IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT GUILDFORD

HER HONOUR JUDGE LEES CP No: 45SH0506523

CASE NO 202304302/B5

[2024] EWCA Crim 1333

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 23 October 2024

Before:

LORD JUSTICE COULSON
MR JUSTICE JOHNSON
HIS HONOUR JUDGE FLEWITT KC
(Sitting as a Judge of the CACD)

REX
V
RAHIL SHUIB

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MISS K KELLEHER appeared on behalf of the Appellant
MR J OLIVEIRA-AGNEW appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The appellant is now 19. On 7 November 2023 in the Crown Court at Guildford, before Her Honour Judge Lees ("the judge") and a jury, he was convicted on one count of robbery. He was acquitted of having an offensive weapon, namely a knife. He had pleaded guilty to two counts of possessing a drug with intent. He was given a total sentence of two years' detention, suspended for two years. His co-defendant, Alfie Williams, was charged with possession of a gun and robbery. The jury were unable to reach a verdict on either count involving Mr Williams.

2. The appellant now seeks to appeal his conviction following leave granted by the single judge.

The Facts of the Offending

3. On 9 May 2023 the appellant responded to an advertisement placed by Mr Theo Murkett-Waters ("the complainant") for the sale of a BMW motor vehicle for the price of £3,500. The following day, in company with Mr Williams, the appellant asked the complainant if he could test drive the car. The complainant got into the front passenger seat and Mr Williams into the back. The appellant drove the car.

4. The appellant drove the car for 10 minutes before stopping on a road in Camberley. The evidence was that the appellant told the complainant to "Get out of the car". The Crown's case was that the appellant produced a knife and Mr Williams produced a gun. By their

verdict the jury were not sure that the appellant had a knife. They were unable to agree whether or not Mr Williams had a gun.

5. It was agreed that, once the complainant had got out of his car as demanded, the appellant then drove it away. Just over an hour later the car was stopped and the appellant and Mr Williams were found inside. It was the appellant's case throughout that he acted spontaneously to steal the car without any threat or use of violence, hence his denial of the robbery count.

The Trial

6. At the trial the Crown relied on the evidence of the complainant and various other witnesses. The appellant was positively identified by the complainant during identification procedures. The Crown also relied on the appellant's failure to answer questions during his police interview. The defence was that the appellant had taken the car on the spur of the moment and there was no weapon or threat to the complainant. Accordingly, the issue in the appellant's case at trial was whether, just before or at the time the appellant stole the car, he had used or had threatened violence towards the complainant.

7. No issue is taken with the judge's written legal directions or her summing-up. The issue that is now said to arise on appeal arose out of a series of jury questions.

The Jury Questions and the Answer

8. The jury asked four questions. The judge had counsel back into court and identified both the questions and her proposed answers for them to consider. The relevant passage in the

transcript reads as follows:

> "THE JUDGE: ...The first question: On count 1 can we find them individually guilty or not guilty? Well, the answer obviously is yes, you consider them separately and there can be different verdicts for different defendants.
>
> Second question: Does force have to include a weapon? The answer is no. Third Question: For the count of robbery does the law see threat of violence and threat of force equally? (i.e. verbal threats) and then the fourth question which is really about the same thing so I read it to you now, are force and violence the same thing? Yes, they are in terms of robbery.
>
> So my answers, although I have drafted them, are these: Count 1 can be different verdicts for the two different defendants. Count 1, and I've just moved the question up because it relates to count 1. The threat of violence is the same of threat of force. Force and violence are the same thing. And then the answer to question 2, force does not have to include a weapon. Are you both happy with that?"

9. Both counsel for the Crown and counsel for Mr Williams confirmed that they were happy with the judge's proposed answers. It had been agreed that counsel for Mr Williams was effectively covering for Ms Kelleher, the appellant's counsel. She was next door undertaking a separate hearing on CVP. As we said to her during argument, and repeat, the judiciary are extremely grateful to the Bar for being able to do other hearings via CVP when they can, and the fact that Ms Kelleher was not in court at the time of the questions is irrelevant to the outcome of this appeal.

10. The judge was, however, properly aware of the jury's potential perception of her absence so she asked counsel for Mr Williams whether she was happy for the jury to be brought back without Ms Kelleher. Counsel confirmed that she was, and she was subsequently able to speak to Ms Kelleher and confirm that Ms Kelleher was happy for the questions to be answered without her being in court. The judge then asked counsel for Mr Williams,

who had spoken to Ms Kelleher by then, "Are you happy with the answers?" and counsel for Mr Williams confirmed that she was.

11. The judge therefore answered the jury questions in the following way:

> "Thank you for your note. I am going to read it out and answer each question as we go along. The first question: ... The short answer yes. They are separate defendants on separate verdicts. So count 1 can be different verdicts for the two different defendants.
>
> Second question: ... Force does not have to include a weapon. Third question: ... Yes, threat of violence is the same as threat of force. Force and violence are the same thing which is the answer to your last question, are force and violence the same thing ... "

12. Plainly it is questions 2, 3 and 4 that are relevant to the appeal. For completeness we note that prosecution counsel emailed Ms Kelleher with the questions and the proposed answers. The text was in the following terms:

> "(i) Can we reach different verdicts for each Defendant
> (ii) Do we have to be sure there is a weapon
> (iii) Does threat of violence mean the same as force in the law
> (iv) Do we have to be sure there is a weapon
>
> Judge intends to say Yes to Q1. For the rest, threat of violence is enough in the law. Don't need to be sure that there was any violence. Don't need to be sure that there was a weapon. Force can be without a weapon."

