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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BRIAN SHIVERS

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (giving the judgment of the court)

[1] The appellant appeals his conviction by Hart J on two counts of murder, six counts of attempted murder and one of possession of two firearms and ammunition with intent to endanger life arising out of the attack by two gunmen on several soldiers who emerged from the gates of Masserene camp on the night of 7 March 2009. He was sentenced to life imprisonment with a minimum tariff of 25 years on the murders and life imprisonment with a minimum term of 10 years on the other counts. Mr O'Connor QC and Mr Bentley appeared on behalf of the appellant and Mr Mooney QC and Ms Kitson on behalf of the prosecution. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The background to these offences was an attack by two gunmen armed with Romanian AK47 assault rifles on several soldiers who had emerged from the gates of Masserene Camp on the night of 7 March 2009 to collect pizzas they had ordered. The gunmen were determined to kill as many people as possible, not only the soldiers who were dressed in uniform, but the civilian drivers who were in the process of making the deliveries and a civilian security guard. It is not alleged by the prosecution that the appellant was one of the gunmen and there was no evidence that he was in the car used by them from which they carried out the attack. The attack was claimed by the Real IRA.

[3] Later that night police located the vehicle used by the gunmen a short number of miles away on Ranaghan Road, a minor country road. An attempt had been made to set the vehicle on fire using petrol. Two used matchsticks were found on the driver's side of the rear passenger seat. The learned trial judge found that these were used to ignite the fire before being thrown on the rear seat. A third matchstick was recovered from the surface of the country road as well as a mobile phone from the front of the vehicle. These items were subject to DNA analysis as a result of which the judge found that the appellant's DNA was on the two matchsticks which were used to ignite the fire. He also concluded that it was possible that the appellant's DNA was on the matchstick found on the road and on the mobile phone. He rejected an account by the appellant seeking to establish an innocent explanation for the presence of his DNA on these items as an invention. He also found that the appellant had lied about his whereabouts and actions before he returned home on the night of the attack. In all the circumstances he concluded that he was satisfied beyond reasonable doubt that the appellant set fire to the Cavalier.

[4] The learned trial judge set out his approach to the legal principles involved in determining the guilt or otherwise of the appellant as a secondary party at paragraph 25 of his judgment. He relied upon R v Bryce [2004] 2 Cr App R 35 at paragraph 71. In the circumstances of this case as they applied to the appellant he concluded that the prosecution had to establish beyond reasonable doubt: –

(i) That the appellant did something to assist the gunmen to carry out the attack by being present when the attack car was abandoned and attempting to destroy it;

(ii) That the appellant deliberately did this, realising that it was capable of assisting the attackers either before or after the attack.

(iii) That when the appellant did this he contemplated that the attackers were determined to kill soldiers at Masserene Barracks.

(iv) That when the appellant did this he intended to assist the attackers to carry out their plan to attack soldiers at Masserene Barracks and escape afterwards.

At paragraph 96 of his judgment the learned trial judge stated that it was not disputed that if it was the appellant who set fire to the vehicle he would be guilty of the offences charged as a secondary party by the application of these principles.

The issues in the appeal

[5] There were essentially three points made on behalf of the appellant in relation to the convictions. The first was that the learned trial judge was wrong to suggest that if it was the appellant who set fire to the vehicle that there was no dispute about

the fact that he would be guilty of the offences as a secondary party. The second submission was that in order to be guilty of the offences as a secondary party it was not sufficient to prove that the appellant had provided assistance after the attack. It was necessary to further establish that he had agreed to provide that assistance before the attack and in contemplation of the type of offence which was in fact carried out. Thirdly it was submitted that the learned trial judge convicted the appellant as a secondary party when the prosecution had presented the case as one of joint enterprise. It was submitted that the learned trial judge had not accepted the prosecution's joint enterprise case.

The dispute over the basis of the case against the appellant

[6] At an early stage of the trial on 7 November 2011 there was a discussion between counsel and the judge as to the basis of the case against the appellant and his co-accused. Mr O'Connor set out the basis upon which he understood the prosecution were proceeding.

