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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 2nd May 2019

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE ANDREW BAKER

and

SIR JOHN ROYCE

_____

R E G I N A

- v -

RICHARD JAMES SPOTTISWOOD

_____

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Mr Andrew Hall QC and Miss Pippa Woodrow appeared on behalf of the Appellant

Mr Richard Wright QC appeared on behalf of the Crown

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J U D G M E N T
(Approved)

Thursday 2nd May 2019

LORD JUSTICE FULFORD:

Background

1. At about 8.15 to 8.20 on the morning of 10th July 2017 a Mr Watson Cowton, who was out walking on a country lane in a wooded area running along the road between Lynemouth and Cresswell on the Northumberland coast, heard loud snoring noises coming from behind a stone wall. He discovered a 24-year old man, Darren Bonner, lying in a recently excavated open hole in the ground. He was naked and fatally injured. The police were alerted and he was taken to hospital, where he died sixteen days later, having never regained consciousness.

2. By the time of the trial with which this appeal is concerned, it was common ground that the deceased's death was the result of being held in a headlock by the appellant in the early hours of that July morning. The headlock had caused irreversible brain damage which led to his death. At trial, the appellant maintained that he had acted in lawful self-defence.

3. On 2nd July 2018, following a retrial in the Crown Court at Newcastle before His Honour Judge Ashurst and a jury, the appellant was convicted unanimously of murder. On 23rd August 2018 he was sentenced to life imprisonment with 22 years specified as the minimum term under section 269(2) of the Criminal Justice Act 2003 (less 402 days served on remand).

4. The appellant appeals to this court against that conviction, the single judge having given leave on a single ground relating to the introduction of bad character evidence concerning an escape from custody in 2010. In addition, the single judge gave leave to appeal against the minimum term.

5. The appellant employed the deceased as a mechanic in his garage business. However, the appellant also grew cannabis commercially with the assistance of the deceased, who was his friend and partner in crime. The two men fell out because the appellant discovered that Bonner had betrayed him to a rival drugs dealer, Paul Taylor. It was the prosecution's case that the appellant reacted angrily and violently to this news and he attacked Bonner at the Cresswell Towers Caravan Park, where the appellant and his partner, Lucy Burn, along with their children and Bonner were spending the weekend in a mobile home.

6. The Crown alleged that the appellant deliberately choked the deceased by putting him into an armlock, thereby inflicting the fatal injuries. The appellant put the dying man into the rear of his van at some stage after rendering him unconscious. At about 8.00 am on 10th July (therefore, about ten or fifteen minutes before Mr Cowton heard Bonner snoring loudly), the vehicle was seen by a member of the public, a Mr Hastings, reversing into a layby adjacent to a gap in the wall behind which the deceased was later found by Mr Cowton. From CCTV images it was apparent that the van was parked in the layby for up to seven minutes, having travelled from the Cresswell Towers Caravan Park. The Crown's case was that the appellant dragged Bonner across some rough ground and dumped him in the shallow hole in the ground that it was alleged the two men had dug at some time on Saturday 8th July. It was said that the appellant realised his distinctive van had been seen by Mr Hastings who had had to wait while the van parked. The appellant then pulled out from the layby, drove back towards the caravan site from which it had come, but instead of returning to the caravan, he executed a U-turn in order to visit an address used by the deceased. Part of that journey was caught on CCTV footage.

7. The appellant drove to the area of the grave during the evening of 10th July 2017. He did not stop his vehicle because the police were present and he returned to the caravan. He hurriedly collected his partner and then took steps to avoid the police.

8. In due course there was a vehicle chase and the appellant was found in some bushes by a police dog on Wednesday 12th July 2017.

9. During extensive police interviews the appellant repeatedly denied knowing anything about how Bonner came to be in the hole in the ground. He said that the deceased was a friend of his who had spent the weekend in the caravan, but that he had simply disappeared on the Monday morning. He was unaware of the hole in the ground. He hoped Darren Bonner would regain consciousness, when he would be able to corroborate the appellant's account. The Crown alleged that the appellant, because he anticipated that his van had been seen in the layby by Mr Hastings, told the police that Lucy Burn thought that she had left her phone behind, and he turned around to go back for it. She then found it in her handbag. It was in those circumstances that he might have turned around in the layby adjacent to where Darren Bonner was discovered. He expressed indignation that the police should see fit to accuse him of complicity in these fatal events. It was put to him that Bonner had been choked and he was asked if he was capable of acting in this way. He thought that he would never have done so.

10. Dr Egan, a forensic pathologist, conducted a post-mortem examination. He found a very large number of injuries (32 in all) which included petechial haemorrhaging on the deceased's forehead and around both eyes. There were little dot haematomas across the whole of the deceased's neck, along with an L-shaped abrasion and graze. There was another abrasion just above the latter, and he noted a tiny graze on the Adam's apple, and further abrasions to the left. On the right side of the neck there was an L-shaped graze and another lineal graze and petechial haemorrhaging. There was no disease or other underlying medical condition which had contributed to the death. Bonner had consumed cocaine, alcohol and cannabis in indeterminate quantities. Dr Egan said that his conclusions were entirely consistent with the application of

pressure to Bonner's neck when struggling violently for no more than about twenty seconds, when the latter had earlier been drinking and taking drugs. He may have collapsed and gone limp.

