2019/01264/B2
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT ATWOOD GREEN
{HHJAder)

Royal Courts of Justice
The
Strand
London
WC2A 2LL

Neutral Citation Number: [2019] EWCA Crim 1094

Friday 21st June 2019

B e f o r e:

LORD JUSTICE MALES

MRS JUSTICE SIMLER DBE

and

MR JUSTICE MURRAY

R E G I N A

- v -

M

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Mr J Anders appeared on behalf of the Appellant

Mr W Noble appeared on behalf of the Crown

J U D G M E N T

(Approved)

Friday 21st June 2019

LORD JUSTICE MALES:

Introduction

1. This is an appeal, brought with the leave of the single judge, against the appellant's conviction for wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861.

2. The appellant (now aged 15) was only 14 years and a few weeks old at the time of the offence. The victim was also aged 14 at the time of the offence. We have, therefore, made an order under section 45 of the Youth Justice and Criminal Evidence Act 1999 that nothing shall be published relating to either the appellant or his victim, while they are under the age of 18, which is likely to lead members of the public to identify them. This judgment is anonymised accordingly.

3. The incident with which we are concerned occurred on 1st July 2018. The appellant was tried in the Crown Court at Wood Green in February 2019. There were three counts on the indictment. Count 1 charged the appellant with attempted murder. On this count the jury could not agree and were discharged from reaching a verdict. The prosecution has since offered no evidence. Count 2, which was an alternative to count 1, charged wounding with intent, on which the appellant was convicted unanimously by the jury on 27th February 2019. Count 3 charged having an article with a blade or point in a public place, contrary to section 139 of the Criminal Justice Act 1988. The appellant had pleaded guilty to that count at the beginning of the trial.

4. On 15th April 2019, HHJ Ader, who had presided over the trial, sentenced the appellant to four years' detention on count 2 and imposed no separate penalty on count 3.

5. The appellant sought leave to appeal against conviction on two grounds. The first ground was that the judge was wrong to allow evidence to be adduced of two previous incidents relating to knives. The single judge refused leave on that ground and the application is now renewed before us. The second ground was that the judge was wrong not to add a further alternative to the indictment, which would have enabled the jury to find the appellant guilty of unlawful wounding, contrary to section 20 of the 1861 Act, and to direct the jury accordingly. That is the ground on which the single judge granted leave to appeal.

The facts

6. The incident with which we are concerned occurred in Islington on 1st July 2018. The victim "A" was stabbed three times with a kitchen knife. He sustained very serious and life-threatening injuries. He was flown by helicopter to the Royal London Hospital. He was found to have sustained two deep stab wounds to the right side of his chest and one superficial stab wound to the left side. That may have indicated that there was some movement in the course of the incident.

4. A CT scan revealed a mixture of blood and air in the chest cavity, active bleeding to the abdominal wall, and a laceration to the liver. Surgery was required.

5. We understand that, thankfully the victim has since recovered – at any rate from the physical injuries. In other respects, of course, the incident may have a longer lasting effect upon him.

6. The background to the incident was that four days earlier, on 27th June 2018, A's father, who was with his girlfriend, had something of an altercation in the street (also in Islington) with the appellant and his older brother, "F". A's father recognised the boys as being from the local area, and it appears that F was verbally aggressive towards him.

7. On 1st July, A's father was at a bus stop talking to a friend when he saw the appellant and his

brother get off the bus. A's father confronted F about the incident which had taken place a few days earlier, and an argument developed. A's father accepted that he had pushed F during the course of the argument. A physical altercation then ensued.

8. It was the evidence of the prosecution witnesses that at an early stage of this argument the appellant lifted his waistband to reveal a black-handled knife tucked down his shorts. The appellant was not otherwise physically involved in the altercation at first, but moved away a short distance, drew the knife from his shorts and then approached the group where the altercation was taking place. By this time, A had appeared on the scene. He remonstrated with F about the rudeness shown to his father and placed himself between his father and the appellant. The appellant then stabbed A with the knife, causing him to sustain the wounds to which we have referred.

The witnesses

9. There were a number of prosecution witnesses who gave evidence to this effect and, perhaps not surprisingly, there were some differences in their respective accounts. The evidence of the witnesses in outline was as follows.

