IN THE COURT OF APPEAL
CRIMINAL DIVISION No. 202302673 B2

[2024] EWCA Crim 88

Royal Courts of Justice

Tuesday, 23 January 2024

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE CHOUDHURY

HIS HONOUR JUDGE ANDREW LEES

REX

V

DAMIEN DANIEL HEAVEN

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MS L. DEUXBERRY appeared on behalf of the Appellant.

MR E. DIVARIS appeared on behalf of the Respondent.

JUDGMENT

LORD JUSTICE POPPLEWELL:

1
The appellant was charged with three offences arising out of an incident involving Ms Cosson on 22 September 2022. Count 1 charged intimidation by threatening and assaulting her, intending to interfere with an investigation in which she had assisted the police in relation to an assault by the appellant on someone else the previous May. Count 2 charged assault by battery on Ms Cosson. Count 3 charged criminal damage by damaging her mobile phone.

2
The appellant pleaded guilty to the criminal damage charge. He was convicted of the intimidation and assault charges after a trial in the Crown Court at Bournemouth before Mr Recorder Dow and a jury, by a majority. He appeals against his conviction on the intimidation charge with leave of the single judge.

3
The sole ground of appeal is that the Recorder was wrong to reject a submission of no case to answer, which was advanced on the ground that there was no evidence from which a jury, properly directed, could be sure of the necessary ingredient of the intimidation offence that the appellant knew or believed that Ms Cosson was assisting the police in the investigation of the May 2022 offence.

4
The appellant and Ms Cosson were near neighbours in a block of residences at Drummond Court. They had not had a good relationship for several years, and she had made a number of complaints about him to the landlord. As she accepted in cross-examination, these complaints had resulted in him being evicted by the landlord a few weeks before 22 September 2022.

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The prosecution case, supported by the evidence given by Ms Cosson and other evidence, was that what happened on that day was as follows. She was in her car and looking for a parking space when she noticed the appellant sitting in his car at the bottom of the road. She parked her car and went to get her shopping out of the boot. The appellant drove up the street and pulled up next to where she was standing. The appellant verbally abused her and spat at her. She had her phone in her hand and began to record the appellant. The footage ended abruptly when the appellant pushed her backwards and she fell to the ground. She believed that the appellant was trying to take her phone and so she held onto it tightly. The appellant did not at that stage succeed in getting her phone and he appeared to have left. The appellant then ran up towards her from behind, grabbed her neck and jaw and pushed her to the floor. He shouted "I am going to get you" and "You're a snitch". He then took her mobile phone and threw it onto a nearby bin store, from where it was later recovered. When recovered it was damaged.

6
Ms Cosson had previously assisted the police by providing footage of the appellant assaulting another person in May 2022. The prosecution had no positive case or evidence as to when or how the appellant came to discover her involvement. She had made it clear to the police that she did not want to be identified, and the evidence of the officer involved, PS White, in a statement made later, dated 31 July, confirmed that arrangements had been made for Ms Cosson to provide the footage at a location away from her home, so that the appellant would not be aware of the police visiting her; and any communications with her were via phone or email for the same reason. The footage was

exhibited to PS White's statement using PS White's initials so as to avoid revealing its source. That footage had been provided shortly after the event in May and the appellant had been charged in May.

7
It was not suggested that he had reacted by doing anything towards the appellant in the period between May and September, nor was it suggested that the appellant knew or believed that she had assisted an investigation by reason of the nature of the footage. Rather, the prosecution's case was that the jury could infer such knowledge or belief from his use of the word "snitch", which it was said had a recognised meaning as a police informant.

8
In the defence case statement the appellant accepted that he called her "a snitch", but said that this was in relation to her repeated attempts to get him convicted.

9
At the close of the crown's case, Ms Deuxberry, who has appeared before us, made a submission of no case to answer on the intimidation count. The submission was framed by reference to the absence of evidence on which the jury could be sure that the appellant's conduct, if proved, took place in the knowledge and belief that Ms Cosson had assisted the investigation of the appellant for the May offence. It was on the basis of such knowledge and belief that the prosecution contended that there was an intention, by way of intimidation, to obstruct, interfere with or pervert the course of that investigation.

10
The Recorder, in dismissing the application, said that he found it finely balanced, but that his decision was guided by the fact that the appellant had not in interview given an explanation for the use of the word "snitch" which was different from its sense as a police informant. In interview he had denied the assault, but answered no comment to other questions, including questions as to whether he was aware that Ms Cosson had supplied footage in relation to the May incident or that it had been seized from her; he gave the same no comment response to the questions "Why would you call her a snitch?" and "What does snitch mean to you?"

11
When the appellant came to give evidence after the ruling, he denied that he had used the word "snitch", or that he had assaulted Ms Cosson as alleged or at all. Denial of the use of the word "snitch" was inconsistent with his defence statement, which was unsigned. In his evidence he said that he had not signed or approved it and that he did not agree with it. In summing-up the Recorder directed the jury about drawing any adverse inference from this inconsistency. No criticism is made of that direction.

