

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01501/B2, 2023/01503/B2

[2024] EWCA Crim 794



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 21st June 2024

B e f o r e :

LORD JUSTICE DINGEMANS

MR JUSTICE BRYAN

HIS HONOUR JUDGE LICKLEY KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

SAMUEL MILLER
JAMES MOSS

Mr G Carse appeared on behalf of the Applicant Samuel Miller

Mr P Eguae appeared on behalf of the Applicant James Moss

APPROVED JUDGMENT

MR JUSTICE BRYAN:

1. On 6th April 2023, following a trial in the Crown Court at Newcastle Upon Tyne before Her Honour Judge Clemitson and a jury, the applicants, Samuel Miller and James Moss were each convicted by a majority (10-1) of false imprisonment (Count 1). Miller was acquitted by the jury of Counts 2 and 3 (further counts of false imprisonment).
2. On 23rd June 2023, Miller was sentenced to nine months' imprisonment (less 132 days spent on qualifying electronic curfew), and Moss was sentenced to a Suspended Sentence Order of six months' imprisonment suspended for 18 months with a Rehabilitation Activity Requirement for a maximum of 20 days and a Curfew Order for three months from 19.00 hours 07.00 hours.
3. On 25th September 2023, Miller's sentence was amended, pursuant to section 385 of the Sentencing Act 2020 to ten months' imprisonment (less 132 days on qualifying curfew), and he was made the subject of a Criminal Behaviour Order for an indefinite period.
4. Miller and Moss (collectively "the applicants") renew their application for leave to appeal against conviction, following refusal by the single judge.
5. The applicants are represented before us by their trial counsel acting *pro bono*: Miller by Mr Gordon Carse and Moss by Mr Peter Eguae.
6. The applicants' common proposed grounds of appeal are as follows:-
 - (1) The judge erred in withdrawing from the jury the following defences provided by section 3(1) of the Criminal Law Act 1967:
 - (a) A person may use such force as is reasonable in the circumstances in the prevention of crime;
 - (b) A person may use such force as is reasonable in the circumstances in assisting the lawful arrest of offenders; and
 - (c) A person may use such force as is reasonable in the circumstances in assisting in the lawful arrest of suspected offenders.
 - (2) The judge erred in directing the jury as to the nature of the reasonableness of force by summarising the dicta of Lord Bingham of Cornhill handed down in the case of *R v Jones* [2006] UKHL 16, which was given in a case decided on the availability of the section 3 defence and not under the defence provided by section 24A of the Police and Criminal Evidence Act 1984 ("PACE").
7. Miller advances additional grounds as follows:
 - (3) The judge erred in admitting the hearsay evidence of Sydney and Tracey Wilkinson (which was pertinent to Count 3, of which Miller was acquitted).

(4) The judge erred in her directions about Miller's bad character.

