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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Tuesday, 13th January 2004

B E F O R E:

LORD JUSTICE SCOTT BAKER

MR JUSTICE MCKINNON

HIS HONOUR JUDGE GORDON
(Sitting as a Judge in the CACD)

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R E G I N A

-v-

ANTHONY LAMBERT
JOSEPH LAMBERT
LEE KEITH FOLEY

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MISS MARIE CRAWFORD appeared on behalf of the APPLICANT ANTHONY LAMBERT
MISS FIONA HORLICK appeared on behalf of the APPELLANT JOSEPH LAMBERT
MR JULIAN DALE appeared on behalf of the APPELLANT FOLEY
MR ROBERT HALL appeared on behalf of the CROWN

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

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1. LORD JUSTICE SCOTT BAKER: Anthony Lambert originally sought leave to appeal against conviction but abandoned that application before it was considered by the Single Judge. He now seeks to have that abandonment treated as a nullity. The reason that he seeks to do so is that the two co-appellants, Joseph Lambert, his son, and Lee Foley, were both given permission to appeal against conviction by the Single Judge on the ground that there was a procedural error in that there should have been an identification parade. Lee Foley was also given leave to appeal against his sentence on the ground that it was longer than that of his two co-defendants.

2. Anthony Lambert's position is that if the co-appellants, Joseph Lambert and Lee Foley, have an arguable case on the grounds on which permission to appeal was granted, precisely the same point arises in his case and that he would wish to argue it.

3. The law with regard to treating an abandonment as a nullity is clear. It is set out in a paragraph at 7-198 in the current edition of Archbold. That paragraph reads as follows:

> "In R-v-Medway [1976] QB 779, 62 Cr App R(S) 85 (a court of five judges), the Court Of appeal emphasised that alongside the jurisdiction which undoubtedly existed to give leave to withdraw an abandonment where it was shown that the circumstances were such as to enable the court to say that the abandonment should be treated as a nullity, there did *not* co-exist an inherent jurisdiction, in other special circumstances, which enabled the court to give such leave. The kernel of the 'nullity test' is that the court must be satisfied that the mind of the applicant did not go with his act of abandonment. It was impossible to foresee when and how such a state of affairs might come about, and it would be wrong to make a list under headings -- mistake, fraud, wrong advice and misapprehension -- which purported to be exhaustive of the types of case where the jurisdiction could be exercised."

What the applicant says here is that he was sent a letter by his solicitor pointing out that if he went ahead with an appeal and did not succeed there was a risk that time that he had already spent in custody would be directed not to count towards his sentence. The applicant was very concerned about that and decided in the circumstances that he did not wish to take the risk and therefore abandoned his application for leave to appeal before it had even reached the stage of being considered by the Single Judge. Miss Crawford, who has appeared today for this applicant, submits that the advice that he was given pitched the risk rather higher than the reality. She points out that, had she been given the opportunity of advising the applicant, she would have made it clear to him that, yes, there was a risk, but the risk was small because it is an order that is only rarely, if ever, made by the Court of Appeal these days.

4. We have not been shown a copy of the written advice that the applicant was given but we are prepared to accept, for present purposes, that it was along the general lines as described to us by counsel. It seems, however, in these circumstances, that it cannot possibly be said that the mind of the applicant did not go with his act of abandonment. In reality, what can be said is that he may have given rather more weight than was in the circumstances justified to the small risk that, if he had proceeded with the appeal and failed, there might have been a direction that some of the time spent in custody should not count towards his sentence. In these circumstances we have come to the clear conclusion that this Court does not have jurisdiction to set aside the applicant's abandonment of his application for permission to appeal. In these circumstances, despite the forceful argument of Miss Crawford, this application must fail.

(Submissions re: appeals against conviction on behalf of Joseph Lambert and Lee Foley then followed.)

5. LORD JUSTICE SCOTT BAKER: Joseph Lambert, Anthony Lambert and Lee Foley were all convicted of assault occasioning actual bodily harm in the Crown Court at Lewes before Mr Recorder Plender QC and a jury on 23rd July 2003. The two Lamberts each received a 12 month sentence. Foley received a sentence of 18 months' imprisonment. Proceedings against a fourth man called Pilkington were discontinued before the trial, apparently on the basis that it was believed that the one witness who implicated him would not be attending trial, although in the event he did. An allegation of affray was dismissed at the close of the prosecution case against the two Lamberts and Foley.

