortly before 1.45 pm, Samantha Joseph deliberately lured Shakilus Townsend by bus to a cul-de-sac in Beulah Crescent, Thornton Heath. He was there attacked by a waiting group of youths some of whom were hooded and masked. The appellant was one of those present. Both McLean and Thompson had motives for a revenge attack.

7. Several of the male defendants were associated with a local gang called Shine my Nine (SMN) and McLean was its leader. Although there was no evidence of the appellant having participated in any gang-related activities before 3 July 2016, he was friendly with McLean and he admitted knowing McLean led SMN. On the appellant's arrest police found artwork making reference to SMN and three of his co-accused by their street names as well as references to other gangs.

8. Telephone evidence indicated that McLean was in contact with the male defendants on the morning of the murder assembling the group with a view to carrying out the attack. He made or tried to make contact with the appellant at 10.45 am and 1.35 pm.

9. At about 1.20 pm, Joseph and Mr Townsend were on a bus headed for the area of Beulah Crescent, but under instructions from McLean on the telephone Joseph made

Townsend leave that bus and get on another that took them almost directly to Beulah Crescent.

10. At about 1.30 pm, the driver of a number 450 bus was approached by a group of young black men. The group included the appellant. The driver was asked whether members of the group could travel one or two stops without passes albeit the appellant himself had a pass with him. One or two stops would have taken them to where they expected to find Joseph and Mr Townsend. The bus driver told them they could not travel and the group, which still included the appellant, walked off together in the direction of Spar Hill with Thompson carrying a baseball bat in a bag on his back. Despite it being a warm day, the appellant was wearing gloves.

11. As they made their way to the scene, three of the group crouched and hid behind parked cars and/or ran after a bus on which they believed the victim was travelling. Some wearing hoods and bandanas to disguise their appearance, they congregated in Osborne Road, close to where the attack took place, awaiting the arrival of Joseph and the victim. They looked excited, as if waiting for something to happen. Independent evidence put Tyrell Ellis, Don-Carlos Ellis, Andre Thompson, McLean, Akinfenwa and the appellant amongst that group.

12. When they realised the victim had arrived at the scene, members of the group ran towards him, shouting, "Get him". They chased and cornered and attacked him. Two to four members of the group punched and kicked him to the ground. He was again kicked, and Thompson hit him repeatedly with the baseball bat to his head and shoulders. One or more of the attackers, probably McLean, also stabbed him four times. One of the wounds was to his chest. The knife had been deliberately twisted to create a very large wound. Those who were not physically involved in the attack stood close by. The attack did not end and the attackers did not leave the scene until the victim had been fatally wounded.

13. In the aftermath of the killing cell site evidence indicated that the appellant, Joseph, McLean, Thompson and Akinfenwa made or received calls or sent or received text messages at times when their telephones were in the same area and to and from each other. The appellant was also in communication with Joseph.

14. When the appellant realised his image had been captured on the bus CCTV he surrendered to the police. In interview he gave them a false alibi that he pursued until the defence case at trial.

15. The case for the prosecution was that this was a carefully planned attack on Mr Townsend to cause him at the very least really serious bodily harm. All the group played their part. If they did not physically take part in the beating and stabbing, they knew what was planned and they were present to corral the victim for the attack and encouraged the attack; they were willing to participate if called upon to do so.

The defence cases

16. At trial the appellant initially ran the same defence of alibi but after the evidence of one of his co-accused he admitted presence. He denied participating in the attack and knowledge of any weapon. He was a young man of previous good character and claimed the artwork found had been created by somebody else. He accepted he did know members of the SMN gang, mainly through McLean. He also admitted telephone contact with McLean on the morning of 3 July but insisted he had travelled to Thornton Heath not to see McLean but to visit another friend. It was only when that other friend was not at home he went to see McLean. He claimed he then met McLean and Thompson by chance. Thompson was carrying the bag that was said to contain the baseball bat. He did not know what the bag contained or that McLean had a knife in his waistband. He knew of no planned attack but did know McLean was expecting a fight. He took a bus from Northwood Road intending to go home and accepted that on the CCTV footage he is with the other young men and he is seen wearing gloves. He insisted this was for fashion purposes. He said that it was coincidence that when he got off the bus he was with the others as he walked up Northwood Road. Sensing both danger and a fight, he ran down the road with the group but was unaware, he claimed, of Joseph and the deceased arriving. He accompanied the group to the cul-de-sac but denied seeing the baseball bat. He saw Thompson and Akinfenwa attack the deceased. He ran off and took the bus home. Since the incident he had been threatened by his co-accused and he had lied in his defence statement and in interview because he was afraid.

