Neutral Citation Number: [2019] EWCA 43 (Crim)

Case No: 201801593 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CARLISLE CROWN COURT
HIS HONOUR JUDGE ADKIN
T20170042

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2019

Before:

Lord Justice Davis
Mr Justice Robin Knowles
and
Sir Wyn Williams (sitting as a Judge of the Court of Appeal)

- -

Between:

R. **Respondent**

- and -

Derrick Cooper **Appellant**

- -
- -

William Clegg QC and Jacqueline Carey (instructed by **Howard Kennedy**) for the **Appellant**
Michael Hayton QC and Martin Reid (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 15 January 2019

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Approved Judgment

Judgment Approved by the court for handing down.

Lord Justice Davis:

Introduction

1. This is an appeal against conviction, brought by leave of the single judge. The grounds of appeal have been advanced on a cumulative basis. Reliance has been placed on asserted demonstrable weaknesses in the prosecution case; on asserted inconsistencies in the verdicts given; on an asserted mistaken deployment of bad character/cross-admissibility directions; and all, it is said, compounded by the way in which matters were left to the jury by the summing up in contrast to the way in which one of the two counts of which the appellant was convicted had been particularised in the indictment. Overall, it is said that there thereby is a "lurking doubt" with regard to the conviction of the appellant on two of the counts which he faced (he having been acquitted on the others); and, more formally, it is said that the convictions on both counts cannot be regarded as safe.

2. At the conclusion of the hearing, the court announced its conclusion that the appeal against conviction was allowed with regard to both counts; and the conviction on each such count was quashed. We said that we would give our reasons in writing in due course. These are those reasons.

3. On this appeal, the appellant was represented by Mr Clegg QC and Ms Carey (neither of whom had appeared below). The Crown was represented by Mr Hayton QC and Mr Reid (both of whom had appeared below).

Background facts

4. The appellant was born on 29 October 1940 and is therefore now 78 years old. Between 1976 and 2006 he had been co-owner and then sole owner of a school called Underley Hall School in Kirkby Lonsdale, Cumbria: although he had never been a teacher there. The school was a specialist boarding school for boys aged between 7 and 16 who had been placed there by local authorities because such boys, by reason of their behaviour and other problems, could not be educated within the mainstream educational system. The fees were for the most part paid by the local authorities concerned.

5. In 2014 the Cumbria Police commenced an investigation into alleged historical physical abuse occurring at the school. Such investigation was prompted by allegations made by a number of former pupils there: some of them had already been to see civil solicitors and were pursuing, or preparing to pursue, civil claims.

6. In 2017 various defendants were charged with various accounts of assault occasioning actual bodily harm and of cruelty to a person under 16 years (there were, it is to be noted, no charges of sexual abuse). The original indictment contained 37 counts. Many of the counts related to a former headmaster of the school, Errol Mayer. However, he was in due course assessed as not fit to stand trial (indeed, because of various illnesses his life expectancy was assessed to be limited) and the proceedings were not pursued against him.

7. In the result, the trial commenced in the Carlisle Crown Court, before Judge Adkin and a jury, in January 2018. It lasted several weeks. There were five defendants: the appellant;

Mr Taylor, Mr Studley and Mr Farish (who were former teachers); and Mr Hadwin (a former school handyman). By this stage the indictment comprised eleven counts.

8. By Counts 1, 2, 4, 5, 7 and 11 the appellant was – in the case of Count 5, jointly with the co-accused Hadwin – charged with counts (not charged as multiple-incident matters) of assault occasioning actual bodily harm against former pupils respectively called Emmott, Gow, Preddy, Douglass, Hann and Aspin. The co-accused Taylor, Studley and Farish were individually each charged with one count of assault occasioning actual bodily harm against other former pupils, respectively called Seddon, Atobatele and Kearney. As previously mentioned, the co-accused Hadwin was jointly charged with the appellant on Count 5.

9. In addition, the appellant faced two counts of cruelty against a person under the age of 16. Count 6 related to a former pupil called Foster: it was alleged in the particulars of offence that the appellant had engaged in repeatedly slapping him and punching him.