10. A's father said that the appellant, who was the younger of the two boys, showed him a black-handed knife. He pulled it out, but said "Come around the corner, there are too many cameras here". He also said "Are we doing this?" A's father accepted that he had pushed F forcefully during the altercation. Later in the incident, A came out and became involved. He remonstrated as to the rudeness shown to his father. The appellant then pulled out the knife and a clash between him and A ensued, after which he noted that A was bleeding. He said that the appellant had made a jabbing motion – not as hard as he could have done, but in a manner that indicated that he knew what he was doing. He said that the appellant pulled out the knife and lunged at A's collar or neck area. He said that he saw the appellant pull out the knife. He had not been waving it about.

11. A himself gave evidence. He said that he had heard an argument and went down to see his father talking to the older of the two boys. The older boy had later punched A and he went for the younger boy. He saw the younger boy holding something big and white. He felt pressure to his right-hand side, felt dizzy and saw "loads of blood". He had seen something in the boy's hand, close to his chest, as he approached him.

12. Simon Pavitt was the friend with whom A's father was speaking at the bus stop. He said that A's father had told the older boy not to insult him when he was with his girlfriend. The smaller boy (the appellant) had said "You can't do nothing because there's a camera there". The older body was saying "Come on, do something". A had joined the group. He had not been aggressive. Mr Pavitt heard a woman shout "He's got a knife". He saw the smaller boy approach from the middle of the road with a large carving knife. He appeared to be moving towards A's father, but A moved across and put himself in between them. A put his hands on the boy's shoulders and said "Do not". The knife, according to Mr Pavitt, had a very long blade, seven or eight inches, plus the handle. The larger boy said "Do it", and then "Do him". The younger boy had referred to the presence of cameras.

13. Alexandria House was an independent witness. She had witnessed the altercation. She saw a younger boy approach the group with a kitchen knife and stab the victim. The boy with the knife had then run around the corner and across the road. She saw him stab the victim multiple times in the stomach, thrusting rather than prodding. It appeared to be a kitchen knife with a black handle. The boy had not said anything.

14. Sian Elliott saw the incident from a balcony overlooking the scene. She saw the smaller boy move towards the victim and noticed him take out a big kitchen knife. She had been shocked and

shouted "Leave it". She had not seen the stabbing, but had seen blood on the victim's T-shirt.

15. Stevie Elliott filmed part of the incident and gave a similar account. She saw the smaller boy with a kitchen knife. He had run around the group, come back with a knife, pulled it out and "pelted or thrusted" at the victim twice with it.

16. Rhys Mathews witnessed the incident. He described seeing the younger boy walk off and then return with a knife about 20 centimetres long in his hand. He was swinging the knife. He had seen the boy swing at the victim's body.

17. Lee Tomlinson saw the boy walking down the road with a long-bladed knife in his hand. He had squared up to the victim and brought the knife down about three times.

18. Thus, there was clear evidence, including from independent witnesses, that the appellant had approached the group of which A was a part, brandishing a knife, and that he had stabbed him several times in a manner which could not have been accidental. Although cross-examined, none of the prosecution witnesses was prepared to accept that the appellant's motions in the stabbing could have been accidental.

The appellant's case

19. The appellant's defence was accident in the course of a fast-moving incident. He said that he had not intended to injure A and did not know how the injuries had been sustained. They must have occurred by accident when he was waving or swinging the knife about from side to side by way of deterrence and without intending to stab anyone. His evidence was that he did not habitually carry a knife but had found this knife earlier on 1st July and kept it. He had seen a strange man going down an alleyway and then coming back out. The appellant went into the alleyway and found the knife. He put it into his shorts. He did not know why he had picked it up.

He did not want to throw it away on the bus because he did not think that was appropriate. He did not tell his brother that he had it. He said that A's father had been aggressive and had grabbed F by the arm. He (the appellant) had not said anything about CCTV cameras. Another person arrived at the scene and punches were thrown. By now there were three men around his brother and he wanted to get him away. He pulled out a knife to get the men away from his brother. He did not intend to use it. A had run towards him, but the appellant had not stabbed him intentionally. They had wrestled. He had been moving or swinging the knife from side to side and only realised that A was hurt when he let go of the appellant. He regretted that A had been hurt and had been shocked. He denied showing the knife to A's father earlier in the incident. The witnesses were wrong when they said that they had seen the knife before there was any physical incident, or that he had used it in a stabbing motion. He had disposed of the knife afterwards in a bin.

