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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 26 September 2018

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE SPENCER

MR JUSTICE WILLIAM DAVIS

R E G I N A
v
NATASHA MYERS

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Mr M Haggar appeared on behalf of the **Appellant**
Mr A Wright appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE HAMBLEN:

Introduction

1. On 23 April 2018, in the Crown Court at Kingston-upon-Thames before His Honour Judge John, the appellant was convicted on count 1 of bringing a prohibited article of Class A into prison, contrary to section 40B(1) (a) of the Prison Act 1952, namely 11 grams of cannabis and on counts 2 to 4 of bringing a prohibited article of Class B into prison, contrary to section 40C(1)(a) of the Prison Act 1951, namely two mobile phones (counts 2 and 3), a SIM card (count 4) as well as two charging cables. On an earlier date she had pleaded guilty in respect of count 5 of bringing a prohibited article of Class B into prison, namely a further SIM card.

2. On 24 April 2018 she was sentenced to concurrent terms of imprisonment totalling 18 months as follows: 18 months' imprisonment in respect of counts 2 and 3; 6 months on count 1; 12 months on count 4 and 8 months on count 5, making a total sentence of 18 months' imprisonment.

The Outline Facts

3. On 29 August 2017 the appellant together with her daughter visited her long-term partner, David Akende, who was a serving prisoner at HMP Wandsworth. Officers on duty observed the appellant pass something to Akende which he appeared to conceal inside the back of his trousers. A later search revealed that Akende had a clingfilm package in his anal passage which contained the cannabis (count 1), two mobile phones (counts 2 and 3), a SIM card (count 4) and two phone charging cables.

4. The prosecution case was that the appellant had brought the clingfilm package and the single SIM card into the prison concealed in an orifice and had handed it to her partner

in the visiting room.

5. The defence case was that the appellant had only passed the prisoner the single SIM card (the subject of count 5) and that the items wrapped together in the clingfilm package (the subject of counts 1 to 4) were already concealed upon Mr Akende's person when he entered the visiting room.

6. The issue for the jury was whether the appellant brought the prohibited items contained in the clingfilm package into the prison and passed them to her partner or whether he was already in possession of them when the appellant arrived.

The Evidence at Trial

7. For the prosecution, evidence was given by Michael Romane, a prison officer on duty in the visiting area of Wandsworth Prison on 29 August 2017. He explained that visitors are subjected to a rubdown search over their clothing. Although a metal detector was installed this was not used as sniffer dogs were not available at the time of the appellant's visit. During the visit the camera operator drew his attention to the appellant who was seated at table 39 and who had something in her hand. A short while later the camera operator informed him that something had been passed from the appellant to the prisoner. He looked over and saw Akende with his hand down the back of his trousers. He believed that he was inserting something into his anus. Staff moved swiftly to remove Akende from the visitors' area. He denied that he had concealed anything but after a detailed search the items were found in his anus. It was agreed evidence that the items subject of counts 1 to 4 were tightly packed in clingfilm in a manner designed to be smuggled into prison. There was no DNA evidence available.

8. Police were called and arrested the appellant. She was in possession of three mobile

phones. In interview, she initially denied taking anything into the prison. She later accepted that she had taken in a single SIM card.

9. CCTV footage from the visiting room was played to assist the jury.

10. For the defence, the appellant gave evidence that she went to Wandsworth Prison that day with her 14-year-old daughter, Morgan, to visit her partner, Akende. She had visited him at various prisons during the past three-and-a-half years, once every fortnight. Sometimes visitors were required to walk through a metal detector or had a wand detector passed over them. On some occasions there would be sniffer dogs which she would not know in advance whether they would be present and there were none during this particular visit.

11. Akende had told her to bring him a SIM card which she had done. She wrapped it in a Rizla cigarette paper and kept it in a tiny pocket before removing it and placing it onto her lap and passing it across. She knew it was wrong but had done it any way. She had not received any payment for doing this.

12. Dealing with the three mobile phones in her possession, the iPhone had belonged to her daughter previously and was given to the appellant when she, the daughter, received an upgrade. The phone contained a video clip of Akende posing in his cell recorded with a bag and two phones saying: "Live a life. I've got some weed". The appellant stated that this would have proved her innocence because he clearly had the items before she visited on 29 August. The iPhone was now in the possession of the police and she had been unable to recall the PIN so the video could be viewed.