10. The second count of cruelty, Count 8, related to a former pupil called Hann (who had also been the complainant for the purposes of Count 7). That count has loomed large in argument before us and requires setting out:

> " **STATEMENT OF OFFENCE**
>
> CRUELTY TO A PERSON UNDER 16 YEARS, contrary to section 1(1) of the Children and Young Persons Act 1933.
>
> **PARTICULARS OF OFFENCE**
>
> DERRICK COOPER between the 25th day of June 1984 and the 16th day of January 1987 being a person who had attained the age of 16 and having the responsibility for Sean Hann, a child under that age, pursued a course of conduct in that he wilfully assaulted, ill-treated, neglected, abandoned or exposed the said Sean Hann in a manner likely to cause the said Sean Hann unnecessary suffering or injury to health by assaulting and humiliating him in the dining area of Underley Hall School"

11. At the conclusion of the trial, the jury acquitted all four of the co-accused on the charges which they faced. They also acquitted the appellant on Counts 5, 6, 7 and 11. They convicted the appellant on Counts 2 and 8. They were not able to agree on Counts 1 and 4 and in due course, with the consent of the prosecution, not guilty verdicts were formally entered on those counts.

12. So the upshot was that the appellant stood convicted of assault occasioning actual bodily harm with regard to the former pupil Gow and of cruelty with regard to the former pupil Hann. He was in due course sentenced to a total term of 20 months' imprisonment. He was, it may be added, a man without previous convictions.

13. The case had at trial been opened high by the prosecution. The defendants were stated to be on trial for "deliberately and repeatedly inflicting physical harm and unnecessary suffering on young people in their care". The school was described as an "abusive school" with "a culture of concealing the truth". The prosecution case against each defendant was that each on occasion had "physically assaulted and bullied pupils to teach them a lesson and to instil fear and brutality".

14. When it came to closing speeches, however, the prosecution case was – in the light of the evidence that had emerged – put in altogether a more low key way. One of the complainants, for example, had said in the evidence that his time at the school in the end "turned out to be some of the best years I had in my life". Others frankly spoke of the extremely disruptive and disorderly behaviour of some of the pupils – some of whom had already experienced the criminal system – and the need for firm correction. Particular criticism was made by witnesses of the (absent) Mayer: the criticisms of the appellant were altogether more limited. Indeed, a number of former pupils and teachers called by the defence spoke highly of him and the school. At all events, the prosecution now disclaimed the suggestion that the school had failed every boy in its care and disclaimed any suggestion of "perpetual and consistent violence and abuse".

15. The prosecution case thus was that in individual instances, as reflected on the indictment, when faced with troubled and troublesome boys the defendants occasionally overstepped the mark and had assaulted or been cruel to some boys. The defence case was that the alleged incidents had never happened. The claims had been falsely made to advance a civil claim for compensation; and it was also said that various of the complainants had colluded together. In a number of instances, the defendants were in a position to advance the troubled background of some of the complainants. Further the defence advanced numerous agreed testimonials from other former pupils and the fact that contemporaneous reports of educational inspectors and the like were uniformly favourable about the school.

16. As part of its case, the prosecution had with the leave of the judge also adduced evidence from some other former pupils (not themselves the subject of any count) who spoke of the regime and culture of the school at those times. Evidence from three such witnesses spoke of pupils on occasion being assaulted and also of being required to wear a towel as punishment for errant behaviour. There was also undisputed evidence that pupils would frequently be required to wear PE kit as punishment.

17. Unsurprisingly, the defence much pressed the lapse of time that had occurred and also the fact that no complaints had surfaced until many years later. In addition, various discrepancies between the complainants' original accounts and evidence were explored at length.

18. The counts on which the appellant was acquitted by the jury or on which a verdict of not guilty was subsequently entered all involved individual incidents of the appellant allegedly striking the complainant in question, either on his own or in conjunction with another (such as Mayer). We do not need to set out the details. But we do need to give some detail of the two counts on which the appellant was convicted and which are the subject of this appeal.

(a) Count 2

19. The complainant was Henry Gow. He, in fact, was the one who was to say that his time at the school had turned out to be some of the best years of his life.

20. Gow was to say that he had been regularly assaulted. He identified Mayer as the chief culprit. He was to say that he (Gow) had little to do with the appellant, although he saw him, for example, at meal-times. He said, however, that there was an occasion when he

was about 14 or 15, when he, Gow, had been involved in a fight with another pupil. He said that when he then walked into the dining room, the appellant attacked him in the presence of other pupils, teachers and kitchen staff: he was head-butted (the appellant was 6′2", Gow 5′2") and when he fell to the floor the appellant kicked him and then picked him up and gouged his eyes, leaving him with a black eye or eyes. He said that he did not complain to anyone because he counted himself as "pretty hard" and because he thought that he deserved what he was getting. There were no other incidents between him and the appellant. His allegation only surfaced, he said, because the police found him some 40 years later.

