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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 2nd March 2001

B E F O R E :

LORD JUSTICE MANCE

MR JUSTICE BELL

and

HIS HONOUR JUDGE FRANCIS ALLEN
(Sitting as a Judge of the CACD)

R E G I N A

- v -

JOHN CRAWFORD

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MR N LEWIN appeared on behalf of the APPELLANT
MR J BEAL appeared on behalf of the CROWN

JUDGMENT
(As approved by the Court)

1. LORD JUSTICE MANCE: On 20th June 2000, at the Crown Court at Plymouth, before His Honour Judge Griggs, the appellant was convicted by a majority verdict of 10 to 2 of assault occasioning actual bodily harm and on 13th November 2000 he was sentenced to 240 hours' community service. He was acquitted on two other counts: false imprisonment and indecent assault. He now appeals against conviction by leave of the single judge.
2. The appellant was the former boyfriend of the complainant, Lisa Wilcox. The counts on the indictment arose out of an incident in the early hours of New Year's Day 2000. Lisa Wilcox gave evidence of the previous relationship. In relation to the night of the incident she said that she had been the victim of an assault without reason in these circumstances. She had gone to the appellant's house because she had lost her umbrella and the keys of her home. On arrival, she had found him as the only person there and an argument had broken out between them. She had become afraid after he deliberately snapped an umbrella in half, and she had thrown an empty bottle at him. It had missed, but the bottle had struck a door, causing damage. The appellant had then moved towards her. She had offered to pay for the damaged door, but he had picked up the bottle and said, "How would you like it?" He then hit her over the back of the head with it. She had screamed at him "Let me leave" and he replied, "Too right you are leaving". He grabbed hold of her by the hair. He had dragged her to the landing and he had thrown her down the stairs. She had landed halfway down. He followed her, picked her up and dropped her again. He dragged her into the living room, where he continued to assault her by punching and kicking. He was not wearing shoes at the time, but the kicks caused bruising to her legs and hip. He blocked her exit. He had refused to let her leave for some time. That was the subject of the false imprisonment count, which, as we have said, led to an acquittal. She had managed to escape from the house. She had run to a telephone box and she rung for a taxi. There was medical evidence about her injuries.
3. The appellant was arrested on 10th January 2000 after the complainant had made a complaint. In interview he had admitted that there had been a heated argument as a result of, he said, their becoming separated in a crowd. He said that she had refused to let the matter drop when they had been at his home. He had asked her to leave his room. She had not done so. He had shoved her out of the door, but, as he did so, she pushed a television over. He had become angry. She then tried to hit him with an empty bottle but had missed and damaged the door. At that point he had then marched her down the stairs. She was kicking and screaming. She had lost her footing and she had stumbled down the first section. He had taken hold of her again and told her to leave. Instead of doing so, she had followed him into the living room, where the argument resumed. She had told him it was all over. After giving her a friendly tap he had said "Fuck you then" and gone upstairs. He heard the door slam. Minutes later he walked to the telephone box at the end of the street. She was inside and told him that she had rung for a cab, which arrived seconds later. As for her allegations of assault and an allegation that he had touched her in the telephone box in her genital area (that being the subject of the second count on which there was an acquittal), he denied that anything of that nature had taken place.
4. In evidence he gave a similar account. He said that she had been the aggressor throughout and her account of what had taken place was no more than lying and exaggeration. There was never any false imprisonment or indecent assault. Any assault which he had committed was in the context of requiring her to leave his flat after she had refused to do so.
5. The leave given by the single judge was on two grounds: firstly, under the heading of "excessive force", the judge erred in leaving it to the jury to convict the appellant on the basis that he had used excessive force to evict the complainant. This, as he said, was not the Crown's case and was not dealt with during the course of the trial by either side. Secondly,

the judge erred in failing to give a 'Brown' direction in his summing-up. The submission here is that, having opened an alternative basis for a conviction on the assault charge, despite the way the case had been put during the trial, the judge should then have directed the jury that before they could convict they should all be unanimous, or, in the case of majority verdict, they should by a majority of at least ten to two be sure that the offence had been committed either on the primary basis on which it was put, namely that there was simply an unprovoked assault with no excuse whatever, or, alternatively, on the alternative basis that, if the appellant was reacting to a refusal to leave his home by the complainant, then he was reacting by use of excessive force. Unless they were all of the view that on one basis or on the other the case was made out, they could not convict.

