IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2023/02327/B1

ON APPEAL FROM THE CROWN COURT AT OXFORD
Mr Recorder Stephen Smith
T20210099

**[2024] EWCA Crim 97**

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 30th January 2024

**B e f o r e:**

**LORD JUSTICE WARBY**

**MR JUSTICE BRYAN**

**HIS HONOUR JUDGE ALTHAM**
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**MORTEZA JODEIRI-LAKPOUR**

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**Mr M Phillips** appeared on behalf of the Appellant

**Mr M Hodgetts** appeared on behalf of the Crown

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**J U D G M E N T**
**(Approved)**

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**LORD JUSTICE WARBY:**

1. On 21st June 2023, following a trial in the Crown Court at Oxford before Mr Recorder Stephen Smith and a jury, the appellant Morteza Jodeiri-Lakpour (now aged 59) was convicted of making a threat to kill contrary to section 16 of the Offences against the Person Act 1861. He was later sentenced by the Recorder to 24 months' imprisonment, suspended for two years with unpaid work and a programme requirement, together with a five-year restraining order.

2. He now appeals against conviction with leave of the single judge.

**The Facts**

3. The appellant and the complainant, Oksana Khylenko, met in Ukraine in 2006. They married in 2007 and had a son, born in April 2009. They lived together in and around Abingdon until September 2019 when the relationship ended.

4. On 16th September 2019 the complainant attended the police station where she reported that on the previous evening, whilst she had been cooking in the kitchen and helping her son with his homework, the appellant had accused her of making too much noise. She said there had been an argument in the course of which the appellant said several times "I want to kill you" and "I will kill you". She had made a recording of part of this argument, in which the parties were speaking Russian. She could be heard screaming.

5. The complainant told the police that she had not reported the incident that night because she feared repercussions if the appellant heard her calling for help. Instead, she had emailed her doctor and a work colleague, stating that if something happened to her or her son, the

appellant would be responsible.

6. On 17th September 2019, the appellant was interviewed. He accepted that he had had a difficult relationship with his wife and that there had been arguments on both sides. She had left him for ten days around the time of their son's first birthday, and again 14 months later. He also accepted that he had been in the kitchen with the complainant on 15th September 2019, but he denied grabbing her wrist or holding a spoon to her eye. He denied attempting to throw water from the kettle at her. He denied that he had threatened to kill her or that he had tried to scare her.

7. Also on 17th September 2019 an entry was made in the complainant's GP records which read: "Morteza is still in police custody. There were threats to kill, threats to pour boiling wall over Oksana, holding a spoon against her eye, threats to gouge".

8. On 17th February 2020 the appellant was reinterviewed in the presence of his solicitor. The complainant's recording of the evening of 15th September was played to him. He accepted that it was his voice but denied any physical violence. Asked if he had ever made a threat to harm the complainant, he followed his solicitor's advice to make no comment.

**The Crown Court Proceedings**

9. The appellant was indicted on two counts. Count 1 alleged controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 of the Serious Crime Act 2015. The particulars were that he had engaged in such behaviour between 28th December 2015 (that being the date when the offence came into existence) and 17th September 2019, and that he had thereby caused the complainant serious alarm or distress which had a substantial adverse effect on her usual day-to-day activities, at a time when he

knew that the behaviour would have a serious effect upon her. Eleven kinds of controlling or coercive behaviour were specified. They included not only physical assaults and threats, but also a number of other kinds of behaviour, such as criticisms of her conduct, monitoring of her movements and monitoring of her use of the phone and social media.

10. Count 2 alleged that on 15th September 2019 the appellant, without lawful excuse, threatened to kill the complainant, intending her to fear that the threat would be carried out.

11. In September 2021, the appellant served a Defence Statement addressing in detail each count on the indictment. In relation to count 2 he accepted that he had said five or six times "I am going to kill you" but maintained that he had not meant this literally. The gist of his case was that the complainant had set him up. She had told him that she would "destroy" him, and then asked him, out of the blue "So, are you going to kill me?". She had then deliberately created a noisy commotion and had recorded all this together with his answers to her question. She knew, he suggested, that he did not mean his words to be taken literally.

12. At trial, the prosecution case was that the appellant had acted abusively towards the complainant throughout their relationship. It was made clear to the jury that it was not alleged that his threats to kill were meant literally, but rather that he intended her to believe that they would be carried out. To prove the appellant's intention the prosecution relied on his actions on the night in question, and the alleged background of his behaviour at earlier times during the marriage.

