

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER CIVIL JUSTICE CENTRE
1 BRIDGE STREET WEST
MANCHESTER
M60 9DJ

Date: 29/08/2012

Before :

MR JUSTICE NICOL

Between :

The Queen

Claimant

- and -

Mohammed Arfan

Defendant

Mark Kellett (instructed by the Crown Prosecution Service) for the Claimant
Imran Shafi (instructed by Middleweeks LLP Solicitors) for the Defendant

Approved Judgment

MR JUSTICE NICOL:

1. Nazir Afzal, Chief Crown Prosecutor has applied on behalf of the Director of Public Prosecutions for leave to prefer a voluntary bill of indictment against Mohammed Arfan.
2. On 30th January 2012 Trafford Magistrates Court sent Mohammed Arfan, together with Imran Qasar, Stuart Ryan and Travis Holness for trial at Minshull Street Crown Court Manchester on a charge of causing Steven McDonald grievous bodily harm with intent contrary to s.18 of Offences Against the Persons Act 1861. The other three defendants (who are charged with the same offence) have been arraigned, entered Not Guilty pleas and are due to be tried on 3rd September 2012 with a time estimate of 3 weeks.
3. Mohammed Arfan applied for the charge against him to be dismissed and, on 3rd August 2012, IIIJ Khokhar acceded to the application.
4. The indictment which the prosecution wish to prefer would charge Mohammed Arfan and the other three defendants with the s.18 charge in count 1. Count 2 would be a charge of violent disorder against Mohammed Arfan alone.
5. The prosecution case in outline is as follows. On Friday 30th December 2011 Steven McDonald and three friends (Mathew Hampson, Christopher Hampson and Daniel Green) were drinking together in various Manchester pubs. At about 2.01am the following morning (and so now on 31st December 2011) they went to the Taste Buds Takeaway in Sale. There is a second branch of Taste Buds in Altrincham. Both are owned by the father of Qasar and Arfan. Qasar was in the Sale branch when McDonald and his friends went in. A fight took place between Qasar and Mathew Hampson. It was broken up by Michelle Bruce. Hampson and his three friends then walked away.
6. One of the other customers in Taste Buds, Michael Atkin, describes a Red Smart Car arriving and two males who were 'pumped up' were talking to a man who had been working in the kitchen. Qasar left the shop as a voice on the CCTV can be heard saying "No, no, I beg you". Qasar got into the Smart car and drove off.
7. At about the time that the fight between Qasar and Mathew Hampson was taking place in Sale, Arfan, Ryan and Holness left the Altrincham branch of Taste Buds. They got to the Sale branch (which was about 3 miles away) at 2.26am. An employee shouted to them "Mo, Springfield, Springfield" and the three of them ran out of the shop. They met up with Qasar on Springfield Road.
8. In interview, Arfan was asked about Ryan. He said that he was aware that Ryan was a 'decent' kick boxer. Holness has previous convictions for violence. He was listed in Arfan's mobile phone as 'T Dog'. When asked about this, Arfan said he had listed Holness' number under a previous friend's

nickname. It was a coincidence that 'Dog' was a reference to gang connections.

9. Arfan said in interview that he only knew his brother had been assaulted when he met him on the Springfield Road. He said he went looking for the complainant group to call the police. There are no calls to the police in the data for his mobile phone. He said he had not made any calls during the incident. However, the call data do show him making calls throughout the period of the incident.
10. Daniel Green had initially returned to Taste Buds, Sale, but left again to warn his friends that they were being pursued. This was before Arfan, Ryan and Holness arrived. Green met up with the two Hampsons and McDonald on Marshland Road and were walking onto Brooklands Road, when a Kia Sedona pulled up and came to a skidding stop. Four men got out of the car. It is the Crown's case that they were Qasar, Arfan, Ryan and Holness.
11. Two of the men who got out of the car chased Mathew and Christopher Hampson down Framingham road. Mathew says that he ran for about 100 metres before knocking on the door of one house to ask for assistance. One of the residents on Framingham Road says that she heard someone shout. 'I'm gonna kill ya. When I get you I'm gonna rip you apart.'
12. Meanwhile two other men attacked Steve McDonald. Daniel Green says that they were: (a) the Asian male who had previously been involved in the argument with Mathew Hampson. He identified Qasar as this person; (b) a white male in a red top. The only person in the group who fitted this description was Ryan. The Crown's case is that it was Arfan and Holness who chased the Hampsons.
13. Daniel Green turned back as the two men were attacking Steven McDonald. One turned to him and said 'you better run' and one of the men kicked out at him. These men then drove off, but they returned a short time later and Daniel Green, who was trying to help Steven McDonald, was chased a short distance down Brooklands Road. One witness said that Qasar shouted 'Try and jump me now'. Other witnesses described three men getting out of the car when it returned. In interview, Arfan admitted that he was one of the three but said that he was shocked by the condition of McDonald, took no part in chasing Green but tried to assist the injured man.
14. An ambulance arrived at 2.40am. Steven McDonald was taken to hospital. He was found to have suffered subdural haematoma and fractures to his skull as well as a number of cuts and abrasions to his head and other parts of his body. A consultant has said that the injuries are consistent with kick or stamp to the head.
15. The Crown puts its case against Arfan in two ways:
 - a. All four defendants had a common intention of causing really serious harm to one or more members of the complainant group (i.e. Mathew and Christopher Hampson, Daniel Green and Steven McDonald). The Crown

submits that a jury could draw this inference from Arfan being in the company of a kick boxer and a man with a conviction for violence, the men being 'pumped up' at Taste Buds, their threats to Mathew Hampson while another pair were actually causing really serious harm to McDonald. The chasing of Daniel Green away and Qasar saying to McDonald "try and jump me now".

