Neutral Citation Number: [2023] EWCA Crim 654

Case Nos: 202202345 B5
202202350 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PORTSMOUTH
Mr Recorder Simon Levene
T20227006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2023

THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981. IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE MAY
and
THE RECORDER OF SOUTHWWARK, HER HONOUR JUDGE KARU
(Sitting as a Judge of the CACD)

- -

Between:

REX

Respondent

- and –

(1) BILLY CHARLES NASH
(2) LUKE NASH

Appellants

- -

Sean Sullivan (instructed by **Roe Lawyers**) for the **First Appellant**
Hannah Hurley (instructed by **Bishop and Light Solicitors)** for the **Second Appellant**

Ben Lloyd (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 25 April 2023

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Approved Judgment (Amended)

This judgment was handed down remotely at 10.00am on 9 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. On 29 June 2022, in the Crown Court at Portsmouth after a trial presided over by Mr Recorder Levene, the Appellants Mr Billy Nash (who was then aged 28) and Mr Luke Nash (who was then aged 35) were convicted unanimously of one count of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. On 24 February 2023, in the same Court, each appellant was sentenced to 45 months' imprisonment.

2. The appellants now appeal against their convictions with the leave of the single judge.

The factual background

3. The factual background can be briefly described as a fight in the car park of a pub in Bognor Regis which involved the appellants and the complainant, Mr James Rae. The end result was that Mr Rae suffered a serious injury to his eye socket and severe lacerations. The case for both appellants was that they were acting in self-defence.

4. On 31 December 2019, the appellants visited the South Downs Pub for a New Year's Eve party. Mr Rae was also at the party with his friends and family. The prosecution case was that shortly after midnight Mr Rae saw the appellants at the bar. They were being rude to his friend. Mr Rae intervened and a fight broke out between him and the appellants. The fight was broken up and the appellants were asked to leave the pub. Shortly after the fight, Mr Rae left the pub. As he walked through the car park, the appellants attacked him. One appellant punched him to the face and both appellants punched and kicked him as he lay unconscious on the ground. They then fled the scene. Mr Rae suffered a fractured eye socket and severe lacerations to his face.

5. To prove the case, the prosecution relied on:

   i) Evidence from Mr Rae: he stated that he saw the appellants arguing with his friend at the bar. He intervened and the argument escalated into a fight. He accepted that he was the first person to use physical force by pushing Mr Billy Nash. The staff intervened and the appellants were asked to leave. Mr Rae then left with his girlfriend, Ms Hannah Kuszka. As he walked through the car park, he heard shouting and saw the appellants run towards him. They attacked him and he was knocked out. He woke up to find that he was being treated by paramedics;

   ii) Evidence from Mr Steven Masters, Mr Jake Sinfield and Ms Sandra Cooper. Mr Masters was the shift leader in the pub; Mr Sinfield was the manager; and Ms Cooper was the assistant manager. They witnessed the fight inside the pub. Mr Sinfield told the appellants to leave;

   iii) Evidence from Mr Aaron Merritt. Mr Merritt was at the pub with Leon Drake and Katy Graham. He had no connection to the appellants or Mr Rae. He did not see the fight inside the pub. However, whilst he was standing outside the

pub with his friends, he heard shouting and saw the appellants punching and kicking Mr Rae;

iv) Evidence from Mr Leon Drake. Mr Drake described seeing Mr Rae walk out of the pub. He then heard one of the appellants yell, "There he is. Get him". The appellants then ran after Mr Rae. He heard Mr Rae say, "leave it" before one appellant punched him to the face. The appellants continued to attack him and, whilst Mr Rae initially fought back, he fell to the ground, where the appellants continued to punch and kick him;

v) Evidence from Ms Katy Graham. Ms Graham described seeing Mr Rae leave the pub. He was "walking fast". The appellants appeared and saw Mr Rae. They "speeded up towards him [and] jumped on him without knowing…and they took him to the ground" where they repeatedly punched him;

vi) A witness statement from Ms Hannah Kuszka. This evidence was initially admitted as hearsay evidence, but following developments in the trial, the jury was directed to disregard it. We shall return to this in greater detail below;

vii) CCTV showing the fight inside the pub;

viii) The inference to be drawn from the appellants' silence in interview.

6. The appellants gave evidence and called witnesses in their defence.

7. Mr Billy Nash stated that he arrived at the pub with his brother and some friends and family. Shortly after midnight, a fight broke out inside the pub. He saw that his brother was caught up in the violence and he intervened to help him. After the fight, he and his brother walked to the car park where he saw Mr Rae and Mr Rae's father "charging straight for him". Mr Rae attacked him and they grappled. Eventually, Ms Kuszka arrived on the scene and they were separated. He did not see what happened to his brother and he did not stamp on or kick Mr Rae.

8. Mr Billy Nash's wife, Maria Nash, gave evidence on behalf of her husband, although she did not see the fight outside. She stated that Ms Kuszka told her not to speak to the police. This was ruled to be inadmissible hearsay.

9. Mr Luke Nash stated that Mr Rae approached him whilst he was at the bar and punched him to the face in an unprovoked attack. He, Mr Nash, was then asked to leave by Mr Sinfield. He went into the car park and saw Mr Rae and his father approaching him. Mr Rae's father then attacked him and they grappled. He did not see where Mr Rae went. He heard someone shout "Get the boys down here" and, fearing for his safety, he fled the scene. He never attacked Mr Rae.

