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No: 201800322/C2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday 7 August 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GOSS

MR JUSTICE KNOWLES

R E G I N A

v

MARK ANTHONY JACKSON

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(Official Shorthand Writers to the Court)

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Non-Counsel Application

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: In January 2012, after a trial in the Crown Court at Sheffield before McCombe J (as he then was) and a jury, this applicant and three others were convicted of the murder of Adam Vincent. The applicant was also convicted of conspiracy to pervert the course of justice. He was acquitted of a charge alleging conspiracy to supply controlled drugs of class A.
2. He was sentenced for the offence of murder to life imprisonment with a minimum term of 29 years. A concurrent sentence of eight years' imprisonment was imposed for the other offence.
3. No appeal against conviction was brought at the time, although the applicant did bring an appeal against sentence which succeeded to the extent that his minimum term was reduced to 25 years.
4. In January 2018 he lodged an application for an extension of time of nearly six years to apply for leave to appeal against his conviction for murder, relying on the decision of the Supreme Court in R v Jogee [2016] UKSC 8. His application was refused by the single judge. It is now renewed to the full court.
5. The deceased was 33 years old at the date of his death. He was addicted to drugs. He had lived in the same house as the applicant and the other accused. The cause of his death was blunt force trauma to his head. The evidence of a pathologist was that the deceased had been struck with severe force at least three times with a weapon such as an axe or golf club to the head. He had sustained other head and facial injuries, and also broken ribs and contusion to the spleen, probably caused by stamping. Five pellet shot wounds were found which had been inflicted with an air rifle.
6. The prosecution case was that all of the accused had been engaged in the supply of drugs, specifically heroin, and that they had jointly murdered the deceased as part of a joint enterprise to silence him and/or as revenge for their belief that he had provided assistance to the police resulting in the accused being arrested and/or had stolen money or drugs from them. The prosecution case was that the deceased had been subjected to violence and physical abuse, behind the closed doors of the house in which they were all living, for a period of about two weeks before he died. His body was then taken to another location where it was dismembered and the parts disposed of in an attempt to conceal the crime. Two particular vehicles, a Ford Escort and a van had been respectively purchased and hired by some of the accused to assist in disposing of the body.
7. It is unnecessary for present purposes to go into the details of the evidence against this

applicant. It is sufficient to say that a number of witnesses gave evidence of things said to them by the applicant which plainly implicated him in the killing of the deceased. There was undoubtedly evidence on which the jury could properly convict if they were satisfied so as to be sure that the evidence was truthful, accurate and reliable. It is to be noted that no submission of no case to answer was or could be made. Neither the applicant nor any of his co-accused gave evidence.

8. In his directions of law to the jury, the learned judge emphasised the need for them to give separate consideration to each of the accused and to each of the different charges. He explained in conventional terms that two or more persons may commit an offence jointly. At page 8A to C of the transcript, he said this:
 - i. "You must ... carefully examine the evidence against and for each defendant separately on this charge and must consider whether or not the prosecution has, indeed, made you sure that the defendant intended to kill or seriously to injure Mr Vincent and that he took some part in the carrying out of that intention either directly by assisting or encouraging the others. If you are not sure of that in the case of any individual defendant, you will acquit that defendant on the charge of murder."
9. In the light of the law as it stood at the time of the trial, the judge went on to add that the direction just quoted was subject to a further point which he explained as follows:
 - i. "As I have said, participation in or encouragement of the fatal attack upon Mr Vincent with the intention to kill or to cause him really serious bodily injury are the elements of the offence of murder in the case of an alleged joint enterprise offence. If you are sure that the defendant whom you are considering participated or encouraged such an attack with the intention that Mr Vincent should be killed, then he is guilty of murder. If you are not sure that the defendant intended that Mr Vincent should be killed but only that he should be really seriously injured, you must ask yourselves whether the use of a lethal instrument -- such as an axe or other heavy, blunt object, such as the head of a golf club -- of the type that you may think inflicted fatal blows was within the scope of the criminal enterprise in which he took part."
10. The judge later summarised his directions by saying at page 9E:
 - i. "So your approach to the matter in respect of each of the five defendants to the murder charge in turn is this: 'Are we sure that this defendant took some part in the fatal attack on Mr Vincent either by: (1) himself unlawfully assaulting Mr Vincent and causing him fatal injuries, intending to kill him or cause him really serious bodily injury; or (2) participating in some way with another

or others in a deliberate plan to kill and that Mr Vincent was killed as a result; or (3) participated in a deliberate plan to assault Mr Vincent in which this defendant intended to cause him really serious harm and that Mr Vincent was killed as a result, subject, again, to the one point?' If you sure of any of these three alternatives in respect of any individual defendant, then, subject to this next point, that defendant is guilty of murder."

