IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1200

CASE NO 202103141/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 29 July 2022

Before:

LADY JUSTICE THIRLWALL DBE

MR JUSTICE SPENCER

MR JUSTICE LINDEN

REGINA
V
PIERS PORTMAN

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MR LEWIS POWER QC appeared on behalf of the Applicant.

J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for leave to appeal against conviction, following refusal by the single judge.
2. On 7 September 2021, in the Crown Court at Southwark, after a five-day trial, the applicant was convicted of intentionally causing racially aggravated harassment, alarm or distress contrary to section 31(1)(b) of the Crime and Disorder Act 1998. On 22 October 2021 he was sentenced to 4 months' imprisonment, ordered to pay £10,000 compensation to the complainant and to pay £10,000 prosecution costs. He was represented at trial by Mr Power QC, who also appears before us to present this renewed application for leave. We are grateful to him for his written and oral submissions.

The facts

3. The offence charged arose from an incident which took place at Westminster Magistrates' Court on 14 June 2018. A woman called Alison Chabloz was a defendant being sentenced that day for an offence involving anti-semitic racial hatred arising from a radio broadcast. Amongst those attending the proceedings was the complainant in the present case, Gideon Falter, who was the director of the Campaign Against Anti-semitism, a charity pledged to combat anti-semitism in all its forms.
4. The prosecution of Alison Chabloz had started as a private prosecution brought by Mr Falter on behalf of the charity, but the prosecution had been taken over by the Crown Prosecution Service and had resulted in a conviction, hence the sentencing hearing.
5. The applicant also attended the sentencing hearing that day. The prosecution case was that he was in effect a supporter of Ms Chabloz and her views. After the hearing, in which we understand Alison Chabloz received a suspended sentence of imprisonment, Mr Falter was making his way out of the building on the public concourse and descended in the lift to the ground floor. As Mr Falter got out of the lift he was confronted by the applicant. Mr Falter's evidence was that the applicant said: "I am Piers Portman. I've written to you before. Come after me, you Jewish scum. Come and persecute me, come and get me". Mr Falter was taken aback. The applicant hastily left the building. There was CCTV coverage of this interaction but there was no sound on that recording.
6. The applicant had indeed written to the charity previously, by an email sent to the charity's generic email address for the attention of the complainant Mr Falter, on 11 January 2018, some 5 months earlier. It was a lengthy rambling email in which the applicant introduced himself as having seen and spoken to Mr Falter the previous day (10 January) at a court hearing. That, it seems, was a reference to an earlier stage of the proceedings against Ms Chabloz. The email queried the motivation of Mr Falter's charity and its campaigning against antisemitism. For example, he asked how the words "Jew" and "Jew boy" could be antisemitic. The applicant was at this time, we should explain, in the throes of bitter divorce proceedings. He said in the email that he was currently married to "a greedy, grasping, thieving and lying criminal manipulator of the system that also happens to be Jewish". The final paragraph of the email offered an invitation to Mr Falter and his charity to:

> "... come and pick on me. Why don't you leave the poor middle aged women alone and come have a do with me? Come and

> perform your charity on me… Have a go at persecuting me ... Surely I am a perfect candidate to receive charity from the Campaign against anti-semitism?"

7. We note the close similarity between those words in the email and the words Mr Falter said the applicant had spoken in the incident giving rise to the charge.
8. The applicant was interviewed by the police on 1 August 2018, some 6 weeks later. He gave a prepared statement in which he denied insulting, abusing, harassing or threatening Mr Falter in any way. He said that he had approached Mr Falter and offered him his hand to shake, which Mr Falter refused. He said he had then repeated what he had just said to one of Mr Falter's colleagues in the charity, Steven Silverman, minutes earlier, upstairs in the building before he got into the lift, namely that he (the applicant) was "also being persecuted by Jewish tyrants posing as victims" and that he had witnessed Mr Silverman giving lying evidence in the trial of Ms Chabloz.

