IN THE COURT OF APPEAL

CRIMINAL DIVISION

No. 202201629 B4
202201631 B4
Neutral Citation Number:
[2023] EWCA Crim 410
Royal Courts of Justice

Friday, 24 March 2023

Before:

LORD JUSTICE WARBY
MR JUSTICE GARNHAM
HIS HONOUR JUDGE LOCKHART KC

REX
V
REMI LOADER
JACOB MONTIQUE

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MR M KIRK and MS C JOSEPHIDES appeared on behalf of the First Appellant.

MR K MOLLOY appeared on behalf of the Second Appellant.

J U D G M E N T

LORD JUSTICE WARBY:

1 On 20 August 2021, two young men were attacked and stabbed whilst walking through Market Place in Cambridge. In April 2022, in the Crown Court at Cambridge, Remi Loader (then aged 26), Jacob Montique (then aged 18), and a third defendant called Josh Reeve were tried on charges arising from this incident. The indictment contained two counts of attempted murder (Counts 1 and 2) and two of wounding with intent contrary to s.18 of the Offences Against the Personal Act (Counts 3 and 4), as alternatives. Loader and Montique each faced an additional count of having an offensive weapon. Those were Counts 5 and 6.

2 On 27 April 2022, Loader and Montique were each convicted on Count 1, the attempted murder of Robert Gaskin, and Count 4, the wounding of Chidubeam Ogbonna with intent to cause him grievous bodily harm. Each was also convicted of having an offensive weapon. Reeve was acquitted of all counts against him.

3 Loader and Montique now renew their applications for leave to appeal against conviction after refusal by the single judge.

The facts

4 The brief facts of the case are that at about 11.20 p.m. on 20 August 2021, Robert Gaskin and Chidubeam Ogbonna were walking through Market Place with a friend called Lewis Taylor when two masked attackers ran out from behind the stalls, each armed with a knife. Attacker 1 ran straight at Gaskin and stabbed him in the abdomen, at which point Taylor fled. Attacker 1 chased Gaskin around a car before turning his attention towards Ogbonna, who was attempting to intervene. Attacker 1 stabbed Ogbonna several times, including whilst he was on the floor. As this was happening, Attacker 2 ran towards Gaskin and stabbed him once before running away. Gaskin and Ogbonna left the scene, after which they received medical treatment.

5 The prosecution case was that Montique was Attacker 1 and Loader was Attacker 2, with Reeve reporting to them by telephone on the victim's whereabouts. The attack was, according to the prosecution, a coordinated ambush which the applicants had planned and executed with the intention of killing each of the complainants. The intention to kill was to be inferred from the nature of the attack and the extent of the injuries inflicted on the victims as a result. The motive, said the prosecution, was revenge as part of some kind of ongoing feud between the Loader and Gaskin families, which was said to explain why Gaskin had been the focus of the attack.

6 Loader and Montique both denied presence and involvement. The issues for the jury were identification, namely whether they were the attackers and, in relation to Counts 1 and 2, whether it was proved that the attackers had an intent to kill as opposed to causing really serious harm.

7 The crown's case was predominantly circumstantial. It relied on eight main strands of evidence.

(1) The nature of the injuries. The agreed facts were that Gaskin had been stabbed to his abdomen and chest. His bowel was perforated and had been eviscerated; that is to say the bowel was partially outside the body. He had a further stab wound to his upper left flank. Ogbonna had stab injuries to the central abdomen and left thigh and he had evisceration of the abdominal walls and defensive injuries to the left hand. The injuries to each were described as life threatening, requiring extensive medical treatment and admission at the intensive-care level. Gaskin spent 18 days in hospital. Ogbonna was not discharged until 25 days had passed.

(2) Secondly, there was CCTV footage. There was CCTV of the applicants together in a bar called "Ta Bouche" about an hour or more before the attack, where the victims were also present. There was further CCTV showing the applicants leaving the bar at 22.40, then

in a Sainsbury's store, and then walking away southwards, disappearing from view at 22.56. There was CCTV showing the attackers from 23.12 onwards wearing dark clothing and on bicycles moving towards Market Square and there was footage from the square showing the attack itself. The CCTV evidence was prepared and presented by the officer in the case DC Cowley.

