Neutral Citation Number: [2024] EWCA Crim 487

Case No: 202300696 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PETERBOROUGH
HHJ ENRIGHT
T202117216

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2024

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
MRS JUSTICE YIP
and
MRS JUSTICE FARBEY

- -

Between :

REX	**Respondent**
- and -	
AURIOL GREY	**Appellant**

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- -

Mr Adrian Darbishire KC, Mr Chris Henley KC, Mr Tom Doble and Mr Brad Lewis
(instructed by **Hickman & Rose Solicitors**) for the **Appellant**
Mr Simon Spence KC (instructed by **CPS appeals Unit**) for the **Respondent**

Hearing dates: 8 May 2024

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Approved Judgment

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Dame Victoria Sharp, P.:

1. On 24 February 2023, in the Crown Court at Cambridge sitting at Peterborough, before His Honour Judge Enright and a jury, the appellant was convicted, after a retrial, of manslaughter. On 2 March 2023, she was sentenced by the judge to 3 years' imprisonment. At a hearing on 19 May 2023 before the full court, she was refused leave to appeal against sentence. At that stage, she had been advised that there were no arguable grounds of appeal against conviction. Following a change of legal representation, she sought leave to appeal against conviction. An extension of time and leave to appeal was granted by this court (Dame Victoria Sharp, P., Yip J and Calver J) on 19 March 2024.

2. We turn to the facts. On 20 October 2020 at about 2.20 pm, the appellant was walking along the pavement on the Huntingdon ring road. Pedestrians and cyclists may have had shared access to that part of the pavement, although that was never clearly established one way or another at trial. Mrs Celia Ward was riding on her bicycle on the same pavement but in the opposite direction. She was an experienced cyclist who generally cycled on pavements or cycle paths owing to difficulties she had with her hearing. Mrs Ward was travelling in the same direction as the flow of traffic. The road itself was subject to a speed limit of 30 miles per hour.

3. As Mrs Ward approached her, the appellant gesticulated towards her, waving her left arm. She shouted at Mrs Ward: "Get off the fucking pavement." She continued to walk towards Mrs Ward who fell off her bicycle into the road and into the path of a car whose driver had no chance to stop or take action. Tragically, the car drove over Mrs Ward causing catastrophic injuries. Despite a quick response from medical staff at a nearby GP surgery and the paramedics who attended, she was pronounced dead at the scene. Mrs Ward was 77 years old.

4. The appellant was 46 years old at the time. She had suffered cerebral palsy since birth when she sustained brain damage that resulted in epileptic seizures; and as a child, she underwent brain surgery to remove the part of the brain causing the epilepsy. As a result of that operation and brain injury the appellant had been left with a weakness to the right side of her body, significantly impaired vision and a degree of cognitive impairment. She walked with a limp and wore a lower leg brace. She had lost half her sight in each eye. The agreed facts at trial record that the consultant ophthalmologist who examined her, said that as a result of her brain operation, where part of the left hand side of her brain was removed, she has a total loss of visual field to the right side of view; i.e. each eye has a total loss of the right half of the visual field (which is completely different from closing your right eye and assuming that is what it looks like). At the time of the incident, as now, the appellant lived in supported accommodation.

5. When interviewed by the police, the appellant referred to her difficulties with mobility and eyesight but said that she did not consider that she had a mental disability. She said that the cyclist had been travelling towards her at speed and that she had "flinched out" with her left arm to protect herself and avoid being hurt. She told the police that she was not sure what she had said. After the CCTV with audio was played to her, she said she could not explain why she had spoken in that way but maintained that her actions were to protect herself.

6. The appellant was in due course charged with manslaughter. The charge was pursued as unlawful act manslaughter. The prosecution case was that the hostile reaction of the appellant to Mrs Ward cycling on the pavement was unlawful. It had caused Mrs Ward to fall off her bike and into the carriageway, resulting in her death. The words "Get off the fucking pavement" characterised the appellant's mindset of hostility to cyclists riding on pavements. There was ample space for both the appellant and Mrs Ward to pass one another but the appellant had deliberately obstructed Mrs Ward's path, waving her arm in such a manner that it either briefly made contact with Mrs Ward or caused her to take evasive action, leading to her falling into the road to her death.

