[2021] EWCA Crim 587

Case No: 201902389/90 B5

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT KINGSTON**
**HIS HONOUR JUDGE JOHN**
**T20177420**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 April 2021

**Before :**

**LADY JUSTICE SIMLER**
**MR JUSTICE SWEENEY**
**and**
**HIS HONOUR JUDGE PATRICK FIELD QC**

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**REGINA**
**And**
**TARIK HILL**

**Ms S Hobson** for the **Appellant**
**Mr I Sheikh** for the **Respondent**

Hearing dates 17 March 2021

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, The date and time for hand-down is deemed to be 22 April 2021 at 10.30am

**This judgment is subject to an order made pursuant to s.4(2) of the Contempt of Court Act 1981 postponing publication of any report of these proceedings until the conclusion of the re-trial in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.**

**NOTE: THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981. IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.**

**Lady Justice Simler:**

## Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the 1992 Act.

2. On 7 January 2019 in the Crown Court at Kingston Upon Thames (before HHJ John and a jury) the appellant was convicted of assault occasioning actual bodily harm (counts 1 and 6), putting a person in fear of violence by harassment (count 2), controlling or coercive behaviour in an intimate or family relationship (count 3) and false imprisonment (count 5).The offences were all committed against the same young woman to whom we shall refer as TC. The offences in counts 5 and 6 occurred on 4 March 2017. The indictment also included an offence of rape of TC on 4 March 2017, but the jury were unable to reach a verdict on that count (which was count 4, rape).

3. There was a retrial of count 4 and on 23 March 2019 in the same court before the same judge, the appellant was convicted by a jury of the rape of TC on 4 March 2017.

4. On 20 June 2019 the appellant was sentenced by HHJ John to an extended sentence of 20 years under section 226A of the Criminal Justice Act 2003 (the "CJA") comprising a custodial term of 15 years and a licence period of five years on count 4, with that sentence reflecting the totality of the offending on all six counts. There were shorter concurrent sentences on the other counts, including a 36 month sentence on count 3, for the controlling or coercive behaviour offence.

5. The appellant appealed with leave given by the Full Court against his conviction for rape and against sentence. He was represented by Ms Sally Hobson who was trial counsel at the second trial, though not the first. She advanced two main grounds of appeal. The first related to the conduct of the trial judge which was said to be hostile and bullying and led to an unfair trial. The second concerned the admission and treatment of evidence of the convictions resulting from the first trial. Taken alone or in combination, she submitted that these matters meant that the conviction for rape was unsafe and should be quashed.

6. The appeal was resisted. We received written and oral submissions from Mr I. Sheikh, who appeared for the prosecution at both trials, and submitted that there was no error in the judge's approach to the admission and treatment of the conviction evidence.

Further, the judge did not 'bully' defence counsel or make it impossible for her to do her duty. His interventions were appropriate and justified at all times; and did not come close to preventing the appellant from having a fair trial.

7. At the conclusion of the hearing of the appeal we announced that the appeal against the conviction for rape would be allowed but indicated that we would give our reasons in writing. These are our reasons for allowing the conviction appeal.

## The facts

8. The appellant formed a relationship with TC in September 2016. She had two young children from a previous relationship. He had moved in with her by late September. She later described the relationship as fine to begin with but as souring by early 2017.

9. In her Achieving Best Evidence interview on 14 May 2017, TC described a number of incidents where the appellant physically and verbally abused her, starting in January 2017. On 3 January 2017 he twisted her wrist around and behind her back because she challenged him in relation to messages on his mobile phone from other women. She began to cry, and he apologised. She did not report the incident to anyone immediately but mentioned it to her friend, Antonia Fyfe, sometime later. On 4 January they were in her car and he grabbed her wrist as she was driving him to work. He apologised and said he did not mean to do it.