> "My Lord in relation to Mr Shivers may I just explain our understanding and of course I'd be corrected if I'm wrong. I don't think it has ever been suggested against Mr Shivers that he was one of the gunmen. It seems to us tolerably clear and paying credit to my learned friend's opening that his allegation is by reason of the DNA connections with the matches and the mobile phone that he was intimately associated with the attempt to dispose of the car shortly after the shooting and thus was either an accessory after the fact or by inference a party to the joint enterprise. That is our understanding and therefore we can't complain about that if that is accurate. That seems to us to be tolerably clear."

[7] It does not appear that there was ever any issue taken by the prosecution with this characterisation of the case against the appellant. The trial proceeded and defence counsel made his submissions on 21 December 2011. In those submissions he reviewed the factual matters concerning his client but there was no return to the legal basis upon which the appellant might be found guilty. However, the prosecution submissions on the previous day had continued to contend for the appellant's guilt as part of a joint enterprise.

[8] We accept, therefore, that the learned trial judge was not correct to state that it was not disputed that if it was the appellant who set fire to the vehicle at Ranaghan Road he would be guilty of the offences as a secondary party. That does not in our view affect the issue of the safety of the conviction. Whether or not any such concession had been made it was still for the learned trial judge to determine what

facts he found proved, what inferences he drew and what conclusions as to the guilt or otherwise of the appellant followed.

Joint enterprise

[9] The prosecution case against the appellant was circumstantial and relied upon seven strands.

(i) The DNA evidence on the two spent matches inside the car used in the attack and the DNA findings on the mobile phone found inside the car and on the spent match outside the car led to the inference that the appellant had set the vehicle alight in order to destroy it and any evidence that might incriminate the occupants who had carried out the attack.

(ii) The attackers left the scene of the attack at approximately 9:38 PM on 7 March 2009. Sometime between 9:50 PM and 10:10 PM a witness saw two sets of headlights on the Ranaghan Road. The vehicles were travelling in convoy from the junction and it was most unusual in this very rural area to see cars in convoy. The learned trial judge recognised that for the attackers to escape and the weapons to be removed there must have been a rendezvous with another vehicle and that the driver of that vehicle together with the two gunmen, the driver of the attack vehicle and the weapons must have left the scene together after attempting to destroy the attack vehicle. The prosecution contended that the proximity in time of the rendezvous to the attack meant that the appellant, who was one of the four at Ranaghan Road, must have been there as a result of a plan made prior to the attack.

(iii) The DNA evidence obtained from the mobile phone examined both the inside and outside of the phone. The DNA evidence from inside the phone produced a mixed DNA profile from at least three individuals. Seventeen DNA components matched the appellant and three other components were represented to some extent. The results were what the prosecution expert would have expected if the appellant had contributed DNA. Her opinion was that the DNA could have been deposited by direct contact and deposit by secondary transfer was less likely. The importance of this evidence was that it tended to suggest that the appellant contributed to setting up the phone in advance of the attack. The fragments of conversation recovered from it and the cell site signal showed that the phone was used almost immediately after the attack. The process of examination was subject to careful scrutiny and in particular the learned trial judge accepted that latex gloves were not changed when dealing with the eight sets of swabs taken from different parts of the phone. In those circumstances the learned trial

judge concluded that he could not exclude the risk of inadvertent transfer of minute amounts of DNA from one part of the phone to another. He proceeded, therefore, on the basis that the DNA recovered from the internal part of the phone may have originated from the outside of the phone. There was no finding as to the inference that could be drawn from this other than the statement at paragraph 95 that the evidence that the appellant's DNA could have come from this phone was a further indication of his involvement with the attack vehicle.

(iv) An expert on image analysis and enhancement viewed CCTV evidence of the appellant's Mercedes car in Magherafelt between 1:21 PM and 2:24 PM and again at 5:08 PM on 7 March 2009. The prosecution sought to establish that the vehicle used in the attack was three cars behind him in a queue of traffic shortly after 1:21 PM on the afternoon of the attack. The prosecution case was that the proximity of the appellant's car to the attack car hours before the shootings demonstrated that the appellant was involved in the preparation of the attack. The learned trial judge, however, felt unable to place any reliance on the evidence suggesting the possible presence of the attack car in Magherafelt on the day of the attack.