(3) Thirdly, there were the ABE video interviews of the two victims. Gaskin said that he had seen Remi, that is to say Loader, in the bar and recognised him as someone he had seen around, but he said he did not know him personally and was unaware of any antagonism between them. He could offer no explanation or motive for the attack, nor could Ogbonna, although he said he had seen Remi in Ta Bouche giving looks towards his group and Gaskin.

(4) Fourthly, there were phone records and cell site analysis which showed the applicants' phones stopping or being unanswered at the time of the attack and showed their movements according to the cell sites that they were using.

(5) Fifthly, there was evidence from a Ms Maria De Meira, a neighbour of Loader, who said that shortly after the time of the attack she had seen him wearing dark clothing on a pushbike and, upon seeing the police, discarding a pair of trainers which he had under an arm.

(6) There was evidence from police officers that they had seen a man on a pushbike who refused to stop when directed to do so. This man was later arrested and identified as Loader.

(7) Seventh, there was evidence of items found upon searching Loader, his home address and Montique's car. Upon his arrest, Loader was found in possession of a Lucozade bottle containing ammonia. At his home, there was a stab vest, a snood, that is to say

a neck and face covering, and a black combat knife. In Montique's car was a carrier bag with a stab vest.

(8) Eighth, there was evidence about a rear-end crash in April 2019 that was said to go to motive. We shall call this "the motive evidence". The evidence was that Loader's brother, Drew, had been struck by a motor vehicle, sustaining serious leg injuries. There was some reason to think the collision might have been deliberate. A car registered and insured in Gaskin's name was found abandoned in a neighbouring street.

It is appropriate to add these points. Mr Gaskin was spoken to by the police, but no charges or proceedings resulted. Forensic examination of Gaskin's car did not support a case that it had been involved in any collision. Loader initially told the police that he had been uncertain whether it was an accident. Subsequently, he told police that he thought it was, but neither Loader, who had been a witness to the collision, nor his brother would co-operate, and both refused to provide witness statements.

8. The applicants resisted the admission of the evidence about the Lucozade bottle, the knife and the stab vest. The judge ruled against them on each issue. At the close of the prosecution case, each of the applicants then submitted that he had no case to answer. The judge dismissed those applications.

9. The defence submission was advanced under the second limb of *Galbraith* [1952] AC 480, namely that the circumstances relied on by the Crown were simply too tenuous a basis for any safe conviction. The defence accepted that the jury could safely find that the attackers meant to cause really serious harm but argued that they could not properly find an intent to kill, and in any event it was said there was not enough evidence to support a safe conclusion that either applicant was one of the attackers.

10. In a full and careful ruling, the judge identified the general principle, namely that the court at that stage was required to assess the inferences that could properly be drawn from the

cumulative effect of the evidence taken as a whole, if accepted. Having considered the prosecution evidence and its relevance to the two issues raised in the decision of the case, he held that there was sufficient evidence to allow the jury to conclude (1) that the applicants were the attackers and (2) that they had the intent to kill required to establish the count of attempted murder.

11. The applicants' final case before the jury relied on weaknesses in the prosecution case, expert imaging evidence and their own oral evidence. They pointed out that there was no forensic material at all to link either of them to the attack and that the knife and the snood could not be identified as those used by the attackers. The evidence of the defence expert was that the CCTV contained nothing that conclusively identified either applicant as one of the attackers, and it was not suggested by the prosecution that identification was possible by that means.

12. Loader said that he had gone out to socialise, not to attack anyone. The collision in which his brother was injured had been years earlier and there was no tension between him and Gaskin, nor did he have any grudge against Ogbonna. After leaving Ta Bouche, he had gone home and was there at the time of the attack. He had the knife and the stab vest for defensive purposes in case anyone wanted to rob him. His trainers had simply fallen out of his rucksack.

