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Case No 202301433/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM THE CENTRAL CRIMINAL COURT

MRS RECORDER DHALIWAL

Royal Courts of Justice, Strand, London WC2A 2LL

Thursday, 26 October 2023

Before:

LADY JUSTICE ANDREWS DBE
MR JUSTICE GOSS
SIR NIGEL DAVIS

REX
V
HARRY JOHN WARD

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MR P CRAMPIN appeared on behalf of the Appellant
MR V MISRA appeared on behalf of the Crown

APPROVED JUDGMENT

LADY JUSTICE ANDREWS:

1. On 31 March 2023 at the Central Criminal Court, following a trial before Mrs Recorder Dhaliwal and a jury, the appellant was convicted of one count of assault occasioning actual bodily harm, which was count 3 on the indictment. He was acquitted of the three remaining counts. He appeals against that conviction on the basis of a judicial misdirection to the jury which he alleges renders his conviction unsafe.

2. The complainant was the appellant's former partner. The matter of which he was convicted arose out of an argument in the complainant's bedroom on the morning of 10 September 2022, towards the end of their 10-month relationship. The couple had planned to go out for the day, but the appellant changed his mind about that when he realised that his phone was broken. The complainant's version of events was that the appellant became upset and agitated about the phone and rejected all her efforts to calm him down. As the argument escalated it became physical.

3. The complainant alleged that the appellant had repeatedly thrown her onto the bed, making her feel sick. He also threatened to punch her. He grabbed her around the throat, making it difficult for her to breathe (this was the subject of count 4, a charge of intentional strangulation, of which he was acquitted). She called her mother in the midst of the altercation asking her to call the police. She tried to push the appellant out of the bedroom door, but he came back to collect some of his belongings and struck her to her face. This caused her to land back on the bed. When one of her children began screaming he said: "now look what you made me do" before saying goodbye to the child and leaving.

4. The complainant went to hospital the same day. It was an agreed fact that the following injuries were noted: strangulation marks, mild bruising to both arms, and bruising and a mild laceration to her left shin. There were also photographs of her injuries which we have seen.

5. The appellant's case in respect of this count was that he had acted throughout in self-defence. The complainant had become angry and upset when he told her that he was not going on the planned trip. In the course of the ensuing argument he had said that he no longer wanted to be with her. She had stormed off crying and he had started to pack his bags. When she saw this, matters escalated and she had physically tried to stop him from leaving. She had pulled him back onto the bed. They had rolled around together until she was on top of him and ripped his top in half. She was refusing to let him go. At one point he managed to remove her hands and free himself.

6. He went to leave, but then realised he had forgotten something, and returned. Again, the complainant physically tried to stop him from going. In the end, the only way he had been able to leave was to pin her down by her shoulders. He had not struck her in the face and he had not tried to strangle her. He left the house without putting on his shoes,

quickly grabbing his bag. In his haste he had left some of his belongings behind. He had no idea how she sustained any injuries, because he had only pinned her down by her arms once.

7. At trial, both the complainant and the appellant gave evidence. The complainant's mother gave evidence about the telephone call. The photographs of the complainant's injuries were adduced. There was also evidence of What'sApp messages between the appellant and the complainant following the incident, in which she repeatedly stated that he did not punch her in the face, after he had complained that she had told her mother that he did. The appellant said that one of these messages, in which he stated that he had only pinned her down so that he could stop everything happening and he could leave, was a truthful account.

8. The appellant contends that his conviction is unsafe because the Recorder misdirected the jury in her written route to verdict document on count 3 by suggesting that it was for the defence to prove to the criminal standard that the degree of force used when acting in self-defence was reasonable.

9. The proposed legal directions to the jury were posted on the digital system on 30 March 2023. At page 10 of the route to verdict document three questions were posed as a route for the jury to take in order to reach a verdict on count 3. These were:

> "1. **Are we satisfied so that we are sure that the defendant was the aggressor i.e. the defendant was not acting in self-defence?**
>
> If your answer is Yes, your verdict will be 'Guilty' to count 3.
>
> If your answer is No, go on to consider question 2.
>
> 2. **Are we satisfied so that we are sure that it was reasonable in the circumstances for the defendant to use some force against the complainant?**
>
> If your answer is no, you will find that the defendant did not act in self-defence and will find the defendant guilty of count 3.
>
> If your answer is yes – go on to question 3
>
> 3. **Are we satisfied so that we are sure that the degree of force used by the defendant was reasonable, in the sense that it was no more than was proportionate in the circumstances?**
>
> If your answer is no, you will find that the defendant did not act in self-defence and will find the defendant Guilty of count 3.