13. In cross-examination she said that Akende had asked a few days earlier to bring him in the SIM card. He did not specify a type but she believed he had a T-Mobile phone so thought the SIM card would have been the same. It was Pay As You Go and not

registered in her name. He had not told her why he needed the SIM card and she had not asked. She knew it was contraband and that she could get into trouble if discovered. She agreed she had lied in interview when she said she had not brought any prohibited items into the prison because she had brought in the single SIM card, but explained that her head was "all over the place at that time". In addition she had not mentioned the video clip of Akende in his cell boasting: "I've some weed" because it did not come to her mind at that time.

14. Akende gave evidence in her defence. He said that the appellant visited him every week. He had received a disputed package earlier that day from a friend who was having a relationship with a prison officer. The prisoner officer had wrapped it into the clingfilm and brought it into the prison. The reason he had hidden it on his person was that four days earlier another officer had found phone chargers in his cell and confiscated them. He did not want these new items to be found because it was a single status cell and if found it would be obvious that they belonged to him. The items were certainly not given to him by the appellant because there were sniffer dogs and a metal detector and every visit had the potential for a random search of the prisoner afterwards. All he received from the appellant was a single SIM card because he wanted a pre-pay contract. He inserted this into his anus whereas the clingfilm package was between the cheeks of his bottom.

15. In cross-examination he said he had asked the appellant to get him the SIM card the previous week. He requested one in a contract in her name so he would not need to top it up. He already had a Samsung phone but wanted more to sell within the prison. He received the clingfilm package at 11.30 am and he named the prison officer and prisoner from whom it came. He concealed it on his person and took it into the visiting room

because this was his only opportunity to meet a prisoner from another wing to whom he was intending to sell the items. He had managed to push the single SIM card further up his anal passage than the larger package. He sent a video clip to the appellant of himself posing with drugs and a phone but this was a week earlier and was not in fact the same phone and drugs he had received that morning and which were concealed in the clingfilm wrap.

The Grounds of Appeal

16. The single ground of appeal is that the conviction is unsafe because the judge's conduct during the trial deprived the appellant of a fair trial. Counsel for the appellant relies in particular upon the following matters:

(1) During the trial, albeit in the absence of the jury, the judge made comments indicating to the appellant that he believed she was guilty. At the close of the Crown's case he told the appellant's counsel in open court to give the appellant "robust advice" due to the strength of the evidence and that it would be "too late to say anything realistic on her behalf once the jury returned".

(2) The judge withdrew the appellant's bail and remanded her in custody the night before she was due to give evidence. The prosecution had not sought a remand. The judge's decision demonstrated a hostile attitude and further affected the quality of the appellant's evidence.

(3) The following morning, when the appellant was giving evidence, the judge called her daughter, Morgan, into court (in the absence of the jury) so she could apologise for being rude to him the previous day following her mother's remand into custody. After she had apologised the judge told her:

> "You are on no account whatsoever either facially or by words to give any reaction to the evidence or the speeches or my summing-up... If you do, I'll have the officer arrest you and take you downstairs. I don't care if you're 14, you'll go into a cell same as anybody else."

(4) When the appellant was giving the evidence the judge erred in posing questions in a manner more akin to comment or cross-examination than to clarify. This was likely to prejudice the jury against the appellant and to have a further detrimental impact on the quality of the appellant's evidence.

(5) The judge's summing-up focused on the appellant's credibility. It is submitted it should have contained a particularly robust direction to counterbalance any impression formed by the judge's earlier questioning and comments, but there was no such direction.

(6) The appellant was ill and was taken to hospital on the day the jury were sent out and returned their verdict. The defence requested the jury cease their deliberations until she returned and could be present but the judge declined.

17. We propose to consider these matters chronologically and cumulatively.

18. The first complaint relates to the comments made by the judge at the conclusion of the prosecution case. The judge said as follows:

> "Mr Haggar, just before I rise, I would just like to say this to you, so that your client can hear it."

