Neutral Citation Number: [2019] EWCA Crim 343

Case No: 201801751 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE UPON TYNE
His Honour Judge Sloan QC
T20167830

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MRS JUSTICE FARBEY
and
THE RECORDER OF LIVERPOOL
(HIS HONOUR JUDGE GOLDSTONE QC)
(sitting as an additional judge of the Court of Appeal)

- -

Between :

LYNDSEY LEE ANNE HARPER	**Appellant**
- and -	
THE QUEEN	**Respondent**

(Transcript of the Handed Down Judgment.
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Nicholas Lumley QC for the Appellant
Adrian Waterman QC and **Ian Mullarkey** for the Crown

Hearing date : 13 February 2019

Judgment
As Approved by the Court

Sir Brian Leveson P :

1. On 12 June 2017, in the Crown Court at Newcastle Upon Tyne before the Honorary Recorder of Newcastle, His Honour Judge Sloan QC, Lyndsey Lee Anne Harper changed her plea to admit the offence of affray. On 27 June 2017, having stood trial with Brian Cahill, they were both convicted of murder; she was also convicted of doing an act intended to pervert the course of justice. The use of their surnames throughout this judgment is for simplicity and not intended as a discourtesy.

2. On the following day, Harper was sentenced to life imprisonment with a minimum term specified pursuant to s. 269(2) of the Criminal Justice Act of 18 years with concurrent terms of 8 months and 16 months respectively for affray and doing an act intended to pervert the course of justice. Concurrent terms were also imposed for other matters. Cahill was sentenced to life imprisonment with a minimum term of 26 years less the time spent on remand.

3. Harper now appeals against conviction by leave of the single judge who extended time by 269 days. She was refused an extension of time and leave to appeal against sentence which she now renews.

The Facts

4. On 24th December 2016, Harper and Cahill had been drinking in Cramlington, both at The Green public house (where there was some trouble and Harper was said to have asserted that he was "just out to get pissed and cause trouble") with the result that they were asked to leave. They then went to the Cramlington Working Men's Club. At the club, there was an altercation which involved both them and others (including Owen Kerry). It was accepted by the prosecution and Cahill that he had stabbed Mr Kerry resulting in his death.

5. Arising out of the incident, this appellant pleaded guilty to affray, accepting that she had punched Connor Frost and had fought with Stephanie Minto. During the time that the appellant had been involved in the fighting, it was alleged that she had hit out at Mr Kerry whilst holding a glass and subsequently lashed out in his direction while on the ground while screaming. During the course of this incident, Cahill also approached Mr Kerry and then stabbed him. The attack with the glass was said to be part of the joint enterprise but also led to an alternative count (to the murder) of attempting to cause grievous bodily harm with intent; following her conviction for murder, no verdict was returned in relation to this charge.

6. The appellant was arrested on 25th December at Cahill's home address. The clothing that they had worn on the night previously was found in the sink: bleach was detected on Cahill's clothing leading to the count of an act tending and intended to pervert the course of public justice. Further, a knife (recovered from the garden) was found to have DNA from the deceased on it. A blood sample taken from the appellant was analysed and revealed the presence of both prescribed and proscribed drugs.

7. In interview, the appellant said that she had thrown the contents of her glass over someone who had pulled her hair and that she was unaware what Cahill had been doing. Cahill denied that he had stabbed anyone but, at trial, he admitted that this was

a lie. The prosecution also relied on admissions said to have been made by Harper to a prison officer while in custody.

8. In short, the prosecution case was that the appellant had been out that night with the intention of causing trouble as evidenced by her behaviour at The Green public house before attending the social club. The case was that the appellant and Cahill were engaged in the fight together. She had assaulted Connor Frost, then Stephanie Minto after which the deceased, Mr Kerry, had approached Cahill who attacked him from the front whilst the appellant attacked from behind.

