IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202301652/B4

[2023] EWCA Crim 1610

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 16 November 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
MR JUSTICE FREEDMAN

REX
v
SCOTT MARSDEN

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MR R QUAIFE appeared on behalf of the Appellant
MISS H HOPE appeared on behalf of the Crown

J U D G M E N T
(Approved)

1. The Vice-President: On 21 21 April 2023, after a trial in the Crown Court at Truro before Recorder Kenefick and a jury, this appellant was convicted of an offence of assault occasioning actual bodily harm. He now appeals against that conviction by leave of the single judge.
2. A brief summary of the facts is sufficient for present purposes. On 16 October 2022 the appellant, then aged 36, returned from a holiday to find that in his absence his home had been burgled and property stolen. From conversations with others he suspected that the culprit was a youth then aged 16. On 17 October 2022 the appellant was given some information about the likely whereabouts of that youth, and went to the relevant location. He there confronted the youth, demanded the return of his property and struck him. Another man, James Carter, then became involved. The youth suffered a black eye and a slash wound across the top of his head which required many stitches.
3. The appellant and Carter were later arrested on suspicion of an offence contrary to section 18 of the Offences against the Person Act 1861. Each of them was interviewed under caution on the afternoon of 18 October 2022. The appellant put forward a prepared statement in which he asserted that he had been angry with the youth and that he had "grabbed him and gave him a clip around the head and started shouting at him, 'Where's my stuff?'" The statement went on to say that he had then seen Carter run at the youth with what looked like a Stanley knife and cut him to the head. The appellant had tried to push Carter away and had himself suffered a cut to the wrist in doing so. Having put forward that statement, the appellant made no comment to the questions asked.
4. The appellant and Carter were initially charged with a joint offence contrary to section 18 of the 1861 Act. The trial proceeded however on an indictment containing three counts. Counts 1 and 2 charged Carter alone with causing grievous bodily harm with intent and

with having a bladed article, namely a Stanley knife. Count 3 charged the appellant alone with assault occasioning actual bodily harm, contrary to section 47 of the 1861 Act.

5. The prosecution case was that the appellant had punched the victim, causing the black eye, and that Carter had then slashed the victim's head with a Stanley knife. The prosecution adduced evidence from the victim, from witnesses to the incident and from persons to whom incriminating remarks were alleged to have been made.
6. The appellant gave evidence that he had struck the victim on the head but had not punched him and had not caused him any injury. He admitted that he was guilty of common assault or battery, but denied the offence charged.
7. Carter gave evidence that he had seen the appellant repeatedly punch the victim and also wound him with a knife. Carter admitted that he himself had punched and kicked the victim, and also admitted that he had been in possession of a screwdriver, but he denied having a Stanley knife and denied wounding the victim. He accepted that he had told a number of lies when interviewed under caution.
8. Before summing-up, the recorder discussed his proposed legal directions with counsel. Counsel for Carter accepted that the jury could find that Carter had both lied in interview and failed to mention in interview matters on which he later relied as part of his defence, and accepted that directions should be given about both those matters.
9. Mr Quaife, then as now representing the appellant, submitted that the jury should be directed that they should not draw any adverse inference from the appellant's no comment interview, because the appellant had not failed to mention in his prepared statement any matter on which he relied at trial.
10. Miss Hope, then as now representing the prosecution, confirmed that she had not cross-examined the appellant to suggest any failure to mention a relevant fact, and that

she did not ask for a direction pursuant to section 34 of the Criminal Justice and Public Order Act 1994. However, counsel for Carter submitted that there should be such a direction in the appellant's case. He said that he had cross-examined the appellant about "various points that he hadn't mentioned, in fact, the whole of 16 October and the whole of 17 October up until 5 o'clock." Counsel did not however identify with any clarity what the "various points" were. He made a reference to the wearing of gloves and suggested that the appellant "did various other things, forgive me, I'm just sort of spouting them off the top of my head." In essence, the submission was that the appellant had said a lot more in his evidence than he had said in his prepared statement.

