No: 2004/5650/D3

Neutral Citation Number: [2005] EWCA Crim 609
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2
Monday, 7 March 2005

B E F O R E:
LORD JUSTICE LAWS
MR JUSTICE HOLMAN
SIR MICHAEL WRIGHT

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R E G I N A

-v-

PAUL MORRIS

- - - - - - -

Computer Aided Transcript of the Stenograph Notes of
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MR G JOHNSON appeared on behalf of the APPELLANT
MISS J OLIVER 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 LAWS: In July 2004 this appellant faced his trial with others before His Honour Judge Campbell and a jury at the Snaresbrook Crown Court. The indictment in its final form contained five counts. Count 1 charged Patrick Nichols, Billy James Carter and this appellant with an offence of violent disorder. Count 2 charged Nichols and the appellant with an offence of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861. Count 3 charged Nichols and the appellant with an offence of wounding contrary to section 20, this was put as an alternative to count 2. Count 4 charged Nichols and the appellant with another section 18 offence against a different victim. Count 5 again charged Nichols and the appellant with an alternative section 20 offence of unlawful wounding. In light of the first ground of appeal, which we shall shortly explain, we should read the particulars of offence given in the indictment in relation to count 1, violent disorder:

> "
>
> PARTICULARS OF OFFENCE
>
> Patrick Nichols, Billy James Carter and Paul Morris on a day between the 7th day of February 2003 and the 10th day of February 2003 used or threatened unlawful violence when present together and the conduct of them all, taken together, was such as would cause a personal of reasonable firmness present at the scene to fear for his personal safety."

2.On 21st July 2004 the jury convicted the appellant and Nichols on counts 1, 3 and 5. Carter was found not guilty on count 1, the only count on which he was charged. The judge also directed the jury to find the appellant not guilty on count 2. We should say that these verdicts were given upon a retrial. The defendants had originally faced trial in April 2004 when the indictment was in an earlier form, but on 21st April 2004 the first jury was discharged because of a dock identification by the alleged victim, Nader Jamali, on what were to become counts 2 and 3.

3.On 20th August 2004 the appellant was sentenced to three concurrent terms of two years' imprisonment. He now appeals against conviction by leave of the single judge. The single judge indicated he saw nothing in one point sought to be made by the appellant to the effect that the judge ought to have excluded from the evidence a photograph of the victim on count 5. Counsel has submitted a note helpfully indicating that he does not seek to pursue that ground.

4.The Crown's case on violent disorder was opened to the jury consistently with count 1 as it was drafted, that is as what Mr Johnson for the appellant has called a "closed" violent disorder in which the only person said to have been present together and using or threatening unlawful violence were the named defendants.

5.The extremely unpleasant incident which gave rise to the indictment took place at and just after midnight on 8th February 2003 at premises called the No.1 Kebab Shop in Dagenham. The shop belonged to Mr Jamali, the victim named in counts 2 and 3 of the indictment. That night he had closed up and was counting the cash with other members of staff including Mr Ugurlu, the victim named in counts 4 and 5. Mr Jamali was to tell the jury that he heard banging and kicking at the shutters. He unlocked the door and lifted the shutter. He said that as soon as he did so three, four or five people started to hit him. Some had sticks. He was struck on the head with a stick. He fell to the ground. They went on hitting him. He was punched in the face and stabbed in the hand with a sharp object. That was the injury charged in counts 2 and 3.

6.Mr Ugurlu was attacked as well. In light of the second ground of appeal we should set out the injuries suffered by Mr Ugurlu as they were noted in the hospital where he was taken in an unconscious condition after the incident. He had bruises to his forehead, bruising surrounding the left eye with blood on the white part of the eye, bleeding around the left ear and swelling to the back of his head. Months later, in September 2003, he went to see his general practitioner because he still had pain in his face.

7.In his witness statement, Mr Jamali had said that he "saw four to five people near the shop door ... these boys started hitting me."

8.The appellant was identified in an identification procedure about four months after the event. He lied initially in interview, as he was to accept. He told the jury that on the night in question he had had far too much to drink. He could not actually remember going into the kebab shop. He had not attacked anyone there.