11. The appellant's case at trial was markedly different from his account in interview. In his defence statement and in his evidence to the jury he maintained that he had killed Darren Bonner accidentally whilst acting in self-defence. He said that the deceased traded in firearms as well as drugs, and that he had brought a bag containing sawn-off shotguns and ammunition to the caravan site. Some time during Saturday night, Darren Bonner had gone off across some fields to dig a hole in which to bury the firearms and ammunition. There was some slight evidence to support the appellant's account that Darren Bonner was interested in and may have procured firearms, including some images on his mobile telephone, along with the discovery of some shotgun cartridges that were securely wrapped.

12. His account was that late on the Sunday night the appellant said that he would accompany the deceased when the latter indicted that he was going to bury the guns. He had agreed to do this because Bonner was adversely affected by drink and drugs. The two men set off in the early hours of the Monday morning. The appellant carried the bag containing the guns. The deceased led the way across fields in the dark to the place behind the wall, next to the layby. The appellant suggested that at the hole Darren Bonner unexpectedly admitted that he had been spying on the appellant for Paul Taylor, a rival drug dealer. The deceased had told Taylor where a crop of cannabis belonging to the appellant was to be found, which Taylor then stole. On his account, the appellant told Darren Bonner that he wanted nothing more to do with him. Bonner became angry and tried to take the bag containing the guns from the appellant. There was a violent struggle, during which the appellant grabbed Darren Bonner in a headlock with his right arm, using what his counsel, Mr Hall QC (who appeared both at trial and before this court)

contended constituted reasonable and necessary self-defence. According to the appellant, Darren Bonner "kicked right off" and tried to pull the appellant's arm from his neck. He maintained his grip. Suddenly the deceased went limp and fell to the ground. The appellant thought that the deceased was play-acting and turned him over, whereupon his legs landed in the hole. The appellant believed that Bonner was dead. In panic he removed the deceased's clothes so that he could not be linked to the incident, during which manoeuvre the rest of the body of the deceased accidentally fell into the hole.

13. The appellant was unable to carry the bag of guns, the spade and the clothing back to the caravan. He hid the bag of guns behind the wall. He collected them the following morning. Additionally, he returned to the scene that night to find out whether there was any activity where the body had been left. He said that he lied to the police to protect both himself and the deceased from police investigation into their illegal activities.

14. Given the ground of appeal on which the single judge granted leave to appeal, there is a further aspect of the evidence that it is helpful to consider at this stage concerning an incident in 2010 which was relied on by the Crown in relation to the appellant's bad character. The judge allowed the prosecution to introduce evidence of an event which was summarised in the agreed facts as follows:

> "74. On 23rd July 2010 [the appellant] committed offences of escaping from lawful custody, possession of an offensive weapon and assault occasioning actual bodily harm.
>
> 75. On that date [the appellant] was remanded at Her Majesty's Prison Everthorpe. He was taken to hospital to be treated for an injury to his hand which he had sustained in one of the prison workshops. On arrival at hospital [the appellant] was taken to wait in a police room and thereafter received treatment. He said that he needed to use the toilet. He was taken to the toilet, chained to Prison Officer Farmer.
>
> 75. On the return journey to the police room the appellant

> attacked Prison Officer Farmer. He took hold of the officer around his neck and put him in a headlock.
>
> 77. Prison Officer Farmer described [the appellant's] grip around his neck as 'tight, it wasn't choking but it was lifting me off my feet'. [The appellant] demanded that the handcuffs be removed. He had in his hand a knife which he pressed into Prison Officer Farmer's neck.
>
> 78. The second officer unlocked the handcuffs. [The appellant] walked backwards through the Accident and Emergency Department with the prison officer still in his grip, before running off. He was soon apprehended by attending police officers. He pleaded guilty to all three offences on 11th March 2012.
>
> 79. Prison Officer Farmer had no physical injuries as a result of this incident. He suffered psychological harm."

The Appeal against Conviction

Ground 1: The Admissibility of the 2010 Incident

15. Leave to appeal was, as we have already outlined, granted by the single judge on the single ground of the admissibility of the conviction for the 2010 assault and escape from lawful custody. In his ruling as regards this earlier incident, which he delivered on Wednesday 17th January 2018 during the original trial and which was adopted during the retrial, the trial judge noted what he described as the "emerging defence" of self-defence. The judge set out the following:

> "When the [appellant] was questioned in his fourth interview, the police put to him that they believed that the injury to the then living Darren Bonner was caused as a result of the attack that he had been strangled around the neck. His reply, 'I don't know nothing about that. You've took my DNA, you've took swabs and all the rest of it'. The officer then said 'Would it be fair to say you are physically capable of doing that?' Reply, 'I don't want to get hypothetical about what I'm capable of doing and what I'm not capable of doing, I don't see myself ever doing that so far as I'm aware. I did not do that to Darren.'
>
> By December of last year, the 8th of December, a defence statement was prepared. … Darren Bonner's death was accepted by [the appellant] as being his responsibility, in the strict sense

> that the fatal injury was occasioned, he posits, during a confrontation between the two of them. It was put in the following way:
>
> > 'At the deposition site an argument flared up between the two men, at the culmination of which [the appellant] told Bonner their association was over and he wanted Bonner off his premises. During the physical confrontation that followed, [the appellant] held Bonner in a neck lock, as the latter struggled violently and in order to prevent him having access to the bag which he believed contained firearms. Bonner collapsed suddenly and did not appear to be breathing. The [appellant] had not intended to kill him or cause him really serious injury by gripping him in a headlock in the way that he did.'
>
> Accordingly, a key issue in the trial will be a consideration by the jury of the circumstances in which Darren Bonner sustained what proved to be a fatal injury."