11. We would add that it seems to us, from reading the transcript of the discussion, that counsel for Carter was concerned that it would be damaging to Carter's case if directions about lies and failures to mention were given in Carter's case, but no corresponding direction at all was given in this appellant's case.

12. Mr Quaife, in response, maintained his submission to the recorder that no section 34 direction should be given. He emphasised that the submission on behalf of Carter had failed to identify what precisely were the matters on which the appellant now relied but which he had not mentioned when interviewed. Mr Quaife further submitted that the appellant's evidence had not contained anything of importance which had not been mentioned in his prepared statement.

13. Having considered these submissions, the recorder directed the jury as follows:

> "You will recall that both of the Defendants were cross-examined about certain things they said in their evidence in court which they didn't mention in their police interviews. Now, for example, and these are only examples, Mr Carter didn't mention in his police interview that he owed a drug debt to Mr Marsden, or that he was scared of Mr Marsden, or that Mr Marsden said that he was going

> to teach [the victim] a lesson, or he was going to annihilate [the victim], or that Mr Marsden put gloves on before he assaulted [the victim]. Whereas, he did say those things in his evidence during this trial.
>
> Mr Marsden had a short prepared statement read out by his solicitor on his behalf during his police interview, in which he did not mention a number of things that he said in his evidence in court. You've got that statement in your bundle. I think it's exhibit two. He then answered no comment to all the questions he was asked in his interview.
>
> Now, Mr Carter gave a number of reasons for not mentioning things in his interview which he now relies on in his defence. In summary, he said that he was still under the influence of drugs when he was interviewed and was not in a fit state to be interviewed. He also said he was confused and mistaken about some of the things he was being asked about. And he also said that he was afraid of Mr Marsden might do to him.
>
> Mr Marsden said that he was advised by his solicitor to provide the prepared statement, and then to answer no comment to all the questions asked in his interview. Please note that, if you accept that he was told this by his solicitor, it is important to take it into account, but you should also bear in mind that someone who is given legal advice has a choice whether or not to [accept] it."

14. The recorder went on to give conventional directions as to the matters of which the jury must be satisfied before they could conclude that either defendant had failed to mention a matter in interview because it was untrue and had subsequently been invented in order to support a defence. In the course of giving those conventional directions, the recorder explained that the jury were entitled to draw an adverse inference in appropriate circumstances because the failure to mention matters later relied upon could harm the defence of one or both of the accused. The recorder thereafter directed the jury about the lies which Carter had told in interview.

15. The jury returned not guilty verdicts in respect of Carter on both counts 1 and 2 but a

guilty verdict against the appellant on count 3.

16. The ground of appeal is that the recorder erred in directing the jury pursuant to section 34 of the 1994 Act on matters not mentioned when questioned. Mr Quaife reiterates his submissions that the appellant did not fail to mention in his prepared statement any matter on which he later relied at trial, and that counsel for Carter had laid no evidential foundation for such a direction because there had been no identification of any matter which it was said the appellant had failed to mention, and no questioning of the appellant as to why he had not mentioned that matter in interview. Mr Quaife further submits that the recorder fell into error in his direction because he failed to identify the facts which the appellant had failed to mention but on which the appellant had later relied in his defence. In support of this latter submission, Mr Quaife relies on the guidance given by this court in R v Pektar [2004] 1 Cr.App.R 22 in a passage conveniently quoted in the Crown Court Compendium at 7-6. It is submitted that in those circumstances the jury could not properly apply the recorder's direction and that the conviction is accordingly unsafe.

17. For the respondent, Miss Hope submits that the recorder's failure to spell out precisely which matters the appellant had failed to mention when questioned did not cast doubt on the safety of the conviction because the matters concerned, which had been mentioned in the closing speech of counsel for Carter, related only to the background to the incident and the appellant's relationship with Carter. They did not go to the central issue of whether the appellant's admitted striking of the victim was a punch which resulted in a black eye.

18. Miss Hope further submits that, even if it would have been preferable for the recorder to have identified the particular facts which the appellant had failed to mention, the peripheral nature of those matters means the conviction is safe.

