IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100208/B5 & 202100210/B5

NCN; [2022] EWCA Crim 166

Royal Courts of Justice
Strand
London
WC2A 2LL
Friday 4 February 2022

LADY JUSTICE ANDREWS DBE
MRS JUSTICE CUTTS DBE
THE RECORDER OF SWANSEA
HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the CACD)

REGINA
V
GARRY COOPER

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MISS S BENNETT-JENKINS QC appeared on behalf of the Applicant

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J U D G M E N T

LADY JUSTICE ANDREWS:

1. On 26 June 2020 in the Crown Court at Nottingham, the applicant Garry Cooper pleaded guilty to conspiracy to supply class A drugs. On 14 September 2020 in the same court he pleaded guilty to counts of affray and possession of a firearm with intent to cause fear.

2. On 22 December 2020, following a trial before Goose J and a jury in the Crown Court at Nottingham, the applicant was convicted of murder. He was sentenced to life imprisonment with a minimum term of 29 years, less time spent on remand. Goose J sentenced him on the same occasion to concurrent determinate sentences of 13 years for the drugs conspiracy, 5 years for the firearms offence, 2 years for the affray and 8 months for breach of a suspended sentence order imposed on 30 August 2016 at Derby Crown Court for an offence of conspiracy to commit actual bodily harm. That suspended sentence was activated in full.

3. The firearms offence was committed by Cooper after he had been released under investigation for the murder of which he was subsequently convicted. On that occasion, the applicant was the front seat passenger in a car which was stopped by the police after a short chase, following reports that the three occupants had been seen earlier attacking another car with a sledgehammer and a baseball bat when both vehicles were waiting at traffic lights (the subject of the count of affray). A number of weapons were recovered, including a fully functional and loaded revolver which had been thrown from the car window and which had Cooper's DNA on it. This incident would ordinarily have attracted a consecutive sentence with a minimum term of five years.
4. Five of the co-accused on the murder count were convicted of murder and sentenced to life imprisonment, each with a minimum term of 25 years less time spent on remand. Four of them had pleaded guilty to the conspiracy to supply class A drugs. A sixth co-accused, Connor Sharman, who also pleaded guilty to the drugs conspiracy, was convicted of manslaughter and sentenced to 13 years' imprisonment.

5. The applicant renews his application for leave to appeal against conviction and sentence following refusal by the single judge.

6. The applicant, who accepted he was known as "Boss Man" was involved with five of his co-defendants in a class A drug supply operation running two drug lines in Nottinghamshire, primarily servicing the areas of Sutton-in-Ashfield and Mansfield. They adopted a practice common to County Lines drugs operations of this kind known as "cuckooing", namely persuading a vulnerable individual to allow them to use his home as an address for customers to come to and buy the drugs. In this case, a 42-year-old vulnerable drug addict named Ross Ball agreed to the use of his flat at 14 Langton Court in return for drugs, food and other gifts. During the period of the conspiracy it was estimated that approximately 4.5 kilos of class A drugs had been supplied on the streets through the drug lines, quite apart from the drugs sold from the flat.

7. On 13 October 2019 a rival drugs group took over Mr Ball's flat and threatened those working for the applicant with violence. Two days later, on 1 November 2019, one of

Cooper's associates and co-accused, Jake Honer (who was in a flat upstairs from 14 Langton Court) was assaulted, tortured and humiliated by members of that rival group who took away his mobile phone. Later that day, at around 21.17, CCTV footage captured the arrival in Langton Court of two cars, a Fiesta and an Audi, which were stolen vehicles with false number plates regularly used for the purposes of the drugs conspiracy. They waited outside for around an hour. At around 22.30 a number of men, including Honer, got out of the vehicles armed with at least three machetes, a sword and baseball bats, and went to the rear door of the flats, which someone had unlocked by pre-arrangement to give them access. Loud banging was heard by neighbours as they attempted to kick in the door to flat 14.

8. The occupants of the flat at that time were Mr Ball and two members of the rival drugs gang. All three escaped initially through the windows of the flat. The other two men ran away, leaving Mr Ball to face the attackers alone in the road outside. Shortly afterwards, Mr Ball was seen covered in blood, dragging himself along the road. He made a 999 call and paramedics arrived. Meanwhile his attackers drove off in the two vehicles. Mr Ball was still conscious and told the paramedics that he had been stabbed, but he did not know by whom. He lost a great deal of blood and went into cardiac arrest. Despite all efforts to save him, he died within the hour.

