Neutral Citation Number: [2020] EWCA Crim 1052

Case No 201902415 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
HER HONOUR JUDGE TURNER QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/20

Before :

LORD JUSTICE HICKINBOTTOM

MR JUSTICE WILLIAM DAVIS
and
HER HONOUR JUDGE MOLYNEUX
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

R

Respondent

- and -

JOHN PAUL BERRY

Applicant

- -
- -

Joseph Bird (instructed by **Drummond Solicitors**) for the **Applicant**
Carolyn Gardiner (instructed by **CPS Appeal Unit (Special Crime Division)**)
for the **Respondent**

Hearing date: 30 July 2020

- -

Approved Judgment

Her Honour Judge Molyneux :

Introduction

1. On 18 December 2018 in the Crown Court at Chelmsford (His Honour Judge Turner QC and a jury), the Applicant was convicted by the jury on the direction of the judge, following his guilty plea, of causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861. He applies for an extension of time (approximately 163 days), leave to appeal against conviction and leave to introduce fresh evidence. His applications were referred to the full court by the single judge.

2. At the end of the hearing on 30 July 2020, we refused all of the application before us, and said that we would provide our reasons in a later reserved judgment. These are our reasons.

The Facts

3. The prosecution case was that, on 23 July 2017 at approximately 10.30pm, Mary-Anne Connors ("the complainant") was at her home in Dunmow, Essex. She was lying on her bed when she heard a noise. She saw the Applicant, who was her ex-partner, standing looking towards her with what she described as an "evil look" upon his face. She ran towards the door to try and escape, but he caught her and pinned her against the wall. The Applicant then knocked her to the floor with force. She believed that he used an object with which to strike her. The Applicant punched, kicked and stamped on the complainant, and said that he wanted her dead and that he was going to dance on her face. The complainant was pleading with him to leave, but he kept pushing her back and saying that he was going to kill her. The Applicant then strangled the complainant on the floor until she passed out. She sustained serious injuries to her head and face, but was unable to recall when these occurred, it being likely that it was when she had passed out.

4. The complainant was taken to hospital with her neighbours and parents present. She had complex facial fractures to her jaw and cheekbones and a laceration to her spleen.

5. The prosecution relied upon the evidence of the complainant in ABE interview. She was willing to attend court. The Applicant's fingerprints were identified on a coke can and razor blade packet examined by crime scene investigators at the complainant's address. There was some evidence that his DNA was present on fingernail and hand swabs taken from the complainant. There was medical evidence of her injuries.

6. The Applicant filed a defence statement. His fitness to plead was in issue and the statement was drafted on the basis of limited information which his solicitors were able to take from him and from members of his family. The gist of the statement was that his defence, if there were to be a trial, was likely to be alibi. The injuries inflicted upon the complainant were not inflicted by him.

7. He and the complainant were members of the travelling community and had had known each other since childhood. They had begun a relationship in 2014. They had a child in August 2015. In September 2015 he received a custodial sentence for a

burglary offence and the relationship came to an end whilst he was in custody. He finally moved out of the home he had shared with the complainant in April 2017, although he continued to visit her regularly and their sexual relationship continued.

8. He said that the complainant's father was a violent man. She had formed a new relationship with a man of whom her father disapproved. She believed that her father would kill her if he knew of the relationship. The Applicant believed that the complainant may have been attacked by her father. He also referred to Facebook postings made by the complainant in which she stated that she was responsible for putting him in jail and that she had done so because he had left her and their child. It was an act of revenge against the Applicant which had caused her to name him as her attacker.

9. He said that the complainant had made a false complaint against him in 2015 when she alleged that he had assaulted her. She failed to attend trial and the case was dismissed.

Trial Day One

10. The case was listed for trial on 17 December 2018. The Applicant was represented by counsel, Mr Tom Williams, in respect of whom he has waived privilege.

11. Mr Williams' attendance note, prepared within 48 hours of 18 December, records that the Applicant was not produced at court on 17 December until 2.30pm. Custody staff said that he had refused to attend. A number of his family members were in court to support him. Whilst waiting for the Applicant to arrive, Mr Williams had discussions with the Applicant's mother. Whilst she was clear that her son had not committed the offence, she also sought advice about a plea to section 20 (inflicting grievous bodily harm).

