[2019] EWCA Crim 1958
No: 2018 05261 05262/C1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 31 July 2019

B e f o r e:

LORD JUSTICE HADDON-CAVE

MRS JUSTICE FARBEY DBE

HER HONOUR JUDGE MOLYNEUX

R E G I N A

v

DAMIAN DEAN THOMAS

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Ms Vida Simpeh appeared on behalf of the **Appellant**
Ms Eddy Leonard appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. **LORD JUSTICE HADDON-CAVE**: On 15th November 2018, in the Crown Court at Lincoln before Recorder Bacon QC, the appellant, Damian Dean Thomas (now aged 38), was convicted of doing acts tending and intended to pervert the course of justice. On 19th December 2018, before the same Recorder, he was sentenced to 4 months' imprisonment. He has already served that sentence and has been released.

2. He appeals against conviction and sentence by leave of the single judge. We are grateful to Ms Simpeh on behalf of the appellant and Ms Leonard on behalf of the prosecution also for their helpful written and oral submissions, and for the measured and fair way in which they have argued this appeal.

3. <u>The facts</u>
On 19th April 2015, at about half past midnight, a BMW motorcar was caught by a static speed camera speeding at 84 mph on the A1 northbound at Great Ponton which has a 70mph speed limit. The registered keeper of the vehicle was Ms Jade Riviere. She was the Appellant's girlfriend or partner at the time. As is normal practice in speeding offences, on 24th April 2015, a Notice of Intended Prosecution was sent to the registered keeper's address asking the keeper to identify the driver.

4. On 27th May 2015, a Reminder Notice was sent. Jade Riviere received the Reminder Notice and asked the appellant who had been driving the car. He told her that it was Mr Kennedy Ntini and gave her the address for Mr Ntini in London. Jade Riviere duly completed the relevant section of the notice and returned it to the Lincolnshire Police Central Ticket Office.

5. On 29th May 2015, the police sent a Notice of Intended Prosecution to Mr Ntini.

6. On 16th June 2015, a formal response was received stating that Mr Ntini had never been the owner/keeper. It was accompanied by a handwritten letter from Mr Ntini stating that he did not hold a driving licence.

7. On 16th June 2015, the police wrote again to Jade Riviere and asked for the correct driver's details. The appellant provided the details of another person, Ms Caroline Rose, and an address in Oxford. The police then sent Ms Rose a Notice of Intended Prosecution. It was returned to the police stating she had never been the owner/keeper of the vehicle and she only held a provisional driving licence.

8. Jade Riviere was subsequently invited for a police interview at Wembley Police Station.

9. She was asked to provide the Appellant's details to the police. The Appellant subsequently attended two voluntary interviews, on 27th July and 20th September 2015. During the first interview, he answered questions and attended without a solicitor. During the second interview, he attended with a solicitor and gave a prepared statement. He was charged by way of postal requisition for the index offence on 30th April 2017.

10. The prosecution case was that between 23rd April and 1st July 2015 the Appellant knowingly provided false information as to the identity of the driver on both occasions to Jade Riviere, knowing that she would give that information to the police and intending that the course of justice would thereby be perverted. Further, the Prosecution alleged that (i) the appellant was the driver of the vehicle (ii) on the occasion of the speeding he was the only person in the BMW at the material time and (iii) his account to Jade Riviere, to the police and the jury that there were five others in the car, including his cousin Lendl Clark, and that they switched drivers, was entirely fabricated.

11. The prosecution relied firstly on the evidence of Jade Riviere as to what the appellant had told her and the circumstances in which she provided the two different drivers' names to the police; secondly, on an image of the BMW taken at the time the vehicle had been caught speeding; and thirdly, on the evidence of PC Colbourne, the investigating officer.

12. The defence case was that the Appellant's evidence was consistent with the appellant's police interview, and that at the time the vehicle had been captured speeding he had been attending a rave and was driving to it with others in the car including his cousin. He supplied the names of the drivers, believing them to be true. His evidence was supported by his cousin. He also relied upon written evidence of a hotel booking and cash withdrawal in Cambridge consistent with his account of the journey. The Appellant also relied on his good character.

