Neutral Citation Number: [2024] EWCA Crim 243

Case Number: 2023/04467/B3

In The Court Of Appeal (Criminal Division)

Royal Courts Of Justice
Strand, London, Wc2a 2ll

Date: 18/03/2024

Before:

The Lady Carr Of Walton-On-The-Hill
The Lady Chief Justice Of England And Wales
Lord Justice William Davis
And
Mr Justice Garnham

- -

Attorney General's Reference
On A Point Of Law No. 1 Of 2023
Pursuant To Section 36 Of The Criminal Justice Act 1972

- -

Tom Little KC and Victoria Ailes appeared on behalf of **His Majesty's Attorney General**
Henry Blaxland KC and Owen Greenhall (instructed by **Kelly's Solicitors**) and **Tom Wainwright** (pro bono) for the **Acquitted person, C**
Louis Mably KC as Advocate to the Court

Hearing date: 21 February 2024

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Approved Judgment

This judgment was handed down at 10.00am on Monday 18 March 2024 in Court 4 and released to the National Archives.

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Note – The defendant is not to be identified, pursuant to Criminal Procedure Rule 41.7.

The Lady Carr of Walton-on-the-Hill, LCJ:

Introduction

1. This reference by His Majesty's Attorney General (AG) raises an important question as to the scope and effect of section 5(2)(a) of the Criminal Damage Act 1971 (section 5(2)(a)) (the 1971 Act). Section 5(2)(a) defines when a person is to be treated as a "having lawful excuse" for the purpose of the offence of criminal damage provided for in section 1 of the 1971 Act. It is a provision which has been the subject of only very limited previous authority but which has become increasingly prominent in the context of the activities of climate change protesters.

2. The defendant (C) was acquitted in the Crown Court of conspiracy to damage property contrary to section 1(1) of the Criminal Law Act 1977. C was one of multiple defendants and unrepresented at trial. All defendants were acquitted of at least one count of conspiracy to damage property.

3. Pursuant to section 36 of the Criminal Justice Act 1972, the AG has referred to this Court two points of law said to have arisen in C's trial and upon which she desires the opinion of the Court. The points of law are as follows:

> "1. What matters are capable, in law, of being the "circumstances" of destruction or damage under section 5(2)(a) of the Criminal Damage Act 1971? In particular,
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> a. if the destruction or damage is an act of protest, are "circumstances" in the phrase "the destruction or damage and its circumstances" capable as a matter of law of including the merits, urgency or importance of any matter about which the defendant may be protesting by causing the destruction or damage, or the perceived need to draw attention to a cause or situation?
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> b. if there is no direct nexus between the destruction or damage and the matters on which the defence rely as "circumstances", can those matters still be "circumstances" within the meaning of the phrase "the destruction or damage and its circumstances"?
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> 2. Was the Judge right to rule:
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> a. before the case was opened to the jury; and
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> b. at the conclusion of the evidence
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> that the defence should not be withdrawn from the jury?"

4. By Criminal Procedure Rule 41.7, a defendant must not be identified during these proceedings without their permission. C has declined to give her permission and so must not be identified.

The Facts

5. C and her co-accused were members of a political group known as "Beyond Politics". That organisation grew out of a group called "Extinction Rebellion" and is now known as "Burning Pink". Burning Pink asserts that climate change is an emergency and that anything short of immediate and substantial change will lead to terrible consequences for the planet and the human race. It seeks replacement of the current political system by a system of Citizens' Assemblies.

6. In July 2020, C, together with others, agreed to target the offices of Greenpeace, Amnesty International, Christian Aid and Friends of the Earth. At each premises the group asked to hand in a letter and then proceeded to throw pink paint and to attach copies of the letters to the premises. The letters drew attention to the climate emergency and what they saw as the culpable inaction of the charities or non-governmental organisations targeted. That was the subject matter of count one. The cost of repairing the damage caused was as follows: Greenpeace - £600-£700, Amnesty International - £3975.00, Christian Aid - £9458.00 and Friends of the Earth - £2415.60.

