IN THE SOUTHWARK CROWN COURT

APPEAL FROM WESTMINSTER MAGISTARTES’ COURT

R E G I N A

v.

**MOOSA MOHAMMED**

DECISION

1. We heard this appeal on 7th and 8th January 2021. The defendant, Moosa Mohammed [MM] had been charged with, and on 24th September 2020 before the Westminster Magistrates’ Court convicted of, an offence contrary to section 9(1) and (5) of the Criminal Law Act 1977 of being on the premises of a diplomatic mission, namely the Bahraini Embassy, as a trespasser on Friday 26th July 2019. He was represented by Ms Kirsty Brimelow QC and the prosecution was represented by Mr Nathan Rasiah. The appeal involved extensive legal argument and we were greatly assisted by both their very helpful skeleton arguments and skilful oral advocacy.
2. MM does not dispute that he went onto the roof of a building which he knew to be the Bahraini Embassy, so that all the elements of the offence are made out and he has no defence to the charge under section 1(3) of the Act. However, he puts forward two other defences to the charge, namely:
3. Necessity;
4. Acting in the prevention of crime.

In addition, it is argued on his behalf that this prosecution is an unnecessary and disproportionate interference with his ECHR Article 10 rights.

The prosecution submits that none of these defences are available to him as a matter of law and that he therefore has no defence to the charge.

1. The facts were not in dispute and were proved by means of the live evidence of one police officer, PC Chris Browne, the reading of witness statements of three others, along with video footage from various sources and some agreed facts. The defendant gave evidence on his own behalf which the prosecution did not challenge and also relied on the written statement of Dr Agnes Callamard, the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions.

