

No: 201900600/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION
Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 5 February 2020

[2020] EWCA Crim 140

B e f o r e:

LORD JUSTICE FLAUX

MRS JUSTICE ANDREWS DBE

HER HONOUR JUDGE ROBINSON
SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION

R E G I N A

v

VAN HUONG NGUYEN

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Mr M Lavers appeared on behalf of the **Appellant**

Mr B Maguire appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

LORD JUSTICE FLAUX:

1. On 16 January 2019 in the Crown Court at Blackfriars, following a trial before His Honour Judge Shetty and a jury, the appellant, now aged 53, was convicted on two counts of kidnapping, one count of carrying an imitation firearm with criminal intent and two counts of false imprisonment. He was acquitted on another count of carrying an imitation firearm with criminal intent. On 17 January 2019 he was sentenced to a total of 13 years' imprisonment.
2. Of his co-accused, Trevor Thomas was convicted on the two counts of kidnapping and sentenced to four years' imprisonment. He was acquitted on the two counts of carrying an imitation firearm with criminal intent. Dung Nguyen was acquitted of the two counts of kidnapping and the two counts of carrying an imitation firearm with criminal intent. Que Thu Kieu was convicted of the two counts of kidnapping and was sentenced to 11 years' imprisonment. She was acquitted of the two counts of carrying an imitation firearm with criminal intent. Michael Ryan was convicted of one count of false imprisonment and acquitted of the other and sentenced to 42 months' imprisonment. Lloyd Barrow-Holnes was convicted of one count of false imprisonment and sentenced to two years' imprisonment.
3. The appellant now appeals against conviction with the leave of the single judge.
4. The facts of the offences are as follows. The complainants Pham and Vu had some involvement in cannabis grow houses, having initially entered the United Kingdom illegally to work as "gardeners". In January 2018 they were suspected by some of their criminal associates of having arranged for at least one of those grow houses to be robbed. The prosecution case was that the co-defendants Kieu and Nguyen had a proprietary

interest in those grow houses and had lost money as a result of the robberies. They had hired the appellant to kidnap the two men in an attempt to recover their losses.

5. In January 2018, Pham and Vu were living in a house at 22 Sutherland Mount, Leeds. Kieu was the tenant and also lived there with the co-defendant Nguyen and a number of other Vietnamese people. During the night of 27/28 January 2018 the appellant was driven to the address from London by Thomas. The appellant entered the premises carrying an imitation firearm which he used to threaten Pham and forcibly remove him from the premises. He also threatened to set off an explosion if Pham did not cooperate. Pham's wrists were tied and he was driven to London in Thomas's car. He was taken to 3 Berry Lane in Lambeth, the home of Ryan. He was held prisoner there, forced to stay and sleep in a small room. He was beaten and assaulted by the appellant, only occasionally provided with food and forced to urinate into a bottle.
6. He was then taken by the appellant to another address, 10B Gothard Road, the home of Barrow-Holnes, where he was kept for about 36 hours, being tied up, gagged and beaten by the appellant, and being asked repeatedly to confess to the robbery of Kieu's cannabis grow house. The appellant recorded the occasions when he beat Mr Pham. During one such recording the appellant was recorded as saying: "You still have to admit to it in the end. Now you say it again for me, what was said before, you took from Kieu, would you agree to give it back to her?"
7. In the early hours of 31 January 2018, the appellant was once again driven to 22 Sutherland Mount by Thomas with a view to kidnapping Vu. Vu's evidence was that the appellant was carrying an imitation firearm, but this was not seen by Thomas who remained in the car. In the event, the appellant was acquitted of that count of carrying an imitation firearm with criminal intent. He forced Vu into the car and Vu was driven to 3

Berry Lane where he was repeatedly beaten by the appellant, deprived of food and water and detained in a small storage room. He was not provided with sufficient water and was forced to drink his own urine. Pham became aware that Vu had arrived at the property and had been imprisoned in a different room. The appellant told Pham that he and Vu would have to pay £60,000 to Kieu and Nguyen to obtain their release. Kieu's bank details were obtained in order to transfer the funds. On two occasions the appellant forced Vu to go to the nearby address at Gothard Road. His hands and feet were tied together with plastic ties and he was assaulted by the appellant with a metal tube and a hammer. A bin bag was forced into his mouth and taped in place. When assaulting him, the appellant shouted: "I'm going to beat you black to white and white to black" and "You need to give your part back, that part didn't belong to you". Vu managed to escape and summoned help from a passer-by. The police were called.

8. The prosecution case relied upon the evidence of Pham and Vu. Pham said that at about 3 am on 28 January 2018 the appellant entered his room with a Western person. The appellant pointed a gun at him and told him to get up and follow him, pointing the gun close to his head. He went downstairs with the appellant, pointing the gun at the back of his head. His hands were tied with black wire. The appellant was wearing an explosive vest and said that if he ran away the appellant would trigger explosions to blow him up. He was taken to London in the car, still tied up, and the appellant threatened to shoot him if he jumped out of the car. He was locked inside a room with his hands and feet tied. The appellant used to hit him on the legs, hands and body. He was taken to another address where he was tied with a cloth in his mouth. The appellant tried to make him admit the robbery of a house in Newcastle, but he would not. The sounds on the audio recording were of him being hit. He said that co-accused Nguyen had spoken to him on

the phone and told him he was now in the hands of the mafia and if he wanted to be released he had to get the money. Nguyen had then come to the house and punched him in the face and kicked his chest. There were inconsistencies in Pham's evidence to which the judge referred in summing-up. The co-defendant Nguyen was of course acquitted.