12. Mr Williams used the waiting time to resolve outstanding disclosure matters with the prosecution. Two of the points which were discussed became important later:

    i) The prosecutor decided to check the details of the Applicant's 2015 battery conviction for which he received a 4-month sentence. This was a domestic violence conviction in relation to his long-term partner, not the complainant. The facts were very similar in a number of ways to the instant allegation and strengthened the prosecution case against him.

    ii) The police located a 7-minute YouTube video which had been made by the complainant in hospital two weeks after the incident. In the video, she recounted what had happened to her on the night in question. She also showed the stapled laceration to the top of her head, caused as part of the facelift she had to have because of the assault. She asked that whoever was hiding the Applicant would hand him in.

13. The Applicant was produced at 2.30pm. He said that he had not been mentally well enough to attend court that morning.

Fitness to Plead

14. There had been concerns about the Applicant's mental health. Before he entered his plea he was seen by three psychiatrists. Dr Singh first saw him on 22 May 2018, when he was defiant and uncooperative, though denying the offence. Dr Singh was unsure whether he was fit to plead and thought that further enquiries were necessary. Dr Cullen then saw him and reported on 16 August 2018. The Applicant continued to deny the offence, and Dr Cullen's view at that point was that he was not fit to plead. Dr Cullen's opinion was that the Applicant appeared to be psychotic and the evidence suggested that he had been unwell for nearly four months. His medical records indicate a possible ADHD diagnosis in 2004 but this was not confirmed. There are references in the notes for 2014 and 2015 to a history of schizophrenia and the prescribing of antipsychotic medication. He had numerous A&E attendances in 2014 and 2015, with abdominal pain and associated aggression and suicidal threats. The A&E records contain references to binge drinking, daily cannabis use and opiate seeking behaviour. Third and finally, Dr Ho saw him on 7 November 2018, and again Mr Berry denied culpability. He was noticeably uncooperative at interview, but Dr Ho's view was that he was fit to plead.

15. Arraignment was delayed to allow for further enquiries but, by the time the matter came on for trial, he was considered fit to plead.

16. On 17 December 2018, he was arraigned and entered a plea of not guilty. A jury was empanelled at 3.13pm. They were put in charge of the indictment and sent home until the following day.

Evidence of Mr Williams

17. Mr Williams spent the afternoon in conference with the Applicant. His evidence is that the defence statement was discussed in detail. The Applicant cannot read or write. The statement was clarified. An addendum to the Defence Statement (signed the next day) was prepared which reads:

> "**Addendum Defence Statement**
>
> 1. Having seen the defence statement served on my behalf yesterday for the first time, I would like to add the following:
>
> 2. On the night in question, I was with a married Irish Woman in Edgware; the following day I went to Stanmore to do some work with my uncle.
>
> 3. Paragraph 9 of my defence statement refers to the complainant's new boyfriend. It should say that he was not a member of the travelling community."

18. Mr Williams discussed the Applicant's previous conviction for domestic violence with him and warned that it would inevitably be admitted in evidence. He advised him that it would strengthen the prosecution case. He said that he had discussed a plea to section 20 with prosecution counsel. They would not accept a plea to a section 20 offence but might accept a plea to section 18 on a basis.

Trial Day Two: Evidence of Mr Williams

19. The following day, the Applicant was produced at court late, just before 10am. Before the case was called on, a conference was held with Mr Williams. Mr Williams had been informed by the prosecution that they would now rely on the YouTube video. Mr Williams said that he had considered applying for it to be excluded under section 78 of the Police and Evidence Act 1984: however, he had formed the view that the judge would in any event admit it in evidence. The Applicant confirmed that he had seen the YouTube video in the past and did not seem concerned about it.

20. The Applicant signed the addendum to his defence statement to which we have already referred and an endorsement of Mr Williams brief which reads:

> " **Endorsement**
>
> 1. I remember that on the night of the incident I was with an Irish lady in Edgeware.
>
> 2. I do not want to name this woman or call her as a witness, because that would bring shame on her.
>
> 3. I am aware that this may damage my case and that I am likely to be cross examined about it."

