IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202400399/B1

[2024] EWCA Crim 1097

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 27 June 2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE DOVE
HER HONOUR JUDGE NORTON
(Sitting as a Judge of the CACD)

REX
v
A.I.Q

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MR H MACDONALD appeared on behalf of the Applicant Crown
MR L MASKELL appeared on behalf of the Respondent Defendant

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: The provisions of section 71 of the Criminal Justice Act 1973 apply to this case and reporting restrictions are accordingly in force. We will return to those restrictions at the conclusion of this judgment. We shall refer to the accused as "AIQ", those being randomly chosen letters which have been used to anonymise her in the listing of this appeal.
2. The Registrar has referred to the full court this prosecution application for leave to appeal pursuant to section 58 of the Criminal Justice Act 2003 against a ruling that AIQ had no case to answer on a charge of aggravated burglary.
3. For present purposes the facts can be summarised briefly. At about 11.30 pm on a night in October 2022, two men burst into a flat in Folkestone. They were recognised by those in the flat as being men to whom we shall refer as "G" and "M". G wore a mask and was said by persons in the flat to be carrying something, variously described as a knife or a piece of pipe. One of the residents was attacked and threats were made of harm to his children. A safe containing cash and a valuable ring was stolen. The men left the flat and a neighbour saw a car speeding away.
4. The prosecution case was that the car was driven by AIQ, who was alleged to have brought G and M to the flat, waited in the car whilst they went into the flat and then drove them away with the stolen property. The prosecution case was that AIQ, G and M were all jointly involved in an aggravated burglary.
5. It might be thought obvious that they should all have been tried at the same time. Regrettably, that did not happen. On 21 November 2022, M pleaded guilty to aggravated burglary. On 20 June 2023 the prosecution accepted from G pleas to offences of burglary and assault occasioning actual bodily harm, and did not pursue the charge of aggravated burglary.

6. AIQ was charged on indictment with aggravated burglary (count 1) and burglary (count 2). Each count alleged that she had committed the offence jointly with G and M. The particulars of count 1 alleged that the offenders at the time of committing the burglary had with them weapons of offence, namely a knife and a metal bar. AIQ pleaded not guilty to both counts. She admitted that she had driven G and M to and from the flat but denied any knowledge of or involvement in burglary or aggravated burglary.
7. She was tried in January 2024. The prosecution put forward a circumstantial case which included evidence of text messages passing between AIQ and a friend in which reference was made to a ring and cash, said by the prosecution to be the ring and cash stolen in the aggravated burglary.
8. The prosecution invited the jury to infer that AIQ must have known of the intended aggravated burglary and assisted the principal offenders by driving them to and from the flat. Alternatively, she must have known at least of the intended burglary, and assisted that crime in the same way.
9. In order to prove that an aggravated burglary had occurred, the prosecution wished to adduce, pursuant to section 74 of the Police and Criminal Evidence Act 1984, the conviction of M for that offence. Following discussions between counsel and some observation from the trial judge, it was ultimately decided that agreed facts to be presented to the jury would include both the fact that M pleaded guilty to aggravated burglary and the fact that G pleaded guilty to burglary and assault occasioning actual bodily harm.
10. At the conclusion of the prosecution evidence it was submitted on behalf of AIQ both that there was no case to answer on count 1 and that her continued prosecution on count 1 would be an abuse of the process of the court. No application was made in relation to

count 2. It was submitted that a conviction on count 1 would require the jury to be sure that when AIQ drove G and M to the flat she knew they were armed with a weapon or weapons and were going to burgle the flat. But, it was argued, there was no evidence capable of proving that she knew of the presence of any weapon. The points were made that there was no evidence of any displaying of the knife, either in the car or when getting out of the car; and that the burgled flat was within a larger building, and there was no evidence of any significant event occurring at the outer door of that building.