- b. Alternatively, the jury could infer that there was a common intention to assault Mathew Hampson and his friends and Arfan foresaw that one of the defendants would intentionally cause really serious harm to a member of Mathew Hampson's group.
16. The Crown has provided me with a two page document entitled 'Findings of HHJ Khokhar'. In their response to this application for leave to prefer a voluntary bill, counsel for Arfan commented that I ought to have a transcript of his decision. I agreed that this would be preferable. However, in view of the shortage of time before the trial of the other three defendants was due to start. I directed that this should be obtained only if it was "reasonably practicable". As an alternative, I directed that I should be provided with an agreed note of the Judge's decision. In the event, it seems that a transcript could not be obtained and no agreed note was forthcoming. I must therefore make do, as best I can, with the note provided by the Crown. I observe that the defence has not suggested that this contained any specific inaccuracy.
17. Judge Khokhar rejected the two ways in which the Crown put its case. As to the first the Crown's note record, "In terms of 'joint enterprise', the Learned Judge stated that in the absence of weapons there was not any evidence to suggest that prior to the defendant group splitting once they left the car that they had a joint intention to cause grievous bodily harm."
18. The Crown had referred to the case of *R v A* [2010] EWCA Crim 1622 for the proposition that a defendant who set out with others to commit crime A would be guilty of crime B so long as he foresaw that his co-accused might commit that offence. This was the legal foundation for the alternative way in which it put its case against Arfan. Judge Khokhar rejected this in these terms. "*R v A* was not of assistance to determining this application, because the defendant group split up the two who actually physically assaulted Steven McDonald were on a 'frolic of their own'".
19. In support of the present application, the Crown has, in effect, repeated the submissions which they made to Judge Khokhar.
20. The Defence made submissions in writing on 21st August 2012. I gave the Crown the opportunity to respond in writing, but nothing further was received. This was not a case where I considered it necessary or desirable to invite oral submissions.
21. The Administration of Justice (Miscellaneous Provisions) Act 1933 s.2(6) authorises the making of rules of procedure for voluntary bills of indictment and these are contained in Rules 6-10 of the Indictment (Procedure) Rules 1971. In this case the Crown has complied with these formal requirements.

There can be no objection to the Crown invoking this procedure simply because the charge against Arfan has been dismissed following an application under Crime and Disorder Act 1998 Schedule 3 paragraph 2. That is because paragraph 2(6) contemplates such an application. It says, "If the charge, or any of the charges, against the applicant is dismissed - (a) no further proceedings may be brought on the dismissed charge or charges *except by means of the preferment of a voluntary bill of indictment.*" [emphasis added].

22. However, the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 W.L.R. 2870 para IV.35.3 says "The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it."
23. Where the 'normal procedure' has involved a successful application to dismiss a case sent to the Crown Court, the authorities underline the caution which should be exercised before a High Court Judge grants leave to prefer a voluntary bill – see *R v Christine Davenport & Ors* [2005] EWHC 2828 (QB) Pitchers J. at [21]–[23] and *R v McGuinness* [2007] EWHC 1772 (QB) Griffith Williams J. at [6]. Without attempting to give an exhaustive list, there may be circumstances which would justify the granting of leave if the Judge who had dismissed the charge had taken the decision without regard to a relevant statutory provision or judicial authority, or had otherwise erred in law, or if the Crown had new evidence which made a significant difference to its case, or if the decision to dismiss lacked a rational foundation.
24. The test for dismissal of a charge is set out in paragraph 2(2) of Schedule 3 of the Crime and Disorder Act 1998 – "The judge shall dismiss a charge ...if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted." In effect the Judge must apply the same test as on a submission of "No case to answer" – see *R v Thompson and Hanson* [2007] 1 Cr App R 15.
25. Contrary to the suggestion of the defence, it is no abuse of the process for the Crown to apply for a voluntary bill of indictment when that procedure is authorised by the 1998 Act. However, the defence are correct to say that the application will only succeed if the Crown can show that the circumstances are exceptional. In this case, the Crown has not suggested that Judge Khokhar applied the wrong test, ignored relevant legislation or authority, reached a decision which was irrational or otherwise erred in law. The Crown has not suggested any other reason why the case is exceptional.
26. Count 2 of the draft indictment would charge Arfan with violent disorder. The Crown has provided no explanation as to why this was not included in the original indictment or why, exceptionally, he should now be prosecuted on that charge by the voluntary bill of indictment procedure.
27. In these circumstances, I do not consider that it would be proper for me to grant leave to prefer a voluntary bill of indictment.

28. Accordingly, I refuse the Crown's application.