6. Joseph Lambert and Lee Foley appeal against conviction with the leave of the Single Judge. Anthony Lambert had sought permission to appeal but had abandoned his application before the matter ever went to the Single Judge. At the commencement of the proceedings today he sought leave to have that abandonment treated as a nullity and to proceed with an appeal on the same basis as Joseph Lambert and Lee Foley, following discovery that these two co-appellants had been granted leave by the Single Judge. That application was refused by this Court after argument this morning for the reasons that were then given.

7. The issue on which permission to appeal was granted and the sole issue before us is whether there was a breach of Code D:2.14 of the relevant Code under the Police and Criminal Evidence Act through the failure of the police to hold an identification parade. In short, the respective positions of the prosecution and the defence are these. The defence say that this was an identification case. A parade should have been held; there was a breach of D:2.14. The prosecution say this was not, in reality, an identification case at all: all the accused admitted that they were present and the real issue was whether they participated in the assault. The appellants sought to stay the proceedings before the trial commenced but the judge rejected that submission. There was a further submission of no case to answer at the conclusion of the Crown's case. It was argued that there was no case to be left to the jury. That submission too was rejected. As we have already mentioned, in reality everything turns on whether the police were right or wrong not to have an identification parade.

8. Briefly, the facts were these. At about 9 o'clock on the evening of 8th April 2002 Edwin Thompson was assaulted in the John Logie Baird public house in Hastings. His arms, eyes and legs were bruised. There were several assailants. There were also a number of witnesses. As is common in these situations, each witness saw different aspects of the events or recollected different aspects of what had occurred. The Crown, however, was able to piece together a story of what had happened and who was involved.

9. It was the Crown's case that there was a group of assailants - probably four: that they were these two appellants, together with Tony Lambert - the appellant Joseph Lambert's father - and a fourth man, all of whom were drinking together at a table in the public house before the fracas occurred and all of them left together after it had concluded. The Crown's case was one of joint enterprise.

10. D:2.14 of the Codes of Practice provides as follows:

> "Whenever a suspect disputes an identification made or purported to have been made by a witness, an identification procedure shall be held if practicable unless paragraph 2.15 applies. Such a procedure may also be held if the officer in charge of the investigation considers that would be useful ... "

D:2.15 reads:

"An identification procedure need not be held if, in all the circumstances, it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence."

11. It is necessary, therefore, in our judgment, to consider the question: did either of these appellants dispute an identification made or purported to have been made by a witness. This is a question that falls for consideration at the time that the police were investigating the offence, rather than in the light of the evidence that was actually given at the trial.

12. One has therefore to consider what the witnesses said in their witness statements, the circumstances as they were known to the police, and the response, if any, by each appellant when questioned by the police. It also goes without saying that the position has to be considered separately for each appellant. It is perfectly possible for there to be an identification issue as regards suspect A but no such issue with regard to suspect B. Furthermore, there does not necessarily have to be a positive dispute of identification raised by the particular suspect. The provision in the Code bites - and there is clear authority on this - if the circumstances are such that it is clear to the police that there is an identification issue.

13. In the first place the Crown's case has always been that this was one of joint enterprise, a joint assault by four persons, albeit each one played a different part. The case was discontinued against one of the four because the witness who specifically implicated him was, as we have mentioned, not expected to come to court to give evidence.

14. When the police arrived at the John Logie Baird public house the duty manager, Mr John Collins, named one assailant as Lee Foley. He described another as Tony, in his mid-forties, and a third as the son of Tony. As to the fourth, he was only able to give a description.

