IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT TRURO
HHJ SIMON CARR T20227072
[2024] EWCA Crim 1351

CASE NO 202302446/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 24 October 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE GRIFFITHS

HIS HONOUR JUDGE LICKLEY KC
(Sitting as a Judge of the CACD)

REX
V
VIVIAN BARRINGTON WILLS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
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MR M POLAK appeared on behalf of the Appellant.
MS F WHEBELL appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE MACUR:

1. This is the adjourned hearing of Vivian Wills's appeal against conviction brought with the leave of the single judge. The hearing of the appeal commenced on 13 June 2024. During that hearing, this Court became aware, for the first time, of information which prospectively appeared to be highly relevant to the issues in the appeal. There had been no application to adjourn the hearing in order to bring it before the Court, although both counsel for the appellant and respondent were aware of it. We were not content to have the issue dealt with informally on the basis of each counsel's then understanding of what had occurred and considered it was necessary to adjourn the hearing part heard, with directions as to the production of the relevant information in proper form and in accordance with specified procedure and the preparation of any skeleton arguments regarding further submissions relating to it.

2. Those directions have been complied with and Mr Polak, who appears on behalf of the appellant, seeks leave to adduce fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968, and has taken the opportunity to seek leave to pursue a further ground of appeal. Ms Whebell, on behalf of the respondent, resists that latter application, which she submits does not relate to the fresh evidence revealed but refers to the judge's summing-up and has been apparent from the outset. We deal with these respective applications below.

Introduction

3. On 22 June 2023, the appellant was convicted of one count of possessing a firearm with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1968. On 22

August 2023, he was sentenced to 2 years' imprisonment suspended for 2 years, with the following requirements:

1. To undertake all rehabilitation activity requirements as instructed for a maximum of 15 days; and
2. To undergo mental health treatment, by a fully registered medical practitioner and qualified psychologist, at a place to be notified as a non-resident for 12 months.

Other ancillary orders were made.

The facts in brief

4. On 1 November 2021, an enforcement agent for Cornwall Council attended the appellant's home address to serve notice of council tax arrears. As he sat in his van with the window down, he heard a voice say, "What do you want?" He could see a man at a window. He said, "I'm looking for Vivian", to which the man replied, "I'm Vivian. What do you want?" To which he replied, "If you come down, I'll explain what I'm here for. I don't want to shout it up to the window." The enforcement officer waited for about 15 or 20 minutes to let the man come down. During this time it is clear that the appellant made two calls to the police. In the first call he told them that there was a man outside offering him, he believed, a fight. He was concerned because he lived in a remote location. He was told to lock the doors, remain inside and the police would be on their way. Some 10 minutes later, he made a second call, in which he told them about a Spanish gang that were after him. He wanted to know when the police would arrive. He was again advised to remain inside and to lock the doors. Recordings of these two telephone calls were played to the jury.

5. In the meantime the enforcement officer remained seated in his vehicle finishing paperwork. He then heard a voice saying, “What do you want? Who are you?” He alighted from his vehicle and immediately turned on his video badge camera. This recording was also played to the jury. The officer said he saw a head appear over the gate at the side of the property and identified himself as an enforcement agent and told the appellant, who was stood some 10 to 12 feet away, that he was there to collect unpaid taxes. He recalled the appellant saying, “I’ll fucking shoot you” - a gun was directed at him. The enforcement officer repeated, “I’m here to deliver a letter and collect your outstanding council tax.” At that point the man lowered the gun and said something along the lines of, “How fucking dare you turn up at my address at this time of the morning to collect council tax.” At that point the gun was lifted back up again and further threats made and abuse hurled.

6. Police attended the scene just as the enforcement officer was going back towards his car. He reported that he had been threatened by a gun. The officers called for armed officers to attend. Before they arrived, the two police officers who had attended at the scene initially, were able to approach and converse with the appellant. The appellant was obviously angry and was displeased at being woken up by a male whom he did not know. The appellant told the officers of an incident 3 years previously in which he said he had been unknowingly involved in the transportation of a significant quantity of cannabis in Spain. He had co-operated with the Spanish authorities and had been subjected to threats from the drug dealers. Consequently he became paranoid when strangers attended his home address. He repeated these facts in interview. A transcript of that interview was available to the jury.