Introduction

8. We turn to the facts relating to the alleged offending. All counts arose out of Miller's membership of the Child Online Safety Team ("COST"), a voluntary organisation which sought to identify, confront, and apprehend online paedophiles. COST used decoy children to communicate with suspected paedophiles before carrying out "sting" operations to effect a citizen's arrest.
9. The prosecution case was that Miller used COST as a vehicle for bullying and self-publicity and, ultimately, to falsely imprison the complainants the subject of Counts 1 to 3.
10. On 6th February 2020 the complainant, Phillip Morris, was detained by members of COST, following Morris' online communications with a COST decoy between 29th January 2020 and 6th February 2020. Morris' detention was recorded by Miller. That is the subject matter of Count 1.
11. In this regard, on 29th January 2020, Morris used the application "Skout" to start communicating with a decoy using the name "Ebony" purporting to be 15 years of age. The communication ended on 6th February 2020.
12. Count 1 arose out of COST's detention of Morris on 6th February 2020, following Morris' online communication with the COST decoy between those dates of 29th January and 6th February 2020.
13. The detention of Morris was recorded by Miller and the footage was played to the jury. Morris' evidence in chief was given by way of an Achieving Best Evidence ("ABE") interview.
14. Morris was interviewed on 7th February 2020. When asked whether "hundreds of messages" were sent between him and Ebony "day and night", he replied: "Probably, aye". In respect of his intention on 6th February 2020, he stated: "I was purely going for one reason only, to see this vigilante group" and "Honestly, the only thing in my head was 'I want to have my say with these, I want to have my say with these'. I knew very well what I was letting myself in for and obviously it's backfired because it looks I've done it again, but, hand on heart, no, I did not. I went to see this group, nothing to do with a child being underage, I went to see this group". When asked whether he intended to meet Ebony believing that she would be there to do whatever sexually, he said, "Nothing sexually at all, nothing sexually at all. I've got no [inaudible] of doing anything like that with a child at all, nothing whatsoever, although everything sounds totally different, but I've got no intentions, nothing towards kids whatsoever".
15. On the same day Miller telephoned the police to say that a decoy he had been running was in touch with a man called Phillip Morris. He said that Morris had not said anything sexual to the decoy and had broken no law; however, Morris did have a conviction for rape. In fact he does not. He had a conviction (following a guilty plea) for attempting to engage in sexual communication with a child between 3rd April and 13th July 2019.
16. Later the same day, at 18.00 hours, Miller attended a local police station having been asked to provide evidence. On arrival, Miller said that he had no evidence, but he

said that Morris had again been in contact with a decoy he was running, though again had not committed any offence.

17. At 21.15 hours, Miller, who was then in the company of James Moss, called the police to tell them that he had decided to detain Morris. Events had been "live-streamed" on Facebook.
18. When interviewed by the police in relation to the allegation of false imprisonment, Miller answered "no comment" to all questions, but served a prepared statement in which he said as follows:

"I deny any allegations of false imprisonment or assault. I have only acted in accordance with PACE when conducting an arrest by other persons.

I have used reasonable force to prevent the offender from leaving the scene, thus disrupting or hindering any prosecution. I have also done this so as to avoid any offender causing damage or loss of property/evidence.

The offences are serious sexual offences against children and breach of Crown Court imposed orders.

That has been my only intention and that's all I'm prepared to say."

19. In an Addendum Defence Case Statement Miller stated:

"Phillip Morris was in the relevant area with the intention of meeting a child whom he believed he had been communicating with online, not with the intention of purchasing alcohol.

No threats were made to Phillip Morris to 'kick his head in' or similar.

No deliberate force was used on Phillip Morris beyond what was necessary to restrain him (for example, it is not accepted that Phillip Morris' hand was deliberately stood on).

No threats were made to smash Phillip Morris' property.

Phillip Morris' property was not deliberately damaged (for example no one deliberately stood on his pack of cigarettes)".

20. At trial, Miller gave evidence, stating that Morris was lawfully detained in circumstances where he, Miller, honestly and reasonably believed that:
 - (a) Morris was committing or had committed a criminal offence, namely meeting a child following sexual grooming (this was ultimately conceded by the prosecution); and

- (b) It was necessary to arrest Morris to prevent him from:
 - i. Causing injury to himself or any other person;
 - ii. Suffering physical injury;
 - iii. Causing loss of or damage to property; or
 - iv. Making off before a constable could assume responsibility for him.
- 21. When Moss was interviewed, his legal representative stated: "My client denies any criminality and on legal advice will be making no comment to all questions". Thereafter, he answered "no comment" to all questions.
- 22. In his Defence Case Statement Moss stated, amongst other matters:

"The general nature of the defence is that any detention which he was party to, was lawful. He believed that Phillip Morris had committed serious sexual offences. Any force used was reasonable and proportionate in the circumstances."
- 23. At trial, Moss, who gave evidence, put forward the same defence as Miller. The prosecution's case was that the applicants' actions amounted to false imprisonment.
- 24. At trial, the prosecution did not concede that Morris had committed an offence of attempting to meet a child following grooming. However, they did agree that the defendants had reasonable grounds to suspect that he had.