7. The incident was captured on harrowing CCTV footage which we have viewed. In addition, the prosecution relied on evidence of motorists and passers-by. The driver of the car that struck Mrs Ward, saw two stationary people, one on a pushbike; they seemed to be chatting. Mr Walker, the driver of the car immediately behind, noticed two stationary women on the pavement and saw an arm movement from the pedestrian aimed at the cyclist which caused the cyclist to wobble and veer to the left. It was not clear to him whether contact was made. Ms Ainley was the driver of the car behind Mr Walker. She saw a pedestrian thrashing her arms around and waving her arms above her head four or five times. Another motorist whose statement was read, saw that the appellant had something in one arm and was using the other arm to shoo a cyclist who was on the pavement. Her arm was being used in a waving action.

8. In addition to CCTV of the incident, the prosecution relied on CCTV from a Sainsbury's supermarket, taken immediately prior to the incident, showing the appellant's ability to avoid obstacles and oncoming shoppers. Evidence of Police Constable Sean Redman confirmed that the incident lasted a matter of seconds. He estimated that Mrs Ward had been riding at 4.7 miles per hour. Finally, the prosecution relied on the comments made by the appellant in police interview to demonstrate her disapproval of cyclists on pavements.

9. The appellant's defence case statement indicated that she was not aware that cyclists were permitted to use the pavement. She had felt anxious and feared that she would be hit by the cyclist who was approaching her at speed. She remembered moving her arm to alert the cyclist and shouting in her direction to make her slow down. She had acted instinctively and lawfully to prevent the cyclist from colliding with her.

10. The appellant did not give evidence at trial. In line with her interview and defence case statement, she advanced the defence of accident or self-defence. The appellant's case was that, owing to her agreed medical difficulties, she perceived Mrs Ward to be coming towards her suddenly and at speed. The appellant's arm motion was a result of her fearing she would be hit. Mrs Ward would likely have been able to see the appellant from some 85 metres away and, despite the appellant's unusual gait, did not stop. It was possible that Mrs Ward had slowed down to pass the appellant, lost momentum, wobbled and fallen into the road.

11. The prosecution now accepts that, by the time that the judge summed up the case to the jury, there was no evidence which could make the jury sure that the appellant had made any physical contact with Mrs Ward. The evidence was that the appellant had gesticulated and shouted at Mrs Ward using a swear word. There was however no evidence to make the jury sure that the appellant pushed or in any way touched Mrs Ward.

12. The judge's written directions show that the issues that left to the jury were whether the defences of accident or self-defence were made out and, if not, whether "a sane and reasonable person" would realise that doing what the appellant did would inevitably expose Mrs Ward to some harm. The reference to "sane" in this context was an error: a sober person, is the correct legal formulation, see *R v Church* [1966] 1 Q.B. 59), but the judge's error in this regard was immaterial.

13. The judge provided the jury with written legal directions and with a written route to verdict. The material parts were as follows:

> "Manslaughter
>
> A person commits manslaughter if he/she does an unlawful act that a sane and reasonable person would realise would inevitably expose another person to the risk of some harm (and that other person dies as a result).
>
> If you concluded that what took place was or may have been an accident, then you will find the defendant not guilty.
>
> If you were sure that what took place was not an accident but found that the defendant was or may have been acting in self-defence, then you will find her not guilty."

> "ROUTE TO VERDICT
>
> Q 1 Was what took place or may it have been an accident?
>
> If so, your verdict is not guilty. Go no further.
>
> If not, go to Q2.
>
> Q 2 Did she believe, or may she have believed it was necessary to use force to defend herself?
>
> If not, self-defence fails and you will go straight to Q4.
>
> If yes, go to Q3.
>
> Q3 Was the force that she used reasonable, or may it have been reasonable?
>
> If yes, verdict not guilty. Go no further.
>
> If no, self-defence fails. Go to Q4.
>
> Q4 Would a sane and reasonable person realise that doing what she did, would inevitably expose Mrs Ward to some harm?