21. Mr Williams went into court. The prosecution were testing the YouTube video on the court equipment. The Applicant's family were present and were angry. They were of the view that the trial would not be fair if the video were played. As the Applicant was brought into court his family shouted to him about the video. The Applicant lost his temper. He raised his voice in the dock, demanding to know why this was happening. He was taken back to the cells, in part because his behaviour was getting worse. By this stage his mother was shouting loudly to him that Mr Williams should be fired.

22. Mr Williams returned to the cells. The Applicant was clearly anxious, although capable of having a lucid conversation. Mr Williams said the Applicant told him that:

> "1. Because the complainant was so devious, he was convinced the jury would believe her.
>
> 2. He wanted to go up and 'put his hands up' in front of the judge.
>
> 3. He wanted to be sentenced today."

23. Mr Williams asked the Applicant to set out what he remembered. Having taken his instructions, he drafted a basis of plea which was signed, in the following terms:

> "1. John Berry went to Mary-Anne Connors' flat in the evening. They talked and drank together.
>
> 2. They eventually got into an argument. She was screaming. She came at him with a knife. He grabbed the knife and pushed her. His finger went into her mouth. She bit down. He slapped her. She bit down harder.

> 3. He punched her three or four times. The incident was very quick. She was knocked out on the floor and ~~she~~ he walked off. That was the last time he saw her that night.
>
> 4. There was no weapon. There was no kicking."

24. Mr Williams' view was that the basis was ambitious, but the Applicant told him that it was "God's honest truth". Mr Williams said that he did not wish to put any pressure on the Applicant at all, no matter how unlikely the basis might be. Mr Williams view was that:

> "… although the Applicant was by now clearly anxious (as many defendants are in similar circumstances), he was perfectly lucid: he gave a full and coherent account of what he said had happened; he was clear that he wanted to 'put his hands up' and plead guilty; he knew a long sentence would follow (I'll get 10 years won't I?); he asked to be sentenced today; and he was perfectly capable of raising whether I felt an extended sentence was likely (pointing out that probation had raised IPP sentence in the past when those sentences were still available: he knew, without any explanation from me, that IPP sentences were now a thing of the past."

25. The Applicant signed an endorsement of Mr Williams' brief which read:

> "**Endorsement Re Basis**
>
> 1. I am at trial for a s18 offence. The prosecution say that I assaulted my ex-partner Mary Anne Connors in July 2017.
>
> 2. The complainant and her Mother are now at court. I have decided to plead guilty. I have set out in my basis of plea what I remember happening. I accept that I am guilty of the offence.
>
> 3. No pressure has been put on me to change my plea. My barrister has explained we are ready for a trial.
>
> 4. I would like my basis of plea to be given to the prosecution and considered with the complainant."

26. The prosecution did not accept the basis. Mr Williams indicated to the court that further discussions would be necessary. The judge suggested that the jury be brought into court as they had been waiting all morning. The Applicant should be rearraigned. Mr Williams went to the back of the court and explained to the Applicant what was about to happen; and that any basis would be a matter for the judge, not the jury. Mr Williams said that the Applicant "had no problem with this at all".

27. The Applicant was rearraigned at 11.28am. Without any apparent confusion or need for further assistance, he pleaded guilty. On its face, that plea was unequivocal. The jury then convicted him of the section 18 offence on the direction of the judge. The Applicant's mother loudly made known her view that he should not have pleaded guilty. Mr Williams asked for more time.

28. Back in the cells, Mr Williams told the Applicant what the prosecution would want before they could accept a basis. The Applicant said that what he had said was true and that he would not be changing his position. Mr Williams advised him that a Newton hearing would consequently be required; that the judge would probably reject his account; and that, if so, the Applicant would lose any credit towards sentence to which he might be entitled. The Applicant signed a further endorsement of the brief which read:

> "The prosecution do not accept the basis drafted. What is written in my basis is true. I understand that we will need a Newton hearing. If the Judge finds against me I know I may lose what little credit may be left."

29. At 12.30pm court reassembled. Mr Williams confirmed that the basis remained unchanged, and the Newton hearing commenced. The complainant's ABE was played. It was intended that Mr Williams would cross-examine her after lunch. When the ABE finished, the Applicant addressed the judge directly. He said that he was confused about what was going on. He did not commit the offence, and Mr Williams would confirm that he had said as much in conference.

