



Neutral Citation Number: [2023] EWCA Crim 1248

Case No: 202301232 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
HIS HONOUR JUDGE LAMBERT
Ind No T20217020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2023

Before :

LADY JUSTICE ANDREWS
MRS JUSTICE STACEY
and
HER HONOUR JUDGE DHIR KC
(sitting as a Judge of the Court of Appeal (Criminal Division))

Between :

ABDULQANI HAMDAN
- and -
THE KING

Appellant

Respondent

Derek Perry (instructed by **Sainsbury Douglas**) for the **Appellant**
Ben Douglas-Jones KC (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: 19 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Note: The re-trial in this case has now taken place. Accordingly this judgment is no longer subject to reporting restrictions pursuant to section 4(2) of the Contempt of Court Act 1981. It remains the responsibility of the person intending to share this judgment to ensure that no other restrictions apply, in particular those restrictions that relate to the identification of individuals.

LADY JUSTICE ANDREWS:

INTRODUCTION

1. This is an appeal by Abdulqani Hamdan against his conviction on 17 March 2023 of one count of wounding with intent to cause grievous bodily harm contrary to s.18 of the Offences Against the Person Act 1861, following a retrial in Bristol Crown Court before HH Judge Lambert and a jury. The main ground of appeal is that the judge was wrong to have refused a joint application by prosecution and defence counsel to discharge the jury following an irregularity in dealing with a jury note, because it was no longer possible to have a fair trial.
2. After hearing submissions by Mr Perry, counsel for the appellant, and Mr Douglas-Jones KC, counsel for the Crown, to both of whom we are grateful for the clear and succinct way in which they were presented, we were satisfied that the conviction was unsafe and that the appeal must be allowed.
3. Since Mr Douglas-Jones had indicated that his instructions were to seek a retrial if the Court were to allow the appeal and quash the conviction, and because the case concerns events which took place well over three years ago, we announced the result of the appeal at the end of the hearing, stating that our reasons would be provided in a reserved judgment. This would be handed down remotely without the need for counsel to attend. We then heard further submissions from counsel, allowed the Crown's application, and gave directions in respect of the retrial.
4. We also made an order under s.4(2) of the Contempt of Court Act 1981 prohibiting the publication of this judgment until after the retrial (or any earlier date on which it becomes apparent that a retrial will not take place). We directed the Crown to inform the Criminal Appeals Office as soon as the order ceases to take effect, in order that the necessary steps can be taken to promulgate the judgment as soon as possible thereafter.
5. These are our reasons for allowing the appeal and quashing the conviction.

BACKGROUND

6. The appellant and the complainant in this case are both Somali nationals who were living in Bristol at the time of the events in question. In the early evening of 28 January 2020 the complainant, Hassan Hersi, was taken by ambulance to hospital with a deep laceration to the top of his skull. He received medical treatment and the wound was closed with three staples. It was accepted that he had sustained this injury following an altercation with the appellant, but their rival accounts of how it happened could not have been more different. Each portrayed the other as the aggressor. There was a history of ill-feeling, apparently emanating from the fact that the appellant's wife had previously been married to Mr Hersi's brother and had left him for the appellant.
7. The prosecution case, based on Mr Hersi's account, was that Mr Hersi had been passing time with a group of other Somali males in a flat above a takeaway shop in Stapleton Road, which was used to socialise and chew khat. The appellant entered the flat from the rear of the building, and his entry was therefore not captured by CCTV

outside. He came into the living room and picked a fight with Mr Hersi. He took hold of his face and twisted it, digging his nails into him. He accused Mr Hersi of interfering with his wife and family, and was shouting and swearing at him before throwing punches at his head and face.