9.The first ground of appeal is that the judge misdirected the jury on the law relating to violent disorder. Because the count of violent disorder had been pleaded and opened as a "closed" violent disorder, referring only to the three persons named in the count, it is said the judge should have directed the jury in effect that they would have to be sure that all those three participated. The reason is that the definition of violent disorder requires participation by at least three persons. It is submitted that the Crown should not have been allowed to rely on the presence of other unnamed persons at the scene since no such persons were referred to in count 1 as drafted or in the Crown opening. In fact, as we have indicated, only two of the three defendants were convicted on count 1 - this appellant and Nichols.

10.Here is how the judge directed the jury in relation to the law of violent disorder (summing-up, page 4F):

> "... in essence the prosecution must prove four elements. Firstly, they must prove that there were three or more people present together who used or threatened violence.
>
> Three or more people present together who used or threatened violence. Secondly, they must prove that one of those three or more people was the defendant whose case you are considering."

Then again at 6D:

> "Now, you will remember that I was telling you about the four elements of violent disorder. I have repeated three of them, let me repeat and amplify the last.
>
> The last one is that the prosecution must prove that the conduct of the three or more persons who are using or threatening violence, the prosecution must prove that the conduct of those three or more persons taken together was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety."

Those directions, it is submitted, would only have been apt for an "open" violent disorder where it was alleged that a named defendant or defendants participated with others unknown.

11. The only question for this court of course is whether the conviction is safe. In circumstances like the present, absent any other complaint, the conviction would in our judgment only be unsafe if the course taken by the judge caused the defendant substantial unfairness: in particular, if it meant that the jury were being invited to consider convicting the appellant on the basis of a case which he had not met and did not have the chance to meet. Counsel Mr Johnson refers to the decision of this court in Mahroof (1989) 88 Cr.App.R 317. The question posed there is articulated thus (headnote page 318):

> "... whether, where three defendants were indicted together for an offence of violent disorder contrary to section 2 of the Public Order Act 1986 and following unanimous verdicts of a jury that two of the defendants were not guilty of the charge, was the jury entitled in law to convict the remaining defendant of the offence charged provided the jury had been directed that they must be satisfied that the latter defendant was one of three or more persons who were present together using or threatening violence within the meaning of section 2."

Giving the judgment of the court, the Lord Chief Justice said this (page 321):

> "It seems to us that the answer to that, and as a consequence the answer to the certified question, is 'Yes, subject to two *very important* quotations': first of all, that there is evidence before the jury that there were three people involved in the criminal behaviour, though not necessarily those named in the indictment; secondly, that the defence are appraised of what it is they have to meet."

Then later on the same page:

> "The best way of alerting the defence, and we would say generally speaking the only way of alerting the defence to a situation such as this, is by putting it in the indictment. Mr McGuinness [counsel for the Crown] was candid enough to concede that he should, in retrospect, have amended the indictment to allege that Edward Biney, Abdul Mahroof, Thomas Sayers and others on June 29 did what was alleged against them."

The appeal in that case was allowed. It is said that the same should apply here.

12. In fact the point relating to Mahroof had been raised in discussions between counsel and the judge which took place at a relatively late stage in the trial. The purpose of those discussions was to consider whether a lesser offence under section 4 of the Public Order Act 1986 should properly be left to the jury as an alternative to violent disorder. After citing Maroof, Mr Johnson submitted to the judge (transcript volume 2, page 7B):

> "And, your Honour, that is exactly what has not happened here. It is not in the indictment. The way the case was opened was that it is these three men who together, not together with others, but these three men together caused a violent disorder.
>
> JUDGE CAMPBELL: No, no, I am sorry, Mr Johnson, this is nonsense. You presumably read the witness statements before you came to court."

And Mr Jamali's statement with its reference to four or five people was then referred to. As we have said, in his evidence Mr Jamali referred to "three, four or five".

13. We are not aware that Crown counsel had been at any stage asked to nail her colours to the mast and indicate whether reliance was sought to be placed for the purposes of count 1 on any persons other than the three named. Had counsel for the Crown indicated that reliance was only being placed on the named three that might be one thing; but in our judgment it is quite another when no such indication is given and both the witness's statement and his evidence assert clearly, if by necessary implication, that three or more persons were present. It was open to defending counsel to seek clarification, if necessary, as to how the judge proposed to sum up to the jury. Indeed in fairness, indirectly at least, that is what Mr Johnson did in the passage from volume 2 of the transcript to which we have referred. It is notable however that in the course of the exchanges then taking place Mr Johnson did not make any complaint of unfairness or of being taken by surprise. He referred to Mahroof, as we have said, but his submission appears to have been only that the jury would have to find all three defendants guilty of violent disorder or none - see transcript volume 2 page 4F. It is noteworthy that the court said this in Mahroof (page 321):

"Mr McGuinness's recollection is, understandably, not altogether clear about what it was that the opening contained by way of a suggestion that these two Moroccans may have been part of the violent disorder. Unhappily counsel for the defence at the trial is not here and his place has been taken, nobly if we may say so, by Mr Leslie.

