[2019] EWCA Crim 2185
No: 201902515/B4 & 201902974/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 29 October 2019

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD

MR JUSTICE NICKLIN

SIR KENNETH PARKER

R E G I N A
v
STUART STEPHEN WHITTAKER

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Mr I Whitehurst appeared on behalf of the **Applicant**

Mr G Pickavance appeared on behalf of the **Crown**

J U D G M E N T
(APPROVED)
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1. SIR KENNETH PARKER: On 7 June 2019 in the Crown Court at Liverpool before His Honour Judge Flewitt QC, following a retrial, the applicant Stuart Stephen Whittaker, now aged 35, was convicted by a majority of 10 to 2 on two counts, first, attempting to cause grievous bodily harm with intent, contrary to section 1(1) of the Criminal Attempts Act 1881; and secondly, wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. In respect of both convictions he was sentenced on 12 July 2019 in the Crown Court at Liverpool before the same judge to an extended sentence under section 226A of the Criminal Justice Act 2003 of 22 years, comprising a custodial term of 17 years and an extended licence of five years. That term was also imposed in relation to the second offence but the terms to run concurrently, so that the final result was an extended sentence under section 226A comprising a custodial term of 17 years and an extended licence of five years. He was acquitted of count 1, a count of attempted murder, and count 5, making a threat to kill.

2. There was a previous hearing of this appeal before this court on 18 and 19 July 2019 where the full court, Hallett LJ VP and Fulford LJ considered the case and it was directed that the Criminal Cases Review Commission ("CCRC") would investigate and report on the following matters under the powers of section 23A of the Criminal Appeal Act 1968: first, whether the usher told any member of the jury how to approach the issue of intent - this would amount to the usher giving the jury a legal direction; and secondly whether the usher provided any advice to the jury on the issue of arriving at a verdict. The report from the CCRC was duly completed and lodged on 6 September 2019 and reference will be made to that subsequently.

3. The applications for leave to appeal against conviction and sentence were referred to the court by the Registrar.

4. The prosecution case at trial was as follows. On 27 June 2018 the first complainant, Anthony Wilson was at his home address at 34 Turret Road, Wallasey with his partner, her four children (aged between five and 15 years old) and their baby aged 10 months. One of the children told the complainant and his partner that someone was at the door and subsequently unlocked it. The applicant was alleged to have burst into the property, shouting: "Where's Joe?" and had been armed with an axe and a hammer. It was alleged that the applicant struck the complainant three times with the axe - that related to the offence of wounding with intent - and that he made threats to kill his baby (that was the foundation of count 5). As a result of the attack the complainant suffered cuts to the top and right side of his head and bruising to his eyebrow and right thigh.

5. The police were called and Police Constable Birkett attended the address. He saw the applicant standing in the doorway with the axe. He shouted for the applicant to put the axe down, drew his Taser and fired it. However, the Taser failed to hit the applicant. It was alleged that the applicant repeatedly attempted to hit PC Birkett with the axe and shouted that he would kill him. PC Birkett activated his bodycam and ran from the scene, whilst calling for emergency assistance. When he realised that the applicant was not

pursuing him, he returned to the address. A number of neighbours heard the commotion and were witnesses to part of the incident. PC Birkett was unable to apprehend the applicant at the scene, but circulated his description to other officers. The applicant was subsequently apprehended hiding in a nearby park.

6. To prove the case against him the prosecution relied upon the following: first, evidence from the complainant and his partner, one Sarah Wilson; secondly, evidence from PC Birkett in relation to the incident and also footage from a bodycam worn by PC Birkett at the time of these events played on several occasions to the jury; and thirdly, evidence from Joanne Wilson (no relation to the first Wilson referred to), Taylor Hoather and Adam Harding-Jones in relation to the incident.

7. The defence case was that the applicant had not committed the offences as alleged. He had known the complainant for around six years. At the time of the incident there was an outstanding issue in relation to a loan that the applicant had made to the complainant. The applicant wished to speak to a male named Joe who was known to the complainant. He stated that he attended the address on the evening in question to try to find out Joe's whereabouts. He admitted that he had attended the address with an axe and that he had subsequently struck the complainant with it. He had not however intended to cause him serious harm. He denied that he had made any threats to kill. He also denied attempting to strike PC Birkett with the axe.

8. The issues for the jury therefore were whether they were sure that the applicant had firstly attempted to kill or attempted to cause grievous bodily harm to PC Birkett with intent; secondly, intended to cause grievous bodily harm to the complainant Wilson; and thirdly, made threats to kill the complainant's baby. The applicant's intent was, on this footing, critical on both the second and third counts on the indictment.

