IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300748/B2
[2023] EWCA Crim 1466

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 17 October 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(LORD JUSTICE HOLROYDE)

MRS JUSTICE YIP DBE

MRS JUSTICE FARBEY DBE

REX
v
ASHKAN SALEHI

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MR M GOOLD appeared on behalf of the Appellant.
MR R SLOWE appeared on behalf of the Crown.

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: This is an appeal, by leave of the single judge, against convictions of two offences contrary to section 1 of the Criminal Damage Act 1971.
2. The appellant is an Iranian national. He suffered torture and imprisonment for many years in Iran. He was granted asylum in the United Kingdom in 2008 and was later granted indefinite leave to remain. In 2009, he was diagnosed with post-traumatic stress disorder (PTSD) as a result of what he had experienced in Iran.
3. On 11 November 2020, the appellant was due to have an operation on his knee. The operation had been delayed and rescheduled more than once because of the Covid-19 pandemic. On arrival at the hospital, the appellant was kept waiting for some time. He became hungry, having complied with an instruction not to eat since the previous evening, and he became increasingly frustrated and agitated by what appeared to him to be a failure to consider his position. Security personnel had occasion to speak to him.
4. At about 11.30 am, a decision was taken to postpone the operation. A nurse Ms Hatchard, accompanied by two security guards, broke that unwelcome news to the appellant. He became very upset and begged to have his operation without further delay.
5. Footage recorded on the body-worn camera of one of the security guards recorded what then happened. The appellant placed his hand on Ms Hatchard. He followed her and the security guards out into a corridor, where he damaged a laptop by knocking over the stand on which it was placed, and also threw over a leaflet stand, which resulted in an injury to another nurse.
6. The appellant was arrested but later released. He was not interviewed under caution until 24 February 2021. He put forward a prepared statement in which he said that whilst waiting at the hospital he had become increasingly hungry and claustrophobic, which had taken him back to when he was imprisoned and tortured in Iran. The statement went on

to say that he had been begging for help and had taken hold of the nurse's hand because it was appropriate and respectful to do so when begging someone. He had tried to get some space but due to his bad knee he had accidentally knocked into the table with the laptop and the leaflet stand. Having provided that statement, the appellant thereafter made "no comment" to all questions.

7. The appellant was tried in February 2023, in the Crown Court at Inner London, before Ms Recorder Carberry KC (to whom we shall refer as "the judge") and a jury. The indictment contained three counts: assaulting an emergency worker (count 1) and criminal damage to the laptop and the leaflet stand (counts 2 and 3). The prosecution case was that the appellant had intentionally and forcibly grabbed Ms Hatchard's shoulder in aggressive reaction to the further delay to his operation and had intentionally and in anger damaged the two items. The defence case was that the appellant merely touched Ms Hatchard to get her attention and to show respect, and that the items were damaged by accident when he tripped or fell into each of them because he was unsteady on his feet.

8. Mr Goold, counsel then, as now, representing the appellant, applied to adduce expert evidence from a psychiatrist, Dr Bisht. In a report dated 31 August 2021, based upon a remote interview with the appellant and viewing of the body-worn camera footage, Dr Bisht assessed the appellant as fit to plead and to stand trial. He confirmed the previous diagnosis of PTSD and depression, and said that it is not unusual for patients with PTSD sometimes to overreact with either verbal anger, aggression or intimidation. He recorded the appellant as having told the doctor that, due to his experiences in Iran, he (the appellant) became easily irritable when people ignored his requests.

9. Dr Bisht expressed the view that, although neither insanity nor automatism was available

to the appellant as a defence, he believed that the appellant's actions at the relevant time "appear to be in the context of his aforementioned mental disorder, namely PTSD". He explained that it is recognised that impulsivity and anger is commonly associated with PTSD and may provide a mechanism through which violence is perpetrated. He expressed the opinion that the appellant's perceived mistreatment in hospital, along with enforced starvation, would have triggered some of the earlier trauma he had endured. Dr Bisht expressed his belief that the appellant's culpability was reduced due to his PTSD.

10. In a short addendum report dated 18 November 2021, Dr Bisht added that there was no evidence that the appellant would have been incapable of foreseeing the risks of his actions at the relevant time.