7. In August 2020, similar events, involving C and others, took place at the headquarters of the Conservative Party, the Labour Party, the Liberal Democrats and the Green Party. These events were the subject matter of count two. At the Labour Party headquarters, one of the defendants took out a glass hammer and used it to smash a window. The cost of repairing the damage was as follows: Conservative Party headquarters - £2363.60, Labour Party headquarters - £8712.00, Liberal Democrats Party headquarters - £3903.27 and Green Party headquarters - £5100.26.

8. Finally, it was alleged that C and others agreed to target the headquarters of various trade unions, specifically the GMB, Unite, Unison, and of the British Medical Association. This agreement was not put into effect. One of the members of the Green Party infiltrated Beyond Politics and attended two meetings held over Zoom, the latter of which was recorded. The agreement was to commit acts of criminal damage at the end of August 2020.

The Trial and the Judge's Rulings

9. The prosecution sought to prove the conspiracies alleged with eye-witness evidence of events at the various premises targeted. It relied also on evidence of telephone calls, emails, zoom meetings and posts on social media involving the defendants.

10. In their defence statements, the defendants raised four defences: (i) lawful excuse – protection of property (under section 5(2)(b) of the 1971 Act); (ii) necessity, duress of circumstance and defence of another; (iii) lawful excuse – namely belief in consent (pursuant to section 5(2)(a)); and (iv) lawful excuse – a general defence relying on Articles 10 and 11 of the European Convention on Human Rights (the Convention).

11. We note in passing that, in relation to the defence raised under section 5(2)(a), C's defence statement stated merely that she would "assert that she believed that the person entitled to consent to the damage of the property had so consented, or would have so consented if they had known of the damage and its circumstances". This was clearly too vague and inadequate to satisfy section 6A(1) of the Criminal Procedure and Investigations Act 1996, in that it failed to identify the matters of fact on which she intended to rely.

12. Before the case was opened to the jury, the prosecution applied for a ruling as to (i) whether the defences set out in the defence statements were available in the factual context of this case where the acts were not denied, and (ii) what the limits of those defences were. The defendants opposed the application on the basis that it would be premature to rule on the availability of defences. In any event, it would be wrong to withdraw any of these defences from the jury and it was wrong in principle to withdraw any of them before evidence had been called.

13. On 11 January 2023, prior to the case being opened to the jury, the Judge handed down a detailed written ruling in relation to the proposed defences. In summary his conclusions were as follows:

    (i) A judge may withdraw a defence from a jury if there is no evidence to support it. Where there is evidence it is not for the judge to evaluate its sufficiency. That will be a matter for the jury.
    (ii) There was no evidence to support any defence of lawful excuse based on Convention rights or on section 5(2)(b) of the 1971 Act or on necessity/duress of circumstances/defence of another. Those defences could not pursued in the trial.
    (iii) Due to the subjectivity of the defence of lawful excuse in section 5(2)(a), it was impossible for him to rule on its applicability before evidence had been called. He permitted that defence to be put before the jury.

14. C gave evidence at trial. Her case was that she believed that the occupiers of the premises (which she and others agreed to damage) would have consented to the damage had they been aware that it was carried out to alert those responsible for the premises to the nature and extent of man-made climate change. Her evidence was that some members of staff in the various organisations whose premises were damaged "*know that they are failing*" and were critical of their response to climate change. C said that this justified her belief that they would have agreed with the defendants' action. She said that "*the people who we believe have the right to consent… would have consented had they been aware of the full circumstances at the time*". If they were "*emotionally engaged, they would have consented to a bit of pink paint being thrown*". It would help mobilise their members when they saw the action in the press. C had said "*it has got to be a shock impact, so they wake up*".