(v) In the course of his evidence the appellant volunteered that he attended four meetings of Eirigi out of curiosity. The prosecution suggested that the learned trial judge should take judicial notice that this was an organisation with dissident sympathies. The learned trial judge concluded that the only evidence about the aims and objectives of the organisation came from the appellant himself who suggested that it was an Irish republican organisation sympathetic to the establishment of a 32 county state. He considered this wholly insufficient to justify any conclusion about its aims and objectives that would make it likely that the appellant was involved in these events in any way.

(vi) The prosecution also relied upon the appellant's failure to use his mobile phone over a period of several hours on the evening of the attack. The learned trial judge accepted that it was strange that he and his girlfriend were not in contact during this period but she corroborated his evidence that he left the phone behind on a charger when he was out of the house. The learned trial judge did not regard the lack of use of the phone at the time as relevant to the charges.

(vii) The prosecution also relied upon the fact that the appellant had lied about his whereabouts on the night of the attack. The learned trial judge concluded that his account about the considerable period of time

spent going to his brother's house rather than returning to Magherafelt had all the hallmarks of having been created at a very late stage of the proceedings. He accepted that the appellant had lied about his whereabouts that night and concluded that no innocent explanation for those lies had been suggested nor could he readily conceive of one. He was satisfied that these lies could be relied upon by the prosecution as evidence supporting its case.

[10] The prosecution case was based upon the fact that this was a professionally executed, well planned terrorist operation. Information must have been gathered about the provision of pizzas to the front of the barracks. The movements of the delivery van must have been carefully monitored on the night of the attack. The attack vehicle had been purchased weeks before. The two mobile phones had been obtained but not activated until the day of the attack and the two assault rifles and 30 round magazines and ammunition obtained and made ready. The role of the appellant as the person who set fire to the attack vehicle required the availability of petrol and matches and his destruction of the vehicle was important in hindering detection. He provided the transport for the escape of the gunmen with the two AK 47s and the driver of the attack vehicle.

[11] Mr Mooney submitted that the facts proved and the background to the preparation of the attack made it inconceivable that the appellant was not fully aware of the nature of the operation. The escape of the attackers and the destruction of the attack vehicle depended upon a trusted person who could be relied upon to rendezvous with the attack car at the agreed location and time. That person would inevitably see the AK 47s and their magazines so it was important that the person was someone who was a trusted and willing participant in these murders. The court was entitled to draw adverse inferences from the failure of the appellant to deal with any of these matters in evidence.

[12] Despite the fact that this was how the case was presented the learned trial judge did not refer at any stage to the concept of joint enterprise in his judgment. The issue for the court was whether it should be inferred that there was a common enterprise to which the appellant agreed prior to the attack to carry out a shooting attack with intent to kill. The learned trial judge made no finding on this issue. We do not accept the appellant's submission that the learned trial judge rejected the joint enterprise case. He simply did not deal with it.

Liability as a secondary party

[13] The principal is the actual perpetrator of the crime, in this case the persons who fired the shots and possessed the weapons. The secondary parties are those who aided and abetted, counselled or procured the commission of the crime. The leading authority on the mental element necessary to establish liability as a secondary party for a crime committed by a terrorist group is DPP v Maxwell [1978]

1 WLR 1350. The appellant in that case was a member of an illegal organisation which had been responsible for sectarian murders and bombings. On 3 January 1976 he was told by a member of the organisation to guide a car at night to the public house in a remote country area. He knew that he was being sent on a terrorist attack but did not know what form it would take. He led the other car to the public house and when he arrived there an occupant in the other car threw a pipe bomb containing explosives into the hallway. The appellant was charged with doing an act with intent to cause an explosion by a bomb contrary to section 3 (a) of the Explosive Substances Act 1883.

