Neutral Citation Number: [2019] EWCA Crim 411

No: 201804313/B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM
THE CROWN COUNT AT SNARESBROOK
(Recorder Philip Engelman)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 1 March 2019

B e f o r e:
LORD JUSTICE MALES

MRS JUSTICE COCKERILL DBE

COMMON SERJEANT OF LONDON
(HIS HONOUR JUDGE MARKS QC)
(Sitting as a Judge of the CACD)

R E G I N A
v
RICKY GREEN

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Ms V Ramsden appeared on behalf of the **Appellant**
Ms M Jollie appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE MALES:

1. On 22 August 2018, in the Crown Court at Snaresbrook, the appellant, Ricky Green, now aged 31, was convicted of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. On 19 September he was sentenced by Mr Recorder Philip Engelman (the trial judge) to 26 weeks' imprisonment. He now appeals against conviction by leave of the single judge, a previous appeal against sentence having already been dismissed. In fact the appellant has now served that sentence.

2. The grounds of appeal are that the judge was wrong to have given the jury an adverse inference direction under section 34 of the Criminal Justice and Public Order Act 1994; that having decided to do so, the terms of the direction which he gave were inadequate; and that the judge failed to give the jury any direction as to one way in which the appellant put the case, namely that he acted in defence of property.

3. The incident in question occurred at about 4.00 am on Saturday 23 December 2017 in Brick Lane, London. It was captured on CCTV. The footage showed the complainant, a man called Oliver Ward, crossing the road together with another man while a car driven by the appellant's father was driven slowly along the road. The appellant was a passenger in the vehicle. The footage showed that Mr Ward and his companion made deliberate contact with the vehicle being driven by the appellant's father, clipping or pushing the wing mirror on the driver's side and also making contact on the passenger side. The car stopped and the appellant jumped out. He punched Mr Ward with such force that he fell to the floor and lost consciousness. At that point the appellant's father also got out of the car and approached Mr Ward's companion, gesticulating towards the wing mirror on the driver's side of the car. Mr Ward's companion threw a bottle which struck the appellant. The appellant then armed himself with his father's wooden walking stick but did not use it or

brandish it. He remained calm.

4. The police were called. The appellant was co-operative, saying that he had been involved in the incident. It was apparent that he was concerned for his father.

5. Mr Ward was taken to hospital. He had sustained bruising and a loose tooth. Subsequent investigation showed fractures to the right eye socket.

6. The appellant was taken to the police station where he was interviewed under caution with a solicitor in attendance. He had been arrested on suspicion of assault and possessing an offensive weapon - a metal pole. In fact there was no metal pole, only the walking stick. In interview DC Patzer summarised the evidence as he understood it, saying that the car had crashed, that the appellant had exited the car and punched Mr Ward and had then picked up a metal pole from the back of the car. He then returned to the unconscious Mr Ward but was held back by people at the scene who prevented him from doing anything further.

7. As will be apparent, this account was inaccurate in several respects. As we have already said, there was no metal pole, the car had not crashed and it appears that the appellant did not need to be restrained as suggested.

8. The officer then asked whether the appellant wanted to give an account before the CCTV was played or whether he would like to watch the CCTV first. The appellant responded "no comment". The CCTV was then played while the officer provide a commentary. At the conclusion of the CCTV footage the appellant was asked whether there was anything else he would like to say, although in fact so far he had not said anything at all. The appellant remained silent.

9. The officer then cautioned the appellant again and suggested to him that he had gone to get the metal pole because he wanted to cause further injury to Mr Ward or his friend. After yet another caution the officer asked whether there was anything else that the appellant would

like to say to which he responded again "no comment".

10. The officer summarised his understanding of the evidence again, saying: "You're not going to say anything about this" and again cautioning the appellant. The appellant said "no comment" and the officer terminated the interview.

11. The appellant's case, set out in his defence statement and at trial, was that he had acted in defence of his father and in defence of property - the property being the car. He said that he had heard glass smash on his father's side of the car and he instinctively exited the vehicle at speed, throwing a punch at Mr Ward in order to prevent a further attack upon his father or further damage to the car. He said that he had acted in the moment and had not meant to cause the injures that Mr Ward sustained. He was of previous good character and produced character evidence. He said he had declined to comment in interview because, as a man of good character, he had relied on his solicitor's advice.