15. The Judge's final written directions to the jury were discussed with counsel. They included the following:

    - "It is a lawful excuse to criminal damage if (1) at the time of the act (a defendant) believed (2) that the person whom s/he believed to be entitled to consent to the damage (3) would have consented to it if s/he had known of the damage and its circumstances…"
    - "The defendant must have believed the various things I'm about to go through at the time of the act, which here is at the time the agreement was made. What happened after that point is not relevant in any way…"
    - "The defendant must also believe that this person would have consented. In considering the person entitled to consent, this person is to be given the knowledge of the damage and its circumstances…"
    - "What are the circumstances here? "Circumstances" is an ordinary English word. It is the logical surroundings of an action - the time, place, manner, cause, occasion - amid which something takes place…"
    - "The "damage and its circumstances"… does not include any belief that the defendant may have in the circumstances. The defendant must believe that the person entitled to consent would have done so, but the damage and its circumstances are what they are, and are independent of the defendant's belief in them…"

- "It is important to note that there is no element of persuasion allowed for here. You need to believe at the time of the agreement…the person with the right to consent would have done so at the time of the agreement. Not sometime future, not having been persuaded by detailed arguments, but would have agreed if they had known of the damage and its circumstances…"
- "Please note that the word is "would". It is not may, might, should, or likely to consent, but would have consented…"
- "[A] belief in consent does not have to be part of a defendant's motivation for committing the damage…"
- "The final point is that once the defence is raised it is for the prosecution to make you sure that there was no lawful excuse…the defendants do not need to prove that they believe these things, the prosecution must make you sure that they did not…"

Section 5(2)(a)

16. Section 1(1) of the 1971 Act (section 1(1)) provides that a person who "without lawful excuse" destroys or damages property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

17. Section 5(2) applies to an offence under section 1(1) and states:

> "(2) A person charged with an offence to which this section applies, shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—
>
> (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or
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> (b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—
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> (i) that the property, right or interest was in immediate need of protection; and
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> (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances". (emphasis added)

18. Section 5(3) of the 1971 Act provides that for the purposes of section 5(2) "it is immaterial whether a belief is justified or not if it is honestly held".

Summary of the Competing Submissions

19. Tom Little KC for the AG stated that the deployment of the defence pursuant to section 5(2)(a) in protest cases is a recent phenomenon. He said that judges at first instance are reaching inconsistent rulings on its application. The AG does not seek an interpretation of the 1971 Act in protest cases that is any different from that applicable in other cases of criminal damage. However, as is indicated by the dearth of authority in relation to section 5(2)(a), a definitive ruling from this court on the matters raised in the reference is highly desirable. It is argued that the way in which the subsection was deployed in the present case could not have been envisaged or intended by Parliament when the 1971 Act was passed.

20. In relation to the first issue raised in the Reference the AG contends as follows:

    (i) As a matter of statutory construction, the circumstances of the destruction or damage mean matters directly associated with the damage. If the damage is caused as part of a protest, the merits or importance of the subject matter of the protest cannot be part of the circumstances. Likewise the perceived need to draw attention to a cause or situation and the defendant's views in relation to the cause or situation are not capable of being "circumstances" within the meaning of the statute. There must be a direct nexus between the destruction or damage and the matters on which the defence rely as "circumstances". In this case the fact that the damage was done as a part of a protest about climate change was a circumstance of the damage. The arguments underpinning the protest were not.

    (ii) It is at the point of the commission of the offence that the defendant must have the belief that the relevant person would have consented to the destruction or damage. As the Judge directed the jury, there can be no element of persuasion after the event. In this case C's evidence that, "*It has to be a shock impact, so they wake up*," and that those entitled to consent needed to "*emotionally connect*" with the issues before they would have consented was a paradigm of a person adopting damage as a means of persuasion rather than someone with a belief that the owner would have consented to the damage.

21. Henry Blaxland KC for C agrees that the first issue turns on a point of statutory construction. He emphasises that section 5(2)(a) creates a subjective test. The sole question is whether the defendant had an honest belief that the owner would have consented. What amounts to "circumstances" in section 5(2)(a) is a matter of fact. Their ambit ought not be restricted in the way contended for by the AG. The reasons for and arguments underpinning the damage caused would be relevant to the defendant's belief in consent. Any argument to the contrary had no logical foundation. He submitted that the AG sought to place artificial limits on the availability of a defence in a subcategory of cases, circumventing the clear wording of the legislation.

