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Case Note

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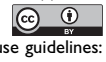

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Written Jury Directions and Contributing to the Force of Numbers

R v N [2019] EWCA Crim 2280

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Joint enterprise, misdirection, written directions, wounding with intent

The appellant, a minor, appealed against his conviction for wounding with intent contrary to s 18 of the Offences against the Person Act (OAPA) 1861. The incident concerned an assault on two boys (referred to as T and A) that occurred on the evening of 13 February 2018. T and A were walking along a road in Newham when a car pulled up beside them. Two masked males got out of the car, while the driver stayed inside. The boys were uncertain whether there were more people in the car. The two males stabbed T and A repeatedly before getting back into the car. T and A were seriously injured and required emergency live-saving hospital treatment.

It was the prosecution case that the appellant was a member of the 'Anyone Can Go' gang and that on the evening in question he had participated in a 'ride-out' whereby gang members visited a rival area with a view to attacking opponents. The prosecution alleged that the appellant was either one of the two attackers or that he was in the car to encourage or assist the attackers if the need arose. Because the attackers had masked their faces, neither victim had recognised their assailants. However, T and A were able to describe their attackers by height and skin colour. Other evidence relied on by the prosecution included a car key, jacket, holdall, large knife and gold mask obtained from the appellant's bedroom, as well as CCTV and cell site evidence showing the car driving to and from the crime scene and the movement of phone numbers attributable to the appellant and his co-accused. The jury were also shown a drill video from the appellant's phone which featured the appellant and included lyrics which appeared to describe him boasting about the attack on T and A.

The appellant accepted at trial that he had been present in the car, but he denied participating in the attack or having had any knowledge of a plan to attack anyone in the area. He had done nothing to assist or encourage the attackers. 'Anyone Can Go' was not a gang but a mere association of friends. While he had appeared in the drill video, he had not written the lyrics and had not been referring to the attack in the song. He accepted that the jacket and holdall were his, but the knife and mask belonged to his brother.

The trial judge gave oral instructions only. These included a direction that the appellant 'would be guilty if he *deliberately attended with a view to helping or encouraging the people who actually stabbed the two to do so*, so he is there as part and parcel of this ride-out' (emphasis added). He further directed the jury that

> the prosecution say (. . .) the defendant is guilty either because he joined in the attack on both of the two and must therefore have either intentionally stabbed or injured either of the two persons or because he deliberately helped or encouraged either or both of the others to do so.

The jury were also directed that 'as a matter of law, mere presence at the scene of a crime is not enough to make a defendant guilty of the crime, but if a defendant is there and intends by his presence to help or

encourage another defendant to commit that crime by giving moral support *or by contributing simply to the force of numbers* then he is guilty' (emphasis added).

The judge did not address the position that would arise if the appellant had been present in the car, had known what the two attackers had intended, but had not agreed with or supported or encouraged that attack. During deliberations, the jury sent a note to the judge, asking about the liability of a person who was present at the scene of an attack, was aware that it was going to happen, but who did not participate in it. Specifically, the note stated: 'If the defendant was aware that the attack was going to happen but did not get out of the car is he guilty of the same charge or a lesser charge'.

Having conferred with counsel, the judge advised the jury that 'merely being present at the scene of a crime is not enough to make a defendant guilty of the crime. But the question that you would ask is: what if you are sure that [the appellant] knew that act was going to happen and chose to be present, would that make him guilty? Well, that by itself would not make him guilty. What you would have to do is look at his intention and if you come to the conclusion that he knew the attack was going to happen and chose to be present, he has to intend by his presence to help or encourage the others to commit the crime by either giving moral support to another or by simply contributing to the force of numbers involved. In those circumstances then he would be guilty. So in order for [the appellant] to be guilty in those circumstances he has to intend by his presence to help or encourage another to commit the crime by either giving moral support to another or by contributing to the force of numbers. If you are sure that was the case then he would be guilty'.

The appellant appealed his conviction, chiefly on the basis that the judge had misdirected the jury in law as to the ingredients of joint enterprise and failed to direct them that they could not convict solely on the basis that the appellant had contributed to the 'force of numbers'; that he had failed to make clear that the appellant's presence inside the car needed to amount to intentional help or encouragement to one or both of the attackers, and that the judge's failure to provide written directions had created a significant risk that the jury was confused.

Held, dismissing the appeal, that in the circumstances of this case the conviction was not unsafe. The trial judge's answer to the jury had cured the lack of clarity (between, on the one hand, mere presence and knowledge that an attack might be planned by others, and, on the other hand, presence coupled to knowledge that an attack might be planned coupled further to an intention to participate in an appropriate way in the attack) in the initial direction.

The nub of the issue for the jury was whether the appellant assisted, for example by being the driver whose role it was to assist in hunting down opposing gang members so that they could be attacked (by others) and/or in assisting in a quick getaway after an attack, or by being a passenger in the car ready and willing to join the fray if that should become necessary by way of back-up to the two actual assailants. These were all relevant possibilities on the facts falling within the scope of the direction given by the judge and which, in law, were capable of amounting to the sorts of assistance that could engage joint enterprise. They were factual matters for the jury and, having heard the evidence, they convicted the appellant. If and insofar as the appellant was therefore convicted on a joint enterprise basis no error of law arose.