But we are by no means certain that counsel for the defence was alive or indeed should have been alive to the way in which this case was put against him by the judge in the passages that I have read in the summing-up: in other words alive to the case as ultimately presented against him."

Mr Johnson has made it admirably clear to us that upon reading the authority of Mahroof before the trial started, his understanding was that by virtue of the fact that the Crown had pleaded a "closed" violent disorder, and indeed that is how the matter had been opened at the first trial, they would be fixed with the offence in that form. And he submits that he framed his tactics for trial on the footing that no defendant could be convicted unless all were convicted.

14. It is, in our judgment, plain that that was an erroneous appraoch. It may have been understandable and we would not wish to criticise Mr Johnson who has made his position, as we have said, very clear this morning. But the true position is that the judge's directions to the jury on violent disorder in this case were wholly unexceptionable. Mr Johnson on behalf of the appellant was on warning that Mr Jamali might say there were more than three involved - he was on warning to that effect from the contents of his witness statement - and indeed Mr Jamali said in effect exactly that. This is not a case, in our judgment, where it may properly be said that objectively speaking the defence had no notice of the case they had to meet. It is also to be noted that in answer to a question from my Lord, Sir Michael Wright, this morning, Mr Johnson frankly accepted that in the course of his cross-examination of Mr Jamali and it may be other prosecution witnesses, he adopted the fact that others were present at the scene in order to support his perfectly understandable case that the witness or witnesses were getting the individuals involved, in particular his client, mixed up.

15. In our judgment there is no unfairness here. There is nothing to touch the safety of the conviction and if that matter stood alone the appeal would fall to be dismissed.

16. The second ground of appeal concerns the conviction on ground 5. It is said that there is no evidence of a wound, which of course was a requirement of the offence under section 20 of the Offences Against the Person Act. The count was put as an unlawful wounding. We have already stated the evidence relating to Mr Ugurlu's injuries which was before the jury. As regards the nature of a wound as a matter of law, the judge directed the jury thus (summing-up transcript page 9B):

"A wound is very simply a break to the surface of the skin."

However, the case of JJC (a minor) [1983] 3 All ER 230 shows that "a wound is a break in the continuity of the whole skin" and that is well established law for the purposes of section 20. On the judge's direction, with respect, a bad scratch might be a wound. Here is how the judge directed the jury on the evidence in this case about the alleged wounding of Mr Ugurlu (summing-up page 15A):

"Mr Johnson makes the point, 'Well, where is the evidence of a wound?' Well, you may think first of all the evidence from the hospital, to the effect that he was bleeding around his left ear would be evidence of a wound.

In addition, when PC Evans arrived on the scene he saw that Mr Ugurlu was on the ground and his evidence is that Mr Ugurlu's face was swollen and he was bleeding from his face which again, you may think, is evidence of a wound and indeed he took the photograph of Mr Ugurlu's face showing, you may think, blood on the face.

PC Evans also told you that on arrival he saw about eight people and half of them had sticks, and he said that the body language of those with sticks was threatening."

This evidence might well have been sufficient if a break in the surface of the skin were all that was required. But it is not and the evidence there summarised by the judge in our judgment is not evidence upon which a reasonable jury could find a break in the continuity of the whole skin.

17. In those circumstances the conviction upon count 5 of an offence of unlawful wounding is unsafe. It is common ground that we may substitute a conviction for an offence of occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act, and we do so. It is appropriate also therefore to quash the sentence of two years passed on count 5. We do so, and substitute a sentence of 18 months' imprisonment, that sentence will run concurrently with the two concurrent terms of two years passed on counts 1 and 3. The overall total therefore remains the same, but it is necessary to make that adjustment because of the substitution we have made of the section 47 offence.

18. To that extent only the appeal succeeds in relation to count 5, otherwise it is dismissed.