17. McLean admitted that he had stabbed the deceased with a knife but claimed it was in self-defence. Joseph agreed she had lured the deceased into a trap knowing there was a plan to assault him but denied knowing that he would be stabbed or seriously injured. Thompson claimed the appellant brought the bag containing the bat to the scene and gave it to him. He then assaulted the deceased with it in self-defence because the deceased who was carrying a knife. The appellant and McLean kicked the deceased while he was on the ground. The others did not give evidence.

The judge's directions

18. The judge's directions were impeccable according to the law as it then stood. They were set out both in his summing-up and in written steps to verdict and agreed by all parties.

19. We do not have the final version of the written steps to verdict but the questions are set out clearly in the summing-up. We shall rehearse the parts of the questions relevant to this appeal:

20. "Q1: Are we sure that the man who inflicted the fatal wound did so deliberately with a knife and at the time he did so intended to kill or cause really serious bodily harm? If sure of that, go to question 3.

21. Q3: Are we sure the man who inflicted the fatal wound was acting unlawfully, not in reasonable and necessary self-defence?

22. Q4: Are we sure that the defendant whose case we are considering took part in an unlawful attack?"

23. The judge set out the various ways in which someone may take part in an unlawful attack, emphasising that mere presence was not enough; presence could only amount to proof if it was presence to provide support for the physical attack should it be necessary.

24. "Q5: Are we sure that in taking part in the unlawful attack that the defendant whose case we are considering knew that one of the attackers had a knife and either intended to kill or cause him really serious bodily harm or realised as a real possibility that one of the attackers might use the knife with the intention of killing or causing really serious bodily harm?"

25. During their retirement the jury asked several questions. Those relevant to this appeal are as follows.

26. "First, if we are sure a defendant took part in the attack and realised there was a real possibility that one of the attackers may cause really serious bodily harm but we are unsure if they knew about the knife being present are we able by law to reach a verdict of murder or manslaughter?"

27. The judge repeated his directions to the effect they had to be sure a defendant knew about the knife to convict of either offence.

28. A second question related to Joseph's knowledge of the knife.

29. In a third question the jury asked to be reminded of the directions on participation in the unlawful attack.

30. In a fourth question they sought guidance on the stage at which: “a particular defendant would have to know that one of the attackers had a knife for us to consider whether to try [sic] the defendant of murder or manslaughter. Would they have to have knowledge before the attack, at the time of the attack or even after the fatal wound was inflicted?"

31. In answer to this question the judge directed the jury again that they must be sure the defendant knew before the unlawful attack began that one of the attackers had a knife and then took part in the unlawful attack with the intention or realisation he had set out previously.

Grounds of appeal

32. Mr Birnbaum has advanced the same grounds of appeal as suggested by the CCRC reference. First, he argues the judge misdirected the jury in directing them that a defendant who participated in the attack on the victim was guilty of murder if he realised as a real possibility that one of the attackers might use the knife with the intention of killing the deceased or of causing him really serious bodily harm. The Supreme Court has now held in R v Jogee [2016] EWCA Crim 1613 such directions are

wrong in law. To be Jogee compliant, the judge should have directed the jury that a secondary party must be proved to have intended that the victim should suffer grievous bodily harm at the very least.

33. Second, Mr Birnbaum argued that the circumstances of the offence and the offender mean that there would be a substantial injustice if this court were to dismiss the appeal and that we should have doubts about the safety of the conviction. The factors upon which he relied included:

i. 34. The appellant played no active part in the attack and was convicted on the basis of encouragement by presence. The appellant's role was very different from that of some of his co-accused. He was recruited relatively late in the day, he wore no disguise, the only evidence of his direct participation came from Thompson and was incredible and he did not dispose of his phone after the killing.

ii. 35. The jury's verdict is consistent with the appellant's realising that McLean had a knife very shortly before the attack started rather than his setting out to participate in an attack which he knew in advance might involve the use of a knife.

iii. 36. The jury's notes to the judge during their retirement indicate their concerns. In particular, the first one showed they focused on the issue of foresight rather than intent.

