Neutral Citation Number [2018] EWCA 320 (Crim)
No: 201800451/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 13 February 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE ELISABETH LAING DBE

HIS HONOUR JUDGE AUBREY QC
(Sitting as a Judge of the CACD)
R E G I N A
v
ABENA ATTA-DANKWA

Ms A Jones appeared on behalf of the **Appellant**
Ms C Bradley appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 3rd January 2018 in the Crown Court at Northampton, Abena Atta-Dankwa was convicted of assault by beating, contrary to section 9 of the Criminal Justice Act 1988 and wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. On her behalf, Ms Jones contends that the latter conviction is unsafe because the jury were incorrectly directed as to the mental element of the offence. Ms Bradley, for the respondent, is also concerned that the direction in question may have misled the jury. So too upon reflection was Mr Recorder Chinery, the learned recorder before whom the case was tried.

2. We will return shortly to the manner in which this case comes before the court. At this stage it suffices to say that we grant leave to appeal.

3. The circumstances giving rise to the prosecution can be summarised briefly. Mrs Mary Houston lives with her family on a private road in Wellingborough. Non-residents of the street sometimes use it as a car park. Mrs Houston and her family, on occasions, ask persons to move elsewhere. On 11th October 2016 Mrs Houston and her adult daughter, Angela, went to make such a request of the driver of a parked black BMW car. It was accepted at trial that the driver was this appellant.

4. The prosecution case was that the appellant's response towards Angela Houston was verbally aggressive. Mrs Houston began to move back towards her house. The appellant then left her car, took hold of Mrs Houston's shoulders from behind and pushed her. Mrs Houston returned to her property and began to shut her gates. The appellant then drove her vehicle directly at the gates. She struck the gates, causing them to open. Mrs Houston stepped forward to close them. The vehicle then drove at Mrs Houston, knocking her down and causing a laceration of her right forearm, which has left visible scarring, soft tissue damage to her wrist and injuries to her ribs. Mrs Houston required in-patient treatment for three days and suffered continuing pain.

5. The appellant's evidence at trial was that she had parked in the private road because she was looking for her son. She thought he might be playing football on an adjacent field. She told Angela Houston that she would only be a couple of minutes. She denied being threatening or aggressive: on the contrary, she said Mrs Houston and her daughter had been racially abusive to her. She accepted that she had touched Mrs Houston's shoulder, but only to attract her attention after the racial abuse. The appellant denied that she had pushed Mrs Houston. Her evidence was that she then returned to her car and drove away. As she did so she saw Mrs Houston tripping over some flower pots and falling. The appellant denied driving at the gates, or at Mrs Houston, or causing her any injury. She accepted that there was damage to the BMW car but said that it had been there before this incident. She put forward an explanation as to why she had failed to mention much of this account when interviewed under caution.

6. The jury had to consider three counts on the indictment. The allegation of pushing Mrs Houston was reflected in count 1, assault by beating. The allegation that the appellant had caused Mrs Houston's injuries by hitting her with the BMW car was reflected in

count 2, wounding with intent and the alternative count 3, unlawful and malicious wounding contrary to section 20 of the 1861 Act.

7. No issue arises as to count 1. It is accepted that the conviction on that count is safe.

8. In relation to counts 2 and 3, there was, as we have indicated, a head-on conflict of evidence, which the recorder clearly identified in his summing-up. On the evidence of Mrs Houston and her daughter the appellant had driven at her. There was a clear basis for an inference of an intention to cause really serious injury, in particular having regard to the fact that the appellant was alleged to have driven forwards twice, initially hitting the gate and then injuring Mrs Houston. The appellant's evidence, in stark contrast, was that she had played no part in causing Mrs Houston's injuries and was driving away when those injuries occurred. There was no doubt that Mrs Houston had suffered a wound and there was no suggestion that the appellant had any lawful justification for driving at or towards Mrs Houston if the jury were satisfied that she did. It was therefore possible to focus on those ingredients of the offences charged which were genuinely in issue.

9. There was, as it seems to us, a clear route which could and should have been set out for the jury to follow in reaching their verdicts on these counts: Question 1: Were the jury sure that Mrs Houston's injuries were sustained when she was struck by the car driven by the appellant? If "no", not guilty on both counts 2 and 3. If "yes", question 2: were the jury sure that when she drove the car into collision with Mrs Houston the appellant intended to cause her really serious injury? If "yes", guilty of count 2. If "no", question 3: "Were the jury sure that when she drove the car into collision with Mrs Houston, the appellant either intended to cause her some injury, however minor, or was aware of the risk that she might cause some injury, however minor, by hitting her with the car, but nonetheless took that risk? If yes, guilty of count 3, and if "no", not guilty of count 3.