20. The appellant's evidence was the only evidence of accident in the case. There was, therefore, a clear conflict between the accounts of the prosecution witnesses and the appellant's version.

Alternative count/offence – the law

21. We deal first with the issue on which leave to appeal has been given: whether the judge should have left section 20 to the jury as an alternative count. It was common ground between counsel at the trial that the law is correctly stated in *Blackstone's Criminal Practice 2019* at paragraph D-19.58 as follows:

> "**Judge's Discretion in Directing Jury as to Alternative Offences**
>
> The judge in summing-up is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law. If, however, the possibility that the accused is guilty only of a lesser offence has been obviously raised by the evidence, the judge should, in the interests of justice, leave the alternative to the jury. This is the case even if neither prosecution nor defence counsel wishes the alternative offence to be left to the jury: (*Coutts* [2006] 4 All ER 353, followed in *Brown* [2014] EWCA Crim 2176, but see *Brown*

> [2011] EWCA Crim 1606). It is important for the court to leave an alternative which does not require proof of specific intent where such intent was required for the charge on the indictment: (*Hodson* [2009] EWCA Crim 1590; *Foster* [2009] EWCA Crim 2214; *Johnson* [2013] EWCA Crim 2001). The court should not take the initiative to add an alternative charge after the accused has given evidence: (*B(JJ)* [2012] EWCA Crim 1440)."

22. We would accept this as an accurate statement, although it would be preferable to regard the decision whether to leave an alternative offence as calling for an exercise of judgment, rather than an exercise of discretion. It is, however, the kind of decision which requires a number of matters to be taken into account and on which there is often no single right answer. Relevant matters will include: the evidence which has been given, or, if the question is whether to add a count at an early stage of the trial, which it can reasonably be anticipated may be given; whether leaving the alternative offence is likely to assist the jury on the one hand, or unnecessarily complicate a simple case on the other; and whether introducing a possible new offence can be done without unfairness to the defendant. This court will not interfere with a judge's exercise of such a judgment, unless it is clearly wrong. As Lord Bingham explained in *Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [23], the critical question will often be whether the alternative verdict is one which is obviously raised by the evidence:

> "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. … I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge …"

23. This court summarised the effect of *Coutts* and other authorities in *Barre* [2016] EWCA Crim 216. Gross LJ, giving the judgment of the court, said at [22]:

> "The law in this area has been considered in a number of authorities, most recently *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 … and *R v Foster* [2007] EWCA Crim 2869, [2008] 1 WLR 1615, a decision in four conjoined appeals heard by a five-member Court of Appeal. For present purposes the following summary may be distilled based on these decisions and others there referred to together with the discussion in *Archbold* at paragraphs 4-532 and following:
>
> 1. The public interest in the administration of justice will be best served by a judge leaving to the jury any obvious alternative offence to the offence charged. The actual wishes of trial counsel on either side are immaterial. As observed by Lord Bingham in *Coutts*:
>
> > 'A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.'
>
> 2. Not every alternative verdict must be left to the jury. Plainly there is no such requirement if it would be unfair to the defendant to do so. Likewise, there is a 'proportionality consideration': *Foster* at [61]. The alternative need not be left where it would be trivial, insubstantial or where any possible compromise verdict could not reflect the real issues in the case (*ibid*). The requirements to leave an alternative verdict arises where it is 'obviously' raised by the evidence. It is one to which 'a jury could reasonably come' or, put another way, 'where it arises as a viable issue on a reasonable view of the evidence': *Foster* at [54]; *Coutts* at [85].
>
> 3. Subject to the above framework, whether in any individual case an alternative verdict must be left to the jury is necessarily fact specific. In this context, the trial judge will have 'the feel of the case' which this court lacks: *Foster* at [61].
>
> 4. Where an alternative verdict is erroneously not left to the jury, on an appeal to the court the question remains as to whether the safety of the conviction is undermined: *Foster* (*loc cit*)."

24. *Barre* was a case of injuries, in that case fatal injuries, caused by a knife wound during a fight although, inevitably, there were a number of differences between the facts of that case and the facts of the present case. The issue was whether the judge ought to have left manslaughter to the jury as an alternative to murder. The court held that he was not obliged to do so. The principal

reason for so holding was that the use of a knife with "moderate force" (that being a technical expression in this context) in the chest area penetrating the deceased's body to the hilt of the weapon was itself indicative of an intention to cause at least really serious harm. In those circumstances the court concluded at [32]:

> "The upshot, in our judgment, is that an alternative verdict of manslaughter was not obviously raised on the evidence. It did not arise as a viable issue on a reasonable view of the evidence. In the circumstances, the judge did not err in declining to leave the alternative verdict to the jury. The most that can be said is that some judges might have left it but that falls short of establishing error on the part of this judge in this case."

