No: 200601317/B1

Neutral Citation Number: [2006] EWCA Crim 2694
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Thursday, 28th September 2006

B E F O R E:

LORD JUSTICE MOSES

MR JUSTICE GIBBS

MR JUSTICE COOKE

- - - - - - -
R E G I N A

-v-

SAQIB JABBER

- - - - - - -
Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)
- - - - - - -
MR M BISHOP QC AND MR O DANESHYAR appeared on behalf of the APPELLANT
MR A BARKER QC appeared on behalf of the CROWN
- - - - - - -
J U D G M E N T
(As approved by the Court)
- - - - - - -

1. LORD JUSTICE MOSES: This is an appeal against a conviction by a majority verdict of manslaughter on one count and perverting the course of justice on a second count against this young man at Birmingham. The issue, particularly in relation to the first count, relates to a ruling that the Recorder of Birmingham gave, that there was sufficient evidence to leave before the jury at the close of the prosecution case.

2. The circumstances which led to the conviction of this appellant arose out of a retaliatory attack upon a man called Tariq Rashid in August 2004. He had gone to the premises occupied by this appellant's father and other members of the family in Alum Rock Road. The family owned a number of cars as part of their property and the victim Tariq Rashid had been trying to break into a number of cars. There were certainly two cars before he sought to break in, and indeed appears to have succeeded in breaking into, a BMW motor car. At the close of the prosecution case it is not clear quite what the state of the evidence was as to who owned the car and who drove it, although we were told at the Bar it was the appellant's mother.

3. The time that Tariq Rashid was trying to break into the family's cars was a moment of great tragedy and poignancy. The appellant's mother, Abdul Jabber's wife, had suddenly just died. The family were in mourning. Many friends and relatives had come to pay their respects to the house. One can well appreciate the reaction of that family when that man disturbed that solemn occasion in the evening by trying to break into their cars. It is plain, however, that that did come to the attention of the family. He was beaten up. However, it is clear that that attack did not lead to his immediate death.

4. About an hour before midnight Jennifer Arundell was walking in the street alongside the house by a car park. She observed nothing untoward, but having quarrelled with her boyfriend she returned to that scene at about midnight. At that time she saw a car just inside the car park. It had obviously not been there long because its interior light was on and its door was open. It was just within the gates of the car park. It is obvious that it was the BMW. The victim, Tariq Rashid, had already tried to break into it and had broken a side window.

5. By the time she saw the scene what she saw is of significance in the factual matrix of this case. She saw two young men. She described them: one was smaller and stockier and a bit older than the other. She described one wearing a white tracksuit and trainers and the other wearing a black jumper and brown cords, but she was never able to identify both men. She watched the scene for a few minutes and saw that they were leaning over a man lying on the ground. They were talking loudly, but not arguing and not talking aggressively. Alongside them, crouching and crying loudly, was a young girl of about 17 or 18, about five foot 4, long hair tied back with a long black coat and an Asian scarf. This was a description that did not match a woman undoubtedly in the car park at the time, an adopted sister of the family, Saiqa Ajaib.

6. The next set of facts relevant to this case took place at about the time of that observation by Jennifer Arundell. A mobile telephone, one of two used by this appellant, was used by Saiqa Ajaib to telephone the emergency services. The time was 11.55. On the recording of that call could be heard two male voices, and a phone call,

it is significant to observe, took place in a mixture of Mir Puri and English. Part of the conversation had to be translated and during that conversation a man said:

> "Bring the towel. Are you doing it? Have you phoned?"

The response was:

> "Yes, I'm doing it. They are contacting it."

And then this:

> "We'll say someone has beaten him and left him in our garage."

7. The operator then managed to connect the call to the emergency services and Saiqa Ajaib then said:

> "We've got a garage at the back and we've just seen someone. Well, he was trying to break into our car and somebody's hit him and we've found a lad lying down, lying on the floor, and he's bleeding."

8. The police arrived shortly after midnight, about nine minutes past midnight. The appellant was not there, nor was another member of the family, Osman, who was also convicted.

9. The motor car was not at that time located. But there were a number of phone calls subsequently traced which showed that whilst Saiqa Ajaib was still calling the emergency services this appellant had called up his other mobile phone, which was being used at the time by Saiqa Ajaib, but because it was being use to call the emergency services it was not possible for this appellant to intervene.

