



Neutral Citation Number: [2024] EWCA Crim 77

Case Nos: 202301043 B1, 202301905 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SNARESBROOK CROWN COURT
Her Honour Judge Levitt KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09 February 2024

Before :

LORD JUSTICE EDIS
MR JUSTICE BAKER
and
SIR ROBIN SPENCER

Between :

REX

Respondent

- and -

MAHBOOB ALI

Appellant

Bartholomew O'Toole for the Appellant
Asma Kham (who did not appear below) for the Respondent

Hearing date: 07 December 2023

APPROVED JUDGMENT

This judgment was handed down by release to The National Archives
on 9 February 2024 at 10.30am

Lord Justice Edis :

1. This is an appeal against conviction and a renewed application for leave to appeal against sentence. On 24 February 2023, in the Crown Court at Snaresbrook before Her Honour Judge Levitt KC and a jury the appellant (then aged 29) was convicted of Robbery, contrary to section 8(1) of the Theft Act 1968 (Count 1). On 20 April 2023, the appellant was sentenced on Count 1 to a term of imprisonment of 7 years. He was ordered to pay a surcharge of £190. An issue arose as to whether the days spent on a qualifying curfew had been properly dealt with. We shall return to that when we come to the renewed application for leave to appeal against sentence.
2. This appeal was heard on the 7 December 2023. Judgment was reserved and the court directed that some further transcripts were required to elucidate exactly what had happened in the Crown Court so far as relevant to this appeal. There was significant delay in their being obtained which is why the judgment has taken longer than we would like to hand down.
3. The appellant stood trial with another man, Mohammad Usman Khan. He also was convicted. His applications for leave to appeal against conviction and sentence were refused by the single judge and not renewed. He is not directly affected by the issue we have to address.
4. The single ground of appeal on which leave has been given to appeal against conviction is phrased as follows-

“The learned Judge erred in allowing the prosecution to read a written statement made by Ali Nur RAHMAN to the jury after the close of the defence case to rebut the defence of alibi. The statement was hearsay and was wrongly admitted into evidence. If it was admissible it should have been excluded under section 78 PACE. The factors set out in section 114(2) of the Criminal

Justice Act 2003 were relevant factors for the Court to consider when exercising its discretion whether to admit it”

The Facts

5. It is necessary to set out the facts of the case, so that the written statement to which the appeal relates can be seen in context, and so that the basis on which it was read to the jury can be analysed.
6. Most of the facts on which the prosecution relied were undisputed. There certainly was a robbery. The issue was whether either, both or neither of the men on trial participated in it.

The Undisputed Facts

7. On 19 November 2021, Mohammed Laidi (‘the victim’) was working as a delivery driver for DPD in the Wanstead area of East London. Shortly after 1:30pm, a grey VW Golf pulled up alongside his parked van. The rear doors of the van were open and the victim was in the rear of the van sorting parcels. The driver of the VW Golf remained in the car and two masked men got out and went into the rear of the van. One of the men was wearing a DPD uniform and the other was dressed in all black. The man in black punched the victim and demanded the keys to his van. When the victim initially refused, the man in black threatened him with a knife. The victim handed over his keys and managed to escape from the rear of the van.
8. The van was stolen and driven off with all its contents. It was recovered nearby a short time later. CCTV enquiries from where the van was recovered showed the same VW Golf arriving, followed by the stolen DPD van. There were three people involved. Two of the men were seen transferring items from the van into

the VW Golf. The items stolen included baby clothes, a Samsung TV and Kurt Geiger cuffs and a ring.

9. DVLA enquires established that the appellant was insured to drive the VW Golf, which was seen parked outside the appellant's address on 30 November 2021. Phone call data showed that there was contact between the appellant and the co-accused shortly before the robbery. ANPR established that an Audi, associated with the co-accused, went to the area of the appellant's address shortly before the robbery and was next sighted after the robbery. Cell site data demonstrated that the co-accused's phone was in the vicinity of the appellant's address at 10:43am. Through a combination of cell site data and ANPR it could be demonstrated that both phones travelled from the appellant's address to the robbery and back in the appellant's car.
10. Both the appellant and the co-accused had worked for DPD.
11. In his police interview the co-accused issued a prepared statement denying any involvement in the robbery.
12. The appellant was arrested on 8 February 2022. During his police interview he denied being involved in the robbery and said that his car was not being driven at the relevant time as it was not taxed.