9. Vu's evidence was that early in the morning of 28 January 2018 he had opened the door to the appellant and a black man, who was Thomas. After he let them in, the appellant drew what he described as a handgun and asked where Pham was. The appellant went upstairs and came down with Pham. The appellant had black cable ties. At about 4 am on 31 January 2018 he was woken up. The co-defendant Nguyen had opened the door to the appellant who had a gun and told Vu to come with him, saying: "Are you faster than my bullets?" The appellant tied his hands with cable ties and took him to a taxi outside, forcing him to go to London. The appellant put the gun in a rucksack and he did not see it again.
10. The appellant took him to 3 Berry Lane and tied him to an armchair with cable ties. He put a small soft toy in his mouth and taped it to stop him shouting. The appellant used a metal tube and a hammer to hit him repeatedly on the ankle. He had to urinate into a cup and drink it. He was then taken to another address and the appellant said that he would get a black man to beat him up. He was tied up with cable ties and a plastic bag was put into his mouth and taped. The appellant beat him for about 30 minutes. He wanted him to admit stealing cannabis and that he would pay for it. When the appellant was out of the room he managed to escape and ran out of the property, seeing a woman in the street and saying "Please police". . She rang the police. The prosecution relied upon her read statement as evidence of his first complaint

11. The prosecution also relied upon footage from a police body-worn camera of Vu when the emergency services attended the address and they relied upon the digital audio recordings of the applicant beating Pham and photographs taken inside 3 Berry Lane.
12. In interview, the appellant provided a prepared statement which stated that he was looking after a homeless person, i.e. Pham, for a friend. He stated that he had never been to Leeds and he had never seen a gun in the United Kingdom. He denied falsely imprisoning or assaulting the homeless man. In a further interview on 21 May 2018, the appellant provided a further prepared statement within which he denied the allegations and wanted it put on record that he suffered from arthritis and could not exert pain or force upon people. In his original defence statement served in July 2018 he continued to deny having been to Leeds.
13. In a further defence statement dated 10 September 2018, the appellant accepted that he went to Leeds and assisted transporting Pham and Vu to London, but with their consent. There had been no force or threat of force. He denied having a gun or an imitation gun with him. He accepted that Pham was at 3 Berry Lane but as a guest. He also accepted beating Pham at Gothard Road but it was in the context of helping Kieu who was owed money from prostitution. He denied being involved in any beatings at 3 Berry Lane. He denied that Vu had stayed at Berry Lane or had ever been at Gothard Road.
14. Thomas was also interviewed. He told the police that he had known the appellant for a couple of years. He said that the appellant set up weed houses for his friends, he would wait for the plants to grow and then he would rob them. On 27 January 2018 the appellant had offered him £350 to drive to Leeds to collect a friend. On the journey to Leeds the appellant had been speaking in Vietnamese to a lady on the telephone. Apparently the men at the address had robbed her weed house. When they arrived they

went inside the property. There were others there all speaking in Vietnamese which Thomas did not understand. The appellant marched one of the men upstairs. At that point Thomas saw a firearm. He said that the appellant looked like he was going to "gun butt" the male. The appellant had taken the gun out of a little black bag. He said that the male cowered. Thomas said that they were upstairs for 15-20 minutes. When they came back downstairs he thought the man had his wrists tied together with a cable tie or plastic rope. He said that he was devastated because he thought the appellant was going to get him into bother. He said to the police that he was pleading guilty and not beating about the bush. He panicked because he had been in trouble with guns before, a reference to one of his previous convictions. He described the gun as a black handgun. After they put the man in the car he did not see the gun again.

15. During the journey back to London he had asked the appellant what they would do if stopped by the police and the appellant had replied that it was just a toy, not the real thing. Thomas had driven the appellant and the man to an address in Norwood and he had then gone home. He decided that he was not going to have any more to do with the appellant. However, the appellant had offered him another £350 or £400 to do the journey again. He said that the appellant was very persuasive. He said the second time they went to the address it was the same procedure although that time he did not go into the property because he did not like what was going on. He did not see a gun on the second trip. The male was brought out of the property and put into the vehicle. He did not think the male was cable-tied. They drove to the same address in Norwood where the male and the appellant got out of the vehicle and Thomas drove home. He thought he was paid around £500 for the trip.

16. He said he was pleading guilty; he wished he had not done it. There was a time when he

thought "Do I Phone the police, you know, is it going to do me harm or, and then I just forgot about it." He said he knew the appellant had been involved in trafficking for quite a long time. He had done previous journeys for the appellant in return for cannabis.

17. Both the appellant and Thomas gave evidence. The appellant said he was asked by a man called Mai to collect a friend of his and provide him with accommodation in London. He had asked Thomas to drive him which Thomas would only do at night because there was less traffic. On the way there he had telephoned Kieu, whose number Mai had given him, and asked her to provide Thomas with some cannabis. When they got to the house in Leeds he rang her again and asked her to wake Pham up. She said these were not good people and Pham owed her money for food.

18. Vu had opened the door and the appellant had told Pham that he was there to collect him. Pham had gone with him voluntarily. No gun was produced, real or imitation, and there had been no discussion with Thomas about a gun. The appellant said he talked to Pham on the way back to London who told him that he did growing and the people in the house blamed him for the robbery. He said that he had never locked Pham in a room. He told Pham the property belonged to a friend and it was up to Pham what he did and where he slept. He said that Pham had followed him on two or three occasions to Barrow-Holnes' address to collect drugs. Mai had told him that he had been supposed to collect two people from Leeds.

