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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 611



No. 202303015 B2

Royal Courts of Justice

Tuesday, 26 March 2024

Before:

LADY JUSTICE WHIPPLE
MRS JUSTICE MCGOWAN
HIS HONOUR JUDGE PATRICK FIELD KC

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SEHAWASH SEDEQE

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MR O MOSLEY appeared on behalf of the Appellant.

MR HAPPE appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE WHIPPLE:

1 On 4 August 2023, the appellant was convicted of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861, following a trial at Woolwich Crown Court before Mr Recorder Kovats KC. On 26 September 2023, the appellant was sentenced by the same judge to six months' imprisonment, which was suspended for six months. He now appeals against conviction, with the leave of the single judge, on a number of grounds which relate to the judge's refusal to give a good character direction in his favour.

The facts

2 The prosecution case was based on the account of Krzysztof Pogadzinski, the complainant. The complainant said that around 10 p.m. on 20 September 2021 he and his friend had been sitting in the rear of a parked van, having just eaten a meal and drunk some alcohol. The complainant said he heard a loud noise as if someone had hit his van with a car door. He exited his vehicle to find the appellant sitting in his stationary car, next to the van. Following an exchange of angry words between the two, the appellant turned on his car engine and his headlights. The complainant stood in front of the appellant's car and the appellant drove towards him. The complainant stumbled back and his leg made contact with the front of the appellant's car. The appellant got out of his vehicle, marched towards the complainant and punched the complainant in the face with his right hand, causing him to fall to the floor and to lose consciousness. The appellant subsequently drove away before police officers were called. This incident was captured on CCTV.

- 3 In consequence of the assault, the complainant had a swollen face and X-ray revealed his lower jaw was broken in two areas which required the surgical fitting of plates and screws under general anaesthetic.
- 4 In support of its case, the prosecution relied on the complainant's evidence which was read to the jury because the complainant had, since these events, passed away for reasons which are unrelated. The prosecution also relied on the CCTV of the incident.
- 5 The defence case was that the appellant had acted in self-defence of himself and/or his property, namely his car. The appellant gave evidence at trial that he drove to that place earlier to smoke cannabis. When he returned to his parked car, he found a van parked very close to his car. There was then an exchange with the complainant who smelt of alcohol and was aggressive. To squeeze into his car, his car had made contact with the van but had caused it no damage. The complainant exited his van and stood in front of the appellant's car, claiming he was calling the police, and asked whether the appellant wanted trouble. The complainant was speaking with his friend in a language that the appellant could not understand. As the incident continued, the appellant began to panic. He drove towards the complainant, a couple of inches. The complainant took a step back, then ran towards the appellant's car and kicked it. As the appellant believed that the complainant was trapping him, the appellant said he felt threatened and got out of his car. The complainant shouted and pointed at him. The appellant then struck the complainant before the complainant could do anything. He then helped the complainant from the floor and gave the complainant's phone to the complainant's friend who said: "Sorry, he's drunk." There was damage to the appellant's car. The appellant left after 5 minutes and planned to call police but was unable to.

6 The appellant's previous convictions and caution were adduced as agreed facts. His previous convictions were for driving while under the influence of drugs on 18 May 2021 and for possession of cannabis and driving while under the influence of drugs on 29 July 2021. He had pleaded guilty to these charges. He also had a police caution for possession of cannabis on the 26 April 2021. The issue for the jury was whether the appellant had acted in lawful self-defence.

Ruling on good character direction

7 At the close of evidence and after the agreed facts had been put before the jury, and without the point having been raised at any point earlier in the trial, counsel for the defence, Mr Mosley, who also appears for the appellant on this appeal, submitted to the judge that an effective good character direction should be given. The following passages appear as parts of a longer exchange about the judge's proposed legal directions.

8 The judge first refused Mr Mosley's application, saying this:

“No, I never give effective good character – it is nothing personal. I just never do. I never give effectively good character directions.”

9 Mr Mosley then submitted that the appellant did not have a propensity to commit violence and the jury should be given a direction to that effect. The judge said that did not require a direction and that in any event, propensity had not been raised as an issue by the prosecution and it was not helpful to raise the point now.

10 Mr Mosley referred to the Crown Court Compendium and suggested that the appellant was of effective good character, to which the judge responded:

“No, no, no. There is no legal status of effective good character.”

11 The judge confirmed that he would not direct the jury on the appellant's previous convictions but he would have no objection to defence counsel dealing with the point in his speech.

12 Later on in the discussion, Mr Mosley returned to the issue, taking the judge to Crown Court Compendium, chapter 11, which deals with good character. The judge indicated he was familiar with the passages to which he was being referred and added:

“In all my experience, I have never come across a case where I have felt it appropriate to give an effective good character direction. Never say “never”.”

13 The judge went on, giving reasons for his refusal to treat the appellant as being of effective good character:

“One, he has deliberately put in his convictions, and it is going to confuse the jury to say, well, you must pretend he has not got any convictions because that is what it boils down to. Two, there is no dispute he has committed significant offences which have resulted in a driving ban, which I am afraid I do not regard as trivial. And, three, it is part of his own case that he is there precisely in order to smoke cannabis ... So I think this is miles away from anything that would get close to an effective good character direction.”

14 Later in the discussion, Mr Mosley invited the judge to direct the jury that the appellant had previous convictions for drugs but not for violence, and so lacked propensity to commit violent offences and said that unless such a direction was given, the jury would not be sure about how to approach these convictions. The judge said:

“No. For the reasons canvassed earlier, I do not accept that it is correct as a matter of law to tell the jury he has no propensity to violence”.

15 When he came to give his legal directions, the judge did not refer to the appellant's previous convictions but in his summing up on the facts he did draw the jury's attention to the lack of previous convictions for violence.