10. Mr Jordan Gretton-Doige gave evidence on behalf of Mr Luke Nash. He did not see the incident inside or outside the pub but stated that he did not see Mr Luke Nash acting aggressively.

11. Ms Kuszka gave a statement dated 1 January 2020 in which she stated that she went to the South Downs Pub with Mr Rae, who she had known for most of her life and who was her boyfriend of a few months. Whilst standing at the bar, she heard Mr Luke Nash threatening Mr Rae. She had been friends with Mr Luke Nash's family

and had known him for approximately 15 years. Mr Luke Nash then punched Mr Rae, which led to a fight breaking out. The pub's manager intervened and she and Mr Rae decided to leave. As they walked through the car park, Mr Billy Nash ran towards them and punched Mr Rae, knocking him to the ground. Mr Billy Nash continued to punch and kick Mr Rae as he lay on the ground. At some point, Mr Luke Nash appeared and joined in, taking it in turns with his brother to punch and kick Mr Rae to every area of his body. A bystander broke up the fight and the Nash brothers ran away from the scene.

Ruling on admissibility of Ms Kuszka's statement: 23 June 2022

12. Ms Kuszka was due to give evidence for the prosecution. On the first day of trial the prosecution applied for screens to be provided for her as she gave her evidence, which application was granted. However, on the second day of trial, Counsel for the prosecution raised concerns that she would not attend. She had been served with a witness summons but had proved "difficult" to contact. The difficulties in contacting her were sufficient to give Counsel for the prosecution "a horrible suspicion she might not turn up … by virtue of the difficulties they had in actually making contact with her." When Defence Counsel told the Court that it had been said at the PTPH that she no longer supported the prosecution, Counsel for the prosecution said that there was no retraction statement "so, officially, there's nothing I can point at to say she's definitely not supportive."

13. On 22 June 2022, Ms Kuszka did not attend court and the Recorder issued a warrant backed for bail. Counsel for the prosecution indicated that, if she did not appear the following day, he would apply for the case to proceed. He told the court that Ms Kuszka had made "not a retraction, … but she's made comments that she didn't want to support this case." Counsel for Luke Nash told the Court that Ms Kuszka had approached her client and apologised for lying to the police in her statement.

14. On 23 June 2022, Ms Kuszka attended court. She was very distressed and wished to address the Recorder privately. Counsel for the prosecution stated in open court that, "she says that she can't remember anything and is full of anxiety" and that she had brought a letter, to which we shall refer below. The Recorder was content to speak to her in the absence of Counsel and stated that the conversation would be recorded and he would make notes. He asked the parties if they were content for him to speak to Ms Kuszka. Counsel for Mr Luke Nash stated, "I'm not sure there's anything we can say to go behind that". Counsel for Mr Billy Nash said "I agree" in response to the Recorder's suggestion that there was a basis for adopting that course of action. Neither prosecution nor defence Counsel submitted that the Recorder should not see Ms Kuszka himself. The courtroom was vacated. Ms Kuszka then refused to enter the courtroom. The Recorder then met her on his own in the witness room. As a result, no recording was made. The Recorder made no note of his meeting or, if he did, it was not disclosed to the parties and we have not seen it.

15. Following his private meeting with Ms Kuszka, the Recorder said in the absence of the Jury:

> "I've spoken to Ms Kuszka, she's with her father, she's in a complete state. She couldn't get into the witness box in my

> view, let alone give evidence. She talks about, in her letter, that she's, the fact that she's taking medication. She's told me what it is. It's a medication. I'm not entirely winging it because I sit on mental health tribunals. It's a medication to control panic attacks and it doesn't seem to be doing that today. There is no way that anybody under any circumstances will get evidence out of her. A transcript of what we've been saying wouldn't do any good because she's just been crying and trembling and her father has been sort of holding her the whole time. So I'm afraid that she won't be giving evidence".

16. Following this, Counsel for the prosecution applied to admit Ms Kuszka's statement as hearsay evidence on the basis that she was unfit due to a bodily or mental condition, pursuant to section 116(2)(b) of the Criminal Justice Act 2003. Counsel accepted that there was no medical evidence before the court, but submitted that in the circumstances, the conditions of that section were met. Counsel also submitted that her evidence was "very similar to" the evidence given by other witnesses.

17. Counsel for Mr Luke Nash opposed the application. She submitted that there was evidence that suggested that Ms Kuszka's account in her original statement was untrue or, at best, unreliable:

i) Mr Luke Nash had told his Counsel that Ms Kuszka had approached him and apologised for lying to the police about him, as Counsel had mentioned the previous day;

ii) A note in the Occurrence Enquiry Log ("OEL") stated that a Witness Care Officer had contacted the police in February 2022 stating, "[she] has requested contact from the OIC for a potential MG11 and states that there are some things in her original statement that were not true". The log had only been disclosed the previous day, despite the fact that the defence had requested it in March 2022.

iii) In her letter to the Court signed and dated that day (23 June 2022) she stated that "In subsequent meetings and conversations with the Police I had expressed my concerns over [my original statement's] contents as I have no clear recollection of the events that took place. I can only attribute this to a combination of alcohol, prescribed drugs and adrenalin all flowing thru [sic] me at the time. So I then became worried as I cannot honestly confirm its contents, which I have told the police. … Due to these concerns I had asked that my Statement be withdrawn, but was simply told it was not possible. …".

