IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 408

No. 202001832 B2

Royal Courts of Justice

Wednesday, 3 March 2021

Before:

LADY JUSTICE CARR
MR JUSTICE WILLIAM DAVIS
MR JUSTICE CALVER

REGINA
V
SHEM FRANK THOMAS

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Non-counsel application

J U D G M E N T

MR JUSTICE CALVER:

1 On 23 March 2016 in the Crown Court at Leicester the applicant was convicted after a trial of attempted murder (Count 1), and possession of a firearm with intent to endanger life (Count 3). On 9 May 2016 he was sentenced on Count 1 to imprisonment for life with a minimum term of twelve years, less 427 days served on remand. No separate penalty was imposed on Count 3. The applicant's co-accused Ruidhe O'Mahony and Eric Manunebo were each also convicted on Counts 1 and 3. They too were sentenced to imprisonment for life with a minimum term of twelve years' imprisonment. The applicant, who is not represented, seeks leave to appeal against his conviction on both Counts 1 and 3. The applicant further seeks an extension of time in which to appeal. His application for permission to appeal was refused on paper by Martin Spencer J on 5 October 2020, but he renews his application to this court.

The circumstances of the offence

2 The prosecution of the applicant and his co-defendants arose from an attack on Mr Hamza Cato late in the evening of 19 February 2015. Three men approached Mr Cato as he was sitting in his car and one of them stabbed Mr Cato repeatedly, and another fired shots at him, which fortunately missed. It was the prosecution case that this was a revenge attack for shots having been fired into a nearby house occupied by members of the applicant's family approximately half an hour earlier, Mr Cato having been mistakenly identified by the men as having been responsible for that. The issue for the jury was whether the applicant was one of the three men who attacked Mr Cato. By its guilty verdict the jury determined that he was indeed one of them.

The grounds of appeal

3 The applicant seeks to argue two grounds of appeal. First, what may be described as the presence issue. The applicant argues that the finding that he was one of the three attackers was rendered unsafe by a combination of two allegedly defective directions given by the trial judge in the course of his summing-up, namely his circumstantial evidence direction and his refusal to give evidence direction. Second, what may be described as the participation or joint enterprise issue. The applicant argues that the judge erred in law in his direction to the jury as to whether the three men, including the applicant, were all participants in the attack upon Mr Cato. The judge repeated this error of law, it is said, in his route to verdict. For the reasons given by Martin Spencer J, both of these grounds of appeal are entirely without merit and the appeal is inexcusably late, with the application being brought no fewer than 1,545 days out of time, there being no reasonable excuse for at least a large proportion of that delay.

4 We can, accordingly, address these issues on this application shortly. So far as the presence issue is concerned, the applicant argues in para.28 of his grounds that the judge's summing-up rendered the jury's verdicts unsafe because:

> "The judge did not give the full and proper warnings about the dangers of circumstantial evidence. Further, the judge did not make sufficiently clear to the jury the inferences the prosecution must establish in order to prove their case, nor the competing inferences that they should give consideration to."

5 There is nothing in this ground. So far as the judge's direction about circumstantial evidence is concerned, at p.4G to 5B of the summing-up transcript, it cannot be faulted.

Indeed, it was specifically approved by both the prosecution and defence advocates before being submitted to the jury and before the summing-up. The jury heard submissions from the advocates as to the inferences which either side said should or should not be drawn from the evidence. Then, subsequently, in the summing-up itself, it can be seen that the judge identified the inferences that the prosecution invited the jury to draw from the circumstantial evidence and the arguments of the defendant against the drawing of such inferences. Similarly, no justifiable criticism can be made of the judge's direction concerning the defendant's refusal to give evidence at p.8F to 9C of the summing-up transcript. The suggestion in para.32 of the grounds that the judge's direction, "[...] invited the jury to give undue weight to an adverse inference drawn from silence at trial", is wholly unmerited. The key passage in this regard at p.8F to 9A of the summing-up cannot be faulted.

6 Turning to the participation or joint enterprise issue, the applicant argues that the judge's approach to participation was wrong in law in the light of *R v Jogee* [2016] UKSC 8, in that once his presence was proven, the jury were driven by the judge to find the applicant guilty on Count 1. He argues that the judge wrongly equated presence with participation in that the judge took away from the jury the issue of whether they were sure that by presence alone the applicant was intentionally assisting, encouraging or causing an attack on Mr Cato. It was then inevitable, it is said, that the applicant would be found guilty on Count 3. There is nothing in this ground either. The judge's direction cannot be faulted and he specifically made clear that mere presence did not equate to participation in the attack. In particular, he explained to the jury at p.5E to G of the summing-up transcript that:

> "The first question for you then in this case is whether the individual defendant you are considering was in fact a participant, that is, whether you are sure he assisted in or actively encouraged the commission of the alleged offences. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation."

Similarly, in the light of the summing-up, there can be no sensible criticism of the route to verdict.

7 Moreover, the applicant's explanation for his delay in bringing this unmeritorious appeal is inadequate. The applicant's chronology in support of his application to extend time demonstrates that there was a 19-month unexplained delay before the applicant sent his solicitors a letter of inquiry stating that he wished to appeal, that is between 9 May 2016 and 21 December 2017. Furthermore, the applicant's solicitors received the transcript of sentencing remarks of the judge on 29 May 2018, and a transcript of the summing-up from the trial on 16 April 2019. Despite this, nothing of any significance took place for a further year after that until counsel was instructed in April 2020. These are unwarranted delays and the application for extension of time is, accordingly, also refused.

The grounds of appeal

8 Section 29 of the Criminal Appeal Act 1968 empowers the court to direct that time spent in custody pending the determination of an appeal should not count towards sentence. Such an order should be considered where an application is devoid of merit in order to deter a renewal of unmeritorious applications to the full court which waste precious time and court resources. This is such a case. This appeal was wholly unmeritorious, and in consequence, we direct that 56 days of the time spent by the applicant in custody pending the determination of this appeal should not count towards his sentence.

9 We, accordingly, dismiss this application for an extension of time to appeal, but had we allowed it, we would have dismissed the application for permission to appeal, in any event.

CERTIFICATE

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This transcript has been approved by the Judge.