19. He then made comments in relation to the evidence and continued:

> "I will say no more about it save for this; I think that the time has come when she needs some robust advice. If this case goes to the jury, it will be too late to say anything realistic on her behalf."

20. In the light of these comments, after a short adjournment, during which the defence

counsel spoke with his client, the judge was invited to give a Goodyear direction based upon the full facts. The judge paused while counsel obtained written instructions from his client for the Goodyear indication to be requested. The judge also established that the appellant had been advised that any indication given would not necessarily be binding. If she chose not to plead guilty the indication would have no effect. The judge indicated, having regard to the appellant's record and her age, he considered the appropriate sentence, following immediate pleas of guilty, would not exceed 30 months' imprisonment, subject to mitigation. In the event the trial continued.

21. It is submitted that the comments made by the judge ought not to have been made, that the judge was inappropriately indicating his view of the strength of the case against the appellant and that the appellant's knowledge of the judge's adverse view placed unfair pressure upon her when she came to give her evidence.

22. In relation to the role of a judge and the importance of neutrality, we have been referred to the case of R v Inns [2018] EWCA Crim 1081, in which the court stated as follows at paragraphs 33 to 34:

> "33. First, the tribunal of fact in a criminal trial in the Crown Court is the jury and no one else.
>
> 34. Secondly, ours is an adversarial system, not an inquisitorial one. The role of the judge is therefore to act as a neutral umpire, to ensure a fair trial between the prosecution and the defence. The judge should not enter the arena so as to appear to be taking sides. These are well established principles of our law…"

23. Reliance is also placed on the case of R v Alves [1997] 1 Cr App R 78, in which the judge addressed defence in the absence of the jury in the following manner:

> "... I think there are some exceptional circumstances here and if you wish to give your client certain advice during the next hour I will permit you to speak

to him through the interpreter."

24. The Court of Appeal held at page 84:

> "... because of the particular nature of the judge's intervention during the course of his evidence, we cannot be certain that an effect may not have been produced on him equivalent to his being interrupted in court, in that the whole burden of the complaint is that he may have formed the view that the judge had taken an unreasonable and excessively adverse view of his case, and may have thought that, because the judge had formed the view that he had indicated, he was not going to get a fair trial. That carries with it the same danger as interruption of his evidence and handicap to the fair giving of his evidence and raises a serious doubt about the conviction that was recorded against him."

25. It is acknowledged that Alves is different from the instant case, in that in Alves the comments were made during the course of the defendant's evidence albeit in the absence of the jury. It is submitted however that little should turn on this distinction. In the instant case the defendant heard these comments before giving any of her evidence.

26. The Crown emphasises that this comment was made in the absence of the jury and that the inference of the comment was that the appellant would still receive some credit if she entered a guilty plea. Although it would be unusual for such comments to be made during rather than before the trial, the comments did not render the trial unfair. The case of Alves is distinguishable as the circumstances in that case were entirely different. The judge in that case said that he saw no prospect of an acquittal after the defendant had begun giving evidence and took the extraordinary step of allowing defence counsel to speak to the defendant in the middle of their evidence. The conviction was quashed when a combination of circumstances were considered which did not apply in this case.

27. In our judgment, it was not appropriate for the judge to make comments indicating his views as to the strength of the case against the appellant during the course of the trial itself. The appellant was in the charge of the jury. The judge's role was to be, as stated

in Alves, "a neutral umpire". By indicating that he had an adverse view of the appellant's case, she "may have thought that because the judge had formed the view he had indicated she was not going to get a fair trial", as in Alves. It also potentially would have weighed heavily on her mind when she gave evidence and thereby been a handicap to the fair giving of that evidence.

28. The second complaint relates to the judge's withdrawal of bail. This occurred following the close of the prosecution case, the judge's comments on the strength of that case and the Goodyear indication and immediately after an unsuccessful application by the prosecution to adduce bad character evidence, namely two previous convictions for drug offences for which the appellant had received suspended sentences. It was on the evening before the appellant was due to give evidence, as the judge had been informed.