Accordingly, Counsel for Mr Luke Nash submitted that the statement appeared to be highly unreliable and should not be admitted. She submitted that the combined effect of the OEL entry and the letter was that the Jury could not be sure and would be asked to speculate about which bits of her original statement were true and which were not.

18. Counsel for Mr Billy Nash supported these submissions. In addition he submitted that there should be proper medical evidence before the Court concluded that Ms Kuszka was not fit to give evidence. He submitted that the evidence before the court demonstrated that Ms Kuszka's statement was inherently unreliable and there was no

medical evidence before the court capable of supporting the prosecution's submission that she was unfit to give evidence. Counsel for Mr Luke Nash then amplified her submissions to include that the Court should adjourn the matter for a short while to enable there to be some medical evidence about whether there would be a time when Ms Kuszka would be fit to give evidence, even if that meant adjourning the trial for a longer period.

19. The Recorder admitted the statement. He concluded that Ms Kuszka was incapable of giving evidence. She had appeared inconsolable during his private meeting with her and couldn't answer his questions. She was being prescribed medication for anxiety. Having seen her, he did not need any medical evidence to be sure that she was incapable of giving evidence and that the conditions in section 116(2)(b) of the Criminal Justice Act 2003 were met. He was unwilling to adjourn the trial for a short period in order to see whether she was or would soon be fit to give evidence because he concluded that she was unlikely to recover.

20. Having made this finding, the Recorder concluded that it was in the interests of justice to admit her statement. He held that her account in her main statement was broadly consistent with that given by other witnesses. Moreover, he considered that the comments that she made in her letter/statement were "in line with the sort of qualifications that other witnesses had given: such as "…well it could have been this, it could have been that, and I didn't quite see all of this, I didn't quite see all of that". There was also sufficient material "for a proper critique of her evidence". For that reason, the Recorder admitted the evidence. He also ruled that the OEL entry should be put before the Jury. Ms Kuszka's original witness statement, her supplementary statement/letter and the OEL entry were duly read to the Jury as part of the prosecution evidence. The Recorder did not give the Jury any direction to introduce the evidence that was read to them either generally or more specifically about the limitations of such evidence, or how they should approach the apparent differences between the first statement and either the second statement or the OEL or both.

21. When the officer in the case gave evidence, he said in cross-examination that he had had a conversation with Ms Kuszka in which she had said that she now stood by the contents of her original statement. That conversation with Ms Kuszka was not recorded in the OEL or elsewhere. It had not been mentioned in the course of the submissions that preceded the Recorder's decision to admit her statements into evidence.

The first application to discharge the Jury

22. Following the late disclosure of the OEL, the appellants sought the disclosure of the emails sent by Witness Care that had triggered the relevant log entry. The prosecution initially refused to disclose them. Counsel for Mr Luke Nash made an application for disclosure pursuant to section 8 of the Criminal Procedure and Investigations Act 1996 dated 23 June 2022. During the hearing of the application the following day, Counsel for the prosecution effectively agreed to disclose the two relevant emails.

23. In the first email, which was dated 2 December 2021, the Witness Care Officer informed the OIC that Ms Kuszka had said that because she had separated from Mr Rae she no longer wanted to support the case. The Witness Care Officer invited the

OIC to contact Ms Kuszka and to take a retraction statement if she still wanted to make one. This email had not been drawn to Prosecuting Counsel's attention and was not disclosed before 24 June 2022, day 5 of the trial.

24. In the second email, which was dated 23 February 2022, the Witness Care Officer informed the OIC that "[Ms Kuszka] is very worried as the victim made her put things in her statement that aren't true which is why she now wants nothing to do with [the prosecution]." The email went on to ask the Officer to contact Ms Kuszka to discuss her issues "as it sounds like she might need to make a further statement. She said she has been having some trouble from the victim." This email too had not been brought to prosecuting Counsel's attention or disclosed before 24 June 2022.

25. Following the informal disclosure of the emails, the Recorder concluded that they were clearly relevant and clearly fell to be disclosed. He regarded the failure to serve the emails in good time to be a serious breach of the disclosure rules. He directed the prosecution to provide an explanation for the late disclosure. During the exchange, Counsel for the prosecution told the Recorder that when he had met Ms Kuszka prior to the hearsay application the day before, she had told him that Mr Rae had told her to state that Mr Luke Nash threw the first punch inside the pub. There was no witness statement from Ms Kuszka to that effect; and Counsel for the prosecution had neither made a note nor informed the defendants or the court of this exchange during the previous day's hearsay application or before now.

26. In the light of this revelation, Counsel for Mr Luke Nash applied to discharge the jury on the basis that Ms Kuszka's statement should never have been admitted and seriously prejudiced the defence. The emails, combined with the comments made to prosecution Counsel, cast serious doubt over Ms Kuszka's credibility and other social media evidence suggested that she had not been unfit. It was now known that she was saying that she had lied; and it was submitted that her conversation with Counsel for the Prosecution showed that she was able to answer at least some relevant questions. [The reference to Social Media was a reference to posts that had been mentioned by Counsel for Mr Luke Nash, posted in the short period since the Recorder had ruled that Ms Kuszka should not give evidence in person, which were capable of supporting an inference that she was not as unwell as she had appeared to be when the Recorder decided that her statement should be admitted and she should not be called.] Counsel for the prosecution proposed that a further statement should be taken from her, explaining what it was in her first statement that she was now saying was unreliable and why.