19. He had been told by Kieu that the two men had forced her into prostitution and she had lost money. This had made him angry so he thought of a way of getting her money back. He put a recording device in his pocket and asked Pham about the money. Pham had not been gagged. He got angry with Pham and hit him. He hit him with a chair at Gothard Road which was a spur of the moment thing. Pham could not speak properly on

the recording because he had wrapped himself up in a blanket and covered his face with it. When he told Pham to stop wriggling, the word for 'wriggle' in Vietnamese meant misbehaving. When he was asked what the house referred to in the recordings was, he said it was a cannabis grow house. He rang Kieu and told her he had proof, asking her to allow Pham time to make some money to pay her back.

20. When he found out that he was supposed to have collected two people, he eventually persuaded Thomas to make a second journey. Upon arrival at the house in Leeds he collected a bag of cannabis for Thomas to smoke. Vu opened the door and the appellant said his friend had asked him to collect Vu. They left together. He did not have a gun and he did not threaten anyone. When they arrived at the property in London, Pham opened the door. He had not done any of the acts alleged to have been committed against Vu. That had been another group of traffickers who had managed to get hold of Vu and Vu was trying to pin it on him.

21. In his evidence, Thomas described the first journey to Leeds and then smoking cannabis on their arrival. He had joined the appellant in the property when he finished smoking. The people there were all Vietnamese. It was not a jolly environment. He saw something black in the appellant's hand. It looked like a gun but he was unable to say it was a gun. The appellant had gone up to one of the men and raised his hand but had not hurt anyone. The appellant had gone upstairs while he remained downstairs. The appellant had come down with another man. Thomas had not seen that man's hands tied. There had been no violence. They got in the car, the appellant driving and the man in the back. Their conversation in Vietnamese had been very calm. He had taken them to Berry Lane where they got out and he drove home.

22. He described the second trip to Leeds which he agreed to do and which he understood

was to collect one of the appellant's friends. He stayed in the car and smoked cannabis while the appellant went into the property. The appellant had come out with another Vietnamese man who had no visible injuries and seemed relaxed. He had not seen anything like a gun. Thomas had taken them to the same address in London where they got out and he went home. He thought he had been paid £800 to £900 for the two trips. He did not understand that he was involved in kidnapping. He did not believe either man was transported against his will.

23. On 25 April 2018 the police had come to his home address and arrested him, taking him to the police station. On the way there, the police told him they were interested in persons trafficking Vietnamese people. They made him feel they were not really interested in him so he had not felt he needed a lawyer. In interview he had said he would be pleading guilty because he thought driving the car made him guilty. He was not doing his best to be truthful and accurate in the interview, but wanted to be spiteful to the appellant for getting him into this trouble.

24. In relation to the "gun butt" statement he could not be sure what he had seen and did not see anyone get struck with anything. The appellant did not have a little black bag but rather a small money bag. He had not seen Pham's wrists tied with cable ties, but had said this in interview because he wanted to hurt the appellant. He said he did not think it was a real gun. Having been arrested, he wanted to get the appellant into more trouble.

25. Thomas was cross-examined by Mr Lavers for the appellant. He agreed that he had accepted that parts of what he had said in the interview were said out of a feeling of spite towards the appellant and that he was now trying to assist as to what he actually remembered happening. He agreed that the item that the appellant had taken out of his bag could have been a mobile phone. He said had he seen a gun on the first trip to Leeds

he would not have gone back on the second trip. He could not remember the appellant wearing anything that would have stood out. He said he would have noticed if the appellant had worn a strap-on bomb or body armour. As far as he was concerned there was no gun on the second journey.

26. In cross-examination by Mr Maguire for the prosecution, Thomas maintained that he did not see a gun but something that looked like a gun. What he had said in interview about the appellant having a gun was because he hated the appellant so much for getting him mixed up in this. He was lying in interview when he told the police that the appellant had an imitation gun with which he was threatening people. He was asked about questions which his counsel put to the appellant in cross-examination about a discussion with the appellant about the gun. He denied that there had been any discussion and said what had been put had been wrong. He denied changing his evidence at trial in order to help the appellant. He said he had invented the account in interview in order to get the appellant into trouble. He had lied to the police when he had said Pham had come downstairs with his hands tied together and did not know where he had got the reference to cable ties from. He had told the police that the appellant had been trafficking people for a long time because he wanted to get the appellant "deeper in the shit".

27. The prosecution had not made any application to adduce Thomas's interview as hearsay admissible against any other defendants, including the appellant, either before or at the beginning of the trial. Nor did they do so during his evidence or immediately after he finished giving evidence on 6 December 2018. There was a discussion with the judge as to his legal directions on 10 December 2018. Thomas's interview came up briefly in relation to whether a *Lucas* lies direction was appropriate in his case. It was agreed with his counsel that it was not. There was no suggestion by the prosecution or the judge

during these discussions that the interview might be admissible not just against Thomas himself but against the other defendants as hearsay under either section 114(1)(d) or section 119 of the Criminal Justice Act 2003.