9. A post-mortem examination revealed that the deceased had suffered a number of injuries, including four deep wounds to the back of his head, his left and right flank, and his right foot, and other superficial wounds. An expert pathologist gave evidence at trial that the death was caused by the loss of blood through the injury to his foot, although it may have been contributed to by a mixture of drugs in his body or a heart abnormality from which he suffered.

10. The prosecution case was that this was a revenge attack on the orders of Cooper who had sent his trusted right-hand men, his co-accused Matthew Jones and Shaun Buckley, along with others to travel to Langton Court armed with the bladed weapons and baseball bats and send out a message to the rival drugs gang. All six co-accused admitted travelling to the scene. It was admitted that Jones had travelled to the scene in the Audi with Honer and Connor Sharman (who was the driver), that Buckley had travelled in the Fiesta with two other co-accused, McDonald and Daw, and that some weapons were present. McDonald claimed that he was only there to protect Daw. Buckley admitted having a machete and knowing that others had weapons but claimed that he intended only to intimidate or frighten the occupants of the flat for the purposes of recovering money or drugs. Jones claimed that he knew of no plan for violence or a robbery and thought that Honer was collecting his belongings. Honer accepted that in a prepared statement he had given a false alibi to the police but he still denied taking part in any violence. Neither Jones nor Buckley accepted that the applicant knew of anything that had gone on. The applicant did not give evidence, having previously exercised his right to silence in police interview.

11. In the case of Cooper, the prosecution relied on circumstantial evidence, including evidence of his leading role in the drugs operation, together with his co-accused, and

mobile phone evidence. That evidence demonstrated that the applicant had phone contact with both Jones and Buckley, who then contacted the other accused, during the period after the take-over of the flat by the rival gang and after the attack upon Honer. There was a similar pattern of telephone contact very shortly before and immediately after the attack on Mr Ball. The applicant spoke to Jones immediately prior to the attack. At 22.34 on the evening of the murder (just after the 999 call) there were two attempts by Jones and Buckley to contact the applicant by text and phone call. At 22.48 the applicant made a call to Buckley which lasted just over five minutes. At 22.59 Buckley sent a text to his girlfriend which read:

> "On way back, babe. Won't be long. Ain't got cash on me. Went half out of hand. Boss man gonna pay us 5,000."

There had also been phone contact between the applicant and Honer, but there was no phone contact between the applicant and McDonald, a matter on which the defence relied as an indication that Cooper had not sent all the men to the address.

12. The prosecution also relied on evidence of what happened after the attack. The Audi with Jones, Buckley, Honer and Sharman in it drove to meet up with the applicant in Mansfield. CCTV evidence showed that between 12.19 and 12.28 am the applicant and his partner, Miss Clay, appeared to be in conversation with Honer, Jones and Buckley. They then travelled back in a taxi to Sutton and to the scene of the murder, ostensibly en route to a public house. The applicant subsequently arranged and paid for Honer, Jones and Buckley to return to Birmingham in a taxi. Efforts were made to dispose of or to destroy evidence.

Application for leave to appeal against conviction

13. Trial counsel settled a sole ground on which the application for leave to appeal against conviction was made, although Miss Bennett-Jenkins QC, who appears on this renewed application and who did not appear at the trial below, has suggested that it has two elements. It is contended that in response to a jury question, the judge gave the jury only a partial reminder of the agreed written direction on circumstantial evidence and then added comments which were overtly favourable to the prosecution. In the written grounds it was said that this was despite a submission by Cooper's counsel that the jury should be told that, "It was for the prosecution to disprove other alternative explanations and to apply the burden of proof rigorously to that approach".

14. There was no requirement on the judge to give the jury any such direction. Moreover, as the transcript clearly demonstrates, in fact he was not asked to. The written grounds of appeal must therefore have been settled on the basis of a mistaken recollection by trial counsel.

15. As this court made clear in R v Kelly [2015] EWCA Crim 817 at paragraph 39, the risk of injustice that a circumstantial evidence direction is designed to confront is (1) that speculation might become a substitute for the drawing of a sure inference of guilt and (2) that the jury will neglect to take account of evidence that, if accepted, tends to diminish or even exclude the inference of guilt. However, as the court said in that case, there is no requirement to give the jury a special direction as to the burden and standard of proof or to use any particular form of words. In this case, we are satisfied that the directions given to

the jury by the judge were more than adequate to protect against those risks.