25. The recent case of *R v Braithwaite* [2019] EWCA Crim 597 was also a case of a fatal stabbing where the question arose whether manslaughter should have been left to the jury. In fact, the judge did direct the jury that if the defendant deliberately stabbed the victim, without intending to kill or to cause really serious harm, but intending to cause some harm falling short of this, they should find him not guilty of murder but guilty of manslaughter. The defence contended, however, that the possibility of a conviction for manslaughter should also have been left to the jury on a different basis. This was unlawful act manslaughter which was said to arise because, even though the jury may not have been sure that the defendant had deliberately stabbed the victim who may therefore have been impaled on the knife in the course of a fight, the defendant was unlawfully in possession of and was brandishing a knife in circumstances where all sober and reasonable people would inevitably realise that there was a risk of some harm.

26. The court rejected this argument. After citing what he had said in *Barre*, Gross LJ observed that this alternative version of manslaughter was remote from the real issues at the trial, which were primarily whether the stabbing was deliberate and, if so, whether it had been done in self-defence. It was an artificial and unreal scenario which "emphatically does not arise obviously

from the evidence".

27. Thus, we see that the authorities have consistently followed the approach suggested by Lord Bingham in *Coutts* and that the critical question is often whether the alternative offence is one which arises obviously from the evidence.

The submissions

28. For the appellant Mr Jon Anders submits to us, as he submitted to the trial judge, that the appellant's evidence raised the possibility that he had acted recklessly in brandishing the knife and that there was a real danger that the jury had concluded that the appellant was responsible for causing the injuries, without being sure that he intended to do so, and had convicted him on that basis. He emphasised the appellant's youth and the unlikelihood (as he suggested) that the appellant would have wished to cause really serious harm to a stranger whom he did not know.

29. For the prosecution, Mr Will Noble submits that there was abundant evidence, including from independent witnesses, that the appellant walked towards the group, holding a knife, and that he stabbed A three times, in quick succession, in a manner which was clearly deliberate. It was a matter for the judge whether to leave section 20 as an alternative; and in circumstances where the section 18 count was already an alternative to the primary case of attempted murder, it was unnecessary for him to do so. The verdict of the jury, convicting the appellant on count 2 and being unable to agree on the count of attempted murder, demonstrates that they rejected any possibility of lack of intent to cause serious harm.

Analysis

30. In our judgment there was in the circumstances of this case no realistic scope for the possibility that the appellant had stabbed A deliberately, but in doing so had not intended to cause him really serious bodily harm. The jury was indeed confronted with a stark choice. Either the appellant had stabbed A three times deliberately, in quick succession, with two of those stab wounds penetrating

deeply; or it had all been an accident, in which the appellant had not meant to stab A at all. If the stabbing was deliberate, it was very difficult to see how the appellant could not have had the intention necessary for a conviction under section 18. The deliberate and repeated stabbing spoke for itself. It was compelling evidence of an intention to cause really serious harm.

31. On the other hand, if it was an accident in which the appellant had not intended to stab A at all, he was not guilty under section 18 or under section 20, and was entitled to be acquitted. As Mr Anders has acknowledged, because the wound was not fatal, there was no room for any conviction of a lesser offence along the lines of the unlawful act manslaughter argument advanced in *Braithwaite*.

32. This was not, therefore, a case where section 20 was an obvious alternative offence which there was evidence to support. It was not the appellant's evidence that he was guilty under section 20 because he had stabbed A, but had not intended to cause him serious harm. His evidence was that he was not guilty at all. He did not suggest that he had stabbed A deliberately, but said that he could not account for how the injuries had occurred. On a proper analysis, therefore, far from being an obvious alternative offence supported by evidence, a conviction under section 20 would have been an implausible outcome.

33. That leaves the danger, highlighted in *Coutts* and other cases, which was summarised by Professor Hungerford-Welch in his commentary on *Barre* in [2016] Crim LR 770, which Gross LJ cited in *Braithwaite* at [39]:

> "The real tension in such cases … arises from the possibility that the jury will decide that the defendant is not guilty of the offence on the indictment, but is guilty of 'something'. This in turn raises the risk that either the jury will convict him of the more serious offence to ensure he does not escape punishment altogether (which would clearly be unfair on the defendant), or else acquit him even

> though they … are sure that he is guilty of some criminality (thus leaving criminality unpunished)."

