Neutral Citation Number: [2024] EWCA Crim 795

Case No: 202301169 B4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM GLOUCESTER CROWN COURT**
**His Honour Judge Lawrie KC**
**T20207163, T20200329 T20217102**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2024

**Before :**

**LADY JUSTICE MACUR DBE**
**MR JUSTICE DOVE**
and
**MR JUSTICE KERR**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Rex** | **Respondent** |
| **- and -** | |
| **Narinder Kaur** | **Applicant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr A Montgomery** for the **Applicant**

Hearing dates : 28 June 2024

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.00am on 12 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

**Macur LJ :**

1. On 10 March 2023 Narinder Kaur, ("the Applicant") was convicted of fourteen counts of fraud, two counts of transferring criminal property, one count of conspiracy to commit fraud by false representation, five counts of doing acts tending and intended to pervert the course of public justice and four counts of possessing criminal property.

2. We are trouble to learn that she is still to be sentenced. This, we are told by Mr Montgomery, trial defence junior counsel, is due in part to the unavailability of leading counsel and the indication by the trial judge that the sentencing hearing would be fixed for his availability. On this basis a future date set for 11 July 2024 (over 15 months post-conviction) is likely to be ineffective. We have no doubt that the trial judge would have countenanced this delay nor would he have given the assurance he did if he had known the likely result. We intend to bring this matter to the attention of the Presiding Judges of the Western Circuit. The Applicant remains in custody.

3. The facts of the offending are contained in the Criminal Appeal Office summary which has been served upon the Applicant. Her counsel has requested revisions to the original summary which have been brought to the attention of this Court and which we assume by virtue of the suggested amendments, have been approved by, and consequently notified to the Applicant. In these circumstances we do not intend to refer to the facts of the offending for which the Applicant has been convicted save as becomes necessary for the determination of this renewed application for permission to appeal against conviction.

4. In short, it was alleged that the Applicant operated a three stage refund fraud. Goods taken without payment from various large stores would be presented for exchange without a receipt. An item of little monetary value would be purchased at the same time in order to generate a receipt for the whole transaction. The stolen goods would then be returned to another branch with the receipt to obtain a monetary refund. The scale of the fraud ran to hundreds of thousands of pounds and covered a wide geographical area. In addition, the Applicant obtained monies from stolen credit card details, and perverted the course of justice by lying as to the identity of a driver, her own migration to India and her medical history.

5. The grounds of appeal identified at the end of a 40 page "perfected advice and grounds of appeal" dated 3 July are in terms that:

    1. The summing-up was defective by virtue of not putting the defence case adequately by reason of:
       (i) a "woefully" inadequate review of the defence evidence;
       (ii) omission to review the evidence of prosecution witnesses who had spoken in complimentary terms about the Applicant;
       (iii) omission to correct points about the summing-up as requested by defence junior trial counsel.
    2. The trial judge's review of the evidence when summing-up was muddled and contradictory.
    3. Judicial bias against the Applicant was demonstrated during the trial and in the summing-up which was "sustained and virulent".
    4. The trial judge erred in the seven rulings he made against the Applicant as to:
       (i) Severance;

(ii) No case to answer;
(iii) Bad character application;
(iv) Application to exclude Tab 7 receipts;
(v) Application for disclosure;
(vi) Defence application to be permitted to call Davis Jones
(vii) A s34 direction.

5. In addition to (iii) above, it is said that prosecution counsel improperly referred to evidence given during voir dire by asserting in cross-examination of the Applicant that "…You were caught out onoath the other day weren't you".
The jury were put under "real pressure of time" and reached verdicts in haste.

6. A Respondent's Notice was served dated 23 August 2023 taking issue with many of the representations and omissions made in the Notice of Appeal.

7. The application for permission to appeal against conviction was considered by the single judge, Sir Nigel Davies, on the papers and refused.

8. Subsequently, Mr Montgomery applied for leave to appeal on an additional ground, namely:
"The Route to Verdict is defective. At paragraph 1 of the Route to Verdict it ought to have read: 1.(i) If you are not sure that the defendant committed theft of an item(s) that is the subject of a given count alleging retail fraud, your verdict is not guilty. If you are sure, go on to consider … [the points set out at para 1(i) to (iv) of the Route to Verdict document that the jury were given]."