7. In his Defence Case Statement the appellant stated that, at the relevant time, he was suffering from panic attacks and fear that the Spanish gang would return because they had lost so much money. The enforcement officer had turned up in the darkness and was shouting for the defendant to come down without identifying who he was and why he was there. He was dressed in black; he was scruffy and did not look like a court enforcement officer at all. He did not state he was alone and the defendant believed that there may have been more than one person, part of the drugs gang. The defendant held up the gun to act as a deterrent. If he had known and believed that the man attending was a bailiff, he would not have acted this way. The defendant's actions were therefore reasonable and proportionate in the circumstances as he believed them to be and he was only acting in self-defence of himself or of his family.

8. Three days prior to trial the appellant's solicitor made a wide-ranging application in respect of information which it was said should be obtained by the prosecution from "the police nationally or the National Crime Agency" in relation to the investigation into the thwarted drugs importation. It included amongst other requests:

> "Any information held, including any police memos or advice which suggests that they accept that the defendant was an innocent dupe in relation to the attempted drug importation..."

The more relevant request in this regard related to:

> "All communications between the police, victim support and the defendant including, but not limited to, risk assessments conducted as to the safety of the defendant and his family."

9. The application was opposed by the prosecution and the majority of the request refused by the judge who regarded it to be:

> "A large shopping list of information which had, it is a fishing expedition of the most extreme kind, in circumstances where what matters is what was in the Defendant's head, which only he could say. And he has the bedrock of the allegation that he'd been involved innocently in drug importation, was scared by his conviction in Spain, and the evidence he can give."

10. At trial, there was no dispute that the appellant was in possession of a firearm as statutorily defined in his confrontation of the enforcement officer.

11. Extensive Agreed Facts were placed before the jury which included:

> "Background information is raised by the defendant, in relation to his unknowing involvement in the Spanish drugs operation and his interaction with Spanish and English police."

Specifically, it is recorded in paragraphs 17 to 19 of those Agreed Facts that:

> "17. On 16 December 2018 at 10:24am Devon and Cornwall Police received the following Intelligence Report. The source was graded as untested and known directly to the source.
>
> VIVIAN WILLS WAS EMPLOYED TO TOW A BOAT TO ALMERIA IN SPAIN FROM STOKE ON TRENT AND TO BRING A SECOND VESSEL BACK FROM COLLECTION. THE SECOND BOAT WAS TOWED TO SANTANDER WITH THE INTENTION OF RETURNING THROUGH PORTSMOUTH BUT BOTH MALES WERE SUSPICIOUS ABOUT IT AND REFERRED TO LOCAL POLICE WHO TOOK THE BOAT APART AND FOUND A HUGE AMOUNT OF DRUGS. WILLS' BOAT AND VAN WERE SEIZED, SPANISH POLICE WERE HAPPY THAT HE WAS THE HAULIER AND THEY WERE ALLOWED TO FLY HOME.

VIVIAN IS WORRIED ABOUT HIS PARTNER AND DAUGHTER'S SAFETY HE IS GOING TO SEND THEM SOMEWHERE ELSE TO LIVE.

18. The Police noted the following comments: BRIEFING ITEM, SECURITY ADVICE AND SAFEGUARDING IN PLACE. On 18 December 2018 Staffordshire Police were contacted by Mr Barrington Wills at 4.29pm who stated that he is now getting calls from the owner of the boat asking where it is, that he did not know what to tell them, that he had been advised to move out of his property but had not heard anything more from the Police. He said that these people keep ringing him, and that he would like some advice as to what to do next. The Police were called by Bradley Wills, the defendant's son, on the same date at 5.23pm stating that he was panicking as he had not received a call back. At 5.43pm Mr Barrington Wills was spoke to by Police who called him and he was advised not to speak to the men involved with the drugs that evening so as not to undermine any ongoing investigation and would be contacted tomorrow. Mr Barrington Wills told the Police that he had left his home address on police advice but was not aware of anything to say the men were going to his address or the Penzance area.