10. On a further occasion, there was an argument in her daughter's bedroom. The appellant punched TC to her side. This was the first occasion on which he actually struck her. She ended up on the floor and he placed and pressed his foot on her neck. She got up to change her daughter's nappy. He took hold of the nappy, held her down on the mattress and threatened to put the nappy on her face, take pictures and post them on Instagram. He then put a small amount of faeces from the nappy on her face. She was upset and crying. He let her go and she ran to the bathroom to clean up. Later in the kitchen, she refused to do something he asked her to do, and went upstairs. He told her that if she did not come downstairs, he would drag her down. He twice attempted to drag her downstairs by her wrists, but she was able to run back upstairs on each occasion. On the third attempt, she sat on the floor, so he dragged her by her arms down the stairs dragging her chest and side against the stairs. By the time they reached the bottom of the stairs, her head was facing down. He laughed and began to make derogatory remarks, saying that she could not look after her own child. The children were told to go upstairs. Once they had gone upstairs, the appellant assaulted TC as she sat on the sofa by punching and striking her. He told her she was weak and pathetic. She said that she suffered bruising as a result of the assault but did not go to a doctor because she wanted to protect him. She cared for him and thought the violence might be a one-off. (These matters were all the subject of the convictions on counts 1 to 3 at the first trial.)

11. There was a further incident when TC drove the appellant to Brixton to find out about a new barber's shop job. She waited in the car for him and when he did not come out, she went in to find out what was happening. He was having a haircut. He was angry that she had come in to find him. As they were driving home, he started flicking a lighter at her and said words the effect, "*if you don't shut up I'm gonna light your hair on fire*". Once at home an argument started. He again got out the lighter and kept flicking it towards her hair. Then he pressed the lighter against her chest causing her pain. He then

twisted her arm behind her back, got her mobile phone and went through it before deleting the name of a male contact. TC did not report the incident to the police because on each occasion she hoped the behaviour would not be repeated.

12. On the morning of 4 March 2017, TC was due to visit her mother, but the appellant did not want her to go. They argued and he would not let her leave her bedroom. During the course of the argument, he took her mobile phone and smashed it against the wall. The appellant told her daughter to go into another room and subsequently locked TC in her bedroom. The child was screaming and TC wanted to leave the room to attend to her daughter. The appellant began to assault her by beating her with his belt and punching her head and body. He choked her and jumped on her whilst she was on the floor. He then left her in the room for around three hours. (This conduct was the subject matter of the conviction on count 5 at the first trial.)

13. When he returned to her bedroom, she was lying on her bed, feeling dizzy. She begged him to let her go but he assaulted her again. (This resulted in the conviction on count 6 at the first trial.) He then unbuckled his jeans and (knowing she was on her period) told her to perform oral sex on him if she wanted to be allowed out of the room. She said that she felt dizzy from the assault. He tried to force her mouth open using his penis. He persisted for some minutes. She resisted and asked repeatedly to leave to go to her daughter. He forced his penis into her mouth, and eventually she did what the appellant wanted. He ejaculated inside her mouth and then allowed her to leave the room. She went into her daughter's bedroom, where she found her daughter asleep. This was the subject matter of count 4, re-tried at the second trial.

14. Later that day, at around 6 or 7 pm, the appellant told her that he would get her mobile phone fixed, but they had to go to Michelle Dill's house. Michelle Dill was his former partner and the mother of his three children. When that relationship came to an end, Michelle Dill obtained a restraining order against the appellant on 14 April 2016, designed to prevent him from conduct likely to amount to harassment. The appellant and TC went to Ms Dill's house, and then on to a mobile phone shop in Tooting Broadway, where the phone was repaired. Later that evening, TC went out with her family for the evening. She did not report what had happened and did not seek medical help.

15. During March 2017 the appellant began to send text messages to Michelle Dill apologising and saying he wanted to marry her and be together as a family. In May he was spending periods of time with her and they were discussing this possibility. However Michelle Dill found out that he was not telling the truth and was seeing other women.

16. In May 2017, Michelle Dill contacted TC through WhatsApp. They had further and increasing contact. Michelle Dill urged TC to contact the police. At first TC was reluctant and felt she was not ready to do so. According to the account given by TC, it was Michelle Dill who eventually pushed her to go to the police.