28. On the afternoon of 10 December 2018, in accordance with the modern practice, the judge then started part one of his summing-up with the legal directions before counsels' speeches. He completed the legal directions on 11 December 2018 and counsels' speeches followed.
29. Before he commenced his speech, prosecution counsel, Mr Maguire, indicated that he wanted to be able to address the jury on the basis that the co-accused Thomas's interview confession was evidence in the case generally and not just admissible against Thomas. The judge did not give a ruling or express any view at that stage and completed his legal directions without making any reference to that issue. In his speech Mr Maguire did suggest that Thomas's account in interview about the appellant having an imitation firearm was true, although he did not suggest that the interview was evidence in the case generally or admissible against the other defendants.
30. In his speech for the appellant, Mr Lavers submitted that what Thomas had said in interview was only evidence against him and could not be used by the jury against a co-defendant. That submission was in accordance with the position at common law and would be the position unless the judge had admitted the interview as evidence against the appellant under one of the hearsay provisions of the Criminal Justice Act 2003, which at that stage he had not done.
31. It was only on the afternoon of 14 December 2018, when all counsel had completed their speeches, that the judge invited legal argument on the status of Thomas's interview, evidently having considered the judgment of this Court given by Hughes LJ in *R v Y*

[2008] EWCA Crim. 10, [2008] 1 Cr.App.R. 34. From this it seems clear that the judge was focusing on the admissibility of the interview under section 114(1)(d) rather than section 119. Having heard argument, he ruled shortly that he would admit the interview against the appellant. He did not give a full ruling but said he would do so in due course in writing.

32. A discussion ensued with counsel as to what, if any, further directions should be given to the jury in those circumstances. Mr Lavers considered that a standard section 119 direction, that is concerning a previous inconsistent statement, would suffice, but the judge said that in his view the main gateway for admissibility was under section 114(1)(d) and that he had not thought about section 119 before the legal argument that day. The judge referred to the checklist of factors in section 114(2), but counsel indicated, and the judge agreed, that it would not be appropriate to give the jury a direction by reference to those factors which were for the court.

33. In the event, the judge did not give the jury any specific direction about the use they could make of the interview or any sort of warning about it. When he resumed his summing-up on 17 December 2018, he only said this about how the jury could use the interview:

"Mr Thomas's evidence on count one is different to that of [the appellant]. There is, of course, his interview and that interview can count as evidence against Mr Thomas and indeed, you can use it, contrary to what Mr Lavers said, to decide what happened in the house in Leeds and whether there was a kidnap and a gun produced."

34. A fully reasoned written ruling was provided by the judge on 9 January 2019, the day after the jury had retired to consider their verdicts. In that ruling the judge noted that the issue on count 1 was whether Pham went consensually with the appellant and Thomas.

The issue on count 2 was the same with the addition that it was disputed that any type of gun was produced. It was common ground that the factual question of whether a gun was brandished by the appellant was likely to be strongly determinative of whether count 1 could be proved. It was an essential fact in respect of count 2.

35. The judge identified what he saw as the difficulty. As a secondary party, Thomas could only be guilty if the appellant was guilty. The route to verdict document identified that pre-requisite. However, in determining as a matter of fact whether a gun was produced or brandished, Thomas's evidence and his confession was part of the evidence in determining whether or not a gun was produced. In so far as Thomas's evidence was concerned, the jury had a stark choice: Thomas was either telling the truth before the court or he was lying and telling the truth in his interview. The judge considered that it would be illogical for a jury to determine the issue of fact of the gun and then having made their determination go through the route to verdict to be directed that they could not use evidence in the interview as counting against the appellant. Jury deliberations had to be imbued with common sense and logic.

36. The judge referred to authorities where the matter had come up, specifically the decision of the House of Lords in *R v Hayter* [2005] 1 WLR 605 which preceded the passing of the relevant provisions of the Criminal Justice Act 2003, and the decisions of this Court in *R v McLean* [2008] 1 Cr.App.R 11 and *R v Y* (supra). He cited what Hughes LJ said at paragraph 52 of *Y*:

"A bare accusation against someone, whether associated with a confession by the maker or not, is capable of falling within section 114(1)(d). It follows that if such an accusation is in fact associated with a confession by the maker, it cannot ipso facto become incapable of falling within section 114(1)(d)." with the caveat that "The admission of a confession (disputed in the sense that the maker no longer accepts what he previously said) is not to be routine."

37. The judge then went through the specific factors in section 114(2) which must, together with any other relevant matter, be considered before addressing the question whether it is in the interests of justice for the hearsay statement to be admitted. He said that he had come down in favour of the jury being allowed to rely upon the confession of Thomas when considering the case as a whole and in particular whether a gun was brandished by the appellant. He continued:

"... the real problem with not allowing the jury to consider the confession evidence of Thomas in a context of the case as a whole and their factual judgments, is that it would create a potential for the jury to decide one thing against Thomas (by rejecting his oral evidence and accepting his confession) ... and then being forced to arrive at a separate factual conclusion against [the appellant]. This would be nonsensical, artificial and illogical."

38. The judge said that both counsel had invited him to consider section 119. It was noteworthy that that section would allow the interview to be admissible as evidence of any matter stated of which oral evidence by Thomas would be admissible. There was nothing in the terms of the section which required it to be read consistently with the common law rule that it was only admissible against Thomas, as Mr Lavers had submitted. The judge concluded that the confession was evidence of what happened, not just against the interests of Thomas but also against the appellant and in respect of the case in general that may be relevant concerning the co-accused Nguyen and Kieu who were also present at the house when the apparent kidnapping took place.

39. Before considering counsel's submissions, we will set out the statutory provisions with which we are primarily concerned. Section 114(1)(d) provides:

"Admissibility of hearsay evidence

(1) In criminal proceedings a statement not made in oral evidence in the

proceedings is admissible as evidence of any matter stated if, but only if—

...