19. On 19 December 2018 at 9.53am the Police spoke with Mr Barrington Wills again and he stated that he and his son had had numerous calls from the men and eventually had returned the call, recording the call on his IPAD. He stated that they had told them that the boat had been seized and drugs were found inside it. Staffordshire Police passed the information to Devon and Cornwall Police for safeguarding and suggested as a minimum a storm location marker on Mr Barrington Wills address should be utilised."

It was also agreed that the appellant had been convicted in Spain in relation to this matter and that a medical note, dated 30 November, recorded his "anxiety, depression and associated panic attacks".

12. The appellant gave evidence at trial in which he said he was repeatedly contacted by the drug gang wanting to know where their consignment was and he was very worried for the

safety of himself and his family including his young daughter. He had been warned by the police to leave his property because of repercussions from the gang. A storm marker had been put on his property because of the danger to him and his family. He lived under fear that the gang would attend his property to attack him and his family and had anxiety and depression because of this. This was the context of the incident leading to trial. When questioned, he agreed, however, that the last communication from the gang was one week after his return to the UK in 2018.

13. Defence witnesses were called in support of the appellant's case of his fear of repercussions as a result of his informing the Spanish police of his suspicions regarding the boat that he had been asked to return to the UK.

14. In accordance with good practice, the judge discussed his legal directions with counsel. Mr Polak sought a direction in accordance with Part 18.2 of the Crown Court Compendium that is:

> **"The defence remains available to a defendant who has made a pre-emptive strike in anticipation of an actual or perceived imminent attack. Similarly, the defence is not precluded if D failed to retreat from what was or what D believed to be an attack. Failure to retreat is a relevant factor in assessing whether the use of force was reasonable in the circumstances."**

The judge refused because "it's not this case". The judge recognised that there was no legal requirement for the appellant to remain in the house but said that the question was whether it was reasonable for him to have done so in the circumstances. The judge then gave the first part of his summing-up, that is the legal directions, to the jury. His

direction to the jury on self-defence was in terms that:

> "... the law of self-defence is really just common sense. If someone is under attack or believes that they or another are about to be attacked, even if they are in fact mistaken, they are entitled to defend themselves, so long as they use no more than reasonable force. If, on the evidence, you're sure the Defendant was the aggressor, did not believe he was under threat, then no question of self-defence arises and, subject to the other elements of the offence being proved, your verdict will be one of guilty. If, however, you consider it was or may have been the case that the Defendant was or believed he was under attack or the threat of attack, you must go on to consider whether the Defendant's response was reasonable.
>
> If you consider what the Defendant did was, in the heat of the moment when fine judgments are difficult, no more than the Defendant genuinely believed was necessary, that would be strong evidence that what the Defendant did was reasonable, and if you consider the Defendant did no more than reasonable, the Defendant was acting in lawful self-defence and is not guilty of the charge. It's for you to decide whether the force used was reasonable. You must do that in light of the circumstances as you find the Defendant believed them to be. If you're sure that, even allowing for the difficulties faced in the heat of the moment, the Defendant used more than reasonable force, then the Defendant was not acting in lawful self-defence and, if the other parts of the offence have been proved, the Defendant is guilty. If you're less than sure, the Defendant is not guilty."

We note that the judge had directed the jury, again in quite conventional terms, that they did not need to decide every issue in the case in terms:

> "You've heard a considerable amount of evidence about events in 2018 in and outside Spain and it's obviously important you heard that as part of the background to the case and the decisions you make about that are entirely a matter for you. But of course, you're here to try what happened in November 2021, and so that's the part you may wish to concentrate on. You may not need to decide every point about the Spanish limb, if I can describe it as that way, in order to reach your decision on the part

> that you're concerned with, and so it would be unfortunate if you were skewed, as it were, to something that, although important, is not the issue in the case and moved away from that which is. So that's the example of concentrating on the issue in the case, not having to decide every point that's been raised."