> If yes, verdict guilty. Go no further.
>
> If no, verdict not guilty."

14. On behalf of the appellant, Mr Adrian Darbishire KC with Mr Chris Henley KC, Mr Tom Doble and Mr Brad Lewis (who did not appear at trial) submits that the Judge failed to specify to the jury the act constituting the relevant "unlawful act" (sometimes called the base offence) that was the alleged cause of death. Neither the Judge nor the parties identified any such act during the trial. As a consequence, the elements of the base offence were never left for the consideration of the jury. The issue was never addressed, and no base offence proved. Mr Darbishire submits that the factual elements which were left to the jury were insufficient in law for a conviction for manslaughter to follow.

15. Mr Darbishire further argues that there was insufficient evidence for the jury to be sure that any base offence had been committed so that the elements of unlawful act manslaughter could not as a matter of law be proved. In answer to an argument advanced on behalf of the respondent that the fact that no submission of no case was made at the conclusion of the trial amounted to a concession as to the base offence, Mr Darbishire says that this illustrates the problem at the heart of this case. The requirement to prove the elements of the base offence had been entirely overlooked by everyone, that is counsel on both sides and the judge.

16. On behalf of the respondent, Mr Simon Spence KC accepts that the judge did not leave the elements of any specific base offence to the jury. He accepts that the base offence could not be a battery as the jury could not be sure of any physical contact. He submits that, on the facts of the case, the only base offence that could have been applicable was common assault, which is defined as an act by which a person intentionally or recklessly causes another to apprehend immediate unlawful violence. Even though the judge did not give any directions to the jury about common assault, Mr Spence submits that the jury were nevertheless directed in terms such that they would inevitably have found that common assault was committed. The cumulative effect of the evidence, the legal directions and the route to verdict was such as to enable the jury properly to understand the issues in the case, and most fundamentally, that they were concerned with the unlawfulness or otherwise of the appellant's actions. Mr Spence submits that the conviction is therefore not unsafe.

17. In *R v Goodfellow* (1986) 83 Cr. App. R. 23, 27, Lord Lane CJ stated:

> "The questions which the jury have to decide on the charge of manslaughter of this nature are: (1) Was the act intentional? (2) Was it unlawful? (3) Was it an act which any reasonable person would realise was bound to subject some other human being to the risk of physical harm, albeit not necessarily serious harm? (4) Was that act the cause of death?"

18. In *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 A.C. 269, the House of Lords confirmed that the unlawful act must be a crime. Lord Bingham said [at paragraph 7]:

> "To establish the crime of unlawful act manslaughter it must be shown, among other things not relevant to this appeal: (1) that the defendant committed an unlawful act; (2) that such an unlawful act was a crime … and (3) that the defendant's unlawful act was a significant cause of the death of the deceased …"

19. A person is only guilty of manslaughter therefore if he or she has carried out an act that itself contravenes the criminal law. All elements of the base offence must be proved before a jury can properly find that a person is guilty of manslaughter.

20. In *R v Lamb* [1967] 2 Q.B. 981, the defendant shot his best friend when he pointed a revolver at him in jest and pulled the trigger. The revolver had two bullets in the chambers but neither was in the chamber opposite the barrel. The defendant did not understand the mechanism of the weapon and did not realise that his actions would cause a live shot. The deceased also treated the incident as a joke. The trial judge took the view that the pointing of the revolver and the pulling of the trigger could of itself be unlawful even if there was no attempt to alarm or to injure. He directed the jury that "using a revolver, in the circumstances of the case, in such a manner as in the contemplation of any ordinary man, possessed of his reason, will cause real and unnecessary risk of injury to another, is an unlawful act, whether or not it falls within any recognised category of crime." The Court of Appeal found that this was a misdirection. On appeal, the Crown conceded that there was no evidence to go to the jury of any assault of any kind. It was acknowledged that a charge of assault could not have been maintained if the pulling of the trigger had not resulted in a shot being fired and the deceased being killed. The Court of Appeal held that it was necessary to prove the mens rea for an assault as well as the actus reus. This case illustrates that it will often be helpful to consider what offence might have been charged if no death had occurred.