Defences raised and the Rulings

- 25. There was no dispute between the parties that in respect of each count the actions of the defendants would amount to false imprisonment in the absence of any lawful justification for their actions.
- 26. The applicants argued that such justification could be derived from several distinct sources, namely section 3 of the Criminal Law Act 1967, section 24A of the Police and Criminal Evidence Act 1984 ("PACE") and common law.
- 27. Section 3 of the Criminal Law Act 1967 (the "CLA") provides:

"3 Use of force in making arrest, etc.

 - (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
 - (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."
- 28. Section 76 of the Criminal Justice and Immigration Act 2008 ("CJIA") provides, amongst other matters, as follows:

"76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence —

- (a) an issue arises as to whether a person charged with the offence ('D') is entitled to rely on a defence within subsection (2), and
- (b) the question arises whether the degree of force used by D against a person ('V') was reasonable in the circumstances.

(2) The defences are —

...

- (b) the defences provided by section 3(1) of the Criminal Law Act 1967... (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances —

- (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
- (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not —
 - (i) it was mistaken, or
 - (ii) (if it was mistaken) the mistake was a reasonable one to have made."

29. Section 24A of PACE provides:

"24A Arrest without warrant: other persons

(1) A person other than a constable may arrest without a warrant —

- (a) anyone who is in the act of committing an indictable offence;

(b) anyone whom he has reasonable grounds for suspecting to be committing an indictable offence.

(2) Where an indictable offence has been committed, a person other than a constable may arrest without a warrant —

(a) anyone who is guilty of the offence;

(b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

(3) But the power of summary arrest conferred by subsection (1) or (2) is exercisable only if —

(a) the person making the arrest has reasonable grounds for believing that for any of the reasons mentioned in subsection (4) it is necessary to arrest the person in question; and

(b) it appears to the person making the arrest that it is not reasonably practicable for a constable to make it instead.

(4) The reasons are to prevent the person in question —

(a) causing physical injury to himself or any other person;

(b) suffering physical injury;

(c) causing loss of or damage to property; or

(d) making off before a constable can assume responsibility for him."

30. In so far as Count 1 was concerned, the defence case was that Morris was committing an offence of attempting to meet a child following grooming at the time he was detained. The applicants detained him to prevent him from committing this offence and from committing offences in the future, as they considered that he posed an ongoing danger to children based upon their understanding that he was already under investigation for a similar offence and had shown himself prepared to meet a child.

31. The prosecution contended that the applicants could not have been acting to prevent the crime they say Morris was committing at the time because he had committed it by the time he was detained and could not have committed the offence of meeting a child and nor could he have committed an offence of sexual violence towards the child because there was no child for him to meet. It was impossible for him to commit the offence of meeting a child following grooming and there was no need to prevent him from committing the inchoate offence; therefore, it could never be reasonable to use any force to prevent it.

32. The applicants argued that they were entitled to use force to prevent a breach of the peace. The nature of the complainants' offending was such that it was reasonable to suppose that they each presented an ongoing risk of communicating with real children and that contact offences might be committed which would result in actual physical harm.
33. The applicants argued that section 3 of the CLA should be given its ordinary meaning, without any gloss. The words of the statute did not limit the defence to particular types of crime and must therefore apply to inchoate offences as much as any other type of offence. The fact that there was no real child would be a factor that the jury would have to weigh up when determining whether the force used was reasonable, but it was a matter for the jury to decide. The prosecution argued that it could never be reasonable to use any force to prevent a crime which risked no actual harm and that the defence should therefore be withdrawn from the jury.
34. In her ruling, the judge stated as follows:

"Section 24A PACE

The defendants are clearly entitled to rely upon this legal justification and invite the jury to conclude that their actions were, or might have been, in accordance with the statutory criteria and were therefore lawful.

...

Common Law

There is no evidence upon which to suggest there was an imminent risk of sexual violence being caused to children at the time of the alleged offences of false imprisonment. The defence cannot, therefore, rely upon the common law right to use force in order to prevent a breach of the peace (considering *Laporte v. CC of Gloucestershire* [2006] UKHL 55)."