16. The agreed direction given to the jury on circumstantial evidence during the judge's summing-up was discussed with counsel in the normal way before the directions were provided to the jury both in writing and orally. That direction followed the guidance in the Crown Court Compendium. It occupied five paragraphs in Part 2 of the judge's written directions and, as, the single judge observed, it was impeccable. Paragraph 1 was purely introductory. The jury were told in paragraph 2 that:

> "The evidence against Cooper is not from direct evidence, in the form of witnesses seeing him direct the attack, but is entirely based on what is sometimes referred to as circumstantial evidence: that is pieces of evidence relating to different circumstances, none of which on their own directly proves his guilt but which, say the prosecution, when taken together leaves no doubt that Cooper is guilty." (Emphasis as in the original).

17. After then fairly identifying the evidence in question and summarising the competing contentions of the prosecution and defence relating to it in paragraphs 3 and 4 respectively, the direction concluded in paragraph 5:

> "It is for you to decide what conclusions you can fairly and reasonably draw from any pieces of evidence that you do accept, taking these pieces of evidence together."

It continues:

> "You must not however engage in guess-work or speculation about matters which have not been proved by any evidence. Finally, you must weigh up all the evidence and decide whether the prosecution have made you sure that Cooper is guilty."

No issue has been taken or could be taken with the essential content of that direction, taken as a whole.

18. When summing-up the defence case in respect of the applicant, the judge reminded the jury of the written direction that he had given as to the meaning of circumstantial evidence and of defence counsel's argument that the circumstantial evidence was not sufficient to make them sure of his guilt. (This is found in the transcript on 15 December 2020 at page 40B to G.)

19. The transcript of the hearing on 22 December 2020, when the jury note was discussed with trial counsel, indicates the following. The question which the jury asked was: "Can you give us any more direction on circumstantial evidence?" The judge said to counsel that he was not minded to say any more than simply remind the jury of the written directions he had given them and maybe to add that: "evidence in a criminal trial can be direct evidence or circumstantial evidence. It's all evidence that you must consider following the written direction I've given you, paragraphs 1 to 5."

20. The applicant’s trial counsel said that he had no observations about that, but for the judge to

remind the jury that it was for the prosecution to establish the case upon that evidence. However, just as the judge started to observe that he thought that that was clear from the written directions, the applicant's counsel cut across him and said: "I think you said that -- in your main direction." It would appear from the transcript that counsel did not have a copy of that direction before him at the time when he said that, but the judge gave him the opportunity to obtain one. The judge then said again that he proposed to refer the jury to paragraphs 1 to 5, and suggested that he might re-read them paragraph 2. The applicant's counsel, who by then had managed to obtain a copy of the written direction, specifically said that he "would agree with that" [course].

21. Despite that exchange, Miss Bennett-Jenkins has contended before us that the judge should have taken matters into his own hands and that he should have decided that the jury needed more help. They would not have asked the question, she submitted, if they had already been able to follow the directions that they were given. She suggested that the judge should have referred to the exact language of the suggested direction in the Crown Court Compendium which uses the phrase: "all other possibilities consistent with innocence can be excluded". As we have already said, it is clear from the case of Kelly that no particular form of language needs to be used, provided that the overall direction is fair and balanced.

22. Miss Bennett-Jenkins also contended that in reminding the jury of paragraph 2 and in particular the closing part of it which refers to the prosecution saying that the evidence when taken together leaves no doubt that Cooper is guilty, the reference to the prosecution case was not counter-balanced by a fair reminder of what the defence had to say. But of course the jury were being taken back to paragraphs 1 to 5 in their entirety. The defence case in relation to the circumstantial evidence was set out in summary in paragraph 3, and so they were being invited specifically to turn their mind to what the defence had to say about that, as well as to what the prosecution had to say.

23. In the light of the transcript, there is in our judgment no basis for making any complaint about what the judge did, which was exactly what he had indicated he would do, and to which Cooper's counsel at the time had rightly raised no objection. It is simply not right to characterise what the judge did as giving the jury only a partial reminder of the agreed written direction, and it is equally wrong to characterise what he did as giving them no assistance. They were plainly assisted by his direction and the reminder to go back to what he had said, because they returned verdicts not long after he had given them the assistance that they asked for.