29. No application for the withdrawal of bail had been made by the prosecution and this was on the judge's own initiative. Having heard submissions the judge ruled as follows:

> "For the reasons I have indicated, I am not prepared to run the risk that this defendant will take flight overnight. In my judgment had I given a more favourable indication [than] the one that I gave, I believe she would have pleaded to the indictment this afternoon and I believe that she has not done so because she is running scared of an immediate custodial sentence and that the weight of the evidence has been borne upon her and for the sake of an overnight remand, I am simply not prepared to run the risk that she takes flight overnight and bail is accordingly withdrawn."

30. On behalf of the appellant, the judge's decision is trenchantly criticised and its prejudicial impact highlighted. In particular, it is emphasised that:

(i) The appellant had never previously been in prison and had been on bail throughout the proceedings.

(ii) The appellant had pleaded guilty to count 5 the previous day and was clearly facing the prospect of custody regardless of the trial outcome and yet had continued to attend.

(iii) The judge had been informed that the appellant was to give evidence.

(iv) The appellant was sole carer of two young daughters aged 3 and 14. No arrangements had been made for their care nor could they have been given the shortness of time available.

(v) The remand into custody appeared to be as a result of her maintaining her not guilty plea after the judge's Goodyear indication, which the defence only requested after the judge's comments earlier that day.

(vi) The ruling involved further comment being made on the strength of the evidence - "the weight of the evidence has been borne upon her".

(vii) The appellant was taken down to the cells in front of her 14-year-old daughter, Morgan, who became very upset. This was the last thing that the appellant saw before she was taken to the cells. She was in a distressed state particularly as no arrangement had been made for the care of her two daughters.

31. Reliance is placed on the case of R v Cordingley [2007] EWCA Crim 2174, in which bail also was withdrawn from the defendant during the proceedings. The trial judge in that case stated at paragraph 9:

> "Well, I am not presently minded to give him bail. I will tell you why, so that you can deal with it. It has become apparent to me from the way the proceedings have so far gone that this defendant is beginning to realise for the first time the peril in which he stands in relation to the evidence and the sentence. I presently take a view that there is a substantial danger that, having come to that realisation, he won't appear tomorrow."

32. The Court of Appeal held that the withdrawal of bail was at least "questionable". This was one aspect of the judge's conduct which had "inhibited" the defendant in the course of his defence. In the light of that overall conduct the court quashed the conviction observing at paragraph 15 that:

> "The safety of a conviction does not merely depend upon the strength of the evidence that the jury hears. It depends also on the observance of due process. In this case it seems to us inescapable that the effect of the judge's conduct must have been to inhibit the defendant in the course of his defence. He clearly felt that the judge was prejudiced against him, as Mr Smith's recollection of his client's own words demonstrate. It may well be that what the judge had said in his presence (although in the absence of the jury) affected him so as to have adverse consequences for his credibility before the jury. But whether or not that is so, it is to be remembered that every defendant, and this is no more than elementary, is entitled to be tried fairly - that is courteously and with due regard for the presumption of innocence. This appellant was not tried fairly. There was a failure of due process by reason of the judge's conduct. For that reason the appeal against conviction is allowed."

33. We have also been referred to the case of R v Tedjame-Mortty [2011] EWCA Crim 950, in which the trial judge revoked bail without giving counsel the opportunity to make representations, having previously made a number of inappropriate comments to the defendant and his counsel. Reliance is placed in particular on the way in which the court addressed the issue of the potential impact on the defendant's evidence. The court stated as follows:

> "14. We turn, then, to the effect of all this upon the appellant. There is no witness statement from him, and we are left to infer what the effect of this might have been upon him, coupled with what his counsel said she observed when she saw him. We think it quite possible that it would have left the appellant unsettled to say at least. Mr Banerjee acknowledges that the appellant would have been upset by the judge's conduct. Miss McAteer describes him as having been 'anxious and shaken'. Indeed, she says that when she saw him later that day the appellant was 'extremely shocked and upset by what had happened'. We see no reason to doubt that. He had been on unconditional bail up to then. He had had no previous experience of custody, and as a result of what the judge had said, the appellant would have known that he faced the prospect of being in prison over the weekend unless the matter was resolved later that day.
>
> 15. But when it comes to the safety of the convictions, the critical question is whether the fact that the appellant had been shaken by all of this affected how he was then to give his evidence. Miss McAteer accepts that he showed no