17. The appellant was arrested and interviewed on 15 May 2017. In his police interview he denied assaulting TC. He accepted that they had arguments but said he had never been violent towards her. He said that none of the incidents described by TC had occurred and he had never seen any injuries on her. He claimed that she had begun to drink and was depressed and cried a lot. This got him down. He claimed that she would spend

most of her time in her bedroom and he would remain in the kitchen. He said that the relationship between them began to break down in December 2016. He denied falsely imprisoning her on 4 March 2017. He denied assaulting her and forcing his penis into her mouth. He denied having oral sex with her on that day or preventing her from leaving her bedroom to attend to her daughter who was screaming for her mother. He said he went to work and she could have left her bedroom whenever she wanted to. He believed that TC had colluded with Michelle Dill to make up the allegations against him.

18. The defence case at the second trial was that the appellant did not rape TC. He gave evidence at the trial that although the relationship with her was volatile, she was able to stand up for herself. He maintained that he did not assault her or act in a controlling manner as she had alleged. He said he was not there on 4 March 2017 and had an alibi as he was working at the barber's shop in Brixton for the entire day. The cell site and telephone evidence relied on by the prosecution showing his mobile telephone being used in the vicinity of TC's house during the day on 4 March 2017, proved nothing because he was not the person using the phone that day. He had left the phone at TC's house when he went to work, and had asked her to send certain messages to his mother on it. The messages were all sent by her at his request.

19. We were told by Ms Hobson that, although at one stage the appellant was planning to rely on WhatsApp messages on his mobile phone that were sent that day (4 March), in the event the defence decided not to rely on these messages in the second trial. Accordingly, TC was not asked about the WhatsApp messages in cross-examination by Ms Hobson. However, it appears that the prosecution made a late decision in the course of the second trial, to rely on the WhatsApp messages, and they were uploaded to the DCS on the morning of 15 May 2019, part way through the second trial. The Investigating Officer then gave evidence about the messages and was cross-examined by Ms Hobson, leading to the judge's first intervention complained of by Ms Hobson (see below at paragraph 36), about her failure to put the defence case in relation to the WhatsApp messages to TC. In the absence of the jury immediately afterwards, the judge made clear that if necessary, they would have to "trouble" TC to return to court, and that he would not be happy about this.

20. The appellant gave his explanation for the WhatsApp messages in evidence: he said he called TC from work on his second (Nokia) phone, which he had taken with him to work, and asked her to send a couple of messages on his behalf on the other phone, left at home by him. The appellant also relied on evidence from Eric Dixon, his work colleague at the barber shop, to support his alibi. Dixon said that although he could not specifically recall 4 March 2017, he could not recall a Saturday when the appellant was not working at the barber shop, in part because this is one of the busiest days of the week at the barber shop.

## The conviction appeal

### (1) The challenged admissibility ruling

21. As we have indicated, at his first trial in January 2019, the appellant was convicted on all but one (count 4) of the six counts on the indictment. He did not seek permission to appeal these convictions.

22. Shortly before the retrial, on 13 May 2019, there was a hearing of the prosecution's application to admit the convictions on counts 1 to 3 as bad character evidence: important explanatory evidence said to put in context the allegation of rape on 4 March and to be evidence of propensity (gateways in sections 101(1)(c) and (d) CJA). More significantly for the purposes of this appeal, the prosecution also applied to admit the evidence supporting counts 5 and 6 and those convictions as relating to or having to do with the facts of the outstanding allegation of rape and so admissible under section 98(a) CJA. The prosecution sought to rely on the convictions to show that the appellant was present at TC's home on 4 March 2017 and they were therefore evidence supporting the allegation of rape.