13. The complainant gave evidence. She gave the jury an account of the appellant's behaviour towards her over the four years covered by the indictment and before that. As for 15th September 2019, she said that the appellant had been away from the house. In the evening, when he returned, he was unhappy. There was an argument. She said that the

appellant put the kettle on, grabbed her wrist and held a spoon to her eye. She was able to pull her arm away and get away from him. He threatened her with the boiling water from the kettle and he threatened to kill her. She had believed, she said, that he was going to stab her in the eye with a spoon. She had believed from his words and actions, and having regard to his behaviour throughout the marriage, that he intended to carry out his threat to kill her.

14. The jury heard the recording of the argument, which lasted nearly seven minutes. A written translation was in the jury bundle. A police officer, DS Morgan, gave evidence of the complainant's demeanour when she attended the police station on 16th September 2019, which was said to be consistent with her allegations. The jury was shown the 17th September 2019 entry in the complainant's medical records. The prosecution also called evidence from four friends of the complainant and her GP. These witnesses gave evidence of what the complainant had told them about the appellant's behaviour towards her over the years running up to, but not including, the events of 15th September 2019.

15. The appellant gave evidence on the lines set out in his Defence Statement. He said that he had not intended the complainant to believe that his threat would be carried out. He had not expressed himself articulately because he was arguing in Russian, which was his third language, and his words, which were nasty and horrible, were said in the heat of the moment. The recording was only a snapshot of what had occurred and was taken out of context. The complainant's comments and responses during the argument were said to be contrived. The appellant also relied on extracts of voicemail recordings which showed that the complainant was unpleasant towards him and their son and had used derogatory language on other occasions. A witness called Dr Kattach confirmed that the appellant's Russian was poor. Three eminent doctors gave character evidence in his defence, which was unchallenged.

16. The Recorder gave the jury written legal directions and a written Route to Verdict. On

count 2 he directed the jury that the prosecution had to make them sure that the words used by the appellant on 15th September 2019 were, properly understood, a threat to kill. If they were sure of that, they would have to go on to consider what the appellant intended when he used those words. On that issue the Recorder gave the jury written legal directions at paragraph 36.3 of the document that he provided to them.

17. The corresponding question in the Route to Verdict in respect of count 2 was question 5. It was in the following terms:

> "Are you sure that D intended Miss Khylenko to fear that the threat to kill her would be carried out?
>
> (a) If yes, your verdict is guilty.
>
> (b) If you are not sure, your verdict is not guilty."

18. The jury were sent out to consider their verdicts at 10.38 on Friday 16th June 2023 (the fifth day of the trial). Just before 1 pm, the jury asked a question, indicating that they thought that they did not have the full recording of the argument on 15th September 2019. They were assured that they had all that there was. Shortly after 2 pm, after some three and a half hours in retirement, the Recorder gave them a majority direction. At about 4.30 pm the jury asked a question about count 2, seeking clarification of the relationship between the passages from the written directions and the Rout to Verdict that we have quoted. It appears that there may have been an error in the written directions. In response to the question, the Recorder made clear that the prosecution must prove that the defendant intended the complainant to fear that she would be killed. If they were not sure that he intended her to fear that she would be killed, their verdict would be not guilty. The transcript indicates that the jurors nodded their heads in understanding. The written legal directions were amended and recirculated accordingly. The jury were released.

19. Because the Recorder had other commitments the trial resumed on Wednesday 21 June when the jury returned their verdicts. On count 1 the verdict was not guilty. On count 2 the jury found the appellant guilty by a majority of 10 to 2.

**The Appeal**

20. The single ground of appeal is that the Recorder failed to give a recent complaint direction to the jury when he should have done, with the result that in all the circumstances the conviction is unsafe. The prosecution accepts that a recent complaint direction should have been given, but contends that the conviction is nonetheless safe.

21. On behalf of the appellant, Mr Phillips, to whose submissions we pay tribute, points to what is said on this issue in the Crown Court Compendium 2022. Reliance is placed in particular on the statement that where evidence is adduced of a complaint made out of court:

> "The jury must be directed about the following:
>
> (1) The complaint itself falls to be judged as part of the evidence of W [“W” being the complainant];
>
> (2) Evidence of W's complaint is evidence about what W has said on another occasion and so originates from W him/herself. Consequently it **does not provide any independent support for W's evidence**."

22. Mr Phillips has also referred us to *R v AA* [2007] EWCA Crim 1779 and to a number of other authorities to which we will come.

