

IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
Case No: 2022/01872/B5  
NCN: [2022] EWCA Crim 1294



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Wednesday 10<sup>th</sup> August 2022

**B e f o r e:**

**LORD JUSTICE WARBY**

**MRS JUSTICE O'FARRELL DBE**

**MRS JUSTICE CUTTS DBE**

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**REGINA**

**- v -**

**GARETH HEAD**

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**Mr K J Baumber and Miss K Oluwunmi** appeared on behalf of the Applicant

**Mr M Cohen** appeared on behalf of the Crown

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**J U D G M E N T**  
**(Approved)**

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## **LORD JUSTICE WARBY:**

1. On 1<sup>st</sup> March 2022, following a trial in the Crown Court at Basildon, the applicant Gareth Head (aged 45) was convicted by a jury of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861. He was sentenced to a 12-month community order and ordered to pay the victim surcharge and £1,750 towards the prosecution costs.
2. The conviction followed a retrial after a jury had been unable to reach a verdict at a trial in October 2021, at which the applicant was acquitted of another charge arising from the same set of facts.
3. The applicant's applications for an extension of time of 78 days in which to apply for leave to appeal against conviction and for leave to adduce fresh evidence have been referred to the full court by the Registrar. Before the hearing we made clear that we would treat it as a rolled-up hearing at which we would determine whether to grant leave and, if we did, would proceed to consider the substantive appeal forthwith.
4. The background can be quite briefly summarised. The applicant was a police officer. He lived in Brentwood. The complainant, Jetu Miah, was a taxi driver. In the early hours of 28<sup>th</sup> May 2018 the applicant, who was off duty at the time, hailed the complainant's taxi in Brentwood High Street. The complainant drove the applicant and his friend, Paul Roden-Flame, to the applicant's home. On the way there was some conversation. On arrival, there was an altercation.
5. The prosecution case was based upon the complainant's account of what happened. His evidence was that on the journey the applicant had made comments about the cab being dirty and smelling of curry. He denied that anything had been said about cannabis, which the applicant was later to assert was the case. The trouble had arisen, said the complainant, on arrival at the applicant's home when the applicant had said that he was a police officer. When the complainant asked for identification, the applicant did not produce any but screamed at the complainant to hand over the keys and, when he declined, opened the car door and punched the complainant repeatedly to the face, causing him a black eye and bruising.
6. That evidence was supported by medical evidence that upon attending hospital the complainant had a black eye, a cut to his lip and tenderness to his jaw. The complainant denied that his car had struck anything as it left the scene.
7. The applicant denied causing the injuries complained of. His case was that he had used lesser, limited, lawful and proportionate force in self-defence and to prevent the commission of a criminal offence. His account was that during the journey he had smelled cannabis and had become concerned that the complainant was driving under the influence of drugs. He said that when he raised the matter the complainant had admitted smoking cannabis earlier that day. The applicant said that he had told the complainant to stop the car so that he could phone the police. When the car stopped, the applicant tried to take the keys. The complainant refused to hand them over, upon which the applicant struck the complainant to stop him driving away. The applicant said that these were mere distraction strikes to the shoulder. He suggested that the complainant's injuries were caused by his reversing his taxi into a post as he drove off, in the course of which, it was said, he knocked over the applicant, his wife and a friend.
8. The applicant did not report the incident. The reason, he said, was that he had not recorded the complainant's number plate and therefore had no evidence that the incident had occurred.

9. The applicant called Mr Roden-Flame as a witness, whose evidence generally supported his own account. He also called his wife Elizabeth and other witnesses from the scene whose evidence supported aspects of the applicant's account, including the demand for the keys and the taxi striking a post as it left the scene.

10. Following a summing up of which no complaint is made, the jury returned a unanimous guilty verdict.

11. The application for leave to appeal is based exclusively on the post-conviction disclosure to the applicant of the complainant's criminal record drawn from the Police National Computer ("PNC"). This showed that on 22<sup>nd</sup> June 2021 the complainant was convicted of driving with excess controlled drug in his system (cannabis) and possession of cannabis, both offences having been committed on 31<sup>st</sup> December 2020. He was fined and disqualified from driving for 12 months.

12. In advance of both trials the prosecution had stated, via a schedule of unused material, that the complainant's PNC disclosed no convictions and was "clearly not disclosable". That was not true at the time of the applicant's first trial in October 2021, or at the time of the retrial which took place nine months after the conviction. The conviction came to light as a result of information provided to the applicant informally by a former police colleague.

13. The new information is said to be fresh evidence which is credible, could not reasonably have been obtained for the trial, would have been admissible at that trial, and casts doubt upon the safety of the conviction.

