

ENGLAND AND WALES / JUDGMENT

R v Ehsan Khan & Anor

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REX V EHSAN KHAN ABDUL HAQ HUSSAIN

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MRC WHITEHOUSE appeared on behalf of the Applicant KHAN MS M PINKUS appeared on behalf of the Applicant HUSSAIN

J U D G M E N T

Approved LORD JUSTICE FOXTON: 1. 2. On 16 July 2024 in the Crown Court at Luton, the applicants, both then aged 19, were convicted of attempted murder and also for the offence of possession of a bladed article. On 3 September they were sentenced to custody for life with

minimum terms of 10 years 344 days. Ehsan Khan (“Khan”) seeks an extension of 16 days in which to renew his application for leave to appeal against conviction and sentence, leave having been refused by the single judge. Abdul Haq Hussain (“Hussain”) renews his application for leave to appeal against sentence following refusal by the single judge. We can state at the outset that we are willing to grant Khan the extension of time sought, the evidence before us establishing that the delay was the result of his solicitor dealing with the consequences of a bereavement which impacted his ability to work. The facts 3. 4. 5. 6. 7. On 24 July 2023 at about 7.15 in the evening, the complainant, Ali Mahmood, was walking along Wingate Road, Luton towards a gym he attended daily. He became aware of a group of four males on the other side of the road wearing dark clothing. Two of the group crossed the road and approached him, their faces covered with masks. They questioned him about whether he was still connected to his cousin, Ibrahim Khan. Ibrahim Khan had been convicted of the murder of the applicant Hussain’s cousin. After a short period of conversation, the complainant was told to start saying a prayer which is to be said before death. The complainant tried to back off but the males positioned themselves, one in front of him and one behind, to prevent him from doing so. They pulled either long knives or swords from their trouser waistbands. The complainant then ran using his backpack as a shield and was chased across the road into a car park where he tripped and fell. At that point the two assailants commenced an attack, in the course of which they stabbed him repeatedly until passers-by shouted at them to stop and staff emerged from a nearby store to assist. The incident was captured on CCTV which we have watched. It shows two assailants participating in a one minute 50 second animated conversation with the complainant before he ran, the chase then taking place and the complainant being attacked. The complainant was taken to hospital where he was found to have lacerations to his chest, abdomen, groin, knees, thighs and forearm. An off-duty police officer who sought to assist him at the scene asked him who had attacked him, but he said that he not know who the attackers were. The complainant was asked that question again by police at the hospital. He said he did not recognise the assailant’s voices or recognise them because he could only see their eyes, but he did tell police that one of the attackers had asked him whether he was still associating with his cousin. It was the complainant’s evidence that the following day, he told his mother that his attacks were the two applicants. On 26 July he made a formal statement to the police identifying the applicants as the persons who had attacked him. 8. 9. Khan left for Pakistan on 25 July 2023. He was arrested at the airport on his return on 12 August. Hussain surrendered to police on 14 August. Neither answered questions in interview. Following a first trial which was halted due to the illness of a witness, the applicants were subject to a retrial where the prosecution case rested on a number of items of evidence. There was the complainant’s identification, evidence of a Louis Vuitton bag taken from Khan on his arrest which was the same type of bag as one of the assailants was wearing in the CCTV, and worn in the same way. There was evidence of extensive phone contact between the applicants on 25th and through to the early hours of 26th July, and cell site evidence placing Khan’s phone in the area around the car park at the relevant time. There was also the evidence of Khan having caught a flight to Pakistan later that day and having made arrangements to stay in a hotel on the evening following the attack.

10. The prosecution also sought to adduce bad character, said to show a propensity on Khan's part to carry a knife of the kind used in the attack. The bad character concerned Khan's arrest and conviction on 23 June 2023 when he was found to be in possession of a bladed article of approximately 68 centimetres in length secreted in his trousers. The application to adduce that previous conviction was opposed.
11. The judge ruled that the conviction was admissible and that ruling is the subject of Khan's appeal against conviction. The judge was asked to hold that the evidence was inadmissible on the basis that it was an attempt to use bad character evidence to bolster a case otherwise dependent on weak identification evidence, with reference being made to R v Hanson [2005] EWCA Crim 824. The Judge found that the bad character evidence was capable of establishing propensity and she rejected the submission that the case was weak and that this was an attempt to use bad character to bolster a case dependent on weak identification evidence.
12. At the close of the Crown's evidence both applicants made submissions of no case to answer. These were rejected by the judge, having directed herself in accordance with R v Galbraith [1981] 1 WLR 1039 and, so far as the identification evidence was concerned, R v Turnbull [1977] QB 224 and R v Long (1973) 57 Cr App Rep 871. She also rejected a submission by Khan that the identification evidence should be excluded because the prosecution had failed to undertake an identity parade in compliance with Code D of the Police and Criminal Evidence Act 1984.
13. The judge's rejection of the submission of no case to answer forms the second ground of Khan's application for leave to appeal, but it has been realistically accepted before us today that in essence both grounds stand or fall on the issue of whether, bad character evidence apart, the prosecution case essentially depended on weak identification evidence.
14. Neither applicant gave evidence. The jury convicted them of attempted murder.
15. When sentencing, the judge referred to the terrifying nature of the incident and its lasting impact on the complainant. There is no criticism of her decision to assess the offence as one falling within Category B high culpability under the applicable Sentencing Guideline. The judge was not satisfied that this was a planned or premeditated attack. She held that it was a category 2 harm case, with the result that the Guideline provided for a starting point of 25 years and a bracket of 20 to 30 years. Having identified the aggravating factor of the previous convictions of both defendants, and the fact they were respectively in breach of bail or community orders, but also their age and other mitigating factors, the judge concluded that this offending was so serious that in both cases a life sentence was required. She said that had she been sentencing them to a determinate sentence the appropriate sentence would have been 18 years' detention, taking a starting point of 25 years, raising it to 27 years for aggravating features, but reducing it to take account of their age and the other mitigation evidence. Khan's application for leave to appeal against conviction

16. We deal first with Khan's renewed application for leave to appeal against conviction. As we have said, it is argued that the judge erred in allowing the previous conviction to be adduced to support a weak identification case and also that, given the alleged weakness in the case, the judge should have accepted the submission of no case to answer.
17. Like the single judge, we are satisfied that there is nothing in either of these grounds. In the bad character application the judge provided a detailed explanation of her conclusion that this was not a case where bad character was sought to be adduced to bolster a case which otherwise depended upon weak identification evidence. 18. So far as the identification is concerned, it was rightly accepted that this was not a "fleeting glance" case. As we have stated, the CCTV shows the complainant in relatively close proximity to and in conversation with his assailants for nearly two minutes, looking directly at them, as well as hearing their voices, although we accept the identification of Khan was a visual rather than vocal identification. There were, we accept, circumstances which could be said to render identification difficult, both the stress of the moment and the fact that the attention of the complainant may have been moving between the two assailants. But the complainant knew Khan, who had been in the year below him at school, and although he had not seen him since March 2020, the evidence was that Khan was someone with whom the complainant had associated on a regular basis prior to that at school. It is correct that the complainant told the off-duty officer at the scene that he did not recognise his assailants and that he did not identify them to the police when in hospital. However, a very short time thereafter on 26 July he said he was 100% certain about his identification.
19. We take into account the shocking effect of the attack on the complainant when asked about identification at the scene and in hospital the fact that the complainant was taking medication. Nonetheless we accept that there are points that could be made about the strength of the identification evidence if it stood alone. But the crucial matter in this case, as the judge correctly identified in her ruling, was that the identification evidence did not stand alone. In particular, the weapon Khan was found in possession of on 23 June was entirely consistent with that wielded by one of the assailants on 24 July. There is the evidence we have referred to of the Louis Vuitton bag being worn in a certain manner both by Khan on arrest and by one of the assailants in the CCTV. There is the fact that Khan took steps to stay in a hotel that night rather than at home and of his flight to Pakistan. There is the ongoing evidence of cell phone contact with Hussain up to and in the aftermath of the attack. There is Khan's association with Hussain who himself had a motive to attack the complainant by reference to the complainant's cousin being involved in the murder of Hussain's cousin and the fact that the association of the complainant with Hussain's cousin was raised by the assailants immediately prior to the assault. There was also the cell site evidence placing the applicant in the area of the attack on the day in question. 20. 21. In so far as it is said that the identity evidence was compromised by the failure to conduct an identification parade, the judge took that into account and gave the jury the direction in *R v Forbes* [2000] UKHL 66 in relation to the potential significance of that failure. No complaint has been made against that direction. In those circumstances, while the judge accepted that there were points

which could properly be made to the jury in relation to identification evidence, she was right to conclude that this was by no means a case in which bad character evidence was being sought to be admitted solely for the purpose of bolstering a case which depended on weak identification evidence. There is no suggestion that the judge did not fairly sum up those matters relevant to the reliability of the complainant's identification in her summing-up and indeed we are satisfied that she did so.

22. Mr Whitehouse accepted, as we have indicated, that his application for leave to appeal on both grounds ultimately centred on the argument that the identification case was weak and that only the bad character and identification evidence were available to support the prosecution case. We have already set out our reasons for concluding that the judge was right to hold that the identification evidence was not inherently weak but in any event was bolstered by significant other evidence. That is also an answer to the submission that the judge should have acceded to the submission of no case to answer. 23. For those reasons the renewed application for leave to appeal against conviction is refused. Applications for leave to appeal against sentence
24. We turn now to the applications for leave to appeal against sentence. Both Khan and Hussain submit that the imposition of a life sentence was manifestly excessive and that the seriousness of the offence and the risk to the public could have been dealt with by an extended determinate sentence. In addition, both applicants say that the judge did not sufficiently inform them that she was considering imposing a life sentence so as to allow them to make submissions on that particular issue.
25. Before us, neither applicant challenges the judge's conclusion that they were both dangerous, nor the minimum term fixed by the judge.
26. We begin with the suggestion that the judge did not sufficiently alert the applicants to the fact she was considering imposing a life sentence. As to this, it is apparent from the terms of both pre-sentence reports that the judge specifically requested the reports to address the issue of dangerousness. The report produced for Khan assessed him as presenting a high risk of serious harm to the public, known associates and gang members, the risk being of physical harm in the form of a physical assault which could lead to serious injuries or ongoing psychological distress. The report referred to an imminent risk of this reoccurring once Khan was released into the community and without monitoring. The report noted that Mr Khan was fully aware that the court was considering sentencing under the dangerous guidelines. 27. So far as Hussain is concerned, the PSR once again stated that, given the serious nature of the offence, he was fully aware the court was considering sentencing him under the dangerous guidelines. He was assessed as posing a risk of serious harm, namely to young male peers, the risk being one of aggressive and violent behaviour with or without the use of a weapon. It was also stated that he had the propensity to cause very serious physical and emotional harm. Significantly, the report assessed the risk of further offending happening imminently on release as being high.

28. As we have indicated, there is no challenge to the judge's conclusion that both applicants were dangerous. In those circumstances, the judge had to consider the sentencing options available as set out, for example, in Attorney General's Reference No 27 of 2013 (Burinskas) [2023] EWCA Crim 336: first, considering whether a life sentence was justified and if the court was not satisfied a life sentence was justified, whether an extended sentence should be passed. 29. It is also accepted that, in the course of Khan's submissions on sentence, the judge asked Khan's counsel what would he say about a life sentence. It is said the judge did not otherwise refer to that possibility and that no similar statement was made in relation to Hussain.
30. We accept that a clearer statement on the part of the judge that a discretionary life sentence was very much under consideration would have been desirable. However, against the background we have outlined, we think the applicant's representatives ought to have been alive to the fact that that was one sentence the judge had to consider. Nor is it realistic to suppose that in imposing that sentence, the judge did not understand and apply the relevant test. In any event, we do not need to focus on that procedural complaint because both applicants have had a full opportunity to make submissions to us today about the appropriateness of a life sentences imposed on both applicants.
31. Notwithstanding those submissions, we are of the view that the judge was entitled to conclude that a life sentence was appropriate. The offence involved a revenge attack on someone, based on their familial relationship with an individual convicted of the murder of Hussain's cousin. The attack took place in broad daylight, in a public area. The judge sentenced on the basis that the attack might have been spontaneous but the applicants' motivation was not an immediate response to some spontaneous provocation but a longstanding resentment or grudge. Steps were taken by the applicants to hide their identities. Further, whilst we accept the injuries were not as serious as they might have been, nine separate stab wounds were inflicted on the complainant, whose injuries would undoubtedly have been very much more serious (and could well have been fatal) but for the timely appearance of members of the public exiting a nearby store which caused the assailants to flee. As the judge noted, the injuries that were inflicted left the complainant with permanent impairment of his right leg, as well as lasting psychological damage.
32. The PSR assessments expressed the view that both applicants presented a high risk of causing significant harm which would arise imminently on their release. Neither applicant has acknowledged guilt or expressed any remorse. While it is the case that both applicants only had a single previous conviction, the nature of those convictions is itself important, both being for possession of a bladed article, meaning that there were two occasions on which the applicants went out with bladed articles. Accepting in their favour that this attack was not premeditated, their willingness to carry dangerous knives in public itself raises a serious concern.

33. There is then the youth and relative immaturity of both applicants. We accept that this is a significant factor and one to which we have had to give considerable thought, as the judge did. The judge took full of account of that factor when fixing the minimum term of the sentence. We accept that it is also a matter of obvious relevance to the decision whether to impose a life sentence. Having given all due consideration to their relative immaturity, we remain of the view that given the nature of the offence and the opinions expressed in the pre-sentence report, the judge was fully entitled to conclude that a life sentence was justified, with the question of whether the applicants should be released at the end of the minimum period being assessed by the Parole Board by reference to the circumstances at that time. The judge presided over the trial. She was well placed to determine the extent of that risk and the best means of addressing it. Accordingly, we refuse both applicants leave to appeal against sentence.

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Prepared on 28 October 2026 · Esheria