[14] The House of Lords held that a person may properly be convicted of aiding and abetting the commission of a criminal offence without proof of prior knowledge of the actual crime intended if he contemplated the commission of one of a limited number of crimes by the principal and intentionally lent his assistance in the commission of such a crime. It was irrelevant that at the time of lending his assistance the accused did not know which of the crimes the principal intended to commit but the relevant crime must be within the contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque. On the facts of that case the appellant must have known that when he was ordered to act as a guide for the other car that he was taking part in a terrorist attack and although he may not have known the precise target or weapons to be used he must have contemplated, having regard to his knowledge of the organisation's methods, that the bombing of the public house was an obvious possibility among the offences likely to be committed and consequently must have contemplated the possibility that the men in the second car had explosives. He was, therefore, rightly convicted.

[15] The learned trial judge relied on R v Bryce [2004] EWCA Crim 1231. That was a case in which the appellant was charged with aiding and abetting X to commit murder. It was alleged that he transported X and the gun with which he shot the victim to a caravan near the victim’s home where X would have an opportunity to carry out the attack. X at the time of the journey harboured reservations about carrying out the killing and it was submitted that the appellant could not be guilty as a secondary party if the principal had not formed the necessary intent at the time. It was held that that it was not necessary for the prosecution to prove that the appellant's acts of assistance were performed at a time when X had formed the necessary intent for murder. All that was necessary in the secondary party was foresight of the real possibility that an offence would be committed by the person to whom the accessory's acts of assistance were directed.

[16] At paragraph 71 of Bryce the court set out what must be proved to establish the liability of a secondary party who assists another who commits the crime:

(a) an act done by D which in fact assisted the later commission of the offence,

(b) that D did the act deliberately realising that it was capable of assisting the offence,

(c) that D at the time of doing the act contemplated the commission of the offence by A, i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and,

(d) that D when doing the act intended to assist A in what he was doing.

[17] It is clear that the learned trial judge then adapted this template to arrive at the requirements we have set out at paragraph 4 above. We consider, however, that this led the judge into error. Both Bryce and Maxwell were cases where the assistance was lent by the secondary party prior to or at the time of the commission of the offence. This is a case in which the acts of assistance were provided after the commission of the crime, though the prosecution case was that the appellant had lent himself to the joint enterprise before that time. The tests formulated by the learned trial judge at paragraph 4 above do not require any knowledge or contemplation of the nature of the offence until he meets the principals at the rendezvous point, in other words after the offence has been committed. Indeed the learned trial judge expressly adopted this approach at paragraph 25 of his judgment dealing with the liability of the co-accused.

> "If Duffy was present in the car during the attack, but was not one of the gunmen, then he could only have been the driver because there is no evidence to suggest that anyone else was in the car except the two gunmen who got out and opened fire, and the driver who remained in the car. The driver was just as much a principal offender as the two gunmen, because there can be no possible doubt that the driver took a full part in the attack by driving the car. If Duffy was not one of the gunmen, and was not the driver, if he helped to prepare the car for the attack with full knowledge of the intention of the attackers to open fire in the way that did occur, or if he helped to destroy the car after the attack with full knowledge of what had already happened, he was an accessory who aided and abetted the principal offenders in either of those two ways. "

[18] We do not accept that a person who provides assistance after a murder with full knowledge of what has happened thereby becomes guilty of murder. There is no authority to support such a proposition. The learned trial judge made no finding as to when the appellant had the relevant knowledge. We consider that the law in

relation to secondary offenders was correctly stated by Lowry LCJ in the Court of Appeal judgment, approved by the House of Lords, in Maxwell.

> "Abetting and counselling are by origin common law offences and a guilty mind is a necessary ingredient. The Crown must prove that an accused participated before or during the commission of the crime, assisted the principal and intended to assist him. The *mens rea* required goes to intent only and does not depend on desire or motive."(underlining added)

[19] In our view this was not a secondary party case in which contemplation of an offence arose and the conviction on that basis is not safe. The case was properly presented as a joint enterprise case where the issue for the court was whether it could be inferred that the appellant participated in a joint venture realising that the principal might commit a crime of the type committed (see R v Powell; R v English [1999] 1 AC 1). That case was not addressed by the learned trial judge.

[20] We conclude, therefore, that the appeal must be allowed. We will hear the parties on the question of a retrial.