(d) the court is satisfied that it is in the interests of justice for it to be admissible."

40. Section 114(2) provides:

"In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it."

41. Section 119 provides:

"Inconsistent statements

- (1) If in criminal proceedings a person gives oral evidence and—

(a) he admits making a previous inconsistent statement, or

(b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18), the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

(2) If in criminal proceedings evidence of an inconsistent statement by any person is given under section 124(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible."

42. In support of his case that the judge had erred in admitting the interview evidence against the appellant, Mr Lavers contended that section 114(1)(d) was forward looking and not retrospective, as was made clear by the reference in the opening words of subsection (2) "whether a statement not made in oral evidence should be admitted under subsection (1)(d)". He submitted that this demonstrated that the decision as to whether to admit hearsay evidence under the subsection must be taken before the evidence is introduced.

43. Mr Lavers submitted that the judge had been particularly influenced in determining that the interview should be admissible against the appellant by his assessment that if the interview was only evidence against Thomas, the jury would be in a position where they could make a finding of fact against Thomas on the basis of the interview, but were only forced to make a separate factual conclusion against the appellant having been told they could not use the interview against him. The judge thought that this was nonsensical, artificial and illogical. However, Mr Lavers submitted juries have regularly been given directions that out of court statements by one defendant are not evidence against another, including in cases of primary and secondary liability, for many years without this presenting any obvious difficulty.

44. Mr Lavers submitted that the judge's concern about what he saw as an artificial and

illogical approach had led to him paying insufficient regard to the note of caution sounded by Hughes LJ in *Y* at 57 that interviews should not become routinely admissible against defendants, other than the interviewee, and that "in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person."

45. He also submitted that the judge's concern about what he saw as an artificial and illogical approach had led the judge to pay insufficient regard to the lateness of the application to admit the interview as evidence against the appellant. He submitted that there was a fundamental unfairness in admitting the hearsay evidence at such a late stage. Both the appellant and Thomas had completed their evidence. Mr Lavers submitted that he had only dealt with Thomas's interview in a cursory manner in his examination of the appellant. Whilst he cross-examined Thomas briefly about what he had said in interview about the gun, he had not challenged him at all about the various prejudicial references to the appellant's bad character, specifically suggestions that he had previously been involved in trafficking and running cannabis grow houses.

46. Contrary to the suggestion in the Respondent's Notice, there had not been an agreement between him and Mr Maguire as to the admissibility of the appellant's bad character. The only agreement was as to the content of Thomas's interview which had been played to the jury. Mr Lavers did not accept that, as was asserted in the Respondent's Notice, the fact that he had attacked the character of Pham and Vu in cross-examination meant that the generalised evidence in Thomas's interview of the appellant's criminal activities was admissible. The prosecution never made an application to adduce that evidence under section 101(1)(g) of the Criminal Justice Act 2003 and Mr Lavers submitted that such an application would have been doomed to fail as it was based only on Mr Thomas's hearsay say-so.

47. He submitted that if he had been given proper notice by the prosecution that they intended to rely upon Thomas's interview, including the bad character allegations, he could have made a properly formulated severance application, although he recognised that the judge had indicated that he would not accede to such an application. He also submitted that if he had such notice he would have been able to make detailed submissions in his speech to the jury about the unreliability of Thomas's evidence generally and specifically in his interview. As it was, he had made brief submissions to the effect that Thomas's interview was not admissible in evidence against the appellant which the judge had then told the jury to ignore.

48. He also submitted that in his consideration of the section 114(2) factors the judge had paid insufficient regard to the importance of factor (e) "how reliable the maker of the statement appears to be". He submitted that the trial judge's assessment of the reliability of an out of court statement was of paramount importance to determining whether it was in the interests of justice to admit the statement under section 114(1)(d). Here the judge had merely said in his ruling:

"... of course D2 is said to be unreliable bearing in mind contrasting versions."

Mr Lavers submitted that it had been incumbent on the judge to assess the reliability of Thomas himself which he had not done.

49. He submitted that the judge's interpretation of section 119 of the Criminal Justice Act 2003 was wrong. If the judge and the prosecution were correct then provided that a defendant in the position of Thomas gave evidence, his out of court statement implicating a co-defendant would always be admissible for its truth. If he adopted the interview in

evidence then the contents of the interview would become evidence against the co-defendant. If his evidence were inconsistent with the contents of the interview and he retracted the answers in interview which incriminated his co-defendant, as had happened here, the contents of the interview would be admissible against the co-defendant under section 119. If this were correct then the interview implicating a co-defendant would become routinely admissible for the truth of its contents, the very thing which Hughes LJ in *Y* at 57 said should not happen. Mr Lavers submitted that section 119 only made the interview admissible in evidence against Thomas, not against the appellant. In any event, the judge should have exercised his discretion under section 78 of the Police and Criminal Evidence Act 1984 to rule that the statements in interview were not admissible against the appellant.

50. He submitted that if the judge had been correct to admit the interview as evidence against the appellant either under section 114(1)(d) or section 119, the judge should have given the jury some sort of warning direction about relying on the hearsay statements in the interview, given that the appellant was not present at the time and given Thomas's self interest in exculpating himself and incriminating the appellant. The fact that Mr Lavers had not sought such a direction should not be held against the appellant when considering the fairness of his conviction.