> If your answer is yes, you will find that that the defendant acted in self-defence and find the defendant Not Guilty of count 3."

10. Question 3 was a clear and obvious misdirection. The correct question that the jury should have been told to ask themselves was: "Are we sure that the degree of force used by the defendant was *unreasonable* in the sense that it was *more* than was proportionate in all the circumstances? The directions as to what they should find depending on their answer to that question would also have been commensurately adjusted.

11. Unfortunately the misdirection was not drawn to the Recorder's attention when counsel were first asked to comment on the proposed legal directions before the summing-up. Defence counsel did not spot the problem at the time. The Recorder therefore commenced her summing-up on 30 March by reference to the documents which she had prepared.

12. As is now the usual practice, the legal directions preceded counsel's closing speeches and the Recorder's summary of the evidence followed them. The Recorder gave the standard direction on the burden and standard of proof. As regards self-defence, she initially said this:

> "... on count 3 the defendant has raised self-defence. It is still for the prosecution to prove the case. So, it is for them to make you sure that the defendant was in fact the aggressor, and was not acting in lawful self-defence. I will go back to that in due course. The important point for you is that the defendant does not have to prove his innocence, in fact he does not have to prove anything at all."

13. The specific legal directions relating to count 3 were dealt with later in the Recorder's summing-up on the early afternoon of 30 March. She said this:

> "... if you are to convict on this particular count on the indictment the prosecution must prove so that you are sure the three – or in fact the two emboldened headings I have put."

It is unclear which two of the three of the emboldened headings she was referring to. Next, she explained that the prosecution must prove, so that the jury were sure, that the defendant assaulted the complainant thereby occasioning actual bodily harm and that an assault meant using unlawful force. Force used in lawful self-defence did not amount to an assault. She correctly directed them that actual bodily harm meant some bodily injury, even if that injury is slight, and that bruises would suffice.

14. She then summarised the rival accounts of the protagonists and said this:

> "… the prosecution have to prove the case, so it is for them to make you sure that it was the defendant who was the aggressor, and that

> he was not acting in lawful self-defence."

She repeated this a few lines later. She then gave detailed directions on the law of self-defence. She directed the jury perfectly properly that if the jury were not sure that the defendant was the aggressor it was for them to decide whether the force he used was reasonable, and that they must do it in the light of the circumstances as they found the defendant believed them to be. Having elaborated on these matters in terms which were unexceptionable, she then turned to the Route to Verdict document. In introducing it, she said the following:

> " Now, *you may not have taken all that on board* because, as I said to you at the outset it is complex, but *I am now going to take you through the Route to Verdict to encompass everything that I have said*, and to make sure that you cover all the necessary elements. *So the one way for you to arrive at your verdict is to answer the following questions in order... "* [emphasis added]

15. She then took the jury through the three questions in the Route to Verdict document and directed them entirely in accordance with it, including the third question. She told them, orally, that they had to be satisfied so that they were sure that the degree of force used by the defendant was reasonable in the sense that it was no more than was proportionate in the circumstances. If their answer to that question was no, they would find that he did not act in self-defence and find him guilty on count 3. She ended her directions on count 3 by telling the jury that they should, "*please stick to those rules, and you will find that you get to the right decision for the right reasoning ...* "

16. After the Recorder had given most of the remaining legal directions, the closing speeches followed. We were told by Mr Misra, who prosecuted the case at trial and appears for the Crown in front of us today, that he opened his closing speech by reminding the jury of the burden and standard of proof on the prosecution. He said that as far as he could recall he would have said to them that it was for the Crown to prove that the force used was unreasonable. However, it is always the case that when the judge comes to sum up, they will remind the jury that counsels' speeches are merely suggestions and that they should follow the judge's legal directions in all matters. Therefore, even if his recollection were correct, Mr Misra very properly accepted that what he said would not have been enough to have cured the misdirection.