27. The Recorder ruled that he would direct the jury to disregard Ms Kuszka's evidence. He indicated that he would have made a different ruling originally if Ms Kuszka had been the only witness. However, he had taken the view that her evidence was broadly consistent with other witnesses. He directed that Mr Rae be recalled so that the content of the emails could be put to him. He also directed the CPS to lodge an explanation for the delay in disclosing the emails.

28. The Recorder did not tell the Jury of his decision that they should ignore Ms Kuszka's evidence until he came to sum up the case at the end of the trial.

The second application to discharge the jury

29. After the weekend, Counsel for the appellants lodged a second, joint application to discharge the jury. They submitted that Ms Kuszka's evidence was "intrinsically tied up with other evidence in this case" and that it could not be "neatly separated" from the other evidence. Her evidence should not have been admitted and caused the appellants significant prejudice. The late disclosure was wholly the fault of the prosecution and led to the admission of wholly prejudicial evidence.

30. Counsel for the prosecution opposed the application. He submitted that the appellants were attempting to reopen the Recorder's earlier ruling. In any event, Mr Rae could not have told Ms Kuszka to embellish her statement because he was unconscious when he was being attacked, so that he did not know the details of his own attack, and therefore was unable to provide them to Ms Kuszka.

31. The Recorder recalled Mr Rae to give evidence on the allegation that he had made her put things in her statement that were not true, on the basis that it went to his credibility as a witness. Counsel for Mr Luke Nash put to Mr Rae that he had pressurised Ms Kuszka to lie in her statement to the police. He denied telling Ms Kuszka to do so. Following this, the Recorder ruled that he would not discharge the jury. He concluded that the appellants' application did nothing more than invite him to reopen his earlier decision. Although Mr Rae had just been cross-examined in some detail about Ms Kuszka and what she had said about Mr Rae, the Recorder still did not say anything to the Jury about the status of Ms Kuszka's evidence or the relevance of the cross-examination that they had just heard.

32. When he came to sum up the case, and during the first part of his split summing up, the Recorder said:

> "And, finally, Miss Kuszka. I'm mentioning Ms Kuszka merely in order to tell you to put Miss Kuszka out of your mind. That sounds odd, but this is the position. Two statements from Miss Kuszka were read to you. You then heard that Miss Kuszka had told [witness care] in February of this year she no longer wanted to give evidence because her boyfriend, Mr Rae, had asked her to put lies into her statement, and that didn't come to light until after Miss Kuszka's statement had been read to you. It was unfortunate that it didn't come to light before then. The Prosecution should have given that information before. It should have given the information before the case even started, so we could have had another think about what … should happen to Miss Kuszka's evidence, but it didn't. It came to light after Miss Kuszka's evidence had been read to you, and my direction to you is this. You heard Mr Rae being questioned yesterday morning. He came back into the witness box and was asked whether he had put pressure on Miss Kuszka to put lies into her statement. I'll deal with his evidence later on, after counsel have addressed you. But I direct you to attach no weight to Miss Kuszka's evidence in this case. The prosecution can no longer rely on it, and it should play, her evidence should play no part in your discussions. You must form your [verdicts] in other words, on the basis of all the rest

> of the evidence that you think is important but nothing to do with her evidence."

33. Written directions in much the same terms were provided to the Jury.

Application to adduce body worn footage

34. Mr Merritt, Mr Drake and Ms Graham gave evidence for the prosecution. In cross-examination, Mr Merritt stated that he had discussed the events on the night, stating, "we spoke about everything obviously, when we were on the way back, and about how quick everything happened. But that's the only time we spoke about it". Mr Drake said that "we didn't really talk about what physically happened. It was more of 'I can't believe I just saw that'". Ms Graham said she had not discussed the events with Mr Drake but was present when he gave his statement to the police.

35. It was the defence case that the evidence of these three independent witnesses was unreliable and had been contaminated by discussions with each other and/or Ms Kuszka. After the witnesses gave their evidence, defence Counsel reviewed the body-worn footage that had been served as unused evidence and noted that some of the footage showed the witnesses in close proximity with Ms Kuszka and apparently in discussion with her.

36. Counsel for the appellants applied to play the body-worn footage to the jury. Counsel for Mr Luke Nash submitted that defence Counsel had been unable to appreciate the importance of the body-worn footage until after the witnesses gave evidence because they had been unable to identify the witnesses until they attended court. Counsel for both appellants submitted that the material suggested that the witnesses' evidence may have been affected by the discussions shown on the body-worn footage, albeit they conceded that the quality of the sound recording made it difficult to hear exactly what was being said so that, on being repeatedly asked to give relevant examples of what was said, Counsel for Mr Billy Nash (who had taken the lead in reviewing the footage) was unable to do so. Despite this, Counsel maintained that the footage was relevant because it suggested that the witnesses may have overheard and been influenced by Ms Kuszka's account. It was submitted that, whilst the sound quality was occasionally unclear, it was possible to hear Ms Kuszka give her account in the earshot of the other witnesses: at one point she can be heard to say "it was two on one".

37. The Recorder refused to allow the body-worn footage to be played to the jury. He ruled that the footage: "at the most, … shows people who we've heard giving evidence standing outside a pub"; that no realistic cross-examination could be based on anything seen in the footage; and that it was "so chaotic, and there is quite clearly no attempt by anybody to impress their view of what happened on anybody else. It is exactly what you would expect if there'd been a drunk punch up at a pub". For that reason, it had no probative value. At most, it showed people standing outside a pub. It did not suggest that the witnesses' evidence was contaminated.