Also he reminded the jury:

> "You've heard about the Defendant's conviction by a Spanish court relating to his involvement in the importation of drugs. You've heard what the Defendant says about this conviction and I'll deal with that when I review the evidence. You've heard about the conviction because it's part of the background to the issues raised by the Defendant. You must not use it as support for the Prosecution case with regards to the charge the Defendant faces in court."

15. The prosecution and defence counsel then made their closing speeches. In his closing speech, Mr Polak said as regards the standard of proof that:

> "... in the past we've described it as beyond reasonable doubt."

At the conclusion of the defence speech the judge said:

> "Thank you. Right, ladies and gentlemen, we're going to break there. There's just one thing I want to mention to you and this is not a criticism of counsel. Speeches are a very fluid thing and sometimes things slip in, but it's important I deal with them. At the beginning of his speech, counsel mentioned the concept of beyond reasonable doubt. Will you please pretend you've never heard it? It has not been mentioned legitimately in any court for 20 years. So the test isn't some fluid sure, reasonable doubt mishmash. It isn't. It's what I've directed. It's satisfied so you're sure. So put the other one out of your mind. It's only confused. Counsel shouldn't have mentioned it, but as I say, these things happen in a moment, so I don't criticise him, as long as you put it entirely out of your mind and concentrate on the direction I gave you as to the law."

16. The direction on the burden and standard of proof had also been in conventional terms, that is:

> "How do the Prosecution prove their case? The standard of proof is best expressed in this way. You will not find the Defendant guilty of the single count unless you are sure. Anything less than sure, he's entitled to be found not guilty."

The original grounds of appeal in summary

17. Mr Polak submits that the judge wrongly: (i) refused to direct the jury in relation to a pre-emptive strike in anticipation of an actual or perceived imminent attack and the fact that failure to retreat does not preclude the application of the defence of self-defence; (ii), interjected at the conclusion of defence counsel's speech in relation to the definition of standard of proof, which had the effect of undermining the points made; and (iii) refused the section 8 application.

The hearing on 13 June 2024 before the Court of Appeal

18. This Court gave directions for the adjourned hearing of the prospective application to admit fresh evidence of which it had been alerted, namely an *Osman* warning issued to the appellant on 26 August 2023. Specifically the respondent was directed to provide: sufficient detail about the source (without being required to name them) of the information of risk to life; to indicate when the information came to the attention of the police; whether any independent investigations were made regarding reporting of the appellant's trial in Spain; when Mr Barrington Wills was notified of the warning and why he was required to travel to a police station to receive it. Further, the respondent prosecution were to disclose any threats made known to the police about Mr Barrington

Wills and his family since 2018 until trial and were to confirm that they had complied with their ongoing duty of disclosure.

Fresh evidence

19. An application to admit fresh evidence, that is the *Osman* warning, has duly been made, although the *Osman* warning itself has not been appended to any such application and we are left still in the same position of having no way of knowing the actual terms of the order in proper form. That which we were shown had no heading, nor was it signed. There is no issue between the appellant and the respondent however that the *Osman* warning appears to be capable of belief. Obviously it could not have been produced by the appellant at trial, because it did not exist. But if it did exist, we have no doubt it would have been admissible. The issue is whether it would afford any ground for allowing the appeal.

20. In this last respect, we do not consider ourselves bound to address the question in terms of whether it would base a wholly new ground of appeal but, in the circumstances of this case, whether it lends support to a ground of appeal already pleaded. In the circumstances, we have regarded it necessary and expedient in the interests of justice to consider the new information de bene esse in the context of the grounds of appeal previously drafted. For this purpose, we are content to accept that the terms of the *Osman* warning are genuinely provided in the document described above, and that such would constitute a threat to life warning.

21. The further additional information provided as a result of the direction confirms that

ongoing duties of disclosure have been fulfilled and all disclosure has been made. The information which led to the issue of the *Osman* threat to life warning was made known to the police on 25 August 2023. Further inquiries, including of the Spanish authorities, did not verify details about the threat or those who posed the risk. All lines of inquiry were exhausted and following a further Superintendent review on 2 October 2023, the threat to life was closed.