16. The judge summarised the differences between the 2010 incident and the circumstances of the fight described by the appellant. He determined that the 2010 incident was relevant because it demonstrated a previous offensive use of a headlock by the appellant, which was directly relevant to the issue of whether on this occasion the appellant had acted spontaneously in self-defence or whether, instead, he had used this tactic offensively. The judge noted that the defence had introduced certain aspects of the appellant's bad character which revealed significant criminal activity on his part, including the commercial farming of cannabis and his preparedness to hide and dispose of illegal firearms and ammunition. In those circumstances, although the facts of the attempted escape were "dramatic and colourful", it formed part of an admitted criminal background about which the jury were, at least in part, already aware.

17. In the summing-up the judge left this issue to the jury as follows:

> "Can I turn now to evidence about the [appellant's] bad character? Now in the course of his evidence [the appellant] has accepted

that at the time of the events you are considering he was heavily involved in setting up and managing cannabis farms, that is to say renting older houses and industrial units for the illegal production of cannabis. He accepted that in order to be successful he took steps to avoid detection.

You have also heard that in March 2011 he was convicted of escaping from lawful custody, possession of an offensive weapon and assault occasioning actual bodily harm. Of course, the mere fact that a defendant was either actively involved in some other criminal activity or has ben convicted of offences in the past cannot prove he committed murder, and you must not convict [the appellant] in this case wholly or mainly because of his criminal past.

What then is the relevance of those matters to your consideration? Well as far as the cannabis business is concerned, both the prosecution and the defence accept that you needed to know about it because it goes to explain important background information and the context of the relationship between the [appellant] and Darren Bonner.

As for the convictions from 2011, the prosecution say that when you consider the circumstances of these events which are set out in paragraphs [75] to [80] of the agreed facts, it shows that [the appellant] has a tendency to use a headlock not for the purpose of restraint but offensively, and it is more likely that he was, in truth, the aggressor in the argument between himself and Darren Bonner. Just as there was no need to surprise Prison Officer Farmer by grabbing him in a headlock and using sufficient pressure to lift him off the ground, the prosecution say there was likewise no need for him to grab Darren Bonner in a headlock and apply pressure. Knowing that he resorted to using a headlock on a previous occasion when there was no question of him acting in self-defence, that is to say using unlawful force, the prosecution argue it is also less likely he needed to defend himself against Darren Bonner and the headlock was used unlawfully again.

The defence say the earlier incident was in completely different circumstances; the offences were long ago in wholly different circumstances, an isolated incident that does not prove a propensity to use a headlock aggressively or in order to kill or cause really serious injury. Both counsel, of course, make the valid point that one difference between the two events was that Darren Bonner struggled when in the [appellant's] headlock and Prison Officer Farmer did not. On the earlier occasion, and I stress it is a matter for you to consider, an important factor in the officer's decision not to struggle was that the [appellant] held a knife in his other hand to the victim's neck.

It is for you, and I emphasise for you, to decide whether his

> previous convictions show that this [appellant] has a tendency to behave in this way; that is to say to use a headlock as a means of attack. If you are not sure they do show such a tendency then you must ignore them, but if you are sure that they do show a tendency, then this may support the prosecution case and it is for you to say whether it does, and if so to what extent. The fact [the appellant] has used unlawful force in the past does not, of course, prove he did so on this occasion and his previous convictions may only be used as some support for the prosecution case.
>
> Another way in which your knowledge of the previous incident may assist you is if you conclude [the appellant] had an awareness of both the effectiveness and the potential dangers of using a headlock. The defence say this shows that he had reason to believe that no injury may be caused even when substantial force is used in such a hold."

18. Generally, it is argued by Mr Hall that there was nothing inherently incredible about the appellant's account as set out in his defence statement and reiterated during the course of his evidence as to what had occurred. It is argued that there was no independent evidence as to where the fatal altercation had occurred or the circumstances in which any violence was inflicted. Mr Hall contends that the 2010 incident had little probative value, having occurred some significant number of years earlier, and that it had not involved the infliction of significant physical injuries. Instead, it is argued that it introduced obvious and unacceptable prejudice into the trial and that it impermissibly bolstered a weak prosecution case. It is suggested that this earlier incident, which occurred in markedly different circumstances, had no relevance to the jury's task of deciding whether the appellant had acted at the relevant time in self-defence.

19. Relying particularly on *R v Hanson, R v Gilmore, R v P* [2005] EWCA Crim 824, [2005] 2 Cr App R 21, Mr Hall argues that a single incident is unlikely to demonstrate propensity. Evidence was given at trial by Dr Egan, when he was cross-examined by Mr Hall, that a headlock has been used – certainly until the relatively recent past – as a method of restraint by some police and prison officers, albeit potentially ill-advisedly. Dr Egan accepted there have been difficulties in the past when officers have used such a hold. It is suggested that it does not,

ipso facto, demonstrate an offensive purpose. Mr Hall emphasises the necessarily aggressive circumstances of the incident in 2010 and argues that it is irrelevant to an assessment of whether the appellant had acted defensively or as an aggressor in July 2017. We are urged to have in mind the self-evident differences between the two incidents and in particular that Darren Bonner clearly struggled, unlike the prison officer in 2010.