12. Accordingly the issues for the jury to consider were, in outline, whether the appellant had a genuine belief that it was necessary to act as he did, either in defence of his father or to prevent further damage to the car and, if so, whether the action which he took was reasonable, in the circumstances as he understood them to be.

13. It was submitted to the judge on his behalf that no adverse inference direction should be given or, more accurately, that the jury should be directed not to draw any adverse inference as a result of the appellant's failure to answer questions in interview. The submission was that there were in fact no questions asked, merely a commentary (and an inaccurate commentary at that) which was given by the interviewing officer so that it was not a case of failure to answer questions in interview at all. In the familiar words of the caution it was said that there was no "failure to answer when questioned" because there were no questions.

14. The judge rejected this submission, recognising that there were no specific questions asked by the officer in the course of the interview, but holding that it was plain from the circumstances and from the whole tenor of what the officer said that the appellant was being invited to give his account and explanation of what had occurred as shown on the CCTV. He concluded therefore that a direction should be given and said at the conclusion of his ruling:

> "So, in my judgment, this is a proper case for a no- comment direction, which, of course, I will discuss with counsel."

15. In the event, as we understand it, there was no discussion with counsel of the terms in which the adverse inference direction should be given. The judge simply gave it in the course of his summing-up as follows:

> "I now go on to the issue of no comment. As you will recall, when this defendant was interviewed by the police, he was shown the CCTV tape and asked on a number of occasions to make any comment which he had and he steadfastly refused to make any comment. He told you in his evidence the reason for that is because he was advised by his solicitor to make no comment. I'll come back to that in a moment. Now, when he was cautioned, you will recall because you were told by the police officer, he was told he didn't have to say anything. He had a right to say nothing and he was also told it might harm his defence if he did not mention when questioned something which he later relied on in court so he was aware then that conclusions might be drawn against him if he failed to mention facts when he was being interviewed.
>
> The facts which he failed to mention are these, the ones of importance. Firstly, that there was a bang on the wing mirror on the side where his father was sitting. Secondly, that the, according to him, the driver's side window was down, thirdly, that the wing mirror was smashed. Fourthly, that the glass in the wing mirror went into the car and fifthly, that he was concerned that his father was under attack which was the reason why he struck Mr Ward.
>
> The reason why he failed to mention those facts as he told you, is that he was advised to give a no comment interview. Now, usually, the conclusion which is suggested might be drawn from his failure to mention those facts is that

> they've been made after the interview and not true. However, you may only draw such an inference if you are satisfied that the defendant's failure to mention the facts relied on in his defence is because the prosecution case is so strong that it clearly calls for an answer and there's no sensible reason for the failure to bring forward those facts when he was being interviewed, but I warn you, you must not convict solely on the strength of the failure to make comments.
>
> I also add in this case that you were told by the defendant that the reason he made or gave a no comment interview was because he was told to do so by his solicitor. It's a matter for you entirely what you make of that, but you may well think that if the defendant is given advice by a solicitor, that he might have good reason for it, but I emphasise that is entirely a matter for you."

16. On appeal Ms Veronica Ramsden for the appellant has repeated the submission that no adverse inference direction should have been given in circumstances where the appellant has not failed to answer any identifiable question. She submitted also that the direction given was insufficient, in particular because the judge did not direct the jury that they could only draw an adverse inference if they concluded that the appellant's silence in interview could only be attributed to him having no answer or none that would stand up to questioning.

17. Section 34 of the Criminal Justice and Public Order Act 1994 provides as follows:

> "(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; ...
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—
> ...
>
> (d) the court or jury, in determining whether the accused is guilty of the

offence charged, may draw such inferences from the failure as appear proper."

18. The requirements which must be satisfied for this section to operate have been considered in a number of cases including R v Argent [1997] 2 Cr App R 27; R v Condron [1997] 1 Cr App R 185 and R v Webber [2004] UKHL 1; [2004] 1 Cr App R(S) 40. There is also valuable guidance together with an example direction in the Judicial College Crown Court Compendium.

19. For present purposes we would highlight the following points.

20. The first is that in order for the section to operate it is necessary that the defendant is being questioned under caution and fails to mention a fact later relied upon. The defendant is questioned under caution, in our judgment, if the circumstances are such that he is expressly or by necessary implication invited to give his account of the matter which has given rise to the interview. It is not necessary that specific questions are asked of him.