22. It is clear that the appellant's trial and his sentence was reported locally in Cornwall - it is unknown whether it was also reported in Spain. Devon and Cornwall Police have checked their systems for any threats made towards the appellant or his family since 2018. Immediately after his arrest in Spain in 2018, he returned to the UK and informed police that he himself felt to be under threat:

> "There has been no other intelligence or reports of threats to the appellant or his family since that time until 25 August 2023 after sentencing took place."

23. The disclosures made by the appellant had already been disclosed within the unused material of the case and featured in the trial. This, Ms Whebell confirms today, is what provided the information which based the Agreed Facts to which we have previously referred.

24. Subsequently, as indicated above, Mr Polak seeks leave to argue an additional ground of appeal, namely that the judge was wrong to say to the jury that the issue of what happened with the Spanish gang was a less important matter and showed a biased view of

the case and that he was prejudicial to the appellant. We are not sure how this arises from the fresh evidence or 'further' disclosure but, in any event, specifically address the point below.

Discussion and outcome

25. It is logical to address this appeal chronologically and therefore we start with the section 8 CIPA application at the outset. This was made extremely late in the day and was so diffuse in its drafting to obscure the wood for the trees. What relevance, for example, the opinion of a police officer that the appellant was an innocent dupe would have as regards the appellant's genuine, even if mistaken, belief that he needed to defend himself is hard to fathom. A guilty participant in a drug conspiracy may have genuinely held such a view. Mr Polak says that this went to the issue of the appellant's credibility, a matter to which he has referred continuously today. But we fail to see how this particular request, or indeed any response it generated, could answer that question in a relevant and admissible way.
26. The generic request for all communications between the British and Spanish authorities was certainly a fishing expedition, as was "information as to results of checks on a specified mobile number and vehicle registration and information regarding larger investigations into the use of couriers to import drugs into the UK and the current status of the investigation." Whilst the judge dealt with the application in a somewhat peremptory fashion, he obviously had regard to the defence issues. He encapsulated it by saying:

> "…we know there's something behind it because of his conviction… So you have, already have, this isn't just somebody who's sat down and come up with a fairy tale. He was involved in the importation of drugs, he would say in a very innocent capacity, and he was in Spain and he was in a jurisdiction he didn't understand. And when they offered him a deal whereby, if he pleaded he could leave, he pleaded and left. But that others thought he was involved in the importation of drugs is intrinsic in his conviction. He has the bedrock of what he wants to say, the rest is, is window dressing. Because, imagine the situation was that, in fact, he was totally unaware of most or all of this, and it transpired he was at risk from an Albanian gang and the police intelligence was there was a hit squad down the end of the road at the same time the Bailiff was there. It wouldn't be relevant to anything, because he didn't know."

27. Whilst the judge did not attempt a bespoke determination of each request of the application and his ruling was somewhat cursory, we do not find the judge's decision in the main to be unreasonable or irrational. However, we do regard the section 8 request regarding "all communications between police, victim support and the defendant, particularly as regards the risk assessments conducted as to the safety of the defendant and his family" to be relevant and have better focus, although we note even that is specified to be "not limited to risk assessments" , which would certainly incline a judge to regard it as yet further 'fishing'. With that caveat, we would have acceded to this request.

28. However, as previously indicated, the respondent prosecution have explicitly stated that disclosure has been made and that the reported concerns reports made by the appellant were disclosed in the unused material and were available at trial. Certainly we regard that sufficient and relevant information was subsequently condensed within Agreed Facts to base the defence case. We are at a loss to understand what further could have been included to the defence benefit.

29. Significantly, in terms of the assertion made in the new draft ground of appeal for which leave is sought, no issue was taken at trial by Mr Polak with that part of the legal directions that urged the jury not to be waylaid into the ins and outs of the Spanish drugs importation. Understandably so. There was no relevance in the details of how the illegal importation was facilitated. What was relevant was that it did occur and that the appellant said that he had received threats or phone calls and subsequently had received a storm marker in relation to his address. The jury were rightly told that the appellant's Spanish conviction did not support the prosecution case. The Agreed Facts make this clear.