11. As part of the written submission of no case to answer, reference was made to the jury having been informed that M had pleaded guilty to aggravated burglary whereas G (the man alleged to have been armed) pleaded guilty only to a single burglary. It was submitted that in the light of that evidence:

> "... it would be open for the jury to infer that [G] was not convicted on the aggravated count due to possibly having no knowledge of the knife, and in these circumstances, the defence submit that the suggestion that [AIQ], who never entered the address and was never seen by the complainants, knew about it, is untenable."

12. As to the application to stay proceedings as an abuse of the process, it was similarly submitted that the prosecution, having not pursued the aggravated burglary charge against G and accepted from him pleas to a lesser form of burglary, the prosecution could not properly invite the jury to be sure that AIQ, who was not alleged to have entered the flat, knew about the knife. It was submitted that to pursue such an allegation in those circumstances would be so unfair as to offend the court's sense of justice and propriety.

13. Both submissions were resisted by prosecuting counsel, who was not counsel who had accepted G's guilty pleas months earlier. He argued that in accepting those pleas from G and leaving the allegation of aggravated burglary to lie on the file, the prosecution had

acted on public interest grounds and had made no concession as to the sufficiency of the evidence.

14. The judge gave a ruling which he helpfully set down in writing. He noted that there was no evidence of anyone having seen the iron bar referred to in the particulars to count 1. He further noted that he had received no explanation of why it had been in the public interest to accept lesser pleas from G in the face of "compelling evidence of his having committed the more serious offence".

15. The judge said that he had always struggled to understand how, once the prosecution had effectively conceded the possibility that a principal offender may not have known that a weapon of offence was being brought into the premises, it was possible for a jury to be sure that a secondary party must have known that, there being no direct evidence of the secondary party having seen the weapon. The judge further said that the acceptance of the lesser plea from G must establish that the prosecution conceded at least a possibility that a principal who actually entered the premises did not or may not commit an aggravated burglary. How then, he asked rhetorically, could a jury be sure that a secondary party must have known that the principal intended an aggravated burglary, not just a burglary?

16. The judge went on to say that there was no evidence of any weapon being brandished or seen prior to entry to the premises, no evidence that a weapon had been visible when the two principals left the vehicle or returned to it, and no evidence that AIQ could see them effecting their entry into the flat. Consequently he said the prosecution case depended on the jury drawing an inference that AIQ must have been aware of the existence of a knife in the possession of, presumably, G.

17. The judge reached this conclusion:

> "In the circumstances that, in my judgement, the jury would have to be told that it has been accepted by the [prosecution] that it was appropriate for [G] to be sentenced on the basis that he may not have known that a weapon of offence was taken into the premises, it is not, in my judgement, possible (let alone fair) on the available evidence, to invite the jury to infer that [AIQ] must have known that a weapon was taken into the premises by [G] (which appears to remain, despite his plea, to be the [prosecution's] case)."

18. The judge posed the question as to how it could be said to be in the public interest to pursue the more serious allegation against the secondary party who was clearly less culpable, and he accepted the submission that there was a very real potential for unfairness. He went on to say that he would be obliged to intervene to prevent such unfairness even if there was sufficient evidence. But he made clear that he had found there was insufficient evidence to permit a conviction on count 1 and he therefore allowed the submission of no answer to answer.

19. It was recognised by all parties that the case would continue on count 2. The jury were, however, discharged because the prosecution gave notice of their intention to appeal against the ruling on the submission of no case to answer. The prosecution have complied with all necessary formalities, including giving what is generally referred to as "the acquittal undertaking."

20. Before this court, counsel for the prosecution (the appellant), submits that the judge fell into error in a number of respects. He argues that the circumstantial evidence could be accepted by the jury as proving that AIQ was the getaway driver in a planned burglary carried out with weapons and as such must have known of the carrying of one or more weapons in the car. He repeats his submission below that the acceptance of lesser pleas from G was not a concession as to insufficiency of evidence and could not be treated as positive evidence that G was not guilty of aggravated burglary. Counsel submits that

under section 74 of the 1984 Act, the prosecution were entitled to rely on M's guilty plea as evidence that the offence of aggravated burglary was committed. In contrast, he submits, AIQ could not rely on G's convictions as in some way proving that G was not guilty of aggravated burglary.