11. The judge sensibly postponed any decision on the application so that she could consider it further after the appellant had given evidence. She refused the application. In a written statement of her reasons, she said that Dr Bisht's evidence was not relevant to any matter in issue in the proceedings. She noted that the diagnosis of PTSD was an agreed fact before the jury and that the appellant had given evidence of how he had been affected by his experiences in Iran. She further noted that the appellant had given evidence that he was having a panic attack at the time of the relevant events, and that there had been no reference in cross-examination to that assertion. She accurately summarised the body-worn camera footage as showing that the appellant was clearly in distress.

12. The judge considered a number of cases: R v BRM [2022] EWCA Crim 385; R v TS [2008] EWCA Crim 6 and R v Thompson [2014] EWCA Crim 836. She concluded that the appellant's background and diagnosis may provide an explanation for his behaviour but was not relevant to the issues the jury had to decide; namely whether they were sure

that an assault took place, as opposed to a light touching to get Ms Hatchard's attention, and whether they were sure that the damage admittedly caused was intentional, not accidental.

13. In her directions of law, given both in writing and orally, the judge identified the legal ingredients of each of the offences charged. She directed the jury that if they were to convict the appellant on count 2 or count 3, they must be sure that he intentionally or recklessly caused the damage. She summarised the prosecution and defence cases and said:

> "... in order to convict the [appellant] the Prosecution must make you sure that he damaged the items, in whichever count you are considering, intentionally. If you conclude that he was or may have been acting accidentally or otherwise inadvertently, then your verdict will be not guilty."

14. After a period of deliberation, the jury sent a note in which they said:

> "If Mr Salehi is suffering a panic attack and therefore a loss of control can he still be considered reckless in law while his actions may be considered unintentional? We are in agreement for counts 2 and 3 there is no possibility of accidental damage. We are seeking clarity on the definition of recklessness."

15. The judge discussed the note with counsel, and initially directed the jury, on the understanding that their question about loss of control related to count 1. The jury then sent a further note, clarifying that it related to counts 2 and 3. After a further discussion with counsel, the judge directed the jury as follows:

> "So in relation to counts 2 and 3, again recklessness does not arise in this case. It is not suggested by the defence that if you find that this defendant was having a panic attack that that means he is incapable of forming an intention. So if you do find that he was

> having a panic attack, it is not suggested that that means he was incapable of forming an intention. In this case, the case against him has always been put on the basis that he acted intentionally. Recklessness does not arise, again that is why you did not see a direction on the legal meaning of recklessness. There has been no suggestion by any party in this case that the defendant was not of his own mind in that moment, so that consideration is not available to you. So I direct you to the very short legal direction on criminal damage. In order to convict the defendant, you must be sure and the prosecution must make you sure that he damaged the items intentionally. If you come to the view that he may have damaged the items accidentally, you will find him not guilty."

16. After a short further period of retirement, the jury found the appellant not guilty on count 1 but guilty on counts 2 and 3. The judge subsequently made absolute orders of discharge in respect of each of those counts.

17. Mr Goold puts forward two grounds of appeal. The first is that the judge was wrong to refuse the application to adduce the expert evidence of Dr Bisht. It is submitted that she took too narrow a view of what was a matter in issue in the circumstances of this case. The appellant's case was that he behaved as he did, not because he was aggressive or in a rage, but because he was panicking, and Dr Bisht's evidence was relevant because it could support the appellant's account. Mr Goold further submits that, since the appellant himself had been permitted to give evidence about his history and his PTSD, and to assert that he was suffering a panic attack, it followed that expert evidence supportive of his account should be admitted.

18. The second ground of appeal is that the judge misdirected the jury in her answer to their question. It is submitted that the judge's direction, which we have quoted, was deficient in that it failed to tell the jury that they could take the evidence that the appellant was suffering a panic attack into account when deciding whether he had acted intentionally. The judge's words would have led the jury to understand that the question of whether the appellant was having a panic attack was irrelevant. Further, it is submitted that the judge

wrongly suggested that the jury should find the appellant guilty if they did not find the damage was caused accidentally, thereby overlooking the possibility that the jury might think the appellant may have been acting recklessly, or may not have been sure that he was acting intentionally. Mr Goold suggests that the judge left the jury with a binary choice, in circumstances where they had already excluded the defence of accident but might have found what Mr Goold refers to as "a middle way."

19. The appeal is opposed by the respondent in a written Respondent's Notice by trial counsel, Mr Gordan-Sakar, and in oral submissions today by Ms Slowe. It is submitted that the judge was correct to exclude the evidence of Dr Bisht and that the terms in which she answered the jury's question did not contain any misdirection. The respondent accordingly contends that the convictions are safe.

20. We are grateful to counsel for their submissions. We have summarised them very briefly but have considered all the points made on each side.