13. The issue for the jury was whether they could be sure that the Appellant deliberately gave false driver names to Jade Riviere knowing that she would give those names to police and a police investigation may have led to criminal proceedings against others.

14. PC Colbourne gave evidence that he was the investigating officer. He said that when the Appellant was first interviewed, he came to the police station voluntarily. At that stage the police did not have the photograph of the BMW speeding, but it was obtained prior to the second interview. The photograph showed, he said, all the seats of the car. The officer further confirmed that he had been unable to locate the Appellant's brother and that he had not been given any information as to how to contact the Appellant's cousin, Lendl Clark.

15. The Appellant gave evidence that he promoted raves, parties and events and at the

material time he had six penalty points on his driver's licence. He said that on Saturday 18th April 2015 he spent the day at Jade Riviere's house and borrowed her car to attend a party in Leeds. He was travelling in the car with two females, a male nicknamed Rider, and his cousin and brother. They were going to stay in two rooms he had booked. He produced the booking confirmation. During the four-hour journey to Leeds, they changed drivers and stopped at a service station in Cambridge. The drivers were him, then Rider, and then one of the females. When Jade Riviere received the Notice of Intended Prosecution, he said he did not know the real name of Rider and he asked his brother, who told him that it was Kennedy Ntini, which is why he passed on that name. His brother subsequently said the name of the female was Caroline Rose, which was why he passed on that name. He gave police a contact number for his brother and attended the police station voluntarily.

16. In cross-examination, he accepted there were six people in the car and that that was more than the number of seats available. He described the people in the car, and when it was put to him that the photograph did not show anyone above the head rest, he maintained they were all in the car. He denied that he had tried to avoid the penalty points and said anyone had been allowed to drive the car and his partner knew that.

17. Lendl Clark gave evidence that he was the Appellant's cousin. He had no previous convictions. He gave evidence in support of the Appellant's account that they went to Leeds with Rider and two females. He produced records to show that he had withdrawn money at the service station in Cambridge. His evidence was they had swopped drivers during the journey. It had happened quite a long time ago. When shown the photograph of the BMW speeding, he said he could barely make out the vehicle and it was not clear.

18. The Recorder ruled that the Appellant had given a false impression to the jury in respect of whether he had penalty points on his licence at the time of the speeding offence. He allowed the prosecution to ask questions in cross-examination as to the points on his licence that the Appellant had, on the basis that the matter had been raised by the defence. We will return to that issue in due course.

19. <u>Grounds of Appeal</u>
In this appeal, Ms Simpeh on behalf of the appellant raises two grounds of appeal. First, she submits that the Recorder erred in admitting evidence of the Appellant's previous penalty points. She submits that he failed properly to consider whether the Appellant had given a false impression of his character through his evidence and the Recorder also failed to allow her, as the Appellant's counsel, to make full submissions on the matter before he gave his ruling on the matter.

20. Second, she submits, the Recorder entered the arena and conducted a hostile cross-examination of the Appellant, which would have created the impression in the

minds of the jury that the appellant was not a credible witness and his account was not to be believed and was certainly not believed by the Recorder.

21. Ms Leonard, on behalf of the Crown, submits in relation to ground 1 that the Recorder properly considered the Appellant's evidence as to his licence and penalty points; he gave the appellant's counsel the opportunity to make submissions on whether a false impression had been created; and the Recorder was right to admit evidence of the Appellant's penalty points, the matter having arisen because of questions asked by defence counsel.

22. As regards ground 2, Ms Leonard submits that the Recorder did not unfairly "enter the arena". He was only seeking to clarify his understanding of the Appellant's evidence. His questioning was not hostile and whilst it may occasionally have strayed towards cross-examination, this is not a case in which the trial could be said to have been unfair. In any event, she submits, the Appellant was convicted on strong and compelling evidence and the conviction is safe.

23. Analysis
Ground 1: "The learned judge was wrong to admit the Appellant's previous penalty points into evidence as he had not considered properly whether the assertions made by the defendant in his evidence amounted to giving a false impression and the learned judge had prevented defence counsel from making submissions with regards to this on behalf of the Appellant."