12
Before us Ms Deuxberry repeats the submissions made to the Recorder. The use of the word "snitch" was, she submits, consistent with it referring to complaints to the landlord resulting in the appellant's eviction. The prosecution had accepted that there was no direct or positive evidence that he knew or believed Ms Cosson had been involved in the investigation of the May offence. On the contrary, the positive evidence pointed towards the appellant not knowing of her involvement. In this context Ms Deuxberry emphasised the following:

(1)

The evidence of PS White which indicated that steps had been taken to prevent the appellant knowing about Ms Cosson's involvement;

(2)
Ms Cosson's acceptance in cross-examination that on 22 September the appellant had not said anything to her about an investigation into the May assault or that he knew or suspected she had provided footage;

(3)
Ms Cosson's acceptance in cross-examination that she had been responsible for his eviction due to making complaints about him; and that when asked if the use of the word "snitch" related to that instead, she had responded that she "didn't know"; and

(4)
The unused body-worn camera footage which was played to the Recorder from when police attended Ms Cosson's house around 30 minutes after the incident on 22 September. In that footage Ms Cosson tells officers that she had recently sought reassurance from the police about whether there had been any recent change, or reason, for the appellant to have found out that she had assisted the police, and she had been reassured that there was not any such reason.

13
On behalf of the Crown Mr Divaris, who like Ms Deuxberry also appeared at trial, submitted that the Recorder was right to reject the submission of no case to answer because "snitch" had an accepted meaning as a police informant and the appellant had not offered any alternative explanation for use of the word when questioned in interview. He also relied on the fact that in his evidence he had denied using the word at all, rather than giving an explanation for its use in accordance with his defence case statement.

14
We consider that the prosecution evidence, taken at its highest, was not capable of making a jury sure of the appellant’s knowledge or suspicion that Ms Cosson had assisted the police in relation to an investigation into the May incident, which was an essential ingredient of the intimidation offence. The use of the word "snitch" was equivocal and equally consistent with it being a reference to the steps taken to get the landlord to evict the appellant, a possibility which Ms Cosson's answer in cross-examination recognised when it was put to her. The other evidence positively pointed away from his knowing or suspecting her involvement. His lack of explanation in interview was not a sufficient reason to leave the issue to the jury. In referring to that feature as tipping the balance, the Recorder no doubt envisaged that if he gave evidence in accordance with his defence statement, the prosecution would be entitled to invite the jury to draw an adverse inference from silence at interview pursuant to s.34 of the Criminal Justice and Public Order Act 1994. But a jury cannot convict wholly or mainly on the basis of such an inference and that would have been the effect of treating that silence as sufficient to justify leaving the issue to the jury.

15
As to Mr Divaris' submission relying on the evidence subsequently given by the appellant that he did not use the word "snitch", that subsequent development is not capable of affecting the question of whether the Recorder should have accepted or rejected the submission of no case to answer at the time that he ruled upon it. It is, however, pertinent to the question which we must ask ourselves whether the conviction is nevertheless safe, the jury obviously having been satisfied that that he did use the word: that necessarily follows from their verdict.

16
His denial that he used it does not alter the fact that the jury cannot properly have been sure, on the evidence, that his use of the word referred to her being a police informant. It remained the defence case that if the word was used, contrary to the appellant's evidence, the jury could not treat it as sufficient to be sure of the relevant ingredient of the intimidation offence, because it could have referred to her part in this eviction. His denial of the use of the word remains consistent with his having used it in that sense, the denial being explicable as seeking to dispel evidence of motive for an assault: this was a case in which at trial he was denying that any assault took place at all and therefore he would not have wanted to have accepteds that he had said something which might have provided a motive.

17
Accordingly, the intimidation charge should have been withdrawn from the jury and the conviction on that charge is unsafe. The appeal will be allowed by quashing the conviction on Count 1.

Now Mr Divaris, there is no question presumably of the Crown seeking a retrial?

MR DIVARIS: No, my Lord, there is not. There is however an application for resentence of the assault by beating under s.4 of the Criminal Appeal Act. Your Lordship will be aware that in sentence Mr Heaven received a total of two years, but no separate penalty for assault by beating.

LORD JUSTICE POPPLEWELL: Yes. Does that matter? I have in mind the release provisions. You are not going to invite us, are you, to impose a further consecutive sentence on that or are you?

MR DIVARIS: No, I have also been informed by learned friend that Mr Heaven is currently serving an essential five and a half years for a separate matter, possession with intent to supply.

LORD JUSTICE POPPLEWELL: If you are not inviting us to impose a sentence that is going to increase the length of his custody, does it matter that it was no separate penalty?

MR DIVARIS: I am instructed simply to mark the criminality of the assault by beating.

LORD JUSTICE POPPLEWELL: Well, he was convicted on the same occasion of another ABH offence, but I understand the submission.

Is it there anything you want to say about that?

MS DEUXBERRY: Not unless I can assist your Lordships, no.

LORD JUSTICE POPPLEWELL: We will rise.

(Short Adjournment)

LORD JUSTICE POPPLEWELL:

18
We do think it is right to reconsider the sentence on the battery, given that that will be the only sentence, as we understand it, in respect of this victim; and we will therefore impose a concurrent sentence of three months' imprisonment on Count 2 for the battery. That will make no difference to the overall length of time spent in prison. When we say concurrent, that will run concurrently to the 12-month sentence that was imposed for the ABH offence on S20220353 for which he was sentenced at the same time by the Recorder.

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So the order will be that on Count 1 the conviction will be quashed and on Count 2, pursuant to s.4 of the Criminal Appeal Act 1968, the sentence of no separate penalty on Count 2 will be quashed and instead a sentence of three months' imprisonment will be imposed, but that will run concurrently with the sentence of 12 months which was imposed on the summary offence which was sent, S20220353 para.1, for the unrelated ABH.

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Mr Heaven, the outcome of the appeal is that your conviction for the intimidation offence has been quashed. That sentence of 12 months for that offence disappears. We have imposed a sentence of three months for the battery, but that will run concurrently to the other sentences that you were sentenced for at the time and will have no overall effect on the length of time you spend in custody.

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