Facts

1. On the evening of 26 July 2019 between twelve and twenty persons gathered outside the Bahraini Embassy [“the Embassy”] in Belgrave Square to protest against the reportedly imminent execution of two prisoners in Bahrain, namely Ali al-Arab and Ahmed al-Malali [“AA” & “AM”]. Having been informed that a man had got onto the roof of the Embassy, officers of the Parliamentary and Diplomatic Protection Unit arrived at the scene, which had already been secured, at around 22.47 hours. The man on the roof, five storeys high, who was MM, had unfurled a banner on which was written: “I’m risking my life to save two men…Boris Johnson act now!” He also repeatedly shouted from the roof urging Boris Johnson to wake up and call his friend King Hamad to stop killing AA and AM. He was seen to straddle a ledge at the edge of the roof and the police became increasingly concerned for his safety. They tried to make contact with Embassy staff to be given access. They were told that a key holder was on the way but no-one materialised. They shouted at the security staff who could be seen inside the building to open the doors but these did not respond, only looked out from inside the building.
2. At about 23.21 they could see members of the Embassy staff on the roof approaching MM who became agitated and appeared to panic as what sounded like an altercation on the roof began. A screenshot from video footage seems to show one of the Embassy staff hitting at MM with a stick. At this point some of the protestors shouted out that they were going to throw him off the roof and the police shouted up at the Embassy staff to get back inside. When the police could no longer see the people on the roof but could hear aggressive shouting, officer Lee Stapleton took the decision, for fear that MM might throw himself off, or be thrown off in a struggle, to force entry under section 17(1)(e) of the Police and Criminal Evidence Act to save life and limb and with consideration to the Human Rights Act. In his evidence PC Browne said that this was done out of necessity.
3. The London Fire Brigade was deputed to force entry. This was done by battering down both exterior and interior doors through which the police entered, making their way up to the top of the building and onto the roof where MM was on the floor with a man holding his hands behind his back. He was visibly distressed and frightened. He was handcuffed and PC Browne told him he was safe and wouldn’t come to any harm. PC Larder arrested him for trespass on diplomatic premises and cautioned him at 23.32. MM gave his name and date of birth and complained that he had been tortured on the roof prior to the police arrival and had an injury to his leg. Some grazes could be seen but after MM had been taken downstairs and out of the Embassy a London Ambulance Service crew examined him and said they had no concerns that he was able to be taken into custody.
4. In custody at West End Central police station MM was seen by a custody nurse between 0135 and 0145 hours on 27th. July 2019 and noted to have injuries to his left leg, wrist, forearm and back with a graze to the knee, arm and armpit. He answered “no comment” during a very short interview without a lawyer and was released on bail at 1426 hours. On 20 August he was released again without bail but was charged with the current offence by postal requisition on 22nd. January 2020.
5. Giving evidence, MM said that, now aged 39, he was born and grew up in Bahrain. Aged 14 he said that he was tortured by the authorities for protesting at the arrest of one of his teachers and sentenced to 10 years imprisonment although he was released following international intervention because he was a child. In adulthood he came into conflict with the authorities for founding a committee for unemployed people which led to his being followed and kidnapped by security forces. In 2005/6 he was imprisoned for 9 months for protest and during that sentence threats to him and his family were issued unless he gave up his activities.
6. He then decided to come to the UK, arriving in 2006 and being granted refugee status in 2007. From 2008-9 he became a regular attendee at the UN Human Rights Council in Geneva acquiring observer status to cover the General Assembly and side events.
7. He said that AA and AM were innocent men who had been unfairly sentenced to death for killing a policeman after confessing under torture. The sentence of death having been upheld on 15 May 2019 Human Rights Watch and another NGO had written a letter to King Hamad urging that the sentences be commuted. This was followed by similar appeals from Amnesty International, Fair Trials, Reprieve and the British Institute for Rights and Democracy with which he worked closely. There was a session in Parliament which he said he had covered requesting some MP’s to tweet to stop the executions.
8. On 26 July 2019 Human Rights Watch issued a press release saying: “Executions may be Imminent” and a call was received from the family of AA and AM to say that they were getting their last visits. That evening he was part of the protest outside the Bahraini Embassy but felt they were achieving nothing and decided to do something more drastic in an attempt to save their lives. He climbed up the scaffolding of a neighbouring building and onto the Embassy roof. He said that they needed somebody to call the King directly. He knew Boris Johnson to be a good friend of the King Hamad of Bahrain and that was why he appealed to him to call his friend. He felt he was doing everything he could to stop the execution. He climbed up holding the banner which said he was risking his life, meaning that, in view of what had happened to Jamal Khashoggi in Istanbul, he thought the people in the Bahraini Embassy might torture him. He unfurled it but unfortunately it slipped and dropped onto the balcony. He sent out a tweet from the roof which read: “I am now on the roof of the Bahrain Embassy in London and willing to risk my life to stop the executions of AA and AM. I’m calling on @borisjohnson to call the King to stop the executions immediately.”
9. He felt the best he could do was to get onto Bahraini soil; people would be filming and publicising it; his colleagues were making a live video on social media and publishing it everywhere. He thought this might prevent the executions because Boris Johnson knew about the AA and AM cases and had stopped an execution in Saudi Arabia by calling the King there. He hoped the Prime Minister would do the same in the cases of AA and AM.
10. Then two members of the Embassy staff did come for him, one hit him with a stick and the other threatened to throw him off. They soaked his T-shirt in water and pushed it over his face to stop him breathing saying no-one would come and save him. They pulled him towards the inside and tried to tie his hands – and then the police arrived.
11. AA and AM were executed a few hours later.