9. In relation to murder, the case put was that the jury could infer that the appellant intended to assist and encourage the assault on Mr Kerry with the requisite intention to kill or cause grievous bodily harm when she had tried to strike him to the back of his head with a glass object and when she had persisted in her endeavours by kicking and screaming after she had been put to the ground. Alternatively, if the jury was not satisfied in relation to murder (or the alternative of manslaughter), it could be sure that the appellant had attempted to cause the deceased grievous bodily harm by the action of trying to hit him on the head.

10. In relation to the attempt to pervert the course of justice, it was contended that the appellant had deliberately soaked her clothing and that of Cahill in bleach in order to destroy any forensic evidential link (the obvious risk being blood) between them and the deceased. The prosecution relied on her admissions to this effect to two neighbours and forensic evidence that bleach had been used on the clothing in the sink.

11. As for the defence, Harper admitted that, generally, she had behaved badly that night but that she did nothing to contribute to the actions of her co-accused. Whilst she had been present it had been Cahill alone who inflicted the fatal wound. She had not encouraged or assisted him to assault the deceased. She had not intended that he should assault the deceased, let alone cause him serious harm or death. She had been unaware that he had a knife. The incident had blown up and was resolved in seconds. As for the alleged confession, it was unreliable.

12. Turning to the allegation of attempting to cause grievous bodily harm with intent, Harper's case was that she had not intended to strike the deceased with the glass. She had intended only to throw the liquid contents over the person who she thought had pulled her hair. The evidence of her swinging the glass had been inconsistent.

13. Finally, in relation to attempting to pervert the course of justice, Harper's case was that she had changed her clothes because they were wet and muddy; she had left them by the sink. She had not soaked their clothing in bleach let alone done so with the intention to pervert the course of justice. The neighbours had not gone to the police to say that they had been told this; in any event, they were drunk and were unreliable.

14. In the circumstances, the issue for the jury in relation to murder was whether they were satisfied so that they were sure that Harper had encouraged or assisted Cahill to assault the deceased unlawfully with the intention that he suffer death or really serious bodily harm or death and, further, whether they were sure that she had intended to encourage or assist Cahill to commit the offence. Manslaughter was left on the alternative basis that the jury were satisfied so that they were sure that Harper had

encouraged or assisted Cahill to assault the deceased unlawfully, not intending that he should be killed or seriously injured but in circumstances where a reasonable person must have realised that the deceased was at risk of suffering some harm albeit not serious. Count 2 (attempting to cause grievous bodily harm with intent) was an alternative to murder and manslaughter and we say no more about it.

15. In relation to the allegation of perverting the course of justice, the issue was whether the jury were sure that the appellant had soaked the clothing belonging to her and Cahill in bleach and, if so, whether they were sure that this had the tendency to pervert the course of justice and that Harper had intended to do so.

16. For the purposes of this appeal, it is unnecessary to elaborate on the evidence presented at the trial. The two main grounds of appeal consist of a challenge to the admission of the evidence of the prison officer and to the directions of law in relation to joint enterprise. There are two further grounds of appeal (concerning the admission of toxicology evidence and the prejudicial effect of a question posed by the prosecution to Harper but not pursued after objection) but it is accepted that, on their own, these latter grounds would not be sufficient to undermine the safety of an otherwise safe conviction for murder.

The Admission

17. Melanie Allen is a prison officer at HMP Low Newton. On 29 December 2017 (that is five days after the killing), she was on duty on the detoxification landing when she was approached by Harper. Miss Allen (who gave evidence over a live link because at the time of the trial she was on holiday overseas) reported that Harper said to her that she was "in for murder". She went on, smirking and laughing:

> "It was both of us really but I'm just saying it was him. If you're going to do something, do it properly, eh Miss Allen? We stabbed him but I am pleading not guilty. Fuck that."

18. Later that day, she made a note of what Harper had said on a piece of paper "word for word", intending, when she had the chance, to enter it into the Intelligence Report System (IRS) at the prison. For reasons that she explained, she said that she did not access a computer during that shift and was thereafter off duty, returning to work on 3 January when she copied the contents of her note verbatim on to the IRS. She then destroyed the piece of paper so that no-one else, such as another prisoner, had sight of it.