38. It is apparent from the speech to the Jury made by Counsel for Mr Billy Nash that the Jury were provided with a still photograph showing a number of people "milling around" in the car park; and it was Mrs Nash's unchallenged evidence that she saw 15 people outside the pub talking about the fight. Counsel for Mr Billy Nash submitted to the Jury that there was a risk that the evidence of the independent witnesses had been contaminated by whatever had been said by Ms Kuszka while disclaiming any suggestion of improper collusion. Counsel for Mr Luke Nash went further. After reminding the Jury that they had seen Ms Kuszka's statement, she asserted that Ms

Kuszka was dishonest and was "in the mix" when the Jury considered whether witnesses had discussed the incident.

Additional material

39. In accordance with directions by the Single Judge when giving permission to appeal, we have been provided with additional information. We set out the most relevant below.

40. The Officer in the Case has provided a statement in which he says that he was appointed OIC in October 2020. He attempted to get in touch with Ms Kuszka and went to her address well over 20 times in his attempts to speak to her; but he was repeatedly put off by excuses and it became clear that she was avoiding him. It appears that these were the difficulties that, at least in part, led the prosecution to seek and obtain a witness summons at the PTPH on 21 February 2022. In February 2022 he received the email from Ms Rose of Witness Support: see [24.] above. He finally spoke to Ms Kuszka on 27 April 2022 when she appeared at Chichester Police Station (without a prior appointment). She confirmed that everything in her original statement was true. He therefore took the view that the February email from Ms Rose "no longer applied". No note was taken of this discussion with Ms Kuszka. His supervising officer confirmed that the OIC had told him about the meeting with Ms Kuszka and had reported that "she had not told lies." The OIC had attempted to send the OEL to the CPS and had received no requests from them concerning it. He therefore assumed that it had been passed to them satisfactorily.

41. A letter from the CPS confirmed that the Defence had asked for a copy the OEL (which was Item 64 on the Schedule of Unused Evidence) and that the CPS had asked the Police for a copy on 4 April 2022. Thereafter "the fact that the police failed to provide a copy of [the OEL] for disclosure was overlooked and … this should have been chased." In the event, it was provided on 21 June 2022, after the trial had started, and was then disclosed.

42. Trial Counsel for the prosecution has provided a "Note" to the Court. He explains that he did not pass on to the Recorder or the defendants' legal teams the comment made to him by Ms Kuszka about Mr Rae throwing the first punch in the pub because he "took the view that I should not pass this comment on before we commenced the legal argument as to hearsay, as it would amount to me, as trial counsel, giving hearsay evidence." He had also noted that it was not mentioned in her letter/witness statement of that date. Only with hindsight does he recognise that it would have been appropriate to raise what Ms Kuszka had said with the Recorder and to suggest that the passage in her original witness statement about Mr Luke Nash throwing the first punch inside the pub should be redacted when it was read to the jury. He asserts that leaving it in the statement would not have been helpful to the Crown's case as the CCTV footage showed Mr Rae as initiating the fight.

The Grounds of Appeal

43. The substance of each appellant's appeal is the same. Each alleges that:

i) The Recorder erred in deciding to admit Ms Kuszka's evidence without her being called;

ii) Having been given further information about the unreliability of Ms Kuszka's written statement, the Recorder should have discharged the Jury;

iii) The failures in relation to Ms Kuszka's evidence were compounded by the Recorder's refusal to admit the body-worn footage from the car park after the incident.

The Crown's concessions

44. With a change of Counsel, the Crown's approach has shifted markedly. It is sufficient to say at this stage that:

i) The Crown accepts that the disclosure process and the way in which the evidence of Ms Kuszka's evidence was treated by the prosecution were both flawed. Specifically, the Crown accepts that Counsel for the prosecution should have made a note of his conversation with Ms Kuszka and should have informed the Court of his conversation when making the application to admit her witness statements as evidence on 23 June 2022. The emails from Witness Support, the OEL and the contents of Counsel for the prosecution's conversation with Ms Kuszka were all capable of undermining the case for the prosecution against or assisting the case for the defendants;

ii) Second, the Recorder should not have met Ms Kuska by himself and in the absence of (a) Counsel and (b) any means of recording or independently witnessing the meeting. Before a hearsay application was considered, evidence as to Ms Kuszka's physical or mental state should have been obtained by the prosecution if possible and evidence that was independent of the Recorder's own view of the witness. The possibility of additional special measures enabling her to give her evidence should have been considered. The prosecution should then have adduced their evidence and made their application to admit her statements in the normal way;

iii) Third, once the problems with Ms Kuszka's evidence became fully apparent, the Recorder should have considered whether the provisions of section 125 of the Criminal Justice Act 2003 should cause him to discharge the Jury;

iv) Fourth, the Recorder should have directed the Jury before Ms Kuszka's evidence was read to them about the limitations of such evidence, in accordance with normal practice.

45. In our Judgment each of these concessions is correctly made and reflects an understanding of normal good and fair practice.

The submissions for the appellants

46. At the hearing before us submissions were first made by Mr Sullivan who now represents Mr Billy Nash but did not represent him at trial. He refined his submissions and presented them compellingly. We shall therefore concentrate on his submissions as presented orally rather than setting out all the points raised in the Advices, Grounds of Appeal and Skeleton Arguments.