24. Ms Leonard pointed out that the fact that the Appellant already had six penalty points on his licence was a matter which the Appellant volunteered during his police interview, but it was deleted from the transcript that was put before the jury. She submitted this was not a 'points' case in which the question of what points the Appellant may or may not have had on his licence was relevant. The charge in this case was simply one of perverting the course of justice.

25. Early in examination-in-chief, Ms Simpeh asked the Appellant following questions:

i. "Q. And in terms of your work, would you have been affected if you were to receive three points on your licence?

B. No, not at that time, no.

i. Q. And would receiving three points result in you being disqualified?

A. No, not that I'm aware of.

ii. Q. Is it also correct that you have no previous convictions?

A. No, none at all. Never been in trouble with the police ever.

iii. Q. And you also have no cautions as well?
A. Nothing."

26. At the end of Ms Simpeh's examination-in-chief, Ms Leonard raised a concern. She said to the Recorder:
    i. "I'm anxious that the jury are not given a false impression."

27. The Recorder immediately said:
    i. "THE RECORDER: Well I agree totally."

28. There then followed the following exchange between the Recorder and Ms Simpeh:
    i. "RECORDER: Yes, right. Ms Simpeh, on the first of those points about the three points, what is the position at the time?

    ii. MS SIMPEH: At the time, your Honour, my understanding is that there were six points. However, it doesn't create --

    iii. RECORDER: Well hang on. Right. Your instructions are that at the time of this offence your client had six points on his licence?

    iv. MS SIMPEH: Yes, but in terms of the questioning, it doesn't create a false impression in the sense of the defendant would not have been disqualified had he received an additional three points, and it wouldn't have affected his ability to continue driving had he received three points. Those are the two questions that were put to him, and that was what he answered to. He didn't suggest that he didn't have any points at all, or essentially he didn't suggest that he had no points at all --

    v. RECORDER: All right, so you can prepare, can you, or make a formal admission that we can hand to the jury that at the time of the offence he had nine points on his licence?

    vi. MS LEONARD: Six, yes that is correct.

    vii. RECORDER: Six sorry. He had six points on his licence.

    viii. MS SIMPEH: Your Honour, in the circumstances, because that's essentially going to bad character evidence, because what the Crown is suggesting is that he had some form of conviction, or something which goes to reprehensible conduct which we have no details of. In terms --

ix. RECORDER: Well I would like the jury to know how many points were on his licence because you put that in issue in the case. *You asked a question about how many points were on the licence and having put that in issue the jury need to know, with the greatest respect, how many points were on his licence.* It will be a matter for them to determine the relevance of that, but if you put in issue the number of points on your client's licence, you've got to be fair and ensure that the Crown can make of that what they wish.

x. The impression - I agree with Ms Leonard - the impression that has been given by your client is that he had no points on his licence.

xi. MS SIMPEH: Your Honour, that's not the impression he's giving because the question that was asked of him was not whether he had any points on his licence --

xii. RECORDER: All right. Well Ms Leonard can ask the questions in cross-examination about how many points are on his licence, and he will have to give that answer."

xiii. (emphasis added)

29. The Recorder then said to Ms Simpeh that if she was not prepared to make an admission then Ms Leonard would ask the question and if she did not ask the question then he (the Recorder) would ask the question. The judge also then went on to assert that the matter went to motive. The Recorder said this:

    i. "It goes to motive, clearly. If someone has six points on their licence they are in a different position to somebody with no points on their licence, so it's clearly a relevant matter that the jury will need to be aware of."

30. Subsequently, when Ms Leonard came to cross-examine the appellant she directly asked him how many points he had on his licence. He said he had "six" and he explained that he said in interview that he had got six but was not sure whether they had been wiped off his licence.

31. Subsequently, there was a further discussion about this issue when Ms Leonard told the Recorder that the question about six points had been deleted from the interview transcript “because I understood there would be no reference to points". The Recorder then commented that points had been referred to in the hearing. Ms Leonard then helpfully and fairly clarified that it had simply been her assumption that the question of six points having been taken out of the police transcript that there would be no further reference to points at the trial.

