No: 200704271/C3

Neutral Citation Number: [2008] EWCA Crim 1162
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 14th May 2008

B e f o r e:

LORD JUSTICE KEENE

MR JUSTICE SAUNDERS

THE RECORDER OF SWANSEA
(Sitting as a Judge of the CACD)

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R E G I N A

v

EDWARD MARTIN MAICHAEL MCEVILLY

- -

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Mr P Astbury appeared on behalf of the **Applicant**
Mr I Harris appeared on behalf of the **Crown**

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J U D G M E N T (As Approved by the Court)

1. **LORD JUSTICE KEENE**: This application for leave to appeal against conviction and sentence has been referred to the Full Court by the Registrar.

2. On 2nd July 2007 at Liverpool Crown Court, before His Honour Judge Mark Brown, the applicant pleaded guilty to one count of unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861. That was count 3 on the indictment. On 5th July 2007, before the same court, he was convicted of one count of wounding with intent, contrary to section 18 of that same Act, that being count 2. Then on 9th July 2007, before the same court, he was convicted of one count of attempted murder, contrary to section 1(1) of the Criminal Attempts Act 1981, that being count 1 on the indictment. He was sentenced on that same day, the 9th July 2007, to 14 years' imprisonment on count 1, with no separate penalty being imposed in respect of the other two counts. All three of those charges arose out of the same incident and involved the same victim, a man called Alan Harrison. They were in essence charges in the alternative.

3. The fact can be very briefly put. There was evidence of a background of some animosity between the applicant and the victim and there was no doubt that the applicant had stabbed the victim a large number of times. The wounds included many to the back and shoulder, three between the ribs from the front and one to the left thigh which damaged the femoral artery. In addition there was a 12 centimetre laceration through the abdominal wall from which protruded part of the membrane which contains the intestine.

4. The defence case at trial was that the applicant accepted using a knife to inflict the wounds suffered by Mr Harrison, but he denied forming the intent either to kill the victim or to do him really serious harm.

5. The basic issue on counts 1 and 2 at trial was that of intent. There were more specific disputes about how the applicant came to have the knife, whether the stabbing took place while the victim was in bed, or when he was standing in the bedroom, and what the applicant had said shortly afterwards, there being some evidence that he had been heard saying: "Come here, I'm going to kill you". There is no doubt that after the stabbing the applicant went to a neighbour's house and asked her to telephone the police as he had stabbed someone.

6. As we have indicated already, those three counts on the indictment were intended to be alternatives. That was just as true of the two which the jury had to consider, the counts of attempted murder and section 18 grievous bodily harm. The judge in his summing-up directed the jury, perfectly properly, as to how they should approach the two alternative charges, telling them that they should consider count 1 first and that if they found him guilty of that, they need not go any further. But if they were not satisfied the defendant was guilty of that, they should go on to consider count 2. The judge also gave the jury the normal direction about the need for unanimity as to any verdict.

7. After about 4 hours' retirement the jury came back into court and the foreman said that they had not reached a verdict on either count on which they all agreed. So the judge gave them a majority verdict direction. Subsequently a note came from the jury, saying:

> "If we cannot get the required majority verdict on first count must we put this aside completely and just look at count 2 and ignore individual judgments on first, ie those who are uncomfortable with a lesser count?"

The answer provided by the judge at that stage was this:

> "If you are unable to reach a majority verdict on count 1 then you should go on and consider count 2 to see if you are able to reach a majority verdict on count 2. In due course you will be asked, through your foreman, whether you have reached majority verdicts on either count. If you have, for example, reached a majority verdict on count 2, then the court will take that verdict from you and then assess the situation."