30. The judge adjourned until 2.15pm. At 1.45pm Mr Williams went to the cells again. The Applicant was in tears. He told Mr Williams that he did not commit the offence, that his basis was lies, that voices were talking to him and had told him to plead guilty, and that he never talked about the voices because he was ashamed.

31. Mr Williams said that the Applicant would need to be reassessed by a psychiatrist if he wished to continue down this path. Mr Williams did not ask for any further endorsement as he did not consider that the Applicant was in a fit state to do so. Mr Williams returned to court and told the judge that he could not continue to act for the Applicant, that psychiatric problems appeared to have resurfaced and that the Applicant did not appear to be in a fit state to carry on that day.

Next Steps

32. The judge adjourned the case. He ordered that the defence notify the court and the prosecution by 10 January 2019 if the Newton hearing was to be pursued and of any other applications to be made (principally any application to vacate the guilty plea).

33. There was some delay. The Applicant appointed new solicitors and counsel. An application to vacate the guilty plea was submitted and was heard on the 3 May 2019 by Judge Turner QC. Mr Williams provided a witness statement detailing the events of the trial and exhibiting his attendance note, endorsements, the addendum defence statement and signed basis of plea. Mr Williams and the Applicant also gave evidence at the hearing and were cross-examined.

The Ruling

34. In his ruling, the judge referred to the vulnerability of the Applicant, which had been apparent to him, and he reviewed the evidence of his fitness to plead. He set out the procedural history and made reference to the fact that the Applicant had sought to blame others, including the complainant's new partner, her father and even her

mother. He referred to the ABE interview of the complainant which he had found, on the face of it, persuasive, and to the medical evidence. The injuries were not disputed.

35. The judge set out the relevant law. He referred to the evidence he had heard from Mr Williams and from the Applicant. Mr Williams said this in his witness statement:

> "One, I did not put any pressure on Mr Berry to plead guilty. The suggestion that he might change his plea came from him. He told me that he wanted to put his hands up in front of the judge and asked if he could be sentenced on the same day. He signed an endorsement confirming, among other things, that pleading guilty was his choice. I had read it to him in full.
>
> I was ready for trial, having done a great deal of work on the case over the weekend and on the first day. We had been given all the disclosure we had requested. And the prosecution had conceded all the non-defendant bad character applications.
>
> Two**,** I did not say that 'the charge would be reduced' and am not entirely sure what that refers to. I had made it clear that the prosecution would not accept a section 20 in relation to sentence. I think we discussed that some limited credit might still be available, particularly if the complainant did not want to have to be put through the experience of having to give evidence.
>
> In any event, this was after he had told me that he wanted to plead guilty. It was not offered as an incentive.
>
> Three, because the prosecution had raised the possibility of accepting a basis, I reminded Mr Berry about this when he said he wanted to change his plea to guilty and asked him to tell me exactly what he remembered happening. I summarised what he had told me in the written basis and read it to him before he signed it. From memory, when we were going through it, Mr Berry told me to change 'she' to 'he' in the third paragraph. The correction is visible in the document. I asked him in terms, whether what he was saying to me was what had really happened, given the importance of the decision he was making at such a late stage. He told me it was 'God's honest truth.'
>
> As set out in the attendance note, Mr Berry seemed to be to be anxious but lucid when he decided to plead guilty and when he went through his basis of plea. It was only when I saw him later on, after lunch, that he told me he was hearing voices.
>
> Finally, the submissions states that the basis of plea is equivocal and raises self-defence. I had considered this point. If a jury accepted that Mary-Anne Connors came at Mr Berry with a knife after an argument and then bit down on his finger when he pushed her away, my view was that the force he said

> he ended up using in response, punching her three or four times hard enough to knock her out and to break multiple bones in her face, would even in the heat of the moment, have been considered excessive**."**

36. The judge referred to cross-examination of Mr Williams by Mr Bird. Mr Williams conceded that he had not, in terms, discussed self-defence with the Applicant, but that it had occurred to him. In a fast-moving situation, he said, he recognised there was a possible argument about excessive self-defence but did not, in terms, put that to the defendant. The judge said:

> "He also conceded that there had been no specific reference to intent and the words 'intent' and 'reckless' had not been used. But he went on to say that he had canvassed section 20 with the prosecution and had made clear to the defendant that that was not going to be acceptable. He, for his part, had taken the view that this line was simply 'not a runner'. He made clear, and I entirely accept, that he had thought about self-defence and had discounted it. He had also, I entirely accept – not least in the context of his reflection on section 20, thought about recklessness and had considered that. He said in evidence and again, I accept, that it was his view that there was not the slightest room for doubt that the defendant, on the account he was giving, was guilty of section 18 on the basis reduced to writing.
>
> That was something that he said he was completely confident of. He said that he and Mr Berry had discussed a section 20 and he had made it clear that that was not possible. At that stage, the only count on the indictment was the section 18. And he said Mr Berry was in no doubt that he was pleading to the count on the indictment. Mr Williams said that he was completely confident that he knew that he was pleading to the count on the indictment. Had Mr Berry given any instructions to the effect that he had 'not meant to cause the injuries', or something of that sort, he – Mr Williams – said that he would have gone on to discuss recklessness and intent, more fully. But Mr Berry was very clear, he said, that he had caused the injuries as a result of the force he had used.
>
> In those circumstances, Mr Williams explained, his view was that if he had punched her repeatedly, deliberately and sufficiently forcefully to cause the constellation of injuries recorded, it would be simply completely unrealistic to have suggested that recklessness might have got anywhere. He said that for his part, he was content that Mr Berry had had ample time to discuss and make the necessary decisions concerned. It was put very fairly and carefully to Mr Williams, that in a fairly high-pressured situation, the defendant was perhaps rushed or that he had perhaps, not fully taken on board the issues of intent and the like, which are so central to section 18. That was not

> something which Mr Williams could or would accept. He did not agree with the suggestion made by Mr Bird that the defendant had somehow made a mistake or there had been a plea to create some sort of damage limitation exercise in response to a high-pressured situation.
>
> Mr Williams stressed that the defendant had taken care to say to him that this was 'God's honest truth' and that had been in the context of the discussions about the basis of plea, which was carefully prepared in writing, in the defendant's presence, read back to him and then, at least in the context of another document, specifically corrected. The defendant knew that a Newton hearing would inevitably follow. He knew that the ABE interview would inevitably be played. Whether there was some confusion in his mind between the ABE interview and the content of the YouTube recording, seems an entirely secondary matter. What matters is that Mr Williams says he was clear that the defendant had been fully, carefully and properly advised."

37. The judge also heard evidence from the Applicant. In summary, the judge said:

> "I am bound to say he was agitated during his evidence in court, here but he, nevertheless, was adamant that he was not guilty.
>
> He did not dispute the basic narrative. On the second day there was an issue about whether some tramadol tablets had been taken without food and he said he had something of a big head rush, but in fact, that aspect of any difficulty on the 18th, was not pursued further. He said that he was agitated and anxious that day and was adamant that he wanted to prove his innocence. His frustration about lawyers generally and indeed, even Mr Bird, clearly striving to help him today, was apparent."

The Judge said:

> "Mr Berry told me that he had 'never been listened to' in his whole life. He was strident today in his oral evidence to me, 'I never did this. Nobody's listening to me. I've got beyond caring. I don't care what you do'. What he did say about the section 18 matter was that he was simply, never near his former partner's place at the time. He persists with his alibi. He said that Mr Williams didn't explain section 18 to him. That Mr Williams didn't discuss self-defence. That Mr Williams didn't explain the differences between section 20 and section 18. And he, Mr Berry, was simply admitting to it all so that he could be sentenced today to get it over and done with. He said that he told Mr Williams, he had never done it. And he persisted in that account before me. He was adamant that the complainant