9. The additional draft ground was not served upon the Respondent in compliance with CPR 36.14(5) until the eve of the renewed application. Prosecution counsel has not had the opportunity to respond. We indicated at the outset that we would consider this issue 'de bene esse' in conjunction with the complaint that the trial judge gave a "muddled" summing up of the ingredients of the three stage fraud offences pursued against the Applicant.

10. We have had regard to the many prosecution and defence skeleton arguments drafted during the trial and the lengthy perfected advice and grounds of appeal, dated 3 July 2023, and Mr Montgomery's responses to the CAO summary, the Respondent's Notice and the Single Judge's reason for refusing permission to appeal. We have also read and considered the full transcripts of evidence, rulings and summing up. Two 'rulings' were not transcribed, but have been supplied in 'note form' by prosecution counsel. Mr Montgomery confirmed, in the course of the hearing for the renewed application, that he accepted the accuracy of the notes.

11. During the course of the hearing before us Mr Montgomery, although not formally abandoning the same, conceded that not all of his drafted grounds were "arguable" as undermining the safety of the convictions but said they nevertheless provided 'ballast'. At the outset of the hearing he indicated that he "largely relied upon" the contents of his perfected advice and grounds of appeal. The focus of his oral submissions was 'judicial bias' and what he said was the "muddled" summing up seen in context with the deficient Route to Verdict.

12. We address several and various assertions of judicial bias in direct response to the assertions made, but do not attempt to answer each and every point scattered throughout what we regret to say are ill disciplined and, in the main, unfocused documents.

"Unbridled hostility to the defendant throughout the trial"

13. This is said to have been demonstrated by frequent "censorious or sarcastic remarks of both the defendant and/or her defence" leading to a 'polite' complaint made in open court by defence leading counsel.

14. There is a transcript dated 20 January 2023 in which leading and junior counsel for the Applicant address the judge in this latter regard. It is revealing, and wholly undermining of the criticism made. The transcript is available on the DCS system at CACD 1:13. The Applicant has access to the transcript. It clearly reveals:

(i) Leading counsel said he was "instructed" and "in explicit terms" by the Applicant, who it was that "perceived" unfairness in certain of the judge's case management. Leading counsel patently did not join in with that criticism.

(ii) The judge addressed and rejected the criticism appropriately without any indication of rancour.

(iii) Mr Montgomery said thereafter that the Applicant "wanted to express her thanks for the kindness and patience that Your Honour expressed, and she's alluding to the kindness at the various junctures at which she's been dealt with". Mr Montgomery explains that this referred to the several accommodations made by the judge in respect of the Applicant's indisposition. Regardless, this clearly refutes the allegation of "unbridled hostility".

15. Further the Applicant complains that the judge on one particular day during the trial, "saw fit to tell the defendant to go into the witness box where he gave her a dressing-down". This incident took place on 17 January 2023 in the absence of the jury. We cannot avoid noting that the attempts of the Applicant to communicate to the judge directly on this occasion undermines the complaint that the Applicant was "represented by counsel and could be addressed through her counsel".

16. The transcript of this incident is available on the DCS system at CACD 1:11, and therefore preceded the "complaint" and Applicant's notified expression of gratitude to the judge indicated above.in summary, the judge was obliged to raise in open court, and in the presence of the Applicant, a matter raised with him by "defence counsel regarding instructions that you're being given, late material, and I say 'late' in the sense that it's, catches you by surprise". Without demur from either defence counsel the trial judge summoned the Applicant to the witness box. He addressed the Applicant firmly but civilly and refused to hear her 'explanation' since she was represented. This was entirely appropriate and avoided any possibility of inadvertent remarks or breach of legal professional privilege.

17. The Applicant's leading counsel addressed the judge thereafter. He made absolutely no complaint at what had occurred, no doubt in the context that it was defence trial counsel who had raised the issue of her late instructions, and the difficulties that occasioned them, with the trial judge beforehand. The written submission that "this episode can

only have instilled anxiety in the defendant" is Mr Montgomery's subjective observation and is not borne out by our reading of the Applicant's obvious resilience and combative approach in answering questions in cross examination.