30. We are satisfied that the prosecution counsel did not attempt to undermine the Agreed Facts, whether in cross-examination of the appellant or in her opening or closing address. The appellant could not expect that the prosecution would not wish to test the appellant's assertion that he was an innocent dupe, since he placed (or rather misplaced) such great weight upon it in his own evidence. After a very short cross-examination on the value of the documentation he placed before the court which, with due respect to Ms Whebell, patently raised issues of what instruction had been given to the appellant as to delivery, she moved on to the point in issue - that whatever had happened in 2018 was not at play in 2021 in the encounter with the enforcement officer. This was entirely appropriate cross-examination in accordance with the prosecution case.

31. Mr Polak submits that the prosecution could not have their cake and eat it, on the one hand, refusing to investigate information held by other Police Forces and, on the other, challenging the appellant's assertion. However, we fail to see that any of the information

sought could have provided the answer whether the appellant was an innocent dupe, nor apart from that which we have already referred to went to the appellant's objective state of mind. All of his reports and self-reported anxieties were contained within the Agreed Facts.

32. Regardless of our view on the discrete point of the request made relating to protection sought by the appellant and given by the police and witness support units, we come to the sure conclusion that the judge's denial of this aspect of the application does not render the conviction unsafe. The refusal to order disclosure did not so adversely impact upon the fairness of the trial to render the conviction unsafe. There is no merit in this ground of appeal.

33. The new evidence (or rather information) has no impact upon this conclusion. Mr Polak, in his submissions today, centres particularly upon the information relating to a Mr Hayward, whose name and details were supplied by Mr Barrington Wills to the police in 2018. Mr Polak argues that the new information confirms that this was genuine and therefore goes to his credibility. However again, we are at a loss to see what this new information actually adds to the information which led to the framing of the Agreed Fact to exactly the same effect. We do not understand how this 'new' additional information could have added to the credibility of the appellant when viewed by the jury.

34. The new evidence regarding the *Osman* warning has no impact at all. It could not have been produced at the time, for it did not exist. But more significantly, it was something that was not known to the appellant at the time that he confronted the enforcement

officer. In those circumstances, we agree with Ms Whebell that the new evidence, that is the *Osman* warning, does not found a ground of appeal. We therefore refuse to admit the same.

The direction on self-defence

35. Mr Polak submits that the emphasis placed by prosecution counsel in cross-examination and her addresses to the jury and the judge in summing-up the facts on the advice given by the 999 operator to the appellant to remain in his house pending the arrival of the police, rendered the direction on pre-emptive strike and duty to retreat as clearly relevant and important in the understanding of the concept of self-defence. He argues that the jury would be left with the understanding that, if they found that the appellant ignored the advice and went out of his home to confront the enforcement officer, he could no longer avail himself of the defence. He also suggested that the judge's disinclination to give the direction in accordance with the Crown Court Compendium indicated that he was biased towards the prosecution case.

36. We simply do not agree that there is any evidence of judicial bias against the defence case. The judge's direction on self-defence is correct and importantly makes clear that the appellant's belief as to the threat of attack may have been mistaken but still genuinely held. We consider that the direction could have been improved by congruent and specific judicial reference to the appellant's evidence of his mistake as to the identity of the enforcement officer, and the appellant's stated belief that the need to protect his property from the drug dealers who were denied their profits by the Spanish authority's intervention in the smuggling cannabis, but the judge's failure to do so does not render the legal direction as wrong in law.

37. The judge correctly and succinctly identified the central issue in the case: were the jury sure that the appellant was the aggressor, in that he was not acting in the reasonable belief that he needed to protect himself and his family from the threat of international drug smugglers? The Agreed Facts and the defendant's and his witnesses' oral evidence laid an evidential basis for the prosecution to specifically disprove self-defence. Prosecution counsel's questions were properly and understandably aimed at testing whether the appellant's stated belief was genuine or not. We regard it to be inevitable that she would seek to expose the appellant's disregard of the advice to remain indoors.