20. Additionally, it is contended that the judge's directions to the jury were flawed in the manner in which it was described how this evidence was relevant to the issue of whether the appellant may have been acting in lawful self-defence and whether he had an intent to kill or to cause really serious injury. It is suggested that the effects of using a headlock are inherently unpredictable, particularly when the person restrained is intoxicated and struggling. The evidence of Dr Egan was that those who struggle risk accidental occlusion of their breathing and that intoxication can have a significant impact on the ability of the struggling person to regulate their heart function and blood supply. Furthermore, given that during the 2010 incident the appellant had used sufficient force to lift the officer off the ground and yet had not caused material physical injury, it is contended that it fails to have relevance in a case in which the Crown were seeking to prove an intention to kill or to cause really serious harm. Dr Egan agreed that unconsciousness could occur within ten seconds and death or fatal injury within twenty seconds if a hold of this kind is used. Mild compressive force would have been sufficient in these circumstances.

21. Mr Hall submits that this evidence risked "inflaming the emotions of the jury" by revealing that the appellant had been in custody and that he had sought to escape by threatening to cut the throat of a prison officer, thereby causing lasting psychological harm to his victim. Even if this evidence had some probative value, its prejudicial effect was so great that it should have been excluded. It revealed that the appellant had been sent to prison for a sufficiently serious offence

and was prepared to carry out a desperate and violent attack in order to secure his release. This, it is said, would have overwhelmed the jury's proper consideration of the relevant issues in the trial and the judge failed properly to take into account the potential adverse impact of this evidence on a fair trial. It is argued that this earlier incident was deployed to support an otherwise weak case which was built overwhelmingly on the jury being invited to draw adverse inferences, given that there were no eyewitnesses or other direct evidence as to what happened between the two men. It is stressed that on the prosecution's case there were significant areas in which the conclusions properly to be drawn from the evidence were uncertain, such as why the hole in the ground had been dug or when. Furthermore, the van was only parked in the layby for a relatively short period of time during which the appellant, on the prosecution case, had to undertake a number of critical activities, including, most particularly, moving the unconscious body from the van and depositing it in the shallow pit or hole.

22. Mr Richard Wright QC, who did not appear in the court below, reminds us that the defence at trial was that the appellant had not used a headlock as an act of aggression and that this was, as far as the appellant contended, an act in resistance and self-defence only. In the Crown's submission, the previous conviction supported the proposition that the appellant would have used a headlock as an aggressor and went to rebut his defence that this was merely an accident that occurred whilst he was defending himself. In this regard, Mr Wright has relied particularly on a passage set out by the editors of Blackstone's Criminal Practice at paragraph F13.53 which reads:

> "In applying the CJA 2003, s. 101(1)(d) […] it is important to remember that a defence may be rebutted via an inference to be drawn from propensity […] or because the evidence of bad character has a probative value independent of any inference from propensity […]. Many defences that might appear credible if the prosecution are confined to one set of facts may be shown to be unlikely by references to other instances of misconduct."

It is submitted that this previous incident received appropriate directions from the judge which were balanced, and (in the last passage that we have quoted above) were arguably tilted in favour of the appellant.

23. Although the jury had before them a not inconsiderable amount of evidence, it is clear that this trial came down to a single central issue: when the appellant placed Darren Bonner in a headlock, may he have been acting spontaneously, using reasonable force in self-defence in order to control a man who was acting aggressively and who was under the influence of drink or drugs (or both); or, instead, was the jury sure that the appellant intended to kill or to cause really serious injury to a man who had recently betrayed the appellant to another member of the drugs underworld? Put otherwise: may this have been an instinctive and lawful response to unexpected aggression, or was it was a deliberate act of violence carried out with the intention of killing or causing really serious harm?

24. The defence statement described for the prosecution and the court, for the first time, that allegedly there had been a violent struggle between the appellant and Darren Bonner during which the latter dropped the sports bag containing the firearms. The appellant suggested that, as a result, he put Darren Bonner in a headlock, wrapping his right arm around Bonner's neck so as to prevent him from regaining control of the bag or any other weapon. Regardless of the extent to which Bonner struggled – and even though he forced them both backwards into a bush – the appellant maintained the hold until the other man suddenly lost consciousness and became a dead weight.

25. Section 101(1) of the Criminal Justice Act 2003 provides seven potential gateways through which evidence of a defendant's bad character is admissible. The material provision for present

purposes is when the evidence is "relevant to an important matter in issue between the defendant and the prosecution" (section 101(1)(d)).

26. By section 103(1) "matters in issue" for the purpose of section 101(1)(d) include "(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence". By section 103(2) a defendant's propensity to commit offences of the kind with which he is charged may be established by evidence of a conviction for an offence of the same description or category as the one with which he is charged. But by section 103(3) this does not apply if the court is satisfied that this would be unjust "by reason of the length of time since the conviction or for any other reason". Furthermore, by section 101(3) evidence coming within section 101(1)(d) is not to be admitted if it would have such an adverse effect on the fairness of the proceedings that a court ought not to admit it.

