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Article

Accepted Version

Krebs, B. (2021) Intentionally overcharged?: R v Thacker & Ors [2021] EWCA Crim 97. Journal of Criminal Law, 85 (3). pp. 232-235. ISSN 1740-5580 doi: 10.1177/00220183211008679
Available at https://centaur.reading.ac.uk/100412/

Intentionally overcharged?

R v Thacker & Ors [2021] EWCA Crim 97

Keywords: endangering safety at aerodromes, intention, protests, statutory interpretation

This was an appeal by a group of activists who had been convicted of the offence of 'intentional disruption of services at an aerodrome' contrary to s. 1(2)(b) of the Aviation and Maritime Security Act 1990 ('the 1990 Act'). The 15 appellants had breached a security perimeter fence at Stansted Airport in order to prevent a flight from taking off that had been chartered by the Home Office to deport 60 individuals to West Africa. They had erected makeshift tripods built from scaffolding poles and, with the help of builders' foam, "locked on" to one another around the base of one of the tripods and around the nose wheel of the plane. In response to the appellants' conduct, the single runway was closed for a significant period. 23 planes had to be diverted to other airports, and a number of take-offs were delayed.

The appellants had initially been arrested for several summary offences but were subsequently indicted and convicted under s. 1(2)(b) of the 1990 Act which makes it an offence 'for any person by means of any device, substance or weapon unlawfully and intentionally to disrupt the services of such an aerodrome, in such a way as to endanger or be likely to endanger the safe operation of the aerodrome or the safety of persons at the aerodrome.'

They advanced five grounds of appeal: firstly, that the trial judge had misinterpreted s. 1(2)(b) of the 1990 Act in the light of its international and domestic law context and erred in his analysis of the offence elements. The offence concerned serious violence of a terrorist nature, not the much lower level of risks generated by the appellants' actions. Secondly, that the judge should have ordered disclosure (of background material relating to the Attorney General's consent to the prosecution as well as Home Office material concerning the immigration status of those threatened with removal) and stayed the prosecution on the basis that the Attorney General's consent had been wrongly given. Thirdly, that the judge should not have withdrawn from the jury the defences of preventing crime under s. 3 of the Criminal Law Act 1967 and necessity/duress of circumstances. Fourthly, that the judge's summing up lacked balance in that he had commented on aspects of risk of harm arising from the appellants' action that went beyond the arguments advanced or evidence relied upon by the Crown. And fifthly, that the judge ought to have directed the jury not to draw adverse inferences from the appellants' no comment interviews.

Held, allowing the appeal on the first ground and quashing all of the appellants' convictions, that the appellants should not have been prosecuted for the extremely serious offence under s. 1(2)(b) of the 1990 Act because their conduct did not satisfy the offence elements. There was, in truth, no case to answer. The Court acknowledged that the various summary offences with which the appellants were originally charged, if proved, might well not have reflected the gravity of their actions. That, however, did not allow the use of an offence which aimed at conduct of a different nature (at [113]).

By enacting s. 1 of the 1990 Act Parliament had given domestic effect to the Montreal Convention [for the Suppression of Unlawful Acts against the Safety of Civil Aviation] as supplemented by the Montreal Protocol [for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation] (at [55]). The Montreal Protocol had introduced a further layer of protection against activities which were essentially of a violent nature and "of a certain level of magnitude". Section 1 of the 1990 Act, in consonance with the policies and objects of the Protocol, had created an offence of universal jurisdiction attracting a maximum sentence of life imprisonment. The offence was so serious that the court was enjoined to consider the dangerousness provisions of the Criminal Justice Act 2003 and it was also a "Convention offence" for the purposes of the Terrorism Act 2006. The appellants' actions were not readily captured by the language and purposes of the Protocol (at [62]).

The "**device [or] substance**" had to be intrinsically dangerous to be caught by the statutory wording [of s. 1(2)(b)]. There was no evidence before the jury to suggest that the builders' foam and poles were capable of causing the sort of damage contemplated by s.1(1) and s.1(2)(a) (at [69]).