8. Mr Hersi defended himself, but then the appellant took out a claw hammer which he had concealed in his jacket, and began to hit him. Others intervened to try and separate them, and in the ensuing struggle Mr Hersi was hit over the head with the hammer, though he said not with full force. The appellant then ran off through the kitchen. Mr Hersi, who was bleeding heavily, went outside onto Stapleton Road. Someone called the police, who arrived at about 7:25pm and an ambulance then took him to hospital.
9. At the retrial the prosecution called no oral evidence from any eyewitness despite the number of other men who were said to have been present. A statement from a man named Mohamed Shariff, who was abroad at that time, was read as unagreed hearsay. He said that the appellant had entered the living room of the flat asking for Hassan Hersi. He had then run towards Mr Hersi, "shouting insulting words of the religion of Hassan". Mr Hersi had tried to defend himself, and a fight had ensued which spilled out of the living room. Another man, who he named, had tried to separate the two men. The appellant then re-entered the living room holding a hammer. Mr Shariff tried to grab the hammer, and the other man tried to grab the appellant's right hand. Mr Shariff then shouted to one of the others in the flat to call the police. Another of the men present, Adam Dubad, who is related to the appellant, told him to put down the hammer, but he refused. Mr Shariff then noticed that Mr Hersi was bleeding from a head wound. Mr Hersi was angry. He had a broom in his hand and wanted to fight the appellant.
10. The appellant's version of events was that he never entered the flat. He had been intending to get some food on his way home, and was on the pavement outside the takeaway in Stapleton Road when Mr Hersi appeared and confronted him, hurling insults and abuse at him due to the appellant's relationship with his brother's ex-wife. Mr Hersi then punched him. The appellant punched him back in self-defence and in the ensuing scuffle, Mr Hersi fell over and hit his head on a metal bicycle rack. Other Somalis then arrived on the scene and pulled the two men apart. Mr Hersi was bleeding from his injury. The others told the appellant to go home. The appellant went into the takeaway, purchased some food and then walked home. The entire incident had occurred outside on the pavement. The appellant had not had a hammer with him, let alone used it. He had seen Adam Dubad on the pavement outside. Although Dubad was related to him they did not get on. He did not know Mohammed Shariff.
11. The police never went inside the flat in Stapleton Road. When they arrived at the scene, a number of Somali males were on the pavement outside, including Mr Hersi. He was taken to hospital in the ambulance more or less immediately. The police attended the appellant's address and carried out a search later the same evening. He was not in at the time. A hammer matching the description given by Mr Hersi was found in an otherwise empty freezer, and taken away in an evidence bag. Subsequent forensic examination of the hammer revealed three DNA profiles, one of which was the appellant's, one of which was from an unknown individual, and the third was said by the forensic expert to have been approximately 780 million times more likely to

have come from Mr Hersi than from someone unknown. There was no other forensic material found on the hammer such as blood or hair.

12. At trial, the defence raised the possibility that Mr Hersi's DNA could have been transferred innocently onto the hammer as a secondary transfer when the appellant moved or handled the hammer after his return home that evening.
13. The appellant attended the police station voluntarily to give his version of events after learning of their visit to his home. He did not have the assistance of an interpreter when he was interviewed under caution, but a solicitor was present. He said that Mr Hersi was the aggressor, and showed the police injuries that he said had been caused by Mr Hersi. When told that the police had found a hammer in his home, he said that everyone had a hammer in their house. He kept the hammer in a freezer that was not working. He said that he did not have the hammer during his fight with Mr Hersi. He denied going into the flat in Stapleton Road, stating that he had no key and could not have let himself in.
14. The jury at the appellant's original trial in March 2022 (in the same court but presided over by a different judge) had been unable to reach verdicts either on the count of s.18 wounding or on the alternate count of s.20 wounding. However they had convicted him by a majority of 10-2 of count 3 on the indictment, having an offensive weapon (the hammer) in a public place. The Crown did not seek to adduce that conviction at the re-trial.

THE IRREGULARITY AT THE RETRIAL

15. The application to discharge the jury was made on the morning of the third day of trial, 16 March 2023, after both parties had been afforded time to reflect upon an incident that occurred late the previous afternoon whilst the appellant was being cross-examined by prosecuting counsel at trial (who was not Mr Douglas-Jones).
16. The appellant, who was giving evidence through an interpreter, was being questioned about the extent of his ability to speak English. This was in the context of counsel putting to him alleged inconsistencies between his account in evidence and what he had told the police in interview. These included that he had stated in interview that a man named Jabouti had been present at the incident but in evidence he denied it; that in interview he said that Mr Hersi had hit his head on a bicycle, whereas in his evidence it was a bicycle rack; and that he had stated in interview that he was storing the hammer in the freezer, whereas in court he said he had hidden it there from some violent Somali friends.
17. In cross-examination the appellant suggested that his understanding of questions in interview, and the clarity of what he had said, were limited by the fact that he spoke little English and that he really ought to have had an interpreter at the police station. Prosecuting counsel challenged him on this, suggesting that in fact his English was perfectly good and that his claim to speak poor English was a lie. The appellant denied this.
18. As the exchanges between the appellant and counsel continued, a juror (who later turned out to be the foreman) wrote out a note and handed it up to the judge. It said the following:

“I heard the defendant talking English on the phone when I left the courthouse last night. Should I declare this?”