The course of the trial and grounds of appeal

9. There was a long delay in the case coming on for trial. The principal witness was the complainant himself, Mr Falter. Another officer of the charity, the operations manager, Anthony Orkin, was also a witness. He had been with Mr Falter at the time of the incident and said he had also heard the offending words spoken. He had not made a witness statement until February 2019, some 8 months later.
10. A third witness who had been present was a young man Jordan Lewis, aged 18, who was working as an intern for the solicitor to the charity who was in fact, we understand, his uncle. Jordan Lewis did not make his witness statement until June 2020, two years after the incident. He could not recall precisely the words that the applicant had used but described him raising his voice to Mr Falter and behaving in a threatening manner.
11. Also among the absolutely bound prosecution witnesses were Mr Mark Lewis and his partner, Ms Miranda Blumenthal. Mr Lewis is a solicitor and was, as we understand it, a legal adviser to the charity and uncle to the witness Jordan Lewis. He had been present during the incident, so had his partner Ms Blumenthal. They had both made witness statements in which they gave evidence of hearing the applicant say the words "Jewish scum", but there were some differences of detail between their accounts and the account of Mr Falter.
12. By the time of the trial, and indeed for a period of several months before the trial, Mr Lewis and Ms Blumenthal were living in Israel. The Crown Prosecution Service had written to the applicant's solicitors explaining that in these circumstances the prosecution would not rely upon their evidence. However, the defence still required their attendance and were expecting them both to be present at the hearing.
13. Through failures in communication between the Crown Prosecution Service and the police, no arrangements had been put in hand for those two witnesses to give evidence remotely from Israel. It was only on the first morning of the trial (Wednesday 1 September) that the defence became aware of this. Initially the defence stance indicated by Mr Power to the judge was that the trial should go ahead without these witnesses. That initial view would not surprise us at all: why would the defence wish to insist on the attendance of two more witness who were going to give evidence adverse to the defendant of the very matter at the heart of the case?

14. However, it seems that the applicant gave firm instructions that he wanted these two witnesses at court so they could be cross-examined on discrepancies between their accounts of the conversation and the account given by Mr Falter and Mr Orkin. The defence then changed their stance and applied for the trial to be adjourned to a later date so that the witnesses could attend.
15. The judge refused that application. This gives rise to what is, chronologically, the first ground of appeal.
16. The trial proceeded. There was a defence application to adduce bad character evidence in respect of the complainant, Mr Falter. Two matters were relied upon. Mr Falter had been the complainant in another prosecution in the magistrates' court several years earlier in 2009, in which the defendant (a senior civil servant) had been convicted of racial harassment arising from events when they were both exercising at the same gym. It seems that the defendant in those proceedings had been watching a news broadcast of a bombing in Gaza and had made the observation audibly "Fucking Israelis, fucking Jews" and went on to say other things as well. The prosecution was based upon what he had said and the evidence of what he had said was given by Mr Falter.
17. That conviction was quashed on appeal by the Crown Court. Mr Power argued before the judge that the fact that the conviction had been quashed showed that the complainant Mr Falter had been disbelieved, had lied, and this was therefore highly relevant to his credibility in the present case.
18. The second matter that the defence sought to adduce was said to be a false complaint which Mr Falter had made to the police in respect of another episode in which he claimed to have been racially abused in a park, the so-called "Paddington Rec" incident. No prosecution had followed. The suggestion by the defence was that this was another example of a malicious false complaint and that Mr Falter was in effect a serial mischievous complainant.
19. The judge ruled that neither of these matters would be admitted. In relation to the conviction that was quashed on appeal there was no transcript of the Crown Court's reasons for allowing the appeal. Enquiries had been made of the Crown Court but not surprisingly, 9 years after the event there was no record still available in the form of a tape which could be transcribed. The judge concluded that it could not be inferred that the complainant had been deliberately lying simply from the fact that the conviction was quashed. In relation to the other matter ("the Paddington Rec") no such inference could be drawn either.
20. The bad character application in respect of the quashed conviction was renewed, quite properly, the following day in the light of evidence from the officer in the case, given in cross-examination on the *voir dire* in the absence of the jury. It seems that at the request of prosecuting counsel, in an endeavour to clarify the basis of the appeal in the Crown Court being allowed 9 years earlier, the officer had recently -- we infer at court -- asked Mr Falter about the reasons for the quashing of the conviction upon appeal. He had been told by Mr Falter that the Crown Court had not believed that he could have heard the offending words clearly in the gym.
21. In a fully reasoned ruling which took account of this further development the judge adhered to his earlier decision. That gives rise to the second ground of appeal. In the written grounds it was broken down into two points but essentially it is the same point. We should say at this stage that Mr Power concentrated principally on this ground in his

oral submissions this morning, without abandoning the other grounds which, he explained, he was bound to pursue on instructions.