13. It also appears that counsel for Mr Williams also noted the questions and the proposed answers in the following terms:

> - "Can we find them individually G or NG – yes separate verdicts for each D
> - Does force need to include a weapon – no
> - For robbery does law see threat of violence / threat of force equally – yes threat of violence is the same as threat of force, threat and violence are the same thing."

14. On the basis of all the contemporaneous notes, it is plain that there was complete unanimity about the judge's answers to the jury's questions.

The Issue on Appeal

15. The issue on appeal is this. On behalf of the appellant, Ms Kelleher argues that the Crown had always put their case on the basis that the appellant had threatened the complainant with a knife. She submitted that, if the jury found that there was no knife, there could be no other use or threat of force on the facts of this case, so she therefore argued that the judge should have answered the questions in a different way. When asked this morning precisely what the judge should have done, Ms Kelleher said that she should have elaborated on the answers she gave, and perhaps repeated parts of the legal directions.

Analysis

16. We consider that the first question is whether the answers to the jury's questions 2, 3 and 4 were right as a matter of law. There is no dispute that the answer was correct. A threat of force is sufficient; a weapon is not necessary to convict the appellant of robbery. Accordingly, no criticism can be made of the judge’s answer.

17. The second question is whether the words "get out of the car" were capable of being a threat of violence, sufficient to trigger the offence of robbery, even in this absence of a weapon. Plainly, in our view, such words can amount to a threat of violence. That is essentially what the judge was telling the jury in answer to their questions. Again, no criticism can be made of the judge’s answer. Indeed, both prosecuting and co-defending

counsel expressly agreed that force did not need to include a weapon. So they were envisaging at least the possibility that the jury would acquit on one or both of the weapons counts, but might still convict on the robbery count because of the threat.

18. The third issue is whether, notwithstanding the legal correctness of the judge's answers to the jury's questions, and the clear possibility that the weapons counts might not succeed but the robbery count might, the judge should have made a completely different point to the jury. To take the appellant's case at its highest, this would have involved saying something to the effect that, if they did not find that weapons were used, they could not find any threat of violence, because of the particular way in which the Crown had put its case. It is essentially an argument that, on the facts of this particular case against the appellant, a finding that there was no knife meant that the jury were obliged to acquit on the robbery charge too.

19. In our view there are a number of insurmountable difficulties with that submission.

20. First, that was not what either prosecuting counsel or co-defending counsel thought should have been said in answer to the jury's questions. They did not object to the judge's indication of the correct answers. Their own notes confirm that the jury could convict of robbery even if they were not sure that there was a weapon. Neither counsel appeared to suggest that those views were in some way at odds with the way in which the Crown's case had been put.

21. Secondly, the judge was plainly of the same view: hence her indication of the answers

which counsel then agreed. She did not appear to think for a moment that this was a case where if the weapons counts failed so too must the robbery count.

22. Thirdly, there is, we think, a more fundamental difficulty with the "no knife, no robbery" argument on the which this appeal turns. If it were right, it would have been front and centre of the judge's legal directions to the jury, and in her summing-up. But it was not, nor was it suggested by Ms Kelleher that it should be. At no point was the judge asked to direct the jury that, in respect of the appellant, they had to consider the weapons charges first and that, if they were not sure that the appellant had a knife or that Mr Williams had a gun, they had to acquit the appellant both of count 5 (the weapon count) and count 1 (the robbery count). On the contrary, the judge dealt with the knife count after the robbery count and did not suggest that count 1 was in any way dependent on count 5.

23. Accordingly, the point that Ms Kelleher has raised on appeal would, on this analysis, require the unravelling of the entire structure and language of the judge's directions to the jury. No such appeal is foreshadowed in the documents and it would, in our view, be quite wrong to quash the appellant's conviction for robbery on the basis of a point never taken at trial, in the context of jury questions which were answered correctly. We note that, almost simultaneously with this appeal, a differently-constituted Court of Appeal came to the same conclusion for the same reasons: see *R v Mundle* [2024] EWCA Crim 1289 at [33] – [34].

24. Finally, just standing back, we consider that even if the Crown had emphasised the use of weapons during the trial, it was plainly open to the jury to conclude that there was a

threat of violence, even if they were not sure that weapons had been produced. After all, the appellant told the complainant to get out of his own car. He would have had no reason to leave a stranger behind the wheel unless he had felt threatened. So if Ms Kelleher had been present in court when the jury questions were received, she might have argued that the point was not open to the Crown, but we are confident that, even if the matter had been fully ventilated at that stage, the judge would have concluded that it was open.

25. Accordingly, although we are very grateful to Ms Kelleher for her clear submissions this morning, for the reasons that we have given, this appeal against conviction is dismissed.