14. The applications for leave to appeal and for leave to adduce fresh evidence were lodged out of time because the PNC was not disclosed until after the 28-day deadline had elapsed.. The PNC was received on 30<sup>th</sup> May 2022. The application followed on 15<sup>th</sup> June. It is said that in all the circumstances this was prompt and that it would be in the interests of justice to grant an extension of time. We agree, and we grant the necessary extensions.

15. As for the merits, there is no doubt that the evidence is capable of belief, and there is a reasonable explanation for not seeking to adduce it at trial. It is conceded that in relation to both trials the Crown erred in failing to disclose the complainant's convictions. We do not need to decide why that was. Indeed, we cannot decide why it was because no explanation has been offered for this clear breach of duty. There is no suggestion that the applicant ought to have questioned the Crown's assertions about the contents of the PNC. Nor is it suggested that he could have discovered this information in any other way by the use of reasonable diligence before trial.

16. In those circumstances the issues on the application to adduce fresh evidence and the application for leave to appeal overlap. We begin by considering the fresh evidence application, applying the criteria in section 23 of the Criminal Appeal Act 1968. On the facts of this case, that is appropriate by way of exception to the general rule of practice explained in *R v Cross* [2014] EWCA Crim 96 at [7] and [25].

17. The first issue for consideration is whether the convictions would have been relevant and properly admissible at the retrial, pursuant to section 100 of the Criminal Justice Act 2003, as evidence of the bad character of someone other than a defendant. Mr Cohen, who appears for the Crown, concedes that the likelihood is that an application would not have been opposed, but would instead have been agreed. He accepts that even if an application had been opposed, it would probably have succeeded. We agree. In our view, the convictions would have been

admissible under section 100(1)(b) as having substantial probative value in relation to a matter which was in issue in the proceedings and which was of substantial importance in the context of the case as a whole.

18. The matters in issue for this purpose are whether it was or might have been the case that the complainant had used cannabis so that a smell lingered in the taxi and there was a conversation about cannabis use as the applicant had alleged. These were key issues for the jury, in our view. The Crown's concession that the convictions should have been disclosed is an admission that the information would have materially weakened the case for the Crown or materially strengthened that of the defence. It may not follow from that proposition that the convictions had substantial probative value as required by section 100(1)(b) but, if it does not, it is certainly a short step from the one conclusion to the other. The convictions represented conduct similar to the misconduct alleged against the complainant, which was an important element of the applicant's defence.

19. Evidence of later misconduct can be admitted as evidence of a propensity at the time of relevant earlier events: see *R v Adenusi* [2006] EWCA Crim 1059. The passage of time is relevant, but would not of itself be a reason for excluding the convictions as a matter of law. It all depends on the facts. The principle is that the evidence must not be admitted if in all the circumstances the inference invited would amount to nothing more than mere speculation: see *R v Richards* [2018] EWCA Crim 2374 at [77].

20. In the instant case it is relevant to take account of the fact, which is common knowledge, that the use of drugs is usually a chronic habit, not a one-off event. The timing of the offending that was the subject of the convictions might have affected the weight that a jury would give to them, but that would be a matter for the jury to assess. There has been no evidence or suggestion in this case that the events of New Year's Eve of 2020 represented some novel and unprecedented behaviour on the part of the complainant. For those reasons we are satisfied that an application for leave to adduce the convictions would have succeeded.

21. The final and critical question raised by section 23 is whether the fresh evidence *may* – and at this stage we stress *may* – afford a ground for allowing the appeal. In our judgment, for substantially the reasons we have already given, it may do so, and the ground of appeal that is based upon the fresh material is arguable. We therefore grant leave to appeal.

22. That brings us to the issue of whether the fresh evidence does afford a ground for allowing the appeal. Does the absence of this evidence at the time of the retrial render the conviction unsafe? The Crown contend that the answer is: No. They submit that the question of whether there was any discussion about cannabis was no more than one of the issues in the case. The ultimate question for the jury, say the Crown, was whether the appellant used reasonable and proportionate force. The injuries sustained by the complainant were not consistent with the appellant's account, they say. Nor was the appellant's failure to report the incident consistent with proper conduct by a police officer. It is submitted that the complainant's convictions had no bearing on those points and would not have made any difference to the outcome. Moreover, the offences post-dated the events that were the subject of the trial by more than two years. Mr Cohen submits that, looked at in the round, the appellant's conviction was not unsafe, the trial was not unfair, and there is no reason to believe that the verdict, if the convictions were admitted, would have been or would be different.

23. Mr Cohen's analysis is beguiling, but we have not been persuaded.

24. We have been referred to a number of authorities on the test to be applied, including *McInnes v Her Majesty's Advocate* [2010] UKSC 7; *R v Kelly (Richard)* [2015] EWCA Crim

500; and *R v Accamo and Djordjevic* [2017] EWCA Crim 751. Mr Baumber, on behalf of the appellant, submits that these cases show that where the material should have been disclosed the test is whether there is a real possibility that the jury would have arrived at a different verdict. That is the test identified by the Supreme Court for cases where the complaint is that the conviction is unsafe because the trial was not fair.