22. There was a further application made at the same time for the proceedings to be stayed as an abuse of process in view of the way in which such an unsatisfactory situation had developed in relation to the non-attendance of the absolutely bound witnesses, Mr Lewis and Ms Blumenthal. It was suggested that this amounted in effect to a manipulation of the court process on the part of the prosecution. Part of the submission was that Mr Lewis may well have got wind of the fact that the defence were likely to ask him about adverse findings in solicitors' disciplinary proceedings, and that he had made himself scarce in Israel to avoid giving evidence in this case. The judge rejected the abuse application. That gives rise to the third ground of appeal.
23. The judge also ruled that even if Mr Lewis had attended as a witness, the defence would not have been permitted to cross-examine him on the disciplinary proceedings. That was part of the grounds of appeal as well.
24. There was no half-time submission of no case to answer. The applicant gave evidence at length. At the end of his cross-examination the judge asked several questions himself, following up matters that had already been raised. For example, the applicant had given evidence that the reason for his attending the hearing of Ms Chabloz's case was that it "might give me some understanding of my home circumstances". The judge asked the applicant to explain what he meant by this, and the applicant did so.
25. The second question the judge asked was to clarify the nature of the case against Ms Chabloz. Prosecution witnesses had given evidence during the trial that they considered her to be a holocaust denier. The judge then asked the applicant:

> "It is probably only fair that you are given the opportunity to respond to that whether you agree or disagree with it."

26. The applicant replied:

> "I don't think it's relevant ... what Alison Chabloz believes either way... I would suggest that many people have many beliefs that are not shared by others. That is not a reason for that opinion to be shut down."

27. The applicant went on to explain the reason why he had spoken to Mr Falter at all in answer to the judge's questions. He said he believed the prosecution of Ms Chabloz was unfair and that "there in front of me were the two people that had been central to her persecution". This was a reference to Mr Silverman and Mr Falter whom he encountered after the hearing. We stress that the applicant used the word "persecution" rather than "prosecution". He said he believed they had "acted as tyrants posing as victims" and he wished to express to them that he had also suffered the same experience himself.
28. It is suggested by Mr Power that the judge's questioning about holocaust denial was inappropriate and prejudiced the applicant unfairly in the eyes of the jury.That is the fifth and final ground of appeal.
29. For the purposes of the appeal the applicant's solicitors obtained a transcript of the whole of the five-day trial. We have studied that transcript carefully. We have also studied with care all the other material which Mr Power had drawn to our attention in his very

full and closely argued grounds of appeal, running to 28 pages.

30. In his oral submissions, as we have already explained, Mr Power focused strongly upon the ground of appeal relating to the bad character application in respect of Mr Falter. He made it clear that he did not abandon the other grounds but he really said no more about them, save for the fifth and final ground.
31. In relation to the bad character application, Mr Power referred us to authority in the form of the decision of this Court in R v Brewster [2010] EWCA Crim 1194; [2011] 1 WLR 601, in which the judgment of the Court was given by Pitchford LJ. At [22] he said this:

> "It seems to us that the trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness."

32. The reference there to "substantial probative value" is extremely important because that is the central issue, it seems to us, upon which the judge correctly focused. Section 100(1) of the Criminal Justice Act 2003 provides:

> "(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
> ...
> (b)it has substantial probative value in relation to a matter which—
> is a matter in issue in the proceedings, and
> is of substantial importance in the context of the case as a whole..."

33. There can be no doubt that the credibility of Mr Falter as a witness was a matter in issue in the proceedings and was a matter which was of substantial importance in the context of the case as a whole. However, what the judge had to focus on was whether the evidence in relation to the question of whether Mr Falter had positively lied as a witness in previous proceedings was sufficient to be of substantial probative value in relation to that matter in issue, namely his creditworthiness. A careful examination was required of the state of the evidence in relation to that issue.
34. What Mr Power says, in short, is that even if the judge's initial ruling could be justified on the basis that allowing the appeal and quashing the conviction did no more than amount to a conclusion by the Crown Court that it could not be sure that the words had been spoken, when the further evidence emerged from the officer of what the complainant (Mr Falter) had himself said about the way in which the Crown Court had explained its reasons, the situation changed.
35. It is necessary for us to set out exactly what that evidence was. At page 38 B-D of the transcript for that day (Thursday 2 September) there was the following exchange during cross-examination of the officer by Mr Power in the absence of the jury:

> "Q. Well, did he tell you why the appeal – what the judges said

why the appeal was upheld?

A. He did yes.

Q. What did he say?

B. Mr Falter said that the judge did not believe that Mr Laxton could hear – [sorry, no, let me?] – the judge had told Mr Falter he did not believe he could hear Mr Laxton's comments clearly in that gym.