23. Mr Phillips argues that the jury in this case might have taken the evidence of complaints about earlier behaviour of the appellant, which included some threats, as supportive of the prosecution case on count 2 as to the appellant's intention. He submits that where there has

been a non-direction by a judge, the conviction will generally be rendered unsafe.

24. For the prosecution, Mr Hodgetts takes issue with that last proposition. He submits that whether a conviction is safe will always depend on the facts of the case, the issues, and the relevance of the direction in question.

**Assessment**

25. We have reflected on these submissions.

26. We accept and agree with the guidance in the Crown Court Compendium. We agree also that it would have been right in principle for the Recorder to give a direction on complaint evidence in this case. That is because the case featured oral evidence from three complaint witnesses and written evidence from another two. That said, the Compendium is no more than guidance. Mr Hodgetts is, in our judgment, right to say that there is no presumption that a non-direction will render a conviction unsafe. A failure to give a direction that should have been given is not of itself sufficient to found a successful appeal. As Lord Alverstone CJ said in *R v Stoddart* 2 Cr App R 217:

> "This court does not sit to consider whether this or that phrase was the best that might have been chosen … or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."

27. The case of *AA*, which Mr Phillips has cited to us, involved a single count of anal rape. The complainant had spoken to a friend the day after the alleged offence, but had taken time to report the matter to the police. The judge had been asked to give a complaint direction and

apparently had agreed that it would be appropriate to do so but had failed in the event to give one. This court concluded that, in the circumstances of that case, the jury might have considered that the hearsay report of the recent complaint afforded solid, independent support for the primary evidence of the complainant, and allowed the appeal accordingly. In a series of later cases, however, which involved evidence of complaint, this court has approved the principles identified in *AA* and reiterated in the Compendium, and yet concluded that in the circumstances of the particular case, a failure to give the directions there set out did not undermine the safety of the conviction.

28. *R v Berry* [2013] EWCA Crim 1389 is one such case. On a reference by the Criminal Cases Review Commission the court held that in the circumstances of that case a complaint direction would have overcomplicated matters and that its omission did not make the conviction unsafe. Very properly, Mr Phillips has referred us to a series of other such cases, conceding that in their result they are all against him, but seeking to distinguish each of them on its facts.

29. We do not consider that these cases are authority for any single principle of law. The proposition which they illustrate is that where a complaint direction is appropriate, the question of whether an omission to give it, or a deficiency in the direction, renders a conviction unsafe will depend on the circumstances of the particular case.

30. Clearly, when considering whether a failure to give a particular direction does render a conviction unsafe attention must be directed to the relevance of the missing direction to the conviction under challenge. It is appropriate therefore to begin by considering count 2.

31. By the time this case came to trial, there was no dispute that on the evening of 15th September 2019 the appellant had repeatedly uttered threats to kill the complainant. He had

admitted as much in his Defence Statement. It was plain on the face of the transcript that was before the jury. The real issue on count 2 related to the appellant's state of mind when he uttered the threats. The question was whether the jury were sure that he intended the complainant to fear that he would act on his threat. That was made clear to the jury in the Route to Verdict and in the written directions that they were ultimately given. We are entirely satisfied that the jury clearly understood the question and concentrated conscientiously upon it.

32. The Recorder's directions about how the jury should approach that question reflected the prosecution case. He told the jury to take account of what the appellant had said and done on 15th September 2019 and the other evidence in the case. However, as Mr Hodgetts has observed today, the concluding words of that direction are standard form language. They were not directed to any particular item of evidence in this case. In substance and reality, when considering the appellant's intention under count 2 the focus was on the appellant's behaviour on the night in question. That is for obvious reasons.

33. It is self-evident that the appellant's conduct on 15 September 2019 provided the best and most reliable evidence of what he intended at that time. Evidence of his conduct that night came in three main forms. There was the oral evidence of the complainant and that of the appellant. Both were eyewitnesses, but their accounts were at odds with one another. Secondly, there was the sound recording of the argument. That gave the jury the tone of what was said (mainly in Russian, but some of the words were in English). Thirdly, there was the agreed written translation of what had been said. A natural approach to resolving the issue of intention would be to test the competing accounts of the two protagonists against that which was not in doubt, because it had been recorded and was agreed. The jury's second question indicates that this is exactly the process in which they engaged. One reason for that may be that in the course of his summary of the evidence, the Recorder suggested this to the jury as a

way of approaching the evidence.