The term **"unlawfully"** was statutorily defined in s. 1(9) and could not be ignored (at [72]). "**By means of**" was synonymous with "using". It required proof of a causal link between the use of the device (i.e. the builders' materials) and the disruption. The runway was closed as soon as air traffic control was warned about the presence of individuals in the vicinity of the aircraft. That happened before the devices were used in any way (at [73]).

"To disrupt the services of the aerodrome" referred to the whole airport and required proof of more than limited interference with traffic movements on the ramp or directing a number of police officers to the scene. Whether this part of the statutory test was met would be a matter of fact and degree (at [74]).

"**Services of the aerodrome**" should not be limited to the take-off and landing of planes because numerous ancillary activities had to be performed to enable those things to happen. In any case, the disruption in the instant case included the closure of the runway and the taking of understandable safety measures and precautions in response to the appellants' presence in a restricted area in proximity to an aircraft that was being prepared for flight. It was not immediately apparent that they were engaged in a protest. To that extent, there was a clear causal link between the appellants' presence at the scene and the services at the aerodrome being disrupted (at [74-75]).

The purpose of the subordinate clause **"in such a way as to endanger or be likely to endanger the safe operation of the aerodrome or the safety of the persons at the aerodrome"** was to qualify or delimit the type of disruption that had to occur for the offence to be made out. "**In such a way**" did no more than make it clear that proof of disruption in itself was insufficient; it had to be disruption to the services of the aerodrome which gave rise to endangerment or likely endangerment to safety (at [77]).

The offence required proof of likely endangerment to safety and that introduced two further qualifications. First, that the chances of the danger arising had to reach a certain degree of likelihood, and secondly that it had to be of a sufficient nature and degree to amount to endangerment, i.e. to something that may properly be described as a peril.

The test was a composite one, and the available evidence fell well short of meeting it (at [80]).

The final issue that arose under the first ground was whether the appellants *intended* disruption to the services of the aerodrome that would likely endanger its safety or the safety of persons (at [85]). It was a strong inference that it was not the aim or purpose of the appellants to cause any wider disruption (at [86]). If, as held, it was necessary for the Crown to go further than prove disruption to this particular flight, the judge had not left to the jury the issue of whether each of the appellants intended (1) to disrupt the services of the aerodrome, and (2) by such disruption, some likely endangerment to the safe operation of Stansted airport and the safety of persons there. The jury should have been directed that they had to be satisfied so that they were sure that this consequence was a virtual certainty, or at the least very highly probable, and that each appellant appreciated that was the case (at [88]).

Commentary

The trial of the activists (also known as the 'Stansted 15') for an offence that is primarily aimed at large-scale acts of violence had attracted a lot of criticism. There can be no doubt that quashing the appellants' convictions for such a crass crime is the right outcome: the 1990 Act was passed in the wake of the Lockerbie bombing and sought to implement into English law a convention (the 'Montreal Protocol') that criminalises, at an international level, actions commonly associated with terrorism. This context alone warrants and supports the narrow interpretation imposed by the Court of Appeal on the s.1(2)(b) offence. The instant decision is significant in that it clarifies the various offence elements whilst expounding the inaptness of charging this particular offence in relation to non-violent direct action on airport grounds.

Unsurprisingly, the judgment is very dismissive of the appellants' attempts to invoke the defences of necessity, prevention of crime and duress of circumstances. It notes that the UK has a 'system of immigration control created by an accountable democratic process and subject to Parliamentary scrutiny and judicial review' where 'immigration decisions may be challenged in the tribunals and the courts' (at [101]). In the court's view, 'the real reason for halting this flight was that [the appellants] believe that all removals and deportations are "illegal" in the sense in which they would choose to use the term. Essentially, therefore, this was the appellants seeking to take the law into their own hands' (at [101]). This is a legitimate concern; however, it is interesting to note that, of the 60 passengers on board the hindered flight, reportedly at least five have since managed to establish a legal right to remain in the UK, lending some force to the appellants' contention that some of the deportations may have been improper or at least premature.

The court's discussion of the intention issue is, however, noteworthy. The court suggests that 'there remains some debate as to whether foresight of "virtual certainty" as opposed to "a very high degree of probability" is required (see *Blackstone's Criminal Practice*, 2021 edition, paras B1.13-B1.14). "Virtual certainty" derives from the judgment of Lord Lane CJ in *Nedrick* and probably still represents the law' (at [86]).