> was lying in her ABE. He said she was 'drugged out of her head'. She was 'contradicting herself'. And he added, 'You can see she's a liar'. He went on to say that he was determined not to plead guilty to something he hadn't done. He said that Mr Williams had told him that he would get '12 years IPP'. And he, in response had said that he would then plead guilty. He added, 'God as my witness, I've never done it'.
>
> He was very, very distressed when Mr Bird touched very gently and delicately on the question of whether he'd heard voices. Voices had been raised in the previous psychiatric reports, the aetiology or even the genuineness of the voices is in question. But it was plain that Mr Berry was not remotely willing to discuss the voices. 'That's no one's business but mine', he said angrily, to Mr Bird, who touched on the matter. 'You shouldn't have mentioned it', he rebuked, Mr Bird. Ms Gardiner, on behalf of the prosecution asked Mr Berry in terms, why if this was true, he had put in a written basis of plea which he had signed. And he said that he had done so only because Mr Williams had asked him what he was saying and he 'had to say something'.
>
> He said that the narrative which emerged in the basis of plea, was something that he had simply made up. He said it was 'a load of lies'. He said, 'I gave a load of lies to Mr Williams. I was frightened. I had been beaten up in jail. I wanted it over with. I'd had enough. I came up and thought I'm not going to plead guilty to something that I'd not done. A lot of bad things have happened to me. All through my life, I have been blamed for things I can't recall. I couldn't take anymore.' He didn't dispute that he'd signed the various documents and he said that Mr Williams was 'telling me to go guilty'. He 'said the judge wouldn't take account of anything I said'.
>
> He said that the judge, 90 per cent of the time, would listen to the other side and would take her word for it, that he was 'fighting a losing battle'. He said Mr Williams had told him that 'her DNA is in my nails and on a can of Coke'. And he, the defendant had replied, 'What's the point?'. He said Mr Williams told him different things and he said to him, 'Are you sure you want to go through with this?'. And he said that he thought he would be better off telling the truth. Now, Mr Berry insisted, he was telling the truth."

38. The Judge concluded:

> "I've not, I confess, found this an altogether easy decision and I have pressed Ms Gardiner on whether, on its face, the basis of plea does have a flavour of equivocality or ambiguity which may need further unpacking. But I regret to say that, having looked at the matter overall, I am very far from persuaded that

> this is a case where anything of significance has gone wrong in the process. To that extent, I have reached a clear conclusion that this is not one of those very exceptional cases which falls within the Shake principles, where I should allow a represented defendant to change his plea.
>
> I am satisfied that across the 17th and 18th of December, there was ample time fully to discuss the key issues. Someone of Mr Williams' experience, I am satisfied, gave the defendant adequate advice in relation to the centralities of what was implied in his guilty plea. I am satisfied that guilty plea was voluntary, that it was understood and that it was properly entered. I am satisfied that the essential law was shared between counsel and client. I do not discern any deficiencies in the advice Mr Williams gave or the approach he took.
>
> I am satisfied that he, at each stage, spelt out sufficient to undergird what was being said by Mr Berry in terms of the causation of injuries.
>
> There was no dispute about the injuries themselves and the shift from alibi and blaming someone else, to acceptance himself, was so significant that it cannot but have been something about which, Mr Berry thought carefully. Where his evidence conflicts with that of Mr Williams, I overwhelmingly prefer the evidence of Mr Williams. He struck me as an experienced, careful and wise barrister. I found his attendance note, drawn within 48 hours of this episode, a carefully prepared, rounded and balanced document. I am satisfied that there has been no injustice whatever to Mr Berry in this case and I therefore, refuse his application to vacate his guilty plea."

The Newton Hearing

39. The case was adjourned for a Newton hearing on 12 July 2019. In the interim, the Defendant made his application to appeal his conviction. On the day of the Newton hearing, the complainant did not attend to give evidence and the complainant's mother (Mrs Connors), a prosecution witness, informed the prosecution that she herself had "lied in her statement". As a result, the hearing was adjourned in order to allow Mrs Connors to seek legal advice and an investigation to be conducted. During the hearing, the judge noted that if the problems with the prosecution evidence persisted he might be minded to revisit the application to vacate the guilty plea.

Mrs Connors

40. Mrs Connors had given a witness statement to the police on the 22 April 2018. In that statement she said that she had been at home on 24 July 2017 when, at 5.15am, she had she received a phone call from a neighbour of her daughter. The neighbour told her that Johnny Berry had "done harm" to the complainant. The neighbour said that the person responsible was "the baby's dad," and that Mrs Connors should prepare herself because it was pretty bad. Mrs Connors went to the complainant's home.