18. The Applicant asserts that despite "the appeal to moderate his behaviour" the judge continued at intervals to berate the Applicant for passing, in his view, too many notes to her counsel. There is no transcript of such scolding commentary. However, we note that Mr Montgomery does not claim that the notes were anything other than prolific. This would be apparent and distracting to the judge, jury and witness. The trial judge was correct to seek to control this behaviour.

19. The asserted frequent judicial comments regarding the defence case statement in the absence of the jury are not particularised. The complaint is anodyne. It is entirely unlikely that the Applicant was adversely impacted by the same. Mr Montgomery makes no explicit suggestion that she was, nor is there objective indication of the same.

20. The Applicant gave evidence over six days. Cross examination of the Applicant was lengthy. A transcript of her evidence runs to 687 pages and is available on the DCS system at Y3. The Applicant is able to access the same.

21. We have read the transcript of her evidence in its entirety and not merely the selected excerpts in the advice and grounds. The judge showed considerable restraint. He interjected on approximately 21 times over the course of her evidence to require the Applicant to answer yes or no to certain questions as was appropriate. There is nothing in the complaint that the judge indicated that the jury had the "gist" of her evidence. Other interventions were made to clarify questions or answers, to warn the Applicant not to answer questions in a way that may breach legal professional privilege, and otherwise to require prosecuting counsel to "move on" or in response to points raised by defence counsel.

22. The subjective view of Mr Montgomery as to the quality and substance of the Applicant's evidence is highly questionable and in any event irrelevant. The assertion that the interjections undermined the Applicant as well as displayed bias is unsustainable. We reject Mr Montgomery's written claim that a "reasonable observer would conclude that the judge was an adversary of the defence."

23. On the contrary, it is clear to us that it was necessary for the judge towards the end of the cross examination to remind the Applicant, and justifiably so, that the prosecution were entitled to put their case to her, to inform the Applicant not to become "personal" in her responses to prosecution junior counsel, that she should confine herself to the question asked and to give disciplined answers. Notably, defence counsel rarely interjected, and only in relation to prosecution questions.

24. Further, it was necessary and entirely correct for the judge to address the repeated assertions by the Applicant that junior prosecuting counsel were unwarranted in putting their case and that it was not based on the evidence. See Y634 F – 335A; 638 D – G. It was also assuredly correct for the trial judge to intervene to address a most regrettable attempt by defence leading trial counsel to curry sympathy for the Applicant at Y776 F – Y 778.

25. This Court has no evidence that the judge was "rolling his eyes". Defence counsel were obviously not averse to raising issues with the trial judge and no complaint as to this alleged behaviour is identified in the transcripts.

26. The episode concerning the Applicant reference to HHJ Cullum's expressed assessment of the case is misrepresented. Defence leading counsel understood that the Applicant transgressed and was not answering "the question I asked". The transcript of this exchange absolutely does not "involve the judge basically saying that he is a witness to a wicked lie by the defendant involving a member of the judiciary." This is not only a florid but unwarranted assertion.

27. Mr Montgomery is simply unable to substantiate his claims that the trial judge made "wholly inappropriate remarks about the prospect defendant being cross-examined" or agreed to prosecution observations as to the unrealistic nature of the defence being advanced by reference to the transcripts.

28. The Applicant cites several authorities on the issue of improper and repeated judicial interruptions and comments, namely:

*R v Tedjame-Mortty* [2011] EWCA Crim 950; *R v Lashley* [2005] EWCA Crim 2016; *R v Hulusi* (1974) 58 Cr App R 378; *R v Zarazadeh* [2011] EWCA Crim 271 at para 23; *R v Mustafa and Mustafa* [2020] EWCA Crim 1723; *R v Bryant* [2005] EWCA Crim 2079 and *R v Tarik Hill* [2021} EWCA Crim 587.

29. The principle to be derived from these authorities is clear. There is a point when the trial process is so disturbed by the interventions as to become unfair and regardless of the strength of the evidence against the defendant the convictions will be regarded as unsafe.

30. Mr Montgomery attempts to 'tether' the facts of this case by alighting upon phrases used with the judgments as mantras. However, the complaints regarding judicial misbehaviour were established on the facts in those authorities. As we indicate above, that is not the case here.

The Summing Up

31. There is a transcript of the discussions prior to, and the summing up itself, On the DCS system at Y.6 and 7. The Applicant has access to the same.