Subsequently, there seems to have been a further note which is not fully recorded, nor is it amongst the court papers but in any event the jury returned to court and the clerk asked whether they had reached a verdict on either count on which at least 10 agreed. The answer was "yes". They were then asked if at least 10 had agreed on a verdict on count 1. The foreman replied "no". The clerk then asked if they had reached such a verdict on count 2. This time the reply was "yes" and on being asked what it was, the foreman said that they found the defendant "guilty" and that was the verdict of them all. The judge then asked whether, if they were given more time, there was a reasonable prospect of them reaching at least a majority verdict on count 1, the attempted murder charge. Very quickly, as counsel for the applicant has very frankly stated this morning, the jury discussed the matter and the foreman said that there was such a prospect and that they would like more time. The judge agreed to that and the court then adjourned.

8. When the case resumed counsel for the defendant, in the absence of the jury, submitted that it had been an error to take the verdict on count 2 and that this might prejudice his client. The judge disagreed. The jury continued their deliberations for about another 30 to 40 minutes and then returned with a unanimous verdict of guilty on count 1.

9. The result of the procedure adopted in this case is that the applicant now has a record which shows convictions for attempted murder, section 18 wounding with intent and section 20 wounding, when all those charges had been laid in the alternative. In those circumstances, we grant leave to appeal against conviction and we proceed to consider the substance of the appeal.

10. On behalf of the appellant (as he now is) Mr Astbury submits that the conviction for attempted murder is unsafe. It is said that the judge very properly directed the jury in his summing-up as to the approach which the jury should adopt, namely that they should only go on to consider count 2, if they were not satisfied of guilt on count 1. To take a verdict on count 2 and then allow the jury more time to consider count 1 was

clearly a procedural error. Mr Astbury submits that the tenor of the jury note to which we have referred indicates that they had got to a state of some finality about count 1. It is contended that the jury may, as a result of the procedural error, have fell under pressure to reach a verdict on count 1 and that is perhaps borne out by the brevity of the extra time which they required in the end to convict on that count. They only took something in the order of 40 minutes to reach agreement, whereas previously they had failed to do so. Something dramatic, it is said, must have happened.

11. For the Crown, Mr Harris points out that in response to the jury's first note the judge, in explaining what would happen, indicated that if they reached a verdict on count 2, the court would "then assess the situation", thereby indicating to them that the matter would not have reached an ultimate stage. Clearly, he submits, the defendant remained in the charge of the jury on count 1. Moreover, immediately after the verdict on count 2, the judge asked the jury if they could reach a verdict on count 1 given more time, and very shortly afterwards he received the affirmative reply. In those circumstances the Crown submits that the conviction for attempted murder is safe.

12. It is the view of this court that there was here a procedural error by the judge. Where there are two charges in the alternative on the indictment arising from the same facts, and with one more serious than the other, the judge should not take a verdict on the less serious count until finality has been reached on the more serious charge. Such finality may take the form of a not guilty verdict, or a decision to discharge the jury on that count because there is no realistic prospect of agreement on a verdict. If this course is not followed, then there is a serious risk of the very situation arising which arose here, with charges in the alternative leading to a multiplicity of convictions. That, as this court pointed out in the case of R v Harris [1969] 1 WLR 745 cannot be right. It is not right.

13. The nearest parallel to the present case seems to be that of R v Fernandez [1997] 1 Cr App R 123, where the appellant had been charged with robbery and handling in the alternative. A verdict of guilty on the latter lesser charge was returned by the jury before any verdict had been taken on the robbery charge. The judge then appears to have appreciated the problem and directed the jury that he could not accept that verdict on the lesser charge of handling until he had received their verdict on the robbery count. They subsequently convicted the defendant on the latter and were discharged from giving a verdict on the handling charge.

14. It was contended on appeal that a defendant could not be convicted of theft or robbery after a jury has returned a guilty verdict of handling the same goods. So it was said that the judge, on receipt of the jury's verdict on the handling count, should have discharged them from returning a verdict on a charge of robbery and consequently that that verdict was unlawful. This court disagreed. It held that the handling verdict did not entitle the appellant, as a matter of law, to a verdict of not guilty on robbery. It was said that, where as a result of a failure by the judge properly to direct the jury, or control the procedure of the court, a jury is allowed inappropriately to return a verdict on a count in an indictment which has only been included in the indictment as an alternative to the other more serious counts, the verdict in respect of the alternative is irregular. The judge is under a duty to take from the jury and the jury are entitled to give their verdicts

on the more serious counts. If a verdict is prematurely returned on an alternative count before the jury have given their verdict on the more serious count, the judge should decline to accept the verdict on the alternative count. If he accepts it, it should ordinarily be quashed on appeal.