22. It is submitted that the second question posed in the Reference is inappropriate, insofar as it seeks to challenge the decision of the Judge on the facts. This Court does not have all the evidence that was available below, and it would be wrong for it to interfere.

Moreover, the second question does not raise a point of law. The Judge's legal directions were correct. Thus, for example, he properly directed the jury that no regard should be had to the potential effect of persuasion on the owner of the property. The jury chose to acquit. For the AG now to pose the second question is to question the verdict of the jury.

23. Louis Mably KC, appearing as Advocate to the Court, agrees with the AG that section 5(2)(a) was not intended by Parliament to cater for protestors seeking to justify damaging property in the course of direct action. As he put it, the justification for acts of damage caused by protesters "*is being shoehorned*" into its scope.

24. Mr Mably submits that, even though it is the subjective belief of the defendant that has to be considered, there is an objective element to section 5(2)(a): whether particular matters are sufficiently related to the damage to constitute its "circumstances" is an objective question. This will be a matter of fact and degree, rather than the subject of a bright-line threshold. The notion of "circumstances" does not require a limitless interpretation in the context of the statutory provision. Reference is made to *DPP v Ditchfield* [2021] EWHC 1090 (Admin) (*Ditchfield*), a case relating to the defence in section 5(2)(b) of the 1971 Act (protection of property) (section 5(2)(b)).

25. Thus, contends Mr Mably, the test is one of proximity. On the facts of this case, the high-level reason for the damage was that it was caused as an act of protest. That was directly related to the damage, and could be seen as the "circumstances" of the damage. The fact that the protest was in relation to a particular issue, here climate change, was a secondary level reason, but could be seen fairly as a "circumstance" of the damage because it was a foundation of the alleged belief in the putative consent. But to descend below that level of reason would be outside the 'circumstances' of the damage. Arguments as to the nature and extent of climate change would be insufficiently proximate to the damage.

26. As for the second question, Mr Mably states that it is well-established that in a criminal trial the judge may withdraw an issue from the jury if no reasonable jury properly directed could reach a particular conclusion: *Attorney General's Reference (No.1 of 2022*) [2022] EWCA Crim 1259; [2023] 1 Cr App R 1 at [118] (*Attorney General Reference (No.1 of 2022)*). If the evidence in the case were such that no reasonable jury properly directed could conclude that the defendant might have had the required belief, the judge would be entitled to withdraw the section 5(2)(a) issue. He submits that C's mere assertion that she had such belief was not necessarily determinative of the point. The matter would have to be judged on all the evidence. He invites comparison with the approach taken to the defence of loss of control: see for example *R v Myles* [2023] EWCA Crim 943 at [16].

27. Furthermore, as a matter of procedure, Mr Mably submits that it would be open to a judge, in an appropriate case, to reach a decision on the sufficiency of evidence before any evidence were called. Each case would depend on its own facts. A judge should be cautious before withdrawing an issue from the jury so as not to usurp its function. In the context of section 5(2)(a), were the defendant to make a bare assertion about her belief in relation to the owner's consent, the judge would be entitled to consider whether the assertion had any adequate evidential foundation. If the asserted belief were inherently implausible and fanciful, it might be that the judge would be able to

determine that no reasonable jury could conclude that the defendant might have had the asserted belief.

Discussion: The First Question

28. The Reference has been made by the AG pursuant to section 36 of the Criminal Justice Act 1972 which provides:

> "(1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it.
> (2) For the purpose of their consideration of a point referred to them under this section the Court of Appeal shall hear argument—
> (a) by, or by counsel on behalf of, the Attorney General; and
> (b) if the acquitted person desires to present any argument to the court, by counsel on his behalf or, with the leave of the court, by the acquitted person himself...
> (7) A reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial."