35. In relation to section 3 of the Criminal Law Act 1967, the judge considered *R v Jones (Margaret) & Others* (supra) and *DPP v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin). From those two cases the judge said that she could distil the following principles:

- When judging what is reasonable a tribunal must take into account the reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy.
- The state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands.

- The law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.
- There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help.
- In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them.
- If the police, when called, will not come, perhaps for operational reasons or lack of resources, a citizen whose person or property is under threat would in such a case be entitled to take reasonable steps to protect himself.
- The right of the citizen to use force on his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large.
- In the absence of very exceptional circumstances, force cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public.
- A court should be prepared to conclude that the defence under section 3 (1) is not available to a defendant and, in such circumstances, the issue of justification should be withdrawn from a jury.

36. The judge continued in her ruling:

"From those principles I conclude that the justification to use force to prevent crime would only be available to the defendants in relation to the crimes they honestly believed were imminent and therefore there was an urgency to act which precluded them from summoning the police to do their duty.

If, for example, it was honestly believed that someone was about to meet a child and harm that child, and the police had been called but refused to attend or failed to attend in time such that the situation called for immediate action to prevent that crime from taking place then the defendants would be permitted to use reasonable force to prevent it.

For the purposes of this ruling, I accept the facts as the defence assert them to be.

In count 1 the defendants believed that Morris was on his way to a meeting place where he intended to meet a child.

However, to the defendants' knowledge there was no child and that particular offence could never have been committed.

Whilst the defendants believed Morris was in the process of committing an offence of attempting to meet a child, they knew there was no risk of harm that needed to be prevented. Indeed, it would have been potentially beneficial for Morris to have committed that offence in order to strengthen any prosecution for that offence. Arguably on the defence version of events he had done so as he had arrived at the meeting place when he was detained. There was no need to prevent that offence from taking place; therefore, it could not have been reasonable for the defendants to have used any force to prevent it.

Securing evidence of a crime is not preventing a crime and section 3 does not justify the use of force in order to do so.

Preventing the defendant from committing other crimes in the future which are not imminent is not the sort of emergency which gives rise to a need to use force to prevent them from being committed.

If an empty money box was left in a prominent place in the hope that an individual would approach it and open it in an attempt to steal the contents, it would not be permissible to use force against that person simply on the basis that they were an impecunious addict who would inevitably carry on stealing in order to fund their addiction.

Because the nature of the offending it is feared Morris would commit in the future is particularly abhorrent, does not give the defendants any greater authority to take the law into their own hands.

In count 2, the defendant believed Ware was engaging in sexual communication with at least one decoy and that he might be talking to a real child and might be arranging to meet up.

This was not an emergency situation where the police had refused or failed to respond to which could have justified force to prevent the crime that the defendant believed was being committed from continuing. The crime that the defendant believed was being committed did not involve a child, but an adult decoy.

In count 3, the defendants believed Wilkinson was committing an offence of attempting to meet a child following grooming and breaching an SHPO.

For the same reasons, this was not an emergency situation which necessitated the defendants to act immediately rather than to summon the police.

Fear that Wilkinson might be committing other offences or preservation of evidence is likewise insufficient for section 3 of the Criminal Law Act 1967 to provide justification for the use of force.

Turning then to the second limb of section 3, it is submitted that the jury are entitled to consider whether a defendant used reasonable force to assist with the lawful arrest (by a constable) of an offender or suspected offender.

All three complainants can properly be described as offenders or suspected offenders and they were all lawfully arrested by a police constable at some point after they had been detained by the defendants.

The lawful arrest by a constable only took place once that constable had arrived on the scene. If at that stage a complainant had tried to flee a defendant would have been entirely justified in using reasonable force to assist the constable in preventing him from doing so. That is the sort of urgent situation which can arise which might call for immediate action. That is very far removed from the defendants' actions which were planned in advance and where the suspected offender was detained before any arrest by a constable was triggered by a 999 call.