That was a perfectly proper question for the juror to have asked. He was right to have raised the matter with the judge.

19. Regrettably the judge did not follow the procedure prescribed for dealing with this situation. At the time of the trial, that procedure was set out in CPD 26M of the Consolidated Practice Directions 2015 (as amended). It is now set out in materially identical terms in paragraph 8.7 of the Criminal Practice Directions 2023, which came into force on 29 May 2023. As the Crown accepts, as a first step he should have quarantined the juror, segregating him from the other 11. He should then have shown both advocates the note and discussed the matter with them in the absence of the jury. With their assistance, he would have determined appropriate questions to be put to the individual juror (or possibly to the appellant, or both). If he took the former course, he could either have asked the juror to answer those questions in writing or brought him into court to answer the questions in the absence of the other jurors. He should then have discussed the upshot of the questioning with the advocates, and considered what to do about it. Depending on the answers, this might have ranged from giving the jury a direction that the issue was immaterial, with an explanation of why it was so, to discharging the individual juror (or the jury, if he had told others what he had witnessed). However, none of these steps was taken.
20. Instead, the judge took what may have appeared to him at the time to have been a pragmatic shortcut. He read out the note in open court before the entire jury, and then immediately turned to the appellant and asked him whether what the juror claimed to have witnessed on the previous day was correct. The appellant’s initial response, via the interpreter, was “who was I speaking to?” When the judge told him to answer the question, he said “no”. This gave rise to a direct conflict between the juror and the appellant about whether the latter had been speaking in English to someone on the telephone the previous afternoon.
21. Shortly after this incident, there was a break in proceedings. In the absence of the jury, Mr Perry raised his concerns with the judge about what had just happened. He pointed out that he was unable to discuss the situation with his client, who was still under oath. That remained the case when the court adjourned for the day around 15 minutes after it had reconvened. Once the jury had left for the evening, Mr Perry again voiced his concerns, and indicated to the judge that he was likely to make an application to discharge them, but that he was in the difficulty of being unable to take instructions. The judge very fairly said that if Mr Perry needed to make such an application later he would not hold against him the fact that he had delayed making it until he was able to take instructions.
22. There was further discussion between Mr Perry and prosecuting counsel after court, and the latter consulted the CPS reviewing lawyer. This led to both counsel addressing the judge first thing the following morning, in the absence of the jury, and telling him that they were both of the view that the jury should be discharged. The judge then permitted Mr Perry to take specific instructions from the appellant on the point, which he did before making his submissions on the application to discharge.

23. There were no doubt a number of questions that Mr Perry might have wished to ask the juror had the proper procedure been followed, in order to gauge whether he had correctly identified his client as the person speaking on the phone the previous night, and if so, what he heard and over what period, including how much English the person he overheard was speaking (since the appellant obviously had some understanding of English). He would also no doubt have explored with the juror whether he had told other members of the jury what he had witnessed, if so, when he did so, and what he had said to them about it.
24. Quite apart from the inability of the defence to explore these matters before deciding if a fair trial was still possible, the juror's account of what had happened in an incident wholly extraneous to the trial had now been refuted by the appellant in circumstances which further called the appellant's credibility into account – unhappily, in the context of cross-examination on his credibility. Moreover, all the remaining jurors had heard the appellant deny what their fellow juror said he had witnessed and had expressly drawn to the judge's attention. That juror had not been isolated at any time, nor had he been instructed not to discuss what he saw with the other jurors. The jury had not been given a direction not to discuss the matter with each other during the short break which took place after the note was handed up. That break preceded the usual overnight adjournment, at which time they were presumably given the usual direction not to discuss the case until they returned to the jury room next day.

THE JUDGE'S RULING

25. In his ruling refusing the application to discharge the jury, the judge described the appellant's evidence in cross-examination that his English was so poor that he had asked the police for an interpreter in the course of his interview, as "something of a surprise" given that it had not been heralded in his defence statement. He observed that the reality was that the appellant could speak some English, because he did speak English in the course of his police interview, and he had spoken to the judge that morning in court with some English.
26. The Judge's ruling began in these terms:

"An application is now made to discharge the jury in this stale case where the Defendant already has the benefit of an inaccurate representation as to his character, which I won't undermine. It's said that because there may be a conflict on a peripheral, immaterial matter, the jury cannot properly proceed with one of them perhaps being biased against the Defendant".
27. The pressures that judges in the Crown Court are currently facing to get through a huge backlog of trials, many of which concern matters dating back some years, are well understood. So too is the natural desire of any conscientious judge to avoid aborting a trial, with all the attendant cost, inconvenience and further delay, unless there is really no alternative. But the staleness of the case and the benefit to the appellant of the failure to adduce prejudicial evidence of bad character in the form of his previous conviction for possessing the hammer on the night in question were irrelevant to the matter which the judge had to decide, which was whether it was still

possible to have a fair trial in the light of the irregular way in which the jury note had been dealt with.