21. That is sufficient to dispose of the first ground of appeal. We agree with the judge that it was plain that the appellant was being invited to give his account and deliberately chose not to do so. He had been arrested for assault and was clearly being invited to say whether he accepted that he had assaulted Mr Ward and if not, why not? He was asked, in the course of the interview, to account for the injury to his hand which, the officer suggested, would have been caused by the blow which he struck. The officer could have said, “why did you punch him?”, in so many words but in effect that was what the officer was saying and the appellant knew that he was in effect being asked that. He was expressly asked whether he wanted to give an account before or after watching the CCTV and, after it had been played, whether there was anything which he would like to say. What he was being invited to comment on was perfectly apparent to him.

22. It was therefore, in our judgment, a case where a direction was appropriate. It was not a case where, because there were no specific questions, the appellant did not appreciate that he was being questioned and invited to give his account. That was not his evidence. Rather his evidence was he decided not to say anything on the advice of his solicitor.

23. Second, in order for any adverse inference to be drawn, the fact that the defendant failed to mention must be one which in the circumstances existing at the time of the interview he could reasonably have been expected to mention when questioned. The judge's direction did not make this important point clear to the jury. He did say that they would need to be satisfied that there was no sensible reason for the appellant's failure to mention the facts and that the reason which the appellant gave was that he was advised by his solicitor to say nothing. But those are not quite the same points. The jury might, for example, have considered that it would have been reasonable in the circumstances for the appellant to indicate, in broad terms, that his actions had been in defence of his father or to prevent further damage to the car. Whether it would have been reasonable to expect him to go into further detail, in the absence of specific questions, may have been another matter. The jury needed to be guided on how they should approach this topic.

24. Third, it is usual to direct the jury that the adverse inference should only be drawn if the jury considers that it is fair and proper to do so. That is appropriate because, even if the conditions for the drawing of an inference are satisfied, it remains a question for the good sense and fairness of the jury whether it is right to do so. That aspect of the direction was omitted by the judge.

25. Fourth, the jury should be directed that they should not convict the defendant wholly or mainly because of a failure to mention facts in interview. Although the judge warned the jury in this case not to convict solely on the strength of the failure to make comments, he

omitted to say "or mainly". This too can be important. There may be circumstances where a failure to mention facts is the main influence on the jury's verdict, even though not the only one.

25. Finally, the judge elided separate aspects of the direction. He said that the jury could only draw an adverse inference if satisfied that the failure to mention the fact relied on in his defence was because the prosecution case was so strong it clearly called for an answer and there was no sensible reason for failure to bring forward those facts when he was being interviewed. However, the strength or otherwise of the prosecution cannot be a reason for failing to mention facts in interview. Rather the point is that no inference can be drawn unless the prosecution case is so strong that it calls for an answer.

27. Although the judge's direction covered much of the ground and a judge is entitled to adjust the specimen direction to the circumstances of the case and not obliged to stick to it word for word, there were, as we have indicated, a number of omissions in the direction given in this case. The jury were not given this or indeed any other legal direction in writing. There had been no discussion of the terms of the adverse inference direction to be given, despite the judge saying, at the conclusion of his ruling, that there would be such a discussion.

28. This case illustrates the value of such a discussion taking place. Moreover, we cannot help thinking that if there had been written legal directions, as this court has repeatedly encouraged, the deficiencies in the direction which we have identified would have been avoided. The case demonstrates that even in a fairly straightforward case such as this, written directions will be useful, not only to assist the jury but also to focus the mind of the judge. Be that as it may, we conclude that the direction in this case was inadequate in the respects we have indicated, even though in one respect, namely the last part of the direction dealing with the solicitor's advice, it was more favourable to the appellant than

the standard direction.

29. Ms Jollie, for the prosecution, submitted that even if the direction was inadequate, the conviction was not thereby rendered unsafe. She says that failure to answer questions in interview was not a central part of the prosecution case. However, the issue in the case was whether the appellant acted in defence of his father or defence of property, which would depend in part on whether he had formed a subjective belief that his father, or the vehicle in which they were travelling, needed defending. It may well be that the jury regarded his failure to say so in interview as a significant matter. We cannot know. But it was entirely possible that they concluded that this was an excuse which the appellant had invented afterwards in order to provide himself with a defence which formed no part of his motivation at the time. If that was part of their thinking it was all the more important that they should only form that view after being given a proper direction as to the circumstances in which such an adverse inference could be drawn. They were not.