Grounds of appeal

16 By grounds of appeal drafted by Mr Mosley, the appellant complains that (1) the learned judge erred by inappropriately refusing to direct the jury that the appellant was a person of effective good character; and (2) the learned judge erred in not directing the jury as to the relevance of the appellant's previous convictions which risked the drawing of inappropriate inferences.

17 In oral submissions before us, Mr Mosley expanded on ground 1, arguing that the judge had wrongly closed his mind to the existence of the discretion and to the possibility of exercising it in the appellant's favour; alternatively, the judge had exercised his discretion improperly or unfairly in deciding not to give an effective good character direction in this case.

18 Mr Mosley asserts as part of ground 2 not only that his client had an entitlement to a propensity direction (the point debated with the judge), but also that his client had an entitlement to the credibility limb of the good character direction, given that the previous offending did not involve any aspect of dishonesty and in circumstances where the issue for the jury in the current case was very much dependent on their view of credibility.

Grounds of opposition

19 The prosecution resist this appeal. In a respondent's notice they say the appellant was not entitled to a good character direction, that the judge had discretion whether to give one or not in circumstances where the appellant had recent and relevant convictions, and that in any event the conviction is safe.

20 In oral submissions before us today Mr Happe, who was trial counsel for the Crown, has, at the court's invitation, advanced submissions only dealing with the point about lack of the credibility limb of the good character direction, which has surfaced on appeal (and was not debated before the judge).

21 We thank both counsel for their clear and focussed submissions.

Conclusion

22 We are not persuaded that there is merit in this appeal. We do not need to look much further than *R v Hunter* [2015] EWCA Crim 631, [2015] 2 Cr App R 9 for an answer to it.

23 Only defendants with a good character, or deemed to be of effective good character, are entitled to a good character direction, modified as necessary to meet the particular case (*Hunter* paras [68] and [72]). The good character direction is illustrated by examples contained in Chapter 11 of the current edition of the Crown Court Compendium. It contains two limbs, the first going to credibility, the second to propensity to commit the index offence.

24 The appellant was not a man of good character; he had previous convictions. His argument to the judge was that he should be treated to be of effective good character. Effective good character is described in *Hunter* at para [79] as "extending to defendants whose previous convictions are old, minor and have no relevance to the charge". As *Hunter* makes clear, whether to treat someone as being of effective good character is a matter of judgment for the trial judge (*Hunter* para [79]). If a defendant is deemed to be of effective good character, he or she is entitled to the good character direction, both limbs, modified as necessary (*Hunter* para [80]).

25 The judge took the view that the previous convictions were not old, were not minor and were of some relevance to the charge. That was a permissible view for the judge to take. In consequence, the appellant had no entitlement to a good character direction.

26 That is not an end to the matter. The judge still retained a discretion to give a direction dealing with the previous convictions as matters going to credibility or to propensity or both. Mr Mosley accepts that the convictions were put in voluntarily, pursuant to section 101(1)(b) of the Criminal Justice Act 2003, and that it was his hope or expectation that the judge would then give a good character direction, at least on propensity. The situation of a defendant who volunteers past convictions in the hope of obtaining a propensity direction is addressed in *Hunter* at para [81] and specifically in this way, further, at para [82]:

“In any event, a defendant with previous convictions or cautions to his name has no entitlement to either limb of the good character direction. It is a matter for the judge’s discretion. The discretion is a broad one of the ‘open textured variety’ referred to in *Aziz* [1995] 2 Cr App R 478 at page 489A whether to give any part of the direction and if so on what terms. It is not narrowly circumscribed. The judge will decide what fairness dictates. Fairness may well suggest that a direction would be appropriate but not necessarily. Where a judge has declined to give a modified good character direction to a defendant in this category, this court should have proper regard to the exercise of discretion by the judge who has presided over the trial.”

27 We must therefore have proper regard to the exercise of the broad discretion by the trial judge. In this case, any hope or expectation that a direction would be given rested on shaky foundations because the judge had not been asked whether he would be willing to give such a direction before the appellant’s previous convictions were adduced. The judge’s refusal was expressed in trenchant terms, but it is clear that he understood that it was open to him, in his discretion, to give a good character direction going to propensity, at least. We conclude that the judge

was entitled to refuse to give a propensity direction. That decision was well within the ambit of his discretion, properly exercised.

28 In any event, the judge reminded the jury in his summing-up that the appellant had no convictions for violence. That doubtless formed part of the defence speech as well. The jury were therefore well aware of the point and could take it into account, even if not directed in terms about lack of propensity by reference to the previous convictions. *Hunter* is of assistance on this point too, see para [91] where the court said:

“To our mind there is a tendency to underestimate the average juror, assuming that unless a judge endorses defence submissions to the full extent the jury will ignore them and relevant character evidence. We prefer to assume that the jury can and should be trusted to bear the evidence in mind and to assess the weight to be placed on it.”

29 Mr Mosley has today argued that the conviction is not safe for lack of a direction on credibility, in other words that the first limb of the good character direction should have been given to reflect the appellant’s guilty pleas to the earlier offences. That argument was not put before the judge and so the judge did not have the ability or the opportunity to rule on it. In our judgment it is too late to raise that point now.

30 We are in any event not persuaded that the lack of a good character direction, assuming it was required, either or both limbs, would render this conviction unsafe. The case against the appellant was strong. His actions were caught on CCTV. The issue was whether the appellant’s account was capable of belief in light of the complainant’s read statement and the CCTV evidence. Even if the judge should have gone further in his directions, of which we are not persuaded, we have no doubt that in this case the jury would have reached the same conclusion, and we conclude that this conviction is safe.

31 For those reasons we dismiss this appeal.

CERTIFICATE

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