51. So far as the references to bad character in the sense of the allegations of previous involvement in trafficking or robbing weed houses were concerned, again there had been no direction. The jury had been told about the appellant's previous convictions consisting of shoplifting, burglary, driving offences, possession of a class A drug, being concerned in the production by another of cannabis, assault and possession of an offensive weapon. The defence had in fact introduced evidence of those convictions

during the course of the appellant's evidence.

52. The judge had given a short written and oral bad character direction stating:

"You have heard about his previous convictions, you should bear in mind that just because someone has committed previous criminal offences does not mean that he must have committed the offences that he is charged with. Nor does that mean, of course, that he must be lying now."

53. Mr Lavers submitted that far from giving the jury appropriate directions warning them about the hearsay statements in interview, the judge had compounded the unfairness by what he did say in the summing-up about the interview which had steered the jury towards concluding that the interview account was true and did not present Thomas's evidence in a balanced way.

54. Mr Lavers also complained that the judge had failed to give the standard direction in relation to the interviews of the co-defendants other than Thomas, namely Kieu, Ryan and Barrow-Holnes, that the respective interview account of each was only evidence against that defendant and not the co-defendants. He submitted that such a direction would potentially have undermined the judge's efforts to convince the jury that Thomas's interview had probative force against the appellant and the judge may have seen a logical inconsistency in telling the jury that they could rely upon Thomas's interview against the appellant whilst giving them the standard direction in relation to the other interviews.

55. Overall, he submitted that in consequence of the judge's admission of the interview and failure to give any warning directions about it, the convictions were unsafe. Pham and Vu had been accepted by the prosecution as far from perfect witnesses with credibility issues. The effect of admitting the interview was that the jury were able to use Thomas's statements in interview that the appellant had produced a gun at the house in Leeds to

support the evidence of Pham and Vu. This went not only to the verdicts on counts 1 and 2 (kidnap and carrying an imitation firearm) but to the whole indictment as it undermined the appellant's credibility generally and bolstered the evidence of Pham and Vu. He submitted that the jury's acquittal of the appellant on count 5 and of Thomas on counts 2 and 5 was explicable on the basis that the jury placed significant reliance on Thomas's account in interview. The acquittal of all four defendants on count 5 is likely to have been because there was no support for Vu's evidence that the appellant had a gun on the second occasion, Thomas having remained in the car on that occasion.

56. In opposing the appeal, Mr Maguire on behalf of the prosecution in his Respondent's Notice points out that it is noteworthy that Mr Lavers had agreed the contents of the interview which went before the jury and did not seek to exclude the references to the appellant's bad character. Nor did he object when Mr Maguire cross-examined Thomas about those matters. During the course of that cross-examination, Thomas accepted that the appellant had said to him that he robbed weed houses. Mr Lavers did not himself cross-examine Thomas further about the reference in interview to the appellant having robbed grow houses. Mr Maguire suggested that that objection was not taken because Mr Lavers appreciated that evidence of the appellant's criminal activities would be admissible against him, once he had attacked the character of Pham and Vu. Mr Maguire questions how the appellant's case or Mr Lavers' closing speech would have differed if the judge had admitted the interview at an earlier stage. He submitted that the judge exercised his discretion correctly in admitting the interview under section 114(1)(d) giving proper consideration to the factors set out in section 114(2) and to the caution sounded by Hughes LJ in *Y*.

57. In his written Respondent's Notice, he contended that the judge had also been right to

admit the statement under section 119, although in his short oral submissions to us this morning, Mr Maguire accepted, it seems to us correctly for reasons we will come to, that the judge had been wrong to rely upon section 119 in the alternative.

58. We can deal shortly with the submission that section 114(1)(d) only operates prospectively. Ingenious though that submission is, we cannot accept it. In *Y* at paragraph 60 this Court expressly recognised the possibility that where the maker of the statement was called to give evidence and cross-examined about that previous statement, an application might subsequently be made to admit the previous statement under section 114(1)(d) even though it was already before the jury. Of course it does not follow that an application to admit the previous statement under the subsection will succeed, especially if that application were made late in the trial process.

59. We agree with Mr Lavers that the judge's concern about putting the jury in the artificial and illogical position of reaching different factual conclusions vis-a-vis the two defendants was misplaced. As he submitted, juries are routinely given warning directions that out of court statements by one defendant are not evidence against another, which may lead to them having to reach different factual conclusions in relation to one defendant than in relation to the other. That does not seem to present any difficulties with jury deliberations.

60. However, leaving aside the lateness of the application under section 114(1)(d), we consider that the judge did properly assess the various factors under section 114(2). Mr Lavers criticised the judge's approach to factor (e) concerned with reliability, but it seems to us that, looking at the ruling as a whole, what the judge concluded was that the jury would be entitled to conclude that Thomas had told the truth in interview but had lied in his oral evidence when he sought to explain away those answers in interview as

motivated by spite. This was in accordance with the approach advocated by this Court in *R v Sliogeris* [2015] EWCA Crim 22, at paragraph 41, where Elias LJ giving the judgment of the Court said:

"At the very least it seems to us that the judge must be satisfied that the evidence is properly capable of being considered reliable by a jury."

