No. 202101647 B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2021] EWCA Crim 1760

Royal Courts of Justice

Wednesday, 10 November 2021

Before:

LADY JUSTICE CARR

MRS JUSTICE TIPPLES

SIR NIGEL DAVIS

REGINA

V

SAMUEL BENJAMIN SOUTH

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MR R. HALLOWES appeared on behalf of the Appellant.

MR I. MORGAN appeared on behalf of the Respondent.

JUDGMENT

LADY JUSTICE CARR:

Introduction

1
On 14 May 2021 in the Crown Court at Ilford, before HHJ Black ("the judge") and a jury, the appellant (then aged 35) was convicted (by a majority verdict of 11 to one) of wounding with intent to do grievous bodily harm contrary to s.18 of the Offences Against the Person Act 1861 ("s.18") (count 1). He was sentenced to six years' imprisonment.

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This is his appeal against conviction, for which purpose he has had the benefit of representation by Mr Hallowes, as he did at trial below. Mr Morgan appears for the respondent. Both have developed their positions skilfully before us.

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The gravamen of this appeal is that the appellant's conviction is unsafe on the basis of a material misdirection as to the necessary mens rea for the s.18 offence. It arises in circumstances where, shortly before the close of the prosecution case, an alternative count of unlawful wounding contrary to s.20 of the Offences Against the Person Act 1861 (count 2) was added to the indictment.

The Facts

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The alleged offending arose out of an incident which took place on 7 October 2018 involving the appellant and Mr Darryn Baxter. Mr Baxter was staying with his fiancée, Sarah Fox, at Flat 14, Rokeby Court. The appellant was staying next door with Ms Gemma Evans.

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An altercation occurred between the two men, who had only met for the first time that day. Mr Baxter had gone to Ms Evans' flat in search of his telephone. Ms Evans witnessed the incident and gave evidence at trial to the effect that the appellant, whom she described as very drunk and acting bizarrely, had had a glass in his hand and struck Mr Baxter "out of nowhere". Mr Baxter received injuries to his head and face.

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The police attended and arranged for Mr Baxter to be taken to hospital, where he was found to have sustained a deep laceration (around 5cm) in the left temple region extending to the ear and involving cartilage, together with tenderness over the left jaw joint. The wound was cleaned and sutured, but had to be reopened a few days later under general anaesthetic in order to remove glass and be re-sutured.

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The appellant was arrested some 45 minutes later, having by then fallen into a canal and with fractures to his eye sockets, nose and cheekbones.

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The prosecution case was that the appellant had, without provocation, struck Mr Baxter with a glass. The defence case was that the appellant, an alcoholic, had not intended to cause Mr Baxter grievous bodily harm. He had been drinking the previous evening and all through the day of the incident. He had been so drunk that he had not been able to form the necessary intention. He struck Mr Baxter with a glass because he was being attacked by Mr Baxter and others. The appellant gave evidence at trial.

Summing-up

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It is relevant to set out the circumstances leading to the judge's directions of law to the jury in his summing-up, which was (now conventionally) separated out broadly into directions of law, followed by counsel's speeches, and then by a summing-up of the evidence. Again, entirely appropriately, the judge provided counsel with both draft written legal directions and a draft written route to verdict for discussion before delivery to the jury. The legal directions were essentially uncontroversial.

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However, Mr Morgan submitted that the route to verdict required amendment. The judge had combined the questions relating to counts 1 and 2. Mr Morgan submitted that the issues on mens rea and self-defence should be separated out so as to differentiate between counts 1 and 2. His concern was that the approach taken in the first draft route to verdict could lead to a conclusion that the appellant was guilty on count 2, when in fact the correct conclusion on the jury's findings would be that he was guilty on count 1. Mr Hallowes fairly accepted that Mr Morgan had a point.

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The judge acceded to the prosecution submission and produced a second route to verdict, which he then incorporated into his written legal directions. This final version read:

“**Both counts:**

1. Has the prosecution satisfied you so that you are sure that Mr South used some force on Mr Baxter which caused Mr Baxter to suffer a wound (really serious injury)?

If you are sure that he did, proceed to Question 2.

If you conclude that he did not or may not have used force, verdict not guilty on both counts 1 and 2.

Count 1:

2. Has the prosecution satisfied you so that you are sure that despite his intoxication through voluntary consumption of drink (or drugs or both) Mr South did form an intention to cause Mr Baxter really serious injury?

If you are sure that he did form that intention, proceed to Question 3.

If you conclude that he did not or may not have done so, verdict not guilty on count 1 and proceed to consider count 2.

3. Has the prosecution satisfied you so that you are sure that Mr South's belief that he was being attacked was mistaken because he was so intoxicated?

If you are sure that it was a mistaken belief, self-defence does not arise and proceed to Question 6.

If you conclude that his belief that he was being attacked was not a mistaken belief caused by drink, proceed to Question 4.

4. Has the prosecution satisfied you so that you are sure that Mr South was the aggressor and was not under attack at the time he inflicted the wound on Mr Baxter?