13. Montique said he did not know either of the victims and had not paid them any particular attention when they were in the bar. He was not in Market Place at the time of the attack. After leaving Ta Bouche, he had gone northwards to meet someone to sell cannabis and then to his girlfriend's. The stab vest was something he had bought because he had been stabbed at the age of 15 and nearly died, but it was uncomfortable so he had sold it to Loader.

14. On 27 April 2022, following a summing-up of which no complaint is made, the jury returned the verdicts that we have mentioned.

Grounds of appeal

15. Loader's grounds of appeal fall under two headings. Although there is a degree of overlap, they can be summarised as follows.

(1) The first group of grounds relates to the issue of intent to kill. Loader contends that he had no case to answer on that issue and the judge was wrong to rule otherwise. Further and alternatively, he submits that his conviction was unsafe because the crown was wrongly permitted to adduce evidence about the collision and to cross-examine him about it.

(2) A second group of grounds relates to the identification of Loader as the second attacker. In this context, Loader also complains of the admission of the collision evidence or the motive evidence, but he complains in addition of the admission of evidence about the knife and the Lucozade bottle. He further complains of the prejudicial effect of the admission of some items of evidence going to identification, reliance on which was eventually abandoned. One such item was something said in the evidence of the officer in the case, DC Cowley, to the effect that other CCTV footage existed that supported the case against the applicants. Another point made is that Ogbonna gave evidence of identification of his attackers, but was so weak that the prosecution withdrew reliance upon it. Loader says that the judge's strong directions were not enough to cure the potentially prejudicial effect of this material. These points are relied on in the written grounds as individually and, in particular, collectively, undermining the safety of the convictions.

16. The grounds of appeal advanced by Montique overlap with those of Loader. Montique submits that the judge was wrong, first, to reject the defence submission of no case to answer on intent to kill; secondly, to rule the motive evidence admissible; and thirdly, to rule admissible the evidence about the stab vest and stab vest bag. Fourthly, like Loader, Montique complains of the prejudicial impact of the admission of the evidence of the officer in the case about further footage. Fifth and finally, he maintains that the cumulatively effect of the second, third and fourth grounds is that his conviction on all counts is unsafe.

17. In oral argument on the renewed application today, Mr Kirk for Loader and Mr Molloy for Montique, to both of whose arguments we pay tribute, have focused primarily on the motive evidence, which is described as "tenuous and prejudicial" and on the judge's ruling on the submission of no case to answer in respect of the intent to kill; but all the other grounds are maintained and adhered to in support of these principal points.

Identification

18. It is convenient to take this first and to address in this context the controversial items of evidence.

The motive evidence

19. Mr Kirk has submitted that the primary relevance of the motive evidence is in relation to intent. We prefer Mr Molloy's analysis that it went primarily to identification. It plainly could not have justified a finding of identification by itself, but it was relevant because, if accepted by the jury, it supplied a potential motive for Loader to attack Gaskin. When taken with other evidence, such as the CCTV, it was capable of supporting a conclusion that Loader was one of the two attackers. It was not unfair to allow the jury to consider whether the evidence did support that conclusion. The main point on which the defence now rely is that Gaskin's ABE interview as a prosecution witness undermined the prosecution case on motive. This however was available to them at trial as a counter argument. The prosecution's approach was selective, but not improper. And in any event Gaskin could not speak of what was in Loader's mind. The applicants rely on the fact that in sentencing the defendants the judge indicated that he was not sure what the true motive was, but, as has been properly conceded today, it by no means follows that it was wrong to admit the evidence.

20. Complaint is made that in cross-examination prosecution counsel went beyond the agreed facts in this regard, in particular by putting it to Loader that his mother had asked the police to fit a panic alarm at her address, for fear that those responsible for the crash would target her.

The form of some of the questions posed was inappropriate, but we do not consider that this was an improper line of cross-examination. We are not persuaded that it was excluded by the agreement reached between the parties. Even if it had been irregular in that respect, we would not regard it as affording any arguable basis for challenging the safety of the conviction. This was a limited line of questioning, which the judge in due course closed down.

