IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/03890/B5
NCN [2022] EWCA Crim 1810

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 1st November 2022

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE JAY

MRS JUSTICE COCKERILL DBE

R E X

- v -

NICO MIFSUD

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Mr L Macdonald appeared on behalf of the Appellant

Mr B Shaw appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 1st November 2022

LORD JUSTICE HOLROYDE:

1. The appellant, Nico Mifsud, appeals with the leave of the single judge against his conviction of wounding with intent, contrary to section 18 of the Offences against the Person Act 1861. He submits that the trial judge erred in failing to allow a submission of no case to answer and that the conviction is inconsistent with his acquittal on another count.

2. The appellant stood trial jointly with Rees Mucklin and Reuben Eyles. All three were said to have been involved in two incidents which occurred in Peterborough on the evening of 19th July 2020. For convenience only, and meaning no disrespect, we shall for the most part refer to persons by their surnames alone.

3. The first incident occurred outside a restaurant and was captured on CCTV. The three defendants arrived in a white Volkswagen Polo. The appellant went into the restaurant, came back out, and re-entered together with Mucklin. They then came out of the restaurant, followed by a group of unknown males. It was the prosecution case that Eyles attacked this group with a Samurai sword. He passed the sword to Mucklin, who similarly brandished it towards the group. The appellant, who had covered his face with a balaclava, stepped close to his companions and was alleged to have participated in a joint affray by supporting and encouraging them. He was also alleged to have had his hands inside the waistband of his trousers, as if he was carrying something concealed there. All three defendants left the scene in the Volkswagen Polo.

4. The second incident occurred a few minutes later and a short distance away. As before, Mucklin was driving the Volkswagen Polo. The appellant was in the front passenger seat, and Eyles was in the rear seat. Two pedestrians, Edmar Neves and Paolo Djaite, were

crossing the road ahead of the car. They had spent the afternoon at a barbecue and had both been drinking. Neves said that he had had about five beers; Djaite said that he had had about 15. The car came close to Neves, who made a critical remark towards the driver and then continued on his way. The car stopped and there ensued a brief, very violent incident which took both Neves and Djaite by surprise. It was in part captured by CCTV, but the camera showed only the offside of the car and did not capture anyone on the nearside.

5. Mucklin and Eyles could be seen to emerge from the front and rear offside doors of the car respectively, and to re-enter the car by the same doors less that a minute later. The appellant could not be seen at all on the footage. Eyles could not be seen to be carrying anything as he left the car. He initially went to the nearside rear of the car and then very quickly came back into view, swinging a Samurai sword at Djaite.

6. Neves gave evidence that he was attacked by a white man with no facial hair, who first hit him with a "baseball stick" and then produced a knife from his trousers and tried to stab him. He initially said that his assailant came from the nearside of the car, but later said that he had been attacked from behind and did not see from where the man had come. He did, however, consistently say that his attacker got back into the nearside of the car. He recalled seeing a man with light brown skin and a beard. It was common ground that the appellant was the only defendant who fitted that description. Neves initially said that that man was in the driver's seat, with someone else in the front passenger seat. However, in cross-examination he accepted that the bearded man may have been in the front passenger seat, and he agreed that that man did not attack him.

7. Neves sustained a six centimetre laceration to the right side of his face and a fracture of his cheekbone. Expert evidence was adduced to the effect that the injury was likely to have been caused by a heavy, bladed weapon, such as a sword, and was unlikely to have been

caused by a kitchen knife.

8. Djaite, who also sustained a head wound, gave evidence that he was attacked by a man who came from the rear seat of the car. He said that everything happened very quickly and he did not remember an attack on Neves. He recalled seeing a man with a beard and said that as far as he was aware, that man did not get out of the car.

9. The three defendants left the scene in the car. There was undisputed evidence before the jury that they briefly returned to the scene of the first incident, apparently in search of something. Thereafter, they left the car, which was found by police officers not far from the scene of the second incident.