iv. 37. The jury convicted only by a majority.

v. 38. Lies told by the appellant could not be relied on to support the argument that the jury would, if properly directed, have found he intended to cause grievous bodily harm.

vi. 39. Had the jury been properly directed, the good character direction as to propensity would have been of much stronger effect and would have led the jury to conclude they could not be sure he had formed the necessary intention.

vii. 40. The appellant was a young man of previous good character

viii. 41. The continuing stigma of a conviction for murder in what is a notorious case will be very great.

ix. 42. The appellant was arrested and convicted in 2009. His minimum term was set at 12 but reduced to 11 years because of his exceptional progress whilst in prison. His earliest date for parole is in March 2020. He has served far more time in prison than he would have served for a sentence for manslaughter. This would be unjust even if he had had no realistic career ambitions.

x. 43. In fact he has always had a strong and realistic ambition to work as a professional rugby player and/or coach, as confirmed by Mr Bob Hardman, an England Rugby Football Union coach. This is said by Mr Birnbaum to be relevant in two ways. First, if he had been sentenced for manslaughter only he could have commenced his career some years ago. Second, as a sportsman in the internet age a conviction for a

notorious murder would almost inevitably come to light during his career and may have an adverse effect on his progress.

44. Drawing those factors together, Mr Birnbaum invited the court to find that a jury directed in accordance with the Jogee judgment may well have been unable to be sure that he personally had the necessary intent required for murder and may well have been prepared to distinguish the appellant from his co-accused. The appellant's participation, Mr Birnbaum suggests, is far less than that of other appellants or applicants who have appeared in appeals or applications before this court since the Jogee judgment was published.

45. Mr Birnbaum has conducted an extensive and thorough analysis not only of the facts of the case but also of the various authorities that have followed Jogee, in particular R v Johnson & Ors [2016] EWCA Crim 1630, the lead case on the application of the Jogee principles.

46. We intend no discourtesy to him by not rehearsing his arguments on the various judgments in any detail save to say he has extracted and applied the same principles to this case in such a way that he submits that the appellant meets the test of substantial injustice.

47. He analysed the factual findings of the jury must have made and arrived at three: the appellant participated in the joint enterprise, the appellant knew that McLean had a knife before the unlawful attack began and he realised that McLean might use the knife with intent to cause grievous bodily harm or kill.

48. It is the third finding upon which Mr Birnbaum focused, namely the issue of foresight. He maintained, and persuaded the CCRC, that the jury's questions indicate it was the issue of foresight that was uppermost in the jury's minds and therefore this court should be particularly concerned about this appellant's case.

49. He acknowledged that the test for substantial injustice is a high threshold to cross but he relied on the words in paragraph 21 of Johnson, that the threshold is not limited to considering simply the circumstances of the offence. He placed reliance on the words "primarily and ordinarily" the court will have regard to whether Jogee-complaint directions would have made a difference. Mr Birnbaum maintained that there must be circumstances where an injustice can be demonstrated without reference to the facts of the case or in combination with the facts of the case. He gave as an example the decision in R v GS [2018] EWCA Crim 1824, in which an appellant was entitled to rely on the effect of a conviction on her immigration status to meet the high threshold.

50. Finally, Mr Birnbaum sought to attack the test as set out in paragraph 21 of Johnson and interpreted in R v Towers [2019] EWCA Crim 664 at paragraph 61 and in the decision in R v Crilly [2018] EWCA Crim 168, arguing that there is a tension in the test applied in each case and that any clarification that this court can give would be welcomed.

Conclusions

51. First, as Mr Duncan Atkinson QC, who now appears for the Crown, observed, the need to satisfy the test for substantial injustice identified in Johnson & Ors is an essential and distinct requirement for an appeal based on a change of law. An applicant for exceptional leave must establish substantial injustice before the court will consider the safety of a conviction. It may well be that if an applicant can satisfy the test for substantial injustice the court will need little time to resolve the issue of safety but they are distinct questions.

52. As was stated clearly in Johnson at paragraph 18, the fact that there has been a change in the law is not itself sufficient:

> "As the Supreme Court stated at paragraph 100 [of Jogee], a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important."