15. The police closed circuit television operator made a call over the radio whilst the police were at the public house that he had tracked four males leaving the premises and going on to French's Wine Bar, which was nearby. Soon after, there another call over the radio saying that a fight had broken out in French's Wine Bar. Accordingly, three police officers - Police Constable Patch, Police Sergeant Ronnie and Police Constable Smith - set off from the John Logie Baird, where they were at the time in the direction of French's Wine Bar. En route they met Lee Foley with blood on his hands and face, and arrested him. He struggled, but eventually calmed down. It was at about that point that the police noticed Tony Lambert, that is the father of the appellant Joseph, and arrested him. Soon after that the fourth man, Pilkington, was likewise seen and arrested. Tony Lambert admitted that he had been at the public house but denied that he had done anything. Initially he gave the police a false name. The appellant Joseph Lambert was not arrested until about 2 months later, on 6th June 2002.

16. On the day after the assault Tony Lambert was interviewed. He agreed that the previous night he had been in the John Logie Baird with his son, Lee Foley and Pilkington and that they were all drinking together. He said he had seen a commotion but did not take much notice and that they all left together. It was put to him that Pilkington had said that when they left together they were talking and it was mentioned that he, Tony Lambert, had just had a fight in the pub with a male in respect of whom something had happened a long time ago. Tony Lambert replied, "No, not that I don't remember, it didn't happen." He also denied that his son had been involved in the commotion. Foley was interviewed the same day. Apart from admitting that he had a noticeable semi-circular scar on the right side of his face just above the eyebrow, he made no comment. A witness, Mr Neaves', description of his scar was put to him. He agreed that his scar fitted perfectly to that description. But, as we have mentioned, that apart, he answered "No comment" to each of the questions.

17. Pilkington was also interviewed on the same day. He said that he went to the John Logie Baird with the Lamberts. They were sitting around a table by the bar. He went out to the toilet and when he returned there was what he described as "a big fight", basically of all the people he was with. He pulled Joseph Lambert away and the fight was broken up. Lee Foley, he said, was at the John Logie Baird. Pilkington said that he did not see anything; it started when he went out to the toilet. When they left he said there was talk about Tony Lambert having an argument years ago with the bloke that he was fighting with.

18. Following his arrest on 6th June, Joseph Lambert was likewise interviewed. He admitted drinking in the John Logie Baird, together with his father, Lee Foley and Pilkington. He was asked to give his account of what happened. He said:

> "Well what it was, I spoke to this chap sitting down. I was bending over with my pint, just talking to him about... I mentioned my dad and something else. Then it was quite busy now. I got nudged from behind and my drink went on him. He stood up, stood in front of me and I got pulled back from someone from behind me. The next thing I know someone come in from the side, smacked him and then after that it was just people all over the place."

He admitted having the conversation that the complainant - and we will come to him in a moment - said had taken place with the man who had assaulted him. He also accepted that he left the public house together with the other three and went to French's. It is important to emphasise - and this is a point that is strongly made by Mr Dale - that although Joseph Lambert accepts he was close to and involved with the complainant in the way broadly described both by the complainant and Joseph Lambert at the beginning of the incident, he himself did not take part in any violence whatever.

19. Lee Foley was further interviewed on 6th June and simply repeated "no comment" to questions put to him.

20. Anthony Lambert, likewise, was interviewed again. He did not have anything to add to what he had told the police in April. The same was true of the fourth man, Pilkington.

21. It is necessary at this juncture to pause and consider what material the police had in their possession at this juncture in the shape of witness statements. They had statements from five eyewitnesses, to which we shall now refer.

22. The first was a Mr Finnan, who described noticing a group of four males sitting on a table in the middle of the bar because they were very rowdy and loud. He said that shortly before 9 o'clock his friend, Mr Thompson, came to his table and asked if he could join him for a drinking session. They had been sitting together for just a few moments when one of the males approached him. Then he gave a description of the male. He said that the male approached Mr Thompson from behind and ruffled his hair. He then returned to his table, took a mouthful of beer and approached him again, when he spat the beer all over Mr Thompson and mumbled words to the effect, "You did something to my dad years ago". He then returned to his own table. Mr Finnan anticipated that there was to be more trouble and said that the same male subsequently punched him on the head. They then wrestled on the floor and Mr Finnan was aware that other males joined in but he could not say exactly who did what. He said:

> "I can't recall everything that happened to Thompson. However, I did see an older male kick him approximately three times as he lay on the floor."

He then described the older male, whom he said he knew to be Tony Lambert as he used to take

him to work in the Eastbourne shopping centre about 20 years before. He also mentioned that the first male had referred to this other man as "dad" on more than one occasion.

23. The complainant, Mr Thompson, became aware of a group of males at a table behind him and then felt a hand on the top of his head, turned round and saw a male whom he then described. He said the male said: "Do you want trouble," to which Mr Thompson said, "I've never seen you before, I don't know you", and the male said: "You picked on my father a long time ago". Mr Thompson said, "I don't know what you're talking about." He then felt liquid all over the top of his head and realised it was beer. A couple of moments later he was advised, "Look out, he's coming back at you again", and he noticed the same man who had placed his hand previously on his head. This man punched him with a clenched fist, striking him below the eye and high up on the cheek. The blow knocked him senseless and he fell to the floor. He said that the man who had done this and an older man who he also described were there, and that he was then kicked by both males on the arms which he was using to protect his face. He said the kicks also caught him on the legs. At this point he was, as he described it, semiconscious. He said that he thought the two males struck him about a dozen times.

24. The third witness was Mr Collins. He noticed the man that he knew as 'Tony' and his son, who he subsequently believed was called 'Joe'. He said that they were shouting, followed by a male who he knows as 'Lee Foley'. He had known Foley for some 5 or 6 years. He said that he had seen Tony come on to the premises about once a week since they had opened in December 2001 and he then described him. He said that he had seen the person he believed to be Tony's son maybe once or twice, but that he was not a regular. The four people whom he described all sat together, opposite the bar in a central position. He said that shortly before 9 o'clock he heard a lot of noise coming from the location of the cigarette machine. He could see all the four men and what appeared to be a melee. He said, "I saw Ben get kicked. At the same time I grabbed hold of Lee. I had seen all four from the table, where they had been together" kicking where he could see the man on the floor.

25. The fourth witness was Mr Neaves. He described events in this way. First of all, he described the person who he referred to as male No 1, which the Crown say was Lee Foley. He described the scarring on his face in some detail and gave another two aspects of his description which Miss Horlick, who has appeared on Foley's behalf, relies on strongly as being inaccurate descriptions and matters that the court should have in the forefront of its mind. He also referred to male 3, who was the son of male 2. He knew that they were father and son because they looked the same. They were always in the pub together and he came in after his father.

26. Mr Neaves described a disturbance starting at a table 4 or 5 metres away. He pulled the first male, Lee Foley, away from a chair. This male started to kick the person on the floor to the body. Having gone up and pulled the male away, he returned and continued the kicking, sarcastically apologising for it, saying words to the effect 'Sorry for that'. Mr Neaves made it clear in his police statement that he only ever saw the first male, that is Lee Foley, fighting; he never saw any involvement on the part of the other two. So there, broadly, was the material in the possession of the police.

27. The demarcation line between issues of identification and issues of participation can sometimes be a fine one. Where identification is in issue, the police are required to follow an identification procedure. In this case, if such a procedure was appropriate, it would have been an identification parade. When identification is not in issue, it is obviously timeconsuming, expensive and unnecessary for the police to hold a parade. The police, as we have said, have to look at the situation as regards each suspect and ask themselves whether, in the circumstances as known to them, there is an identification issue.

28. The judge referred to two authorities. The case of R v Chen [2001] EWCA Crim 885 and R v MacMath (unreported, 26th March 1997). These are, in our judgment, illustrative of situations falling on each side of the line. There is the passage from the judgment of Longmore LJ in the case of Chen, in which he said:

> "In this case, we cannot see that there is any question of disputed identification as such. There was a dispute about what particular role, if any, each of the appellants played. But a dispute about roles or about the commission of particular acts in the context of criminal activity sustained up to the moment of arrest is not, in our view, a dispute about identification, since the suspects are disputing not identification but criminal participation. We do not consider that Code D requires an identification parade every time an individual suspect, while accepting he was present at the scene of the criminal activity, disputes particular participatory acts."