21. We are not persuaded by counsel's invitation to infer from their verdicts that the jury must have relied on the motive evidence. An inference of that kind can of course only be drawn where no other explanation is possible. That is not the position here. Mr Molloy has submitted that the motive evidence is the only available explanation for the fact that the applicants were convicted only of the lesser charge in respect of Mr Ogbonna, although he sustained the greater injuries. We do not agree. For instance, Mr Gaskin was the first to be attacked and the assault on him was direct and ferocious. The attackers went past Ogbonna to do that. The jury may well have concluded that Gaskin was the principal target on this basis, regardless of the motive evidence.

The ammonia

22. It was clearly open to the jury to conclude that the ammonia was in Loader's possession with a view to its use as a weapon. On that footing, he was at the relevant time equipped to carry out an attack of some kind. The jury could properly conclude that it was therefore more likely that he was one of the attackers that night and that he had the intention alleged by the prosecution. The potentially probative effect of this evidence may have been weakened, but it was not destroyed by the fact that the attack was not carried out with the use of ammonia.

The knife

23. Although the knife found at Loader's home was not used in the attack, the jury were entitled to consider whether the fact that Loader was found to have a large combat knife in his possession shortly after the time of the attack lent support to the Crown's cases that he was one of the attackers. The evidence was that the knife was found under the stab vest.

The stab vest and bag

24. Loader's possession of the stab vest and Montique's possession of the bag belonging to that vest were logically supportive of the prosecution case and all the more so in the context of the other evidence we have mentioned. Loader makes no complaint about the admission of these items into evidence. As the single judge observed in rejecting Montique's complaint on this topic:

> "A stab vest is an unusual item to possess and has utility for a planned knife attack. The jury were entitled to consider whether it was coincidence that the applicant and his co-defendant were in possession of these items."

The context

25. We have considered, anxiously, whether the evidence going to identification was in its totality so weak that the jury's verdict is arguably unsafe. In our judgment, that is not the case. The points that we have been discussing need to be seen in context. It is helpful here to record what the judge said in dismissing the submission of no case to answer on the issue of identification. He said this:

> "There is clear evidence that suggests links between them, including, amongst other things, the defendants' behaviours in Ta Bouche bar in relation to the victims and each other; the timings and the location of the last CCTV contact with the defendants and the first CCTV contact with the attackers; the fact that nothing about cell site, phone usage, CCTV or general appearance excludes the defendants from being the attackers or from being present where the attackers were. The fact that D3's behaviours in relation to the victim group, in particular when they came to be leaving the bar coincided with the phone contact with D3 and D2, including at a time when one of the attackers appears to be listening to his phone. Taken in combination, this evidence is not merely speculative and it clearly raises a case to answer."

26. It is notable that this reasoning places no reliance on any of the disputed items of evidence that we have addressed so far. It relies instead on other factual matters that were properly in evidence, were not disputed - indeed were indisputable - and the inferences that could safely be drawn from those matters. In our judgment, this reasoning cannot be faulted. There are indeed

other aspects of the evidence that might also have been mentioned in this context, including the evidence of the neighbour and the police about the bike and the shoes.

DC Cowley

27. What then of DC Cowley's evidence suggesting, that there could be some evidence not seen by the jury that implicated the defendants? A complaint about this seems to us to be at best a makeweight point. The prosecution rightly concedes that the emergence of this evidence was unfortunate, but it was not led by the Crown, it emerged in cross-examination. The jury never saw any evidence of the kind described by the officer. In our judgment, any risk of prejudice was appropriately catered for by the judge's very clear direction that the claim that there was "a bit of CCTV which could demonstrate this or that or the other" simply could not take the case forward, and his further direction that "any such claim which was not backed up by evidence must be ignored".