There she found the complainant in a distressed state. She went with her to the hospital. At the hospital her daughter came around, and Mrs Connors said to her, "Was it Johnny Berry?". There was no answer. Mrs Connors asked again, "Was it Johnny Berry?"; and the complainant replied, saying, "Of course it was". Mrs Connors continued to give a more detailed account of what the complainant had said the next day, all of which named the Applicant as her attacker.

41. On 12 July 2019, when Mrs Connors was interviewed by the police, she said that she had lied in her statement. She had assumed the Applicant was responsible for the assault, although she did not know that, and was concerned the police did not appear to be pursuing him. Therefore, she decided to invent an account that would lead the police to arrest him and, in the event of a conviction, result in a significant prison sentence for him. She accepted that she did not know who was responsible for the assault, the neighbour had not told her that it was the Applicant and that there were other people, aside from the Applicant, who it might have been. She also observed that she thought the complainant had little or no recollection of the assault.

42. In a witness statement dated the 24 July 2017, PC Thomas Jackson said that he had arrived outside the complainant's home at 7.30am that morning. There was an ambulance at the scene. He was approached by a paramedic who said that the complainant was in the back of the ambulance and was about to be taken into hospital. PC Jackson entered the ambulance. He saw the complainant, badly injured. She could barely speak. He asked her what had happened. She said something similar to "hit me in the face". Her voice was distorted due to injuries to her face. He asked her who did it to her and she said something inaudible, followed by "Baxter". At this point, PC Jackson recorded: "Her mum stepped in to ask her to tell the truth. The complainant then said, 'John Berry'".

43. The case returned to court again at the request of the prosecution on 29 October 2019, when the prosecution persuaded the judge not to rule on the renewed application to vacate the guilty plea, given that an application for leave to appeal had already been made to this court. There is no doubt that, even before sentence (when the Crown Court has the power to vacate a plea), this court has the jurisdiction to entertain an appeal against conviction in the circumstances of this case, because "conviction" for the purposes of the Criminal Appeal Act 1968 includes a conviction on the direction of the judge following a plea of guilt (R v Drew (1985) 81 Cr App R 190).

44. In the meantime, in relation to her initial statement, on 18 May 2020, Mrs Connors pleaded guilty to attempting to pervert the course of justice and was sentenced to a term of 5 months' imprisonment suspended for 24 months.

Grounds of Appeal

45. Mr Bird submits that the guilty plea was equivocal, in the sense that the Applicant's mind did not properly go with the plea when it was made, because the Applicant was inadequately advised on fundamental issues in the charge; and, without adequate advice, his freedom of choice regarding his plea was improperly narrowed. The judge erred in not allowing him to vacate his guilty plea.

46. Furthermore, it is now known that a principle prosecution witness (Mrs Connors) had lied extensively in her original statement, and it was upon that evidence – now

disowned – that he made his plea. The Applicant makes an application under section 23 of the Criminal Appeal Act 1968 for the new evidence relating to Mrs Connors' evidence now to be admitted, on the basis that it is necessary or expedient in the interests of justice that we receive it for the purposes of the appeal. It undermines the basis of his plea (and thus the safety of the verdict), so that, even of the original grounds to set the plea aside are not made good, it should be set aside now.

47. For those reasons, it is submitted the conviction is unsafe. Additionally, the Applicant applies for leave to appeal out of time.

The Applicant's Submissions

48. In relation to the delay, Mr Bird regretted that the notice of appeal and grounds were filed out of time. However, the grounds of appeal are unusual, and implicitly suggest a degree of criticism of those involved in the original trial. Accordingly, time has been taken carefully to consider the advice given to the Applicant and the merits of this notice. The necessary reflection has taken more time than might ordinarily be required to consider and advise on the merits of an appeal. Further delay was occasioned by holiday commitments and by difficulties in gaining access to the prison.