9. On 17 June 2019, trial counsel, in a trial which followed the applicant's trial (10 days after conviction), visited the trial judge. Counsel informed him that the jury bailiff had mentioned in conversation that she had given some advice to the jury in relation to the issue of intent in the applicant's case. As the conversation had taken place in the courtroom, the DARTS system was in operation and the conversation could be listened to. It was subsequently directed that a transcript of the relevant conversation should be obtained.

10. On 17 June 2019 the judge also received an email from defence counsel in respect of two issues: first, the above alleged misconduct by the jury bailiff, having also been informed of the development by counsel in the following case; and secondly that one of the jurors, believed to be the forewoman, had contacted members of the applicant's family. Having obtained their details via social media, the juror had contacted members of the applicant's extended family who then put her in contact with members of his immediate family. During a telephone conversation, which the family recorded, she informed them that the jury bailiff had provided further advice during their deliberations on the issue of intent

and also that when they informed her that they were stuck in their deliberations, she urged them to keep deliberating until they reached a majority verdict.

11. For the purposes of its investigation, the CCRC obtained the DARTS audio transcript already referred to and transcripts of the forewoman's telephone conversation and of two interviews of the jury bailiff carried out on 5 July and 19 July by Her Majesty's Court Service. The CCRC itself interviewed the jury bailiff on 8 August 2019.

12. The conclusions of the CCRC were as follows. As to the first issue, namely the alleged direction, the CCRC concluded that the jury bailiff sought to assist the jury with the meaning of intent whilst they were considering their verdict. She had admitted doing so by use of an analogy. There was however conflicting evidence as to the details of the analogy which she used. During the CCRC interview, the jury bailiff said that on 7 June 2019 when a juror asked her the meaning of the word 'intent', she gave an analogy in which she made a gesture as if to throw a small water bottle at a jury member and asked the jury: "What was my intention?" This was done in the jury room whilst all members of the jury were present during deliberation and prior to the verdict being delivered. The jury bailiff also said that she gave an analogy to the jury after the verdict had been delivered and that it involved comparing an attack with a breadstick or baguette and one with an axe. It is of note that in the DARTS audio transcript the jury bailiff mentioned the breadstick and then explained that the jurors were struggling with the word 'intent'. That would suggest that she did so before the verdict was delivered. Her account recorded by the DARTS system was closest in time to the incident being discussed and was during an informal discussion as opposed to one during which she was aware she was being investigated. It was also of note that the jury bailiff during the forewoman's telephone conversation suggested that she gave the analogy involving the breadstick before the verdict was delivered.

13. As to the second matter, namely pressure on the jury to reach a verdict, the CCRC said that in light of its investigation the CCRC had concluded that there is a conflict in evidence on this point. During the forewoman's telephone conversation, she suggested that the usher entered the jury room when the jury were at a stalemate and told them that they had 'to keep going until you try and get to 10/2'. In her CCRC interview, the jury bailiff said that she did not recall saying this to the jury; she had absolutely no idea whether she had done so, but that it was not something she would normally do. In all these circumstances, including the fact that she did not specifically deny the suggestion when put to her, the CCRC considered that there was a real possibility that she did indeed advise the jury as the forewoman described. She has however made no admission to that effect.

14. Following this comprehensive investigation and report by the CCRC, it is clear that the jury bailiff on her own admission did purport to give guidance to the jury on the legal meaning of intent for the purposes of the jury's deliberations. It is not entirely clear what analogy or analogies she presented to the jury before they reached their verdict, but it is

clear that she did on her own admission present at least one purported analogy. As to pressure to reach a verdict, having regard to the facts and matters set out in the CCRC report, we endorse the CRCC's conclusion that there is a real possibility that the jury bailiff did indeed advise the jury "to keep going until you try and get to 10/2."

15. Turning now to the grounds of appeal. By virtue of supplementary submissions dated 21 October 2019, the applicant invites the court to grant leave to appeal against conviction on a single ground, namely that the unlawful actions of the jury bailiff towards the jury when they were in retirement resulted in the jury's verdicts being unfairly and unduly influenced and thus the verdicts should be quashed as unsafe.