Mr Anders also invoked that concern as being a factor in this case.

34. While that may be a reasonable concern in some cases, it does not mean that a lesser alternative must be left to the jury in every case where it is a possibility, regardless of whether the alternative is one which is obviously raised by the evidence. We refer to what Lord Mance said in *Coutts* at [98] to [100], on which Mr Anders relied:

> "98. However, in the limited number of previous cases in the United Kingdom, a different general approach has been taken in a context where an alternative verdict presents itself as possible. The approach has been (a) to recognise that there *can* be a real risk of the absence of a direction regarding the possibility of an intermediate alternative verdict influencing a jury to convict of the more serious charge laid by the Crown, out of reluctance to let the appellant 'get clean away with a complete acquittal, and (b) to seek to identify whether in the particular circumstances of the case that real risk actually arose: … The test involved in part (b) of this approach was advanced by Lord Ackner in *R v Maxwell* [1990] 1 WLR 401 at p.408 in the following terms:
>
> > 'What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct.'
>
> 99. I am persuaded that this is an unworkable test to apply to a jury trial. There is no reliable means by which an appellate court can, on so particular a basis, measure whether or how a jury may react to an unnatural limitation of the choices put before it. One is entitled to assume that juries go about their task in the utmost good faith, but the concern is with sub-conscious as well as conscious reactions. Like my noble and learned friends, I find persuasive the reasoning of Callinan J in *Gilbert v The Queen* (2000) 201 CLR 414, 441, para. 101, to the effect that, as a matter of human experience, a choice of decisions may be affected 'by the variety of choices offered, particularly when … a particular choice [is] not the only or inevitable choice'. (In the present case, the possibility

> that the decision not to leave manslaughter to the jury might conceivably play out against, rather than for, the appellant is also inherent in defence counsel's apparent remark to the appellant at the time about 'rolling the dice'.)
>
> 100. Accordingly, in my view, where, as Lord Bingham has said, an obvious alternative verdict presents itself in respect of some more than trifling offence and can without injustice be left for the jury to consider, the judge should in fairness ensure that this is done, even if the alternative only arises on the defence case in circumstances where as a matter of law there should apart from that alternative be a complete acquittal."

35. It is apparent that Lord Mance's conclusion on this point, consistent with that of Lord Bingham, was that the alternative offence should be left, when there was evidence to support it as an obvious alternative verdict. He did not, therefore, propound a different approach from that to which we have referred.

36. It is and remains the case that it is for the trial judge to make a judgment. He (or she) will have a better feel for the case than this court will have. That judgment is whether, in any particular case, it is appropriate to include the possibility of a lesser alternative verdict. We see no reason to think that the judge was wrong to conclude that an alternative count was unnecessary in this case. We note, moreover, that the jury knew that the appellant had pleaded guilty to possessing the kitchen knife and that therefore there would be no question of him escaping punishment altogether. We conclude, therefore, that the judge was entitled not to accede to the submission that section 20 should be left to the jury as a possible alternative verdict.

Intention – the summing up

37. In his written submissions, Mr Anders made no criticism of the judge's summing-up on the question of intention. However, he has this morning adopted an observation made by the single judge as to the terms in which the trial judge dealt with the question of intention. The judge directed the jury that in order to convict they had to be sure that the appellant intended to cause really serious bodily harm and that if they were not sure of this, he should be acquitted. It is clear

that the jury were satisfied about this and that to the extent they entertained any doubt at all, it was whether the appellant had intended not merely to cause really serious bodily harm, but to kill. That is apparent from the fact that, as we are told, they indicated at an early stage of their deliberations that they had reached a verdict on count 2, but ultimately failed to agree on count 1.

38. That said, and although there is formally no ground of appeal on this point, we agree with the single judge that the trial judge's direction was not as clear as it might have been. When ruling that the alternative section 20 offence would not be left to the jury, the judge stated that the jury would be directed very carefully on the intent necessary for a conviction on count 2. It is, therefore, very surprising that the judge did not provide the jury with a written direction, as this court has repeatedly urged. When he summed up, the judge correctly told the jury that they had to be satisfied that the appellant intended to cause really serious bodily harm. However, after summarising the case for the prosecution and the defence, he added:

> "… in particular, you need to look at whether those injuries could have been caused accidentally or whether they were in fact caused deliberately. And the prosecution would say that the facts speak for themselves, to some extent; it is not one wound it is three. That does not sound like an accident."