10. Unfortunately the recorder did not provide the jury with that or any other written route to verdict. Nor did he give the jury any written direction as to the law. In his summing-up, he gave the jury an initial direction about the allegation of an intention to cause really serious injury. No complaint is or could be made about that direction in itself. It was however followed at pages 6A - B of the transcript by the following direction about count 3, the section 20 allegation:

> "Then you have count 3 and that is an alternative charge to count 2. It relates to the same injury. The difference is that if you decide, so that you are sure, that the defendant caused the injuries, but that she did not intend to cause those injuries, then it is open to you to find the defendant guilty on count 3 but not guilty on count 2. Conversely, of course, if you decide -- and I suggest you do it in the order in which you have it on the indictment -- that the defendant is guilty on count 2, you do not then need to go and consider count 3."

11. With respect to the recorder, we see three problems with that passage. First, it misstates the standard of proof and is at least capable of being misunderstood as to the burden of proof. Secondly, it omits any explanation of the two different states of mind

which the jury might find proved in relation to count 3, namely, an intent to cause some injury, however minor, or recklessness as to the causing of injury. Thirdly, although the recorder encouraged the jury to consider count 2 before count 3, an encouragement which he repeated in stronger terms later in the summing up at page 10C, his use of the word "conversely" may have been understood by the jury as an indication that they could start with count 3 and then work back to count 2 if necessary.

12. No separate argument has been advanced before this court as to whether the unsatisfactory nature of that passage would of itself cast doubt on the safety of the conviction on count 2. We need not decide that issue. We focus instead on what happened when the jury, after a period in retirement considering their verdicts, asked a question in the following terms:

> "If the defendant drove at Mary intending to scare her rather than to injure her but the injury was the result of the ensuing collusion, is she guilty of count 2? We need advice as to the requisite level of intent."

13. The recorder, rightly, discussed with counsel how that question should be answered. Ms Bradley asked for and was given time to consult the Crown Court Compendium in order to assist the recorder by drafting a suggested direction explaining recklessness to the jury. No doubt all three participants in this discussion were trying to ensure that the jury were correctly directed in response to their question. Unfortunately, through what appears to have been a collective muddle, all three appeared to have become confused as to which count was which. It seems probable that there was a temporary and collective oversight of the less serious offence charged in count 1. Be that as it may, it appears somehow to have been assumed that the jury's enquiry about count 2 (the section 18 offence) in fact related to count 3 (the section 20 offence).

14. In the result, when the jury returned to court the recorder thanked them for their question and at page 12G - 13A said this:

> "I think the answer to the question which you pose is perhaps rather more simply put in this way: if you find, so that you are sure, that the defendant drove her car at Mrs Houston, knowing that there was a risk that Mrs Houston might be injured, but nevertheless went on to take that risk, in circumstances where it would be unreasonable for her to do so, that would amount to the question which you are raising with me which is that she would be guilty on count 2.
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> So what you have to be satisfied of, really, is -- and the question of scaring does not really come into it -- that the defendant knew that there was a risk in driving the car at Mrs Houston, the risk being she might be injured, but nevertheless went on to take that risk with the resulting consequences, if you are satisfied that was what happened."

15. Thus the jury were wrongly directed by the recorder that recklessness would be sufficient for a conviction of count 2, the section 18 offence. That was plainly wrong.

Wounding with intent, contrary to section 18 of the 1861 Act is a crime of specific intent. Nothing less than an intention to cause really serious injury would suffice.

16. Very regrettably, nobody recognised the error at the time. The jury retired again, and a comparatively short time later returned their guilty verdicts on counts 1 and 2.

17. Sentencing was adjourned until the following day. By the following morning Miss Jones had realised that there had been a misdirection. She raised her concerns with the recorder, who adjourned sentencing. He was persuaded to grant a certificate that the case was fit for appeal.

18. Although a trial judge has power, under section 1(2)(b) and section 11(1)A of the Criminal Appeal Act 1968, to certify that a case is fit for appeal, it has long been established that the power should only be exercised in exceptional circumstances - see for example R v Bansal [1999] Crim LR 484, in which the court held that there would be very few circumstances which would justify a trial judge's assumption of powers normally exercised by judges of the Court of Appeal; and see to similar effect R v Inskip [2005] EWCA Crim 3372. A trial judge must first be satisfied that there is a compelling ground of appeal. In the circumstances of this case, where the recorder was rightly persuaded that he himself had fallen into serious error, that requirement may be satisfied. But it does not follow that a certificate of fitness for appeal should be granted.