38. What is more, the recorded evidence of the appellant's behaviour towards the enforcement officer was before the jury, as was the evidence that the police officers who accessed his mood to be angry with and not intimidated by the enforcement officer. There was evidence before the jury and upon which they were sufficiently well directed implicitly regarding a pre-emptive strike, to conclude that the prosecution had made out its case. We agree with the judge that the issue about retreat did not arise on the facts of this case. We do not read his directions to say that, if the jury were sure that the appellant emerged from his house with a shotgun, that self-defence did not arise. Nor do we agree with Mr Polak's submissions that the judge did not balance the point that the appellant had emerged, despite advice to the contrary, by reference to the facts. He clearly did, pointing out in the second part of his summing-up:

> "They deal with the 999 calls, which you've heard. Do you remember how many times the Operator said just keep the doors locked and stay inside? And you know the mention of the Spanish gang occurred in the second call, by which time he had called both of his, or one of his sons, who called the other one. You've got the evidence of the attending Officers and what they heard and saw and you know the firearm wasn't functioning, although that is irrelevant for the charge of the matter.

> You've had the information about which you've heard a considerable amount about the matter that occurred in 2018 and you've got the admitted facts and structure of that within those document, which is an important one for you to consider.
>
> A week after the return, the Defendant's office started getting phone calls from the people who had arranged the boat movement, asking where the boat was, which made everybody very frightened. The police provided him with suitable panic numbers to call if there was any difficulty with what the police described was a significant gang. He told you he was so concerned that, when he had extension works done to his property, as you know, a small panic room was installed in his premises and you've seen the video footage of that...
>
> And the Defendant says he was and the man said words to the effect he needed to speak to the Defendant outside. He thought back to the events in Spain, so he made the 999 call you've heard and received the advice that he received. He was worried that the police had not attended speedily or reacted speedily before. He also called his sons, who lived nearby. He agreed that, after he'd made those various phone calls, he went outside pointing the gun at Mr Mascot, telling him to, order to keep him, he did it in order to keep him at bay until the police arrived. He knew the gun wasn't functioning and it was the first thing he could grab. He was thinking about his daughter being in the house. The Defendant said he just wanted to talk big and felt safe behind the metal gate. As soon as Mr Mascot said he was a bailiff, the Defendant said he lowered the gun. He hadn't expected the, the bailiff to attend over Council Tax. When the police arrived, the Defendant accepted he initially tried to imply that he'd taken a broom out, but he did that because he panicked."

39. We have considered the impact of the prospective new evidence, that is the subsequent *Osman* warning, on this issue de bene esse. We accept the argument that it may have bolstered the evidence relating to the appellant's stated belief that his life was under threat, if it had been recent or proximate before the incident with the bailiff. It would have likely been referred to by the judge in summing-up in amongst the factors that he had already reminded the jury they may wish to consider, when deciding whether the

prosecution had proved beyond reasonable doubt, that the appellant was not acting in self-defence by raising his gun against the enforcement officer. Therefore, in these circumstances, we find that these matters do not undermine the safety of the conviction and we dismiss this ground of appeal.

40. It appears to us that the new ground of appeal which Mr Polak wishes to pursue merely raises a different perspective in relation to ground 1. Mr Polak has been able to argue the point in his submissions on this ground, therefore we refuse leave for the additional ground 4.

The judge's comment at the end of defence counsel's speech

41. We understand the judge's wish to ensure that the jury should not be confused regarding the burden and standard of proof and that he should contemplate the possibility that Mr Polak's remarks on this issue, in his closing speech, tended to do so. The judicial remark was not an interjection but a postscript. We consider that it would have been better practice for the judge to have raised the matter with counsel subsequently, after the jury's departure, in terms of reiterating the need to avoid confusing the jury by reference to the expression "beyond reasonable doubt" and to indicate that he would tell the jury that he was concerned that Mr Polak's comments on the standard of proof led to confusion and to remind the jury that he had correctly directed them on the standard of proof and they must follow his directions on the law. However, we do not accept that the sequence of events reasonably leads to a conclusion that the jury would have believed that the judge's remarks meant that they should disregard all the defence jury points, of which there were many. This is not a *Bryant* case ([2005] EWCA Crim 2079). This ground is without merit.

Conclusion

42. We do not consider that there is any doubt raised as to the safety of the conviction. The 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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