15. We agree with that judgment. Applying those principles to the present case, it is to be observed that no finality had been reached as to the attempted murder charge when the verdict on the section 18 count was taken. The jury had returned no verdict on count 1 and had not been discharged from returning such a verdict. So the Crown is right in saying that the appellant was still in their charge on count 1. Nor does it seem to us that the position had been reached where the judge was required to exercise his discretion to discharge the jury on count 1. True it was that they had, at that point, been unable to reach a verdict, but the judge had not established from them that there was no realistic prospect of a verdict if they were given more time. Indeed, as we have indicated, very soon after the section 18 verdict was returned, it became clear that, given more time, the jury thought they could reach a verdict on count 1. What the judge should have done was to make that enquiry about the prospect of a verdict on count 1, if additional time were allowed, before taking any verdict on count 2. However, there was nothing unlawful about the verdict which was in due course returned on count 1, the attempted murder charge.

16. Nor does this court regard that verdict as being unsafe because of the procedural error. There is no reason why the jury should have felt under any pressure to reach a verdict on count 1, merely because they had been allowed to return a verdict on count 2, and we do not regard the amount of time which passed before they returned their verdict on count 1 as indicating that there was anything improper or untoward which followed from the procedure adopted in this case.

17. Mr Astbury has another string to his bow, but he acknowledges that it is not a powerful one. It is contended that the judge's summing-up was one sided and not properly balanced. Counsel points to certain issues highlighted by the judge in his summing-up, and to his favourable comments on one witness, who said that he heard the appellant threatening to kill Mr Harrison, and yet the judge made no such comment about another witness who did not hear such a threat. We emphasise that we have read the whole of the summing-up. We do not regard it as unbalanced. It presents the appellant's evidence and his defences fairly and fully. The issues highlighted by the judge towards the end of that summing-up were what any judge should do to help the jury focus on the vital disputes which arose on the evidence. As for his comments they did not, in our view, go beyond the proper and normal extent of judicial comment on evidence and witnesses. The judge had at the outset directed the jury not to adopt any view which he expressed about the facts, if they did not agree with him.

18. It follows that this court is satisfied that the conviction for attempted murder is safe. The appeal against that conviction is therefore dismissed. However, for the reasons which we have indicated earlier, we quash the conviction on count 2, the section 18 offence, and we also direct that the plea of guilty on count 3 earlier entered be vacated. To that limited extent the appeal against conviction succeeds but only to that limited extent.

19. We turn, finally, to the application for leave to appeal against sentence. The applicant is now aged 45. He has one previous conviction, that being one for battery in 1999, for which he was conditionally discharged and that seems to us to have no significance in dealing with the sentence for attempted murder.

20. The judge had before him a psychiatric report which recorded that the applicant had been in an emotionally aroused state on the day in question because of a lack of contact with his daughter whose birthday it was. He had been drinking as a result and he lost control. On his behalf Mr Astbury submits that the 14 year sentence failed to take account of those circumstances. There was, he emphasises, no pre-planning, and it is submitted that this was simply a loss of temper case.

21. We say straightaway that we are not persuaded that this sentence is arguably excessive, far less manifestly so. It has to be borne in mind, as this court has now said several times, that sentences for attempted murder before the Criminal Justice Act 2003 came into effect provide only limited guidance, because that Act has increased generally the tariff for murder itself. In any event, unlike murder, attempted murder always requires an intent to kill, which makes it particularly grave. The jury patently found such an intent on the part of this applicant in the present case. There was here a brutal and frenzied attack upon an unarmed and defenceless victim. He has been very severely affected as a result of that attack, as the judge in his sentencing remarks recorded. There is nothing wrong with this sentence and the application for leave is consequently refused.