

IN THE WESTMINSTER MAGISTRATES' COURT

The Queen v Moosa Mohammed

JUDGMENT

Introduction

1. Moosa Abd Ali Mohammed is charged with trespassing on a diplomatic premises, the Bahraini embassy at 30 Belgrave Square in Belgravia, on 26th July 2019, an offence contrary to section 9 of the Criminal Law Act 1977.
2. The facts are agreed. The defence relies on the legal defences of necessity, prevention of crime and Article 10 of the Convention.
3. The case arises out of a protest against the imminent execution of two young men, Mr Ali Al-Arab and Mr Ahmad Al-Malali, who had been sentenced to death in Bahrain after what various respected organisations, including Human Rights Watch, have described as an unfair trial, based on confessions obtained by torture. Mr Mohammed was one of about 15 protesters, protesting that night against the planned execution. He was the only one of the protesters who went on to the roof of the embassy.
4. I should make it clear at the outset, it is not the job of this court to make any comment about the trial in Bahrain or the sentence or about the way the two young men were treated there. The defence relies on the expert Dr Agnes Callamard whose evidence I summarise below.
5. The trial took place on 18th September 2020, judgment was given on 24th September. Ms Brimelow QC for the defence provided a skeleton argument and submissions as did Mr Rasiah for the Crown. I had a bundle of the authorities that Ms Brimelow was relying on. I am most grateful to both counsel.
6. The prosecution case consisted of read statements and one live witness, a police sergeant. I was provided with agreed facts and was shown film of the protest. The defence called the defendant. The defence provided me with a statement from Dr Agnes Callamard, a UN Special Rapporteur on extrajudicial, summary or arbitrary executions, which I read. The defence relied in particular on paragraphs 1 to 29 of her statement. She is an expert on human rights and has a great deal of experience of the Middle East.

Background

7. On Friday 26th July 2019 there were about 15 people protesting outside the Embassy in Belgrave Square. Shortly before 10.45pm, the defendant using a neighbour's scaffolding, climbed on to the roof of the embassy. He had a banner prepared in advance and was waving and shouting from the top of the building. Most of what he

said was inaudible, some of it in Arabic and some in English, but what could be made out was that he was asking the Bahraini authorities not to kill the two young men sentenced to death and was asking Boris Johnson to intercede with the ruler of Bahrain. The defendant was astride the balustrade on the roof and at times had one leg hanging down. The police were concerned about his safety.

8. At about 11.30pm embassy staff, who had got on to the roof via a fire escape inside the building, removed the defendant from the parapet despite being asked by the police not to approach him. The police officer who gave evidence was watching from below. He noted that the defendant was extremely distressed and in fear when the embassy staff came on to the roof. The defendant was shouting that the staff were going to kill him.
9. Very soon after the police, who had been refused access by embassy staff, asked the fire brigade to break down the front door and they went in.
10. They found Mr Mohammed detained on the roof. They told him he was safe. He was arrested at 11.32pm. He complained immediately of being tortured. Ambulance staff said he was fit to be detained. He did not give the details of the torture as he did not answer any questions in interview but at the police station he was found to have grazes to his knee, cut and scratches to his arm and scratches on his back under his armpit.

What the Crown have to prove and the defence

11. The burden is on the Crown, they have to prove the elements of the offence so that I am sure of the defendant's guilt before I could convict.
12. The two elements are that the premises concerned are or form part of a diplomatic mission within the meaning of Article 1(1) of the Vienna Convention on Diplomatic Relations 1961 as that Article has effect in the United Kingdom by virtue of section 2 and Schedule 1 to the Diplomatic Privileges Act 1964.
13. The second element is that the defendant entered the premises concerned as a trespasser. Not relevant to this case but a defence is provided for a defendant who proves that he believed the premises not to be a diplomatic mission.
14. The defendant relies on the defences of necessity and of prevention of crime. In addition, the defence asked the court to consider the importance of freedom of expression under Article 10 of the European Convention of Human Rights.

Defence case

15. The defendant gave evidence and told the court that he had been tortured and mistreated in Bahrain over a number of years after first protesting at the age of 14 about the arrest of his teacher. He had been granted asylum in this country on 7th August 2007. He works as a reporter and writes about human rights in Bahrain. His citizenship in Bahrain was revoked in 2012.