Witness statement of Dr Agnes Callamard

1. This was a twelve-page document which was read out in full. It contained information from a wide range of sources much of which would ordinarily constitute hearsay and included expressions of opinions held by the author and others. The prosecution could have objected to much if not most of its contents on these grounds. However, since it was relied upon entirely in support of the defences of necessity and the prevention of crime, Mr Rasiah maintained that it was irrelevant in its entirety because it went only to non-existent defences: at the same time he accepted that, not having objected to its being put before us nor led evidence to contradict its contents, we could take it fully into account in relation to any defence we might find to be available to MM.
2. Of particular potential relevance. Dr Callamard summarised the cases of AA and AM, how each had been subjected to torture to obtain confessions, held on a bus while their trials took place and sentenced to death in absentia. She had made extensive representations to the Government of Bahrain as to how their treatment involved multiple violations of their internationally recognised human rights and urged that their executions be halted. On 26 July 2019, after their death sentences had been upheld by the Court of Cassation rendering their executions imminent, she published a statement as UN Special Rapporteur urgently calling on the Bahraini authorities to halt plans for their execution immediately, to annul their death sentences and allow them a re-trial in accordance with international law.
3. She went on to say that the UK government has a long-standing involvement with the Bahraini government institutions tasked with investigating and redressing allegations of torture and cruel, inhuman and degrading treatment. The UK has a history of intervening in cases of both British and foreign nationals sentenced to death in jurisdictions across the world which have often been successful when sustained at the highest level, giving examples of instances of successful interventions by the UK Prime Minister in the UAE and Saudi Arabia. In relation to Bahrain, she understands from Reprieve, media reports and UK Parliamentary records that since 2016 the UK has made high level interventions in two similar cases to those of AA and AM, where it was alleged they had made false confessions under torture and faced imminent execution. Sustained representation by the UK led to their cases being referred back to the courts in 2018.
4. She said that, at the time of MM’s protest, the UK had not intervened in the cases of AA and AM in a sustained way or at the highest possible level. The only intervention of which she was aware was by a UK FCO Minister Lord Ahmad who said in the House of Lords on 20 May 2019: “[w]e are clearly following the cases of AM and AA and have raised the cases with the Bahraini Government”. There is no indication that the British Prime Minister raised their cases before they were executed.

Defences – Article 10 ECHR

1. It seems to us that Ms Brimelow’s submissions under this head can be dealt with quite shortly without denigrating the cogency of her exposition of the requirements that any interference in the right to free expression must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society for the protection of the objectives set out in Articles 10(2) and 11(2).
2. MM did not go on to the roof of the Embassy primarily to exercise his right to freedom of speech. Inasmuch as he may be said to have been exercising this right in order to achieve his aim of stopping the executions, Mr Rasiah submitted that, to the extent that the offence of trespass on diplomatic premises may be said to impose any restriction on the right to freedom of expression in Article 10, ECHR, it meets all these requirements. He relied by analogy on the case of *Richardson v DPP* [2014] AC 635 where the defendants were charged with aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 and Lord Hughes said at paragraph 3.

*“By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of a trespasser, whether protestor or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced.*

*Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is in accordance with law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people’s property in order to give voice to one’s views.”*

1. Ms Brimelow accepted that there was a “high bar” to overcome where a trespasser sought to rely on article 10. However, she argued that the proceedings against MM were analogous to the protocols under which officers ask protestors to “move on” before charging them with obstruction or criminal trespass so as to ensure that any action by the state restricting article 10 rights is proportionate and involved the minimum level of interference. She argued that MM’s rights had been sufficiently interfered with by the proceedings so far, that it would be disproportionate to continue them and that this court as a public authority should therefore allow the appeal and bring the matter to a close.
2. Having regard to the words of Lord Hughes, we agreed that article 10 rights could not be relied upon to justify trespass and that it was not therefore a breach of MM’s rights for him to be prosecuted or convicted. We reject Ms Brimelow’s contention that each case had to be considered on its merits because we felt sure that, if Lord Hughes had thought this question should be considered on a case by case basis, he would have said so. We conclude therefore that there was no violation of MM’s article 10 rights such as to provide a defence to the charge he faces.

