

NCN: [2019] EWCA Crim 147
No: 201703534 B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 29 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE MCGOWAN DBE

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a judge of the Court of Appeal Criminal Division)

R E G I N A

v

LANCE MORRIS

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Mr J Manning appeared on behalf of the **Appellant**

Mr J Normanton appeared on behalf of the **Crown**

J U D G M E N T

LORD JUSTICE SIMON:

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1. The appellant appeals against his conviction on count 4 of an indictment in respect of which he was convicted following a trial at the Croydon Crown Court before Her Honour Judge Smaller on 7 July 2017. Count 4 was a charge of failing to comply with the section 59 Environmental Protection Act 1990 notice, contrary to section 59(5) of the 1990. Unfortunately, it was only while the jury were in retirement considering this count, as well as two other counts on the indictment, counts 1 and 3, that it was realised that count 4 charged a summary only offence, that is to say, an offence triable only before the magistrates' court.
2. The jury convicted on count 4, but the judge, recognising that an error had been made, passed no sentence on this count.
3. Ground 1 of the grounds of appeal is that the crown court had no jurisdiction to try the offence charged as count 4 on the indictment. The prosecution has accepted that this is so and the single judge granted leave so that the conviction on count 4 could be quashed. We make that order.
4. This could have been done administratively, but the appellant by Mr Manning, assisted by his pupil Mr Belhadi, wishes to renew his application for leave to appeal against conviction on two further grounds. In respect of these grounds the single judge refused leave on the basis that they were not reasonably arguable. We will refer to him as the applicant on this renewed application.
5. Before turning to these points, it is necessary to set out the relevant charges in the

indictment. Count 1 was a charge of depositing controlled waste, contrary to section 33(6) of the Environmental Protection Act 1990, the particulars being that the appellant knowingly caused or permitted the deposit of controlled waste at 1A Martin Crescent in Croydon, between 18 October 2012 and 15 October 2015 without an authorised environmental permit and without a registered exception.

6. By the time the jury came to consider Count 3, it was a charge of failing to comply with an enforcement order, contrary to section 179(5) of the Town and Country Planning Act 1990 in these terms:

Particulars of offence.

Lance Morris between 1 March 2015 and 1 December 2015 did fail to comply with an Enforcement Notice served on him on 9 December 2014 by the London Borough of Croydon in that he carried on activities required by the notice to cease, or caused or permitted such activities to be carried on, namely demolish the unauthorised extension and remove all resultant debris from the land, cease the unauthorised change of use of land, remove sheeting and other materials from the front gate, remove all materials and other paraphernalia deposited on the top of the building at the rear of the yard and remove the caravan, motor vehicles and other paraphernalia from the land.

7. We should say that it is the particulars of count 3, which forms the focus of Mr Manning's argument on ground two.
8. Count 4, the summary only offence, was a charge of failing to comply with a notice under section 59 of the Environmental Protection Act 1990, contrary to section 59(5) of the Act: the particulars being that between 22 June, and 15 October 2015 he failed to comply with a section 59 notice served on him on 1 June 2015, which he was required to comply with by 22 June 2015, and in respect of which he failed to take the required steps.

9. In short summary, the complaints raised on the applicant's behalf are these. First, the inclusion of the summary only offence, count 4, allowed the admission of bad character evidence, which was so prejudicial to the jury's consideration of the remaining counts on the indictment that the applicant could not receive a fair trial.
10. Second, in any event, count 3 was drawn too widely and did not make grammatical sense and confused the two parts of section 179 of the Town and Country Planning Act 1990.
11. The applicant leased land at 1A Marine Crescent at a builder's yard. Mr Quintyne, an environmental officer for the London Borough of Croydon, visited the land in 2012 and noticed a number of items on the site. Throughout 2012 and 2015 the items accumulated. They included mattresses, doors, windows, tyres, a bed head, computer monitor and a fridge. The prosecution case was that the applicant unlawfully deposited a large quantity of controlled waste on the land. He was served with various notices by the council in respect of the use of the land and the storage of controlled waste; and failed to comply with the notices.
12. The defence case was that the materials were not waste, controlled or otherwise, and were not discarded; and that he was unable to comply with orders and notices relating to the supposed waste because (a) he was not served with notices, and (b) he was not the occupier of the land at material times and in material respects, because his landlord had changed the locks on the gates to the yard preventing him gaining access. There was an issue of fact as to how long this exclusion lasted.

13. The issues for the jury were set out in a route to verdict, in very helpful and comprehensive written directions given to the jury and in the judge's summing-up.