27. In *R v Hanson* (supra) Rose LJ VP indicated:

> "9. There is no minimum number of events necessary to demonstrate … a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare *DPP v P* [1991] 2 AC 447 at 460E to 461A). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity."

28. In *R v Dossett* [2013] EWCA Crim 710, Moore-Bick LJ observed:

> "28. The admission of previous convictions to show propensity is no longer confined by the common law requirement for 'striking similarity' between the previous offending and the offence being tried. It is important that *Hanson* should not be understood as maintaining that requirement by a different use of language. At the same time it is important that the requirement to show propensity should not be allowed to degrade or diminish to the point where convictions are admissible if they merely show a preparedness to engage in crime of vaguely the same kind as the index offence. This court has repeatedly emphasised the need for care in this. There must be a logical basis for concluding that the previous offending shows that the defendant was more likely to be prepared to commit the specific crime in question. Provided such a logical connection can be made, there is no requirement that the previous offending should consist of or include an offence of a strikingly, or even markedly closely, similar nature to the index offence."

29. It follows, therefore, that a single conviction can be admissible to demonstrate propensity if there is a legitimate basis for contending that the circumstances of the previous offending render it more likely than otherwise would be the case that the defendant was prepared to commit the crime before the court.

30. Although during the trial the appellant accepted that he had told lies, nonetheless many of his answers were suggested by Mr Hall to be accurate, particularly as regards the background to the incident and his relationship with Darren Bonner. As we have already described, in the fourth interview the appellant was asked if he was physically capable of strangling Bonner, to which he replied he did not consider that he was capable of acting in such a way.

31. In 2010, the appellant seemingly engineered an opportunity, during a visit to a hospital, to attack a prison officer by placing him in a headlock that he accepted in evidence was identical to the one he used on Darren Bonner. During that earlier occasion he produced a knife. In the 2010 attack he was able to apply sufficient pressure to the prison officer's neck to lift him off his

feet. In July 2017, he reinforced his grip by grabbing hold of his right wrist with his left hand, thereby (at least potentially) increasing the pressure on Darren Bonner's neck. Indeed, his grip was sufficiently strong, on his own account, to maintain his hold on Darren Bonner for at least twenty seconds whilst the latter struggled violently.

32. Against that background, the judge directed the jury that the earlier incident was relevant because it demonstrated a tendency on the part of the appellant to use a headlock when he was attacking someone else. This was a way in which he had assaulted another person, acting offensively rather than in self-defence. Given this highly distinctive behaviour when carrying out an attack, we have no reservations as to the admissibility of this evidence. There are two critical factors: first, that the appellant had said in interview that he did not believe he would ever do such a thing; and, second, his defence was that he had used a headlock in self-defence. Against that background, the previous incident of an assault on another man, when the appellant adopted the identical tactic of applying significant pressure to his victim's neck – he lifted him off his feet – was clearly relevant to the issue of whether he may have been telling the truth when he said that he had simply acted instinctively in self-defence, rather than having attacked the deceased by placing him deliberately in a headlock. On both occasions he restricted his victim's freedom of movement, while simultaneously and successfully applying potentially asphyxiating pressure to the neck. As the judge directed the jury, the 2010 incident demonstrated a tendency or a propensity to use a very particular hold on another person (namely, the headlock) not for the purpose of restraint or defence, but offensively and therefore making it more likely that he was the aggressor in 2017.

33. In our view, the judge was also correct in leaving this evidence to the jury on the factual basis that it was open to them to conclude that, as a result of the events in 2010, the appellant had an awareness of both the effectiveness and the potential dangers of using a headlock.

Having admitted this evidence, this part of the direction was, if anything, of assistance to the defence in seeking to ensure that the jury had regard to all the relevant considerations.

34. We are unable to accept the submission, ably advanced by Mr Hall, that the evidence of the 2010 incident would have inflamed the emotions of the jury, thereby preventing a fair trial. The appellant admitted his role as a producer and supplier of cannabis, along with his preparedness to assist in the retention of firearms and ammunition, and we are unpersuaded that the facts of his earlier conviction would have interfered with the jury's dispassionate consideration of the evidence concerning the events in 2017. The assault and escape from custody was undoubtedly a dramatic incident, but the facts were not so shocking as to render the trial unfair because the appellant would have been prejudiced following the revelation that he had behaved in this way in the past.

35. In the summing-up the judge gave the jury appropriate directions in this regard (as set out above), limiting the potential relevance of this material. The judge instructed the jury that this evidence could at most provide only some support for the prosecution's case.

36. Finally, we are equally unable to accept the submission that this evidence had the effect of bolstering a weak case, thereby contravening the warning issued by this court in *Hanson*:

> "18. Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions; that, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to

> decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity is shown, to take this into account when determining guilt. Propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case. …"

Contrary to Mr Hall's submissions, there was a clear case for the appellant to meet. In his defence statement he admitted having applied deliberate and sustained pressure to the neck whilst Bonner struggled violently, having discovered that the latter had betrayed him to a rival. He lied significantly during his interviews and his movements were generally consistent with an attempt to dispose of a body, following an unlawful attack, rather than a reaction to a tragic accident. He abandoned the naked body of a dying man whom he said he believed was dead; he removed the latter's clothing to prevent a link being made between him and the victim. Furthermore, it was open to the jury to conclude that he returned to the scene later to discover if Bonner was indeed dead; and he undoubtedly tried to evade arrest by the police.