23. The application was opposed on the appellant's behalf by Ms Hobson. In relation to counts 5 and 6, she emphasised to the judge that the appellant maintained his defence that he was not there on 4 March, and none of the offences had occurred. She submitted to the judge that she was entitled to advance that case before the jury. It is fair to say that there was some lack of clarity as to whether she was contending that the convictions should not therefore go in at all, or whether she accepted they (or the underlying evidence) could go before the jury, but that the appellant had to be permitted the opportunity to persuade the jury that those offence were not committed by him and he was wrongly convicted of them. She also argued that the convictions on counts 1 to 3 were not important explanatory evidence, nor relevant to propensity. In any event, she relied on section 101(3) CJA and/or section 78 Police and Criminal Evidence Act 1984 ("PACE") and submitted the evidence should be excluded.

24. Neither Ms Hobson nor Mr Sheikh referred the judge to section 74(3) PACE, which is regrettable.

25. During the course of legal argument, the judge said (and repeated) words to the effect that:

> "On the other hand, you are not able to run your case on the basis that the false imprisonment and the actual bodily harm did not occur."

And that

> "You [the defence] are not permitted, in my judgment, to have a second bite of the cherry in front of this jury about it, by suggesting it did not happen."

Far from correcting the judge, Mr Sheikh said that he agreed with the judge's approach, and "*it seems the defendant wants to treat this new jury as an appellate court and to re-run the hearing de novo, and that must be wrong*."

26. The judge admitted the evidence of all five convictions. In rejecting the defence arguments, he ruled as follows in relation to counts 5 and 6:

> "11. I am quite satisfied not only that the convictions on counts 5 and 6 should be before the jury but that it would be quite wrong if they were not. Of course, the defendant's continued stance of maintaining he was elsewhere presents him with an evidential

> difficulty. However, this is not one of those cases in which it would be wrong to admit convictions because it would close off all issues for the defendant: see *R v Smith* [2007] EWCA Crim 2105. He cannot be prevented from running his alibi again or indeed from asserting that he was not guilty on Counts 5 and 6, but the jury cannot be invited effectively to re-try those Counts. It remains open to them to conclude that they are not satisfied that the alleged rape took place.
>
> 12. I reject the submission that the evidence should be excluded either under section 101(3) or under section 78 PACE 1984 (as to which no separate argument was advanced)." (Emphasis added)

27. So far as counts 1 to 3 are concerned, the judge held:

> "18. I am satisfied that convictions on these counts are admissible as important explanatory evidence. Without it, the jury would find it as least difficult to understand other evidence in the case, and its value for understanding the case as a whole is substantial: see section 102. The jury would be assessing the evidence in support of count 4 in a misleading vacuum if they were unaware of the proven violent and abusive background to the relationship, and the detriment to the defendant is balanced by the fact that the evidence underpinning those counts will not be before them.
>
> 19. I am also satisfied that the convictions are admissible under section 101(1)(d). The defence has misread the application in advancing their argument that these convictions did not demonstrate propensity: that is only one matter which can fall within section 101(1)(d): see section 103.
>
> 21. As before, I am satisfied that there is no basis for excluding the evidence of these convictions under section 101(3) or under section 78 PACE 1984."

28. Before us Ms Hobson challenged that ruling as wrong. She submitted that although relevant to the issues in the case, knowledge of the convictions would predetermine in the minds of the jury what took place and the fact of the appellant's presence at the scene on 4 March. Allowing the convictions to go before the jury effectively closed off the defence of alibi and deprived the appellant of a fair opportunity to put his case. Ms Hobson submitted that although the appellant was able to maintain his alibi defence in evidence, (without contradiction from Mr Sheikh) she submitted that the judge did in fact prevent any cross-examination of TC to the effect that the offences in counts 5 and 6 did not occur and that the appellant was wrongly convicted of those offences because he was not present at her home on 4 March.

29. We consider that there can be little doubt that the convictions on counts 5 and 6 (and the evidence supporting them) were legally admissible under section 98(a) CJA (and we make no criticism of the judge's ruling in this regard, or indeed, in relation to the

admission of the other convictions). However, the quid pro quo for the prosecution being able to adduce the convictions of false imprisonment and assault on 4 March to support the prosecution case of rape on 4 March, was that the defence had an express statutory entitlement to seek to prove that those offences did not take place. The judge's ruling in relation to counts 5 and 6 that "*the jury cannot be invited effectively to re-try these counts*" created an improper restriction on the appellant's right to prove that he had not committed any offences on 4 March. As we have said, that was his express entitlement under section 74(3) PACE which provides:

> "In any proceedings where evidence is admissible of the fact that the accused has committed an offence, if the accused is proved to have been convicted of the offence … by or before any court in the United Kingdom … he shall be taken to have committed that offence unless the contrary is proved."