14. The main prosecution evidence about the history of the site was given by Mr Quintyne. He became aware of the site in 2011. In January 2012 the site had been cleared by the council. In October 2012 the applicant told him that he had permission to use the land. Due to recent appearance of rubbish at the site, Mr Quintyne told him that the storage of rubbish was illegal. On 13 March 2013 he returned to the site and said there was a lot more rubbish, including six mattresses. The applicant told him that some of the items related to his work and some he would be sending abroad. Mr Quintyne told the jury that at no point were there any permits or exemptions which would have permitted the accumulation of controlled waste on the site.

15. Due to a further build-up of waste on the site, he attended on 24 April 2013 with a police officer and an enforcement officer. He served the applicant with a section 59 Environmental Protection Act notice, which required the removal of waste unlawfully deposited. He said the applicant was not there initially, so he posted the notice on the gate. However, they later went back when he was there and the notice was served on him in person. The notice gave him a 28-day period to clear the site.

16. On 10 May 2013, before the expiration of the 28-day period, he returned to the site to see if there was any progress. The applicant was attending a small fire and appeared to be burning rubbish. Mr Quintyne told him that he had to dispose of the waste properly. At this point there were tyres at the site, small bits of rubbish on the floor, mattresses and

also a bed stand. He returned on 10 June 2013, after the 28-day period had elapsed. The applicant was there and nothing had been taken away. The witness spoke to the applicant and was told he was, "Getting rid of it." He noticed make-shift buildings had been erected on the site.

17. On 24 September 2013 he returned to the site, and the appellant was not present. He said the buildings appeared to be higher and the waste had not been cleared. Further visits were made by environmental officers in 2014.

18. On 9 December 2014 Mr Quintyne went to the site and served a planning enforcement notice by pinning it to the gate of the yard. This was the enforcement notice referred to in count 3, which it was said was not complied with in the indicted period between 1 March 2015 and 1 December 2015. By May 2015 no progress had been made with clearing the waste. Mr Quintyne told the jury that there was now a second lock on the gate, whereas before there had only been one lock, which he understood belonged to the applicant. The applicant made contact by telephone and informed him that the owner of the site had locked him out and that he had had to go to court. Mr Quintyne telephoned the owner and asked him to remove the lock because he intended to serve another notice on the applicant. The lock was removed on the same day; and so on 1 June 2015 he served a section 59 notice by giving a copy to the applicant's partner at the address he was living in at the time and pinning a copy on to the gate of the site. This was the section 59 notice that was the subject of count 4.

19. When the applicant telephoned him the following day and told him he could not clear the

land because the gate was locked, Mr Quintyne was able to inform him that the second lock had been removed, so it was only the applicant's lock that remained on the gate. He explained that the applicant was required to remove all the rubbish from the land. The applicant informed him he would try and clear the waste.

20. Mr Quintyne went to the site again on 10 July 2015. There had been a large fire at the yard which had been attended to by the fire brigade. He next visited on 7 September 2015 to photograph what was left after the fire. On 5 October 2015 he made arrangements for the site to be cleared.

21. He said that the applicant was offered an interview on several occasions but never accepted the invitation. This evidence was not challenged in cross-examination, although the applicant said he had never been offered an interview, when he came to give evidence in his own defence.

22. The applicant's evidence was that he first got access to the land in October 2012. He said some items were on the site when he arrived. He was repairing the property, taking the roofing off, putting sheeting on and replacing windows. He said some of his possessions had been in storage, but he could not afford to pay for the site and storage and so he brought some of the storage items to the site. He planned to send some of the items abroad. Other items, such as doors, he planned to recondition. He was storing the mattresses at the site until he got a bigger property to live in; they were not waste. He said he was not bringing discarded items to the site as a tip. He was using the site for storage. Items that were to be thrown away he put in a skip that was on the site for the

purpose.

23. He said he never got any notices from the environmental officers. He saw the 9 December 2014 planning enforcement notice, the subject of count 3, on the gate but he had not had access to the property since September 2014. This continued up until June or July 2015, when Mr Quintyne arranged access for him. He then saw the notice on the gate. He said he did not comply with the notice at the time because the land had been broken into and there had been a fire and he was waiting for the investigation into the fire to finish.

24. In cross-examination he said he was using the items in the yard. When asked about the specific items, he said that some were being stored, some were to go into the skip and some were going to be used or reused. He said he had done some tidying in the yard. He had tried to comply with what he had been asked to do because he had been served with another notice, namely 1 June 2015 notice, the subject of count 4.