The Prosecution Case

13. The prosecution case was that the appellant and the co-accused, along with at least one other, were involved in the robbery. They relied upon the combination of CCTV, ANPR, call data and cell site evidence which showed the movement of the VW Golf, the Audi and the mobile phones belonging to the appellant and

the co-accused at the material time. These undisputed facts were admitted by each defendant, but each offered a different and contradictory explanation of how they came about.

14. The prosecution were unable to attribute a particular role to either defendant. They suggested that it was likely that the co-accused was the driver of the VW Golf. He is 6 ft 3.5” tall, whereas the two masked men seen on the CCTV taking goods from the van were obviously shorter than this. The heights of those two men were confirmed by the evidence of the victim, the driver of the van. He said that one of them punched him and waved a kitchen knife at him.
15. The evidence relating to the call data established that during the period of the robbery, there was no phone contact between the defendants’ phones, as evidence in support that the appellant and the co-accused were together during the relevant period. This contrasted with the amount of contact outside that period.
16. The agreed evidence that both the appellant and the co-accused had worked for DPD and therefore could have had access to a DPD uniform, as worn by one of the robbers.
17. The evidence that the VW Golf (and both the appellant’s and the co-accused’s mobile phones) was in the area of the robbery for over an hour before the robbery took place, which indicated that the robbers had knowledge of the victim’s regular route and were lying in wait for him to arrive, as further evidence in support of the appellant’s and the co-accused’s involvement, particularly given that the co-accused worked in the same DPD depot as the victim and that his route was in the adjacent postcode.

18. Four days after the robbery the appellant made enquiries about the possible sale of items identical to those stolen in the robbery, as further evidence in support of the appellant's involvement.
19. The prosecution relied on adverse inferences from the failure of both defendants to mention facts in interview, and, in the case of the appellant, his failure to put forward his alibi defence at that stage. He also lied in interview, in particular about the use of his car.
20. The prosecution suggested that the inconsistencies between the accounts of the appellant and the co-accused, undermined the reliability of both of them. It was suggested that their evidence about whether the appellant gave the co-accused a lift in his VW Golf on the morning of the robbery was entirely inconsistent.

The statement of Ali Nur Rahman

21. In his defence statement, served late, the appellant had said that he intended to call evidence of alibi. In fact, his evidence was that the VW Golf had been lent to a woman called Rubena Begum shortly before the robbery. She was called and gave evidence that she had driven the car to the robbery which she had committed herself with others, not the appellant. His phone was left in the car by mistake. Another witness was also named, Mr. Rahman. He was said to have introduced the appellant to this witness and it was intended to call him confirm the account of her having borrowed the VW Golf at the material time.
22. Soon after the service of this statement, a witness statement was taken from Mr. Rahman by the police. In it he said that a Range Rover had been lent by the appellant to this woman, and was very specific about when this had happened.

He said it was months after the robbery, in February 2022. He said nothing at all about the day of the robbery (November 2021), or any VW Golf. He said that this was the only time he had arranged for Ms. Begum to borrow a car from the appellant, and that he had introduced them for this purpose shortly before it happened. This statement was disclosed to the defence who decided, during the trial, not to call the witness. At a late stage in the trial the prosecution applied for a witness summons to bring him to court, and this was granted. It was unsuccessful and the witness did not appear. It appears he could not be found. At the stage when prosecuting counsel applied for the summons he did not say what he intended to do with the witness should he arrive.

23. When it became clear that the witness had not arrived, and very soon before the evidence in the case concluded, prosecuting counsel made another application in relation to him. This was an application expressed in these terms by prosecuting counsel:-

“[The statement of Mr. Rahman] is clearly rebuttal evidence, because it contradicts whatever [the appellant and Ms. Begum] have said in a very important part of Mr. Ali’s case, which is that he was elsewhere and the vehicle involved in the robbery was lent to Rubena.....the Crown is not asserting the truth of the contents of the statement but instead wish to adduce parts that refer to the alibi and the parties’ relationships.”

24. The judge summarised the application, with the agreement of prosecuting counsel, in these terms:-

“The purpose of adducing the statement is to contradict the evidence given by Mr. Ali and by Rubena Begum. So it is not being adduced as evidence of any matters stated within it.”