19. If the trial judge does grant such a certificate, there are two consequences. The first is that it obviates the need for the convicted defendant to apply for leave to appeal against his or her conviction. The second is that the trial judge may grant bail pending appeal - see section 81(1)(f) of the Senior Courts Act 1981.

20. As to the first of those consequences, it must be remembered that the Registrar of Criminal Appeals has the power to refer an application for leave to appeal directly to the full Court, which can be done very quickly, and that in an appropriate case, steps can be taken to ensure that an appeal is heard within a short period of time. It must also of course be remembered that the time limit of 28 days for applying for leave to appeal against conviction is a maximum, not a norm. In the circumstances of this case, it seems to us that the prompt submission by Ms Jones of an application for leave to appeal, accompanied by a note explaining to the Registrar the reasons for dealing with it urgently, could and would have been referred to the full Court within a very short period of time.

21. As to the second consequence, it should have been of no practical importance in this case, because we have no doubt that the recorder should in any event have adjourned sentence to obtain a pre-sentence report, and we can see no reason why he should not have granted the defendant bail during that period of adjournment. We must express our surprise to have been told by Ms Jones that although she asked for an adjournment to obtain a pre-sentence report, the learned recorder dismissed such a report as unnecessary in view of the inevitability that a section 18 conviction such as this would result in a substantial term of imprisonment. Bearing in mind that, even on the very limited information available to us, it is clear that the appellant was the mother of at

least one child, we have no doubt that a report should have been obtained even if, in the end, it proved relevant only as to the length of sentence.

22. Setting that point to one side, it seems to us that in the circumstances of this case the conventional appeal procedure could, and in our view should, have been followed. We would add that trial judges should reflect very carefully before deciding to take the exceptional course of certifying a case fit for appeal.

23. There was in any event a procedural irregularity in the recorder's agreement to certify the case fit for appeal. By Criminal Procedure Rule 39.4, a defendant who wishes a trial judge to grant a certificate must either make an oral application immediately after the conviction occurs (which did not happen here) or must make the application in writing (which also does not appear to have happened here). It is therefore fortunate for all concerned that the Registrar, for the avoidance of any doubt, did swiftly refer this case to the Full Court. So it is that we have granted leave to appeal at the start of this judgment.

24. The appeal now being before the court, Ms Bradley, for the respondent, rightly, does not resist it.

25. It is in those circumstances inevitable that we will conclude that the conviction on count 2 is unsafe and must be quashed. We hope that it goes without saying that it is very regrettable that a conviction falls to be quashed in such circumstances.

26. We have been addressed about what should be the appropriate consequences if, in the light of what is now before us, we grant the appeal and quash the conviction. Ms Jones, for the appellant, submits that the appropriate course would be for this court, upon quashing the section 18 conviction, to exercise its power under section 3 of the Criminal Appeal Act 1968 to substitute a conviction of the alternative count alleging an offence contrary to section 20. Ms Bradley, for her part, invites the court to order a retrial. We have reflected upon these submissions. We have no doubt that a retrial must be ordered. It is very regrettable that the appellant will again have to face a trial and that Mrs and Miss Houston and other witnesses will again have to give evidence. It is regrettable that there will inevitably be some delay before the retrial can be heard. But as against that, the allegation put forward by the prosecution is a serious one. Whatever a jury may ultimately make of it, no one has suggested that there was not a case to answer on count 2. The reason this conviction must be quashed is that there has been a serious error in the manner in which counts 2 and 3 were laid before the jury by the recorder. It follows that no jury has yet given proper consideration to those two alternative charges.

27. Thus, at the conclusion of this judgment, we will announce our decision to quash the conviction of count 2 and to order a retrial. But before that, we must make some observations as to how the serious error which occurred here could and should have been prevented.

28. Criminal Procedure Rule 25.14(4) states that jury directions, questions or other assistance may be given in writing. Research has shown that jurors are assisted by

having written directions. The research is well known. It is conveniently summarised by the learned authors of the Crown Court Compendium, to which reference was made in the course of this trial, at paragraph 1.6 of their 2017 edition and the authors there conclude that the argument in favour of providing written directions is "overwhelming". Numerous decisions of this court have made clear the importance and desirability of written directions, and have encouraged their use. The provision of a written route to verdict was recommended by Sir Brian Leveson in his Review of Efficiency in Criminal Proceedings in 2015. The Criminal Practice Direction now makes specific reference to it, supplementing rule 25.14 in the following terms:

> "26K.11. A route to verdict, which poses a series of questions that lead the jury to the appropriate verdict, may be provided by the court (CrimPR 25.14(3) (b)). Each question should tailor the law to the issues and evidence in the case.
>
> 26K.12. Save where the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict. It may be presented (on paper or digitally) in the form of text, bullet points, a flowchart or other graphic."