The threshold for establishing substantial injustice is a high one and the court will "primarily and ordinarily have regard to the strength of the case advanced that the change in the law would in fact have made a difference". That test, albeit formulated in different ways, has stood the test of time. It was endorsed in Jogee and, in our judgment, has been applied consistently since the decision in Jogee and we reject Mr Birnbaum's assertions to the contrary.

53. Furthermore, in many of the appeals or applications this court has considered since the Jogee judgment considerations such as the stigma that attaches to a conviction for murder, the young age of the offender, the contrast in the likely sentence for manslaughter or murder have all been apparent yet a finding of substantial justice has not been made.

54. We shall therefore apply the test as set out in Johnson: "What is the strength of the case advanced that the change in the law would in fact have made a difference?" We first determine the factual findings made by the jury in the light of the judge's directions.

55. 1. The appellant's presence at the scene of the murder was not coincidental.

56. 2. The appellant participated in a preplanned group attack on one man.

57. 3. The appellant was at the scene, encouraging it and ready to join in if required.

58. 4. The appellant knew before the attack began that one of the attackers had a knife.

59. 5. The appellant realised there was a real risk that the man with the knife would use it to kill or cause really serious harm.

60. 6. The man with the knife used the knife to kill with the intention to kill or cause grievous bodily harm.

61. Proof of foresight, as we now know, does not in itself suffice to prove the intent for murder, but it remains good evidence of intent post the Jogee judgment. Furthermore, in this case, proof of the foresight must be coupled with all the other factual findings we have identified. Together they establish that this appellant was involved in crime A on the spectrum set out in Johnson namely he participated in a crime of serious violence. The circumstances and seriousness of the offence in which he was involved are themselves good evidence that he had the requisite intent. He knew before the group attack began that the one of the attackers had a knife with him and had the foresight that that man may use that knife to kill or cause grievous bodily harm. In our judgment, this provides a powerful case that he was a party to a joint enterprise in which he personally intended that grievous bodily harm would be inflicted.

62. For all those reasons, therefore, we are satisfied that there is a perfectly proper basis upon which to conclude that the jury's verdicts would not have differed post the Jogee judgment.

63. With respect to the Criminal Cases Review Commission, the grounds for the reference focus far too much on what was described as the ‘paramount importance’ of the jury's questions and the fact that this was a majority verdict. The focus for the CCRC's deliberations should have been on the jury's ultimate verdicts in the light of the judge’s directions and the findings of fact that flowed from those verdicts. To suggest that foresight was uppermost in the jury’s minds at the time they returned their verdict against this appellant amounts to little more than speculation. Their question relating to foresight may have related to another of the accused, could have been triggered by just one of the dissenting jurors, and or whoever wrote the note may have inadvertently omitted the reference to intent. Most importantly, the assertion that the question was of paramount importance ignores the fact that during the course of their deliberations, a jury’s focus may alter. Even if at the beginning of their deliberations one or more jurors had doubts about the appellant’s intent, they may well have been resolved by the time the verdict against him was returned. Juries' questions will rarely provide a clue to the basis for their ultimate decision, albeit the judge's answers to their questions may be very helpful and show us the path a jury must have taken.

64. We were also surprised to see any reliance placed on the facts that the jury were deliberating for some time and returned a majority verdict. Again, this simply invited speculation as to the jury’s deliberations. Seven young people stood in the dock charged with murder. One would expect a jury to work their way through the evidence and the case against each defendant with considerable care. A verdict is not subject to a challenge simply because it takes a jury some time to do their duty and by the end of their deliberations two of the jury remain unsatisfied as to all the elements of the offence.

65. We acknowledge, as Mr Birnbaum invited us to do, that the appellant has responded extremely positively to his time in custody and he may still be able to do something with his life on his release. He has a obtained a degree (his degree ceremony is this afternoon) and he may be able to fulfil some of his potential as a rugby player. However, he was a party to a joint enterprise to kill or cause grievous bodily harm to a 16-year-old boy. That 16-year-old boy did not live to fulfil his potential. The appellant's personal circumstances and the stigma of the murder conviction do not, in our view, even when taken with the circumstances of the offence, come close to establishing the test of substantial injustice. In any event we would reject the submission that the conviction is unsafe for all the reasons we have already given.

66. We are indebted to Mr Birnbaum and Mr Atkinson, who have analysed the case with conspicuous thoroughness and provided the court with very considerable assistance, but we reject the application for exceptional leave and we dismiss the appeal.

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

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