Ground 2: The Judge's Directions in relation to lies and the failure to mention facts in interview

37. The single judge, as we have indicated, refused leave on this ground of appeal. Mr Hall has renewed the application, and we grant leave. Section 34 of the Criminal Justice and Public Order Act 1994 provides, *inter alia*, that when an accused is questioned under caution by a constable and fails to mention a fact relied upon in his defence which he could reasonably have been expected to mention, the jury may draw such inferences from the failure as appear proper. We are reminded that the interviews in which the lies were told occurred before Bonner died, and that the appellant had expressed the hope during interview that Bonner would recover and would assist the appellant by supporting his account.

38. In *R v Lucas* (1981) 73 Cr App R 159 and *R v Goodway* [1993] 4 All ER 894, it was held that statements made out of court – for example, statements to the police – which are proved or

admitted to be false may in certain circumstances amount to corroboration. The lie must be deliberate; it must relate to a material issue; and the jury must be satisfied that there was no innocent motive for the lie.

39. The judge directed the jury as to lies and the failure to mention facts in interview in accordance respectively with section 34 and *Lucas* as follows:

> "There are two aspects of the [appellant's] police interviews [in relation to] which I need to provide you with legal directions. They concern first of all lies told by [the appellant], and secondly his failure to mention his defence which he was questioned.
>
> Now during the course of his police interviews [the appellant] denied he knew anything about how Darren Bonner came to be found naked and barely conscious in a shallow pit in woodland near Cresswell. He now accepts that that was a lie, and when you consider this evidence you must decide why he lied – and I have underlined that word deliberately.
>
> In doing so you must bear in mind that a defendant who tells lies is not necessarily guilty. Sometimes a person who is not guilty will tell lies for some other reason; some people may lie out of panic or confusion, or say the first thing that comes into their head. In this case [the appellant] said he told lies about how Darren Bonner came to be fatally injured because to tell the truth would have first exposed him and Darren Bonner to questioning about the cannabis production operations, it would have exposed them to inquiries about the handling or supply of the firearms, it would put them at risk of substantial terms of imprisonment if convicted. If you find that those reasons are or may be the truth, then you must take no notice of these lies and not hold them against him. If, however, you are sure [the appellant] did not lie for such reasons you may use this as evidence which supports the prosecution case, but you should not convict him either wholly or mainly simply on the basis that he lied.
>
> I direct you separately in relation to his failure to mention his defence when questioned. Before each of his seven interviews with the police between the 12th of July and the 3rd of August last year the [appellant] was cautioned in these terms by the interviewing officer: 'You do not have to say anything, but it may harm your defence if you fail to mention when questioned something which you later rely on in court. Anything you do say may be given in evidence'.

> In his interview he spoke of his relationship with Darren Bonner and gave details about his and Bonner's involvement in the garage and the cannabis business, and how Darren Bonner came to be staying with him, Lucy Burn and their children at Cresswell Towers; but at this trial he has gone on to describe in detail the events relating to the early hours of Monday the 10th July, and how Darren Bonner ended up being left naked and unresponsive at the deposition site. The prosecution say that the facts he failed to mention but which he now relies on as part of his defence are that Darren Bonner had earlier dug the hole, that they had left together after dark in the early hours of Monday the 10th of July across the fields and that he was carrying a bag with sawn-off shotguns to help Bonner bury them. He now relies on the route that they had followed; that there had been an argument out of the blue about Paul Taylor; that Bonner had begun to lose control and that he, the [appellant] feared he might be attacked by him; that he, in order to defend himself or calm Bonner down, carefully applied a headlock to his neck; that this all happened at the edge of the hole; that Bonner accidentally fell into the hole; that he then removed all of Darren Bonner's clothing; and that he then retraced his route back to the caravan park where he disposed of the clothing.
>
> [The appellant] accepts that he did not mention any of the above details when he was questioned by the police. He told you in evidence he chose not to answer any questions he believed would incriminate him, or for that matter Darren. That failure to give details of his defence when questioned may, as he was told in the words of the caution, harm his defence. This is because you are entitled, subject to certain conditions, to draw the conclusion that his detailed account is not true and has since been invented by him to support his defence. Those three conclusions are that the prosecution case being presented to him at the time of his interview was such that it called for an answer; that he could reasonably … have been expected to mention the matters he now relies upon at the time he was being interviewed; and thirdly, the only sensible reason for not raising these matters is that he had not yet thought of them. …
>
> The final sentence is important. If you are sure that an adverse inference should be drawn, either from the [appellant's] failure to mention matters in interview or the lies he admits telling, you must not convict him wholly or mainly on the basis of those admissions."

40. Mr Hall criticises this direction on the basis that giving what he describes as "overlapping directions of this kind" was misleading and invited the jury to place undue weight on the appellant's lies by "double counting": that is to say, drawing a double adverse inference in

relation to the same conduct. Mr Hall relies substantially on *R v Hackett* [2011] EWCA Crim 380, [2011] 2 Cr App R 3. That was a case in which this court criticised the trial judge's decision to give a section 34 direction and a *Lucas* direction.