10. The next piece of evidence relates to the officers coming to speak to this appellant and inviting him to make a statement. That was a few days later, on 11th August; in other words, some six days later. He replied, albeit not under caution:

> "No I don't want to get involved. I have got too much going through my head. I wasn't there. I don't know anything about this. I was at home at the time."

11. The police were able to locate the BMW and to examine it. There were tool marks on the exterior front nearside window frame and on one of the rear quarter lights, and they found glass within the BMW which matched glass found on the deceased's clothing. There were also fibres on the driver's seat of the BMW found on the back of the deceased's clothing. The quarter light had been replaced, but it was plain that the fragments of the glass of the previous window in the BMW, revealed that it was indeed one of the cars that the deceased had tried to break into and steal.

12. Although the appellant made no comment in his interviews, he did give evidence. He persisted in the story that both he and Osman gave, backed up by the family, that he was not at that house at the time the deceased was injured and attacked. He had left, he

said, at about 10.00 p.m. in the evening, together with Osman in the BMW and had gone elsewhere. He was, he said, nowhere near Alum Rock Road when Rashid received his injuries.

13. The evidence of the phone call and the evidence in relation to the BMW certainly provided evidence that the appellant had been at the scene shortly after the deceased was injured.

14. At the close of the prosecution case the submission was advanced, in which Mr Bishop QC persists in this appeal, that that evidence, taken separate separately and together, was not sufficient evidence upon which a jury properly directed could convict this appellant of manslaughter. In order to conclude that he was guilty of manslaughter the jury would have to be satisfied, so that it was sure, that this appellant actually participated in the attack. It is trite to observe that mere presence would not have been enough. The circumstances in which he left the scene, once the jury were satisfied that he was there, and escaped were merely consistent with him helping his brother Osman to flee the consequences of an attack committed by Osman. The injuries, which he was found to have suffered were consistent with him being beaten up; but major injuries above the left ear and cerebral swelling with subdural haemorrhage, were consistent his falling to the ground. He was found with his trousers around his groin. One man could have done that, submits Mr Bishop, and, as far as the evidence went, it was no more than to show that the appellant had assisted his brother. Certainly one could not say which of the two men, both of whom had pleaded not guilty, was responsible for causing the injuries from which Rashid died. The prosecution, in short, could not exclude as a realistic possibility that the appellant was merely assisting his brother.

15. Before reaching a conclusion as to this submission we must consider the legal proposition upon which Mr Bishop QC relied. One might at first blush be surprised that he relied upon any legal propositions since the principles to be applied at the close of the prosecution case are, one would have thought by now, so well known. But his helpful and clear submissions did throw into sharp perspective comments made by Lord Diplock in a Privy Council case as to the approach to be adopted when drawing factual inferences from circumstantial evidence. The dicta upon which Mr Bishop relied is contained in Kwan Ping Bong and another v The Queen [1979] AC 609. This was a case which concerned a statute in a Hong Kong ordinance which provided, in relation to drugs offences, a presumption, on possession of certain documents of title, of knowledge of the contents of the goods to which those documents of title related. The difficulty in that case was that the prosecution, in order to create that statutory presumption, had relied upon documents for which no provision was made within the relevant ordinance. In those circumstances, there was no statutory presumption of knowledge under the Hong Kong ordinance; the criminal law of Hong Kong, which paralleled the common law of England, applied.

16. Lord Diplock said:

> "There is no principle in the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged -- and

> the proof must be 'beyond all reasonable doubt,' which calls for a degree of certainty considerably higher than proof on a mere balance of probabilities. The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling -- one (and the only one) that no reasonable man could fail to draw from the direct facts proved."

17. In reliance upon those dicta Mr Bishop contends that the circumstances of this case were not such that no reasonable man could fail to draw the inference that the only explanation for the appellant's conduct was that he had participated in the attack.

18. It is, faced with that submission, necessary to remind ourselves of what we thought was by now well settled law as to the approach the judge must take when a submission is made, at the close of the prosecution case, that there is insufficient evidence upon which a jury properly directed could convict.

19. The question for the judge at that stage of the case was whether there was sufficient evidence on which a jury, properly directed, could draw the inference that this appellant had participated in the attack, on Tariq Rashid, which caused his death. Since there was no direct evidence of this appellant's participation, the prosecution relied on inferences to be drawn from what had been seen by Jennifer Arundell and from the actions of the appellant at the time and immediately after. It is perfectly true that no jury could properly convict unless, on looking at the evidence as a whole, it rejected any other realistic possibility from which it might reasonably be inferred that there was an innocent explanation for his actions. Thus, before the jury could convict, it would have had to reject the possibility, suggested by the defence, that the appellant had come upon the scene, a scene initiated by his brother, and had only left with him in the family BMW to assist that brother. In other words, that all his actions could reasonably be explained as being attempts to assist another family member.