30. The result of the judge's failure to refer to section 74(3) PACE, and his ruling to which we have referred, is that the whole trial proceeded on a fundamental misunderstanding (as Mr Sheikh was eventually driven to concede) that it was impermissible in effect to retry counts 5 and 6.

31. As this court said in *R v C* [2010] EWCA Crim 2971:

> "9. Section 74(3) is uncomplicated and it means exactly what it says: once it is proved (whether by agreement or otherwise) that the defendant was and remains convicted of a criminal offence and assuming that evidence of that fact is admissible, the prosecution is not required, merely because the defendant denies guilt, to prove that the defendant was guilty of the offence, or to assist him to prove that he was not guilty, or indeed to call witnesses for either purpose. The evidential presumption is that the conviction truthfully reflects the fact that the defendant committed the offence. Equally, however, it is clear that the defendant cannot be prevented from seeking to demonstrate that he did not in fact commit the offence and therefore, that the jury in the current trial should disregard the conviction. If so, it follows that he should be entitled to deploy all the ordinary processes of the court for this purpose, and in particular to adduce evidence that will enable him to prove, whether by cross-examination of prosecution witnesses or calling evidence of his own that he was not guilty and that the conviction was wrong. It also follows that if the defendant does adduce evidence to demonstrate that he is not guilty of the offence, it remains open to the Crown then to call evidence to rebut the denial.
>
> 10.The danger in this situation is satellite litigation, which for obvious reasons is undesirable. That danger acknowledged, the stark principle remains that any defendant is entitled to contest his guilt in accordance with the ordinary processes of the criminal justice system, and therefore to challenge or to seek to undermine the Crown's case against him or to advance evidence in support of his own case. That principle extends to evidential

> presumptions relating to his guilt of an earlier offence. To prevent him from doing so or deny him the opportunity of adducing admissible evidence that he did not commit the earlier offence would be likely to result in an unfair trial of the present offences."

32. Here there was no danger of satellite litigation, and no reason why the quid pro quo to which we have referred, was not applicable. The convictions on counts 5 and 6 were intimately connected with the offence being tried. TC had to give evidence about the alleged rape on 4 March. Her credibility was in issue, and her account of what happened on 4 March was fundamentally challenged by the appellant who said he was not there. Once the convictions were admitted, the appellant was entitled to contest his guilt in relation to them. Though it is true that he gave evidence that he was not there and did contest his guilt in relation to all three offences on the 4 March, by preventing Ms Hobson from cross-examining TC about everything that occurred on 4 March, the judge denied him the opportunity of proving that he did not commit the count 5 and 6 offences. The appellant was prevented from deploying all the ordinary processes of the court for this purpose, and in particular, cross-examining TC to prove that he did not in fact commit those offences and that the jury in the second trial should disregard the convictions. In our judgment, the result is that there was an unfair trial of the rape offence, and on this ground alone, the conviction on count 4 is unsafe and must be quashed.

## (2) The conduct of the trial Judge

33. Ms Hobson also contended that the appellant was deprived of a fair trial at both trials, because of the hostility and bias displayed by the judge in favour of TC and to the appellant's detriment. She submitted that this hostility increased during the appellant's second trial to such an extent that there was a level of hostility towards her as counsel which she submitted could only be described as bullying. The judge inappropriately intervened during the appellant's evidence, repeatedly telling him to speak up, asking questions which were more akin to cross-examination rather than clarification, telling him to remove his hands from his pockets and generally treating him in a different manner to TC.