28. When the judge focused on that question, he minimised the potential prejudice to the appellant of continuing with the same jury. He said that this was extraneous material devoted to an immaterial matter in respect of the case and “this extraneous immaterial matter is not such as to imperil the safety of any conviction”. He described the appellant’s ability to speak English as a “slight matter which might impact upon credibility” and he thought that a firm direction that the case shall be decided by reference to the evidence alone and not on what might have been overheard on that particular occasion would suffice to cure any prejudice, which was minimal and would “evaporate when the jury considers the facts of the case”. He made observations to the effect that jurors could be relied upon to comply with judicial directions. Such a direction was indeed given to the jury. So too was a *Lucas* direction on how the jury should treat any lies.

COUNSEL’S SUBMISSIONS

29. Mr Perry submitted that the judge’s ruling failed to grapple with the real issue, which was the direct conflict between a juror and the defendant on the question of what the juror saw and heard. The judge may well have been right that the quality of the appellant’s English was not the main issue in the case, and that just how good or bad it was, was a question of fact and degree. However that was not the point, or ceased to be the point when the content of the note was put to the appellant by the judge and denied from the witness box. The appellant’s denial of what the juror said he had witnessed pitted his honesty and accuracy against that of the juror.
30. From that point onwards that juror was liable to conclude, by reference to an extraneous matter, that the appellant was a liar, and moreover, had called the juror a liar, or at the very least challenged the accuracy of his observation. The other jurors would have observed the conflict and there was a real prospect that they would side with their fellow juror - the person who in due course they elected as their foreman. Whatever warnings were given to the jury, the temptation to take this matter into account, even subconsciously, might be irresistible. There could certainly be no confidence that it would not be taken into account.
31. In any event, the test of whether a conviction is safe depends on the likely perceptions of the objective observer. Such a person could not be confident that in assessing the credibility of the appellant the jury did not take into account the fact that he had categorically denied what one of their number was clear he had witnessed with his own eyes and ears, and had been sufficiently honest to draw to the attention of the judge.
32. On behalf of the Crown, and despite the position taken by the prosecution at the trial, which he described as a prudent reaction to an admitted irregularity, Mr Douglas-Jones contended that the conviction is safe. He submitted that the jury was perfectly positioned to assess the plausibility of the Appellant’s explanation for the inconsistencies in his accounts to the police and at trial because they could weigh his command of English for themselves over the course of a 43 page, 58 minute interview. His idiom, grammar and vocabulary were plainly those of someone who does not speak English well.

33. The direction given by the Judge that they should only consider the evidence that they had seen and heard in court and not “the matter one juror said they overheard outside court” was enough to overcome any prejudice. The *Lucas* direction would serve to further insulate the Appellant from any prejudice if the jury thought he had lied about not speaking English on the phone. Alternatively, the strength of the evidence was such that the conviction is safe in any event.

DISCUSSION AND CONCLUSION

34. The credibility of the two protagonists lay at the heart of this case. The judge was right about the jury being in a good position to assess the appellant’s command of English and thus to assess whether his explanation for the differences in his accounts in interview and in the witness box was truthful, and, if it was not, whether he might have been lying for some reason other than guilt. However, the real mischief caused by the irregularity was brought about by the appellant’s unequivocal denial, in the witness box, that he had been speaking in English on the phone the previous evening, a direct conflict with what the juror thought he had observed.
35. Looking at that matter objectively, from the perspective of a neutral observer, as Mr Douglas-Jones accepted one must do, there would inevitably be a perception, or a niggling concern, that the jury would be bound to hold that against the appellant whatever directions the judge might give them, and however conscientiously they tried not to. An appearance of bias is enough to make a trial unfair. Prosecuting counsel at trial had been realistic enough to accept that there was no alternative to discharging the jury in these circumstances. Both advocates told the judge that they considered that the appellant could no longer have a fair trial, and they were right.
36. Although the evidence against the appellant, particularly the DNA evidence, was strong, the fact remains that the previous trial had resulted in a hung jury. In the light of that we are unable to characterise this as a case where the evidence was so overwhelming that we can be sure that the conviction is safe regardless. Accordingly, we allowed this appeal and quashed the conviction.