20. However, the difficulty we have with the dicta on which Mr Bishop QC relies is that it suggests that at the close of the prosecution case the judge, if he is to allow the case to continue, must be satisfied not that the jury would be entitled to reject innocent explanations for the appellant's conduct, but would be bound to. Read literally, Lord Diplock's dicta might be understood to be saying that an inference was only to be regarded as compelling if all juries, assumed to be composed of those who are reasonable, would be bound to draw such an inference. In short, an inference could only be drawn if no one would dissent from it.

21. We reject that as an approach to be taken by the judge at the close of the prosecution case, even where the evidence is only circumstantial. The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those

circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude. We are not bound by the passing observation of the Privy Council in relation to a Hong Kong ordinance, a far cry from the proper approach of a judge at the close of a prosecution case.

22. We turn, then, to the circumstances of this case. It is true that there were inadequacies in Jennifer Arundell's identification; indeed, it was no identification. Her description of the girl did not match the description of the sister Saiqa. But the only other members of the family present at the house were older than this appellant and his brother Osman. The jury would have been entitled to conclude that the two men Jennifer Arundell observed talking loudly, bending over the body were, indeed, Osman and his brother and that the woman there was the sister. The sister almost immediately, on the observation of Jennifer Arundell, contacted the emergency services with the victim lying there on the ground in the car park. Two male voices were heard. The jury would be entitled to conclude, if the evidence had gone no further, that those were the two males voices of Osman and this appellant joining in the attempted deception of the emergency operator as to what in fact had occurred. The jury would then have been entitled to bear in mind that this appellant had left the scene almost immediately, as revealed by his further call on his second mobile phone. The only reasonable explanation for which would be that he was checking on whether his sister was indeed pursuing her attempt to mislead the authorities as to what had occurred.

23. The alternative innocent explanation, which Mr Bishop says is such that no jury could reasonably reject it, is that all this was done by the appellant merely to assist his brother. But that does not explain why he, out of all the family, had chosen to go down stairs, join his brother at the scene and bother to drive away in the BMW motor car. Precisely who was driving was not apparent on the evidence at that stage. Why should he? What possible reason would there be to assist his brother in this way? His brother was of much the same age and would have needed no assistance to leave the scene and take the BMW with him. Indeed, anyone not involved in the attack, as indeed the family members did, could have stayed there merely to help to throw off the police scent away from the perpetrator or perpetrators of the attack.

24. These were all considerations which, in our judgment, the judge rightly left to the jury. We have a system in this country in which judges do not reach decisions as to guilt or innocence. Inferences are left to juries as long as the state of the evidence is such that a jury could reasonably reject innocent explanations and reach a conclusion that the only inference proper to draw on the facts is one of guilt.

25. In our judgment, the approach to this evidence by the judge was correct. It was a matter upon which the jury properly directed could reach an adverse conclusion taking the evidence as a whole. It was not simply a question of a man leaving the scene of the crime. It was evidence, which, viewed in the round, spoke of the participation of this appellant to a far more telling effect. We reject the ground of appeal relating to the first count.

26. We turn then to the second count, which, to put shortly, might well appear to have been a case of the prosecution "over-egging the pudding". After all, if there was evidence upon which a jury could properly convict of guilt of manslaughter, the first question that arises is as to what the point was of charging him with perverting the course of justice.

27. The evidence against the appellant of perverting the course of justice was, to put it shortly, that he had joined in removing the scene of the crime, as Mr Barker QC so graphically put it, he had participated in taking away the very car that provided the motive for members of the family to attack Rashid and associated Rashid with the car. For it was in the car at that time that anyone might have observed the broken window caused by Rashid as he tried to break into the car and glass that associated Rashid with the interior of the vehicle. Furthermore, there were fibres in the car which showed that Rashid had been inside that vehicle. Small wonder then that members of the family should wish to hide that link between the family and the attack on Rashid.

28. Mr Bishop contends that those facts were no more than the facts on which the prosecution relied in order to support the conviction on the first count. In those circumstances, it was improper and inappropriate to charge him with the second count.