10. The defendants were arrested a short time later. A Samurai sword was found in the rear of the car with blood on its blade. Analysis revealed a DNA profile which matched Djaite.

11. The appellant was wearing a black jacket and had a pair of surgical gloves. Analysis of bloodstaining on one of the gloves and on the left pocket, sleeve and cuff of the jacket revealed a DNA profile which matched Neves.

12. The defendants stood trial in the Crown Court at Cambridge before His Honour Judge Cooper and a jury on an indictment containing eight counts. In relation to the first incident all three were charged with a joint offence of affray (count 1), and Eyles and Mucklin were each charged with having a bladed article, namely a sword, in a public place (counts 2 and 3).

13. In relation to the second incident all three were jointly charged with the wounding with intent of Neves (count 4); Eyles and Mucklin were jointly charged with the wounding with intent of Djaite (count 5); Eyles was charged with having a bladed article, namely a sword, in

a public place (count 6); and he and Mucklin were jointly charged with a similar offence (count 8). The appellant was charged with having an offensive weapon, namely a knife, in a public place (count 7).

14. At the conclusion of the prosecution case Mr Macdonald, then as now appearing for the appellant, submitted that there was no case to answer on any of the counts against him. The submission was opposed by Mr Shaw, then as now appearing for the prosecution. The judge held that there was a case to answer on all counts, on the basis that the appellant "got out of the car to participate in a joint attack to wound Neves and also that he possessed an offensive weapon (a knife)".

15. In relation to count 4, the judge said that it was open to the jury to accept Neves' evidence that he was threatened with a knife and to be sure, having regard to the very short period of time in which the incident occurred, that the appellant was the only one of the three defendants who could have done that. The judge concluded that it was for the jury to assess Neves' evidence in the context of the CCTV footage and that it was properly open to them to find that all three defendants actively participated in the attack on Neves. The judge added that the prosecution had, for the first time, put forward an alternative basis for conviction, namely that the jury could find that it was the appellant who wounded Neves with the sword. The judge regarded that theory as inconsistent with the evidence and said:

> "It seems to me that such a theory could not be a sound basis for a finding of any case for [the appellant] to answer and I make clear that I would have refused to find a case to answer if the case was put on this basis alone".

16. In subsequent oral submissions, the judge said that whilst it remained an outside possibility that the appellant wounded Neves with the sword, that seemed to him to be "a

considerable stretch". He accepted, however, that it was open to the prosecution to make that submission to the jury.

17. Mr Macdonald sought clarification. The judge said that the basis on which he was leaving the case to the jury was that:

> "There is evidence of an assault by Mr Eyles using the sword, supported by another person who is with him for longer, and he gets him to back off under threat of a knife."

The judge again accepted, however, that it was open to the prosecution to make such observations and comments as they saw fit.

18. The trial accordingly proceeded. None of the defendants gave evidence.

19. The judge gave some of his directions of law to the jury in advance of the closing speeches of counsel. He then gave further directions when summing up. He provided the jury with more than one iteration of a document entitled "Judge's Notes". A rubric to that document read:

> "These notes are not a transcript of the summing up. They provide only a summary of certain legal points covered by the judge, and are provided to assist the jury in recalling the directions while deliberating."

The judge's oral directions were in large part similar to, but not in all respects entirely the same as, the instructions given in the document.

20. The directions of law included one in conventional terms as to the need for separate

consideration of the defendants and the charges. He directed the jury more than once that a defendant could be guilty of a crime either on the basis that he did the relevant acts with the necessary intent, or on the basis of a joint enterprise. As to joint enterprise, the judge gave a general direction that

> "So long as the person intends that the crime should be committed and then causes, assists or encourages someone else to commit it, even to a limited extent, then both of them, or indeed all of them, are guilty of the crime."