19. We are grateful to both counsel for their admirably succinct and very helpful submissions.

20. So far as is material for present purposes, section 34 of the 1994 Act provides:

> "**34 Effect of accused's failure to mention facts when questioned or charged**.
>
> (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."

21. An initial question of law arises as to whether that section can be relied on by a co-accused in circumstances where the prosecution does not seek to rely upon it. The words of the statute which we have just quoted do not specifically limit the ambit of the section to the drawing of inferences which the prosecution invite the jury to draw against a defendant. On the other hand, the relevant questioning is questioning by a constable investigating the offence which the prosecution allege has been committed; and the

direction conventionally given to a jury, and indeed given by the recorder in this case, is couched in terms of the jury regarding the defendant's failure to mention the facts as providing some support for the prosecution case. Furthermore, we think there will be few cases in which the terms of the police questioning are capable of fulfilling the statutory conditions for the possible drawing of an adverse inference from silence sought by a co-accused, because it will rarely be the case that police questioning is focused on a matter which is relevant to a co-accused but not relevant to the prosecution. It will for that reason, we think, rarely be possible to say that the defendant "could reasonably have been expected to mention" the matter concerned.

22. Counsel have been unable to find any authority directly bearing on this interesting issue and their submissions on the point have been limited. Given that the words of the statute do not explicitly exclude reliance by a co-accused on a section 34 direction, we do not feel able in this case to determine that section 34 can never be relied upon by a co-accused in circumstances such as these. Any decision to that effect must be deferred until more detailed submissions are heard, and a more fully-informed decision can be reached, in another case which raises the point.

23. What can, however, be said is that if section 34 does apply in circumstances such as these, any direction permitting the jury to draw an adverse inference against a defendant at the behest of his co-accused will need to be drafted with care, paying close regard to the guidance helpfully given in the Crown Court Compendium but recognising that that guidance relates to the conventional situation of the prosecution seeking the direction. It will be essential to identify the precise matters which the defendant failed to mention but has relied on in his defence; the circumstances existing at the time of the questioning which are capable of leading the jury to the conclusion that the defendant could

reasonably have been expected to mention those matters; the inferences which it is suggested might properly be drawn from the failure to mention the facts concerned; and any explanation put forward by the defendant as to why he did not mention those matters.

24. We have no doubt that the recorder fell into error in his direction pursuant to section 34 of the 1994 Act permitting the jury to draw an adverse inference against this appellant. In fairness to the recorder, he received very little assistance from counsel who had sought the direction, who had failed to spell out what it was he contended the appellant had failed to mention. It may also be that the recorder was anxious lest his directions appeared to place undue weight on findings the jury might make about Carter's responses in interview, when there was no corresponding point for them to consider in the case of this appellant. Such a consideration could not, however, justify the giving of a section 34 direction in this appellant's case if it was not otherwise appropriate to do so. At most it might be a reason why Carter could argue that no direction should be given in his case.

25. In our view, the first question which the recorder had to decide was whether a section 34 direction in relation to this appellant was appropriate at all. Miss Hope tells us, and we of course accept from her, that the only failures to mention which were referred to in the closing speech on behalf of Carter related to matters which were peripheral and unimportant. If that was the case, then in our view the recorder should have acceded to Mr Quaife's primary submission and should have directed the jury that they could not draw any adverse inference against the appellant. We would observe that one of the advantages of precise identification of the relevant matters when an application of this kind is made is that it will assist the judge to decide whether the giving of any direction is appropriate at all.

26. If however the recorder had taken a different view as to the potential importance of any

matters not mentioned by the appellant, then he should have identified them precisely to the jury. It was not sufficient merely to tell the jury, as he did in his directions, that the appellant "did not mention a number of things that he said in his evidence in court." In the circumstances of this case, it was also necessary for the direction to identify the questions asked by the police which the appellant could reasonably have been expected to answer by mentioning the relevant matters. That was not done. In the result, the jury were permitted to draw an adverse inference without any clear direction as to the basis on which they might properly do so.

27. Unfortunately those errors were compounded by the fact that in relation to Carter, against whom the prosecution had sought a section 34 direction, the recorder gave a more detailed and entirely appropriate direction. This appellant was thereby placed at a disadvantage.