In any event, the evidence of the defendants was clear that their intention was not to assist the police to arrest the offender, but to arrest him themselves, which they did. Had they attended with the police and assisted in ensuring that the suspect could not escape, section 3 would have provided a potential defence, but not when the use of force subject of the allegation of false imprisonment was entirely separate to the subsequent arrest by a constable. The use of force was clearly in order to effect a citizen's arrest.

Conclusion

For all of those reasons I conclude that section 3 can have no application in this case in the way that the defence submit that it should.

The defendants were entitled to use reasonable force in order to effect a lawful arrest.

The jury will be entitled to consider whether an arrest was justified by virtue of section 24A [of] PACE, and if they conclude that an arrest was so justified the force used to effect that arrest will then fall to be considered by reference to section 3."

37. The applicants' common proposed grounds of appeal are as follows:

- (1) The judge erred in withdrawing from the jury the following defences provided by section 3(1) of the Criminal Law Act 1967:
 - (a) A person may use such force as is reasonable in the circumstances in the prevention of crime;
 - (b) A person may use such force as is reasonable in the circumstances in assisting the lawful arrest of offenders; and
 - (c) A person may use such force as is reasonable in the circumstances in assisting in the lawful arrest of suspected offenders.
- (2) The judge erred in directing the jury as to the nature of the reasonableness of force by summarising the dicta of Lord Bingham of Cornhill handed down in the case of *R v Jones* (supra), which was given in a case decided on the availability of the section 3 defence and not under the defence provided by section 24A of PACE.

38. Miller advances two additional grounds. The first additional ground (Ground (3)) was that the judge erred in admitting the hearsay evidence of Sydney and Tracey Wilkinson. The complainant in Count 3 was David Wilkinson, the son of Sydney Wilkinson and brother of Tracey Wilkinson. Although Miller was acquitted of Count 3, it is submitted that the evidence of Sydney and Tracey Wilkinson undermined Miller's credibility generally.

39. The material and disputed part of Sydney Wilkinson's statements was his assertion that the tall male (accepted to have been Miller) "came through the doorway without [his] authority"; or to similar effect, that Miller and his group "forced their way into [his] address". The material and disputed part of Tracey Wilkinson's statement was her assertion that Miller "came into the hallway" from the front door and "shouted something like 'I'm working with the police'".

40. It was submitted that the Leaned Judge was wrong to admit the hearsay statements under section 116(1), based on condition 116(2)(c) (fear); that it was for the Crown to prove beyond reasonable doubt that a witness' refusal to give evidence was through fear; and that the evidence did not establish that, but that even if it did, and having regard to the interests of justice and the factors set out in section 114(2) as identified at paragraph 34 of the proposed Grounds of Appeal, the hearsay evidence should not have been admitted.

41. The second additional ground advanced by Miller is that the judge erred in her directions about Miller's bad character. It is said that they went beyond his credibility (Miller having made an attack on another person's character for the purpose of section 101(1)(g), and extended to his propensity to commit offences of the kind with which he was charged.

42. The judge's direction was in these terms:

"The reason you heard about those convictions was because D accuses [Morris] of committing child sex offences. Some of

those accusations are accepted and some are not. You are entitled to know about the character of the person who makes those accusations when you are deciding where the truth of them lies.

Further, you are entitled to take into account all you know about D's character when deciding whether, or not, you accept his evidence as being truthful. D's credibility as a witness and, in particular, whether D has told the truth about what he honestly believed, are critical issues in this case.

The prosecution suggest that when you look at D's convictions as a whole they demonstrate deceptive behaviour and an attitude towards the police, the judicial system and the rules by which society is governed, which make it more likely that D has lied in evidence about his true beliefs and make it more likely that he would bend his account in evidence to suit what he believed was required to legally justify his actions whilst hiding his true purpose which was self-gratification.

...

If having considered the nature of the offences D admitted to by pleading guilty, and D's evidence to you about them, you conclude that those matters do not have any bearing upon his credibility then you should put them to one side and not take them into account as any support for the prosecution case.

However, if you conclude that these matters do undermine D's credibility then you are entitled to take that into account when deciding whether or not you accept his evidence.