29. The central question raised by this Reference is as to the proper construction of section 5(2)(a). Before turning directly to that exercise, it is helpful first to recognise the context in which the question arises and then to consider briefly the authorities.

Context

30. Two well-known principles, long recognised and protected by the common law, and also by the Human Rights Act 1998, are engaged, namely i) the right to hold and enjoy property and ii) the right to make peaceful protest.

31. The courts have addressed these potentially competing rights in two cases to which we were referred. In *R v Jones (Margaret) and others* [2006 UKHL 16; [2007] AC 136 (*Jones*) the House of Lords considered the cases of protestors who had damaged property at military bases. By the time that the case reached the House of Lords, no defence pursuant to section 5(2)(a) or (b) was in issue. However, Lord Hoffman made the following general remarks:

> "89…civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account…

> 90. These appeals and similar cases concerned with controversial activities such as animal experiments, fox hunting, genetically modified crops, nuclear weapons and the like, suggest the emergence of a new phenomenon, namely litigation as the continuation of protest by other means… The protesters claim that their honestly held opinion of the legality or dangerous character of the activities in question justifies trespass, causing damage to property or the use of force. By this means they invite the court to adjudicate upon the merits of their opinions and provide themselves with a platform from which to address the media on the subject. ...
> 93. My Lords, I do not think that it would be inconsistent with our traditional respect for conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed.
> 94. The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified… Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered ..."

32. *Ditchfield* concerned the spray-painting of two "XR" (Extinction Rebellion) symbols on a Cambridgeshire County Council building. Ms Ditchfield relied on the defence in section 5(2)(b), arguing that the criminal damage alleged could amount in law to something done to protect another's property by pressuring the public authority to take protective action. The Divisional Court, referring to [89] in *Jones* as set out above, rejected that argument, noting that it would be to "give *carte blanche* to the pursuit of politics by means of damage to public or private property, which Parliament cannot, in our view, have intended" (see [23]).

33. Whilst these observations do not dictate the outcome of the issues raised in this Reference, they do confirm that the right to protest does not give a right to cause damage to property. The extent to which the exercise of the right to protest provides a defence to a criminal charge depends on the precise nature of the criminal offence and the available defences.

Previous authority

34. As indicated above, there is limited previous authority on the ambit of the defence provided by section 5(2)(a). Two cases have been cited to us, the first the decision in *Jaggard v Dickinson* [1981] 1 QB 527 *(Jaggard)*. There the defendant had been given permission to use a house as if it were her own. She returned to the house late one night. She was very drunk. In her drunken state she went to the wrong house. She broke a window of that house to gain entry. Her honest, albeit mistaken, belief was that the owner would have consented to the breaking of the window. The mistake stemmed from her inebriation. She was convicted by the magistrates because they considered that the defence was not open to her due her intoxication. The High Court found that to be an error of law and quashed her conviction. The case is of no assistance to us because there was no issue but that, had the defendant broken the window at the right house, the owner would have consented.

35. In *R v Denton* [1981] 1 WLR 1446 the appellant was asked by the owner of business premises to set it on fire as part of a fraudulent insurance claim. The conviction was quashed because the owner in fact had consented to the damage. The fraudulent purpose of the owner was irrelevant to the defence under s5(2)(a). This authority also does not advance the analysis for present purposes.

36. There have been cases involving protests in which the defendant has relied on the defence of protection of property as defined in section 5(2)(b). *Ditchfield* was one such case, referred to above. We have also considered *Hill and Hall* (1989) 89 Cr App R 74 (*Hill and Hall*). Although the terms of section 5(2)(b) differ in important respects from section 5(2)(a), there is some assistance to be gained from what was said there.