25. When asked about the fire Mr Quintyne saw him burning, he said he was not burning rubbish; it was some old bits of wood chips. He said Mr Quintyne did not tell him to stop burning.

26. We turn then to the matters of complaint.

27. First, ground two: the argument that the inclusion of the summary only offence, count 4, allowed the admission of "bad character" evidence, which was so prejudicial to the jury's

consideration of the remaining counts on the indictment that the applicant could not receive a fair trial. Mr Manning referred the court to the case of *R v Stark* [2015] EWCA Crim 1513 as an example of a case where the court regarded the inclusion of a count that had to be quashed as infecting the entirety of all the other charges.

28. In our view, this is not properly arguable. It is, of course, highly unfortunate that count 4 was left to the charge of the jury. However, the fact that evidence in relation to this count was adduced at trial cannot be said to have led to prejudice or unfairness. It was part of the history, which was covered by count 1, the charge under section 33(6) of the EPA 1990.

29. The facts in relation to what followed the service of the section 59 notice on 1 June 2015 were material to the charge under count 1. They went to whether the applicant knowingly caused or permitted waste to be deposited on his land which was a necessary requirement for proving an offence under section 33(1)(a) and section 33(6). Count 1 was a widely drawn count which covered the period between 18 October 2012 and 15 October 2015. The evidence that formed the charge under count 4 covered the latter part of the period after 1 June, when a further Environmental Protection Notice was served on the applicant.

30. The evidence was therefore "...to do with the alleged facts" of the substantive offence charged under count 1 and was not bad character (see section 98(a) of the Criminal Justice Act 2003), nor, we would add, was the evidence in relation to the failure to comply with 24 April 2013 notice, bad character evidence either. We note that no

application was made to exclude that evidence.

31. In any event, even if the evidence on count 4 should not have been before the jury, this was not a case where the evidence they heard came close to rendering the trial unfair or the conviction on that particular count unsafe.

32. We turn then to ground 3. Mr Manning submitted that more care should have been taken over the redrafting of count 3. As we have noted, it came to be redrafted during the course of the trial in the way in which we have described.

33. The primary objection he makes is that as drafted the particulars did not distinguish between the obligations of an owner requiring activity, (see section 179(1) and (2)), and the occupier requiring something to cease (see section 179(4) and (5)). The particulars, even as redrafted, had the capacity to confuse because they related both to the former and the latter type of conduct. For example, Mr Manning submitted that the particulars of count 3 referred to the demolition of a building, which should not have remained as a particular of count 3. It may or may not have been relevant to the charge before it was redrafted, but it was certainly not relevant to the charge as it was finally put before the jury. The judge, Mr Manning submitted, failed to direct them that they were only concerned with something that should have ceased.

34. In the summing-up the judge made quite clear at p.20B as to what it was the prosecution had to prove:

Next, the prosecution have to prove that Mr Morris is a person in control of

or interest in the land to which the enforcement notice relates, namely the land at 1A Martin Crescent. Well, I do not think anyone has suggested that Mr Morris is not in fact someone with an interest in that land. You have got that agreement written down in your jury bundle showing that Mr Morris was going to rent the land. And indeed, he tells you, does he not, he was paying monthly [rent] to do so.

So if you are satisfied that Mr Morris is such a person in control of, or interest in the land [...] then he must not carry on any activity which the notice requires him to cease.

35. The judge went on to deal specifically with the questions that needed to be asked and answered. In the route to verdict dealing with count 3, the questions were posed in this way:

Question 1

Have the Prosecution proved that Mr Morris is a person with control of, or an interest in, land to which an enforcement notice relates, namely the land at 1A Martin Crescent?

If no, verdict not guilty.

If yes, go to question 2.

Question 2

Have the Prosecution proved that Mr Morris failed to cease the activity outlined in the notice [...]

If yes, we are sure that Mr Morris failed to cease the storage of controlled waste at the yard, verdict guilty.

If no, we are not sure that the Prosecution have proved that Mr Morris failed to stop the storage of controlled waste at The Yard, verdict not guilty.

36. That, in our view, taken with the summing-up, made quite clear that the jury were only concerned with failure to cease a particular activity. It is true that there were matters

which might have suggested a different approach in the particulars, but by the time it came for the jury to consider their verdict, the matter was put quite clearly by the judge in her summing-up, in the route to verdict and in the written directions.

37. For these reasons, like the single judge, we have concluded this ground too is not properly arguable. It follows that the renewed application must be dismissed.