16. In his Respondent's Notice dated 18 September 2019, Mr Graham Pickavance on behalf of the Crown stated as follows:

    i. "Having carefully considered the report from the CCRC, whether by using the analogy of the water bottle or the analogy of the baguette, the jury bailiff interfered with the jury's deliberations. Further, if she told them they had to reach a verdict of 10-2 when they were dead-locked, she put undue pressure upon them to reach a verdict. The Crown accepts that these factors render the convictions unsafe."

17. Notwithstanding the agreement between experienced counsel, this court must of course reach its own conclusion as to the nature and significance of the irregularities accurately identified in the CCRC report. It is clear that the issue of intent was critical to the jury's deliberations both in respect of the alleged offence under section 18 of wounding with intent against the first complainant and also on the alleged offence against PC Birkett of attempting to cause grievous bodily harm. The defendant's case was that he had no such intent to wound so far as the first complainant was concerned, and he had no intent to harm PC Birkett, certainly no intent to cause him serious harm.

18. The learned judge in leaving the case to the jury had given them a legal direction on intent. During their deliberations the jury asked a question regarding the difference between section 20 simple wounding and section 18 wounding with intent and the judge explained to them that the difference lay in the defendant's intention at the time of the alleged act of wounding. It appears that the jury or some members of the jury nonetheless remained uncertain of what precisely was required for them to be sure that the defendant acted with the requisite legal intent. In these circumstances, it barely needs stating the proper course was for the jury, by a further written note, to seek to explain to the judge the nature of their continuing difficulty and to invite further clarification from the trial judge. Again, it barely needs stating: it is the trial judge and no one but the trial judge, who has the function of directing the jury on all matters of law. The trial judge, as in this case, specifically tells the jury in open court that they must follow his or her directions on all questions of law. The functions of the jury bailiff on the other hand are limited and specific and it is essential that the jury bailiff does not depart from those limited and specific findings: see paragraph 429(i) of the Court Manual published by the

Lord Chancellor's Office upon the establishment of the Crown Court, approved in R v Lamb 59 Cr.App.R 196 at 198, CA, and in R v Dempster 71 Cr.App.R 302, CA. Their fundamental duty, that is the duty of jury bailiffs, is to prevent approaches by outsiders and to preserve the integrity of the deliberative process. It cannot be emphasised too strongly that it is not within the functions of the jury bailiff to engage with the jury or any member of the jury in any discussion about the substance of the trial, which plainly includes but is not limited to any aspect of the evidence and *a fortiori* any matter of law. The irregularity in this case was stark and grave. As already explained, the issue of intent was critical to both offences. The judge had given directions on that issue. The jury bailiff in purporting to give legal directions on that critical issue both acted wholly outside her permitted functions but also trespassed on the exclusive domain of the judge. It matters not, in our judgment, what she precisely told the jury, whether it was correct or not in law. We might however note that from the material that we have seen, what she said was neither accurate, appropriate or comprehensive.

19. That touches upon another important principle. The judge's legal directions are given in open court. They are typically framed after discussion with counsel who then have the opportunity to make representations as to their accuracy, appropriateness and comprehensiveness. That is in accord with the principles of fairness and open justice. Those principles are violated when a person such as a jury bailiff discusses in private with the jury any matter pertaining to the trial, denying both prosecution and defence any opportunity to respond to what has been privately discussed.

20. In our judgment, this irregularity standing alone would render the verdicts in this case unsafe. There was however the further irregularity. It does appear that the jury bailiff was seeking to encourage the jury to reach a majority verdict. Again, such conduct is not at all within the permitted and limited functions of the jury bailiff. The judge and judge alone has the function of managing the jury's deliberations. Furthermore, the law imposes strict obligations on the judge in this respect. For example, Criminal Practice Direction: VI Trial 26Q Majority Verdicts lays down a detailed code for managing majority verdicts. The judge must not bring improper pressure on the jury to reach a verdict, a well-established principle. In some very exceptional circumstances the judge may give what is called a Watson direction (1988) QB 690, Cr.App.R 1 CA, but this court has prescribed the wording that should be used, has generally discouraged the practice of such directions: see R v Logo [2015] 2 Cr.App.R 17, CA and warned in strong terms that departures from the prescribed wording may risk the judge bringing improper pressure on the jury and rendering the verdicts unsafe: see R v Morgan [1997] Cr.App.R 593, CA.

21. The jury bailiff's conduct in this case has undermined all those strictures and safeguards. For these reasons, we conclude that there was in this case material and highly significant irregularities such as to render the verdicts unsafe. We therefore grant leave to appeal, we quash the convictions and allow the appeal to that extent.

