Neutral Citation Number: [2023] EWCA Crim 22

Case No: 202201202 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN
T20217383 and T20210418

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2023

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE CHEEMA-GRUBB
and
MRS JUSTICE ELLENBOGEN

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Between :

Gold	**Appellant**
- and -	
Rex	**Respondent**

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- -

M Pasteris (instructed by ACA Law) for the **Appellant**
R Brown (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing dates : 13.12.2022

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Approved Judgment

This judgment was handed down remotely at 11:30am on Monday, 16 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lady Justice Thirlwall :

1. The appellant, Harsymram Gold, is 40. On 1st November 2021 in the Crown Court at Wood Green he pleaded guilty to Counts 1-14 and 17 on a 23 count indictment. Counts 1-12 were offences of theft as was count 17. Count 13 was an offence of fraudulently using a vehicle licence contrary to s.44(1) and (3) Vehicle Excise and Registration Act 1994. Count 14 was an offence of driving whilst disqualified.

2. A trial took place on the remaining counts which were renumbered 1- 6 and on 23rd March 2022 he was convicted on all 6 counts. On 8 July he was sentenced as follows.
Count 1, robbery contrary to s.8(1) Theft Act 1968, an extended sentence of 11 years imprisonment (8 year custodial term and 3 year licence).
Count 3, robbery, 4 years' and 6 months imprisonment, concurrent.
Count 5, robbery, 2 years' imprisonment, concurrent.
Count 6, robbery, 4 years' imprisonment, concurrent.
Count 2, having an article with a blade or point contrary to s.139(1) Criminal Justice Act 1988, 6 months' imprisonment, concurrent.
Count 4, having an article with a blade or point contrary, 6 months' imprisonment, concurrent.

3. The judge imposed no separate penalty on counts 1-14 and count 17 on the original indictment.

4. The judge properly reflected the whole of the criminality in the sentence on Count 1, imposing concurrent prison sentences on the other offences of which the appellant had been convicted at trial. However, it was not appropriate to impose no separate penalty in respect of the offences to which he had pleaded guilty. Concurrent sentences of suitable length should have been imposed to mark the litany of shoplifting as well as the driving offences, not least driving whilst disqualified which had been going on for well over a decade. We say no more about the sentence. Leave to appeal was refused and the application has not been renewed.

5. This is his appeal against conviction which he brings with the leave of the Single Judge on two grounds. There is also before the court an invitation pursuant to section 23A of the Criminal Appeal Act 1968 to direct the Criminal Cases Review Commission to investigate a juror who is the subject of the second ground of appeal and to report to the Court.

FACTS

Background

6. The appellant pleaded guilty to a very large number of shoplifting offences committed between 6th January and 17th April 2021 in which he took multiple bottles of alcohol (and, on occasion, meat), leaving the stores without paying. Many of the offences are recorded on CCTV which we have seen. The footage showed the appellant operating in a brazen and persistent fashion. On occasion the appellant would go into a shop with a bag over his shoulder. The next time he would have two large bags. He made no attempt to hide what he was doing, although on some occasions he was wearing a Covid mask and a hat to hide his identity. He was nonetheless a distinctive and large

figure. There is footage of young shop assistants standing near him as he helped himself to a large amount of stock from the shelves. On one occasion he brought a large empty suitcase with him, along with shoulder bags. He proceeded to fill them all with a range of products, mainly bottles of alcohol. On most occasions he simply walked towards the tills and walked out of the shop. On occasion he can be seen pretending to use the self-service tills while taking bottles out of his bags and putting them into supermarket carriers to which he had helped himself.

The counts on the indictment

7. The offences in respect of which he was tried were all more serious. In each case a member of staff challenged the appellant. And on each occasion, it was their evidence that he threatened them. On occasions he threatened the staff member or other members of staff with a blade or a knife. On the last occasion he barged his way past a female store manager who had tackled him. We turn to the detail.

8. On 14th April 2021, the appellant went into Marks and Spencer in Muswell Hill. At around 3-3.30pm, he made his way to the wine and crisps section. He was confronted by a member of staff, who informed him he was banned from the store and asked him to leave. The appellant ignored the staff member, took bottles off the shelf and placed them into a bag. He was again told to leave. He removed a knife or a blade from his jacket pocket and stated, "If you get involved, you'll get hurt". The staff member was shocked and felt threatened. He stepped back. The appellant walked out of the shop with the goods. Those were the brief facts of counts 1 and 2 on the trial indictment.

9. On 7th May 2021, a man in a balaclava entered Sainsbury's in Enfield and walked directly to the sections displaying wine, and then crisps. He took a plastic bag from beside a till and placed a few bottles of wine inside. When confronted by a member of staff who pointed out that he had not paid, he produced a knife from his bag and pointed it at the store security guard, Dominic Delima. He took two more bottles and left the store (Counts 3 and 4). Staff took a photograph of the vehicle registration number of the car he left in.