The criticism that the reference in the judge's direction to 'contributing simply to the force of numbers involved' was misleading and incorrect took the direction given by the judge out of its proper context. The judge had made clear that the appellant had not only to be present but had to intend by his presence to help or encourage the others to commit the crime by either giving moral support to them or by contributing to the force of numbers involved.

On the facts of this case, the absence of written directions did not render the conviction unsafe either. In circumstances in which an oral direction only is provided, a conviction will normally be quashed because that oral direction was wrong or materially confusing. It will not be because of the mere omission of written directions. It was clear from their note that the jury clearly understood the significance of the various permutations arising, hence the very specific factual situation described in the note.

The judge made clear to the jury that upon the hypothesis set out in the note, the appellant would not be guilty.

Commentary

The present case is noteworthy for two reasons: first, for its attempt to illuminate the notion, introduced in *Jogee*, of presence that amounts to a 'contribution to the force of numbers [in a hostile confrontation]' which gives rise to accessorial liability and which needs to be distinguished from 'mere' presence which does not; and secondly, for its stark criticism of the judge's decision to provide oral directions only, in as complex an area as joint enterprise.

Taking the second point first, while the Court confirmed that a lack of written directions will not per se render a conviction unsafe, it stoically refused to 'rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner' (at [19]). Indeed, the Court could not have been clearer in its disapproval of the judge's decision to direct the jury orally only, and while it remains technically open to trial judges to decide against the provision of written directions—under the Criminal Procedure Rules 25.14(4) the court 'may', not must, 'give the jury directions, questions or other assistance in writing'—they do so increasingly at the peril of reproach in the Court of Appeal and giving cause to what the Court in the present case clearly considered an unnecessary appeal: had the judge produced written directions, the Court concluded, he 'would have used greater precision and clarity in his initial directions, the jury would have had valuable written guidance which they could have referred to as they worked their way through the various factual permutations which arose, there would have been no need for the jury to send a note, and this appeal might well not have arisen' (at [18]). These words follow hard on the heels of similar observations in *Atta-Dankwa* [2018] EWCA Crim 320 (where the Court noted (at [32]) that cases that were so straightforward that no written materials for the jury were necessary were a minority) and *R v PP* [2018] EWCA Crim 1300 (where the Court called the Recorder's refusal to provide draft directions and to discuss them with counsel 'the greatest shame', see [26]). The upshot of the criticisms in the present case, which have since been echoed in the December 2019 Preface to the Crown Court Compendium Part 1, is that it is now almost mandatory for judges to prepare written directions, ideally in consultation with counsel.

On the difficult issue of when an individual's informed presence at the scene of a crime can give rise to accessorial liability, the merit of the present decision is that it stresses the importance of context, clarity, precision and nuance in directing juries. The Court (although critical of the trial judge's use of informal language, and noting that his reference to knowledge rather than foresight was generous towards the defendant) seems to approve of the judge's explanation, given in response to the jury's note, to the effect that '(i) mere presence was not enough; (ii) mere presence together with knowledge that others were planning an attack was also not enough; but (iii), that presence plus knowledge of what others intended to do coupled to an intention to assist in an appropriate way [ie to either lend moral support or contribute to the force of numbers] in the attacks to be perpetrated by those *could* suffice to found joint enterprise' (at [14]).

Juries may, of course, find it difficult to distinguish (ii) and (iii) in practice. The hardest cases surely will be those where there is little, if any, evidence of accessorial involvement beyond presence and knowledge (or foresight). Will it in such circumstances be appropriate to infer the requisite intent *solely* from evidence of presence and knowledge or foresight? *Jogee* leaves open the possibility, but doing so risks slipping back to parasitic accessory liability. The issue did not arise in the present case, for there was other evidence (mask, knife, jacket, CCTV, cell site, drill video, gang membership, etc) to suggest that N played a role going beyond mere (or 'accidental') presence: as the Court of Appeal considered (at [16]), 'possible factual permutations (which it was for the jury to determine)' might have seen N act as a getaway driver or standing by as back-up ready to assist the assault if the need arose. The relevant passage suggests that the Court of Appeal may not be averse to trial judges elaborating (in an

explanatory, not definitive, manner) when directing juries on the requirements of accessorial liability on what might be relevant 'factual permutations' given the concrete evidence. At the least, the Court seems to welcome elaboration (of what it means to be *present with an intent to assist in an appropriate way*) along the lines of lending moral support (at [15]) or standing by 'ready and willing to join the fray if that should become necessary by way of back-up' (at [16]), this being how the Court makes sense of the expression, coined by the Supreme Court in *Jogee*, 'contributing [simply] to the force of numbers [in a hostile confrontation]'.

Finally, and at the risk of sounding like a broken record, I would still argue that it is bound to aid clarity in the area of criminal complicity to eschew all reference to joint enterprise (be it in submissions, jury directions or judgments, other than perhaps those dealing with 'historic' incidents of parasitic accessory liability). The post-*Jogee* law is clear that what matters is whether there is evidence to make the jury sure that the secondary party, by their informed presence or otherwise, intended to assist or encourage the perpetrators in the commission of their crime. The language of 'joint enterprise' adds nothing to a description along the lines of intentional assistance or encouragement (elaborated on, as needed) but retains the potential to obscure and confuse the jury about what requirements need proving against the secondary party. The Crown Court Compendium employs 'joint participation' or 'joint criminal activity' to describe events involving two or more defendants; counsel, not just judges, are well advised to follow this lead.

Beatrice Krebs