41. *Hackett* concerned the alleged involvement by that appellant in a bomb attack. The court focused on the denial by the appellant when first interviewed that he had visited a petrol station to buy petrol at a highly relevant time, albeit that in a later interview he admitted that this had occurred. He suggested that he had purchased the petrol to use in a strimmer. In *Hackett* the two directions related to the trip to the petrol station which, it was accepted, had occurred. In those circumstances, the sole issue in this context was the failure on the part of Hackett to mention in the first interview the purpose of travelling to the petrol station, namely, to buy petrol for the strimmer. Against that factual background, the Court of Appeal explained:

> "25. … A section 34 direction invites the jury to draw an adverse inference as to the truth of a fact relied upon by the defence from the defendant's failure to mention it earlier without reasonable explanation. The adverse inference is that the fact is the product of more recent invention and false. By way of contrast, the purpose of a *Lucas* direction is to protect a defendant by reminding the jury that lies may be told for a number of innocent reasons, such as in order to bolster a true defence; they should not jump to the conclusion that because the defendant lied he is guilty.
>
> 26. But … it may well be unnecessary to give both directions. If the factual context of the case is such that the defendant is entitled to the protection of a *Lucas* direction then that protection can be incorporated in the section 34 direction. If a defendant gives an explanation for his failure to mention a fact and the same explanation for what is contended to be a lie then that explanation can and should be incorporated into the section 34 direction. Unless the jury rejects that explanation then it cannot draw an inference adverse to the defendant. Unless the jury rejects the defendant's explanation for his lie it will have little, if any, significance. If the jury takes the view that the defendant's explanation for telling the lie may be true, its only significance will be as to credibility and, generally, it will be of no use to draw to the jury's attention that limited utility. On the contrary, directing the jury as to both the effect of section 34

and lies is likely to complicate and confuse."

42. The circumstances of the instant case are to a material extent different to the situation which faced the court in *Hackett*. The judge in the trial with which we are concerned gave the two directions in relation to what he was entitled to view as issues that were (at least partially) distinct. The lies direction related to the appellant's wholesale denial in interview of knowing anything about the circumstances in which Darren Bonner came to be found naked and barely conscious in a shallow pit. That was an admitted lie which, standing alone, would properly merit a direction in accordance with *Lucas*. The section 34 direction concerned the appellant's emerging account in his defence statement and at trial as to what he said had occurred, leading to the headlock and Bonner's unconscious body being left in the pit, none of which had been set out in interview. In relation to that detailed account, it was necessary to direct the jury that it was open to them to draw the adverse inference that these suggested facts were not mentioned earlier because they were the product of recent invention and they were false.

43. The two issues were clearly interrelated but his explanations for, first, the lies he told in interview and, second, his failure to mention in interview any of the circumstances he set out in his defence statement and in his evidence were not entirely the same. For the lies in interview (viz. that he knew nothing about the circumstances of Mr Bonner's death), his explanation was that telling the truth would have exposed him and Darren Bonner (who was still alive) to questioning about their involvement in cannabis production and with firearms, which could have led to substantial prison sentences if they were convicted of those offences. However, the failure to reveal his defence was more nuanced, in that he chose not to answer, or to answer truthfully, any questions which he believed would incriminate him. In this regard it is to be recalled that his defence was that he killed Mr Bonner unintentionally, whilst acting in self-defence. In those circumstances, it was open to the judge to allow for the fact that the approach that the jury was

required to take to the lies, on the one hand, and the failure to set out the facts on which the appellant relied for his defence in interview, on the other, were sufficiently – indeed, clearly – distinct such as to justify making them the subject of separate directions.

44. These directions were not in any sense contradictory. Nor did they involve, as Mr Hall has suggested, "double counting" of the same adverse inference for the same conduct. To the contrary, as we have set out above, the separate directions related to differing accounts given by the appellant at different stages of the proceedings, in relation to which distinct legal principles apply.

45. However, all of that said, many judges would nonetheless have combined the *Lucas* and section 34 directions in accordance with "Example 3" at page 16 -10 of the Crown Court Compendium: Part 1: Jury and Trial Management and Summing-Up. That is an approach that we endorse in circumstances such as these. If properly given, this ensures that the accused will receive the benefit of a direction from the judge that there may be an innocent explanation for the lies, at the same time as receiving the section 34 direction.

46. We echo the passage set out in *R v Rana* [2007] EWCA Crim 2261, in which Auld LJ observed:

> "11. … [The] authorities indicate the considerable potential for overlap between a lies direction and a section 34 direction, where both may be considered appropriate. They also indicate how a court should approach the matter. The choices between one or another and as how to deal with it, by way of modification or otherwise, are in every case a matter for judgment of the trial judge according to the circumstances and the precise issues in play in the case. It seems to us, given the way in which thinking has developed … that whilst, in any particular case, both may be appropriate, or one may be slightly more appropriate than the other, it is unhelpful to a jury to be given both directions out of an over-abundance of caution. We consider that the better course is

> to select the one or other that seems to be the more appropriate to the case and, if necessary, as the judge did here, modify it to meet the particular circumstances."

This particularly applies when the explanations for the failure to mention things in interview and the lies are the same.