25. This test may not be quite the same as the more general test for whether fresh evidence undermines the safety of the conviction, which was identified by the Privy Council in *Dial v The State of Trinidad and Tobago* [2005] 1 WLR 1660, and has been regularly applied in this court. In that case the Privy Council said that where fresh evidence is adduced on appeal and the Court of Appeal finds it credible, it is for the Court of Appeal to evaluate its importance in the context of the remainder of the evidence in the case. The Privy Council said:

"The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury."

That said, when applying this test, the court will consider whether the fresh evidence might have reasonably led the jury to a different verdict: see *R v Nealon* [2014] EWCA Crim 574.

26. Our view is that the *McInnes* test, which this court treated as the settled approach in *R v Kelly*, is the right one in the circumstances of this case. But we conclude, as the court did in *Kelly* (see [48]), that on either of these approaches the appeal must succeed.

27. In our view, the prosecution is taking an artificially limited view of the case. True it is that one key issue was whether the injuries sustained by the complainant were consistent with the use of reasonable force in lawful pursuit of an honest wish to prevent crime. But there were two other key factual issues which logically came first.

28. One was whether the appellant was or may have been genuinely concerned that the complainant was unfit to drive due to using cannabis. That was the sole basis for his defence that he had used reasonable and lawful force to prevent the commission of a crime. The trial judge correctly directed the jury that the prosecution had to make them sure that this was not the case and that the issue was to be decided on the basis of the facts as they were, or as the appellant honestly believed them to be. The jury therefore had to consider the competing and incompatible accounts of what had been said and what happened during the journey.

29. The appellant had made a statement on the day of the incident in which he asserted that he had noticed a strong smell of cannabis and taken the matter up with the driver. He reiterated this account in interview under caution some months later, and in his defence statement. It remained a central element of his case and his evidence at trial. This version was described by the prosecution at trial as "nonsense", which had been invented by the appellant. The prosecution relied on the complainant's account which was in stark contrast. What he said was that the appellant had told him that his taxi "stinks of curry and onions". He denied that his car smelled like "weed". He denied that he had smoked "weed", and he denied that there had been any reference to this or driving whilst under the influence of drugs during the journey.

30. In our judgment, the fact that the complainant was a user of cannabis who had on another occasion been found in possession of that drug when intoxicated with it to an unlawful degree, and whilst driving, was clearly relevant to the resolution of this important conflict of evidence. To put it simply, these convictions could have been seen as making it more plausible that the appellant had indeed smelled cannabis in the taxi, been concerned about the complainant's

fitness to drive and taken the matter up with him. As we have said, a jury might regard the fact that the conviction related to a later occasion as weakening the force of the point, but that is by no means necessarily the case. It cannot, in our judgment, be said that it would be unreasonable speculation to infer that the complainant, intoxicated whilst driving in December 2020, was or may have been doing the same in August of 2018.

31. It is also of some relevance to bear in mind that this offence was committed whilst this case was awaiting its first trial. We are not persuaded by Mr Cohen's submission, not all of which was foreshadowed in the Respondent's Notice, that other evidence in the case would have undermined the inference contended for. The evidence of Nurse Becky Rice, to which he referred, seems to us far from conclusive on this point, given the limited statements she made about the matter related to events many hours after the journey which was the focus of the case. In our judgment, there is a real possibility that the jury's approach to that aspect of the case could be influenced in the appellant's favour by knowledge of these convictions.

32. Then, secondly, there is the issue of how the complainant came by his injuries. Were they inflicted by a series of unprovoked punches thrown by the appellant? Or was it, or might it be, the case that they were wholly, or at least partly, the result of a collision with a post as the complainant drove away? The question of what did or did not take place on the journey to the appellant's home cannot be viewed in isolation. If a jury concluded that the complainant's evidence on that issue was false or unreliable, they might well conclude that the same was true of what he said about how his injuries were sustained. In short, the convictions could indirectly damage his credibility in a significant way and therefore go to what the prosecution contend is the critical issue in the case.

33. For both these reasons, these convictions are important evidence in the context of the case as a whole, and the fact that they could not be deployed by the defence undermines the safety of this conviction.

34. We therefore grant leave to appeal, admit the fresh evidence and, on the basis of that evidence, conclude that the conviction is unsafe. The appeal is allowed and we will quash the conviction.

(The Crown requested time in which to take instructions on a retrial)

(The defence resisted the request)

35. **LORD JUSTICE WARBY:** If the Crown does not seek a retrial, then the order will be as pronounced so far, unless there are any other consequential matters. If the Crown does seek a retrial, then we will have a hearing at a time to be arranged on Friday.

**NOTE:** *On 11 August 2022 the Crown indicated that it did not seek a retrial.*

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

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