32. The judge's reference to 'fog of battle' was applied to the "welter of information and accusations and counter accusations…".
We find it is unobjectionable. It does not target the Applicant, rather highlights the prospect of the jury being distracted from the evidence by irrelevances. At page Y1094 F the judge explains this in terms:
"Why is that a part of the fog? Well, it's because you end up with a, a personal element within the context of this case, which can distract you or potentially distract you, depending on how you evaluate things, from the core evidential features which the Crown rely on. And that's what you, and that comes down to, in essence, the nature of those offences, how they're committed, a much narrower issue rather than personalities being involved. So that's, I urge caution, but ultimately it's your assessment that matters, not my comments in respect of that."

33. We do not agree that this amounts to "rubbishing the defence case." Consequently, it is irrelevant that Mr Montgomery took exception to it.

34. Mr Montgomery evidently seeks to categorise orthodox and unexceptional legal direction on inference by suggesting bias in favour of the prosecution because there is mention made of the inferences which the prosecution invited the jury to draw from the evidence. This is perverse. The judge patently does not define the concept as if only applicable to the prosecution. He makes clear by saying: "In the course of their submission to you both, advocate, both advocates suggested what inferences you should draw from particular parts of the evidence." See Y1069 E – Y 1070.

35. We consider the description of the summing up relating to the Applicant giving evidence, as "The most baffling but also fundamentally unfair decision of the judge" is of itself "baffling and fundamentally unfair." To say that it "basically said that allowance should be made for the fact that she was "fighting for her life" is completely unfounded. That it is said that the trial judge defamed the Applicant by likening her to a politician being questioned and put on the spot, he reasonably explained as his attempt to assist the jury understand the pressure to which she was subject. This part of the trial judge's legal directions advantaged the defendant. There was no reason why he should have redressed his commentary in accordance with Mr Montgomery's submissions. Neither did the judge act "as a second prosecutor or prosecutor-in-chief". We see absolutely no evidence that the "judge from early on had taken sides and he was unabashed in showing it, in or out of the presence of the jury."

36. Furthermore, we find no imbalance in the summing up in reminding the jury of the defence case. This aspect of complaint is not assisted by the specific criticism that the judge failed to remind the jury of commentary that, taken out of context, was beneficial, or at least benign to the Applicant. The Applicant was not entitled to a good character direction. The benign commentary which is acknowledged by the prosecution to have been made by certain prosecution witnesses is unable to be seen as significant or necessarily relevant to the offences charged.

"Muddled" summing-up

37. Mr Montgomery complains that the judge muddled the jury by saying "that this was not a case of theft, as it were pilfering something and making off with it" but "then revised his earlier comment out of all recognition by saying the prosecution on the fraud counts had to prove theft and if they did not then it was not guilty (as the correct verdict). This was not accompanied by any analysis of what evidence the prosecution actually had of theft or any reminder of the defence submission that there was no evidence of theft at all".

38. This complaint is not substantiated by an objective and fair appraisal of the summing up read as a whole. We regret that Mr Montgomery has again taken certain of the trial judge's comments out of context.

39. The written legal directions clearly and correctly identify the three stages of the fraud alleged by the prosecution that is (i) dishonestly, (ii) with intention to make gain for herself, (iii) falsely representing that she was entitled to a refund for an article. The judge went on, by directly referring to the defence being run so as to direct the jury's

attention to the relevant dishonest act alleged by the prosecution, namely stealing an item to be later returned for exchange and receipt with the intention of obtaining a cash refund to which she knew she was not entitled.

"And remember this, this whole case is about refunds, whether in cash or on cards, or exchange for other items. Miss Kaur's defence can be simply and briefly stated, namely at all times she was acting lawfully and exchanging previously purchased items for another item or obtaining a refund. She did not steal any items. About that, she has been, always been absolutely clear and adamant. The issue will be did she repeatedly and knowingly make false representations to the retail outlets identified in the counts, and when she did so, did so dishonestly?" See Y21 A – D of the transcript.

40. The judge reminded the jury on several occasions thereafter that the Applicant denied shoplifting or any dishonesty. The trial judge was not in error to distinguish theft simpliciter from offences charged. We find no realistic prospect that the jury would fail to follow his legal directions on the steps to be followed in reaching their verdicts on the relevant fraud counts.