21. In cross-examination, he was to say that he thought the appellant "pretty fair" on a day-to-day basis and that he cared about the children at the school. He referred to the appellant as being "all right and quite jovial" and agreed that there was for most of the time a caring environment at the school. He maintained, however, that the assault in question had occurred. When his contemporaneous Social Service records were put to him, which recorded him being positive about the school at the time and as raising no complaints, he denied that he had ever spoken to Social Services or other professionals about the school. At one stage in his cross-examination, he said that he was not prepared to tell the whole truth but was being selective in what he was prepared to answer: albeit he had come to court to tell the truth.

(b) <u>Count 8</u>

22. Count 8 has to be viewed in the context of Count 7 (on which the appellant was not convicted) since the alleged events occurred within a very short time of each other.

23. The complainant, Sean Hann, gave evidence about his time at the school (which he attended from 1984, at the age of 13). He was not complimentary about it. In particular, he described an incident when he had gone back to his previous school and there had been trouble. When he got back to Underley Hall, he said, he was taken by Mayer into the office. The appellant was also there. According to him, both slapped and punched him. He said that the appellant (who was wearing a ring) punched him in the mouth causing a hole in his lip. It was that alleged assault which constituted Count 7, in respect of which the jury acquitted. Following this he was told by the appellant to strip naked and was then taken to the coffee area adjoining the dining hall.

24. Count 8 related to what happened immediately after Hann had been taken to the coffee room. He said that he was made to go into the dining hall (where all the other pupils were, along with teachers and kitchen staff) wearing only a towel. Whilst there, according to him, he was then further assaulted by the appellant: who, he said, grabbed him by the head, slammed it into the table and then kicked him when he went to the floor. The appellant then told everyone that free home weekends were suspended for all. He said that he then was put into a chair: when a tray of food was put in front of him, he refused to eat and the appellant then smashed the tray in his face, with blood in the food and on his face.

25. He was to say that he was never treated for the injury. He insisted in cross-examination that this happened. There was an amount of cross-examination both about the lateness of his complaint and about the fact that he had been in touch with civil solicitors, as well as cross-examination on his background. In addition he had said that after this incident he had thereafter been made to wear the towel for several days in freezing conditions and

sleep in an ice-cold corridor. He also said that on one occasion he contracted bronchitis: although there was no medical record of this. Further, he had referred in a statement to a pupil being assaulted by Mayer and the co-accused Hadwin in a police cell: when the agreed evidence at trial was that that simply would not have been possible. There were other lines of cross-examination as well, which it is not necessary to set out. In the result the jury convicted on Count 8.

The appeal and the disposition of his appeal on Count 8

26. Mr Clegg, for understandable forensic reasons, commenced his argument on this appeal by focussing on the verdict on Count 8.

27. The written grounds of appeal argue that the verdicts on Counts 7 and 8 are inconsistent. The relevant principles in this respect can be found in cases such as *R v Durante* (1972) 56 Cr App R 708 and *R v Fanning* [2016] 2 Cr App R 19. It is difficult, however, as Mr Clegg accepted, to say that the verdicts are, strictly, logically inconsistent: the jury could conceptually not have felt sure of the first incident but have felt sure of the second incident occurring a few minutes later. But even so it has to be said that the resulting verdicts are on the face of it decidedly odd. Mr Hayton himself frankly accepted before us that an acquittal on Count 7 but a conviction on Count 8 was "surprising". It is difficult on the face of it to discern any rational basis for the jury not being persuaded so as to be sure, on the basis of Hann's evidence, as to the assault which allegedly occurred in the privacy of the office: but being persuaded, again solely on the basis of Hann's evidence, as to the assault which allegedly occurred in the dining room immediately thereafter. Moreover, it could be thought surprising that the appellant should behave in this way not only in the presence of all the other pupils but also in the presence of teachers and kitchen staff, with at least the risk of a complaint. Indeed, there was not only no supporting evidence of such a (surely memorable) incident in the dining room but an amount of undisputed evidence advanced at trial to the effect that various pupils, kitchen staff and teachers had no recollection whatsoever of any such incident.

28. This oddity leads on to Mr Clegg's next point. He suggests that so surprising an outcome can be explained, if at all, be the way in which the matter was left to the jury: a way which, he submits, does not accord with the count as particularised on the indictment.