16. He said that on 26th July 2019 he became aware that Bahrain was about to carry out the execution of Mr Ali Al-Arab and Mr Ahmad Al-Malali. In fact, they were executed the following morning.
17. In the preceding days, he and others had contacted MPs and NGOs including Human Rights Watch and they were hoping the execution would be suspended. They wanted to demonstrate to draw attention to the execution.
18. He had climbed to the roof of the embassy with a banner which said that “I am risking my life to save 2 men about to be executed in the next few hours, BJ act now”. He was risking his life because he expected he would be tortured or killed by the embassy staff.
19. On the roof he was shouting in English and in Arabic: “stop killing in Bahrain”. In evidence he said he was asking Boris Johnson to intervene with the King of Bahrain to save the two men. He said he knew Mr Johnson had done this in another case and he was hoping his protest would work on this occasion. He thought that Mr Johnson had a good relationship with the King. He wanted to convey his message to Mr Johnson and being on the roof was the fastest way of stopping the two men from being executed.
20. He said when the embassy staff arrived on the roof they threatened him and that he was hit. He said they tried to push him off the roof. That was not visible from the street below. They tried to handcuff him with a cable. They put his wet tshirt over his mouth. That was not a complaint he made to the police at the time. He made a complaint much later about the staff but the police did not charge the men as there was insufficient evidence.
21. The defence expert, Dr Agnes Callamard sets out her expertise and summarises the concerns in relation to Mr Ali Al-Arab and Mr Ahmed Al-Malali. She sets out what she has been told about their treatment. Arrest, torture and forced confessions, a mass trial which took place while the two men were held on a bus outside the court. Convicted of terrorism offences, they were sentenced in absentia and stripped of their citizenship. Mr Al-Malali was shot during the arrest but was not treated for 23 days. Their sentences were upheld by the Bahraini Court of Appeal, the highest court the Court of Cassation and finally by the King of Bahrain.
22. Dr Callamard and colleagues at the UN have communicated with the Government of Bahrain expressing their “extreme concern” about the imposition of the death penalty. They urged it to halt the executions. This request was repeated the day before the men were executed, Dr Callamard had stated that the men should not have been convicted of terrorism offences in “seriously flawed trials”. Dr Callamard gives examples of when the United Kingdom Parliament had made high level interventions to prevent executions including in Bahrain.

Findings

23. I accept that when the defendant climbed on to the roof of the Embassy it was in the hope that his action would be brought to the attention of the then new Prime Minister, Boris Johnson so that he would intercede, to prevent the two executions which took place in Bahrain the following day.
24. The Crown has to prove firstly that the defendant was on the roof of a diplomatic mission. There is no doubt that it was. Secondly, it has to prove that Mr Mohammed was a trespasser, he accepted in evidence he was. Both of those aspects of the case are proved beyond reasonable doubt.
25. The only question for this court is whether the defendant can avail himself of the defence of necessity and prevention of crime or rely on freedom of expression.

Legal defences - discussion

26. Firstly, necessity. The defence of necessity consists of the following elements. Firstly, a defendant must genuinely believe that there is a threat of death or of serious injury to a person; secondly, that belief must be reasonable; and thirdly, the actions of the defendant must be a reasonable and proportionate response to the threat. The burden lies on the Crown to disprove the defence beyond reasonable doubt.
27. Ms Brimelow in a detailed skeleton argument sets out the authorities which were provided in a helpful but lengthy bundle.
28. I had no doubt that the defendant genuinely believed that there was a threat of death to the two young men in Bahrain. The defendant is a man of good character which makes his views more credible. Secondly, I have no doubt that belief was reasonable. The two men were executed on 27th July 2019, the day after the protest
29. The third aspect of the defence is the one I take issue with. To have a defence of necessity, the actions of the defendant must be a reasonable and proportionate response to the threat. The threat to life was in Bahrain, thousands of miles away, not in the Bahraini Embassy in Belgrave Square. The fellow protesters in Belgrave Square, sharing the characteristics of the defendant, protesting as they were too about the imminent execution, did not choose to climb on the roof, trespassing on a diplomatic mission.
30. The defendant, according to his evidence, was putting himself at risk from assault or worse. Certainly, he would have been at risk of falling at height. He also put the police at risk and involved the fire brigade and an ambulance, the latter two services were called out for him. The actions he took were to persuade another, the Prime Minister, to intercede and were not a reasonable and proportionate response to a threat that was many miles away. The defendant was not expecting his actions to prevent directly the executions but it was in hope of bringing the imminent executions to the attention of a third party, who might be persuaded by his protest to step in and intercede.