You should bear in mind the fact that D has previous convictions does not necessarily mean that he has told lies. Nor does it necessarily mean that he is guilty of these offences and you should not convict just because he has convictions. **You must decide whether these convictions help you when you are considering whether or not D is telling the truth and whether the prosecution has proved that his actions were unlawful**, but you must not convict D of any of these offences just because he has been convicted of offences in the past. In reaching a conclusion on this matter you must take into account everything you have heard about D." (The emphasis is that of the applicant Miller)

43. It is submitted that such direction amounted to directing the jury that Miller's bad character was ultimately capable of demonstrating a propensity to behave in the way suggested by the prosecution (that is, unlawfully and for the purpose of self-gratification) and/or a propensity to be dishonest without the safeguard in *R v Hanson* [2005] EWCA Crim 824 being considered, and in circumstances in which the prosecution had conceded that the bad character did not go to propensity.

44. The Crown served a Respondent's Notice. In relation to Grounds 1 and 2, advanced by both applicants, it raises the following points:

(1) In relation to Ground 1, and following the provision to the judge by prosecution counsel of their written submissions as to defences to be left to the jury, it was submitted that the judge carefully considered the issue in detail and provided a written ruling on 3rd April 2023 as to why these defences were appropriately withdrawn from the jury in this case.

(2) In relation to Ground 2:

(a) It is submitted that the judge carefully considered the defence submissions and provided a very clear and helpful Route to Verdict, which is neither confusing nor contradictory (it being argued on behalf of the applicants that section 24A of PACE does not refer to section 3 of the CLA (or vice versa), and that by affixing the section 3(1) CLA "test" to the end of the section 24A PACE "test", the judge erred by creating a hybrid test that was confusing, contradictory and significantly narrower than section 24A of PACE).

(b) The test was not significantly narrower than section 24A of PACE. This case involved the offence of false imprisonment, with the factual circumstances involving the use of force. Specifically for Morris, the complainant in Count 1, the applicants alleged that the force went no further than was necessary and was reasonable. Section 24A of PACE provides a more restricted scheme of powers of arrest for people other than the police. Police officers are lawfully only able to use reasonable force when carrying out an arrest. It therefore stands to reason that civilians are also only permitted to use reasonable force. In the factual context of this case, it was therefore necessary for the jury to consider the reasonableness of the force. The trial judge appropriately applied this test within the Route to Verdict, a document which was not objected to by trial counsel.

45. So far as Grounds 3 and 4 are concerned that are raised by Miller, the points raised in the Respondent's Notice are:

(1) In relation to Ground 3 (that the judge erred in admitting the hearsay evidence of Sydney and Tracey Wilkinson):

(a) The evidence of Sydney and Tracey Wilkinson was in relation to Miller's actions regarding count 3, for which he was acquitted.

(b) Nevertheless, the hearsay evidence was properly admitted by the judge.

(c) Prior to the hearsay ruling, the judge had the benefit of watching the Body Worn Footage ("BWF") showing Sydney and Tracey Wilkinson's fear at the time of the incident.

- (d) In relation to fear, even the co-defendant Iain McCutcheon stated in his evidence that Tracey Wilkinson was terrified.
 - (e) In her ruling in relation to her decision to admit the hearsay evidence, the judge applied the correct legal test and rightly concluded that it was appropriate to admit the evidence.
 - (f) David Wilkinson's evidence in chief was that the man (who was accepted to be the applicant Miller) moved at speed up the stairs towards him. David Wilkinson's evidence in chief was that the defendants were dressed in black, wearing stab vests (or vests) and because of the way that they were dressed, he thought that they were the police. During cross examination, David Wilkinson's evidence was that he believed that the defendants were police because of the authority that they had, the way that they accessed the house and the way that they were dressed. He said: "We do not just let anybody walk into the house willy nilly". This evidence contradicts the assertions in the applicant's Advice and Grounds of Appeal (at paragraphs 34(a) and (b)) that there was no other evidence to support the assertions that the defendants forced entry or identified themselves as being associated with the police.
 - (g) The judge appropriately directed the jury about the hearsay evidence, and the defence had the opportunity to comment on the hearsay evidence.
 - (h) The defence had the opportunity to put before the jury evidence taken from the BWF in the form of agreed facts 3 to 5.
- (2) In relation to Ground 4 (that the judge erred in her directions on Miller's bad character) the Respondent's Notice points out:
- (a) The judge had considered the defence arguments on *Hanson* and ruled upon the same in appropriate terms.
 - (b) The jury were clearly directed that the bad character may be used in relation to Miller's credibility, specifically whether he was telling the truth. This was a central issue in the case and the jury were entitled to consider this evidence in the way they were directed by the judge.
 - (c) The judge's directions in relation to Miller's bad character were impeccable.