> outward sign of distress when giving evidence, but that is not necessarily a reliable guide about how he was feeling, and a combination of shock at being harangued by the judge, concern that he might have committed a contempt of court and worry about the arrangements for the weekend could all have resulted in him not doing justice to his case. We do not think that we can safely exclude the possibility that his evidence may not have come out as well as it would have done if the judge had dealt with the matter appropriately. Since his credibility was directly in issue in the case, since his defence was by no means a weak one, since it took quite a while for the jury to complete their deliberations in what was a relatively straightforward case, and since the jury's verdict on one of the two counts was a majority verdict of 10 to 2, we cannot safely exclude the possibility that the appellant might have been acquitted if he had given his evidence as credibly as he may have done if the judge had dealt with the matter appropriately. We are collectively left with a sufficient sense of unease about what the outcome of the case might have been to compel us to the conclusion that in these circumstances the appellant's convictions are unsafe.
>
> 16. We do not want this judgment to be regarded as requiring judges to treat defendants with kid gloves just before they give evidence. There will often be times when the natural course of the trial will result in a defendant being upset just before he gives evidence. Obvious examples are the rejection of a submission of no case to answer which the defendant may have been pinning his hopes on, or unexpected allegations being made against him by a co defendant who gives evidence before him. Indeed, there will be times when a judge quite properly decides to revoke a defendant's bail just before he gives evidence. The difference in this case is that the quality of the defendant's evidence could have been affected by conduct on the part of the judge which was wholly inappropriate."

34. The Crown emphasises that this is a case in which an experienced judge reached a decision on bail based on reasons he explained and was well placed to assess. This was a defendant who had pleaded guilty to one count and who had received suspended sentences of imprisonment on two occasions for possession of Class A drugs with intent to supply.

35. The Crown says that the case of Cordingley is readily distinguishable. It was a case in which the Court of Appeal described the judge as showing rudeness and discourtesy to defence counsel of which he should be ashamed. That case featured bad judicial behaviour far in excess of anything which is alleged in this case. It was the cumulative

effect of the judge's behaviour which led the appeal to be allowed. The case of Tedjame-Mortty is also submitted to be readily distinguishable on its facts.

36. As in Cordingley, we consider that the decision to withdraw bail in this case to be "questionable". As in that case, it is legitimate in such circumstances to consider its impact along with that of other relevant conduct and in particular its impact on the appellant's ability to do justice to her case in giving evidence. In this case there is direct evidence of the effect on the appellant of being separated from her children and placed in custody for the first time. At 16.30 that day the custody/escort officer was sufficiently concerned to produce a suicide self-harm form stating that: "Prisoner implied she will commit suicide and is concerned about her 14-year-old daughter". There is also evidence of this potential effect on her evidence as it is apparent from the transcript that she was at times emotional and told by the judge to "try not to be".

37. In our judgment, the withdrawal of bail and the terms in which the ruling was expressed, including comments as to the weight of the evidence, is likely to have reinforced any impression formed from the judge's earlier comments that the appellant was not going to get a fair trial and to have provided a further handicap to the fair giving of her evidence.

38. The third complaint relates to the judge's treatment of the appellant's daughter, Morgan, and his threat to arrest her and send her to the cells. This exchange occurred after the appellant completed her examination in-chief and just before she was about to be cross-examined. The judge said this, addressing Morgan:

> "Now I'm going to allow you to remain on terms. The first term is you're going to sit in the back row in the far corner of the court and you are not at any time to approach the dock. Do you understand?
> [MORGAN]: Yes.
> [JUDGE]: And you are on no account whatsoever either facially or by words to give any reaction to the evidence or the speeches or my summing-up. Do

you understand?
[MORGAN] Yes.
[JUDGE]: If you do, I'll have the officer arrest you and take you downstairs. And I don't care if you're 14; you'll go into a cell same as anybody else. Do you understand?
[MORGAN] Yes.
MR HADDER: Well your Honour it might depend on the reaction slightly.
[JUDGE]: I beg your pardon?
MR HADDER: It might depend on the reaction.
[JUDGE]: Don't lecture me Mr Hadder. I'm speaking to her. Right, now are you prepared to accept those conditions?
[MORGAN] Yes.
[JUDGE] Right, go and sit in that corner seat in the back row and bear in mind what I say.
MR HADDER: I'm grateful that you allowed her into court.
[JUDGE] Yes. I'm not going to have the court disrupted by children who shouldn't be in court at all in my view."