Specifically in relation to the appellant's alleged role in the second incident, the judge made clear that the prosecution case involved Neves being wrong about some aspects of what happened. He summarised the prosecution's submissions that the appellant did get out of the car and demonstrated support for the attack on Neves by threatening him to back off – a conclusion which the prosecution argued was "supported to some extent" by the finding of Neves' blood on the appellant's clothing. He gave a clear direction against speculation, and reminded the jury of Mr Macdonald's submissions as to the lack of any sound evidential basis for the case against the appellant. In relation to the appellant, the judge concluded:

> "You would need to be sure that he intended that one or more of the pedestrians would be attacked with a sword to cause serious injuries, and also that he took an active part in helping to achieve that."

21. In relation to count 7, the judge directed the jury that if they concluded that the appellant played a part in the assault on Neves by getting out of the car and threatening him with a knife, that would also amount to the offence of possession of an offensive weapon.

22. The jury returned a not guilty verdict on count 7. They convicted all the defendants on all other counts.

23. Mr Macdonald argues two grounds of appeal against the appellant's conviction on count 4: first, that the judge was wrong to reject the submission of no case to answer; and secondly, that the jury's verdict against the appellant on count 4 was inconsistent with their verdict on count 7, having regard to what is said to be the sole and narrow basis on which the judge left count 4 to them.

24. No challenge is made to the conviction on count 1.

25. In relation to the first ground of appeal, Mr Macdonald accepts that it was for the jury to evaluate Neves' evidence. He also accepts that Neves was plainly wrong about some important matters. In particular, it is common ground that Neves was wounded with the Samurai sword, not struck with a "baseball stick". But, Mr Macdonald submits, the jury could not simply pick and choose which part of Neves' account to accept, without having an evidential basis for doing so. The reasoning advanced by the prosecution, and accepted by the judge for the purposes of the submission of no case to answer, was that the jury could properly find that there was insufficient time for Eyles to have threatened Neves with a knife before he came back into view on the CCTV, and that therefore it must have been the appellant who did so. Mr Macdonald argues, however, that that line of reasoning involved the jury accepting Neves' evidence of being threatened with a knife, even though there was no other evidence of a knife being produced; but at the same time rejecting Neves' evidence that his attacker was a clean-shaven white man who came from the rear seat of the car, and that the appellant was not involved. He submits that there was no evidential basis on which the jury could properly adopt that approach. He further submits that there was no evidence on which the jury could find that the appellant did anything to assist or encourage Eyles before Eyles wounded Neves.

26. For the respondent, Mr Shaw submits that the jury were entitled to accept Neves' evidence that his attacker got back into the car on the near side, and could accordingly find that the appellant must have got out of the car. From that starting point he submits it was then open to the jury to find that the appellant was himself the man who wounded Neves with the sword; or, alternatively, that the appellant was acting in joint enterprise with his co-accused, either on the basis that he produced a knife after Eyles had inflicted the wound, or on the basis that he encouraged and assisted the assault by Eyles, whether or not he had a knife. Mr Shaw submits that the fact that the judge had not accepted one of those scenarios when considering the submission of no case to answer was not a bar to the jury's accepting it.

27. In relation to the second ground of appeal, Mr Macdonald submits that the only route to a guilty verdict which the judge left open to them involved the jury being sure that the appellant threatened Neves with a knife. By their verdict on count 7, they were clearly not sure of that fact. The verdict on count 4 was therefore inconsistent with that on count 7.

28. Mr Shaw replies that the judge had not excluded the possibility of a conviction on a basis which did not include threatening with a knife, and that it was logically open to the jury to be sure that the appellant had actively encouraged or assisted the wounding of Neves, even though they could not be sure that he was in possession of a knife.

29. We are grateful to both counsel for their written and oral submissions, which we have found very helpful. As often happens in a case involving sudden and unexpected violence against men who have been drinking, the victims of the violence were unable to give a detailed and consistent account of precisely who did what, and some of Neves' evidence was, on any view, mistaken. However, it was not suggested that either Neves or Djaite deliberately gave false evidence, and the jury were able to assess the accuracy and reliability of their testimony about the second incident in the context of the other evidence. That

evidence included the following important features. First, there was no doubt that Neves was wounded with a Samurai sword wielded by one of the defendants, and the jury were plainly entitled to find that any defendant who either inflicted that wound, or deliberately encouraged or assisted in its infliction, must have intended to cause grievous bodily harm.