Defences – Necessity

1. Both Ms Brimelow and Mr Rasiah drew on the judgment of Simon Brown LJ (as he then was) in *R v Martin (Colin)* (1989) 88 Cr App R 343 as articulating the elements of the defence of necessity.
2. Ms Brimelow summarised these elements of the defence as being:
3. A defendant must genuinely believe that there is a threat of death or serious injury to persons;
4. That belief must be reasonable;
5. The actions of the defendant must be a reasonable and proportionate response to the threat, and,
6. Where raised, the burden lies on the Crown to disprove a defence of necessity.
7. In similar vein, Mr Rasiah said that the elements of the defence as articulated in *Martin* were as follows:
8. Was the accused, or may he have been, impelled to act as he did because, as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious injury would result?
9. If so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation as the accused acted?
10. We do not think there is any significant difference to be found between these two expressions of the elements of the defence of necessity. It calls firstly for a subjective assessment of the defendant’s state of belief, secondly for an objective assessment of the reasonableness of that belief and thirdly for an objective assessment of the reasonableness and proportionality of the action he took in response to it.
11. However, Mr Rasiah’s primary submission was that the defence of necessity could not arise as a matter of law in relation to a prosecution under section 9 as it would undermine the whole purpose or legislative scheme of the section which implemented the UK’s obligations under Article 22 of the Vienna Convention 1961 to protect a foreign mission; he cited the cases of *R v CS* [2012] EWCA Crim 389 and *R v Quayle & Ors.* [2005] 2 Cr App R 34 in support.
12. But we note that Article 22 in imposing a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity, was not specifically targeted on protests or demonstrations. And Mr Rasiah accepted that the actions of the police in breaking into the Embassy to rescue MM could be justified on the grounds of necessity. Even if the police may be said to have been exercising a statutory power, it was conceded that necessity could justify citizens entering to save life in circumstances akin to those of Mr Jamal Khashoggi in Istanbul.
13. We decided that if necessity may be available in law in those circumstances there are no criteria on which we can rely for drawing a line; each case must be considered on its own merits. We concluded that that the defence of necessity is available to MM in this case if the ingredients are made out.
14. There is no dispute as to whether MM believed there was a threat of death or that it was reasonable for him to hold that belief – the two men were indeed executed within hours. Miss Brimelow cited authorities that showed the defendant does not have to be in the same geographical location as the persons he is seeking to save nor wait until the very last minute, and these were not disputed by the Crown. The issue is whether his actions could be regarded as objectively reasonable and proportionate; that question seems to us to be closely allied to the Crown’s formulation derived from *R v Martin* namely: “may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation as he did.”
15. To determine this issue, we first considered what other action MM could have taken in the attempt to stop the executions which did not involve going onto the Embassy premises. Other measures which might have had the desired result had already failed. Lord Ahmad had written on behalf of the UK government to express its concern but seemingly to no avail. Similarly, representations to the Bahraini authorities had been made by UN bodies and other NGO’s on several occasions without success. The UK Parliament had risen the previous day. As MM was aware, the UK had a record of positive interventions on humanitarian grounds in Bahrain and Saudi Arabia and Boris Johnson knew King Hamad personally. It seems to us that it was reasonable to suppose that only a direct appeal from the UK government directly to the King of Bahrain, if that could be brought about, was the last chance.
16. How was that to be achieved? We accept that some form of public protest was the only option open to MM at this eleventh hour. Unfurling his banner and shouting in the street outside the Embassy was not likely to come immediately to the Prime Minister’s attention. Nor is it likely that he could have achieved his object by saying what he felt he had to say from another location, such as outside the gates of Downing Street, or by climbing onto a nearby building in Belgrave Square (although we do not accept that he had to get onto the roof of the Bahraini Embassy because it was as close as he could get to Bahrain itself, as suggested by Ms Brimelow).
17. We can see that his action in climbing onto the Embassy roof was calculated to bring a massive security response as well as maximum media coverage. It did just that. As to the former, not only did the police, the London Fire Brigade and the London Ambulance Service attend, but we were told that helicopters were hovering overhead. There was considerable international sensitivity following the Khashoggi case and the UK government would want to do everything possible to avoid any similar occurrence at a mission in the UK. That was the sense in which MM was risking his life as stated on his banner. We do not know whether his actions were reported to the Prime minister that night as a matter of urgency nor, in particular, whether he was made aware of what MM was calling upon him to do. But we think the ‘stunt’ of trespassing on the Embassy roof and engaging the UK security forces afforded at least as good a chance of being reported to the Prime Minister as anything else he could have done that night.
18. All that said, we ask ourselves whether there was any realistic prospect that his actions would cause Boris Johnson almost instantly to pick up the phone to King Hamad and the King in turn to call off the executions? While it was imperative that the incident be brought under control and MM removed from the Embassy, no imperative of UK foreign policy was engaged. No British interests were involved and there would have been the strongest official resistance to being seen to heed the call of a trespassing protestor. We accept that this was MM’s last desperate bid to prevent the executions; but in our judgment, there was, objectively considered, no realistic prospect that it would have the desired effect. The idea that Mr Johnson would have made an urgent plea to King Hamad because there was a protestor on his Embassy’s roof is, we think, unlikely in the extreme. If this amounts to saying that there was nothing MM could do to prevent the executions, we think that reflects the reality of his situation.
19. We therefore conclude that we can be sure that MM’s action in climbing onto the Embassy roof was neither reasonable nor proportionate in relation to his stated objective, and that a sober person of reasonable firmness, sharing MM’s characteristics, would accordingly not have responded to the situation as he did.