34. Further the judge was rude to and critical of her as defence counsel. She submitted that he was unnecessarily scathing about her submissions in relation to the bad character application. He unfairly blamed her for not putting questions to TC about the WhatsApp messages which resulted in TC being recalled during the appellant's case. He unfairly criticised her questioning of the alibi witness. She submitted that the combined effect of this behaviour was to diminish her and the appellant in the eyes of the jury and the appellant did not have a fair trial in consequence.

35. We were provided with the transcripts of the interventions particularly relied on by Ms Hobson as exemplifying the behaviour she complained about. We have also listened to the recordings (as far as we were able with the discs provided).

36. We take each of the examples relied on by Ms Hobson in turn, and reach conclusions about them where possible, having considered also the submissions made by Mr Sheikh in relation to each one. We then stand back and consider the interventions and the conduct as a whole. We do that to avoid a fragmented approach that might have the

effect of diminishing any eloquence that the cumulative effect of the conduct might have had on the overall fairness of the trial.

i) **Intervention 1.** This occurred during cross-examination of the Investigating Officer, and involved the judge expressing disbelief that it was being suggested that the WhatsApp messages on the appellant's phone, including "*Hey mama, what's up? Did you send it*" were sent by TC and not by the appellant. The judge was critical of Ms Hobson in front of the jury, saying "*You are seriously suggesting, looking through this series of messages and their terms, that she sent them? That should have been put to her.*" He repeated this several times. Ms Hobson said that she was driven to apologise.

In fact, as Ms Hobson explained, and we have adverted to above, the prosecution only indicated an intention to rely on these messages on the morning of 15 May 2019 when the Investigating Officer was called – indeed they were only uploaded to the DCS that morning as the judge subsequently acknowledged in the course of legal argument without the jury present. By then TC had given evidence and been cross-examined. Mr Sheikh did not gainsay this. He could not explain why, in these circumstances, he did not come to Ms Hobson's defence when she was wrongly criticised by the judge. During the subsequent legal argument in the absence of the jury, the judge made clear that, if necessary, TC would have to be "troubled" to return to court and that he (the judge) would not be happy about this.

We consider that the judge's intervention in front of the jury is likely to have created the impression in the minds of the jury that Ms Hobson was at fault, and moreover, it was her fault that TC had to be brought back to be questioned further. This criticism was not merited.

We shall return below to the impact of the judge's behaviour on defence counsel and the fairness of the trial.

We are particularly troubled by the fact that when TC was recalled and interposed, her evidence was interposed during the defence case, and worse still, part way through the appellant's own evidence, after examination in chief but before cross-examination. It was suggested by Mr Sheikh from memory (but as he indicated, without anything in writing to assist him with detailed particulars) that this was the only time that TC could be recalled. He could not explain why TC could not have been recalled after the Investigating Officer's evidence or immediately before the appellant's case (with a short adjournment if that was necessary). Put simply, when pressed Mr Sheikh was quite unable to satisfy us why interposing TC in this way was the only course available to the prosecution. We find it extraordinary that prosecution evidence from the victim herself was interposed in this way.

ii) **Intervention 2.** This came at the start of the appellant's examination in chief when the judge said "*Hands out of your pockets please*." The evidence proceeded for a short while and then when the appellant was asked about is previous convictions in Bermuda, the judge intervened and said "*Sorry, can you leave the bundle alone please? No one has asked you to look at it*."

Although Ms Hobson submitted that the appellant did not have his hands in his pockets at the time, Mr Sheikh was clear that he did, and said "*Pardon? I have done man*". Mr Sheikh accepted that the judge might have been short with the appellant, and might have raised his voice, but said he remained polite. Whatever the truth of the hands in the pocket, it seems to us that these admonitions (in a short, raised voice as Mr Sheikh accepted) were likely to contribute to the impression that the judge had a negative view of this appellant.

iii) **Intervention 3.** This occurred during the appellant's evidence in chief when he was asked about various girlfriends. He said it was exhausting because he "*had to keep up with all three*". The following exchange then occurred, which speaks for itself:

JUDGE JOHN: Do you think that is a funny comment?
A. No [words to effect just explaining how it was exhausting]
JUDGE JOHN: You did not have to at all, did you? [Crosstalk]
JUDGE JOHN: Let us be adult about this, you chose to.
A. Well, yes it was my choice, but that's what happened, yeah. I'm sorry.
JUDGE JOHN: All three of them being deceived by you.
A. Not really deceived?
MS HOBSON: Please could I raise a matter of law?
JUDGE JOHN: There is no matter of law arising from that.
MS HOBSON: Well could I ask, then, if Your Honour would please refrain, whilst the defendant is giving evidence, from making comments?
JUDGE JOHN: I will intervene if I think it is appropriate, not otherwise.
MS HOBSON: Well I am putting on record that I have asked Your Honour if Your Honour would refrain-
JUDGE JOHN: Yes.
MS HOBSON: -from making comments-
JUDGE JOHN: Very well.
MS HOBSON: -while he is giving his evidence.
JUDGE JOHN: Yes.
MS HOBSON: Thank you

This intervention was not for the purpose of clarifying relevant evidence. It was in the nature of a reprimand and to express disapproval of the appellant's behaviour. But the appellant was not on trial for the way he conducted his personal life, and the court was not judging his morality.

iv) **Intervention 4.** This was an occasion when the judge told the appellant to speak up and a little later to "*enunciate more clearly*". The appellant apologised. The judge continued:

JUDGE JOHN: You know, it is not so much it makes my job difficult, but if my job is difficult it means I am inhibited when I sum the case up to the jury. It is a big room, you have heard other witnesses be told this
A: Sorry
JUDGE JOHN: please take it on board.
A: Sorry

There were other occasions when the judge told the appellant that he could not hear what was being said and referred to difficulties created by the appellant's "*accent"*. These are extracts six and seven.

v) **Intervention 5.** This relates to Ms Hobson's questioning of the alibi witness, Mr Dixon. Ms Hobson put to the witness that the police asked him about a particular date, a Saturday in March, and she identified the date of 4 March. The following exchange then occurred in front of the jury:

JUDGE JOHN: That is a very leading question for an alibi witness. It is quite improper.
MS HOBSON: Well I apologise-
JUDGE JOHN: It completely devalues the evidence of an alibi witness if you put the date in his mouth. I am astonished that you should do it, someone of your experience. Never lead on a date with an alibi witness. Yes, very well, you have done it now.
[Lengthy pause for just under a minute].
JUDGE JOHN: There are other ways of getting the witness to the point that you wish to, other than by putting the critical date into his mouth two years after the event. Now, do you have any questions for him?
MS HOBSON: [Forgive me?], yes.
Pause.
Q. Mr Dixon, how many people worked at the barber shop?

Mr Sheikh contended that although the date of the offence was not in issue, what was in issue was whether or not, on that date, the appellant was at TC's address and committed the offence alleged or was at his place of work, as he claimed. The date was therefore very much in issue and should not have been led where alibi was the defence to the allegation. He submitted in writing that the judge was "entitled to and justified in making the intervention he did and it is wholly wrong to suggest that the intervention was in some way designed to intimidate and/or belittle defence counsel."

We reject those submissions. First, in our judgment the intervention was wholly unjustified. The witness would have been entitled to refresh his memory and Ms Hobson would have been entitled to lay the ground to enable to him to do so. That would have involved naming 4 March, and had this been done, it could not have been the subject of any challenge, or indeed, any criticism from the judge. In any event, in the course of the questioning, at some point the date (4 March) would have had to be identified for the witness. We can see nothing wrong in the questioning by Ms Hobson of the alibi witness, particularly given the evidence that he was expected to give: he could not be sure about any particular dates, but said the appellant worked every Saturday; he could not recall not seeing him on a Saturday; and if he had not come in on a Saturday he thought that would have been noticeable.

Secondly, even if an intervention was justified, the manner in which the judge expressed himself to Ms Hobson and his admonition of her in front of the jury was unacceptable. It undermined defence counsel's standing with the jury. Interruptions and admonishments by a judge are liable to distract

> counsel away from the task of effectively representing the interests of their client, and to preoccupy them with seeking to avoid any further intervention. Ms Hobson described the impact on her in defending her lay client, of this intervention. It had those effects. She was rendered speechless. She felt that she was undermined in the appellant's eyes, and in the eyes of the jury.