25. On that basis, the judge held that the statement was not hearsay and fell outside the scheme of Chapter 2 of the Criminal Justice Act 2003. She referred to the definition contained in section 115 of the Act. She said:-

“This is a situation where the prosecution say we do not know and we do not care whether the account given about the Range Rover is true, what we are saying is this is a witness statement that was taken from a witness whose name was put forward by the defence in support of the defendant’s alibi and it directly contradicts what was said by the defendant.”

26. After a lengthy exchange between the judge and Mr. O’Toole for the appellant, she said that she was going to allow the evidence to be given and that she would give a detailed ruling at a later time. These exchanges did not include any further reflection on the basis on which this witness statement was admissible, but rather concerned the fairness of admitting it. This was because at the start of his submissions in reply to the application Mr. O’Toole had conceded the correctness of the judge’s analysis that the statement was not hearsay, and directed his submissions to the overall fairness of admitting the statement, relying on section 78 of the Police and Criminal Evidence Act 1984 (PACE).

27. The written ruling was handed down two days later, during a break in the summing up of the facts. The judge ruled that in principle the prosecution were entitled to rely on the evidence, as the issue in relation to the rebuttal evidence did not arise until after the appellant gave evidence. The judge was satisfied that the evidence was not hearsay, as the prosecution did not seek to rely on it to prove the truth of its contents. The purpose of adducing it was to show that it contradicted the appellant’s evidence and was therefore capable of disproving his alibi. The evidence was admissible, subject to the questions of relevance. The relevance of the evidence was plain given that the truthfulness of the alibi

was at the heart of the case. The judge went on to say that if she was wrong and the evidence was in fact hearsay, then it would have been admitted under either section 116 or section 114(1)(d). In considering whether the evidence ought to be excluded under section 78 PACE, the judge determined that the factors in section 114(2) were not relevant. The judge noted that the situation was of the defence's own making and that fairness included fairness to the prosecution as well as to the defence. The jury would be directed on matters upon which the defence relied on in relation to the shortcomings of the witness statement. It is appropriate to quote the paragraph of the ruling where the judge addressed the question of whether, on the alternative basis that the evidence was hearsay, it should be excluded under section 78. This reads:-

“I have been asked by counsel for the second defendant to consider the factors in section 114(2) as relevant to the exercise of my discretion. I am not persuaded that this has any relevance to the question of fairness in given that those factors all relate to the reliability of the evidence and that is not the issue for the jury, who are not being asked to consider whether what is said in the statement is true or not, merely to consider the extent to which it is inconsistent with what was said by the second defendant in evidence and by the witness he called.”

28. On the morning after the legal argument and her decision, while dealing with written directions, the judge had raised the question of what direction should be given in relation to the rebuttal evidence. She said that she would listen to closing speeches and give a further written direction on that subject once she had heard how the parties dealt with it. She was concerned that it might be appropriate to remind the jury that Mr. Rahman had not been cross-examined by the defence, who may have wished to challenge him by questioning.

29. Later that morning, just before the judge gave written legal directions to the jury followed by closing speeches, some further agreed facts were put before the jury and Mr. Rahman's witness statement was read to them. The agreed facts recited Mr. Rahman's many previous convictions and then said:-

“You were told in this that Mr Mahboob Ali's defence statement was served on 17 January, in which he named two alibi witnesses, Rubena Begum and Ali Noor Rahman. The police interviewed both of those people. The defence for Mr Ali had indicated in the defence statement that they were likely to call both witnesses, but during the trial they made the decision not to call Mr Rahman, as was their right. The prosecution then decided they would call Mr Rahman as a witness, but by then he could not be found, and the learned judge, that is me, gave the prosecution permission to read the witness statement which Mr Ali Noor Rahman had given to the police on 27 January 2023.”

30. Prosecuting counsel then addressed the jury. When he did so he did not have the benefit of the written ruling on the admissibility of the statement. However, the basis for its admission was clear nonetheless, see [23]-[26] above. In relation to Mr. Rahman's statement, he said this:-

“Now think about what Mr Rahman said – [inaudible] remember I read it out, yes. He said about this lending of the cars. Remember Rahman was brought into the frame at the behest of the Defence. The Crown didn't – how would they know who Rahman is? So, remember what he said. It was not November 2021. How does he remember this? The fully loaded car. Remember, I kept asking people about Range Rovers and everybody puzzled; why is he asking about Range Rovers? There you go; right. Why would – you see the number of convictions Rahman has, but why would he lie about this? What's in it for him? If anybody was telling the truth in all of this it's Mr Rahman.