32. Discussion

There appears to have been an unfortunate misunderstanding between Prosecuting and Defence Counsel as to what could be raised at the trial about the points on the Appellants' license. The reference to six points was excised from the transcript of the police interview. Ms Leonard assumed that there would be no further reference to points at the trial. Ms Simpeh assumed that there was no problem with her asking the Appellant whether the fact of receiving points would have affected either his licence or his work and the questions put by Ms Simpeh were carefully phrased accordingly. It might have been desirable for counsel had had a discussion beforehand as to the scope of any questioning on this issue but unfortunately this did not occur. It is clear that Ms Leonard was taken by surprise by Ms Simpeh's questions.

33. The key issue is whether the Recorder's ruling was either correct in law and/or fair. In our judgment the ruling by the Recorder was wrong in law. The test in section 101(1)(g) is whether or not a misleading impression had been created by the questions and answers that were given in the examination-in-chief. We do not accept that there was a materially misleading impression given in examination-in-chief. As Ms Simpeh says, at no stage did she ask how many points he had on his licence. At no stage did the Appellant say that he had no points on his licence. He was simply asked whether or not having three points would affect his licence or his work. He answered negatively. In our view, the Recorder was too quick to form a view or a conclusion on this point. He should have considered the matter more carefully. Had he done so, the Recorder may not have fallen into error. He mischaracterised what in fact had been said in examination-in-chief. He said, as we have quoted above, Ms Simpeh had asked her client "a question about how many points were on his licence". She did not. She simply asked him whether three points would mean disqualification or affect his work.

34. We are also troubled by the way in which the fact that the appellant had six points was then allowed to come out in cross-examination, which may have given the jury the impression that the appellant had not been entirely forthcoming in examination-in-chief. **This was not something which was curable by the summing-up and no attempt was made by the Recorder to deal with this problem. Indeed, the Recorder said this in his summing-up:**

    i. "And then we heard from Mr Thomas. He said that he was employed doing promotional work, party promotions, putting on raves. He said that - in answer to the question, 'In terms of your work, would you have been affected by three points on your licence?', his answer was, 'Not that I'm aware of'. He has no previous convictions and has never been in any trouble, no cautions. *We were told subsequently that he had, at the time, six points on his licence.* It is a matter entirely for you to take that evidence into account like all the other evidence. You make of

that what you wish."

35. (emphasis added)

36. The Recorder did not remind the jury that Mr Thomas had at no stage ever sought to conceal the fact that he had six points. The Recorder did not correct any misleading impression that might have been given by the manner in which this issue had come out, nor did the Recorder give any other suitable direction which might have dealt with this point. In our judgment this was an error by the Recorder which was sufficiently serious as to undermine the safety of the conviction itself.

37. Ground 2: "The questioning by the Recorder went beyond his role as a neutral umpire and would have caused the jury to take the view that the Recorder did not believe the defendant."

38. The authorities
There are numerous authorities dealing with the fundamental importance of ensuring that everyone has a fair trial.

39. In R v Hamilton [1969] Crim LR 486, Lord Parker CJ and Eveleigh J were concerned with a case in which a defendant had been convicted of an indecent assault. He appealed on the ground that the number and nature of the interventions by the judge was such that the conviction should be quashed. He also complained that the judge, in the absence of the jury, obliged him to remove a regimental blazer he was wearing on the ground that it might be considered evidence of good character. The court dismissed the appeal but highlighted the following:

    i. "... it was wrong for a judge to descend into the arena and give the impression of acting as an advocate and often it did more harm than good. Whether interventions can give ground for quashing a conviction, it is not only a matter of degree but also depends on what the interventions are directed to and what their effect might be. Interventions to clear up ambiguities and to enable the judge to make an accurate note are perfectly justified. Interventions which may lead to the quashing of a conviction are (1) those which invite the jury to disbelieve the defence evidence in such terms that they cannot be cured by the telling the jury that the facts are for them, (2) those which make it impossible for counsel to present the defence properly, (3) those which have the effect of preventing the defendant from doing himself justice and telling his story in his own way. In the present case though the judge descended into the arena he did not do so to an excessive degree, counsel was not prevented from presenting the defence and [the defendant in that

case] did himself full justice. The judge was not justified in forcing [him] to remove his blazer but have had no effect on the trial."