21. It is common ground that the appellant could only be convicted of manslaughter if she had committed the offence of common assault, this being the only possible base offence. It is also common ground that the elements of the base offence were never specified at trial, whether by the prosecution or by the judge, nor was the failure to do so recognised by those then representing the appellant. This was not simply a failure to provide a label for a base offence about which the jury were otherwise properly directed. The jury were provided with no directions at all about any of the elements of the base offence, whether relating to the actus reus or the mens rea. They were simply not asked to consider the factual elements required to prove a common assault. This amounted to a failure to direct the jury about an essential ingredient of the offence of manslaughter.

22. We reject Mr Spence's submission that the judge's failure to deal with common assault made no practical difference. It cannot realistically be maintained that the jury were,

notwithstanding the absence of any legal directions on common assault, aware of the elements that must be proved. Nothing in judge's legal directions or in his summary of the evidence implies that the jury were sure that the appellant committed a common assault which caused death.

23. The elements of common assault, which should have been identified for the jury, are:

    i) The actus reus or conduct element, namely that the appellant's conduct caused the deceased to apprehend immediate unlawful infliction of force;

    ii) The mens rea or mental element, that is, that the appellant's threat of force was intentional or reckless.

24. To prove recklessness, the prosecution had to prove that the appellant:

    i) Was actually aware of the risk that the deceased would apprehend immediate unlawful violence; and

    ii) Nevertheless went on to take the risk; and

    iii) In the circumstances known to the appellant, it was an unreasonable risk for her to take.

25. The judge's legal directions did not address any of these issues. They focused instead on accident and self-defence. The route to verdict first asked whether "what took place" was or may have been an accident. This could not have greatly assisted the jury on the facts of this case. In one sense, "what took place" was an accident. No one suggested that the appellant intended that Mrs Ward would fall into the road and be killed. In another sense, the appellant's actions were not accidental. It was not an "accident" that she waved her arm (or arms) and uttered the words that she did. Posing this question did not and could not have invited the jury to consider whether the elements of common assault were made out.

26. In his directions on self-defence, the judge said: "If you reject self-defence, it means you have found that she used unlawful force." This was a misdirection in law. The jury had to consider whether the elements of common assault were otherwise made out before considering whether the defence of self-defence might apply. They had not been invited to do so.

27. The prosecution case at trial was that the appellant waved her arm towards Mrs Ward in a swinging motion, shouted at her to get out of the way using obscene language and walked towards her. The trial did not address the issue of whether such actions caused Mrs Ward to apprehend the immediate unlawful infliction of force.

28. In his summing up, the judge described the parties' respective cases as follows:

> "The Crown case is that the defendant was angry at the sight of the bike approaching her. She could have stopped, could have stepped aside but, instead, kept moving forward, shouting angrily and striking out in anger and, whether that blow connected or not, it caused the cyclist to topple slowly sideways, perhaps in apprehension of a blow. That's the Crown case and

> the Crown say if you apply the legal directions, there can be only one outcome.
>
> The defence say, essentially, that she may have been taken by surprise by the sight of a bike coming down the pavement and feared for her safety and acted instinctively; accident, self-defence."

29. Even if this accurately encapsulates the prosecution's case, it follows from this that, the prosecution case taken at its highest was that Mrs Ward perhaps apprehended a blow. It was not enough however for the prosecution to prove that the appellant's conduct may have caused Mrs Ward to apprehend immediate unlawful force. The prosecution had to make the jury sure that the appellant's actions did have that effect. The jury were simply never asked to consider that issue.