Conclusion

47. The appeal against conviction is dismissed.

The Appeal against Sentence

48. In passing sentence the judge summarised the main facts that we have set out above. He referred to the appellant's criminal record, which includes some serious and violent offences. In 2003, he was convicted of assaulting a police officer and common assault. In 2005, there was a conviction for unlawful wounding, an offence which involved a knife. In 2006, the appellant was convicted of robbery following a trial, for which he was sentenced to four years' imprisonment. Finally, in March 2011, he admitted offences of sexual assault, assault occasioning actual bodily harm, possessing an offensive weapon and escaping from lawful custody, for which he received an extended sentence of six years and four months (viz. a custodial term of five years and four months, and an extended licence period of one year).

49. The judge determined that the appellant had essentially been living a criminal lifestyle since his release from prison. He was sentenced on the basis that at some stage in the early hours of the Monday morning there was a fight in the caravan between the appellant and Darren Bonner, because the former felt betrayed and during which he inflicted the fatal injuries. Believing him to be dead, Bonner was dragged across some rough ground and placed in the shallow pit, having been unloaded from the appellant's van. However, the body was not covered because the

appellant realised that Bonner was just still alive, albeit struggling to breathe. Later, the appellant returned to discover if he was dead, but found the police at the scene.

50. The judge identified the starting point at fifteen years. He accepted that this was not a premeditated killing, but he found that there was an intent to kill and he expressed his findings as follows:

> "First, you applied additional pressure, when he struggled, by placing your free hand onto the grip you already had. Second, you had relevant experience of using a headlock unlawfully when you tried to escape from custody and, therefore, you did know your own strength. Third, you were enraged by what you regarded as Darren Bonner's deceit and needed to silence him to protect your status as a significant local drug producer; and, fourthly, you only let go when you thought he was dead."

51. The judge described the aggravating factors:

> "I find the following aggravating factors: you attempted to conceal his body and dispose of any incriminating evidence. You left your victim in a degrading and humiliating state. Rather than seek help for a man you knew was, in fact, still holding on to life, you thought only of yourself. You involved your partner to help fabricate a cover story to put the police off the scent. You attempted to avoid detection. You feigned concern for Darren throughout the investigation, when it was shallow and insincere and the motivation was to preserve your criminal lifestyle; and finally, you are a man with significant and relevant convictions. Particularly to the point is your conviction for escape, assault and having an offensive weapon, when you sought to slip a prison escort by holding an officer in a headlock, lifting him off the ground and holding a knife you had concealed to the officer's neck."

52. Mr Hall contends that there was no medical evidence to support the suggestion that the appellant applied "additional pressure" on Darren Bonner whilst he was struggling. The appellant's account was that he did this to stabilise his hold during the struggle. It is argued that

the judge should not have relied on the 2010 incident to found the conclusion that the appellant had experience of using a headlock and that, in this context, "he knew his own strength". It is suggested that the judge descended into speculation when he determined that the appellant was enraged by Darren Bonner's betrayal. Similarly, it is said that there was no evidence to support the suggestion that the appellant only let Bonner go when he thought he was dead. More generally, it is submitted that there was no conclusive evidence that Bonner had been dragged across rough ground, or that the appellant lied about what happened to the guns and the spade.

53. The judge needed to consider the evidence in the trial and to come to his own reasonable conclusions as to what had occurred. Even ignoring any material that related to Lucy Burn introduced during the first trial (as Mr Hall invites us to do, albeit we stress we do not make any determination as to whether this material should properly have been considered for the purposes of sentencing), as the single judge observed there was ample evidence to find that the fatal altercation occurred in the caravan and that Bonner was dragged part of the way to the shallow pit. Furthermore, it was open to the judge to reject as incredible the explanation as regards the fate of the guns and the spade, notwithstanding the fact that there had been a break-in at the appellant's garage.

54. As to the pressure applied to the victim's neck and the intention to kill, these also, in our judgment, were matters which properly fell to the judge to determine on the basis of the evidence. It was a credible conclusion that once he heard of Darren Bonner's betrayal, the appellant determined to kill him and believed he was dead after the attack in the caravan. Once he reached the shallow pit, he realised that Bonner was struggling to breathe, and he could not bring himself to bury him alive. This, we remind ourselves, was close to the time when the laboured breathing was heard by Mr Cowton. On this basis it was open to the judge to conclude that the appellant left him there, naked and just alive, and he returned later to determine if he had

succumbed.

55. Accordingly, notwithstanding Mr Hall's submissions, the later awareness of laboured breathing by Bonner does not undermine the judge's finding that the appellant had intended to kill. It is to be noted that the appellant himself suggested that he believed Bonner was dead after he collapsed.

56. Mr Hall reminds us that an intent to kill is not an aggravating factor and should not involve an uplift from fifteen years. Instead, a lack of an intention to kill is one of the statutory mitigating factors in this bracket. We are of the view that the judge was entitled to rely on the aggravating features he carefully outlined. But together or separately they do not, in our judgment, properly result in an uplift of seven years from the starting point. The degrading circumstances, the appellant's selfishness in leaving a man in a shallow grave who was alive, the attempt to avoid detection, the involvement of his partner to cover up the crime, and his criminal background were all in themselves serious features, but, as we have just observed, they did not justify a minimum term of 22 years.

Conclusion

57. We therefore allow the appeal against sentence. The minimum term will be reduced to 20 years. In all other respects, the sentence imposed by the judge remains in place, including the deduction of the time served on remand.

58. To that limited extent this appeal against sentence is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the

proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk