QEB
HOLLISWHITEMAN

# COURT OF APPEAL JUDGMENT IN SULEIMAN KHAN DELIVERED ON 21 JULY 2022

On 21 July 2022 the Court of Appeal (Crim. Div.) delivered its reserved judgment in the case of Khan which had been argued on Friday 8 July. The case revolved around the central issue of what it means when we say that 'the prosecution must prove its case' and the extent to which a trial judge is entitled or required to depart from the prosecution case theory and leave all the possibilities allowed for on the facts, even when not contended for (and even positively resisted) by the prosecution.

The facts require a little explanation.

Muhammed Suleiman Khan (Sully Khan) was 19 years old at the time of the offence. He was an on-off partner of J – they had been together for at least 18 months prior to the events of 21st July 2020 but it is plain that their relationship was volatile. He exercised control over her; he had a coercive relationship with her and he had in the past been violent towards her. J had very recently started seeing a young man called Panashe Bako (Panashe). The prosecution suggested Khan was jealous and controlling.

As far as J was concerned she and Khan had ended their relationship (not for the first time) prior to the few days she chose spend at the Crowne Plaza in Birmingham with Panashe. It is clear that Khan did not share that view and was extremely possessive about her and jealous of any suggestion that J was engaged in a relationship with anybody else.

J and Panashe decided to spend the nights of the 20th and 21st July 2020 in the hotel. Eventually by means of a series of texts to J, Khan discovered her whereabouts and in the afternoon of 21st July went to the hotel and confirmed which room she was in. He then called his friend B (as the prosecution suggested) as back up, he knew that Panashe was bigger than him and had previously threatened to stab him.

The two men were allowed into the room and at first the conversation was reasonably civilized. Khan became verbally abusive to J and when she attempted to leave and to call for help she was prevented. Eventually Khan and B agreed to leave but by this stage either Khan or B had taken J's telephones. Panashe then became involved in a struggle with Khan and was beating him when according to the prosecution case Khan beckoned to B and said – "if you gotta do it, do it", or words to that effect. At this point, on the prosecution case, B stepped forward and drove the knife into Panashe's chest which proved to be a fatal injury. The knife was then re-sheathed and dropped at the scene.

The knife and sheath had the DNA of all three male participants on it. Khan when arrested had the victim's blood on his top and trousers. B was not arrested for several months.

When first spoken to, J told her mother that 'Sully had killed someone', however she almost immediately changed that to say that it had been B but that Sully had encouraged him. In her first ABE she described how Sully had looked at B who was standing nearby and uttered the words mentioned above upon which B attacked Panashe with the knife.

Just before trial, J made a retraction ABE claiming that B had been the stabber but without Khan's encouragement. It later transpired that Khan had been in frequent contact with J while he was held

on remand. The transcripts of those conversations revealed that his purpose was to cause her to alter her account, absolving him of culpability. At no stage in the conversations however did he specifically admit guilt.

Khan and B were jointly charged with murder. The prosecution case against B, based largely upon the first ABE of J, was that he was the one who had actually stabbed the victim but that he had been encouraged to do so by Khan who was therefore an "aider and abettor".

J gave evidence although in chief only her first ABE was played. In cross-examination by Khan's counsel (Tim Raggatt QC) she agreed wither her second ABE which was put to her and she was further cross examined by the second defendant's counsel (Michael Ivers QC) on the basis that that was a lie and it was put firmly to her that Khan was the stabber. In re-examination the prosecution turned her hostile and cross examined her on the basis that her first ABE was the truthful one and that B had used the knife with Khan's encouragement.

Before speeches the learned Judge (HH Judge Montgomery QC sitting at Stafford Crown Court) discussed her proposed 'split' summing up. She was inclined to leave the case open to the jury having directed them on both murder and manslaughter and intended to allow the jury to come to any verdict they felt appropriate upon the evidence they had heard.

The prosecution (represented by the writer leading Cathlyn Orchard) indicated that he did not feel that the prosecution could change its stance at that late stage and could not encourage the judge to do so. 'Simpler and safer' as it was put, to leave the case on the prosecution's basis of case, that B wielded the knife encouraged by Khan and if the jury did not so find, then acquittals would follow. Counsel for Khan supported that position. Counsel for B vociferously objected to it because, in his view, if the jury thought the 'only way to get Khan was to get B' then his client might be severely prejudiced. He argued that the judge was correct and that the case must be left so as to allow the jury to depart the prosecution case but still convict Khan.

Manslaughter was added to the indictment and the learned Judge left the case open to the jury having fully directed them on murder and manslaughter and giving the classic accomplice direction in respect of each defendant's evidence.

The Jury acquitted B entirely and only convicted Khan of manslaughter. The conviction must have been based upon the decision that Khan was the stabber but did not have murderous intent when he put the knife into Panashe's chest. Khan was sentenced to fourteen years imprisonment. Khan appealed the conviction.

On appeal, Tim Raggatt on behalf of Khan argued that the Judge was not entitled to depart the prosecution case and that in doing so his client was prejudiced and the conviction was unsafe. The Respondent (still represented by the writer and Ms Orchard) argued that although the prosecution was correct not to try to depart from its own case, the Judge was correct, despite the prosecution's arguments in the Crown Court, to leave the case to the jury as she did.