47. Mr Sullivan submits that there were five major things that went wrong.

48. First, there were the multiple failures of the disclosure process. The OEL was not disclosed to the Defence before trial, despite a specific request that was initially actioned but then overlooked by the CPS. The emails from Witness Care were not disclosed. This appears to have been because of a failure by the OIC to understand his obligation of disclosure, which led to him not disclosing them initially and subsequently taking the view, after he had seen Ms Kuszka, that the February email "no longer applied". This had a direct and detrimental impact on the trial. It is evident that the Recorder would not have admitted Ms Kuszka's written evidence had proper disclosure been given and had the relevant documents been brought to his attention. It is plain that the OIC did not understand his obligations, as he took no effective steps after the Witness Service had brought to his attention that Ms Kuszka did not stand by her statement. His failure of understanding was exemplified by his failure to take a note of his meeting with her on 23 April 2022 when she appeared at Chichester Police Station.

49. Second, there was the failure of Counsel for the Prosecution to disclose the substance of his conversation with Ms Kuszka on 23 June 2022 or to take a note of that conversation as he should have done, whether or not it was witnessed by a representative of the CPS. What she said to Prosecution Counsel was obviously disclosable: it was relevant both to the application for her witness statement to be admitted in evidence and to the question whether she was in fact able to answer relevant questions. Choosing his words carefully and advisedly, Mr Sullivan submits that the explanation provided by Counsel concerning hearsay, which we have set out above verbatim, is untenable and incredible.

50. Third, Mr Sullivan points to the actions of the Recorder himself. As is now conceded, he should not have seen Ms Kuszka himself in the absence of others and with no record being taken of what was said. Not only did he not have a secure basis for concluding that Ms Kuszka was unfit to give evidence, his conduct made him a potential witness.

51. Fourth, when initially permitting the evidence of Ms Kuszka to be read, the Recorder failed to give the jury the normal direction about the limitations of such evidence. This was particularly important where the evidence that was admitted included not merely her original statement but the supplementary letter/statement and the OEL entry. Then, having decided that Mr Kuszka's evidence should not be relied upon, he did not immediately direct the Jury to that effect. The consequence of that is that Ms Kuszka's evidence remained "live" for the Jury after the close of the prosecution case. That being so, the Recorder should have considered section 125 of the Criminal Justice Act 2003 and should have discharged the Jury.

52. Fifth, the Recorder's decision to exclude the body-worn footage was wrong. The evidence was relevant and admissible on the issue of potential contamination of evidence even if it did not support an allegation of improper collusion; and it remained relevant after Ms Kuszka's evidence was withdrawn from the jury as that did not answer what, if anything, she said to other witnesses while outside and whether what she said may have adversely affected their evidence. Whether or to what extent it would assist the defendants tactically to play all or part of the footage, is a different question: if they wished to put footage showing witnesses (and others such as Ms Kuszka) in close proximity and apparently talking to each other, they should have been permitted to do so, particularly in what might appear to be a strong

case with the witnesses proving to be essentially consistent with each other when giving their evidence.

53. Based on these failures, Mr Sullivan submitted that these convictions must be set aside. He accepts that, on the face of things, there was a strong evidential case against the appellants; but he submits that the apparent strength of the evidence should be seen in a different light given the unfair failures of process and procedure that occurred. As outlined above, the presence of Ms Kuszka talking to witnesses gives rise to the possibility of contamination which the defendants were unable to explore fully without viewing the body-worn footage showing where people were and who was talking to whom from time to time. Although it is accepted that much of the speech is inaudible or undecipherable, the reference to Ms Kuszka saying "it was 2 on 1" is clearly detectable and it was material to the defendant's case to demonstrate the general atmosphere and response to the incident of those who were outside. Once Ms Kuszka's evidence was ruled out on the grounds that it may be unreliable, her proximity to witnesses milling around assumed a greater significance which the defendants should have been allowed to explore.

54. Second, the admission of Ms Kuska's evidence was the result of multiple failures of disclosure including the police, the CPS and Counsel for the prosecution. There can be no confidence that the Jury disregarded her evidence, not least because the Recorder neither told them about the limitations of disputed evidence when given in documentary form and because he did not tell them to ignore it until the summing up, by which time they had had plenty of time to assimilate and be influenced by it. Although others gave evidence that was supportive of the prosecution case, the doubts about the credibility of her evidence meant that there was a real risk of the Jury being misinformed and misunderstanding or failing fully to exclude the evidence they had heard.

55. The alleged unfairness is submitted to be compounded by the failure of prosecuting counsel to tell the Court and those representing the defendant about his conversation with Ms Kuszka when she attended court. And, finally, had the Court properly considered the provisions of section 125 of the Criminal Justice Act 2003, the Recorder should then have discharged the jury. The failure to do so was a failure of fair and proper process which can only be remedied by setting aside the convictions. As Mr Sullivan put it: once the prosecution had run fast and loose with the steps that are intended to ensure that a defendant has a fair trial, the only satisfactory remedy is to set aside the conviction, even in what otherwise appears to be a strong case against the defendants.

56. Ms Hurley for Mr Luke Nash adopted Mr Sullivan's submissions. In addition, she submitted, there were things she wanted to put to Ms Kuszka that she was unable to put, and simply recalling Mr Rae, who predictably denied any improper influencing of Ms Kuszka, simply made matters worse for the defendants.