61. The judge also gave proper consideration to *Y* and what Hughes LJ said about it not being routine to admit statements in interview by one defendant as evidence against another. It follows that, subject to the issue of the lateness of the application in the ruling, we consider that the judge cannot be criticised for admitting the interview under section 114(1)(d).
62. We will return to the lateness of the application shortly, but first we will deal with the question of whether the judge was also right to admit the interview as a previous inconsistent statement under section 119. In our judgment he was wrong to do so. The section refers to the previous inconsistent statement being "admissible as evidence of any matter stated of which oral evidence by him would be admissible" but does not say that the evidence in question - the previous inconsistent statement - is treated in every respect as if he did give that evidence. We consider that under the section the previous inconsistent statement is admissible against the person making the statement as evidence against him of the truth of its contents, thus reversing the common law rule enacted in section 5 of the Criminal Procedure Act 1865 that the statement only went to the witness's credibility: see Archbold paragraph 8-270.
63. The conclusion at which the judge arrived that section 119 also made the previous inconsistent statement by Thomas in interview admissible as evidence against another defendant such as the appellant is inconsistent with what Hughes LJ said in *Y* at

paragraph 48 to the effect that out of court statements which did not amount to confessions would only be admissible against another defendant "under section 114(1)(d) providing of course the interests of justice test was satisfied", see also the cautionary approach in paragraph 57 of that judgment to which we have already referred.

64. We note also that in giving the judgment of the Court in *R v Riat* [2012] EWCA Crim 1509, [2013] 1 WLR 2592, where the statutory framework in relation to hearsay evidence under the Criminal Justice Act 2003 was considered, Hughes LJ does not identify section 119 as one of the gateways to admissibility of hearsay evidence against a defendant. It seems to us that if the section had the wide-ranging effect for which the prosecution contended at trial and which the judge accepted, it is inconceivable that a judge of the immense experience of criminal law of Lord Hughes would not have said so in one or other of these judgments.

65. We return to the lateness of the application. It is unfortunate that the application was made so late. Mr Maguire is entitled to say that he did not know until Thomas gave evidence that he would seek to retract the answers in interview which had incriminated the appellant. Of course, if he had adopted the contents of the interview in his evidence the answers would have become part of his oral evidence and admissible against the appellant, in which case the prosecution would not have needed to make an application under section 114(1)(d). However, once Thomas had been cross-examined by the prosecution, it must have been obvious that an application under section 114(1)(d) would need to be made. It seems to us that the application should have been made at the end of the prosecution cross-examination of Thomas, or at the very least the prosecution should have warned Mr Lavers at that stage that an application was likely to be made.

66. However, what matters is the extent to which the lateness of the application can be said to

have caused irremediable prejudice to the appellant. We do not consider that there is anything in the point that, if Mr Lavers had known that the application was going to be made, he would have presented the appellant's case or his evidence differently, not least because, for the reason we have just given, we do not consider that the prosecution can be criticised for not making the application until the end of their cross-examination of Thomas, by which time the appellant's case was closed. Nor do we consider that there was any prejudice to the appellant in relation to the allegation Thomas made in interview that the appellant had a gun on the first occasion. Mr Lavers cross-examined Thomas extensively about whether the appellant had a gun on the first occasion and as to why he said that in interview.

67. Mr Lavers did not ask Thomas any questions in cross-examination about his assertion in interview that the appellant had previously been involved in trafficking and robbing grow houses - no doubt because he did not want to draw attention to the point which had not been put to the appellant himself when he was cross-examined. Mr Lavers had of course allowed the assertion to go before the jury as part of the agreed contents of the interview. As we have already said, Thomas accepted in cross-examination by the prosecution that the appellant had told him that he had previously robbed weed houses. Whilst that line of questioning should not have been embarked upon without an application to adduce such bad character evidence, the fact is that Mr Lavers did nothing to object to the cross-examination. Once Thomas had given that evidence, what was in the interview was overtaken by events, as Thomas had now given direct evidence in the witness box that the appellant had told him that he had previously robbed weed houses. At that point there should probably have been an application by the prosecution to rely upon this as bad character evidence under either section 101(1)(d) or (g). Contrary to Mr Lavers'

submissions, it would not necessarily have failed because it was only based upon Thomas's hearsay evidence statement since he had now repeated the assertion in his oral evidence.

68. In a very real sense therefore, any prejudice was already suffered before the judge gave his ruling. We are sceptical about the suggestion that Mr Lavers would have engaged in a more detailed cross-examination of Thomas about those assertions, even if he had known that the judge would rule the interview admissible against the appellant. Tactically, he may not have been able to improve on the evidence Thomas gave early in his cross-examination, that parts of what he said in interview were said out of a feeling of spite towards the appellant, and that in his oral evidence on reflection he was trying to assist as to what had actually happened. Further questioning of Thomas about his generalised assertions as to the bad character of the appellant might only have made matters worse for the appellant, particularly given what Thomas had said in cross-examination by the prosecution about the appellant telling him that he had previously robbed weed houses.

69. We are also somewhat sceptical as to whether the appellant was prejudiced because Mr Lavers was unable to include in his speech further criticism of Thomas and his statements in interview. It is apparent that he did submit to the jury that Thomas had a self-interest in exculpating himself and implicating the appellant and that he had an axe to grind in relation to the appellant. Whilst he may have made more of these points if he had known the interview would be admitted in evidence against the appellant, this seems to us to be more a question of emphasis than one of substance.

70. Overall, we consider that whilst there was some prejudice to the appellant from the lateness of the application, this was not sufficiently serious to warrant refusal of the

application under section 114(1)(d). Any prejudice could have been cured by an appropriate warning direction.