Then, in MacMath, where it was held that there should have been an identification parade, Henry LJ said this at page 8, having referred to the relevant paragraph of the Code:

> "That requirement operates unless any of the exceptions set out in the Code apply, and none do here. Though the appellant had admitted his presence at the scene, but denied his participation, it was still an identification case for the reason that there were a fair number of people in the vicinity at the time, and so presence would not necessarily be evidence of identification as a participant."

The fact that a suspect admits presence at the scene is obviously not an answer to an identification issue because it is perfectly possible for there to still to be a very serious identification issue notwithstanding the presence at the scene is admitted.

29. It seems to us, however, that what is critical in these cases is not so much to look at the facts of other cases, because each case in this field is necessarily very much determined on its own facts, but to look at the facts of the instant case to try to put oneself in the shoes of the police at the time that they were conducting the investigations and ask themselves the question: is there a true identification issue here?

30. Turning, therefore, to the particular circumstances of the present case - first, Foley. What was the position with regard to Foley as known to the police at the material time? He admitted that he was the possessor of a scar precisely as described by one of the prosecution witnesses, but with regard to everything else he made no comment. The witness Neaves identified one of the attackers as having a heavily scarred face and Foley accepts the description matches his scars. Mr Collins, the bar manager, had known Foley for 5 years as a friend of a friend and also spoke of the scar. He saw the witness, Neaves, grab Foley and try to break it up. Avery, who was the off-duty police officer, recognised Foley and saw him kicking and punching a man on the floor along with two others. He was not able to say if the kicks landed, but plainly his evidence went to a joint enterprise having taken place. So he too, like Collins, was somebody who had previous knowledge and was able to recognise this appellant. Then there were the three police officers who found Foley nearby with his head and face covered in blood. There was an admirable opportunity for Foley to put in issue the question of identification were he minded to do so, but he did not and instead chose to make "no comment" to the various questions that were put to him. Of course he is perfectly entitled to do so, but when one looks at the position from the viewpoint of the police officers investigating the offence, Foley did nothing to suggest that there was a serious issue of identification in the case, when he was well able to do if there was.

31. Miss Horlick says, if one goes through all the witnesses, there is quite a lot of conflicting evidence of description. So, indeed, there was. But that, in our judgment, does not assist on this question of whether in truth there was an identification issue with regard to Foley.

32. Viewing the matter realistically, Foley was recognised; he was seen as a participant, and he chose to tell nothing to the police about what his defence might be. In our judgment, the police were perfectly entitled to conclude that this was not a case which required an identification parade.

33. As to Joseph Lambert, the position as regards him becomes clear from the answers that he gave to the police in interview. He admits speaking to someone who plainly must have been the complainant. He admits making reference to his father. He admits nudging the complainant from behind. He also admits that drink was spilt on the complainant, though he does not go as far as the complainant does in describing how that happened. He further admits that he was pulled back from the complainant and that someone came in from the side and smacked the complainant. In our judgment, it is perfectly plain that Joseph Lambert is admitting a degree of participation in the events that occurred, which makes it abundantly plain that identification is not a disputed matter. What is disputed is the extent to which he participated and whether he participated to the extent to make him criminally liable for assault occasioning actual bodily harm.

34. The question of identification plainly was considered by the police. That can be gleaned from page 37 of the summing-up, where the judge briefly said:

> "No forensic examination was made; an identification parade was considered but not thought necessary."

In our judgment, the police were fully entitled to reach that conclusion.

35. Concluding, as we do, that the police were right to decide that no identify parade was necessary in the case of either of these appellants, that, in our judgment, is in reality the end of the appeal. However, Miss Horlick complains that the judge should not have allowed the Crown to adduce evidence of description. In our judgment, there is nothing in that point.

36. Mr Dale submitted that his client disputed any participation whatever in the fight - and so he did. But the admissions that he made of involvement with the complainant make it perfectly clear, in our judgment, that he was not at that juncture disputing identity.

37. Mr Hall, for the Crown, submits that both defendants were given every opportunity, and indeed took it during the course of the trial, of testing the evidence when it conflicted. Neither appellant ever asked for an identification parade or said anything to the police to suggest that identification was in reality an issue. That would not, of course, be a complete answer if the whole of the circumstances made it plain that, despite the suspects saying nothing, identity really was an issue. But that is not, in our judgment, this case. We have read carefully the learned judge's summing-up. It was, in our judgment, both full and fair.