39. It was not appropriate for the judge to threaten to send a 14-year-old girl to the cells at all, let alone for a mere facial reaction to the evidence, speeches or summing-up. The threat was unnecessary because the judge should simply have informed Morgan that she would not be allowed to remain in the courtroom if she showed any reaction such as crying. Morgan had already been told by the judge to sit in the back corner of the public gallery so the jury could not get a good view of her. Alternatively, the judge could simply not have allowed her to the remain in the courtroom. Again, this is likely to have caused considerable upset to the appellant and potentially to have handicapped her in the continued giving of her evidence.

40. The fourth complaint relates to the judge's interventions during the appellant's evidence. Two interventions are relied upon.

41. First, during the appellant's examination in-chief, she gave evidence that her daughter attended with her and that she would not put her daughter at risk by bringing in a large item such as a phone or package. It is said that the judge seemingly questioned this evidence by repeatedly reminding the appellant that she had brought a SIM card into the

prison, and this was done in a manner more akin to comment than to questioning. The intervention was as follows:

> "A …
> Why would I have to choose when my daughter was in to do something like that? I wouldn't do that. I didn't go there to give him anything apart from the SIM card.
> Q. And you mentioned your daughter, what did you think might happen if you'd taken something in?
> A. Because on the, when you go in there they have loads of things saying like that you can't bring phones so I'm not going to go in and bring in a phone. Like I'm not going to do that, that's is not what I'm going to do.
> [JUDGE]: Yes but you know you can't take a SIM card either?
> [THE DEFENDANT]: I knew you can't take a SIM card.
> MR HADDER: Why did you decide to take a SIM card and not a phone or anything else like drugs?
> A. I just took the SIM card because, I don't know.
> Q. Why were you not worried about the SIM card in the same way as you were about.
> A. Because a SIM card is tiny. Even though I know it's wrong, you're not allowed to bring it in. I know it's wrong but it's a lot smaller than a phone, a golf ball of - what you say? Cannabis, and all the other stuff. Like it's much smaller than that.
> [JUDGE] I don't understand; what does the size of it matter if it's a prison contraband that you're not allowed to take in? What does the size of it matter?
> MR HADDER: Your Honour, she-
> [JUDGE] No I didn't ask you.
> [THE DEFENDANT] I'm not saying that the size, it matters about the size. But I'm just saying that I wouldn't go and do something like bring something so big into a prison. And my partner, he wasn't going to be in there, like he will be released soon so why would I need to go and do all of that stuff?"

42. We agree these interventions are more comment than clarification. Particular care has to be taken not to intervene unnecessarily in examination in-chief as stated by Toulson LJ in R v Perran [2009] EWCA Crim 348 at 34 to 35:

> "34 ... there are good reasons why a judge should be particularly careful about refraining from intervening during a witness' evidence in-chief, except insofar as it is necessary to clarify, to keep the evidence moving on and, if necessary, to avoid prolixity or irrelevancies. The first is that it is for the prosecution to cross-examine, not for the judge. The second is that the right

> time for the prosecution to cross-examine is after a witness has given his evidence in-chief. It would be unthinkable for prosecuting counsel to jump up in the middle of a witness' evidence in-chief and seek to conduct some hostile cross-examination. This is not merely in order to preserve an orderly trial. There is a more important, fundamental reason. A jury will inevitably form a view of each witness as the case goes along. As the witness is giving his or her evidence in-chief, so the jury will be absorbing that account and forming their own impression of the witness.
>
> 35. The appellant's story may have been highly improbable, but he was entitled to explain it to the jury without being subjected to sniper fire in the course of doing so. The potential for injustice is that if the jury, at the very time when they are listening to the witness giving his narrative account of events, do so to the accompaniment of questions from the Bench indicating to anybody with common sense that the judge does not believe a word of it, this may affect the mind of the jury as they listen to the account."