24. The judge said that the direction was set out in paragraphs 1 to 5 of his written directions and he was not going to add to it. He was entitled to do that. He invited the jury to consider those five paragraphs. He said: "They're meant to give direction as to how you approach the evidence." He then specifically re-read them paragraph 2 which contained the essential definition of circumstantial evidence and addressed the two mischiefs referred to in Kelly. That was not an error, nor was it unfair or favourable to the prosecution, and defence counsel had agreed to that course. All that the judge added, as he had foreshadowed in his discussions with counsel, was that in a criminal trial evidence can be direct or circumstantial. He said:

"It's all evidence and it's evidence that you must consider and follow the written direction that I have given to you. I can't, I'm afraid, go further than that."

25. No complaint can be made about those remarks, which certainly did not favour the prosecution. There is always a danger when a jury note is sent in in a case of this kind of further directions confusing a jury or even contradicting what was said at an earlier stage. We are sure that if defence counsel had thought that it was appropriate at the time to ask the judge to give a further direction, he would have asked for further time in which to formulate the words and the judge would have given him that time, but it was not done and one can understand why.

26. In the light of this, there is no merit whatsoever in the submission in paragraph 14 of the original advice on appeal that the judge's response to the jury's question "must have had an undue and potentially unfair influence on them". The jury were properly directed. The evidence against the applicant may well have been circumstantial but it was more than adequate to support a conviction. As the single judge said, this ground is unarguable and the conviction is safe. This renewed application is refused.

Application for leave to appeal against sentence

27. The judge sentenced Cooper and the other defendants who were convicted of murder on the basis that they did not intend to kill but to cause really serious harm, but that each of them knew that weapons, in particular bladed ones, were being taken to the scene for the purpose of causing such harm. He was satisfied that the applicant directed the attack with the intention of sending out a clear message to the rival drugs operation.

28. The applicant was, at 34 years old, the oldest and had already amassed 20 convictions for 43 offences, including the offences of affray and possession of the firearm with intent to cause fear for which he also fell to be sentenced on that occasion.

29. The judge took a starting point of 25 years for the minimum term of the life sentence because of the taking of weapons to the scene. He correctly identified the aggravating factors as significant planning, the fact that there were six attackers acting together, the disposal or attempted disposal of evidence, and the background of drug dealing. He sentenced the applicant as the ringleader and explained that he had increased the minimum term in his case from 27 years to 29 years to reflect the firearms offence, committed separately, for which he also had to sentence him. When sentencing for the firearms offence, he explained that although normally that sentence would be required to be served consecutively, given the life sentence that he had imposed for the murder, he had taken this offence into account in fixing Cooper's minimum term of 29 years, and that the five-year minimum sentence imposed for the firearms offence would be served concurrently.

30. In the initial grounds of appeal it was contended that the judge had imposed too high a sentence in respect of the conspiracy to supply class A drugs, although that was a concurrent sentence. Very sensibly, on instructions, Miss Bennett-Jenkins does not pursue that ground before us on this renewed application.

31. As for the firearms offence, the submission is essentially one based on totality. Although Miss Bennett-Jenkins rightly accepted that it was open to the judge to have passed a consecutive sentence for the firearms offence which would have carried with it a minimum term of five years, she submitted that the overall criminality of his offending was adequately reflected in the uplift from 25 to 27 years and that the 29-year period that was imposed in relation to the firearms offence was excessive. That is a slightly different way of putting the ground of appeal from the way in which it was put in the written grounds, which complained of an element of double-counting.

32. In our judgment, however it is put, there is nothing in this ground either. The firearms offence was a serious offence which was committed after the murder and in the company of two men other than the co-accused in the murder and drugs conspiracy counts. The firearm was loaded with two live bulleted cartridges and the applicant's DNA was found on the grip and the muzzle. Had the judge been sentencing for any other offence than murder he would have been likely to pass a consecutive sentence, but after considering totality and proportionality he decided to reflect this additional and unrelated serious criminality by taking the course that he did. There was nothing arguably wrong with that approach, and it certainly did not involve any element of double-counting.

33. The judge reflected the overall criminality of Cooper's conduct by making an uplift of two years to the minimum term, which is less than half a five-year determinate sentence. It might be possible to infer from the mathematics that he had it in mind to give some credit for the guilty plea to the firearms offence. In any event, in adding the extra two years on he certainly did not double-count, and he did not go beyond that which was appropriate, having in mind the overall principle of totality. Therefore, this renewed application for leave to appeal against sentence is also refused.

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