38. In the course of his skeleton argument Mr Hall made a number of references to aspects of the summing-up. He said that as the defendants had accepted their presence at the scene, they were not disputing identification but were disputing criminal participation. These are points that Mr Hall observes were made fairly and firmly by the judge to the jury. A person does not participate in an offence merely by being present at the scene. The prosecution have to prove In relation to each defendant that he took some part in the offence, and that the jury should be careful in attaching weight to witnesses' evidence. He also went on to tell the jury that they

might like to bear in mind some features of the Turnbull direction. The appellants argue that this was a complete about-turn by the judge: having ruled that this was not an identification case, he was then backtracking and treating the case as if it was.

39. In our judgment, that is not a justifiable criticism. The judge was not saying that this was an identification case. He did, however, no doubt because he was mindful of the comments that had been made during the course of argument and was anxious to be entirely fair to the defendants, draw to the jury's attention certain of the classic Turnbull features. We can find no substance in any criticism of the judge in that regard.

40. In the result, we have come to the conclusion, not only that the case did not call for an identification parade, but also having looked more broadly at the circumstances, that this was an entirely safe conviction and in respect of both these appellants. Accordingly the appeals against conviction will be dismissed.

(Submissions re: appeal against sentence in the case of Foley then followed.)

41. LORD JUSTICE SCOTT BAKER: Miss Horlick advances two points on Foley's behalf. In the first place, she submits that the judge was wrong to impose a greater sentence on Foley than on the other two defendants. Secondly, she submits that, in the light of the positive pre-sentence report and also the good report from the prison officer, there are real signs here of a young man who is minded to change his ways.

42. We have given careful consideration to both those points. However, at the end of the day the question that we have to consider is whether the sentence that was passed by the judge was manifestly excessive. He had the advantage of presiding over the trial. He was well placed to assess the relative levels of criminality of the various defendants. We cannot conclude that this sentence falls into the category of being manifestly excessive. In these circumstances, the appeal against sentence is dismissed.

43. LORD JUSTICE SCOTT BAKER: What about costs, Mr Hall?

44. MR HALL: My Lord, £275.

45. LORD JUSTICE SCOTT BAKER: What is the position about the two appellants?

46. MISS HORLICK: Mr Foley is serving his sentence and has no means of paying costs; he has no assets or savings.

47. LORD JUSTICE SCOTT BAKER: What is the position about Mr Lambert?

48. MR DALE: He is released on prison licence, having be tagged. He has no job and is surviving on benefits.

49. LORD JUSTICE SCOTT BAKER: No order as to costs.

50. MR DALE: Can I raise one matter? Very early on today my learned friend was addressing your Lordships, and your Lordships indicated that you were not aware of seeing the advice with regard to Anthony Lambert but accepted it of course in positive terms. Such advice has been before your Lordships in the case of Joseph because the advice was written and submitted to the solicitors on behalf of Anthony, retyped and sent on by the solicitors with a note that they applied to Mr Joseph Lambert equally well and were to be considered in that case, which of course they have been and leave was granted.

51. LORD JUSTICE SCOTT BAKER: We indicated that we would accept what we were told and so a correction will be made in the transcript.

52. MISS HORLICK: In the usual course, the work which goes into the preparation of advice which the Single Judge grants leave on will be covered. Unusually in this case the work that went into that advice was that of my learned friend Miss Crawford. I prepared the matter and presented it today. I wonder whether your Lordships would feel it appropriate to indicate that the work that Miss Crawford put into the grounds of appeal should be remunerated under the order relating to Joseph Lambert on that advice which has been in front of the Single Judge and in front of this Court. It is unusual, as it were.

53. LORD JUSTICE SCOTT BAKER: What order do you want us to make?

54. MISS HORLICK: I would like the Court to make an order that Miss Crawford should be remunerated for the advice submitted on behalf of Joseph Lambert in this case.

55. LORD JUSTICE SCOTT BAKER: We do not see any reason why not, as long as it is not paid for twice.

56. MISS HORLICK: I did not do the advice in the case. I picked it up from there. Thank you very much.