37. The appellants were convicted in separate trials of possession of a hacksaw blade intending to damage the perimeter fence of a US Naval Facility in Pembrokeshire. Their defence was lawful excuse, namely the damage was intended to protect their property. Their case was that their actions would cause the US authorities to conclude that their base was insecure and to decide to close it. That would mean that the USSR would no longer have a reason to launch a nuclear attack on the part of Pembrokeshire where the appellants lived. The judge in each case ruled that the proposed act of damage was far too remote from the eventual aim at which the appellants were targeting their actions. Accepting in that case that the appellant's belief was honest and genuine, the act of damaging the fence could not objectively amount to something done to protect their homes.

The interpretative exercise

38. Our task is to interpret section 5(2)(a). Applying normal principles, the words of the statute are given primacy and are to be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the legislative intention. The fact that this is a protest case cannot affect the proper construction of the subsection; there are no special restrictions to be imposed on protest cases. Further, section 5(2)(a) provides a defence to a criminal charge. It must be interpreted in a manner which avoids doubtful penalisation (see *Bennion, Bailey and Norbury on Statutory Interpretation* at 10.6).

39. With these principles in mind, we consider the proper meaning and effect of section 5(2)(a).

40. First, it is clear from the words "at the time of the act or acts alleged to constitute the offence" that the belief on which a defendant relies to establish the defence must be one held by the defendant at the time of the commission of the offence. It cannot be one formed to explain the conduct after the event. Nor can it be a belief founded on the actual or potential effect of efforts that might be deployed after the event to persuade the owner to consent. As the Judge directed the jury in this case, the damage cannot be an instrument of persuasion.

41. Secondly, the belief required must be a genuine belief, otherwise it is not a belief at all. Section 5(3) provides that the belief does not need to be justified but it must be honestly held. It follows that this element of the defence involves a subjective test.

42. Thirdly, the defendant's belief must be as to the consent of the person whom the defendant believed to be entitled to consent to the damage to the property in question

(for convenience, described as the owner). The defendant must believe that the owner either had consented (as in *Jaggard*) or would have consented to the damage if they had known of the damage "and its circumstances". The inclusion of the phrase "would have" involves a certainty in the belief in the owner's consent, not merely that the owner might (or should) have consented. There is therefore a requirement that the defendant's honest belief must be that she was sure that that the owner would have consented.

43. Fourthly, in any case where the defence under section 5(2)(a) is raised there must be evidence that the defendant believed that the owner would have consented to the damage had they known of the damage and its circumstances.

44. The possessive pronoun "its" is central. It delimits the "circumstances". It is only the circumstances of the damage which are relevant. The circumstances must relate to the destruction of, or damage to, the property. Thus, the relevant circumstances may include matters such as the time, place and the extent of the damage caused. These factors would be linked to the damage and directly relevant to the owner's hypothetical decision as to consent. They do not include the political or philosophical beliefs of the person causing the damage.

45. One commonly postulated circumstance where the defence in section 5(2)(a) is likely to arise is the case of the stranger discovering a child locked alone in a car on a hot day. The child is at risk of harm unless freed. If the stranger damages the car window in order to free the child, the defence of lawful excuse under section 5(2)(a) may be available to them: they believed at the time that the owner of the car would have consented to the damaging of the window because the circumstances of the damage included the need for speedy action, the importance of rescuing the child, and the relative unimportance of the damage to the vehicle. There would be a direct connection between the damage (the broken window) and the circumstances (the freeing of the child).

46. The need for a direct nexus between the circumstances of the damage and the anticipated giving of consent is implicit in the statutory language. The circumstances must belong to the damage, not to the defendant. To this extent there is an objective element to the defence. To draw the parallel with what was said in *Hill and Hall* in relation to the defence pursuant to section 5(2)(b), the circumstances cannot be so remote from the damage as no longer to be part of the damage. There must be a sufficient connection between the damage and its circumstances.

47. Both the AG and the Advocate to the Court accept that the reason for the damage as advanced by C, namely that it was an act of protest against climate change, was a "circumstance" of the damage. Just as the stranger who broke the car window did so to rescue the child, so C agreed to damage the relevant premises as a protest against climate change. The issue of climate change was the immediate prompt for the causing of the damage but also it was the foundation of the alleged belief in the putative consent.