41. It is in this context that we have reviewed the late complaint regarding the Route to Verdict document provided to the jury. (See [8] above). Mr Montgomery cites *R v Gabbai* [2019] EWCA Crim 2287 in support of his submission in this regard, but the facts and circumstances in *Gabbai*, in which the Route to Verdict omitted reference to intentional penetration in the offence of anal rape, are patently distinguishable. We do not consider that the Route to Verdict required to be in the terms advanced by Mr Montgomery. In any event, even if there is any force in those submissions, we are of the clear view that this identified deficiency in the light of the clearest direction of what the "dishonesty" comprised, it would not render the conviction unsafe.

42. These composite grounds are unarguable.

The Rulings

43. As indicated above, Mr Montgomery did not seek to amplify the written arguments he advanced on these issues and as were considered by the single judge. We independently considered the application afresh. However, and in summary, we find ourselves in complete agreement with the reasons given by the single judge to refuse leave on these grounds of appeal. That the single judge did give "short shrift" to the application is correct but understandable since there is simply no cogent argument that can be identified in the documentation. We cannot 'improve' upon what the single judge said and completely reject Mr Montgomery's suggestion that he gave "cursory consideration" to the documents.

44. A copy of the single judge's comprehensive reasons have been served upon the Applicant. We don not reproduce the six page, 30 paragraph ruling here for it is of no practical importance to any other case not do they raise any novel point of law. However paragraph 24 of the ruling corresponds entirely with our views on the merits of the arguments advanced in respect of the rulings, and we reproduce it here as an appropriate summary.

    1) Severance: this was a matter for the trial judge's discretion. There was undoubtedly, as the trial judge found, a sufficient nexus, of alleged dishonesty and deceit to justify

the matters being heard together. His discretionary and evaluative decision also was that the trial would not thereby become over complicated or over-burdened.

2) Submission of no case: given the primary facts, such a submission was never going to succeed. It was clearly open to the jury to draw the inferences as to a three-stage fraud from the prosecution evidence. the judge was entitled to reflect the application as he did, as a matter of evaluation.

3) Bad character: the judge was justified in permitting to be adduced those aspects of the antecedents that he allowed, for the reasons he gave. They were admissible under more than one statutory gateway and there was no cogent reason for exclusion.

4) The receipts: it would have been most surprising if the jury had been deprived of having the evidence of these receipts. Such receipts were unquestionably relevant evidence.

5) Phone disclosure: the application was late and the basis for admission in any event speculative.

6) David Jones: the judge was, in his discretion, entitled to refuse to allow this evidence to be admitted (this would have been at a late stage of the proceedings). Mr Jones was not an expert and as such and his (recent) test purchases would appear to be peripheral to the true issues in this case relating to the defendant herself.

7) S.34 direction: in my opinion, the judge was entitled to include all nine points in the direction. In the summing-up he duly thereafter gave directions on the defence stance on these aspects.

45. As regards the Applicant's challenge to the first of the previous convictions recorded against her, she bore the burden of disproving them on the balance of probabilities; see section 74(3) Police and Criminal Evidence Act 1984. We note that the judge's summing up required the jury to "make a decision" about the adequacy of "her records" but made no reference to the standard and burden of proof. Nevertheless, we do not consider this deficiency to provide an arguable ground of appeal. The challenge made as to accurate attribution of the first recorded convictions of dishonesty did not apply to the greater and later convictions, where the challenge was as to lack of propensity.

46. Otherwise, we agree that prosecution counsel should not have introduced voir dire material into cross examination before the jury in the way that he did. However, this aspect of the trial did not undermine the safety of the conviction and neither is there any other irregularity identified that could do so.

47. Finally, we agree with the single judge that there is no basis to suggest that the jury were put under undue pressure to reach their verdicts. The trial was listed with a time estimate of four weeks. He advice on appeal describes it as continuing for "fully four months"! A review of the transcripts obtained on behalf of the Applicant gives an indication of why it took so long. It appears to us that considerable latitude was afforded to the Applicant as we have indicated above.

48. The evidence against the Applicant was overwhelming.

49. The application to amend the grounds of appeal and this renewed application for leave to appeal is refused.