Those who teach, rather than practice, criminal law may be forgiven for having assumed that the House of Lords had settled this issue in *Woollin*. In truth, though, *Thacker* is not the only case recently to have cast doubt on the continued relevance of the virtual certainty model jury direction, although it may be the first case of note to do so explicitly (if cautiously: 'probably' leaves wriggle room for later courts to backtrack from the sufficiency of 'a very high degree of probability' to establish intention).

The court bases its proposition that oblique intent may be inferred from foresight of a very high probability on a passage from *Blackstone's Criminal Practice* (which, in turn, relies on the attempted murder case of *Walker* (1990) 90 Cr App R 226 (CA), decided post-*Nedrick* but before *Woollin*). As a matter of authority, however, it would be better to base the proposition on the Supreme Court decision in *Jogee* which, as the court acknowledges (by citing *Jogee* alongside *Moloney*, *Nedrick*, *Woollin* and *MD*), is the latest authority to have considered the relationship between intention and foresight.

While *Jogee* is clear that foresight can be evidence of intention, a threshold condition to curtail the jury's ability to infer that an accessory intended to assist murder from evidence that he anticipated his conduct would assist the principal's commission of that crime is conspicuously absent from the Supreme Court's judgment. This can be contrasted with *Woollin* where the House of Lords was adamant that the jury is 'not entitled' to conclude that a killer acted with oblique intent unless the evidence makes them sure that he had appreciated that death or grievous bodily harm was a virtually certain consequence of his actions.

In (potentially) parting ways with *Woollin* on whether there is a prescribed minimum level of foresight below which juries must not infer (or find) oblique intent, *Jogee* has introduced an inconsistency into the law of intention as it applies to perpetrators and accessories respectively. This, although flagged by academic commentators (see David Ormerod QC & Karl Laird, 'Jogee: not the end of a legal saga but the start of one?' [2016] 8 Crim LR 539-552; Beatrice Krebs, 'Oblique intent, foresight and authorisation' (2018) 7(2) UCL Journal of Law and Jurisprudence 1-24), remains unresolved. Perhaps *Thacker* then is the first judicial attempt to address this issue (by doubting the *Woollin* virtual certainty direction) which is not just academic: if there is a threshold condition for perpetrators but not accessories, it may still be easier to prove intention against secondary parties than principal offenders, and juries may need to be given different directions, depending on the defendant's role, which could be confusing where a defendant has been charged as perpetrator and accessory in the alternative.

The virtual certainty approach has many critics (and the House of Lords left open the possibility that the judiciary would revisit it). But if it goes, what should replace it? The problem with a less restrictive foresight criterion to delineate legal intention is that the criminal law might end up on the same slippery slope that led to the infamous line of murder appeals starting with *Hyam* and ending with *Woollin* (though *Jogee* may be the latest addition yet) and, in the context of complicity, to the adoption of parasitic accessory liability and foresight as a *mens rea* element in its own right. I have explained elsewhere (Beatrice Krebs, 'Oblique intent, foresight and authorisation' (2018) 7(2) UCL Journal of Law and Jurisprudence 1, 16-22) how an endorsement-based conception of intention (asking 'did the defendant endorse the consequences of his actions?' and, in the context of complicity, 'did the defendant endorse the principal's actions or their consequences?') could rationalise *Jogee* and replace *Woollin*, whilst

anchoring direct and oblique intent under a common denominator, and why this remains within interpretative reach of the common law.

The Court of Appeal unfortunately went no further than to say that the jury should have been given a proper direction on the meaning of (oblique) intention, in terms of either 'virtual certainty' or 'very high' probability. It remains to be seen what a future (or differently constituted) Court of Appeal makes of the relevant dicta in *Thacker*, if anything. But it may well be that the (judicial) intention debate has just been reopened – which might not be a bad thing in light of (1) the unpopularity of the *Woollin* direction, (2) its extremely rare use in practice, and (3) the many interpretational and conceptual difficulties with the notion of an inferred (conditional) intent to assist or encourage crime as exposed in *Jogee*.

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