Submissions for the Crown

57. We have summarised the concessions made by the Crown at [44.] above. While recognising these substantial flaws in the procedure and process that was adopted, Mr Lloyd (who appeared before us on behalf of the Crown though not at the trial below) submits that this was a case where the injuries inflicted on Mr Rae were such that,

realistically speaking, it could not be a case of self-defence. The Jury was bound to follow the Recorder's direction, belatedly given, that they should ignore Ms Kuszka's evidence and there is no reason to believe that they would not and did not do so. The Defence had and took the opportunity to attack Mr Rae's general credibility on the basis that he had told Ms Kuszka to lie, and she did not need to be a witness for that point to be put to him. He submits that the body-worn footage is no more than a makeweight since the general scene outside the pub was amply evidenced by witnesses and the still photograph to which have referred. In his oral submissions Mr Lloyd accepted that, if nothing had gone wrong, the body-worn footage could have been admitted if the defendants wanted to put bits of it to a witness or show it to the jury. To that extent he resiled from his written submission that the decision to exclude the body-worn video footage was a reasonable case-management decision to take in circumstances where Counsel then representing Mr Billy Nash was unable to identify any speech captured by the footage upon which he would wish to rely. Given that the overall question is whether the flaws in the process and procedure were sufficient to render the convictions unsafe, the Crown's case is that the absence of the body-worn video footage adds little, though Mr Lloyd concedes that it carries some limited weight.

58. Mr Lloyd points to a number of features of the case which he submits indicate that, despite the acknowledged flaws in the conduct of the trial below, the convictions are safe. In summary:

i) Whatever happened inside the pub, that was a self-contained incident that was over by the time of the fight outside. What mattered was who did what *outside* the pub and, if the Appellants inflicted the grievous bodily harm that Mr Rae suffered, what was their state of mind when they did so;

ii) The evidence of the independent witnesses was cogent and compelling and unequivocally supported the prosecution case that the Appellants set upon Mr Rae and inflicted the grievous bodily harm with the requisite intent for an offence under section 18;

iii) The assertion by Mr Billy Nash that he acted in self-defence was plainly rejected by the Jury. There was no basis for any other conclusion since the force inflicted on Mr Rae was clearly disproportionate to any need to defend himself;

iv) There was no evidence that the account of any of the independent witnesses had been influenced by contamination either amongst themselves or by what was said by others;

v) The Jury were directed to ignore Ms Kuszka's hearsay evidence. This was a correct direction to make;

vi) The evidence against the Appellants was strong.

Discussion and conclusion

59. The obligations of disclosure that rest on the police, the CPS and lawyers representing the prosecution during criminal proceedings are well known and do not require to be

repeated here in any detail. There is a continuing obligation on the prosecutor to disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused: see section 3, Criminal Procedure and Investigations Act 1996. The Crown's concessions on disclosure are properly made. Each of (a) the OEL, (b) the emails from Witness Support, and (c) the contents of Counsel for the prosecution's conversation with Ms Kuszka should have been disclosed promptly but were not. In addition, a note or some other formal record should have been kept of the conversation when Ms Kuszka attended the police station on 23 April 2022, if only to explain (not justify) the continuing non-disclosure of the emails, if that was the explanation. Similarly, Counsel for the prosecution should not have seen Ms Kuszka alone and should have kept a note or other record of his conversation. The Appellants are right to submit that the wholesale failure to disclose those materials promptly evidences a failure to understand their obligations on the part of the police, the CPS and Counsel for the prosecution.

60. The Recorder's reaction after he was appraised of the material that had not previously been provided to him when he had admitted Ms Kuszka's written evidence demonstrates that these failures of disclosure were instrumental in causing her evidence to go before the Jury. It is not unreasonable to describe the failings in disclosure as fundamental.

61. The Crown's concessions about the Recorder's conduct of the trial are also properly made. We accept that the Courts' understanding of how to deal with vulnerable witnesses is subject to constant development and is certainly not set in stone. But we take the observations of a different constitution of this court in *R v Lubemba and JP* [2014] EWCA Crim 2064 at [41] to be entirely apposite to the circumstances of this case:

> "48. The judge's approach was wrong in a number of respects. If his visit was designed to assess her competence, he should have taken the parties with him or used the live link in their presence. He should not have questioned her alone … . If his visit was merely designed to introduce himself properly to her and he unexpectedly began to question her ability to participate, he should have informed the parties of his concerns and sought their submissions, before making a ruling. He should have considered whether any other special measures such as the services of an intermediary might benefit the witness … . Furthermore, he could have considered calling for an expert to assist him."

62. We do not doubt that the Recorder was motivated by a wish to keep the trial running and that he had formed a clear view that Ms Kuszka was unfit to give evidence. But he should have realised almost as soon as he met Ms Kuszka that he could not go further than introducing himself to her and, perhaps, offering a few words of comfort about the course that her evidence would take. We can readily conceive of circumstances arising during the course of a witness giving their evidence which justify a judge in taking the view that the evidence should be curtailed because of the impact that giving it is having on the witness. But that is a far cry from the facts of

this case. We regard the Recorder's failure to proceed in the presence of the parties and then to rely upon an undocumented assessment of Ms Kuszka based on a conversation to which there was no other witness to be fundamental. It offends against every aspect of the principled statement from *Lubemba* that we have set out above. It is cold comfort to have to record that neither Counsel for the prosecution nor Counsel for the defendants raised either the general principles or the specific authority of *Lubemba*. Had that happened, we hope and trust that it would have driven the Recorder back to the straight and (not particularly) narrow.