17. By the time that the Recorder had finished summing up the evidence and was coming to her final legal directions, it was late in the afternoon, and she very sensibly decided not to ask the jury to retire to consider their verdicts until the following day.

18. Mr Crampin, who was counsel for the defence at trial, and who also appeared before us today, spotted the misdirection in the Route to Verdict when he considered the document again overnight. The following morning he drew it to the attention of the Recorder, and submitted that question 3 should be amended to show that it was for the prosecution to prove to the criminal standard that the defendant acted with unreasonable force.

19. The Recorder was not particularly taken by that submission. She asked Mr Misra for his views. He accepted that throughout her directions the Recorder had pointed out that it was for the Crown to prove the defendant's guilt, but said that he could "see Mr Crampin's point". However, instead of accepting the force of it, he sat on the fence. He used the somewhat curious expression that he 'did not object' to defence counsel's view, after which he said that he felt that there was nothing he could profitably add.

20. Where, as in this case, there is a clear misdirection to the jury there is an obligation on the Crown to endorse the correction that has been put forward very properly by the defence. Prosecuting counsel's failure to do so in this case was wrong, and it is deeply regrettable that he did not more firmly associate himself with the position that was adopted by Mr Crampin. Had he done so, it is possible that this case would not have come before this court.

21. It is equally regrettable that, although the Recorder did have an opportunity to correct the position before the jury retired to consider their verdicts, and the correction would only have required minimal alterations to her directions, she refused to do so. She relied on the fact that she had already told the jury repeatedly that there was no burden whatsoever on the defendant. Whilst that was true as far as it went, it failed to take account of the fact that at the end of the directions that had been specifically tailored to the issue of self-defence, (which only arose on count 3) and which she had rightly identified as being complex, the Recorder had set out the approach that they must take and the questions that they must ask themselves in the Route to Verdict. Moreover, she had told them *in terms* that they must stick to those rules, and that by so doing they would not go wrong. But if they did stick to the Route to Verdict, they would have gone badly wrong.

22. It is unnecessary for the appellant to prove that the jury did follow the written directions they were given. It is enough that they may have done so. Although it is impossible to tell whether they reached question 3 on the Route to Verdict document, it can be inferred from the fact that they acquitted on count 4 that they did not wholly accept the complainant's account of the argument (in particular, the allegation of attempted strangulation).

23. Mr Misra sought to persuade the court that the conviction was nevertheless safe because if one looked at the summing-up as a whole, the clear indication that was being given to the jury was that the burden was on the Crown and that the defence had nothing to prove. In some cases that may be an answer where there is a misdirection. However, in this case we are satisfied that it is not, given the circumstances in which the misdirection came about at the end of the summing-up, specifically in a Route to Verdict document on which the jury was directed in the way that the Recorder directed them. For those reasons, we are not satisfied that the repeated directions to the jury concerning the burden of proof were enough to cure the mischief caused by the misdirection so as to enable us to conclude that this conviction is safe.

24. Mr Misra very fairly did not seek to urge upon us an argument that the conviction was safe because the evidence was overwhelming, in the light of the fact that the defendant was

acquitted on all the other counts on the indictment.

25. For those reasons, we allow this appeal and we quash the conviction on count 3.

Mr Misra, I think that despite the fact that you told my Lord in answer to a specific question that you were instructed not to seek a retrial, that you wish to now do so?

MR MISRA: Yes, my Lady, I do apologise. I had the wrong Ward email open on my laptop. I am instructed to seek a retrial in this appeal.

SIR NIGEL DAVIS: Did you have such directions to seek a retrial before the hearing before this court started?

MR MISRA: I did, my Lord, yes.

SIR NIGEL DAVIS: So why did you tell the court otherwise on my Lady's question and on my question?

MR MISRA: My Lord, I had the wrong email open. It is simply a matter of I was reading the wrong URN. Having correctly looked after having said 'No', that was when I saw that I had the wrong one and that is why I immediately sought to correct it.