21. For AIQ, counsel relies primarily upon the submissions and arguments which were advanced below. He submits that the evidence was simply insufficient to enable a jury properly directed to draw an inference of knowledge that the proposed burglary would involve the carrying of one or more weapons. To invite such an inference was, he submitted, a step too far and could only lead to speculation by the jury.

22. We are grateful to both counsel for their assistance.

23. On an appeal under section 58 of the Criminal Justice Act 2003 the powers of this court are conferred by section 61, which so far as material for present purposes says:

> "61 Determination of appeal by Court of Appeal
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> (1) On an appeal under section 58, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.
> (2) Subsections (3) to (5) apply where the appeal relates to a single ruling.
> (3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.
> (4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—
>
> (a) order that proceedings for that offence may be resumed in the Crown Court
> (b) order that a fresh trial may take place in the Crown Court for that offence
> (c) order that the defendant in relation to that offence be acquitted of that offence.
>
> (5) But the Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order were made under subsection (4)(a) or (b).
>
> ...

(6) Where the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in subsection (4)(a) to (c) (but subject to subsection (5))."

24. It is also relevant to refer to section 67, which reads:

"67 Reversal of rulings

The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—
(a) that the ruling was wrong in law
(b) that the ruling involved an error of law or principle, or
(c) that the ruling was a ruling that it was not reasonable for the judge to have made."

25. As we have observed, it is unfortunate that the three persons accused in this case were never formally joined in one prosecution, and instead came before the court separately and at different times. We recognise that such situations may occur, in particular as a result of the pressures on the criminal justice system and the need to observe the differing custody time limits of several accused. This case, however, illustrates the problems which may arise when a piecemeal approach to the prosecution of those accused of a joint crime results in attention being distracted from an overview of the prosecution case as a whole. The judge was placed in a difficult position by the manner in which the prosecution dealt with the charges against G and M and by the manner in which the applications were argued before him. However, sympathetic though we are to the judge, we are satisfied that he fell into error. We have reached that conclusion for the following reasons.

26. First, we think it very regrettable that neither counsel invited the judge's attention to the decision of the Privy Council in Hui Chi-ming v The Queen [1992] 1 AC 34. The facts

in that case were striking. Four men were charged with a joint offence of murder. At trial two of the alleged secondary offenders entered guilty pleas to manslaughter, which were accepted, and a third was acquitted on the direction of the judge. The jury found the alleged principal, A, not guilty of murder but guilty of manslaughter. The appellant and another man were then charged. The other man pleaded guilty to manslaughter and that plea was accepted. The prosecution would have been willing to accept a similar plea from the appellant, but he declined. He was tried for murder on the basis that he had participated in a joint enterprise in which A had murdered the victim. He was convicted by the jury.

27. An appeal to the Privy Council was dismissed. It was held that the trial of a secondary offender can proceed even though the alleged principal has been acquitted in an earlier trial. It was further held that the trial judge had been correct to exclude evidence of A's acquittal of murder and conviction of manslaughter. The verdict reached by a different jury in an earlier trial, whether on the same or different evidence, was irrelevant and amounted to no more than evidence of the opinion of that jury.

28. That aspect of the decision by the Judicial Committee of the Privy Council has not been overturned by subsequent case law. It continues, rightly, to be cited in the current editions of both Archbold, at paragraph 18-30, and Blackstone, at paragraph A.4.16. In the latter, it is treated as authority that a secondary party may in certain circumstances be convicted where the actual perpetrator of the actus reus of the substantive offence is either acquitted or convicted of a lesser offence. We agree with that summary. If it had been brought to the judge's attention we do not think he would have approached the submission of no answer to answer in the way he did.

29. The Judicial Committee in Hui Chi-ming also considered whether it was an abuse of the

process for the prosecution to proceed against the appellant for murder rather than manslaughter. It was held on the facts that it was not.