19. When cross-examined, she accepted that there were computers available to access at the time and that an entry would have taken only minutes. She destroyed the paper having logged it on to the system. It was put to her by leading counsel that, having said she was "in for murder" Harper had said:

> "They've nicked both of us but it was him. I'm going not guilty. Fuck that."

Referring to a member of staff by the name of Kitchen or Kitchener, it was suggested that Harper had attributed the words "if you're going to do something, do it properly" to her. Miss Allen did not accept this version of events.

20. The admissibility of this evidence was not challenged although, following waiver of privilege, leading counsel then appearing for Harper expresses concern that he did not do so not least because he describes it as a confession that went to joint enterprise which corroborated the accounts of eye witnesses who described the actions of Harper at the precise moment that it was said Cahill must have stabbed the deceased.

21. In these circumstances, relying on *R v Devani* [2008] 1 Cr App R 4, Nicholas Lumley QC (who did not appear at the trial) argues that because Miss Allen was a prison officer she falls within s. 67(9) of the Police and Criminal Evidence Act 1984 ("the 1984 Act") as a person "other than a police officer charged with the duty of investigating offences or charging offenders" and thus had to have regard to any relevant provision of the Codes of Practice. The relevant parts of the Code C are 11.13, 11.14 and Note 11E which refers to recording any unsolicited comments with an opportunity for the suspect also to sign the note. Although not suggesting that she was then charged with the duty of investigating offences, a submission under s. 78(1) of the 1984 Act should have been made to exclude the evidence on the basis that the spirit of the Code had been breached and that its admission would have an adverse effect on the fairness of the trial.

22. *Devani* concerned circumstances in which the appellant (a solicitor) visiting a prison to take instructions from a client was seen to take possession of letters one of which was addressed to that client's co-accused: that letter was said to contain a plan to create false evidence. When asked specifically, the appellant denied having taken anything from her. She was searched and the letter found. In the presence of another solicitor, a prison officer then asked why she had taken the letters; the appellant was later charged with attempting to pervert the course of justice. It was held that the overseeing staff were not caught by s. 67(9) and there had not been a breach of the Code but that the prison officer did fall within these provisions and so should have cautioned the appellant. In the event, the appeal was dismissed as the judge had considered that it was not unfair to admit the evidence notwithstanding a breach of the spirit and that the same considerations applied to an actual breach of the Code.

23. On behalf of the Crown, Adrian Waterman QC submits that Miss Allen was not investigating any offence such as would trigger an obligation under the Code so that no obligation arose under it. She was the recipient of an unsolicited and unprompted comment: indeed, it is not suggested that she spoke, let alone asked a question. To that extent the case can be distinguished from *Devani*.

24. We have no doubt that Mr Waterman is correct in his analysis of this situation. Whether or not the spirit of the Code is engaged by the fact of Miss Allen's occupation, the circumstances in which these observations were made do not engage the Code or the need to obtain a signed copy of the comment. Although we accept that points can be made about the failure promptly to record the comment, the delay in placing the information on the IRS and the destruction of the note, these were all points that go to weight rather than admissibility.

25. Incompetent representation is not, itself, a ground of appeal: the conviction must be unsafe as a consequence: see *R v Day* [2003] EWCA Crim 1060 at [15] and followed in *R v Ekaireb* [2015] EWCA Crim 1936. In our judgment, whatever concession leading counsel at the trial might now make, the decision not to challenge the admissibility of Miss Allen's evidence was not incompetent and Mr Lumley does not

suggest that it was. Further, given the spontaneity of the conversation, the total absence of any question or comment which precipitated the comment, and the fact that there is no suggestion of bad faith, we have no doubt that any challenge to the admissibility of this evidence would have been bound to fail.

Overwhelming Supervening Event

26. Mr Lumley also challenges the failure by the judge to direct the jury in relation to the significance of Harper's ignorance of the knife. Using the words of the Supreme Court in *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2017] AC 387 ("*Jogee*"), he contends that the use of a knife by Cahill constituted an "overwhelming supervening act by the perpetrator". In that regard, he prays in aid the fact that, after conviction, the prosecutor conceded that it could not positively be asserted that Harper knew about the knife. This concession, Mr Lumley argues, undermines the safety of the agreed directions of law which included the observation:

> "It is Ms Harper's case that she was unaware that Mr Cahill had a knife at the material time. Knowledge or ignorance that Mr Cahill had a particular weapon at the material time will constitute evidence relevant to your determination of whether you can be sure Ms Harper intentionally encouraged and/or assisted Brian Cahill to assault Owen Kerry unlawfully with intent either to kill Mr Kerry or to cause him really serious bodily injury."

27. Mr Lumley goes on to argue that in the context of a case where spontaneous violence has erupted, it is central to the question of Harper's intention that she did not know of the knife's existence. An unpleasant episode of drunken aggression and ineffectual violence turned, in a moment, to a fatal incident, with a sudden, single and unseen stab by someone other than the appellant unaided by her in any way. Thus, the jury ought to have been directed in this case that they first had to be sure that Harper knew of the presence of the knife before they could consider the further elements of the offence.

28. This submission ignores the thrust of *Jogee*. First, intention to assist in a crime of violence is not determined only by whether D2 knows what kind of weapon D1 has in his possession: see *Jogee* at [98] which goes on:

> "Knowledge or ignorance that weapons generally or a particular weapon is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

29. This feature was underlined in *R v Brown* [2017] EWCA 1870 which makes it clear (at [28]) that knowledge of a weapon used by a principal to inflict harm is not determinative of secondary party liability but is evidence that may inform the jury's decision both as to the intention to cause harm and the level of such harm. Further, what the prosecution said at the time of sentence (when it remained the case, as it always had been, that Harper had acted in concert with Cahill, with her seeking to deploy a glass to injure) is irrelevant, as would be the judge's conclusions as to

knowledge. In *R v Johnson (Lewis) and other cases* [2016] EWCA Crim 1613, the court made it clear (at [22]):

> "We invited submissions on whether it was appropriate for the court to take into account the observations of the judge when sentencing in determining the factual basis for the conviction. In our view, the court should not do so. Its duty is to examine the matters before the jury and the jury's verdict (including the findings of fact that would have been essential to reach such a verdict). Such an approach is consistent with the approach the court took in relation to observations made by judges in life sentence cases when it was their practice to make reports to the Home Secretary for the purposes of the determination of the tariff: see *R v Jones* [1998] 2 Cr App R 53 and *R v Dillon* [1997] 2 Cr App R 104."

30. That brings us to the concept of overwhelming supervening event. Although Mr Lumley argues that the presence of a knife constitutes such a feature, in our judgment, it is clear that it does not: if it were the case that it did, the observations in *Jogee* is no more than evidence from which the jury could reach conclusions about intention would be wrong. In any event, this argument has since been analysed in *R v Ali Tas* [2018] EWCA Crim 2603 which examined the line of authorities which included *R v Smith (Wesley)* [1963] 1 WLR 1200, *R v Betty* 48 Cr App R 6, *R v Anderson, R v Morris* [1966] 2 QB 110, *R v Reid (Barry)* 62 Cr App R 109, and *Jogee* along with those concerning fundamental difference.

31. *Tas* concerned a conviction for manslaughter and the argument that if D1 away from D2 produced a knife, this could constitute an overwhelming supervening event and that the judge was wrong to withdraw that possibility from the jury. Having set out *Jogee* at [95]-[98], the court went on:

> 37. Thus, in underlining the requirement for proof of intention, one of the effects of *Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.
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> 38. The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in [96] of *Jogee*, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based on

> principle and the correct application of *Church* (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self defence.

32. The judgment goes on specifically to deal with overwhelming supervening event in this way:

> 40. What then is left of overwhelming supervening act? It is important not to abbreviate the test articulated above which postulates an act that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". In the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.
>
> 41. We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency.