Q. And that's – Mr Falter told you that's what the judge said?

C. That's what he said yes.

Q. Right. Did he say that to his dismay that he, Mr Falter, hadn't been believed?

D. Mr Falter felt aggrieved that he hadn't been believed yes.

Q. Yes.

E. He was not happy with that… with that outcome."

36. That was the end of the relevant questioning and that was the sum total of the evidence about the matter. We bear in mind that Mr Falter was being asked about what had been said in the Crown Court some 9 years earlier.
37. The real question therefore is whether the state of the evidence, even with that additional information, was sufficient for the judge to be able to conclude properly that there was material which was of substantial probative value in relation to the creditworthiness of Mr Falter in the prosecution which was now taking place. The judge concluded that he was not satisfied that that material had substantial probative value. It is submitted that he was wrong to reach that conclusion. This was the main point that Mr Power advanced in his oral submissions. However, we do need to take the grounds of appeal in turn.

Discussion and analysis

38. We have considered all Mr Power's submissions with care, as did the single judge. We agree entirely with the reasons which the single judge gave for refusing leave. We do not propose to set out his very full reasons in this judgment. They are well known to Mr Power and to the applicant and are there to be seen and studied.
39. In short, taking the grounds of appeal in turn, in refusing the adjournment the judge exercised his discretion in a perfectly proper way. He was critical of the prosecution's failures but the reality was that if the case was adjourned there was no guarantee when it could be heard again. It was already three years old. The judge had to strike an appropriate balance. The judge paid careful attention to the evidence which the two absent witnesses would have been able to give. They had heard the words "Jewish scum", so that was hardly likely to assist the applicant's defence. At most they could have been cross-examined to highlight discrepancies in the various accounts in statements made long after the event. On the face of it, it was to the applicant's advantage that the trial should go ahead without them. The applicant had not been deprived of exculpatory evidence.
40. The judge correctly concluded it was entirely speculative to suggest Mr Lewis had made himself unavailable because he did not want to be cross-examined about his disciplinary finding. He was in Israel at the time of the trial. He had indicated he would be available from October onwards and was willing to participate via video link. That was

inconsistent with the suggestion that he was deliberately making himself unavailable.

41. The judge was also unarguably correct to refuse the application to stay the proceedings as an abuse of process. It was very unsatisfactory that the court had been misinformed at a previous hearing, owing to a breakdown in communication. The abuse application centred on the non-attendance of Mr Lewis. In fact it was to the applicant's advantage, as we have said, that the trial proceeded in his absence. The judge was satisfied that the adverse findings in the Solicitors' Regulation Authority Tribunal proceedings could have had had no relevance or probative value. The background to the complaint was that Mr Lewis, who was disabled, had sent offensive messages hence the disciplinary sanction; but he had done so in response to a "barrage of racist anti-semitic tweets and tweets mocking his disability". In any event, as he was not to be a witness and the findings of the disciplinary proceedings could only go to his credit as a witness, there was no basis on which the evidence could be relevant or admissible in the trial.
42. The judge was entitled to conclude there was nothing in the circumstances or the degree of fault on the prosecution's part which meant that the applicant could not have a fair trial, or that a stay was necessary to protect the integrity of the criminal justice system.
43. In relation to the application to adduce bad character evidence the judge's ruling was entirely correct. The "Paddington Rec" incident had no probative value at all in relation to Mr Falter's credit as a witness. The police had decided not to prosecute because it was simply one person's word against another's. In the course of his oral submissions Mr Power confirmed that he was not seriously pursuing that matter.
44. In relation to the conviction which was quashed by the Crown Court on appeal, we have already explained why we agree with the decision of the single judge in refusing leave. There was no clear inference to be drawn that the court must have rejected Mr Falter's account because they did not believe him and had positively found him to be a dishonest witness. The judge ruled that taking matters at their highest, all that could properly be inferred from the fact that the appeal was allowed was that the court could not be sure that the words "Fucking Jews" were used, although it was apparently accepted that the words "Fucking Israelis" were said. There was no proper basis to infer that the Crown Court had positively concluded that Mr Falter had knowingly given false evidence. There was no transcript of the Crown Court's reasons. A newspaper article and a report of the case on a dubious website on the Internet could not provide any such foundation. Nor did Mr Falter's explanation to the police officer (as reported by the officer on the *voir dire*) take the matter very much further.
45. Finally, the question the judge asked about holocaust denial does not bear the pejorative implication which the applicant suggests. We have set out verbatim what the judge asked and what the applicant replied. In the event, it added nothing to the evidence that had already been given about the trial of Alison Chabloz. Mr Power made no complaint about the judge's question at the time. The judge was not asked to say anything about it to the jury. We agree with the single judge that it is not arguable that the judge's question was of any significance.

Conclusion

46. For all these reasons, and despite Mr Power's tenacious and focused submissions, we are quite satisfied that there is no arguable ground of appeal. It is not arguable that this conviction is unsafe or that the trial was in any way unfair. Accordingly the renewed

application for leave is refused.

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

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