40. Since Hamilton there have been a number of powerful authorities reinforcing the fundamental principle of the right to a fair trial. We were referred to a number of helpful authorities by Ms Simpeh.

41. First, R v Copsey [2008] EWCA Crim 2043. In that case, the Court of Appeal held that the conviction of the defendant was unsafe due to the frequency and hostile nature of the judge's questioning of the defendant, as well as his description of an important part of the defendant's defence as "bizarre". It was further held by the court there that some of the judge's questioning of the defendant had been in the nature of cross-examination, which would have been perceived by the judge as showing that the judge did not believe him. Ms Simpeh submits that this is what occurred in the present case.

42. Secondly, Ms Simpeh referred us to R v Perren [2009] EWCA Crim 348. In that case, Toulson LJ said as follows:

    i. "24. ... We add that if the court is driven to the conclusion that the defendant has not had a fair trial, when the matter is looked at in the round, the natural conclusion will be that the verdict is unsafe because our criminal justice system is dependent upon the fundamental principle of the provision of a fair trial. To allow an appeal in such circumstances, even though the evidence for the prosecution may have been exceedingly strong, is not to allow an appeal on a technicality, but to allow it upon a fundamental principle which underlies our criminal justice system."

43. Having set out some of the exchanges during that trial, Toulson LJ said as follows:

    i. "34. We must evaluate the effect of these interventions in the context of the trial as a whole. We are particularly concerned about the questions put in the course of examination-in-chief. It is not a sufficient answer in our judgment to say that because questions were likely put in cross-examination, there was no harm in them being put by the judge in the course of the appellant's evidence-in-chief. We do not suggest that any inventions in the course of evidence-in-chief, other than by way of clarification, must render a conviction unsafe. However, there are good reasons why a judge should be particularly careful about refraining from intervening during a witness's evidence-in-chief, except insofar as it is necessary to clarify, to keep the evidence moving on and, if necessary, to avoid prolixity or irrelevancies. The first is that it is for the prosecution to cross-examine, not for the judge. The

second is that the right time for the prosecution to cross-examine is after a witness has given his evidence-in-chief. It would be unthinkable for a prosecuting counsel to jump up in the middle of a witness's evidence-in-chief and seek to conduct some hostile cross-examination. This is not merely in order to preserve an orderly trial. There is a more important, fundamental reason. A jury will inevitably form a view of each witness as the case goes along. As the witness is giving his or her evidence-in-chief, so the jury will be absorbing that account and forming their own impression of the witness."

44. Toulson LJ continued in Perren as follows:

    i. "35. The appellant's story may have been highly improbable, but he was entitled to explain it to the jury without being subjected to sniper fire in the course of doing so. The potential for injustice is that if the jury, at the very time when they are listening to the witness giving his narrative account of events, do so to the accompaniment of questions from the Bench indicating to anybody with common sense that the judge does not believe a word of it, this may affect the mind of the jury as they listen to the account.

    ii. 36. We have been driven in this case to the regrettable conclusion that the nature and extent of the interventions over the three days in which the appellant gave his evidence deprived him of the opportunity of having his evidence considered by the jury in the way that he was entitled. The conclusion from that is that we do not consider that he received the quality of fair trial to which he was entitled. This was not curable by a summing-up which reminded the jury that the facts were for them because their process of forming their opinion as to where the truth of the facts lay would have begun as they listened to the evidence unfold."