28. In short, we are satisfied that there was a material misdirection of the jury.

29. Is the conviction of the appellant nonetheless safe? We recognise that the issue in the appellant's case was a narrow one: were the jury sure that his admitted striking of the victim was a punch which resulted in a black eye, or might it have been no more than a clip around the ear which caused no injury? We also recognise that there was strong evidence pointing towards a finding of guilt. However, this was a case in which allegations were made against the appellant not only by the prosecution but also by his co-accused. In our view the misdirection to which have referred both unfairly disadvantaged the appellant and gave an unfair advantage to Carter. Having regard to the verdicts which the jury returned, we are unable to say that that imbalance did not affect the jury's decisions.

30. In those circumstances, we conclude that the conviction is unsafe and must be quashed.

We accordingly allow this appeal and quash the conviction.

31. Miss Hope, are there any consequential applications?
32. MISS HOPE: My Lord, I am instructed that the Crown would need time to consider whether or not a retrial is appropriate in this case.
33. THE VICE-PRESIDENT: Why?
34. MISS HOPE: Because I am instructed that the decision needs to be made by the reviewing lawyer.
35. THE VICE-PRESIDENT: This is no criticism of you, Miss Hope but everyone knows that when an appeal against conviction is before the court, if it results in the quashing of a conviction, the question of whether there is to be a retrial will immediately arise. There can have been nothing surprising in our judgment. The ground of appeal was very clear. The decision would go one way or the other. Why could appropriate consideration not be given well before this hearing as to whether any retrial would be sought?
36. MISS HOPE: I am afraid I cannot give my Lord a better answer than those are the instructions I have been given.
37. THE VICE-PRESIDENT: You are not assisted by anyone present today. Have you been given any indication of how long is sought?
38. MISS HOPE: I would imagine given the nature of the case that this could be done swiftly.
39. THE VICE-PRESIDENT: Yes. Mr Quaife, is there anything you would want to say either on that particular point or generally about any application for a retrial.
40. MR QUAIFE: Other than agreeing with my Lord's view that appropriate consideration should have been given and of course not leaving this appellant in a state of uncertainty for an unreasonable period of time.

41. THE VICE-PRESIDENT: Yes. The sentence was a non-custodial one but it did impose a punitive requirement of an electronically monitored curfew between 9.00 pm and 8.00 am for 90 days. Presumably that has all been served.
42. MR QUAIFE: It has.
43. THE VICE-PRESIDENT: We are beyond that date, are we not?
44. MR QUAIFE: We are.
45. THE VICE-PRESIDENT: Do you happen to know, Mr Quaife whether the further requirement which was added to the condition of an existing suspended sentence has taken any effect?
46. MR QUAIFE: I do not. I attempted to find that out the day before yesterday from probation but I was unable to get an answer so far as the additional RAR days were concerned.
47. THE VICE-PRESIDENT: Thank you. We will just retire to consider Miss Hope's request.

(Short adjournment)

48. THE VICE-PRESIDENT: Miss Hope, thank you for your submission and we reiterate that we make absolutely no criticism whatsoever of you personally; but it must be clearly understood that when an appeal against conviction is before the court, the respondent should instruct counsel in advance of the hearing as to whether any retrial will be sought should the appeal succeed. Of course there will be complex cases, perhaps involving multiple defendants and/or multiple grounds of appeal, where time may be needed to assimilate the details of a judgment just given. But this case is very far removed from that category. The issue was clear cut. It was known in advance that the appeal would either succeed or would fail on clearly defined grounds. We can see no reason why, if an

application was ever to be made for a retrial, it could not be made today. We would add that in any event any application would have faced a steeply uphill struggle in persuading the court that the interests of justice required a retrial in the circumstances of the case.

49. For those reasons, Miss Hope, we are not prepared to allow the respondent any more time and as I understand it you do not, in those circumstances, make any application?
50. MISS HOPE: Particularly not in light of what your Lordship has just said.
51. THE VICE-PRESIDENT: The judgment which we have given concludes the matter. The conviction is quashed and there is no order for retrial.

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

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