It was argued for the respondent that, although the burden is always upon the prosecution to prove its case, this does not mean that every aspect of the prosecution case theory has to be proved. What it means is that the prosecution had to prove each element of the indictment. Provided the jury were properly directed as to the law and there was a sensible factual basis for the conviction, then it was a safe conviction provided there was no real prejudice to the defendant's case. There

was plenty of other evidence (including the forensic evidence) which supported the contention that Khan could have been the stabber and there was no forensic evidence to the contrary.

Further, the respondent argued that in this case the defence on behalf of Khan knew what the co-defendant's case was (i.e. that Khan was the stabber) from the start of the case when the defence statement was revealed. Khan gave evidence and was cross examined on the basis that he was the stabber by the co-defendant counsel (albeit not by the Crown!). Khan's counsel cross-examined B on the basis that he and not Khan was the stabber. Prior to speeches, all parties were well aware of how the judge was going to leave the case, indeed she had already dealt with the law in the first part of the split summing up.

Khan argued that the case as it was left was never the one posited by the prosecution and that his client had not been cross examined by the prosecution on the basis of the way it was left or upon the basis upon which he must have been convicted. Thus, he ought not to have had to fight against two possible bases of conviction and it was unfair to leave the case as it was left. Further, he argued that his conviction must have been solely on the basis of B's evidence (which the prosecution had disavowed) and the accomplice direction was insufficient and ought to have been closer to the old fashioned corroboration warning.

The Respondent relied primarily on two cases – Coutts which was decided by the House of Lords in 2006 and the case of Kinse Adid 2021 EWCSA Crim 581, a case in which the issue was whether the judge should have given a specific direction on drunken intent, the court said –

> [88]. *Juries in criminal cases are not limited in their consideration of the evidence to the arguments advanced by the prosecution and the defence. They are the finders of fact and it is open to them to reach conclusions that do not match the particular contentions advanced by the parties. They are free, for instance, to reject an accused's account but nonetheless to acquit him or her (or convict of a lesser charge) because they conclude that they are unsure that one or more of the ingredients of the offence of specific intent have been made out*.

In Coutts, ([2006] UKHL 39) as in Khan, the prosecution (represented by the writer's ex-stable mate John Kelsey-Fry QC) had firmly resisted the judge leaving manslaughter on the basis that this would leave the case to the jury on a basis wholly different to that opened and contended for by the prosecution. The learned judge was persuaded by those arguments and failed to leave manslaughter. The Court of Appeal upheld that conviction.

The House of Lords took a different view. Lord Bingham delivered the leading Judgment.

> *12. In any criminal prosecution for a serious offence there is an important public interest in the outcome (R v Fairbanks [1986] 1 WLR 1202, 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type*

*charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (Von Starck v The Queen [2000] 1 WLR 1270, 1275; Hunter and Moodie v The Queen [2003] UKPC 69, para 27).*

*[23]The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support.*

*[82]. Directing the jury on the way that the law applies to any reasonable view of the facts disclosed by the evidence ensures that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take. Therefore, by omitting to mention manslaughter in a case where it could apply on a reasonable view of the facts, the judge will misrepresent the position by making the law seem more rigid and less nuanced than it actually is. While, for tactical reasons, it may suit counsel on either or both sides to represent the law in this way, as offering a stark alternative between murder and acquittal, with nothing in between, in fact the law provides for an intermediate position. The jury are entitled to be told of that intermediate position, whenever it might come into play on a reasonable view of the evidence. The intermediate position may not be to the liking of either the prosecution or the defence, but the jury are still entitled to be told of it, so that they may reach their conclusions "in light of a complete understanding of the law applicable to them." Where the duty of the judge is to give a direction on the alternative verdict, counsel have to adjust their speeches to the jury to take account of that prospective direction. (Lord Rodger)*

*[95]. But there have been some cases considering the situation where an alternative offence presents itself not as an answer to the Crown's case, but as a possibility which (although not canvassed by either side) arises in law on the defendant's own case if and only if the Crown's case is rejected. In this situation, a direction by the judge to the jury to consider the alternative offence may lead to conviction in circumstances when otherwise the jury would in law have had completely to acquit. Not surprisingly, there are cases in which defendants have complained that the judge should not have left an alternative offence to the jury in these circumstances: e.g. R v. McCormack [1969] 2 QB 442; where, equally unsurprisingly, the complaint was rejected (although the court pointed out, at page 446, that a trial judge must have a discretion not to leave an alternative to a jury, if to do so might cause undue prejudice, as where the defendant had lost the chance of giving or calling evidence to cover or guard against the alternative). An important public interest is served by the conviction of offenders of offences which they have committed, and the judge is not bound by the way in which either side has presented its case, if an alternative offence can without injustice be left to the jury. (Lord Mance)*

Although Tim Raggatt on behalf of Khan argued that Coutts was confined to the consideration of whether a lesser offence should be left to the jury the court was not persuaded. They took the view that Coutts had a wider application and was applicable to the current case.

The Court looked carefully at the question of whether or not there was any real prejudice to Khan's case, i.e. could his case have been put or run any differently? Could or would his counsel have cross examined any of the witnesses differently? Was there an opportunity of dealing with the alternative basis in speeches? On all these points the court decided that in reality the case could not have been run in any different way to the one it was and there was no prejudice to the appellant. The accomplice direction given by the judge was, as argued by the respondent, sufficient. The appeal was accordingly dismissed.

The appeal is interesting, depending on the view of the reader of course, in that it considers that central question – what does it mean 'to prove the prosecution case'. Beware the error (that the writer might be accused of making) of confusing the prosecution case with the prosecution case theory.

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