45. Ms Simpeh submitted the words of Toulson LJ in paragraphs 34, 35 and 36 are directly applicable to the present case.

46. The third case Ms Simpeh directed to us was R v Inns [2018] EWCA Crim 1081. In that case Singh LJ emphasised as follows:

    i. "32. Before we turn to the fundamental submission which is made in these appeals on the facts of this case, we would wish to set out some fundamentals which we take to be uncontroversial.

    ii. 33. First, the tribunal of fact in a criminal trial in the Crown Court is the jury and no one else.

iii. 34. Secondly, ours is an adversarial system, not an inquisitorial one. The role of the judge is therefore to act as a neutral umpire, to ensure a fair trial between the prosecution and the defence. The judge should not enter the arena so as to appear to be taking sides. These are well established principles of our law. If authority is needed for them, it is to be found in the two decisions of this court which have been placed before us: Hamilton, an unreported judgment of 9 June 1969, and Gunning (1994) 98 Cr App R 303.

iv. 35. Thirdly, there is nothing wrong in principle with a trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in an immediate response to an answer that has just been given by a witness. Otherwise, it may often be preferable for the judge to wait until the end of the evidence given by that witness, or at least the end of the evidence-in-chief. Often things that are not clear may become clearer once the evidence-in-chief has been completed.

v. 36. Fourthly, since ours is an adversarial system, it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.

vi. 37. Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that he or she would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there is a risk that a defendant will not be able to give his or her account fully and in the manner they would wish to put before the jury.

vii. 38. Sixthly, this is not affected by the fact that the defence account may appear to be implausible or even fanciful. If it is truly incredible, the prosecution can reasonably be expected to expose its deficiencies in cross-examination and the jury will see through it. If anything, unwarranted interventions by a judge may simply prove to be counterproductive."

47. With that magisterial summary of the law we entirely agree. Ms Simpeh submitted that the Recorder in this case transgressed most of the principles which Singh LJ outlined.

48. Finally, Ms Simpeh referred us to the case of Myles [2018] EWCA Crim 2191, where Hamblin LJ and the court reiterated these fundamental principles and found on the facts of that case that by reason of the judge's interventions the trial had been unfair, and the appellant's conviction was unsafe and must be set aside.

49. The transcript
We have read the transcript of the appellant's examination-in-chief and cross-examination with great care. The Recorder made a considerable number of interventions during the examination-in-chief of the appellant and no interventions during the cross-examination. The appellant's examination-in-chief was punctuated with regular interventions by the Recorder from an early stage. It is not possible or necessary to rehearse each and every one of these interventions, save to refer to a few which give a flavour of these interventions and the fact that they were directed to important issues in the case.
Ms Simpeh's overall submission is that the Recorder's questioning from the very beginning gave the impression that the appellant's account was not to be believed. In our judgment, Ms Simpeh's submission is entirely borne out by a reading of the transcript.

50. On page 5 of the transcript the Recorder intervened in the examination-in-chief and questioned the appellant as to why a confirmation from the hotel had been received so late by the appellant and why it was dated 10th October. The relevance of this evidence was that it was relied on by the defence to demonstrate the number of people that the Appellant had with him on his trip to Leeds.

51. On page 7 of the transcript the Recorder intervened again and questioned the Appellant as to why he did not know the names of all the other people who were in the car with him.

52. On page 9 the Recorder intervened again and engaged in detailed questioning of the Appellant about an issue which was relied on as regards them stopping at a service station at Cambridge so that the appellant's cousin could draw out money.

53. On page 10 of the transcript the Recorder intervened again and asked a series of questions about what drinking had been going on.

54. At the bottom of page 10 the Recorder continued his interventions as follows:

    i. "RECORDER: You are saying that your brother and cousin had been drinking before you left, and because they'd been drinking they couldn't drive?

A. Yea, that's why they didn't want to drive.

ii. RECORDER: Right, so you believe it was Rider who drove?

A. First. I know they both drove, but I'm just trying to remember what order. It's a long time ago.

iii. RECORDER: They both drove. What do you mean they both drove?

A. The female -- Rider and the female.

iv. RECORDER: All right. Rider and a female?

A. Yes.

v. RECORDER: Because you don't know her name?

A. I can't remember. I didn't know her.

vi. RECORDER: Okay, carry on."