48. We agree with those submissions. We also agree that further explanation of C's views on climate change – the extent, reasoning or her wider motivations (including the need to draw attention to the subject matter of the protest) – lacked the necessary proximity to the damage. The issue is whether C honestly believed that the owner would have consented had they known of the damage and its circumstances. On the facts of this case what C had to say about the facts of or effects of climate change could not amount

to the circumstances of the damage. Such evidence would be inadmissible in relation to the defence under section 5(2)(a).

49. The limits on the scope of the defence are defined by the words of section 5(2)(a). Parliament required a direct link between the damage and its circumstances. Echoing the observations in *Jones* and *Ditchfield* as set out above, it was not Parliament's intention in enacting section 5(2)(a) to give protesters free rein to publicise their cause through the criminal courts. Section 5(2)(a) was not intended to afford a defence to protestors based on the merits, urgency or importance of their cause (nor the perceived need to draw attention to a cause or situation).

50. This is not to place artificial restrictions on the availability of the defence in a particular category of cases nor to adjudicate on any matter touching on the validity of political, moral or religious beliefs. Rather, that by applying the normal principles of statutory construction, the merits, urgency or importance of any matter about which the defendant may be protesting do not constitute the circumstances of the damage for the purpose of section 5(2)(a).

51. In the light of that analysis we set out in the conclusion section below our answer to the first question posed in the Reference.

Discussion: The Second Question

52. The second question raised by the Reference invites the Court to opine on whether the Judge was right to rule i) before the case was opened to the jury and ii) at the conclusion of the evidence that the defence should not be withdrawn from the jury.

53. We decline to answer the question in the terms in which it is posed. Such an answer might have the effect of calling into question C's acquittal and so contravene the prohibition in section 36(7) of the Criminal Justice Act 1972. Mr Little accepted that we could address instead the legal question as to when it is appropriate, in principle and as a matter of law in cases such as the present, not to leave a possible defence to the jury.

Removing a defence from the jury

54. In deciding whether a defence should be left to the jury, the appropriate starting point is the guidance given in *Attorney General's Reference (No.1 of 2022)* where Lord Burnett of Maldon CJ stated (at [118]):

> "When considering whether an issue should not be left to the jury, we have well in mind two principles. First, the judge may not direct a jury to convict. But that prohibition is to be distinguished from circumstances in which a judge is entitled to withdraw an issue from the jury, or where an issue does not arise on the evidence and so no direction need be given about it to the jury (*R v. Wang* [2005] 1 WLR 661 at [3] and [8] to [14]).
>
> Secondly, a judge may withdraw an issue from the jury if no reasonable jury properly directed could reach a particular conclusion (e.g. that the defendant might have acted under duress (*R v. Bianco* [2001] EWCA Crim 2516 at [15]); that the defendant might have a "reasonable excuse" *(R v. Nicholson* [2006] 1

> WLR 2857 at [9]; *R v. G* [2010] 1 AC 43, 87D); or loss of self-control (*R v. Martin* [2017] EWCA Crim 1359 at [39]).”

55. Where an issue does not arise on the evidence, the judge is entitled to withdraw the issue from the jury. No party to these proceedings suggests otherwise.

56. As to the second principle identified by Lord Burnett, such circumstances can arise when there is some evidence which could be said to substantiate a defence. Mr Blaxland argued that, where the defence is entirely based on the state of mind of the defendant, there is no scope for withdrawing the issue from the jury, however implausible the proposition. He relied in particular on *R v Asmeron* [2013] EWCA Crim 435 (*Asmeron*).

57. Reference was made to *R v Nicholson* [2006] EWCA Crim 1518; [2006] 1 WLR 2857 (*Nicholson*) where Auld LJ stated (at [9]):

> “If, however, on the facts advanced or to be advanced by the defence, a jury could find them to support an evidential issue raised by the defence, particularly one involving a value judgment such as that of reasonable excuse, then he should leave it to the jury. If such a proposition requires cited authority, it is to be found in the principle enunciated by the House of Lords in *R v Wang*…., in which their Lordships considered in a wholly different statutory context a statutory defence defined by reference to the defendant's state of mind. Their Lordships held that where the defence raise such an issue, the judge is only entitled to withdraw it from the jury if there is no evidence going to that issue. If there is some evidence, however tenuous or nebulous, the question should be left to the jury”.