30. Secondly, the decision of the prosecution to accept pleas to lesser offences from G did not of itself mean that the prosecution necessarily accepted that the evidence was insufficient to prove him guilty of aggravated burglary. It is not suggested on behalf of AIQ that prosecuting counsel who accepted those pleas said anything at the time which amounted to an express concession of evidential insufficiency.

31. Thirdly, as the judge noted, no detailed explanation was given to him of the reasons why the prosecution accepted pleas as it did from G. But even if the reasons were known, they would be irrelevant to a jury's assessment of the sufficiency of the evidence against AIQ and would for that reason be inadmissible in her trial.

32. Indeed, for the reasons we have given, the fact of G's guilty pleas would also be inadmissible. We understand of course why there may well have been a desire to tell the jury something about what had happened to G, lest they were tempted to speculate about it. But the solution to that problem (which was one aspect of the difficulty which the prosecution had created) was for the judge to give a firm direction that there was no evidence about G's position and the jury must not speculate about it.

33. Fourthly, it was recognised that there was a case for AIQ to answer on count 2. That necessarily meant that the evidence was sufficient for a reasonable jury properly directed to draw the sure inference that AIQ knew of and participated in a plan by one or both of the others to burgle the premises. In other words, the jury could properly draw that inference from her conduct before and after the burglary and from all the other facts and circumstances, including the fact that she was trusted by G and/or M to drive them to and from the scene and to carry away the stolen property. Logically the same evidence was

also capable of supporting the inference that she also knew of and participated in a plan by one or both to carry a weapon or weapons. If the jury could be sure that she was trusted to know some of what was planned, they could go on to infer that she must also have been trusted to know of the weapon or weapons. After all, a jury might think that G and M would have been unwilling to take any risk that AIQ might, after the offence, learn for the first time what they had done and be so shocked that she would report them to the police.

34. For those reasons the judge was, with respect, wrong to find that the possibility of a secondary offender knowing that a weapon or weapons were to be carried was excluded by the acceptance of lesser pleas from G.

35. We turn briefly to the submissions made as to abuse of process. The judge did not find the continued prosecution of AIQ on count 1 to be an abuse, and this appeal accordingly does not relate to that point. We do however make it clear that in our view no such finding could have been made. The principle stated in Hui Chi-ming is again relevant. Applying that principle, there was evidence on which the jury could properly find AIQ guilty of count 1, a count to which one of the other accused had pleaded guilty, and in the circumstances of this case we think it impossible to argue that the continued prosecution justified the exceptional measure of staying the prosecution as an abuse of the process.

36. We must express our conclusions in the terms of section 67 of the 2003 Act. With all respect to the judge we are satisfied that his ruling allowing the submission of no case to answer on count 1 was wrong in law and was a ruling which it was not reasonable for the judge to have made. We therefore grant leave to appeal, allow the appeal and exercise our power under section 61(1) of the 2003 Act to reverse the ruling. We order that a fresh trial may take place in the Crown Court for that offence. It is of course open to the

prosecution at that trial to include in that indictment not only count 1 but also the alternative offence charged in count 2.

37. Meaning absolutely no disrespect to the judge, we think it better in all the circumstances if the fresh trial takes place before a different judge at a different court centre. Such a course is commonly taken when appeals under section 58 of the 2003 Act are allowed. We will invite the Presiding Judges of the circuit concerned to nominate an appropriate venue and trial judge.

38. Finally, we return, as we said we would do, to the question of reporting restrictions. Having received helpful submissions from both counsel we are satisfied that so long as the anonymity of AIQ is preserved there is no realistic risk of prejudice to the fair trial of the further proceedings if this judgment is reported in precisely the terms in which it has been delivered. We accordingly direct that in any report of these proceedings AIQ must not be named and no matter may be included which may lead members of the public to identify her. She must instead be referred to only as "AIQ". That restriction having been imposed, no further restriction is necessary and we disapply the other provisions of section 71 of the 2003 Act.

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

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