Ogbonna's evidence

28. We have reached a similar conclusion in respect of the applicants' complaints about Ogbonna's identification evidence. A complaint is made that the Crown decided without warning not to adduce identification evidence from Taylor, but did put in evidence Ogbonna's ABE interview which was later acknowledged to be unreliable on that issue. The defence say that had they known in advance that the Crown would take this course, they would have objected to the admission of this aspect of Ogbonna's evidence. As it was, the defence suffered irretrievable prejudice.

29. However, the Crown was entitled to choose what evidence it led. And Ogbonna's edited ABE interview went before the jury by agreement or at least without defence objection or qualification. It was in the course of argument on the submission of no case to answer, and thus after Ogbonna had been cross-examined, that the prosecution first acknowledged that it would not be safe to rely on Ogbonna on the issues of identification. The judge duly directed the jury

in plain terms that they should disregard it. We reject the contention advanced in writing that because this was pre-recorded evidence the prosecution "knew in advance" that it was so weak and unreliable that it should not be relied on. This is a fallacious and unfair argument for which we see no proper basis. In our view, it is clear that the prosecution's change of stance resulted from a reappraisal of this aspect of the evidence, as part of the trial dynamics. We also consider it clear that the judge's strong direction was sufficient to dispel any risk of prejudice.

Conclusion on identification

30. For these reasons, we conclude that it is not arguable that the applicants' convictions are unsafe for want of sufficient evidence of identification or because of unfair prejudice from evidence adduced in that connection.

Intent to kill

31. Nor do we consider it arguable that the evidence did not permit a safe conclusion that the applicants had the necessary intent to kill.

32. Addressing the applicants' submission that they had no case to answer on this issue, the judge applied the following rigorous test:

> "Not simply whether the evidence taken as a whole is merely consistent with an intention to kill in regulation to each defendant, but whether a properly directed jury could be sure that taken as a whole the evidence is definitively probative of an intention to murder."

33. The judge set out in some detail the competing arguments and the key items of evidence. His conclusions were fully reasoned. The ruling was a model of its kind. His conclusions can be summarised as follows. The behaviour of all three defendants in Ta Bouche was capable of supporting a conclusion that they had formed a plan to attack Gaskin at least. The nature and extent of that plan could be inferred from what happened after that, including the evidence of the attack itself. The inference could be drawn that, as he put it:

> "All three defendants intended to do what D1 and D2 very nearly did, plainly kill Mr Gaskin."

As for Ogbonna, the applicants knew that he was there and that he could be expected to resist any attack on Gaskin, as he did. The evidence was that the attackers did not treat Ogbonna more lightly than Gaskin. On the contrary, the attack on Ogbonna lasted longer and the final blows were struck when he was on the ground.

34. On this issue, we agree with the reasoning of the single judge. Rejecting the applicants' arguments, he pointed out that for these purposes it has to be assumed that the jury were entitled to conclude that Montique was Attacker 1 and Loader was Attacker 2. The single judge went on:

> "... based on the CCTV evidence, the jury were clearly entitled to conclude that the applicant and Montique had jointly planned a sudden, targeted attack with lethal weapons and their identities disguised. The jury were entitled to infer from the nature of the attack that the applicant intended to kill Gaskin and Ogbonna, for the reasons given by the judge."

35. Again, the focus is notable. Here, it is on what the jury saw and heard about the nature of the attack. Neither the trial judge nor the single judge referred in this context to the evidence going to motive. Mr Kirk has argued today that if there was sophisticated planning behind the attack that is not an indicator of an intent to kill. He has also made points about the location and nature of the wounds sustained by the victims and the way in which the assailants left the scene when success in an attempt to kill had not apparently been achieved. Mr Molloy has adopted those submissions and pointed also to a gesture by one of the attackers after the event, which he says is an indication of victory. All of these were good and valid points for the jury to consider, but they are not so compelling, individually or collectively, that the judge was bound to withdraw the issue from the jury. For those reasons, we conclude that the judge was right to hold that each of these defendants had a case to answer on the issue of intent to kill. Those counts were properly left to the jury and the guilty verdicts on Count 1 are plainly safe.

Disposal

36. For all these reasons, these renewed applications are refused.

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