58. This was interpreted in *Asmeron* at [22] by Toulson LJ as follows: “[t]he fact that a defence might be considered hopeless on the merits is not a good reason for a judge to withdraw it from the jury”. Toulson LJ also stated at [15] that “[e]ven if the judge had been satisfied that no reasonable jury could have resolved that issue in the defendant's favour, he would still have been wrong to have withdrawn the defence…”

59. We consider that, taken at face value, this goes further than was suggested in *Wang* and *Nicholson*. It is also not consistent with what was said in *Attorney General's Reference (No.1 of 2022)* as set out above. Further, such an approach has not been applied in any subsequent authority of which we have been made aware. It has only been cited once in any reported case: *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin). That was solely in relation to the interpretation of section (2)(4)(c) of the Asylum and Immigration (Treatment of Claimants) Act 2004.

60. Furthermore, *Asmeron* must be understood in its context. In particular, Toulson LJ went on to state in [22] that:

> “The court can only rule that the explanation advanced by a defendant is incapable in law of amounting to a good reason or a reasonable excuse if it can properly be said, on the true construction of the Act, that it would be inconsistent with the essential nature and purpose of the offence for the defendant's explanation to be capable of amounting to a defence. R v Kelleher 147 SJLB 1395 is a good example…”

61. The case of *Kelleher* concerned a protestor who had knocked the head off a statue of Margaret Thatcher. The defendant argued that he had a lawful excuse because he was seeking to draw attention to his strongly and sincerely felt concerns that the policies of the UK and certain other Western countries were leading the world towards its destruction. The court held that the trial judge had been right to direct the jury that the defendant's explanation of his conduct did not fall within the reach of what was capable of being a lawful excuse within the meaning of the statute. Toulson LJ in describing the judgment said at [18] that "one can readily understand that it cannot have been Parliament's intention that a desire to make a political point, and attract publicity for it, should afford a lawful excuse for the deliberate destruction of another person's property".

62. Given that *Kelleher* was cited with approval in *Asmeron,* the statements of Toulson LJ are not to be understood as identifying a new threshold for the removal of a defence from a jury. The decision in *Kelleher* did not concern whether it would be 'inconsistent with the essential nature and purpose of the offence' to remove the defence from the jury; rather, it applied orthodox principles to find that the alleged act of protection was too remote from the damage caused for the defence to be available.

63. As such, if Toulson LJ's remarks are read in their full context, the decision stands simply as an example of the caution that ought to be applied when removing a defence from the jury, particularly where the defence goes to the defendant's state of mind.

64. In our judgment, the principles that are to be applied in determining when a defence ought to be removed from the jury remain those stated at [118] of *Attorney General's Reference (No.1 of 2022)*. A judge may withdraw a defence from a jury if no reasonable jury properly directed could reach a particular conclusion. We emphasise that a judge must exercise considerable caution before taking that step. It is not for the judge to substitute his or her decision for that of the jury when deciding to withdraw the defence. The judge is only entitled to withdraw the defence from the jury where *no reasonable jury,* properly directed, could find the defence to be made out.

Conclusions

65. In those circumstances, we provide the following answers to the first questions of law posed by the AG:

    i) "Circumstances" in the phrase "the destruction or damage and its circumstances" do not include the merits, urgency or importance of the matter about which the defendant is protesting, nor the perceived need to draw attention to a cause or situation.
    ii) "Damage and its circumstances" means the damage and the circumstances of the damage which, in protest cases, means the fact that the damage was caused as part of a protest (against a particular cause).

66. We decline to answer the second question posed in the Reference but have set out above our views on the point of law which arises.