71. What is clear from the discussion on 14 December 2018, after the judge had ruled that he would admit the interview as evidence against the appellant, is that for tactical reasons Mr Lavers did not want the judge to give a specific direction about hearsay and appears to have accepted that no such direction was necessary because Thomas, as the maker of the hearsay statement, had been challenged in cross-examination. It would appear that both Mr Lavers and the judge had in mind the assertions in interview about the gun which had been fully explored in Thomas's evidence and were not thinking about the assertions about the appellant's bad character, perhaps because of the direct evidence that Thomas had given.
72. However, although the judge gave part 2 of his summing-up on 17 December 2018, there was then a three-week break in the trial until 8 January 2019 when the judge gave the jury a summary of the critical parts of the evidence as suggested by counsel. Thus, Mr Lavers had plenty of time in which to consider whether to ask the judge to give a fuller bad character direction specifically dealing with Thomas's assertions in interview. He did not do so, presumably again for tactical reasons. The judge had not in fact referred in the summing-up to Thomas's evidence in the witness box that the appellant had told him that he had previously robbed weed houses, so that tactically it was probably better not to draw attention to that evidence by seeking a further bad character direction.
73. Ultimately, whatever position the defence adopts as regards legal directions for tactical reasons, the decision as to whether in fairness a particular direction should be given rests with the trial judge. We consider that in the present case it would have been better for the judge to give the jury a warning direction addressing the limitations of the interview

and the need to consider Thomas's explanation for his lies.

74. In relation to the assertions in interview about the appellant's bad character, as we have already said, these were really overtaken by events because Thomas had said in his oral evidence that the appellant had told him that he had previously robbed weed houses. Given that evidence the judge was faced with a choice of either giving a direction as to the potential relevance of that evidence of bad character or telling the jury to ignore it. The short bad character direction he had given, which we quoted earlier, did not deal with this aspect but only with his previous convictions. It was not really adequate because it failed to tell the jury how they could use the evidence. On balance, given the potential complication of any further direction and the fact that the prosecution did not make a formal bad character application in relation to the evidence that the appellant had said he had previously robbed weed houses, the better course would have been to direct the jury to ignore that evidence, which after all was no more than an assertion by Thomas which had not been put to the appellant when he gave evidence.

75. We also consider that Mr Lavers is correct that the judge should have given the standard direction in relation to the other defendants' interviews, although they were only evidence against the particular defendant being interviewed. During the further discussion about directions on 14 December 2018 the judge indicated he would give that usual warning, but in the event he did not do so. It is entirely speculative to attribute that failure to the judge's desire to avoid logical inconsistency, as Mr Lavers suggested. In our judgment, although it would have been better if the judge had given such a direction, there was no prejudice suffered by the appellant as a consequence of his failure to do so. Indeed, it might be said that by giving such a direction the judge would have highlighted the differences between those interviews and Thomas's interview in a way which was

prejudicial to the appellant.

76. In relation to Mr Lavers' criticism of the judge's summing-up, we consider that the evidence that Thomas was telling the truth in interview was strong given that he referred to certain details, for example the use of cable ties, which were consistent with the evidence of the complainants, which he had not been told by the police and which he could only have known if they were true. The judge referred to Thomas's evidence that his interview was a lie in many respects, to the possibility that his explanation of what he said in interview may be true and to the appellant's denials. Elsewhere in his summing-up he had referred the jury to the many inconsistencies in the complainant's evidence. When the trial resumed in January, as we have said, he gave the jury a written summary of the evidence about which no complaint is made. We consider that Mr Lavers' suggestion that the summing-up was unbalanced and somehow biased towards the prosecution is unfounded.

77. Accordingly, we consider that the interview was appropriately admitted under section 114(1)(d) despite the lateness of the application, but that the judge should have given the jury directions about how they should approach it and the bad character evidence. The question remains whether his failure to do so rendered these convictions unsafe. In our judgment it did not. Irrespective of the evidence of Thomas and what he said in interview, the case against the appellant that he had kidnapped these two men and falsely imprisoned them in London was very strong. The evidence of the appellant at trial was inconsistent with his original denial in his prepared statement in interview and in his first defence statement that he had gone to Leeds at all. Much of what he said in evidence he had failed to mention in interview or to disclose in his defence statements. The judge gave a specific direction to the jury about that failure.

78. The audio recordings of the appellant beating Pham were particularly damning as regards what had really been going on and the appellant's explanation in evidence was, to say the least, unconvincing. The fact that he had assaulted Pham in this way provided strong support for the overall case that he had gone to the house in Leeds to kidnap Pham and had done so, threatening him with a gun, rather than his own somewhat absurd and incredible explanation that he had been asked to collect Pham by a friend and provide him with accommodation in London. As Mr Maguire says in his Respondent's Notice, the appellant was an unlikely choice for collecting Pham for innocent purposes given that he could not drive. That the appellant committed the offences in counts 1 and 2 was also supported by the evidence of Pham and Vu which was consistent with the overall picture of kidnap and violence.

79. In relation to the counts relating to Vu, there is not only the evidence of Vu and Pham but the evidence of first complaint and the footage from the body camera of the police officer. Again all this other evidence is consistent with kidnap and violence, even if the jury were not sure that the appellant had a gun on the second occasion. As with Pham, the appellant's explanation that he went back to Leeds to collect Vu and provide him with accommodation and thus that this was an innocent trip was absurd and incredible.

80. In our judgment, despite our conclusion that it would have been better for the judge to have given some directions about the assertions in interview and that the appellant had told Thomas that he had previously robbed weed houses, we are satisfied that overall the convictions were safe. This appeal against conviction 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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