SIR NIGEL DAVIS: You have some other case which is extant before the Court of Appeal?

MR MISRA: My Lord, simply, yes. It is a matter called Ward that -- I had simply typed "Ward" into my CJSM and that is why I was looking at the wrong URN.

SIR NIGEL DAVIS: Had you not checked the position before the hearing started?

MR MISRA: My Lord, I must admit I did not double check downstairs before I walked in and I should have.

MR JUSTICE GOSS: The sentence passed in the lower court was one of 12 months' imprisonment.

MR MISRA: And had already been served at the time.

MR JUSTICE GOSS: Yes. He has now served that sentence.

MR MISRA: He has. He had served it at the time of conviction.

MR JUSTICE GOSS: Although he will not be in custody, he will still be serving it because it was March 2023.

LADY JUSTICE ANDREWS: Yes.

MR JUSTICE GOSS: There was a restraining order made?

MR MISRA: There was, my Lord, yes.

MR JUSTICE GOSS: And of course the statutory surcharge.

MR MISRA: There is no objection to the restraining order, and in terms of the custodial element Mr Ward had already served the custodial element at the time of sentence.

LADY JUSTICE ANDREWS: In the light of those matters, why is the Crown seeking a retrial?

MR MISRA: My Lady, I am simply told that I am asked to request a retrial.

LADY JUSTICE ANDREWS: Just because?

MR MISRA: Indeed, my Lady. I have attempted to get further instructions as to why but have only been informed that this is the views of the OIC.

SIR NIGEL DAVIS: One trusts the complainant's views have been sought?

MR MISRA: My Lord, yes, they have been.

SIR NIGEL DAVIS: But you do not know.

MR MISRA: They have been sought, the views have been sought but the views have not been shared with me. It is only the view of the OIC that is shared with me.

MR JUSTICE GOSS: I do not want to delve into the decision making process but the officer in

the case has said a retrial should be sought in the event of the conviction being quashed. The Crown Prosecution Service have expressed no view, they have not said we have applied our mind to it, to consider whether the public interest would be served or it is appropriate for there to be a retrial, they have just said the officer in the case has said there should be a retrial, we therefore say there should be a retrial.

MR MISRA: Indeed, my Lord. "Counsel is to request a retrial if the convictions are quashed. You will have seen the email I have sent to the OIC." I have received no further update as to the views of the complainant. I suspect the complainant has not responded and that is why.

LADY JUSTICE ANDREWS: We had better ask Mr Crampin what he says.

MR CRAMPIN: My Lady, it is a matter for the court in the exercise of discretion. This is a matter which goes back now to April 2022 so it is not particularly of any antiquity, but it is right to say that the defendant was released immediately upon conviction for that, having been in prison for six months and served the custodial part of the sentence. What my learned friend says is correct. There was no objection taken to the imposition of a restraining order and of course in these circumstances my understanding is a restraining order can stay in place if required. There is no need for a conviction for a restraining order to be put in place by the court. So in the circumstances, in my submission it would seem, to put it frankly, otiose to have a retrial in these circumstances.

SIR NIGEL DAVIS: You raise no objection to the continuance of the restraining order even if there is no conviction on the record?

MR CRAMPIN: That is right, my Lord. The position was, and again I do not have specific instructions from Mr Ward as of today, but his instructions at the time of the end of the trial were that he was happy for the condition of the restraining order to be in place

because their relationship had finished and there was no need for him to have any further contact with the complainant. They had no shared children. He was happy to, as I say, happy and content to walk away from the relationship.

SIR NIGEL DAVIS: I am a little rusty on these things. A restraining order can be imposed in the absence of any conviction?

MR JUSTICE GOSS: On acquittal, yes.

LADY JUSTICE ANDREWS: On acquittal, yes, it can.

MR JUSTICE GOSS: It is a six year order, I remind myself.

MR CRAMPIN: Yes.

(The court adjourned to consider retrial)

LADY JUSTICE ANDREWS: On the basis of what the court has been told and taking into account the specific circumstances of this case, the court does not consider that it is appropriate for it to order a retrial in this matter. But for the avoidance of any doubt the restraining order that was imposed will remain in place.

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

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