31. This was a planned event as is proved by the preparation in advance of the banner, the defendant will have had some time to consider whether the protest would have any effect. The other protesters made their protest outside the Embassy without breaking the law which is where the defendant's protest should have taken place. The seriousness of the protest, one man on a roof and the timing of the protest, starting as it did after 10.30pm on a Friday night, would have meant it was highly unlikely to reach even the Foreign Secretary, let alone the Prime Minister.
32. The authorities relied on by Ms Brimelow set out the framework for this defence. The following principles can be drawn from the authorities she relies on:
- People under threat do not have to be closely connected to the defendant
 - People under threat do not have to be geographically close by. The example given in *Lord Advocate's Reference No 1 of 2000* (2001) JC 143 at paragraphs 44 and 45 is that of a person, damaging an industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, could avail himself of the defence. The plant though was the source of the potential industrial disaster which is not the case of the embassy.
 - There is no requirement for the danger giving rise to the defence to be absolutely immediate as long as it "impels intervention" (Lord Goff in *F v West Berkshire Health Authority* [1990] 2 AC 1 paragraph 24). The principle is one of necessity not emergency (*In Re A*)
 - The threat of imminent death is required to be operating on the defendant's mind when he commits what would otherwise be a criminal offence. The example given in *R v Abdul-Hussain (Mustafa Shakir)* [1999] EWCA 3528, is that of Anne Frank stealing a car to escape, if she had been charged with theft, she would not have been denied a defence on the grounds she should have waited for the Gestapo to knock on her door. The execution of two men in another country is a more remote action.
33. In terms of the reasonableness and proportionality of Mr Mohammed's actions, the authorities relied on by Ms Brimelow do not concern events that are as remote as these are from the executions. They do not concern someone protesting to persuade someone else to intervene.
34. Having considered the defence of necessity, it is not made out. I am sure the climbing of the roof was not a proportionate and reasonable response to the threat.
35. The second defence raised by Ms Brimelow on behalf of Mr Mohammed is that he was acting to prevent a crime, the crime of torture. I am prepared to accept for the sake of argument that a sentence of execution in these circumstances is torture although there are strong arguments to the contrary articulated by Mr Rasiah in his skeleton at paragraphs 14 and 15.
36. Ms Brimelow sets out section 134(1) of the Criminal Justice Act 1988. She relies on the evidence of Dr Callamard that the two men had been tortured and were going to

be executed. Ms Brimelow sets out the two forms of a defence of prevention of crime. A statutory defence and a common law defence. Section 3(1) of the Criminal Law Act 1967 states:

3 Use of force in making arrest, etc.

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

37. This section was considered in *R v Jones (Margaret) and Others* [2007] 1 AC 136, HL. The events are to be assumed as actually going to happen and if those events would in law be a crime then the defendant is entitled to use such force as was reasonable to prevent it. Lord Hoffman said that the reasonableness of the force used is an objective question. Ms Brimelow relies on *R(DPP) v Stratford Magistrates' Court* [2017] EWHC 1794 and quotes from paragraph 50, which says “the defence applies to the direct application of force, although the force would not necessarily have to be applied directly against a person. It would apply for example to a defendant who attached himself to a lorry which was believed to be carrying chemical weapons”. Ms Brimelow then draws the analogy with the defendant who had climbed on to the embassy roof. I did not find that quotation or analogy helpful. Climbing on an embassy roof is not using such force as was reasonable to prevent a crime, if that is what it was, occurring nearly 4000 miles away.
38. Mr Rasiyah quoted Lord Justice Simon’s judgment in the same case which drew a distinction between preventing an imminent and immediate crime and a protest against what is regarded as objectionable and even illegal. I agreed with Mr Rasiyah that what Mr Mohammed was doing was protesting against something which might be regarded as objectionable and illegal.
39. Ms Brimelow’s argued next that section 3 of the Criminal Law Act 1967 did not extinguish the defence under common law to use action short of force in the prevention of crime. The question was the reasonableness of what was done. The court in *R v Cousins* [1982] QB 526, compared the defence in section 3 with the common law defence and decided that if force was justified something less than the use of force would be too. *Cousins* involved a defendant making a threat to another to forestall an attack by the other. I found the events of 26th July 2019 were a far cry from that situation.
40. Another case relied on by Ms Brimelow was *Bayer v DPP* [2004] 1 WLR 2856. The defendant in that case had tied himself to tractors as he believed the tractors and drivers were inflicting or about to inflict unlawful damage on the property of another. The defence was available to them whether they tied themselves to the tractors or

attacked the drivers. There is a clear nexus in *Bayer* which is lacking in this case. I do not find that the defendant can avail himself of the common law defence.

41. Finally, Ms Brimelow briefly relied on Article 10, freedom of expression and the common law right to protest. It is clear that this right is a qualified right. The protesters in front of the embassy within Belgrave Square were exercising their rights to freedom of expression in a proportionate way, I find that Mr Mohammed's climb on to the embassy roof was not a proportionate action in the circumstances. The embassy like any embassy in the world is protected not just under the civil law of trespass but by the relevant provisions of the Vienna Convention. It is right that embassies are protected in that more particular way in view of their standing and role. The section protecting diplomatic missions is proportionate and necessary and the aim of the section is sufficiently important to justify limiting this right. I reject that defence.

42. I find the defendant guilty of this offence.

Senior District Judge (Chief Magistrate) Emma Arbuthnot

24th September 2020