29. In this regard, it will be recalled that Count 8 was drafted as a count of cruelty. By virtue of s.1(1) of the Children and Young Persons Act 1933 a defendant is guilty of cruelty to a child where he "wilfully assaults, ill-treats, neglects, abandons or exposes him … in a manner likely to cause him unnecessary suffering or injury to health". It has long been established (given the disjunctive nature of the statutory forms of cruelty) that the prosecution when drafting the indictment should "choose with care that word which appears in the sub-section which more precisely and appropriately than any other describes the conduct complained of": see *R v Beard* (1987) 85 Cr App R 398 at p.402.

30. In the present case, the count as particularised – unlike the particularisation of the count of cruelty in Count 6 with regard to the pupil Foster – alleged that the appellant "assaulted and humiliated [the complainant] in the dining area at Underley Hall School". The word" humiliated" does not appear in s.1(1) of the 1933 Act. So we asked Mr Hayton why it had been included here. His initial answer (he not having advised on the drafting of the indictment) was that the words "and humiliated" were mere unnecessary surplusage ("assault", of course, being within s.1(1)). The court then asked him, if that

was so, why the matter had not been charged as assault occasioning actual bodily harm, as so many other counts had been. Having taken more instructions, he then said that the view had been taken that the incident did not justify charging this incident as a s.47 offence (a view on which we ourselves express no view), that it had not been thought appropriate to charge this on the indictment as common assault and that humiliation had indeed consciously been added in order to reinforce and make good the count of cruelty.

31. But this gives rise to difficulties too. As Mr Clegg said, the particularised offence is of alleged assault and humiliation conjunctively: both had to be proved (as indeed Mr Hayton, given the circumstances, ultimately accepted). But in his written legal directions to the jury the judge had focused on the language of s.1(1) of the 1933 Act, going on to explain the ingredients of assault, neglect, abandonment and exposure (ill-treatment he presumably left to their good sense) and had said that "any one of these methods of committing the offence is enough". Mr Clegg protested that, whilst by reference to s.1(1) itself, that was legally correct, such a legal direction failed to correspond to Count 8 as particularised: whereby the prosecution had taken it upon itself to prove *both* assault *and* humiliation on this particular occasion.

32. We think that this criticism of the legal directions, taken on its own, is of limited force. The judge was, unexceptionably, setting out the legal ingredients of the statutory offence at this initial stage. He was not required, in our judgment, further to particularise matters at this stage of his legal directions in the way which Mr Clegg suggested.

33. Nevertheless, the point did have to be addressed appropriately at some stage in the summing-up thereafter (this being a split summing-up). At all events, when the judge came to sum up on the evidence after closing speeches, in dealing with Count 8 he drew attention (at p.32G of the summing-up) to the fact that Count 8 on the indictment related to unnecessary suffering by assaulting and humiliating the complainant in the dining-area. That is correct. The judge in due course then proceeded to summarise the evidence relating to Count 7. Having done so, and turning to Count 8, he said this (p.33E):

> "He [Hann] then went on to describe the aftermath, which is Count 8, the allegation of humiliation in the dining-hall."

The judge then summarised Hann's evidence as to what happened, including his assertion that thereafter he had been made to sleep in a towel in freezing conditions. Having done so, the judge said this (at p.36D-E):

> "If you are sure that those events happened, that is the attack when he was punched in the face with a ring causing injury, then Mr Cooper would be guilty of Count 7. If you are sure that there was an incident of cruelty where he was humiliated in the dining room, then Mr Cooper would be guilty of Count 8. If you are not sure of those events, then you would find the defendant not guilty."

34. The complaint here is two-fold. First, the judge never said to the jury with regard to Count 8 that they must be sure that the appellant had *both* assaulted *and* humiliated Hann in the dining-area. Second, compounding that, the judge had twice referred to Count 8 as being the incident of cruelty whereby Hann had been "humiliated". Given the broad nature of the prior legal directions (which the jury had with them in writing), and given the instruction that "any one of these methods of committing the offence is enough" the

jury may well have thought, it is complained, that the "humiliation" was an aspect of "ill-treatment" which was, of itself, sufficient to convict.