29. In R v Kay [2017] EWCA Crim 2214, this court, differently constituted, has recently drawn attention to the importance of that part of the Criminal Practice Direction.

30. It is, in our judgment, entirely clear that the circumstances giving rise to this appeal would not have occurred if written directions, or a written route to verdict, or both, had been provided to the jury by the recorder. In that way the jury would have had a clear record, to which they could if necessary refer during their deliberations, of the approach they should take in deciding their verdicts on counts 2 and 3. It would probably have obviated the need for the jury to ask a question about an intention to scare as opposed to an intention to cause serious injury. But even if they had still asked that question, neither the recorder nor counsel would have fallen into error about which count was which, and the answer to the jury's question could have been expressed with specific reference to the document which had been provided to them.

31. There is a lesson to be learned from this case. It is that one should never be too quick to assume that a case is so straightforward that a route to verdict would be superfluous. Experience shows that problems can arise even in cases which seem straightforward. In the present case, the criticism which we have made of the recorder's initial direction as to count 3 shows that a written route to verdict would not have been superfluous even if the later events had not occurred. Moreover, quite apart from the assistance which the end product will provide to the jury, the mental discipline of drafting a route to verdict in itself assists the court to identify the essential ingredients of the offences charged and the issues on which the jury must focus.

32. We recognise, of course, the pressure of work on judges and recorders sitting in the Crown Court and we accept that some cases are so straightforward that no written materials for the jury are necessary. But such cases are in a minority and this case

illustrates the general desirability of providing the jury with written directions, a written route to verdict, or both.

33. For those reasons, we quash the appellant's conviction on count 2 and we order a retrial on counts 2 and 3. The conviction on count 1 of course stands.

34. We must give some directions. We direct that a fresh indictment containing what have hitherto been counts 2 and 3, but will now be renumbered, be served. We further direct that the appellant be re-arraigned on the fresh indictment within 2 months.

35. Ms Jones, Ms Bradley, is there any reason why the retrial should not be held in the Crown Court at Northampton. Was there, for example, any local reporting which might in any way be thought capable of prejudicing the retrial?

36. MS BRADLEY: Not that I am aware of.

37. MS JONES: No my Lord.

38. LORD JUSTICE HOLROYDE: We will simply direct that the appellant be re-arraigned and the retrial proceed in the Crown Court at Northampton.

39. Ms Bradley, the defendant is presently on bail, awaiting sentence on count 1, no longer on count 2 because we have quashed that conviction. There is in any event the question of her status between now and any retrial. Has the bail of late been unconditional?

40. MS BRADLEY: I think there are certain --

41. MS JONES: There are a number of conditions: her passport was surrendered to the local police station and she reports every Saturday between the hours of 10.00 and 12.00. She is now based in London not Northampton. There is to be no contact with the complainant or her family.

42. LORD JUSTICE HOLROYDE: All right. In a moment we will rise to consider that. Is there any other direction which either of you seeks from us in relation to the retrial?

43. MS BRADLEY: No thank you my Lord.

44. LORD JUSTICE HOLROYDE: We will just rise for a moment.

(Short Adjournment)

45. LORD JUSTICE HOLROYDE: We will direct that the appellant remain on bail subject to the same conditions as before and Ms Jones, in the event of any wish to vary those conditions, then an application can be made to the Crown Court in the usual way.

46. Now it does not seem to us that there is any reason why we should depart from the important principle of open justice by restricting the publication of the judgment in this case pending retrial. It does not seem to us to be a case in which, even in the improbable event of any juror reading our decision, there could be any possible prejudice to the fair trial of the appellant. Does either of you suggest the contrary?

47. MS JONES: No my Lord.

48. LORD JUSTICE HOLROYDE: Ms Jones, I should have read out to you one further provision which is for the benefit of the defendant (as she now becomes). I take it she was legally aided?

49. MS JONES: She was.

50. LORD JUSTICE HOLROYDE: That order does not cover the retrial. You must apply, for a representation order to cover the retrial, to a specific department of the Legal Aid Agency. Rather than my reading out the full details of the address, it is probably best if you have a quiet word with the Registrar in court when convenient and she can tell you about it.