30. Secondly, the defendants had all been involved in a joint offence of affray minutes earlier, in which a sword had been brandished, had travelled together from the scene of that incident to the scene of the second incident, left together in the car, and returned to the scene of the first incident. There was no suggestion that any of the three had done anything to distance himself from the activities of the others.

31. Thirdly, it was clear from the CCTV footage that Eyles got out of the rear seat from behind the driver and via the rear offside door, Mucklin got out of the driver's seat, and they returned to the same seats. If, therefore, the jury accepted Neves' evidence that his attacker returned to the nearside of the car, they could be sure that the appellant had not remained in the car and was involved in the wounding of Neves.

32. Fourthly, the blood found on the appellant's jacket and glove, though not by itself determinative of involvement in the wounding of Neves, was certainly consistent with such involvement.

33. In those circumstances, the judge was, in our view, correct to reject the appellant's submission of no case to answer. The jury could properly find that Neves, though clearly wrong about some matters, was nevertheless accurate and reliable about other matters. We cannot accept Mr Macdonald's submission that the jury could only convict by picking and choosing parts of Neves' testimony without any evidential basis for doing so. They were entitled to accept Neves' repeated statements that his attacker re-entered the car on the

nearside, and the inference that he must have been referring to the appellant was strengthened by the finding of blood on the left side of the appellant's jacket and by the movements of the other two defendants, as shown on the CCTV footage. The jury could therefore be sure that Neves was mistaken when he said that the man with the beard may have remained in the car. Once sure that the appellant had got out of the car, the jury could properly find that he had participated in a joint attack, either directly or by assisting, encouraging and lending his support to the other defendants.

34. In addition to that evidence, the jury, when later considering their verdicts, were also able to find some support for the prosecution case in the appellant's failure to give evidence. No criticism is made of the judge's direction as to the inference the jury might draw from that failure.

35. The second ground of appeal is based on the premise that there was only one basis on which the jury could convict the appellant on count 4. In our view, that premise is mistaken. True it is that the judge had rejected the submission of no case to answer on one particular basis, and had indicated that he would not have found a case to answer solely on the basis that it was the appellant who inflicted the wound to Neves with the sword. The judge did not, however, direct the jury that they could only convict on one factual basis. In the circumstances which we have summarised, it would have been wrong for him to do so. He correctly directed the jury that they could find a defendant guilty either on the basis that he personally did the acts which constituted the offence, or on the basis that with the necessary intent he deliberately encouraged or assisted his co-accused to do those acts. Although the judge saw little merit in the suggestion that the appellant had initially had the sword at the nearside of the car and had used it to wound Neves before passing it to Eyles, the judge could not and did not direct the jury that they could not properly make such a finding; and the speed of events shown by the CCTV footage could be said to be consistent with that suggested

sequence.

36. It was also open to the jury to convict the appellant as a secondary participant in the wounding, and they were entitled to do so whether or not they were sure that the appellant had been armed with a knife. The judge did not direct the jury that they could only convict the appellant of count 4 if they convicted him of count 7. On the contrary, he correctly directed them to consider the counts separately.

37. Given that no one but Neves made any reference to a knife, and given that Neves' head wound was caused by a different bladed instrument, namely the sword, the jury may well have felt less than sure that the appellant had a knife. But it did not follow that they could not be sure that he gave his support and encouragement to the others and added weight of numbers in a joint attack upon Neves.

38. Mr Macdonald realistically accepted in his written submissions that his grounds of appeal were not significantly affected by the judge's general approach to directing the jury or by the precise status of the "Judge's Notes" provided to the jury. We, therefore, think it unnecessary to say more in that regard.

39. For the reasons we have given, we accordingly reject both of the grounds of appeal which have been advanced. Grateful though we are to Mr Macdonald for his forceful submissions on behalf of the appellant, it follows that this appeal fails and must be dismissed.

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

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