10. The next day, on 8th May 2021, the appellant attended a Next store. He was holding a store basket with a coat draped over it. There were clothes in the basket. When he moved towards the exit, the store manager, a woman, confronted him and told him to put the clothes back. As he attempted to leave the store, he charged and pushed past her, with the basket, causing reddening to her chest. Those were the facts of count 5.

11. Staff in Sainsbury's and in Next each recorded the vehicle registration number of the car in which the appellant left, LS53 VFC.

12. Finally, on 11th May 2021 the appellant went back to Marks and Spencer in Muswell Hill. On this occasion he was wearing a small man bag across his body. He was not wearing a mask or hat. At around 11am, he picked up bottles of champagne and attempted to leave the store via the entrance, without paying. He was challenged by an undercover security guard, who told him to put the items back and to leave. The appellant said, "If you don't move away from me I will smash the bottles on your head". The security guard asked him to put the bottles into a trolley and grabbed hold of him. One of the bottles fell and smashed. The appellant put the bottles in the trolley and said he was going to leave. He opened his bag and produced a knife, pointing it at the

security guard. He grabbed some of the items in the trolley, left the store and got into a vehicle (Count 6).

13. On 13th May 2021, the appellant was stopped by police driving a vehicle with the registration number LS53 VFC. This number was found to be false, the true registration number being LS06 FZJ. In 2008, the appellant had been disqualified from driving until he passed an appropriate driving test. It would seem that he never passed such a test but drove nonetheless. Those were the facts of the offences at 13 and 14 on the original indictment.

The Trial

14. The prosecution called evidence from some of the complainants and from other eyewitnesses. They also adduced CCTV footage, all of which we have watched, as did the jury.

    The Defence case shifted from the appellant's initial position that it was not he who was responsible for any of the offences to an acceptance, when he gave evidence, that he was the person shown to be shoplifting on the CCTV. He had not expected that members of staff would attempt to stop him and when they had done so, he had been terrified and had left the store. He denied being in possession of a bladed article, or otherwise using or threatening force in any of the stores. He denied pushing the store manager in Next stating that she pushed him and/or he brushed past her.

15. The issue for the jury was whether the appellant had used force or put any person in fear of being subjected to force, with a knife or bladed article, or otherwise. They convicted.

GROUNDS OF APPEAL

16. There are two grounds of appeal:-
    i) The Judge wrongly allowed the Prosecution to play relevant CCTV footage to its witnesses as a memory refreshing aid. This effectively permitted part of their evidence in chief to be commentary on the CCTV footage.
    ii) The judge wrongly refused to discharge a juror who disclosed part-way through the trial that she knew the victim of the Count 3 robbery, describing him as "nice" and "chatty".

17. In granting leave on the second ground the single judge said that it was arguable that the judge ought to have made more inquiries than she did before refusing to discharge the jury. It seems to us that if there is any merit in the argument then it would follow that Ms Pasteris would be entitled to argue that the judge was wrong to refuse to discharge the juror. In any event she invites the court to direct the CCRC to investigate the position with the juror.

Ground One

18. The prosecution relied on several sections of CCTV evidence which were played during the Prosecution opening. Just before he called the first witness on the first robbery Mr

Brown indicated that he was going to play the CCTV footage to the witness while he was in the witness box. Ms Pasteris objected. She said that the use of the CCTV footage in examination in chief would have the effect of refreshing his memory, impermissibly. She intended to put the CCTV footage to the witness in cross examination. If matters arose on which re-examination was required, she would have no objection to the CCTV being put to the witness by the prosecution at that stage. The judge directed the prosecution to call the evidence of the witness in chief without showing the CCTV and, if necessary, the matter could be reviewed at that stage.

19. Towards the end of his examination in chief, counsel for the crown indicated that he was going to move to the CCTV. Ms Pasteris objected. The judge heard short argument in the absence of the jury. Ms Pasteris maintained her objection for the reason she had given earlier. The judge asked the prosecution whether there would be any unfairness to the prosecution in proceeding as Ms Pasteris had suggested. Mr Brown said there would be no unfairness to the prosecution but it would be unfair to the witness. It was not entirely clear why that should be the case, since there were no material inconsistencies between his evidence from the witness box, his statement, and the CCTV, although it is clear that the footage contained a lot more information than the witness statement.