If you are sure that he was the aggressor, proceed to Question 6

If you conclude that he was not or may not have been the aggressor, proceed to Question 5

5. Has the prosecution satisfied you so that you are sure that the force used by Mr South was unreasonable in all the circumstances as he perceived them to be at the time?

If you are sure that the force used was unreasonable, proceed to Question 6

If you conclude that the force used was or may have been reasonable, not guilty verdict on count 1.

6. Has the prosecution satisfied you so that you are sure that when Mr South used unlawful force on Mr Baxter, he either intended to cause Mr Baxter some injury, however slight, or he was aware of a risk that he might cause Mr Baxter some injury, however slight, but took that risk?

If you are sure this was the case, verdict guilty on count 1.

If you conclude this was not or may not have been the case, verdict not guilty on count 1 and proceed to consider count 2.

Count 2:

1. Has the prosecution satisfied you so that you are sure that Mr South's belief that he was being attacked was mistaken because he was so intoxicated?

If you are sure that it was a mistaken belief, self-defence does not arise and proceed to Question 4.

If you conclude that his belief that he was being attacked was not a mistaken belief caused by drink, proceed to Question 2.

2. Has the prosecution satisfied you so that you are sure that Mr South was the aggressor and was not under attack at the time he inflicted the wound on Mr Baxter?

If you are sure that he was the aggressor, proceed to Question 4

If you conclude that he was not or may not have been the aggressor, proceed to Question 3.

3. Has the prosecution satisfied you so that you are sure that the force used by Mr South was unreasonable in all the circumstances as he perceived them to be at the time?

If you are sure that the force used was unreasonable proceed to Question 4.

If you conclude that the force used was or may have been reasonable, not guilty verdict on count 2.

4. Has the prosecution satisfied you so that you are sure that when Mr South used unlawful force on Mr Baxter, he either intended to cause Mr Baxter some injury, however slight, or he was aware of a risk that he might cause Mr Baxter some injury, however slight, but took that risk?

If you are sure this was the case, verdict guilty on count 2.

If you conclude this was not or may not have been the case, verdict not guilty on count 2."

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It is common ground that Question 6 in count 1 (“Question 6”) was there in error. It should have been removed when the questions on counts 1 and 2 on intention and self-defence were separated out. However, no one identified the error at any stage, including when the revised document was provided to counsel or later the jury and when the legal directions were given.

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The judge first gave oral legal directions to the jury. He identified the three main issues as:

i) Whether it was the appellant who caused the injury to Mr Baxter's face;

ii) Whether the appellant had the necessary intent to do what he is alleged to have done; and.

iii) Whether the prosecution had made the jury sure that it was the appellant who had caused the injury and he was not acting in lawful self-defence when he did so.

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For the purpose of both counts, the judge directed the jury on the meaning of "maliciously" and on the meaning of "wound and serious injury." He said that maliciously meant that the appellant either intended to cause Mr Baxter some injury, however slight, or was aware of a risk that he might cause Mr Baxter some injury, however slight, and took that risk.

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We pause at this stage to intervene that, whatever might be or might have been the position on the s. 20 offence, it is rarely, if ever, necessary to give a direction on malice for the purpose of a s.18 offence: see R v Mowatt [1968] 1QB 421; [1976] 51 Cr App R 402 (at 426B) and Archbold at 19-262.

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The judge then addressed the question of specific intent on count 1 as follows:

"I now want to look at the intent which is required in count 1, but is not required in count 2 and that is the intent to cause really serious harm to Mr Baxter ...

If you think that the defendant was or may have been so drunk that he did not form an intention to cause Mr Baxter really serious injury, you must find the defendant not guilty of count 1 and go on to consider the alternative of count 2, but if you are sure that, despite being affected by alcohol, the defendant did intend to cause Mr Baxter really serious injury, then, subject to what I am about to say about self-defence, you would go on to find the defendant guilty of count 1 and not have to consider or return a verdict on count 2 ..."

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He went on to say that the question on count 2 was whether the jury was sure that the appellant had acted maliciously in the legal sense that he had explained (and ignoring the involvement of drink).

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The jury were then provided with the revised route to verdict. The judge read out the questions in turn, including Question 6. When introducing the questions for count 2, he emphasised, again, that, unlike for count 1, count 2 did not require the appellant to have the specific intention to cause really serious injury.

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Following counsel's speeches the next day and having summed up the evidence and completed his oral legal directions, the judge provided the jury with his written legal directions, which were materially identical to his oral legal directions.