22. The next matter that must be considered is the question of retrial. The Crown submits that the court should order a retrial. The applicant contends that there should be no retrial. On behalf of the applicant counsel submits firstly that the length of time that would have elapsed since the commission of the offence and the appeal hearing and retrial date being fixed is excessive. Secondly, it should be remembered that the applicant would have been in custody for nearly two years if the retrial is fixed for next year, as is highly likely in all the circumstances. Thirdly, the applicant would, if the court orders a retrial, face a third trial on the same facts, albeit the first trial was aborted after only the two main civilian complainants had given evidence. Fourthly, the emotional and physical burden placed upon the applicant at the trial. Critically the appellate process has adversely affected his mental health and it is submitted that it would be unjust for the applicant to face a trial again in all the circumstances. Fifthly, the convictions recorded against the applicant received considerable publicity in the local community and were reported extensively in the local media and we have seen copies of those media reports. It is submitted that the nature of the press reporting would adversely affect the applicant's right to a fair trial.

23. In R v Graham [1997] 1 Cr.App.R 302, this court stated that a retrial must be justified as necessary in the interests of justice. The court observed that that required an exercise of judgment and will involve consideration of the public interest and the legitimate interests of the defendant. The public interest is generally served by prosecution of those reasonably suspected on available evidence of serious crime if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence and any penalty the defendant may already have paid before the quashing of the conviction.

24. We have carefully considered these submissions by Mr Whitehurst, counsel on behalf of the defendant, but conclude that in this case it would be in the interests of justice to order a retrial, taking account of the following considerations. First, the alleged offences in this case are very serious - attempting to cause grievous bodily harm with intent where the maximum sentence is life imprisonment and wounding with intent contrary to section 18 where again the maximum sentence is life imprisonment. One alleged offence is against a police officer in the execution of his duties. An indication of the seriousness of the alleged offences is given by the length of the sentences in fact imposed by the judge. It is also notable that the defendant was assessed to be a dangerous offender under the Criminal Justice Act 2003 - a factor also supporting the public interest in a retrial. Secondly, this is not a case where the jury failed to agree or where any fault could be imputed to the prosecution or judge. The irregularities were outside their control. Furthermore, we have considered the judge's ruling on no case to answer, his summary of the relevant evidence and his sentencing remarks. The strength of the evidence has been held on authority to be a relevant factor: see Reid v The Queen [1980] AC 343 Privy Council by Lord Diplock at 390. This court must not engage in excessive speculation: see R v Stone [2001] EWCA Crim 297. But on the material we have seen, it would not be appropriate in our judgment to proceed in this case on the basis that the Crown's case

is weak or dependent on obviously slender evidence. Thirdly, this does not appear to be a case where the alleged victims do not wish there to be a retrial. That is in any event not a decisive consideration but would carry some weight in an appropriate case. Fourthly, there has been some passage of time in this case, the alleged offences occurred at the end of June 2018 and a retrial may not take place until early next year. Therefore, the period will exceed at least 18 months. We accept that that is indeed a significant passage of time, but there is nothing to suggest that this period of delay would be unfairly prejudicial to the fairness of the retrial or would result in unacceptable oppression of the defendant. Connected with this factor is the fact that the defendant has spent a period in custody since he was sentenced in July 2019 and may spend a further period in custody before a retrial. However, it must be remembered that he was sentenced to an extended sentence with a custodial element of 17 years so that the period spent or to be spent in custody before retrial would be a relatively limited part of any sentence that it is probable he would have to serve on conviction at a retrial. The present case therefore is very different to those where a defendant has served all or nearly all of the sentence imposed and this court has then declined to order a retrial. It is also well-established that a sentence on retrial would have to take account of the fact that he had been sentenced previously and had served part of that sentence before retrial, thus, mitigating at least to some extent the effect of the retrial on the overall period spent in custody.

25. Finally, we have had regard to the material relating to publicity that has been put before us. The legal test in that context is the same as would apply in respect of an application at the first trial: see R v Stone (already referred to). In our judgment, given the usual and generally effective safeguards that are adopted where there has been unfavourable publicity, that is not a bar to a retrial or a factor sufficient to undermine the many factors supporting in the public interest an order for retrial in this case.

26. Accordingly, for those reasons we do order a retrial.

(**The re-trial in this case has now taken place. Accordingly, this judgment is no longer subject to reporting restrictions pursuant to section 4(2) contempt of court act 1981. It remains the responsibility of the person intending to share this judgment to ensure that no other restrictions apply, in particular those restrictions that relate to the identification of individuals**.)

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