6. We have only found it necessary to hear argument on the first ground. It has been accepted before us by counsel on both sides that it was never part of the Crown case that the appellant overreacted and committed an assault by the use of excessive force. The Crown's case was always that indicated by the complainant's account of events, namely that this was an assault for which there was no excuse at all. It was nothing to do with requiring her to leave the appellant's house: on the contrary, it was simple vindictiveness, indicated by the words which she said were used. The defence to that case was simply that she was lying and exaggerating, and that all that had happened was a successful attempt to require her to leave the appellant's house.
7. It was implicit in that way of conducting the trial that no offence was committed if the appellant's account of events was or might, in the jury's view, represent the truth. However, in summing up, the judge introduced a further possibility. He quite correctly defined the nature of an assault occasioning actual bodily harm; he said:

“An assault is only a form of touching. If it occasions actual bodily harm, obviously it is one accompanied by a measure of violence. It must be unlawful. If committed in circumstances amount to self-defence, reasonable and necessary self-defence, it will not be unlawful. Once the issue of self-defence is raised, it is for the prosecution to satisfy you that the defendant was not acting in self-defence; or in this case, in defence of his home.”

8. Thus far no problem arises. But he then went on:

“If you think the defendant may have needed to defend himself or his home, and did no more than he honestly and instinctively thought was necessary, then he would be entitled to be acquitted. Was the amount of force used reasonable or unreasonable? You must judge that by what the defendant himself perceived to be appropriate. If you are of the view that he overreacted, that he began by defending himself or his home, but then acted out of a desire to retaliate or revenge, or some other such motive, then you no longer be acting in defence of himself or defence of his home.”

9. At that point it seems to us that, although he was explaining accurately the legal position, he was doing so in a way which opened up an alternative basis of conviction which the Crown had never suggested. The Crown never said at any point in the trial, in opening or in cross-examination of the defendant or in closing speeches that, even if the jury thought that the appellant's account of events was or might be the truth, still it would be appropriate or necessary for them to consider whether, on his own account, he may not have committed an assault by overreaction by use of excessive force. The judge, however, directed the jury

precisely to that effect. He repeated this direction two pages later in his summing-up at page 9, where he said:

“What he [counsel for the defendant] was saying is that the appellant was acting reasonably in seeking to get her to leave his house and home. It is the law that someone is entitled, as long as they act reasonably to eject someone else from this property. If you think the injuries sustained by Miss Wilcox were caused or may have been caused by the defendant seeking to push her out of his house, his bedroom, to drag her to the stairs...”

10. Then comes again the critical phrase:

“... providing that all he was doing, providing he was acting in a reasonable way, then he would not be guilty.”

11. Again the judge in that passage qualified the defence in a way which had not been suggested by the Crown at any point during the trial.

12. Counsel for the appellant accepts that, had the Crown put the matter as the judge did, it would have been open to them to do so and there was probably nothing further that he could have put to the complainant in cross-examination. His case put to her was that she was at all points lying and exaggerating. But he says that he could and would have required the Crown to put any such alternative basis for conviction to the appellant, who gave evidence. Further, he could and would have dealt with the subject in his final speech.

13. We accept those submissions. In our view the appellant's case was prejudiced as a result of the way in which the case was put in the summing-up by the judge. We have been referred to the authorities of Atlee 58 Cr App R 378 and Gregory 77 Cr App R 41, which support our view that what happened on the facts of this case constituted an irregularity. It is not an irregularity which we think can be passed by without a conclusion that the resulting verdict was unsafe. This was a verdict arrived at only by a majority of the jury by ten to two. Furthermore, we are informed (though this may only mean that the judge adopted the view of the facts most favourable to the appellant when sentencing) that the judge in sentencing proceeded on the basis that the jury's verdict involved a conclusion that, although the appellant had been reacting to the complainant, he had overreacted and used excessive force in seeking to remove her from his house. That may also be regarded as consistent with the jury's acquittal on counts 1 and 2. However, that may be, the potential prejudice from the way the judge summed up is clear. In our view this verdict cannot be regarded as safe. In those circumstances, it has been unnecessary for us, as we have said, to consider the second ground of appeal for which leave was given. We need say no more than that the appeal succeeds and the conviction will be quashed.

14. Presumably he has done his 240 hours' community service?

15. MR BEAL: A concurrent order was made in relation to another matter of 180 hours. I do not know whether he has finished that yet or not, but plainly the other 60 hours would be suspended after this hearing, as I understand it.

16. LORD JUSTICE MANCE: Yes, I see. You are not suggesting that this should be a retrial?

17. MR BEAL: My Lord, no.