29. As a principle of law we reject that submission. The mere fact that the evidence in relation to perverting the course of justice is the same as the evidence upon which the substantive offence, in relation to which the perversion of the course of justice is alleged to have taken place, is not a sufficient ground for not charging perverting the course of justice. But underlying the submission was a more substantial question of whether it was appropriate to charge this appellant with that second offence.

30. There are dicta, particularly in R v Sookoo [2002] EWCA 800 in which Douglas Brown J in this court said that it would be wrong to charge an attempt to pervert the course of justice merely because someone ran away to escape responsibility for the crime unless there were serious aggravating features (see paragraph 8).

31. This, however, as this court recognised in R v Clark [2003] RTR 27 at 411 provides no clear principle to guide prosecuting authorities as to whether to prosecute or not for such an offence. At paragraph 14 Tuckey LJ referred to the suggestion, supported in Archbold, that such a charge should be restricted to serious cases, but, as he said:

> "... we think that such restraints are elusive and not acceptable as a means by which to define the ambit of a criminal offence."

32. In Clark this court rejected the propriety of a charge of perverting the course of justice, where one who had been driving a car, having taken drink, sought to escape the consequences by leaving the scene and taking the car away. The court appears to have concluded that merely taking the car away, whilst the damage in it remained, was insufficient to pervert the course of justice. It took the view that there had to be some positive act of concealment.

33. We agree that there must be some principled approach to the charging of such an offence. We acknowledge the difficulty this court has in grappling with the principle to be applied, since the circumstances in which it will be proper to charge such an offence will vary so much from case to case. There must, we conclude, be some evidence of positive action. In most cases, but not all, that will be evidence of concealment, but the actions must amount to something beyond merely an attempt to escape from the scene of a crime of which the defendant is accused, coupled with a subsequent denial of involvement. If the evidence amounts to no more than such an escape and such subsequent denials, in our judgment, it will not be sufficient to found a charge of perversion of the course of justice.

34. It is necessary to establish some positive act of perversion, be it of concealment or distortion. Precisely what is sufficient will so much depend upon the facts of each different case as to render it impossible of further elucidation.

35. The question then arises whether there was sufficient in this case. In our judgment, there was. This appellant had participated in taking away, as Mr Bishop put it rightly, the scene of the crime, the very thing that would associate both him and other members the family with the crime. By taking the car away he presented the family with the opportunity, which it took, of giving a lying account of how Rashid met his injuries, saying that someone else must have beaten him up. Although it is true that, contrary to what the Recorder appears to have suggested in his ruling at the close of the prosecution case, this appellant did not directly join in the precise lies told by other members of the family, he did, as the evidence of the emergency call revealed, participate in assisting his sister in giving the initial lying account. He presented the opportunity of her using his mobile phone. He then checked very shortly after from elsewhere to find out whether that which he obviously intended should take place was taking place. So it is not merely his leaving the scene and his subsequent lies that found the second charge, it was his positive act of assisting in taking away the car and in the promulgation of the lying account of how the injuries were caused that founded his conviction on the second count.

36. In one sense, it added nothing if he was guilty of the first count, but we can readily understand, and approve, of the addition in this particular case of that count, bearing in mind other members of the family were charged and indeed convicted of the offence. It would have looked odd and complicated to a jury if this appellant had not been one of the defendants joined in that count. Of course, the prosecution was in no position to know whether he would be convicted of manslaughter or not.

37. In those circumstances, whilst supporting everything this court has said about the need for care before such a charge is added to other more serious counts, we reject that ground of appeal. The judge rightly left for the jury to consider whether the facts upon which the prosecution relied not only made out a case of manslaughter, but also one of perversion of the course of justice.

38. This was a sad case in the circumstances for all concerned, but we are happy to record that, although the sentence will have a severe impact upon this young man, it was no more in total than one of two years. But we are confident that the approach the

Recorder took to the submissions at the close of the case at half-time were correct, in the sense that they left the inferences which could properly be drawn to that jury. The appeal is dismissed.

39. MR BISHOP: My Lord, I have a representation order. I don't think I need to ask for a particular order.

40. LORD JUSTICE MOSES: If you do, you may have anything that will properly reward you.

41. MR BISHOP: May I make a request? I am assisted by my learned junior who is here pro bono. I wonder might the representation order be extended to cover his appearance? He has assisted in the preparation of the skeleton argument.

(**Pause**)

42. LORD JUSTICE MOSES: It breaks my heart to have to say this, but I am afraid, no.