35. We consider that there is force in this objection. One does not want to be overtechnical; and it may be that the first reference in the summing-up to humiliation on Count 8 could have been taken simply as a short-hand reference to, or description of, the count. But it is much harder so to say when the point was shortly thereafter repeated in the terms that it was at p.36 of the summing-up. Moreover, the prosecution had adduced an amount of evidence from other witnesses that pupils were sometimes punished (and humiliated) by being compelled to wear towels: which would have supported Hann's account on this aspect. Although of course one cannot know the jury's thinking, this would also then at least potentially provide a rational explanation for the jury convicting on Count 8, notwithstanding that they had acquitted on Count 7. But they would have done so without a clear instruction that in the present case they all must be sure *both* of an assault *and* of humiliation. The jury thus may well have thought that humiliation was of itself enough.

36. Taking all these matters together, and having regard to the combination of circumstances, we are driven to the conclusion that the conviction on Count 8 is unsafe.

The appeal and disposition of the appeal on Count 2

37. We turn to the challenge to the conviction on Count 2.

38. Mr Clegg launched a strong attack on the sufficiency of evidence on this count. He said that the verdict was "remarkable" and "extraordinary" and "completely against the weight of evidence". He raised the following points:

    (1) There was no corroborative evidence of Gow's account.
    (2) There was no record or medical evidence of bruising to his eye.
    (3) Contemporaneous written records record him speaking highly of the school to various professionals: contact which he wholly implausibly denied.
    (4) In spite of frequent opportunities, he made no prior complaint.
    (5) There was evidence, submitted as agreed facts, that other pupils at the school at this time had not witnessed anything untoward.
    (6) There was agreed evidence from kitchen-workers and others that they never had witnessed any violence in the dining-room.
    (7) There was evidence from a number of people that the appellant had not been observed to assault a pupil.

39. This is a formidable list of points and we have no doubt they would have been fully deployed in the closing speech of leading counsel appearing at trial. But overall this was a jury matter. Mr Clegg accepted that he could make no criticism of the fact that a submission of no case to answer was not made. We agree with Mr Hayton that ultimately this was a matter to be left to the decision of the jury. Put like this, therefore, this ground involves an impermissible invitation for the appellate court to interfere with a jury's evidential appraisal.

40. The alternative way in which this challenge is advanced, however, is altogether more formidable.

41. The judge had been invited to give, and did give, a cross-admissibility direction. He did so in terms which did not differentiate between all the counts of assault occasioning actual bodily harm and all the counts of cruelty. Moreover, the judge, as we have said, had permitted (perfectly justifiably) the adducing of the evidence of other witnesses relating to being forced to wear a towel. This was legitimate "generic" evidence going to the culture of the school. Further, the counts against the appellant were said by the prosecution to be cross-admissible bad character evidence as (inter alia) going to (a) whether the appellant had a propensity to assault pupils and (b) whether the appellant had a "propensity to treat pupils in a cruel way including the use of violen[t], humiliating conduct designed to cause unnecessary suffering".

42. Mr Hayton fairly accepted before us that the evidence adduced by the prosecution with regard to the forced wearing of towels was designed to support an assertion of propensity to cruelty.

43. That being so, it may well be that the jury, in accordance with the judge's general instruction that it was open to them to do so, may have used the evidence and conviction on Count 8 to support a verdict of guilty on Count 2 (or, indeed, vice versa). But given that, for the reasons we have given, the verdict on Count 8 cannot be regarded as safe, that of itself tells against the safety of the conviction on Count 2. Moreover, again for the reasons we have given, the jury may have decided the outcome on Count 8 by reference to the allegation of humiliation. But there is no obvious correlation by way of cross-admissibility and propensity between an assertion of cruelty in terms of humiliation by compelling the wearing of towels in public on the one hand and an assertion of actual physical violence on the other. At the very least, if these complaints were to be cross-admissible, a tailored and qualified direction was needed in this respect. None was given (although in fairness to the judge counsel had not asked him to do so).

44. In consequence the conviction on Count 2 also has to be regarded as unsafe.

Fresh evidence

45. We should add that the appellant had also sought to adduce fresh evidence based on certain statements which the complainant Hann is alleged to have made after the trial had concluded and also based on his (alleged) conduct at an inquest relating to the death of his brother held in 1999. Our initial view was to be unimpressed by the materiality of the proposed fresh evidence and our initial view was that it would not afford a ground for allowing the appeal. However, we did not think it necessary to hear full argument on this point; and we need express no concluded view on that matter.

Conclusion

46. For these reasons, we have allowed the appeal and quashed the convictions on both counts. The Crown, realistically and pragmatically given the circumstances, have not sought a retrial.