Of course you could say he's talking about Shameen. There's Mabs, Shipon – remember when Shipon came out as a name? We all have our different names, yes. I'm Mr Siri, but my clients might know me as somebody else. Who knows? You know, I might have my own street name. Barristers do sometimes. Anyway, there we are. Don't get confused about these different

names. So both these accounts are the most bizarre stories I've heard in a long time or shall I say story because that's what they are. Now got to be careful about what I'm going to say next. So as someone paraphrased to me more colourfully recently – don't let them pee down your back and tell you that it's raining. If you want to keep dry, there's only one verdict, isn't there? Both of these gentlemen – these forgetful gentlemen – are guilty. And don't confuse yourself by saying, 'Oh, yes, but some are...!' That's the red herring coming back to haunt you. You have eleven other people to help you along if you're confused.”

31. The passage about names was apparently inspired by the fact that in his statement to the police Mr. Rahman had referred to the appellant by a different name (Shams or Shameen) from that by which he was known to Ms. Begum (Mabs) and the name he used for himself during the trial. In evidence he said he had never been known as Shameen. Mr. Siriwardena, who appeared for the prosecution in the trial, was known to all as Mr. Siri, so the transcripts reveal. A number of comments might be made about the tone and clarity of this passage (which is consistent in those respects with the rest of the speech) but from the point of view of the appeal it is pertinent to note that the prosecution were by this stage relying on Mr. Rahman as a witness of truth.

32. Mr. O'Toole, who appeared at trial and also before us on behalf of the appellant, dealt with the case in a clear and focussed closing speech which included a passage about Mr. Rahman' evidence. We will not set out the whole of the passage, but it was an attack on the truthfulness and reliability of Mr. Rahman. This extract serves to make the point:-

“I suggest, members of the jury, that [Mr. Rahman] has lied and was and/or was completely confused by what he was being asked to recall. And before you accept his evidence as a truthful account of what he, the Crown would say, he was supposed to be saying, having been put up to it falsely by Mr. Ali, bear in mind the background that that man comes from, which you have been reminded of already. Bear in mind that his evidence is

completely at odds with Rubina Begum’s evidence, and that she did come here, she did subject herself to cross-examination, she was challenged for consistency, and she maintained a consistent account. And bear in mind this, most of all, that I had no opportunity of questioning Ali Noor Rahman to challenge him or to test him on any of his account.”

33. So Mr. O’Toole was challenging the evidence of Mr. Rahman on the basis that the prosecution were relying on it as truthful evidence and seeking to undermine it.

34. The judge’s written direction on the significance of Mr. Rahman’s evidence contains this passage:-

“The prosecution do ***not*** say that the content of that witness statement is true: indeed their position is that they have no idea whether it is true or not. That is not why you heard this evidence.

The prosecution’s reason for putting it before you is that they say that it completely undermines Mr Ali’s defence of alibi. Their case is that if people are lying, then their accounts may well unravel and be inconsistent with each other.

The defence would have wanted to ask-questions of Mr Rahman and to have challenged important parts of his statement, but that is not possible because he cannot be found, and you will have to consider whether or not the defence is disadvantaged by this.”

35. The direction continues with what the single judge, granting leave, accurately described as “conventional hearsay directions” about matters going to the reliability of the statement.

The appellant’s submissions

36. Mr. O’Toole provided a skeleton argument which contends that the statement of Mr. Rahman clearly was hearsay and the judge erred in admitting it on the basis that it was not. Her alternative basis of admissibility, that it was hearsay

but admissible under sections 116 or 114(1)(d) of the 2003 Act, was flawed because the judge:-

- a. failed to consider the checklist of relevant factors in section 114(1)(d);
- b. held those factors were irrelevant to the exercise of the exclusionary discretion under section 78 because the jury were not being asked to decide whether the statement was true; and
- c. failed to direct the jury appropriately given the fact that the prosecution clearly were relying on the statement as being evidence of the matters stated in it.