21. In R v BRM, the applicant, aged 14, had been convicted of murder. The deceased had sustained two deep stab wounds, either of which would have been fatal. The applicant admitted inflicting one of the wounds in self-defence, and contended that the other had been inflicted accidentally. He denied having the requisite intent. His grounds of appeal related to the applicant's diagnosis of Asperger's Syndrome, and criticised the trial judge for excluding expert evidence about that diagnosis. This court refused leave to appeal, saying that the applicant's diagnosis may have been relevant to an overall view of him as a factor in his personality, but was not relevant to the issues the jury had to decide. At paragraph 26, the Court observed:

> "Juries are not to be burdened with evidence unless it is probative of an issue in the case."

22. To similar effect, we note what was said in R v T(AB) [2007] 1 Cr App R 4, at paragraph 13:

> "The general principle is that for evidence to be admissible as relevant, it must be logically probative (or disprobative) of a fact in issue between the parties."

23. We respectfully agree with and endorse those observations. Issues as to the admissibility of the evidence necessarily require an analysis of the specific issues in a case, and the purpose for which it is sought to adduce the evidence. Here, the prosecution case on counts 2 and 3 was that the appellant had damaged the items intentionally. If the jury were not sure of that, they must acquit. The defence case was that the appellant had indeed damaged the items, but had done so in each case by accident. The issue on each of counts 2 and 3 was therefore a stark factual one.

24. Quite apart from any questions as to the proper ambit of expert opinion, Dr Bisht's evidence could not assist the jury on those issues. The appellant himself had given evidence that he was suffering from a panic attack and had not been challenged in that regard. The fact that he had been permitted to give that unchallenged explanation did not of itself mean that expert evidence became relevant and admissible to say the same thing. Dr Bisht did not purport to provide expert evidence that a panic attack would or might have precluded the appellant from forming an intention. Nor did he purport to provide expert evidence that a panic attack would or might have made it less likely that the appellant became angry and acted with a deliberate intent. On the contrary, his report indicated that impulsivity and anger are commonly associated with PTSD and that the

appellant himself had said that he had a tendency to react in precisely that way in certain circumstances. Nor did Dr Bisht suggest that a panic attack would or might have any effect on the appellant's tendency to lose his balance because of the injury to his knee. In short, Dr Bisht's evidenced did not bear on the crucial evidence issue of whether the appellant acted intentionally.

25. The judge was accordingly entitled to rule as she did. We would add, moreover, that we find it difficult to see how the appellant would have been assisted by the jury hearing expert evidence, such as we have indicated, about the reactions commonly associated with PTSD. We therefore reject the first ground of appeal.

26. The second ground of appeal provides an illustration of the ways in which even an apparently straightforward case may throw up unexpected difficulties. Counsel and the judge were collectively faced with such a difficulty when the jury asked the question which we have quoted. The jury, or perhaps a juror, may have thought that a panic attack would deprive the sufferer of all self-control and might therefore remove any moral responsibility for his actions. But be that as it may, the question related to a hypothetical issue of recklessness which had not been raised and about which there was no evidence. The prosecution had throughout made clear that a conviction was only sought on count 2 or count 3 if the jury were sure the appellant acted intentionally. Although, as a matter of law, a conviction on the basis of a reckless act was possible, the prosecution had not sought a conviction on that basis, and the judge's directions plainly excluded conviction on that basis.

27. It would no doubt have been possible for the judge, if she had had more time to consider a point which had arisen unexpectedly, to have crafted a rather more user-friendly answer to the jury's question, to have included a firmer direction away from impermissible

speculation about an issue which had not been raised, and to have avoided the criticism that her words to the jury were not quite the same as those which she had used when discussing with counsel how the question should be answered. With respect to the judge, we accept the terms in which she expressed herself are open to some criticism. However, nothing which she said was wrong in law. She referred the jury to her written directions, which had not been the subject of any criticism, and we reject the submission that her words undermined her earlier direction as to the burden and standard of proof or in any way undermined the appellant's defence. In addition, the judge's answer to the jury ended with the unequivocal direction that they must find the appellant not guilty if they thought he may have damaged either of the items accidentally. We are therefore satisfied that the terms of the judge's answer to the jury's question do not cast any doubt on the safety of the convictions.

28. We would add that, sympathetic though we are to the appellant's personal history and diagnosis, the case against him, in particular the footage from the body-worn camera, was very strong. This appeal accordingly fails and is dismissed.

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

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