20. The judge asked Ms Pasteris whether she intended to put to the witness any inconsistencies between the witness's account and the CCTV. Ms Pasteris said she did not. The judge indicated in brief terms that she was against Ms Pasteris. She gave a short ruling, having set out the objection,
"In my judgment, the witness giving evidence-in-chief, and having given a clear account in line with his statement, was entitled to see the CCTV. He did not change his account in chief, having seen it, when I ruled against the Defence." The judge went on to say that she was confirmed in her view that this was correct because, when the witness was cross-examined and defence counsel zoomed in at various points on the footage, "the defendant suffered no prejudice whatsoever in the CCTV being played when it was. It was in the interests of justice, both Prosecution and the Defence, that the witness saw the CCTV after he had given his account but before cross-examination. The Defence made proper progress in cross-examination as I would have expected."

21. Having lost the argument in respect of that witness, Ms Pasteris did not object to the same approach being taken to the other witnesses. As she put it, there was no point in making the same submission on each occasion, only to achieve the same result.

22. Mr Brown suggested, for the first time in submissions to this court, that the purpose of showing the CCTV footage had been to allow the witness to explain (eg) who could be seen on the footage, where they were standing and so on. Ms Pasteris observed that there was no issue about who was where and who was doing what. Only a small number of people were involved on each occasion. We have seen the footage. We take Ms Pasteris's point.

23. It is inescapable that the CCTV did not help on the issue of whether or not the appellant had threatened violence and whether, on two occasions, he had a knife or some other bladed article. All depended on the evidence of the eyewitnesses. Ms Pasteris' fundamental objection to the witness being shown the CCTV after he had given his own evidence and before she cross-examined was that it undermined the potential cross-

examination. It was therefore unfair. Having just seen the CCTV he would have been primed to answer in accordance with what he had just seen, she argued. Assuming that to be the case and acknowledging that there was no inconsistency between his evidence and the CCTV we cannot see that this is more than a theoretical difficulty on the facts of this case. Ms Pasteris argues that she might, for example, have wanted to ask the witness (unaware of what his answer might be) how the appellant had held the knife/whether he had raised it/how he had moved when he had it. She suggested that had the CCTV footage not just been shown to the witness he might have said something (about which he had not previously been asked) which was contradicted by the CCTV footage. She could then have relied on his answer to suggest to the jury that this undermined other parts of his evidence, presumably that he had been threatened and that the appellant had used a knife. This, in our judgement, is wildly speculative. The witness had given evidence which, before he knew what the CCTV showed, was consistent with it. Counsel is entitled to test the evidence and must put the appellant's case but we cannot see, on the facts of this case, that there was any realistic possibility of cross-examination yielding information that would have undermined the substance of the witness's evidence on the main issues.

24. Had there been a dispute about what the CCTV showed we can see that there might have been the potential for unfairness in proceeding as the prosecution wanted, but that was not the case.

25. Mr Brown's argument before the judge and in writing before us was that he always played CCTV footage to witnesses, in chief, without objection. That may well be so but on this occasion, there was an objection and his submissions to the judge did not develop much beyond the assertion that this was the way he always did things. That is not a principled approach to the introduction of evidence. Mr Brown could not help about the nature of the evidence that he elicited by way of commentary on the CCTV, nor could Ms Pasteris. It was apparent to us that this exercise was, broadly, a waste of time. We cannot see that fairness (to either side) required it. The witness could have given evidence in chief without reference to it.

26. There may well be circumstances where the approach adopted here would be unfair but that was not the case here. The witness having given evidence consistent with the CCTV footage, Ms Pasteris cross- examined effectively, making good use of the zoom button and the frame freeze function to demonstrate that no weapon could clearly be seen on the footage. The jury knew that, were appraised of the potential reasons for it (the position of the camera, the movement of people etc) and, in the end, had to decide who they believed.

27. Ms Pasteris submitted that the question of how CCTV evidence is put before the court should be the subject of guidance from this court. She helpfully provided to us guidance from the College of Policing under the heading "*Investigation Strategies*" (last updated on 19 May 2020). This sets out the approach to be taken by investigating officers when there is CCTV evidence of incidents to which there are eye-witnesses. Ms Pasteris reminded us of the observations of Lord Bingham CJ in *R v Roberts* (1998) CLR 682. In that appeal against conviction, it was submitted that a witness who had provided a witness statement should not, later, have been shown CCTV and allowed to amend his evidence in the light of it. The appeal was dismissed on the basis that the evidence had not been tainted by the showing of the CCTV and there had been no unfairness. Lord Bingham said (some 25 years ago) that the increased use of (what

was then) video footage "merited detailed consideration by the appropriate authorities with a view, after necessary consultation, to devising a code of practice." The Police College guidance reflects the observations of the court in *Roberts*. We do not understand the court there to have been suggesting that guidance to the courts was necessary or desirable. CCTV evidence is adduced before the Crown Court as a matter of routine every day. Counsel usually agree how the footage is to be put before the court. If they cannot agree then the judge decides it as part of his or her trial case management powers. There is no hard and fast rule. Each decision is highly fact sensitive. It is no surprise that this issue is not dealt with in the Criminal Procedure Rules It is something that is sorted out in the Crown Court. No guidance is required.

28. We are quite satisfied that there was no unfairness here and nothing which comes near to undermining the safety of the conviction. We reject this ground.

Ground 2

29. On 28th March a juror wrote a note to the judge. She said, "Around three years ago, I used to shop at Sainsburys at London Road. And even though I don't know any staff member personally, I recall a very nice black security guard. He was very nice and chatty and I believe it is Dominic from looking at the footage."

30. Ms Pasteris, who was rather caught on the hop, as she explained to us, made an application to discharge the juror. The judge refused and later gave a short ruling. She set out the contents of the note and continued, "The security guard is not a witness in the case. The defendant disputes he is the person shown in the footage [this being the appellant's position at that stage]. A passing knowledge of a person who is not a witness and not, therefore, subject to challenge, is not a legitimate, valid or necessary reason to discharge a juror. The jury have been properly warned and reminded as to their affirmation as jurors and they are able to try the case on the evidence. The application is refused."

31. Ms Pasteris argues that the judge was wrong not to discharge the juror, at least without first asking questions of her. There is a risk that she could have been motivated not to try the appellant fairly because she liked Dominic. Alternatively, or additionally, she submits that the CCRC should be asked to interview the juror and ask her questions. The outcome of the interview may or may not then be used to support this ground of appeal.

32. So far as is relevant, Section 23A of the Court of Appeal Act 1968 reads as follows.
Power to order investigations

(1) On an appeal against conviction … the Court of Appeal may direct the Criminal Cases Review Commission to investigate and report to the Court on any matter if it appears to the Court that—

(a) in the case of an appeal, the matter is relevant to the determination of the appeal and ought, if possible, to be resolved before the appeal is determined;

(aa) …

(b) an investigation of the matter by the Commission is likely to result in the Court being able to resolve it; and

(c) the matter cannot be resolved by the Court without an investigation by the Commission.

33. Ms Pasteris points out that the jury had been asked to indicate if they knew anyone on the list of names that was read out before the trial. Whilst Dominic's name was not on that list, it was on the indictment. The juror had not said anything, and this should have given rise to concern. We do not share Ms Pasteris' concern. It is plain that the name was not on the list of witnesses. No question was asked about the indictment but even if it had been there is no reason to think the juror would have realised that she had some (very limited) knowledge of the particular member of staff who was present at the store at a relevant time but for some reason not said anything. It is obvious that she recognised him on the CCTV. It was three years since she had shopped at that branch of Sainsbury's. There is nothing sinister in the fact that she did not mention it earlier since as soon as she realised, she knew who he was, she declared it. She was self-evidently being scrupulously fair.

34. Relying on the leave given by the single judge, Ms Pasteris submits that the trial Judge ought to have asked the juror questions before making her decision. She suggested half a dozen possible questions including, "Do you think that knowing the alleged victim might or might potentially (whether consciously or sub-consciously) affect your view of this case?" It is not necessary to rehearse the other questions. They, and the question we have quoted serve unnecessarily to complicate a simple issue: was the juror able fairly to try the defendant on the evidence?

35. The juror had shopped at Sainsbury's three years before the events in question. The victim of the offence, the security guard whom she recognised, was not a witness. Evidence of the events constituting the offence involving him came from other people. The question was whether or not the appellant had a knife (although earlier in the trial and at the time of the ruling it was his case that the person involved was not him). We cannot see how the fact that the victim was described as nice and chatty even arguably gives rise to any potential concern about the juror's ability fairly to try the appellant according to the evidence.

36. There are occasions when it is necessary to ask a juror or indeed a whole jury whether or not they still feel able to try the case fairly in accordance with the evidence. It may be that some judges would have done that on this occasion but in our view such an inquiry was unnecessary where the connection (if that is not overstating the link) between the victim who was not a witness and the juror was so tenuous and the juror had made clear the extent of that connection in her note. The position is even more marked in respect of other jurors. If, which is not known, the juror had told other jurors that Dominic was a nice man, their ability fairly to assess the witnesses to the robbery could not be affected by the knowledge that one of the jury thought the victim was a nice person.

37. We can see no error in the judge's ruling. She was entitled to consider that a fair-minded and informed observer would conclude that there was no real possibility that the juror in question would be biased against the accused (see Criminal Practice Directions 26M.25). We reject ground 2.

38. It follows that there is no issue which requires investigation and so the application under section 23A falls away.

39. The appeal is dismissed.