37. Mr. O'Toole submits that these failures rendered the conviction unsafe.

The prosecution submission

38. Mr. Siriwardena was unfortunately unable to appear before us at the hearing, and alternative counsel, to whom we are grateful, appeared in his stead. He did, however, draft the prosecution skeleton argument. Although Mr. O'Toole's skeleton was late and the prosecution skeleton was settled before it had been received, the substance of Mr. O'Toole's submissions is very similar to the very clear remarks of the single judge in giving leave. It might have been expected therefore that the prosecution skeleton would address those remarks. It does not.

39. The prosecution seeks to support the fairness of allowing evidence in rebuttal. The fact that the alibi evidence in the defence case arose *ex improviso* is not challenged.

40. The prosecution submits that the factors identified in section 114(1)(d) of the 2003 Act were irrelevant because “the application to introduce Rahman was not in relation to hearsay”. The skeleton argument does not say what the application did relate to, or seek to explain the passage in the prosecution closing speech set out above which the single judge had highlighted.

41. The summary paragraphs give a sufficient flavour of these submissions:-

“Summary

13. The statement of Rahman was allowed to be adduced because it was not identified as Hearsay but as rebuttal alibi evidence which was forced to be *ex improviso* because of the late decision by the defence to refer to Rahman as an alibi when they clearly should not have done so.

14. Any prejudice to the Defendant was created by the defence legal team themselves. The level of prejudice created against the defendant by his own legal team by seeming errors of omission and commission in not recognising the need to mitigate poison within Rahman’s statement at various times before and during the trial was far greater than anything inflicted by the Crown.

15. Even if it was conceded by the Prosecution that the statement should not have been adduced, any prejudice to the defence has to be weighed against the overwhelming evidence and the sheer ridiculousness of the reliance on the alibi of Ms. Begum.

16. For the above reasons, this appeal should be dismissed.”

Discussion and decision

42. It appears to us that there were two quite different bases on which this statement could have been read to the jury. These are mutually inconsistent. They were:-

- a. The first basis involves the statement being false. It might demonstrate that the appellant was willing and able to procure people to tell lies for him. This would require the jury to be sure that the witness statement was dishonest and false. The witness was attempting to say what he had

been asked to say, but by the time the police spoke to him he had forgotten the script and therefore ended up getting things seriously wrong. No doubt the plan had been that he would “refresh his memory” from a statement made to the defence solicitors and get things right in the witness box. Mr. O’Toole told the judge that a witness statement had indeed been obtained by the defence solicitors, but this was never disclosed. This line of argument, we should make it clear, does not involve any allegation of impropriety against the defence lawyers. If the jury accepted this line of argument it would undermine the evidence of the appellant himself and of Rubina Begum given during the trial.

- b. The second basis involves the statement being reliable and true. It is hearsay evidence of the matters stated in the statement, on which the jury is invited to rely. This would, subject to an application and ruling, be admissible under section 116 (witness cannot be found) or section 114(1)(d) (the interests of justice safety valve).

43. Because of the stage at which the issue arose, after the completion of the defence case, there was a general discretion to permit or to refuse evidence in rebuttal. This was not contentious in this case and we heard no argument on the subject. We will not therefore say anything about except to make two points:-

- a. The submissions at trial and on appeal involved quite extensive consideration of whether it was fair to the appellant to elicit this statement at that stage. That is an important factor, but the prior question of whether and, if so on what basis, it was admissible at all did sometimes become elided with the discussion about fairness.

b. The first of the two bases involves an inferential finding that the appellant had contrived a false defence. Fairness would generally require that this be explored with him in cross-examination. In general terms the allegation that his defence was a “put up job” was explored, in particular by Mr. Cohen for the co-accused, but no-one asked him anything about how he had procured a witness statement from Ali Nur Rahman and why, when the police took a statement from that witness, it turned out to be so very different from what the appellant must have expected him to say when his defence statement was served on the 27 January 2023.