39. Taken in isolation, that would, or at least might, suggest that it was sufficient for the prosecution to prove that the injuries were caused deliberately. That would, of course, be wrong. The fact that these particular wounds were caused deliberately would be evidence from which the jury might (and indeed would be likely to) conclude that the appellant intended to cause really serious bodily harm. But that is, nevertheless, a matter about which they would need to be sure. If written directions had been given after discussion with counsel beforehand, as should by now be standard practice, any such inaccuracy could have been avoided. As it is, however, the summing-up on the question of intention must be taken as a whole, and, taken as a whole, the

direction on intention was sufficient, and the inaccuracy here, if such there was, does not render the appellant's conviction unsafe.

The previous knife incidents

40. We turn next to the renewed application for leave to appeal against the judge's decision to allow the prosecution to adduce evidence of two previous matters. The first matter was an occasion when the appellant and his brother F were stopped by police on 31st October 2017 and the appellant was found to be in possession of a penknife, possibly with a missing blade. He told the police that he had found the knife and kept it. He received a police warning.

41. The second matter occurred on 21st May 2018. The appellant, who was at school, was seen by a teacher searching for and viewing images of knives on his computer. It appears that they were flick-knives. He was spoken to by a police officer and warned about the possible consequences of carrying knives.

42. It should be noted that by the time the judge gave his ruling, the appellant had pleaded guilty to count 3 (having an article with a blade or point in a public place). Accordingly, evidence of the earlier matters could only be relevant to the extent that it had a bearing on counts 1 or 2. Moreover, at the time when the judge gave his ruling, the appellant had not yet given evidence. Mr Anders, on his behalf, had indicated a provisional view that he would not be adducing evidence that the appellant, who had no convictions, was of good character. Ultimately, evidence of the appellant's good character was adduced and the judge gave an appropriate direction. But that was only done after the judge had ruled that the earlier matters could be adduced. If he had ruled otherwise, the trial may have taken a different course so far as the appellant's character was concerned.

43. The single judge concluded that there was no arguable basis for interfering with the judge's ruling. We agree. The appellant has served a Defence Statement in which he asserted that he did

not habitually carry a knife, but had found a knife in the street, had picked it up, and had kept it out of curiosity, without any idea of what he was going to do with it. The evidence of the previous matters was, therefore, relevant as showing that the appellant had an interest in knives and a propensity to carry them. It was relevant to undermine and contradict his case that he had just found the knife with which he stabbed A in the street. That was the same excuse as he had given in the previous incident. If the jury rejected that excuse and concluded that he had knowingly and deliberately taken a knife with him, that was a matter which they would be entitled to bear in mind when considering the appellant's state of mind.

44. There is no criticism of the way in which, having decided to allow the evidence, the judge directed the jury in relation to the two previous matters.

Disposal

45. Accordingly, we dismiss the appeal in relation to Ground 2 (the alternative count) and refuse leave to appeal in relation to Ground 1 (the evidence of the two previous incidents).

Post script

46. There is one final matter which must be mentioned, although it is not the subject of any ground of appeal. At the beginning of his summing-up, the judge explained in conventional terms that he would first direct the jury on the law and would then remind them of the evidence. He then said:

> "I wish I did not have to do that. You have been reminded of the evidence by both counsel, perfectly appropriately, and in other countries this does not happen. But I am afraid it does in this country and I have to do it."

47. The judge would, with respect, have done better to keep his opinions to himself. It cannot have assisted the jury – or even encouraged them to pay attention – to suggest to them at the outset that a major part of the summing-up, which they were about to hear, was pointless and unnecessary. In fact, however, a balanced summary of the evidence from an independent and

impartial judge, pulling together the evidence on the important issues in the trial, is likely to be of assistance to the jury in all but the very simplest of cases, and even in those cases will at least reassure the jury as to the straightforward nature of their task, without taking very long to do. This, however, was a trial which had lasted a week and numerous witnesses had been called. Providing that assistance to the jury, which will generally require more than simply reading out extracts from the judge's notebook, is an important part of the function of a trial judge.

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