Grounds of Appeal

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Mr Hallowes submits that the judge gave a material misdirection as to the necessary mens rea on count 1 and that therefore there is a risk that the jury convicted without being sure of the requisite intent. Mr Hallowes submits that it would have been better in the route to verdict if the judge had raised the questions relating to alcohol before the questions relating to intent. He accepts that if the questions on count 1 had stopped at Question 5, there would be no cause for concern. However, Question 6 contradicted Question 2 on count 1 (“Question 2”). The misdirection was compounded by Question 4 in relation to count 2, which was framed in precisely the same way, albeit correctly in the context of count 2. The only basis on which it is said the jury could avoid Question 2 was in the event of a not guilty verdict on count 1. Having answered Questions 1 to 5, the jury would necessarily have reached Question 6, which by definition contradicted Question 2. Whilst the written legal directions were accurate, the route to verdict was wrong and key to the jury's deliberations. Mr Hallowes emphasises that “all roads led to Question 6”. Whatever provisional conclusion the jury may have reached on Question 2, their deliberations on self-defence might have influenced their views on intent. They may have wished to revisit intent. The route to verdict had the potential to cause significant confusion.

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Beyond that, it is submitted that the prosecution's case was not a strong one evidentially. The jury deliberated long and hard and the verdict was a majority verdict. Mr Baxter had credibility issues. Ms Evans' evidence to the effect that the applicant had left her premises uninjured was contradicted by the body-worn footage from a police officer, during the course of which a witness indicated that he had seen a man matching the appellant's description leaving the property with a black eye and a bandage on his hand. There was also significant evidence as to the very high level of the appellant's intoxication at the time.

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It can be said, submits Mr Hallowes, that the conviction is unsafe in all the circumstances.

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Resisting the appeal, Mr Morgan submits that there was no material misdirection. Neither prosecution nor defence counsel objected to Question 6. Had Question 6 stood alone, it would have contained a material misdirection. It had been intended for count 2, but no one noticed that it contained what were only otiose requirements on count 1. Those requirements did not contradict the earlier parts of the route to verdict and were not wrong as such. If the jury had got to Question 6, they would already have been sure of intent. They had been directed in terms to follow the route to verdict faithfully and the route to verdict has to be seen in the full context of the judge's legal directions.

Discussion

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Question 6 clearly was not intended to appear in the route to verdict in the context of count 1. It was designed for inclusion in the questions for count 2. The issue for us is whether its presence renders the appellant's conviction unsafe.

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Looking at the route to verdict as a whole, and given the judge's oral and written legal directions, we have concluded that it does not. The oral legal directions on the necessary specific intent on count 1 (as set out above) were clear and accurate. The written directions were also clear and accurate. Thus, the jury was directed in terms that:

"Count 1 requires that you be sure not only that Mr South intended to cause Mr Baxter some harm, but also that the harm he intended amounted to really serious harm or injury. In relation to count 1, Mr South says that he did not intend to cause Mr Baxter really serious injury, because he was unable to form that intention, given that he is an alcoholic, had been drinking the previous evening and all day on Sunday and was drunk ...

If you think that Mr South was or may have been so drunk that he did not form an intention to cause Mr Baxter really serious injury, you must find Mr South not guilty of count 1 and go on to consider the alternative count 2, but if you are sure that despite being affected by alcohol Mr South did intend to cause Mr Baxter really serious injury, you will then move to consider the Question of whether Mr South was acting in lawful self-defence."

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The feature of specific intent for count 1, unsurprisingly, featured in counsels' closing submissions, at least so far as the prosecution was concerned. There were no questions raised by the jury arising out of these legal directions or the route to verdict itself. There was no suggestion of any confusion on their part.

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The critical question for present purposes is Question 2. Consistent with his oral legal and written directions, when it came to this part of the route to verdict, the judge directed the jury in terms that if they did not answer that question in the affirmative, their verdict would be not guilty on count 1. Only if Question 2 was answered in the affirmative were the jury to go on and consider Questions 3 to 5, which in turn led on to Question 6. There was nothing provisional whatsoever about the directions so far as the conclusion on Question 2 was concerned.

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On any view, therefore, the jury were sure that the appellant had the necessary mens rea for a s.18 offence; namely they were sure that he formed an intention to cause Mr Baxter really serious injury. Given that conclusion, they could only have answered Question 6 in the affirmative. Question 6 added nothing, which may well explain why the error did not leap out to anyone at the time that it was made. Fundamentally, in our judgment there is no risk that the jury convicted the appellant on count 1 without being sure that the necessary ingredients for that offence were made out.

Conclusion

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For these reasons, the appeal will be dismissed.

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Both counsel have very fairly accepted that they should have noticed and drawn to the judge's attention the errant Question 6. We repeat the importance of compliance by both prosecution and defence counsel with their duties at the time of the initial directions to the jury and summing-up. In the recent case of R v Sakin & Ors[2021] EWCA Crim 411 this court said (at [77])

" ... We underscore that it is a core duty of trial advocates, both for the prosecution and defence, to focus on the judicial summing-up at the time that it is given. This is necessary for the proper discharge of the advocate's overriding duty to the court in the due administration of justice (to which the advocate's duty to act in the best interests of his or her client is subject). In particular, it is the advocate's duty to raise promptly with the Judge what appears to be a material error in the summing-up, whether it be of law or fact, at the time of the summing-up. To do so is not inconsistent with the advocate's duty to the client, not least since a failure to raise complaint or suggestion at the time of a summing-up may be regarded on an appeal as relevant to the validity of any later complaint (see Reynolds at [61] and [66])."

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