44. The judge admitted the statement under the first basis and, in case she was wrong about that, under the second basis as well. However, her reasoning in respect of the second basis was also dependent on the proposition that the prosecution were not relying on the truth of the statement, see [27] above. This also featured in her direction to the jury, see [34] above. This direction ignored the way in which prosecuting counsel had actually addressed the jury, see [30] above. Leaving that rather unfocussed submission aside, the true position was that no-one at the trial actually thought that the statement Ali Nur Rahman had given to the police was true. It says clearly that there was only one occasion when he had lent a car to Rubena Begum (“This was the only time I have arranged for Rubie to borrow a friend’s vehicle”) and gives a radically different account of that event from that given by the appellant and Rubena at trial. The inference that he must have said something equally false, but different, to the appellant’s solicitors at the request of the appellant is very strong, and this was a proper basis for the statement to be admitted in evidence. The alternative

basis, that it was true and admissible as hearsay, did not arise and the judge erred in saying that this was a basis for admissibility if she was wrong in her main decision. That error caused her to give the “conventional hearsay directions” which, in this case made little sense. If the statement was admitted on the basis that all parties agreed it was false, then it seems unlikely that Mr. O’Toole would actually have wished to cross-examine Mr. Rahman to demonstrate the falsity of what he had said. That would have been a course, if it had been possible, which would have been unnecessary and rather risky.

45. In all these circumstances the way in which this statement was treated at trial was not entirely satisfactory. However, it was admissible and the judge’s direction to the jury did accurately identify the proper basis for admissibility:-

“The prosecution’s reason for putting it before you is that they say that it completely undermines Mr Ali’s defence of alibi. Their case is that if people are lying, then their accounts may well unravel and be inconsistent with each other.”

46. It is inconsistent with that to say, as the judge had just done, that the prosecution position was “that they have no idea whether it is true or not”. This observation may also not have been accurate, given the way the prosecution had addressed the jury.

47. These problems do not lead us for one moment to doubt the safety of the conviction. The prosecution case was overwhelming and the appellant’s case was dependent on a number of wholly implausible coincidences. It was a classic case where the adverse inference from the failure to mention almost all of it in interview was very strong. Finally, it was undermined by the evidence of the co-accused whose cases was almost equally implausible, but different.

48. For these reasons, this appeal is dismissed. It would never have been arguable if the prosecution case had been presented with clarity both as to the law and as to the facts.

Sentence

49. The single judge refused leave to appeal against sentence, and refused the extension of time which would be necessary if it were to be pursued. The ground which he rejected alleged an objectionable disparity between the sentence of 7 years' imprisonment imposed on the appellant, and 4 years for the co-accused. The single judge said this:-

“1. Disparity arguments on sentence rarely succeed and in my view they cannot do so here. The sentence imposed on the applicant was within the adjusted Guideline range. The Judge explained the differences between the two accused. The applicant was held to be the prime mover; was older; and sought to dispose of the stolen property. The co-accused, on the other hand, was held not to be a prime mover; was a carer to his mother; had strong personal references; and had mental health issues.

2. This was a serious planned robbery, involving a group attack on a DPD employee and where a knife was produced. A sentence of 7 years after trial was in such circumstances not excessive. Since the disparity ground is not, in my assessment, arguable, it follows that it is not arguable that this sentence was manifestly excessive. I therefore also refuse to grant an extension of time.”

50. We cannot improve on that succinct but comprehensive decision. The ground of appeal against sentence is not arguable. The co-accused, as explained above, was the driver of the VW Golf at the time of the robbery and did not himself use or threaten violence, and did not threaten the victim with the knife. That was the work of the two men who carried out the robbery. It is not clear whether the appellant was the one who carried the knife, but he was very closely

associated with that conduct even if it was the other one who actually did it. The victim had suffered considerable distress as a result of the crime against him, to the extent that he gave up his well-paid work with DPD and now earns much less than he did. The appellant had constructed a false defence, enlisting Rubena Begum and Ali Nur Rahman to lie on his behalf. The fact that this had unravelled in the way we have described does not reduce its significance as an aggravating feature.

51. We must, however, give leave to appeal against sentence limited to the way in which the days spent on a qualifying curfew were dealt with. No declaration under section 325(2) of the Sentencing Act 2020 of the number of days was made in open court, as is required by section 320(4). Instead, an administrative correction was made, allowing 174 days to count against the sentence. This is arguably of no effect, and we give leave to ensure that the appellant receives the credit to which he is entitled. It is said on behalf of the appellant that the figure is 174 days. This has not yet been agreed by the prosecution, but the issue has been apparent now for a very long time, and it has not been disputed by the prosecution either. The appeal will be allowed to the extent that the sentence is unaffected except that the order will show that the appellant will be credited with 174 days against that sentence.