55. Then very shortly thereafter the Recorder intervened again:

i. "RECORDER: Well it's not a question of not recalling, it's very important. It's not a question of not recalling her name. His evidence was that he didn't know her name. Is that right? He's not saying I've forgotten her name now. His evidence was, as I understood it, and I've made a note of it, that when he met Rider with the two girls, he wasn't introduced to them by name. He didn't know their names?"

56. The Recorder then continued to ask the appellant why he did not know the girls' names.

57. On page 16 of the transcript the Recorder intervened again, questioning the appellant as to why he did not give his brother's contact details to the police. Ms Simpeh submitted that the effect of this was to suggest that the appellant's account as to this issue was not credible.

58. In summary, there were numerous interventions by the Recorder during the examination-in-chief of the Appellant which can be seen in para 1-18 of the transcript. There were, by contrast, no interventions by the Recorder during Ms Leonard's cross-examination of the appellant, which is to be found at pages 24-38 of the transcript.

59. At the end of Counsel’s questioning, however, the Recorder then said he had some further questions to ask and for the next six pages of the transcript the Recorder engaged in a series of detailed questioning of the appellant on a range of issues. To give a flavour of this we cite the following passages (page 39E ff.):

i. "RECORDER: Now your evidence to the court is that you didn't know the names of the two girls in the car.

A. Mm, mm. I was probably told them but I couldn't remember.

ii. RECORDER: No, your evidence to the court was that you were not told their names. I made a note of it.

A. Okay, I said I didn't know their names, yes.

iii. RECORDER: Yes. So that the case, is it, you didn't know their names?

A. I didn't know their names, no.

iv. RECORDER: So you were in the car for four hours and you didn't know their names?

A. To be honest I didn't really care about their names. I don't mean that in any form of rude way or anything, but they were two girls rolling up, coming with us to Leeds to party. That's all I actually cared about in that sense of that night. They may have said their names, but from my recollection I don't remember.

v. RECORDER: And you were not asked by your own counsel, but you were cross-examined about what you alleged to be a second occasion where you pulled over on the roadside to swop drivers. At this point Rider was driving and you were in the passenger seat. Is that right?

A. Yes, that is correct.

vi. RECORDER: And then Rider decided to pull over, did he, to change the driver to somebody else?

A. Yea, he didn't want to drive no more.

vii. RECORDER: So, tell me what the words were that he used?

A. He just said he don't want to drive no more. Someone else drive.

viii. RECORDER: Why didn't you volunteer to say, 'Well I'll drive again'? You were in the passenger seat.

A. Cos I still didn't want to drive again at that point.

ix. RECORDER: So you then volunteered one of the girls?

A. I didn't volunteer anybody. He said, 'Oh my girl at the back she can drive, let her drive'. She opted to drive. I didn't once say, oh yea, you drive.

x. RECORDER: But the words were, just tell me what?

A. I can't remember the exact words, because, as I said --

xi. RECORDER: The gist of what the words were, I know, I have

a terrible memory, I know we can't remember things, but the gist of what was said in the car?

A. He just said, 'Let me friend drive, she'll drive'."

60. Later, during the Recorder's questioning, there was the following exchange:

i. "RECORDER: Right, can I just remind you that it is vitally important for your case that I understand what your case is. I just want to know what the facts are.

A. So if Rider went in the back seat, then he's probably gone back to his original position where he was with the girl sitting on his lap, or whatever, or what -- I dunno, because my brother would have been in the back as well.

ii. RECORDER: Right, and a girl who is nameless gets in the front of the car and you are sitting next to her?

A. Pardon?

iii. ...

iv. RECORDER: And you're next to her in the passenger seat?

A. Yea.

v. RECORDER: Did you talk to her about this? Did you talk at all?

A. We would have words, but maybe small talk really."

61. And then subsequently there was the following exchange:

i. "RECORDER: Right, okay. You said in answer to one of the questions that when you were asked to look at the photograph, page 25 of the jury bundle, I've got a note of you saying it may be that when the flash went off the people in the back seat had put their heads down. I don't know --

A. I didn't say put their heads down, I said they may have moved their heads. I'm saying it's just a flash. Sometimes a flash doesn't always take the true meaning of what's happening.

ii. RECORDER: Why do you say they moved?