30. We turn to the final ground of appeal, which is that the judge failed to direct the jury as to the appellant's defence of defence of property. It was part of the appellant's case at trial that he had acted in order to prevent damage to the car as well as to defend his father. That was his evidence and it was agreed between counsel that the jury should be directed on this issue. The judge indicated that this would be left to the jury or at any rate said nothing to indicate the contrary. The issue of defence of property was then referred to by both counsel in their closing speeches. It was not mentioned, however, in the judge's summing-up at all, the summing-up on self-defence being concerned solely with defence of the appellant's father.

31. At the conclusion of the summing-up Ms Jollie, for the prosecution, raised the point with the judge in the presence of the jury. She said:

> "There is one matter. We had discussed defence of property yesterday. We had discussed defence of property yesterday as well as defence of another."

32. The judge's response was that he realised that was the position but he had deliberately omitted the direction. He said : "I've left it deliberately to the principal issue in this case". He continued:

> "Members of the jury, there's no mystery about this. At one stage, the defendant said [inaudible] he was concerned about damage to his car, but you may well think the main issue in this case is the defence of his father."

33. The jury then retired. Subsequently they came back with a question as to the matters they needed to answer relating to self-defence. They asked the judge to confirm that the questions to answer were first, did the defendant act in self-defence, to which the judge responded:

> "The principal defence in this case is that this defendant acted not in defence of himself, but of his father and that is the issue you should concentrate on."

34. The second matter about which the jury asked was whether they need to consider whether the appellant's actions were reasonable. Again, the judge dealt with that in terms of lawful defence of another with no mention of defence to property.

35. The result of all that was that the judge confined the issue to defence of the appellant's father and effectively withdrew the issue of defence of property from the jury's consideration. Moreover, he did so without warning by the way he dealt with it in the summing-up, when counsel had understood that it was going to be left and had addressed the jury on it.

36. Ms Jollie submitted that the judge was right to confine the issue in this way because the appellant's principal fear, if he had one, must have been fear of an attack on his father.

However, while an attack on the appellant's father, if the appellant had such a fear, would no doubt have been of greater concern than the possibility of damage to the car, it would have been open to the jury to conclude that what was really motivating the appellant was the prospect of damage to the car. It seems to us that this was a real possibility in circumstances where the appellant's father was seated in the car when the appellant exited it and therefore, on one view of the facts, not necessarily in any danger, while it was undoubtedly the case that Mr Ward and his companion had already made a deliberate and gratuitous contact with the car, albeit that there was an issue about exactly what that contact had consisted of. In those circumstances it would have been realistic for the jury to conclude that the appellant's subjective understanding was that, even if his father was not in danger, there was a prospect of damage or further damage to the car.

37. If so, the jury would have needed to consider the question of defence of property. They would have needed to consider whether the appellant's actions were reasonable or an overreaction, when considered merely as a defence of property. It may be that the jury would have regarded the punch as an overreaction but that was a decision for them and not for the judge.

38. At all events defence of property was part of the appellant's defence, which he was entitled to have the jury consider and which would not necessarily be irrelevant if the jury rejected his case as to defence of his father. Moreover, the terms in which the judge dealt with this and the circumstances in which the issue was effectively withdrawn from them, ("at one stage the defendant said ... but you may well think ...") were liable to leave the jury with the impression that the judge had not dealt with this issue because he did not think much of the appellant's evidence about it. He was also, by implication, telling the jury that parts of defence counsel's closing speech were of no relevance without having given any advance

warning that this was the way in which he proposed to direct the jury. That was unfortunate.

39. On this ground also therefore we conclude that the appellant's conviction is unsafe and accordingly we quash the conviction and allow the appeal. It is regrettable that the appellant has served his sentence but at least he will have the consolation in the light of our decision that he remains a man of good character.

MS JOLLIE: I ask for a retrial, at this stage, on this case?

LORD JUSTICE MALES: We see no point in a retrial; as he has served his sentence there will be no retrial. Thank you both very much for your assistance.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk