IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01878/B1, 2022/01822/B1
[2024] EWCA Crim 308

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 6th February 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE MORRIS

MR JUSTICE BRYAN

R E X

- v -

ANTHONY REID

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss C Oborne appeared on behalf of the Appellant

Mr J Morgans appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 6th February 2024

LORD JUSTICE HOLROYDE:

1. On 20th December 2021, following a trial in the Crown Court at Norwich before Her Honour Judge Bacon KC and a jury, the applicant was convicted of an offence of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861. He was sentenced to three years' imprisonment.

2. His application for an extension of time in which to apply for leave to appeal against his conviction and sentence has been referred to the full court by the single judge.

3. The charge related to an incident at HMP Wayland on 7th July 2020. CCTV footage showed the complainant, Scott Forrester, walking along a landing to the door of the applicant's cell, leaning down to speak through the hatch, and then recoiling and moving swiftly away. He was subsequently seen to have reddening and blistering on his forehead.

4. Forrester's evidence was that he was making an innocuous request to borrow a towel when the applicant, for no apparent reason, threw boiling water, which hit him in the face and scalded him.

5. The applicant's account was that Forrester had spat at him and made an abusive remark, to which he (the applicant) had responded by throwing the contents of his coffee cup towards the hatch in a dismissive manner. The applicant denied that the coffee was boiling, or even particularly hot. He said that some of it had struck the door and splashed back over him, with no harmful result. He accordingly admitted conduct amounting to an assault, but denied that he had caused any injury. He relied on what he suggested was delay before Forrester drew any injury to the attention of any prison officer, and on a subsequent retraction and

inconsistent accounts said to have been given by Forrester.

6. The judge in her summing up accurately encapsulated the issue for the jury as follows:

> "If you are sure that the [applicant] did throw hot water into Scott Forrester's face, causing blisters and burns to Scott Forrester's face, then your verdict would be guilty. If you are not sure that the [applicant] threw hot water into Scott Forrester's face causing blisters and burns, then your verdict will be not guilty."

7. Thus the issue for the jury was straightforward. Unfortunately, the course of the trial was not. We must summarise important features of it.

8. When the trial began the applicant was represented by counsel and solicitors acting pursuant to a representation order. We shall refer to them as "trial counsel" and "the solicitors" respectively. It should be noted that the applicant (aged 32 at the time of the incident) was serving a sentence of imprisonment for public protection. From the age of 14 he had been sentenced on 15 occasions for a total of 36 offences, including five of violence and three of public disorder. In January 2004 he was sentenced to a total detention and training order of two years for offences of robbery committed when he was 15. In July 2005, he received a sentence of detention for public protection, with a minimum term of 27 months, for offences of attempted robbery and wounding committed when he was 17. In February 2008, he was sentenced to imprisonment for public protection, with a minimum term of three years, for false imprisonment. The victim of that offence, committed when the applicant was aged 19, was a fellow prisoner who was tied to a bed and assaulted by the applicant and others with cigarette burns and boiling water. In 2011, the applicant received 18 months' imprisonment for an offence of assault occasioning actual bodily harm committed when he was aged 22; that offence was also against a fellow prisoner.

9. As will be apparent, the applicant had remained in custody, pursuant to his indefinite sentences, long after serving the minimum terms imposed upon him.

10. On the first day of the trial, 14th December 2021, oral evidence was given by Forrester and two other prosecution witnesses, and they were cross-examined by trial counsel. The applicant was dissatisfied with trial counsel's conduct of the case, in particular because matters which he felt should have been raised in cross-examination had not been put to witnesses. At the end of that court day, and before court on 15th December, he declined to speak to trial counsel.

11. On the morning of 15th December, in the absence of the applicant, trial counsel informed the judge that he assumed that the applicant no longer wished him to act, but that the solicitors would remain on the record. Mr Morgans, then as now representing the prosecution, characterised this as an attempt by the applicant to cause disruption. The applicant was then brought into court. He confirmed that he did not feel that trial counsel was representing him. The judge indicated that she did not wish to hear any more from the applicant and told him that he now had a "stark option": to continue with trial counsel representing him, or to represent himself. She added: "You will not disrupt this trial", which the applicant said he had no intention of doing. After a further exchange in which the applicant said that he felt he could properly represent himself, the judge repeated the "stark option" and the applicant chose to continue unrepresented. The judge forthwith told trial counsel that he was free to withdraw.

12. When the court reconvened, Mr Morgans reported that he understood that the solicitors could instruct new counsel to continue the following day. Mr Morgans suggested that that course would inevitably involve an application to start the trial again. The applicant asked

that his partner, who he said was legally trained, could assist him. The judge said that she would not discharge the jury and start again. The applicant said that he understood that, which is why he was asking, as an alternative, if his partner could act as a McKenzie friend. The judge asked Mr Morgans if he wished to say anything. Mr Morgans said that the applicant had taken his decision and was now unrepresented. Without more, the judge replied: "Yes, I agree. Mr Reid, you will now continue to represent yourself".

13. That hearing ended at 11.23. Four minutes later, the solicitors emailed the court saying that they remained able to act and that the applicant was keen for his trial to proceed with new counsel. They asked for the trial to be adjourned until the following morning, when new counsel would be able to take over the conduct of the trial.

14. At around the same time, Mr Morgans gave the applicant a copy of a bad character application relating to the applicant's previous convictions.

15. At 11.35 the judge resumed the trial. When the jury came into court, she pointed out to them that trial counsel was no longer present and said: "That is because Mr Reid has dispensed with his services and will now, as is his right, represent himself". The prosecution evidence then continued.

16. Towards the end of the morning the judge considered the prosecution application to adduce evidence of the applicant's previous convictions between 2004 and 2011 for offences of violence. The application was made on the basis that the previous offences were capable of showing a propensity to violence and in particular to violence in prison. The applicant indicated that he had no objection to the jury learning of his convictions because they related to offending long ago, when he was young and immature, and he could explain to the jury how he had changed since then.

17. The judge then granted the application in respect of the most serious previous convictions. The fact of those convictions, and a summary of the circumstances of the offences, were thereafter adduced in evidence.

18. Later that day the applicant gave evidence in his own defence. In giving his account of the incident, he said that he would not have acted as he was alleged to have done when he was only days away from a Parole Board hearing at which everyone was recommending his release. He later gave evidence about the circumstances in which he had offended in the past. He said that he had moved on from his previous violence and anger, and that he was no longer the same man.

19. Mr Morgans began his cross-examination, though it was not completed that afternoon. The applicant admitted that he had initially claimed to have thrown hot soapy water when Forrester spat at him. He said that he had told this lie in panic, thinking he would not be believed if he said that he had been holding a cup of coffee, but it was not hot. He was cross-examined about the retraction and the inconsistent statements by Forrester on which he relied, and said that Forrester had asked him for money to drop the case.

20. As the cross-examination continued, the judge observed that the applicant had made a number of references to what he had said to his lawyers. She explained that what a defendant says to his lawyers is normally covered by legal professional privilege, and said that the applicant was in danger of his solicitors being asked for their account. The applicant responded that they could be asked. The judge asked if he was waiving his legal professional privilege, and the applicant said that he was. Shortly thereafter, the judge adjourned for the day.

21. On the following morning, 16th December, Mr Morgans submitted that the applicant had given the jury a false impression by claiming to be a changed character, and with a view to correcting that false impression, he applied to cross-examine the applicant about entries in a 50-page schedule recording prison adjudications which had been obtained overnight. He also applied to put in evidence all of the applicant's previous convictions. It does not appear that the judge gave any ruling about that latter application, but it was treated as if it had been granted.

22. The judge did not ask if the applicant had any submissions to make in relation to the record of prison adjudications. She enquired whether he needed more time to go through the document, a copy of which had been given to him, and the applicant said that he did not.

23. Thereafter, the applicant was cross-examined about a selection of the many entries in the record, some of which, he pointed out, related to allegations which had not been proved. He was also cross-examined about all of his previous convictions, including those when he was a juvenile. Mr Morgans put to the applicant that he had twice been found to be dangerous by a judge. The applicant denied that that was so. He began to explain that the second sentence for public protection had been imposed on the basis of the finding of dangerousness which had previously been made. He was stopped by the judge, who said that imprisonment for public protection required an assessment that he had been found to be dangerous. In the course of cross-examination it was repeatedly suggested that the applicant was a manipulative man, and in particular that he had tried to manipulate the process of the trial by sacking his barrister and then being able to carry on in person "knowing that you can throw in all sorts of nonsense that is neither checked nor should be admissible".

24. On 17th December the solicitors asked to withdraw from further representation of the applicant due to professional embarrassment. That request was granted by the judge, without

the applicant being given any opportunity to make any submissions. It appears that the judge also discharged the representation order, again without the applicant having had any opportunity to make submissions.

25. Cross-examination of the applicant was then resumed. He was questioned, amongst other things, about a note in the solicitors' file indicating that he had been advised through his mother that matters relating to Forrester's retraction and inconsistent statements might, if pursued at trial, give rise to an allegation that the applicant had been attempting to pervert the course of justice. He denied that any such advice had reached him.

26. He was later cross-examined about Parole Board documents which were said to show that he had given the jury a false impression of the likelihood that he would be released at a hearing soon after the date of the incident. These document showed in particular that before that incident the applicant had actually withdrawn his then current application to the Parole Board.

27. At the conclusion of the cross-examination, the applicant was not permitted to give evidence about a series of Facebook messages involving Forrester, which had been the subject of part of the cross-examination. The judge took the view that anything the applicant said would be inadmissible hearsay. We are bound to say that we find that ruling difficult to understand.

28. In her summing up the judge directed the jury not to speculate about Forrester's previous convictions, about which there had been no evidence. As to the applicant's evidence, her direction to the jury included the following:

"He also told you that he is serving sentences of imprisonment

> for public protection currently. You need to understand that such sentences can only be passed if a judge finds an offender to be dangerous. Such a sentence requires the judge to set a minimum period for the offender to serve. After that the offender can only be released by the Parole Board who, having considered evidence about the offender, decide it is safe to do so. That is the [applicant's] position currently. He has served his minimum term and cannot be released until the Parole Board decide he is safe for release."

29. The judge went on to refer to the three previous convictions on which the prosecution had relied as showing "a tendency to behave in the way alleged in this case", and to the applicant's evidence that he had changed since the last of those convictions in 2011. She then referred to "various adjudications made against him whilst in prison", and explained that the prosecution alleged that the applicant had tried to mislead the jury when he said that he had changed and that the applicant denied that allegation. She directed the jury that even if they were sure that the applicant had been trying to mislead them about how he had changed, that "does not mean he was trying to mislead you about everything, but it is evidence that you could use when deciding whether or not the [applicant] was a truthful witness".

30. After a short retirement, the jury found the applicant guilty. The judge proceeded immediately to sentence. She found the applicant to be a dangerous offender, but said that she would pass a determinate sentence because that would be sufficient to indicate to the Parole Board that the applicant was not safe to be released. She placed the offence into category 2A of the relevant sentencing guideline, with a starting point of one year six months' custody and a range from 36 weeks to two years six months, but said that the offence was aggravated by the applicant's previous convictions, by the custodial location, and by the attempts which the applicant had made to interfere with Forrester maintaining his complaint. In those circumstances she imposed the sentence of three years' imprisonment to which we have referred.

31. The single judge, Farbey J, to whose diligence and care in this matter we pay tribute, gave detailed reasons for referring the applications to the full court. She conveniently summarised, under five headings, the grounds of appeal which the applicant himself had at that stage put forward. The Registrar subsequently granted a representation order, as a result of which the applicant now has the advantage of being represented by Miss Oborne.

32. On the applicant's behalf, Miss Oborne submits that the conviction is unsafe. Adopting the structure helpfully suggested by the single judge, Miss Oborne puts forward a number of grounds of appeal challenging the judge's rulings to which we have referred and criticising aspects of the legal directions to the jury. She further submits that the sentence was manifestly excessive in length.

33. Mr Morgans emphasises what he submits is the strength and simplicity of the prosecution case. He maintains that the rulings were fair and appropriate, that the conviction is safe, and that the sentence was appropriate in al the circumstances.

34. We are grateful for the assistance of counsel. We have considered all of the points made on both sides.

35. We say at the outset that the applicant's decision to dispense with the services of trial counsel appears to have been intemperate and unwise. It was a decision which undoubtedly gave rise to certain difficulties. We can see from the transcript that the task of cross-examining the applicant was far from an easy one. It can fairly be said that in a number of respects the applicant made matters more difficult for himself. Furthermore, we recognise the need for judges to be vigilant against attempts to manipulate or disrupt a trial, and the need in such circumstances for robust case management, which this court will be slow to criticise. But all that said, the applicant was, of course, entitled to a fair trial. With respect to

the judge, we accept Miss Oborne's submission that he did not receive one. Regrettably, there were a number of serious deficiencies in the conduct of the trial.

36. We begin by considering the circumstances and consequences of the applicant's decision to dispense with trial counsel. A defendant who makes such a decision in the course of a trial may well find that he is required thereafter to represent himself; but we see at least three substantial problems about the way in which the issue was dealt with in this trial.

37. First, we think it unfortunate that the applicant was very quickly required to make a stark choice between representation by counsel in whom he said he had lost confidence, and representing himself. That was coupled, as we have noted, with a warning by the judge that she would not permit the applicant to disrupt the trial – a warning for which, in our view, there was at that stage no justification. The applicant was given no chance to say whether he wished to be represented by different counsel, as in fact he did.

38. Secondly, the judge adopted a similarly peremptory approach when she was told that the solicitors would be able to instruct fresh counsel and resume proceedings the following day. The judge immediately accepted the suggestion of the prosecution that there would inevitably be an application to start the trial anew, and that any such application would inevitably be granted. There appears to have been no reconsideration of that decision when the subsequent email from the solicitors indicated that they only sought an adjournment until the following morning. Nor does there appear to have been any opportunity for the applicant to make submissions as to whether the interests of justice required that the trial should start again.

39. Thirdly, and most importantly, the judge seems to have lost sight of the fact that the applicant was still represented by solicitors and was entitled to be advised by them. The judge, at a very early stage, enquired whether the applicant had been able to speak to his

solicitors on the phone and was told that he had. But nothing more was done. No steps had been taken by the judge to discharge the representation order, even if, which we doubt, it could be said that grounds for doing so had arisen. The solicitors remained on the record until 17th December, by which time a number of important rulings had been made. It does not appear that the applicant was ever told in terms that he was entitled to seek the advice of his solicitors. Nor was any attempt made by the judge to require a representative of the solicitors to attend the hearing so that he or she could advise the applicant.

40. Although the trial took place several months before the decision of this court in *R v Nguyen* [2022] EWCA Crim 1444; [2023] 1 WLR 975, the importance of the continuing existence of a representation order granted to a legally aided defendant in criminal proceedings was well known. In those circumstances it seems to us that little, if any, weight can be given to the applicant's ostensible agreement to proceeding as the judge stated she would proceed.

41. We would add that, in any event, the jury should have been directed that they should not speculate about why the applicant had chosen to dispense with counsel, and that they should bear in mind the difficulty which the applicant might face in representing himself. They were not so directed, either when they were first told that trial counsel would no longer be acting, or during the summing up.

42. Next, we consider the first bad character application made by the prosecution. True it is that the applicant raised no objection to the jury hearing of his previous convictions. But at no point was any consideration given to the precise relevance of any previous convictions to the issue which the judge had correctly identified. The applicant admitted that he had thrown liquid at Forrester in a manner which amounted in law to an assault, but he denied that he had in fact caused the alleged – or any – injury. In our view, the judge should have required the

prosecution to spell out much more clearly how the applicant's previous convictions for offences of violence, including violence in prisons, could or would assist the jury on that issue. Reference in broad terms to "a tendency to behave in the way alleged in this case" was not a sufficient basis for an application to adduce evidence which would clearly have a highly prejudicial effect on the applicant's case. Again, his entitlement to be advised by the solicitors appears to have been overlooked.

43. We turn to the second bad character application and the application to adduce evidence from the record of prison adjudications. That record noted in schedule form a total of no fewer than 224 adjudications over a period of many years. They did not include any finding of guilt of any assault since 2010, though there was an incident of using threatening and abusive words or behaviour in 2013. We make allowance for the fact that the prosecution were seeking to respond to evidence given by the applicant, and that matters were therefore being dealt with in the middle of a trial, with comparatively little time for reflection. Nevertheless, it is, in our view, impossible to support the judge's granting of permission to refer indiscriminately to that very large number of entries in the record. To take an obvious example, reference to allegations which were never proved could not possibly assist the jury to decide whether the applicant had given a false impression of his changed character; but such references would plainly add to the prejudicial effect of portraying the applicant as a prisoner who repeatedly breached prison discipline. A much more rigorous approach was needed to the admission of any part of that record in order to comply with the requirement in section 105(6) of the Criminal Justice Act 2003 that evidence to correct a false impression should go no further than is necessary for that purpose. We would add that the applicant does not seem to have been given any opportunity to make submissions in this respect, or to submit that at least parts of the record should be excluded, pursuant to section 78 of the Police and Criminal Evidence Act 1984.

44. We take the same view in relation to the expanded application in connection with the applicant's previous convictions. We would add that it is an unhappy indication of the way the trial proceeded that prosecution counsel appears to have presumed, and the judge seems to have permitted him to presume, that that application had been granted when in fact no ruling was given. Once again, the applicant was left to deal with these matters without any apparent involvement of the solicitors who at that stage were still active.

45. We next consider the applicant's waiver of legal professional privilege. Once again we regret to say that there appears to have been a lack of rigour in addressing this question. No consideration appears to have been given to whether the applicant truly was waiving legal professional privilege in respect of the entire contents of his solicitors' file, or only in respect of specific matters. It is not easy to see why some of the matters relied on by the prosecution were relevant to correct a false impression, as opposed to suggesting the solicitors' views of certain issues in the trial. In the result, the applicant was cross-examined to very damaging effect about notes made by the solicitors which had little, if any, relevance to matters in respect of which the applicant could be said to have relied in his evidence on things said by or to the solicitors.

46. We turn finally to matters relating to the use made by the prosecution of the applicant's sentences for public protection. In cross-examination, counsel referred to the applicant having been assessed as dangerous, and the judge refused to permit the applicant to give the explanation he wanted to give in answer to that line of cross-examination. There are, we think, at least two substantial causes for concern in this regard.

47. First, in the context of a case in which previous convictions were relied upon as showing a relevant propensity, it seems to us that considerable care was needed in deciding what should be said to the jury about a judicial finding of dangerousness, as that term is used in the

context of sentencing, if indeed it was appropriate for the jury to be told anything about those judicial findings. The finding of dangerousness for the purposes of sentencing requires a judge to make an assessment on present evidence of future risk. There are obvious difficulties about seeking to justify such an assessment being admissible as evidence of bad character – that is to say, misconduct or other reprehensible behaviour. In short, this was an area in which, if the judge was prepared to venture at all, considerable care was needed. It does not appear, however, that the jury were ever given any explanation of the meaning of dangerousness in this context, nor any direction as to how they should approach the evidence of previous judicial findings of dangerousness.

48. Secondly, the applicant was justified in seeking to explain why he denied that he had twice been found dangerous. As Miss Oborne has pointed out in her careful submissions, the statutory provisions in force at the time when the applicant was sentenced to imprisonment for public protection in 2008 had the effect that, because of his previous conviction for a specified offence, the court was required to find him dangerous, unless it decided that it would be unreasonable to conclude that there was a significant risk to members of the public of serious harm occasioned by the commission of further specified offences. In our view, the judge was therefore over-hasty in her insistence that there must have been two findings of dangerousness, and wrong to direct the jury as she did on this issue.

49. The same error was made in the judge's interventions in the applicant's evidence, and even during his closing speech to the jury, and was reiterated during the judge's summing up of the facts. In the context of this case, the effect of repeated assertions that two separate judges had found the applicant to be dangerous was inevitably highly prejudicial, and particularly so when combined with the use made of the record of prison adjudications and the frequent assertions by the prosecution that the applicant was trying to manipulate the trial process to his own advantage.

50. Underlying all these considerations is a point rightly made by Miss Oborne: it is very difficult to think that the trial would have proceeded in anything like the manner it did, if the applicant had not become unrepresented in the circumstances which we have described.

51. Miss Oborne has raised a number of other points. But we have said enough to explain the principal reasons for our concluding that the applicant did not receive a fair trial. Whatever rulings might have been made, if all matters had been considered and addressed as they should have been, it is impossible to regard this conviction as safe.

52. In view of that conclusion it is unnecessary to address the application for leave to appeal against sentence. We merely note that if it had been necessary to rule upon it, we would not have been persuaded that the sentence was either wrong in principle or manifestly excessive in length.

53. We accept the applicant's explanation of the reasons why he did not lodge his Notice of Appeal in time and why he needs to seek a significant extension of time. We are satisfied that that extension should be granted.

54. For those reasons we grant the necessary extension of time. We grant the application for leave to appeal against conviction. We allow the appeal and we quash the conviction. The appeal against sentence accordingly falls away.

55. Finally, Mr Morgans tells us on instructions that the Crown Prosecution Service invites the court to consider ordering a retrial. Bearing in mind that the applicant was denied a fair trial, and that he has long since served the entirety of the sentence imposed, we cannot accept that a retrial would be necessary or appropriate in the interests of justice. That application is

accordingly refused.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