43. Secondly, during cross-examination the appellant was cross-examined by the prosecution on her answers in interview. She stated that the police had been pointing to the objects that had been unwrapped from the package retrieved from the anal passage of Akende. She said that this was why she made comments during interview denying any wrongdoing as she had not taken the package into prison. The judge then pressed her repeatedly on whether she was sure and the objects had been in the interview room. The relevant exchange is in the following terms:

> "Q. The officer's not saying anything cannabis or mobile phones there, is he? He's asking if you took anything.
> A. Yeah but he's pointing, that's the thing. He might be saying, it might say nothing but when he's talking to me he's pointing to this. He's like 'I've done this all before, I know,' that's what he's doing. He's pointing to it, he's not saying like just asking like how you're asking me and asking the questions. He's not; he's pointing, pointing, pointing.
> [JUDGE]: Sorry, pointing to what?
> A. To the stuff found on David, like the phones and everything.
> [JUDGE]. Are you saying that was-
> A. And that's why I said I didn't bring him nothing.
> [JUDGE]. Just a minute, are you saying that those items were in the interview room?
> A. Yes those items were there.
> [JUDGE] Are you sure?

A. In the interview?
[JUDGE] Yes.
A. When the guy showed it to me they were there.
[JUDGE] They were there?
A. They were there, yes.
[JUDGE] It was a video interview, wasn't it?
MR WRIGHT: It was, your Honour, yes.
[JUDGE]: There's no reference on the summary asking her to look at anything or to anything being produced so that may have to be checked.
MR WRIGHT: I can do that your Honour.
[JUDGE]: I mean are you saying that those items were there, were they, on the table?
A. Yes, I saw them there, yes.
[JUDGE]: Yes, alright."

44. We agree that this repeated questioning by the judge of the appellant's evidence that the items were in the room was done in a manner which indicated that the judge did not believe her evidence. It was later confirmed and agreed that the objects had been in the interview room and that the appellant's evidence was correct. The impression which would have been conveyed at the time was, however, one of the judge intervening in such a manner as to demonstrate an adverse view of the appellant's evidence.

45. We do not consider that there is any great weight in the fifth and sixth complaints. As to the fifth complaint, the judge in his summing-up gave a full summary of the evidence. It is understandable that he gave prominence to the evidence of the appellant and her partner as the prosecution evidence had been virtually unchallenged and the jury would naturally have to focus on the question of what they made of the credibility of the defence witnesses. We note however that the focus on the issues of credibility highlights the importance of the appellant's giving of evidence in this case.

46. As to the sixth complaint, we agree with the Crown that the appellant did not suffer any disadvantage by not being present at the end of the trial deliberations and that the judge was entitled to exercise his powers of case management by continuing with the final remarks in the summing-up and the jury deliberations in her absence. This was a matter

for his discretion.

47. We have nevertheless found that there is substance in the first four grounds of complaint.

48. We next have to consider the overall impact of those matters on the fairness of the trial process. In our judgment, taken together, these matters may well have led the appellant to conclude that the judge had taken an adverse view of her case and that because he had formed that view she was not going to get a fair trial. We also consider that taken together, they may well have handicapped the appellant in the giving of her evidence. As a result we conclude that the appellant did not receive a fair trial.

49. As stated by Toulson LJ in Perran at 24:

> "24... if the court is driven to the conclusion that the defendant has not had a fair trial, when the matter is looked at in the round, the natural conclusion will be that the verdict is unsafe because our system of criminal justice is dependent upon the fundamental principle of the provision of a fair trial. To allow an appeal in such circumstances, even though the evidence for the prosecution may have been exceedingly strong, is not to allow an appeal on a technicality, but to allow it upon a fundamental principle which underlines our criminal justice system."

50. In all the circumstances, we conclude that the appellant's conviction is unsafe and must be set aside.

51. MR WRIGHT: My Lord, I have taken instructions on the question of application for a retrial. Given the information that has emerged that the appellant was released on home detention curfew last week and also bearing in mind that the conviction on count 5 which she pleaded guilty to and was marked by a sentence of 8 months' imprisonment will remain on her record, the Crown do not take the view it is in the public interest to invite a retrial in this case.

52. LORD JUSTICE HAMBLEN: That seems a realistic view.

53. I am grateful to counsel for their assistance.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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