Acting in the prevention of crime

1. Lastly it is argued by Ms Brimelow on MM’s behalf that he was acting in the prevention of crime and therefore has a defence provided by section 3(1) of the Criminal Law Act 1967, the first part of which reads: “A person may use such force as is reasonable in the circumstances in the prevention of crime…”.
2. Alternatively, or additionally, she submits that he can rely on the common law rule that allows the use of action falling short of the use of force to prevent a crime if it is reasonable in the circumstances.
3. That such defences are generally available is not substantially in dispute. There was some argument about the level of force required and whether this element of the defence was satisfied. But we accept that either MM’s actions in holding onto the parapet involved sufficient force or that, if the statutory defence requires more force than he used, the common law defence was available.
4. What is disputed in relation to this posited defence is whether that which MM was seeking to prevent indeed represented a crime, and whether, in any case, there was a sufficient nexus between the use of force and the prevention of the crime in question.
5. It was agreed that what a defendant is seeking to prevent must be a crime under the law of England and Wales and triable in this jurisdiction. And the crime upon which Ms Brimelow sought to rely was that of torture which, by virtue of section 134(1) of the Criminal Justice Act 1988, is such a crime wherever a public official acting as such inflicts severe pain or suffering on another. To the objection that MM’s actions were not directed at preventing the psychological torture inherent in the anticipation of an execution but the executions themselves, Ms Brimelow maintained, by reference to the cases of *Ocalan v Turkey* [2005] ECHR 282 and *Bader v Sweden*[2005] ECHR 939, that execution of persons following an unfair trial is itself capable of constituting torture. In the former case the Grand Chamber held that the implementation of the death penalty on a person who has not had a fair trial would be a violation of Article 2 of the Convention; and that the imposition of the death penalty after an unfair trial, in circumstances where there is a real possibility of its being carried out, would be a violation of Article 3 on account of the significant degree of human anguish to which it would give rise. These findings were reiterated and followed by the ECHR in the *Bader* case. Mr Rasiah argues that, however abhorrent it may be to our values, the imposition of the death penalty, does not equate to the crime of torture. These cases seem to us to suggest that it could.
6. But even allowing that a breach of Article 3 might constitute torture so as to render the conduct a crime under English law, MM’s actions were directed at preventing the executions themselves. And it is less clear that a violation of Article 2 by implementing an execution after an unfair trial would be a crime in our domestic law. Moreover a court in the UK would be very slow to adjudicate on the lawfulness of a sentence of capital punishment imposed by a foreign court:: see *R v Jones (Margaret & Others* [2006] UKHL 16; [2007] 1 AC 136, per Lord Bingham at paras. 29-30.
7. We therefore think it doubtful that a defence that he acted in the prevention of crime is open to MM despite the force of the argument that it is or should be where, as in this case, there is unchallenged evidence that AA and AM did not receive fair trials.
8. But even if such a defence were open to MM, for much the same reason as we concluded that the defence of necessity fails, we think the defence of prevention of crime would be similarly bound to fail for lack of a clear nexus between the use of force and the crime to be prevented: see *R (DPP) v. Stratford Magistrates’ Court* [2017] 2 Cr App R 32. As already stated, we are sure that MM’s actions stood no realistic chance of preventing the executions in Bahrain. They amounted to a last desperate, albeit well-intentioned and sincere, attempt to do so. But they were, in our view, forlorn.
9. For these reasons we have concluded that each of the defences raised by MM must fail. It not being disputed that the elements of the offence under section 9(1) of the Criminal Law Act of 1977 are made out, it follows that MM is guilty as charged and we so find.

**His Honour Judge Grieve QC**

**Colin Gregory JP**

**Lucinda Lubbock JP**