46. We are most grateful to Mr Carse and Mr Eguae, who appear *pro bono*, on behalf of the applicants, Miller and Moss for the quality of their written and oral submissions. There is, however, upon examination, nothing in the grounds advanced on behalf of the applicants and we do not consider that any of the grounds is arguable, essentially for the same reasons as given by the single judge in refusing leave.

Ground 1

47. In relation to Ground 1, the judge held that the defendants were entitled to rely on the defence under section 24A of PACE, and section 3 of the CLA in so far as it permitted the use of force in the course of a lawful arrest. On the agreed facts, she was not arguably wrong to hold that the defence could not rely on any additional defence under section 3 of the CLA. That provision only allows 'reasonable' force to be used. The feared crime (against an adult decoy) did not involve any risk of harm. It would not have been open to the jury to conclude that it was reasonable for force to be used to prevent the crime. Nor was it open to the jury to conclude that it was reasonable for force to be used to prevent possible future crimes that were not imminent. Nor was the force used to assist a constable to arrest: at the time the force was used no constable was present.

Ground 2

48. Section 24A of PACE does not itself give rise to a power to use force. That power arises from section 3 of the CLA (and, in the case of a constable, section 117 of PACE). That only permits the use of reasonable force. The judge was right to direct the jury as to the reasonableness of the force that was applied, and to do so by reference to *Jones* [2006] UKHL 16. The judge correctly directed the jury in accordance with the Route to Verdict which was placed before the jury.

Ground 3

49. The judge correctly directed herself as to the law and made reference to the relevant evidence. She was entitled to conclude that the prosecution had established to the criminal standard that the witnesses were too afraid to give evidence and that it was in the interests of justice for the evidence to be adduced as hearsay. In this regard, and prior to her hearsay ruling, the judge had the benefit of watching the BWF showing Sydney and Tracey Wilkinson's fear at the time of the incident and the defendant Ian McCutcheon stated in his evidence that Tracey Wilkinson was 'terrified'. David Wilkinson's evidence both in chief and in cross-examination is that he believed the defendants were the police which supported the assertion that the defendants forced entry and identified themselves as being associated with the police. The judge's ruling in relation to her decision to admit the hearsay evidence applied the correct legal test and she did not arguably err in concluding that it was in the interest of justice to admit the evidence. The judge directed the jury appropriately in relation to the hearsay evidence and had the opportunity to address the jury on it (as well as having had the opportunity to put before the jury evidence taken from the body worn footage in the form of an agreed fact). Such evidence in any event only related to Count 3, on which Miller was acquitted. As such, and as was recognised in the submissions before us, it does not arguably render the convictions unsafe.

Ground 4

50. Miller concedes that the bad character evidence was properly adduced because the applicant had attacked the character of the complainant, and it was therefore relevant to the applicant's credit. However, the complaint is that the judge directed the jury that they could take it into account to establish propensity. She did not do so. As is apparent from the direction quoted above, her direction to the jury was limited to the question of whether the defendant was telling the truth or telling lies. It was not a propensity direction and did not amount to the same. In any event, such direction, even had it been inappropriate, did not arguably render the conviction unsafe."

51. Accordingly these renewed applications for leave to appeal against conviction are refused.