63. It may sometimes be necessary or desirable for the party making the application to obtain medical or other expert evidence in support, but that will be a fact sensitive question in every case. What matters is that a Judge who is being asked to admit hearsay evidence because the witness is unfit should have reliable independent evidence upon which to base their decision. As the facts of the present case show, a Judge who relies solely upon their own meeting with a potential witness as the foundation for an assessment of the witness' fitness to give evidence has only a very limited evidential base, which may prove to be far removed from the full picture. It follows that making an assessment on such a base will normally be suspect and should be avoided if at all possible. In the present case there was no reason to follow the course that the Recorder followed, particularly since Counsel for the prosecution had said on 22 June 2022 that he would apply for the case to proceed in her absence if Ms Kuszka did not appear. Even without the benefit of hindsight it should have been clear that the prosecution had an apparently strong evidential case without any contribution from her. There was accordingly no imperative in the interests of justice to make a snap decision to admit her written evidence as part of the case for the prosecution.

64. We recognise that it is not uncommon for a Judge to direct a Jury to ignore evidence that they have heard and that the starting point for this Court is to assume that the Jury will follow the direction that they have been given. Even in an uncomplicated case, however, it is necessary to consider whether there is a risk that the Jury will continue to be affected by what they have heard, for whatever reason. In this case, however, there are a number of complicating features. Each of them, in our judgment, goes to the fairness of the trial process; and each increases the risk that these convictions are or may be unsafe.

65. First, the Jury were not simply read Ms Kuszka's first witness statement. They were also read the terms of the OEL and her second statement/letter. At its lowest, there is a clear tension between these documents which could not properly be explained in the absence of Ms Kuszka and was not explained to the Jury.

66. Second, the Recorder did not give any direction to the Jury about the admission of the hearsay evidence and the limitations of such evidence. Given the tension to which we have just referred, such a direction (which is basic good practice) was clearly necessary in this case. Nor was anything said to the effect that the prosecution accepted that Mr Rae had thrown the first punch during the incident inside the pub. The reason why such a direction is basic good practice is that a Jury may otherwise be confused about the status of such evidence and how to approach it.

67. Third, the Recorder did not inform the Jury immediately upon taking the decision that they would be directed to ignore the evidence from Ms Kuszka that had been read to

them the previous day. Again this would have been basic good practice which guards against evidence becoming lodged in a Jury's mind.

68. Fourth, the effect of the previous failures was that the case progressed beyond the close of the case for the prosecution without the Jury having been told to ignore Ms Kuszka's evidence. In those circumstances, as conceded by the Crown, the Recorder should have considered the provisions of section 125. Since it had not been withdrawn from the Jury, the case against the defendants was based in part upon Ms Kuszka's written statement. For the reasons we have discussed above, there were difficulties that rendered her statement unconvincing. Although the case against the defendants was also supported by the other evidence upon which the prosecution relied, Ms Kuszka had been most close to and closely involved with Mr Rae and, had her evidence been convincing, it would have been an important part of the prosecution case. There is a danger in second-guessing a decision that was not in fact taken, but our view is that, had the provisions of section 125 been considered, they may well have led to the conclusion that the Jury should be discharged. What is undeniable is that the existence of section 125 and the steps it requires are an important procedural safeguard that was not implemented when it should have been.

69. Fifth, when the Recorder eventually directed the Jury to disregard Ms Kuszka's evidence he gave them no explanation or reasons for his decision. We have set out his direction at [32.] above. Although he accurately set out the circumstances, the only explanation he gave was that, if the prosecution had provided the information earlier "we could have had another think about what … should happen to Miss Kuszka's evidence." In our judgment that left the field entirely open for speculation by the Jury about what was the real reason for the exclusion of her evidence.

70. Ms Kuszka's evidence went not only to the primary facts of the incident but also to the question of contamination which, for the reasons we have outlined, was a necessary and important part of the case being run by the appellants. We agree with the Crown that the question of admission of the body-worn footage is less weighty than the difficulties emerging from the treatment of Ms Kuszka's evidence. However, we also agree with Mr Sullivan that the body-worn footage was relevant and admissible and that the Recorder's assessment that it had *no* probative value was wrong. Its value may have been limited but, given the case that the defendants were obliged to run if their self-defence arguments were to survive scrutiny by the Jury, at least some of it should have been admitted.

71. With these considerations in mind, we come to the question that we must answer: do we think that the convictions in this case are unsafe? On the one hand, the prosecution had a strong evidential case, even without Ms Kuszka or the body-worn footage. However, we are driven to the conclusion that the combined effect of the errors that we have outlined was to render the trial process unfair. We are particularly influenced by the absence of the normal procedural safeguards, namely (a) giving a prompt direction to the Jury about how they should treat the written evidence when it was admitted and read to them, and (b) giving a further prompt direction to ignore it when that decision was taken, and (c) the failure to consider the provisions of section 125 of the 2003 Act after the close of the case for the prosecution. That being so, the only way to remedy the unfairness of the trial process is to set aside the convictions. However, we should also add that, in our judgment, the errors led to a real risk that

the convictions are unsafe, on the conventional basis that, had the errors not occurred, we cannot be sure that the Jury would have reached the same verdicts.

72. For these reasons we quash the convictions of each of the appellants. We order that there shall be a retrial and that the Appellants shall have conditional bail pending the retrial, all on the terms more particularly set out in the orders which we make and hand down with this judgment.