34. The medical records of 17 September 2019 were relevant to what had happened on the night in question. These amounted to no more than a record of what the appellant had said to the doctor or a member of her staff. They were not evidence independent of the complainant that was capable of supporting what she said about those matters. But there was no need for any direction to that effect. There was no issue of substance about what had happened. And the defence positively relied on the record as evidence supportive of its overall case that the complainant had, and had executed, a plan to implicate the appellant in this conduct. It has not been suggested by Mr Phillips, nor do we consider that it could be said, that the failure to give a complaint direction about the medical records undermines the safety of the conviction.

35. As for the other evidence in the case, none of the five witnesses who spoke of previous complaints had any evidence at all to offer about what had been said by whom on 15th September 2019, or in what context or what tone, or for what reasons it had been said. Their evidence related exclusively to what they had been told about events at earlier points in time. That obvious point was made to them and accepted by them in the course of their evidence. The jury did not require any judicial direction upon it. But in summarising the evidence the Recorder did make the point that "all the other witnesses accepted that they were not there and of course that makes absolute sense" because (as the Recorder put it), these were private, sensitive incidents that took place in the family home with nobody else watching.

36. As Mr Phillips has pointed out, two of the complaint witnesses did report that the complainant had told them of previous threats to kill made by the appellant. But this evidence was put before the jury as evidence going to count 1. We accept that a complaint direction would have been appropriate in that context. The omission to give such a direction might have been a matter of significance if the jury had convicted on count 1. It certainly might

have been important if there had been any question of the jury, having convicted on that count, reasoning that a man who was guilty of coercive and controlling behaviour was more likely to have intended to make the complainant fearful that he would kill her. But none of that took place. On the contrary. There was no suggestion that the jury could follow this line of reasoning. The Recorder gave the jury a straightforward direction that they must determine each count separately. His summary of the evidence dealt separately with the evidence in respect of count 1 and that which went to count 2. So far from suggesting or even implying that the jury could use the one to help with the other, the Recorder expressly invited the jury, when deciding upon count 2, to focus upon the oral evidence of the complainant and the appellant, the recording and the transcript. And in the event the jury acquitted on count 1.

37. We would add these points. First, it must have been obvious to the jury that the complaint witnesses were not giving independent evidence, but merely relating what the complainant had said to them. The point is to some extent one of common sense, but it must have been highlighted by the defence case. This was that the complaint witnesses were merely "mirroring" false allegations which the complainant had made to them. Secondly, none of the complaint evidence alleged that on any previous occasion the appellant had intended to kill, or to make the complainant fear that he would kill her. And thirdly, as the single judge observed, a history of previous threats on which the appellant manifestly had not acted would tend if anything to undermine the prosecution case.

38. We note, further, that in the usual way the Recorder's legal directions were discussed and provided to counsel in draft before they were delivered. Nobody thought to mention that a legal direction should be given about any of the evidence of complaint. It plainly did not cross the minds of prosecution, defence, or the Recorder. That is always a matter to be borne in mind when assessing the weight of a point raised on appeal as undermining the safety of a

conviction.

39. Accordingly, whilst we accept that so far as count 1 is concerned the omission of a complaint direction was an oversight, we consider it to be an understandable one in the overall context of the rival cases on that count. And it is an oversight that did not matter in the event. So far as count 2 is concerned, we are not convinced that it was a material error to give no complaint direction. There was only one directly relevant piece of complaint evidence, namely the medical records, and that went wholly or mainly to the fact of threats, which was not in dispute. Nobody was suggesting to the jury that the evidence of threats on earlier occasions or the evidence about complaints made about other matters was material which the jury should or could use to resolve the disputed issue of what the appellant intended by the threats he made on 15th September 2019. The legal directions and the summing up pointed in the opposite direction.

40. In all these circumstances it would in our opinion be fanciful to suppose that the jury may have used the evidence adduced in support of count 1 as a means of reaching a conclusion on the issue of intention under count 2. We therefore do not see that the failure to give a complaint direction in respect of the evidence adduced on count 1 casts any doubt upon the safety of the conviction on count 2.

41. There are other aspects of the summing up that give us additional comfort. So far as the appellant is concerned, the jury were given a full good character direction and directed that they must not hold it against him that he had answered no comment to one question in interview. In summing up the evidence, the Recorder twice highlighted the fact that the recording was only a snapshot of what had taken place on the night and emphasised that the jury would need to consider the evidence about their context.

42. For all these reasons we are satisfied that the conviction is safe. The appeal is therefore dismissed.

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