11. Towards the end of his summing-up, the judge provided the jury with a written route to verdict consistent with the directions which he had given.
12. In his applications for an extension of time and for leave to appeal against conviction, the applicant makes clear that he was advised at the time of his trial that he had no grounds of appeal against conviction. He says however that the law relating to joint enterprise has now been redefined by the Supreme Court in Jogee. In his grounds of appeal, he says:
 - i. "I believe that if I had been tried under the law as it now stands I would not have been convicted. This is on the grounds that there is no evidence that I was present at the time of Adam Vincent's death or that I participated in any way which directly led to his death or that I offered any assistance or encouragement knowing that this might lead to his death.
 - ii. The prosecution put its case saying that I was jointly involved in the drugs and in the murder of Adam Vincent. The not guilty verdict to the drugs charge demonstrates that I was not nearly so heavily involved as they suggested.
 - iii. In the judge's sentencing remarks he found that there was no intention to murder, just to inflict grievous bodily harm and that the motivation for that was the perceived need to exact retribution from Mr Vincent for having damaged the gang's interests and to enforce primitive discipline within it. The jury verdict takes away any motive which the prosecution say I had to punish Adam Vincent."
13. The applicant relies on essentially the same points as being exceptional circumstances justifying the grant of leave to appeal so long out of time. The need for that long extension of time arises, he submits, simply because the appeal is based on a comparatively recent development in the law.
14. The applications are opposed by the Crown in a Respondent's Notice which submits that Jogee does not assist the applicant in the circumstances of this case.
15. The court in Jogee considered cases of what had become known as parasitic accessory

liability. In a series of decisions, including the decisions of the House of Lords in Powell, English and Daniels [1999] 1 AC 1 and Rahman [2008] UKHL 45, it had been held that if D1 and D2 agreed to commit crime A, and in the course of that joint enterprise D1 commits a different crime B, D2 is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. The case law had however recognised an exception to this principle where offence B involved a "fundamental departure" from what had been agreed in relation to offence A. It was in that context that in cases of murder issues arose as to whether D1 had unexpectedly used a much more dangerous weapon than anything which D2 had foreseen as a possibility. Hence the direction which McCombe J gave in this case as to foresight of the possibility that a deadly weapon might be used.

16. In Jogee it was held that the law had previously taken a wrong turning. Although foresight of what might happen could be evidence from which a jury might infer the necessary intention, it could not be the test for the mental element of secondary participation in murder. Murder requires an intention to kill or to cause really serious injury and a secondary party must intend to assist the principal to act with such intent. It will generally be sufficient if the secondary party himself intends to kill or to cause really serious injury. In the light of this restatement of the principles, the Supreme Court indicated that questions of "fundamental departure" will rarely arise for consideration.
17. The Supreme Court went on to state at paragraph 100 that where a court had correctly applied the law as it previously stood, exceptional leave must be sought to appeal out of time against conviction and exceptional leave will only be granted if there would otherwise be a substantial injustice.
18. In Johnson [2016] EWCA Crim. 1613, the Court of Appeal stated that it is for the applicant to demonstrate substantial injustice, which is a high threshold. At paragraph 21 the court said:
 - i. "In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult."
19. In the passages which we have quoted from the learned judge's summing-up, he repeatedly emphasised the need for the jury to be sure that a defendant intended to kill or to cause really serious injury. His direction relating to the use of a heavy weapon was set in the context of the jury being sure that a defendant intended at least to cause really serious injury. The jury's verdicts therefore show that they were sure that the applicant himself intended that the deceased should be killed or seriously injured. The decision in Jogee cannot assist a defendant who has been convicted on that basis.

20. The applicant's submission that there was no evidence that he was present when the deceased met his death cannot assist him either. As a matter of law, his guilt did not depend on whether or not he was present at that time.

21. The applicant submits, as we have said, that he had no motive to harm the deceased and that there was no evidence sufficient to prove that he participated in the killing. But those were issues which the jury had to consider at trial and which they resolved against the applicant. There is, in our judgment, no basis for saying that the jury would have reached any different decision if they had been directed in accordance with Jogee. The only difference would be that if the jury were sure, as they must have been, that the applicant assisted or encouraged the killing of the deceased with the intent that he be killed or seriously injured, then questions as to whether he foresaw the use of a particular type of weapon would be irrelevant. In short, the only effect of Jogee would be to make the applicant's case weaker not stronger.

22. We are therefore satisfied that there is no arguable ground for granting exceptional leave to appeal out of time. The renewed application accordingly fails and is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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