30. The prosecution appear to have approached this case on the basis that hostility on the part of the appellant was enough to establish that her actions were unlawful. The legal directions did nothing to correct that misunderstanding. There was no focus on the appellant's subjective state of mind. There was no identification of what the appellant needed to have appreciated in order to establish recklessness. No attention was given to whether she recognised that there was a risk of Mrs Ward apprehending that she would be violent towards her. The jury were not asked to determine what circumstances were known to the appellant or to decide whether she ran an unreasonable risk in those circumstances. The mental element of common assault was simply not addressed at all.

31. Had the issues been properly identified at the outset, it is likely that much greater attention would have been given to the evidential basis upon which the prosecution case was founded. The prosecution and the judge invited the jury to focus particularly on the CCTV evidence as the best evidence of what happened. That evidence plainly could not establish what was in the mind of either woman as they encountered each other. However, one possible view of the movements captured on the CCTV footage is that Mrs Ward altered her course to avoid the appellant walking towards her and lost her balance. That reflects how the prosecution case was ultimately left to the jury, that is that there was uncertainty as to whether Mrs Ward toppled in apprehension of a blow or for another reason.

32. We discern no possible grounds for concluding that the jury could properly have been sure that Mrs Ward apprehended immediate unlawful violence. If anyone at the trial had appreciated that the jury should be provided with directions about the base offence, it would have been obvious that the prosecution case was defective. The only question was whether the jury were sure that Mrs Ward apprehended a blow; what she may perhaps have apprehended was legally insufficient to found a conviction. In our judgment, the prosecution case was insufficient even to be left to the jury.

33. Had the prosecution been able to overcome the first hurdle of establishing the actus reus for a common assault, the appellant's state of mind would then have required close attention. If the parties had properly identified the issues for the jury, the evidence at trial may well have been different. Although the jury had some evidence of the appellant's disabilities, we anticipate that they may have been given greater attention

had the necessary elements to establish recklessness been clearly identified. In this regard we have the benefit of considering a medical report prepared for the appellant's sentencing appeal, and a helpful and perceptive letter from the appellant's brother-in-law. He was not aware of the appellant's prosecution or sentence, but having been made aware of it after the event by reports in the media, brought about the instruction of her fresh legal team.

34. The jury would have required careful directions as to how to approach such evidence, that is, of the appellant's cognition and her disabilities, and its impact on her actions and perceptions at the time. As it was, the jury were simply not directed to consider the mental element. There is no possible basis for inferring that they answered questions that were not posed. The issues they were asked to determine did not address the fundamental question of whether any base offence was established.

35. Mrs Ward's death was a tragedy and the circumstances of it were horrific. We recognise the huge distress caused to her family and acknowledge that the outcome of this appeal may add to that. The appellant's actions that day contributed to Mrs Ward's untimely death. It seems to us that this formed the starting point for the prosecution. Had Mrs Ward not died, we regard it as inconceivable that the appellant would ever have been charged with assault in circumstances where it could not be established that she had made any physical contact with the cyclist. The death of Mrs Ward is plainly of great significance and undoubtedly called for proper investigation of any criminal responsibility. However, the requirement to prove all the legal elements of common assault remained the same and were simply not addressed as they should have been.

36. In all the circumstances, we have no hesitation in concluding that the appellant's conviction for manslaughter is unsafe. The judge's legal directions contained fundamental and material misdirections of law. That stemmed from the failure of all involved to properly identify and address the issues to be determined by the jury. Had the need to identify and prove a base offence been recognised, the evidential insufficiency of the prosecution case would have been recognised. There was, in our judgment, simply no proper basis for the appellant to be convicted of manslaughter in this very tragic case.

37. This appeal is therefore allowed, and the conviction will be quashed.

38. We are obviously grateful to all counsel but should particularly mention the appellant's new legal team, including counsel and solicitors who advised and prepared this appeal pro bono.