33. The directions which the jury received were approved by counsel and no submission was made to the effect that overwhelming supervening event should have been left. We have no doubt that to have done so would have been to reverse the development in the law identified by *Jogee*. This ground of appeal is also dismissed.

Remaining Grounds

34. We turn to the two further grounds of appeal which we can address briefly: Mr Lumley recognises that, standing alone or even together, neither can undermine the safety of this conviction.

35. The first ground concerns the admission of toxicology evidence. Elaborating, the jury were told, as part of the agreed facts, that forensic analysis of a blood sample taken from Harper showed the presence of a number of prohibited drugs such as methadone

and morphine. The defence submitted at trial that such evidence was inadmissible: although the blood sample had been properly requested and provided, it was used not for the stated purpose of ascertaining whether Harper was involved in the offences for which she had been arrested, but to assist in determining her state of mind at the time of the offences. In those circumstances, it was submitted that the evidence should be excluded in accordance with the principles of s. 78 the 1984 Act on the basis that its probative value was outweighed by its prejudicial effect.

36. The judge rejected that submission. He held that the evidence was also relevant to the jury's assessment of Harper's evidence, should she give evidence (which she did). In our judgment, this evidence was admissible for that purpose for the reasons given by the judge and, given her admission in relation to taking prohibited drugs, could not, in any event, be considered prejudicial. It would have been preferable if the judge had gone on to explain to the jury the potential relevance of the evidence; his failure to do so does not, however, impact upon the safety of this conviction.

37. Finally, it was contended that an improper question put to Harper in cross-examination had a prejudicial effect. She was asked whether she was worried that her DNA might be on the murder weapon; she had said that she was, and that it might have been a knife which Cahill had used in the bedroom. When she was shown the murder weapon, she denied that she had ever seen it before.

38. This line of questioning led to an objection by her leading counsel because it was based on unused material, the deployment of which had not been notified in advance to the defence. It was suggested that the line of questioning, rather than the answers which it elicited, may have in some way undermined the defence case that she had never seen the murder weapon before.

39. In our judgment, this line of questioning was perfectly permissible and understandable. It arose because Harper had changed her account between the time when Cahill was being cross-examined on her behalf and when she gave evidence. On her behalf it was suggested to Cahill that he had told her about the stabbing as they were leaving the club, and that when they had arrived home, she had raised the topic of conversation again, whereupon he had produced the knife, washed it and thrown it away. When she gave evidence, however, her account was different: there had been no discussion about the knife and she had "assumed" that he had produced and washed it.

40. It is correct to observe that the Crown could, and perhaps should, have forewarned the defence that previously unused material would be deployed in cross-examination. However, the failure to do so does not invalidate the legitimacy of the line of questioning. Any objection to prevent it, had notice been given. would have been doomed to failure. Furthermore, once objection was taken, the matter was not pursued and Harper's answer on the topic was final. There is nothing in this point.

Sentence

41. There is also a renewed application for leave to appeal against sentence for which an extension of time (of some 269 days) is sought.

42. Mr Lumley accepts that the starting point for the minimum term in light of Schedule 21 to the Criminal Justice Act 2003 was 15 years. It is further accepted that the Judge was entitled to increase the minimum term to take account of the other offences committed by Harper on the evening in question. In addition, Harper's previous convictions were a statutory aggravating feature as was the fact that these offences were committed while she was subject to a community order and a suspended sentence order. Nevertheless it is submitted by Mr Lumley that, when adjusting the minimum term to reflect the mitigating features, insufficient weight was given to her limited role, the lack of premeditation and, in particular, her tragic personal background both generally and specifically in relation to events concerning her children.

43. In refusing leave, the single judge observed that the judge plainly had regard to both mitigating and aggravating factors in reaching his conclusion, and that he was entitled to conclude that the serious aggravating features markedly outweighed the mitigating features. We agree. It cannot be said even arguably that the sentence was manifestly excessive. Had we considered that there was any merit in the renewed application, we would have extended time, but as there is none, the extension sought is refused.