37. In the light of these extracts, Ms Hobson, who relies on *R v Hulusi and Purvis* (1974) 58 Cr. App. R. 378 in support of this ground, submitted that the interventions diminished her in the eyes of the jury, affected her ability to conduct the trial, and affected the appellant when giving evidence to such an extent that the trial as a whole was unfair.

38. The overarching submission made by Mr Sheikh was that looked at as a whole, the trial was fair. Many of the exchanges took place away from the jury. In respect of the more robust exchanges, there was nothing scathing or scornful and nothing was done by the judge to intimidate or demean defence counsel.

39. As foreshadowed earlier, we must evaluate the effect of the conduct and interventions we have summarised above in the context of the trial as a whole. The role of the judge is to ensure a fair trial between prosecution and defence. He or she is the neutral umpire. The prosecution must prove its case, and it is of fundamental importance that the defendant in a criminal trial is given the opportunity to put forward his defence, however implausible it might be, without the defence case being undermined (whether overtly or by means of subtle comment and asides) by the judge. Interventions that tend to invite the jury to disbelieve the defence case or make it impossible for counsel to present the defence case properly, or which prevent the defendant from fully giving his side of the story are unlikely to be capable of being justified, and may lead to a conviction being quashed. The question is one of degree, and it is the overall fairness of a trial taken as a whole that is the touchstone. For a clear distillation and recent application of these well-established principles, see *R v Thomas* [2019] EWCA Crim 1958 and *R v Mustafa Kemal Mustafa* [2020] EWCA Crim 1723 at [7].

40. This was a strong prosecution case. It was all the more important in those circumstances, for the judge to be scrupulous in the fair treatment of the defence, and in ensuring the appearance (at the very least) of his own neutrality. We regret to say that we have come to the conclusion that the judge failed in this regard.

41. The interruptions of the appellant, requiring him to enunciate more clearly, criticising his accent and challenging what he said about the three girlfriends, together with the astonishment he expressed at times in relation to the defence case, had the effect of inviting hostility and disbelief. Viewed alone, although inappropriate, these interventions might not have been regarded as unacceptable in themselves.

42. However, in addition, we consider that the criticism of Ms Hobson herself was at times unfair and unjustified, and on at least two occasions, the unjustified admonitions occurred in front of the jury. We accept Ms Hobson's account of the impact of the judge's comments on her ability to carry out her duties as counsel in properly representing the appellant. Whatever his intention, and whether or not he had an unconscious animus towards the appellant, what was inevitably conveyed to the jury was a lack of respect for and disapproval of the appellant. Moreover, the judge's conduct must also have undermined defence counsel in the eyes of both the appellant

and the jury. The interventions not only prevented Ms Hobson as the appellant's counsel from doing her duty properly in presenting his case, but also had the effect of preventing the appellant from doing himself justice before the jury.

43. We have concluded that taken together with the judge's failure to apply section 74(3) PACE the appellant did not have a fair trial in this case.

44. Our conclusion is particularly regrettable because there will need to be a retrial in the interests of justice, and TC will have to give evidence about the events of 4 March 2017 for a third time. This however, cannot be avoided. It is through no fault of the appellant or Ms Hobson that this is required.

45. In light of our conclusion it is unnecessary to address ground three which relies on a failure by the judge to direct the jury to disregard any hostility he had displayed. The judge's conduct could not have been cured by such a direction and this ground adds nothing in the circumstances. Ground four was not pursued by Ms Hobson.

46. It also follows from our conclusions that the sentence appeal falls away.

## Conclusion

47. The result is that the appeal is allowed and the conviction on count 4 is quashed. The interests of justice require that there be a re-trial and we have directed that a re-trial take place. The Presiders on the SE Circuit will assign the case to a different judge. Reporting restrictions apply until after the re-trial.