A. I'm just saying, cos there's people, I know there's people in the car.

iii. RECORDER: Let me just ask the question. Why are you saying they could have or may have moved their heads? Why did you say that?

A. Because the prosecution were trying to say there's no one in the car. I'm saying there's people in the car.

iv. RECORDER: But when you look at the photograph, you are accepting that you can't see anybody in the car?

A. You can't see anything. You can't even see who's driving.

v. RECORDER: So if they had not put their heads down, they would be visible in the car?

A. I never said that either.

vi. RECORDER: Well what do you say about that?

A. I'm just saying, maybe, you know. Like I'm just saying, I'm just trying to explain the picture of what I see in front of me.

vii. RECORDER: Just take a pause and think about the evidence you are giving. This is a court of law. All right. If there were four people in the back of that car, grown-up adults, with one person sitting on the lap of somebody else, is it your experience, applying your common sense, that you would see in that photograph people in the back of the car?

A. I can't answer that to be true.

viii. RECORDER: Why not?"

62. There was one further exchange following the re-examination by Ms Simpeh of her client after the Recorder's questions in which she took the opportunity to get her client to clarify that he did volunteer the points to the police in interview. The Recorder then sought to ask a few further questions, including as follows:

i. "RECORDER: Have you got any explanation that you can offer to the court, either yourself, or having discussed the matter with the Met Hotel in Leeds, as to why it's taken until 10th October?

A. No, cos I didn't print the form ...

ii. RECORDER: Have you got a receipt for the bookings?

A. I've got a bank reference ..."

63. In that exchange the Recorder was returning yet again to the issue of the hotel booking confirmation in respect of which he had intervened at the beginning of the examination-in-chief.

64. <u>Discussion</u>

Ms Simpeh's overall submission is that the Recorder's interventions in the examination-in-chief of the appellant and his questioning of the appellant following the conclusion of the examination-in-chief went far beyond what was appropriate "neutral umpire". She submitted that the Recorder gave the impression that he was not a "neutral umpire" and had sided with the prosecution. She submitted that the appellant did not have a fair trial. She further submitted that the Recorder simply gave the standard directions

that it was a matter for the jury to consider all the evidence, and the jury would have taken that to include all the evidence including the Recorder's own numerous interventions.

65. With those submissions by Ms Simpeh we entirely agree. Having considered all the evidence and the transcript in detail, we are driven to the conclusion that the appellant did not have a fair trial in this case because of the inappropriate nature and frequency of the Recorder's interventions in relation to issues which went to the core of the defence case. Ms Simpeh is, in our judgment, right to submit that the jury may well have formed the impression that the Recorder himself did not believe the appellant and that in effect the Recorder had sided with the prosecution.

66. This is a case in which unfortunately the Recorder did indeed descend into the arena and transgressed the principles enunciated by Singh LJ in Inns. The hearing became essentially inquisitional. For these reasons, in our judgment, there is no question but that this conviction must be quashed because the trial was unfair. Accordingly, the conviction is set aside, and we will hear submissions from counsel on any consequential matters.
67. It is not therefore necessary for us to deal with the sentence appeal.

68. Ms Leonard?

69. MS LEONARD: My Lord, I am instructed to ask that the matter be retried.

70. MS SIMPEH: My Lord, it is my submission that it would not be in the interests of justice to have the matter retried. Mr Thomas has served the full extent of his custodial sentence and has been released since then. There is unlikely to be any punishment that the court can impose effectively in the circumstances were he to be convicted again. This is also an incident which took place in 2015 and there has been considerable time since then. In those circumstances my submission is that it would not be in the interests of justice.

71. LORD JUSTICE HADDON-CAVE: Thank you.

72. (The Bench conferred.)

73. LORD JUSTICE HADDON-CAVE: The prosecution's application for a retrial is refused. There will be no retrial. This conviction is quashed and must be expunged from the appellant's record.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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