49. In support of the grounds of appeal, Mr Bird submitted as follows.

i) On any view, the basis of plea asserts self-defence. The account says that the Applicant accepts causing the injuries to the complainant. Crucially, it does not say that he intended to cause the injuries sustained by the complainant, or that he intended to cause grievous bodily harm. On those two points, the basis on which the plea was made is plainly equivocal.

ii) The decision to enter a plea of guilty came at a time of particular stress to the Applicant and must be viewed against his considerable pressure of circumstances. The speed of his change of mind gives cause for concern.

iii) As a result of the unconventional sequence in which the Applicant's plea was entered, this was not caught by the usual safeguards of a careful review by prosecuting counsel and the trial judge. The plea was entered before either had the opportunity to review and consider the basis of plea in detail. There appears to have been some degree of hurry in getting the Applicant to enter his plea, with the basis left to one side for further discussion later.

iv) Defence counsel conceded, in his witness statement and in his live evidence, that he had not specifically advised on the issues of intention and recklessness and the defence of self-defence. The issue of intention/recklessness is the key distinction between offences under section 18 and section 20 of the Offences against the Person Act 1861, and should have been discussed in detail with the Applicant.

v) Self-defence is one of the primary defences to any charge of assault and so ought to have been discussed with the Applicant.

vi) In R v McCarthy [2015] EWCA Crim 1185 a similar issue arose. Whilst a number of the issues in that case are different, on the central point it is very similar to the Applicant's situation. The key paragraphs are [78]-[82]. Just as Jamie McCarthy's freedom of choice was improperly narrowed by the inadequate advice offered to him – namely the absence of advice on the issue of intent – so in this case the Applicant's freedom of choice was improperly narrowed by the absence of advice on both that issue and on a primary defence that could have been open to him.

vii) The principal prosecution witness, Mrs Connors, the mother of the complainant, has admitted that she lied in her original police statement. Her admissions fundamentally undermine the prosecution evidence in the case.

viii) Mrs Connors acceptance that she has invented an account to secure the conviction corroborates one of the primary motivations behind the decision to enter a guilty plea. The Applicant's fears that the complainant was devious were well-founded.

ix) In Mr Bird's oral argument, the concerns about Mrs Connors were developed. It was submitted that the decision of the Applicant to enter a guilty plea was based, at least in part, on his belief that Mrs Connors would give evidence against him. He believed her to be a manipulative and devious woman and was concerned that she would be believed and that her evidence would lend weight to that of the complainant.

x) Further, it was Mrs Connors who introduced the Applicant's name to the complainant. In the ambulance, the complainant named "Baxter". Mrs Connors told her to tell the truth, and it was only then that she named the Applicant. There is a very real possibility that Mrs Connors gave the name of the Applicant to her daughter. She may have encouraged her daughter to lie.

The Crown's Response

50. In response, Ms Gardiner made the following submissions.

i) On the second day of the trial, defence counsel approached Ms Gardiner and asked whether a plea of section 20 would be acceptable. She refused the offer, as had been anticipated by defence counsel.

ii) Whilst on the face of it, the basis of plea may look equivocal, it was understood by the parties that the Applicant was admitting his guilt to the offence charged, and further discussion was to take place which may lead to an agreement between the Crown and the defence as to the basis of that plea, taking away the need for a Newton hearing.

iii) The Applicant's basis of plea was then a work in progress. The parties were to be given time to discuss it. The judge did not wish to detain the jury, who had already suffered considerable delay.

iv) To argue self-defence in light of those injuries was, in the Crown's view, "ludicrous". The possibility that there was no intent to cause grievous bodily harm, flies on the face of common sense.

v) Mr Berry accepted causing the injuries. On that basis, a Newton hearing could have taken place immediately to determine the facts before sentence. Thereafter, he changed his mind claiming he was not responsible and was not even present when the complainant was assaulted despite signing the basis of plea and his counsel's endorsements

vi) The Applicant did not receive flawed legal advice. He was represented by experienced counsel, who subsequently gave evidence to the court during the application to vacate plea, that he was satisfied the Applicant was fully aware of what he was pleading guilty to. The judge accepted that evidence.

vii) The Applicant is not a stranger to the Courts. He is 31 years old, and has 13 convictions for 40 offences including assaults and a section 20 wounding in 2009.

viii) Mrs Connors approached counsel at the Newton hearing and said she had "over egged" her statement. The police then took her for interview under caution. However, her change of evidence does not assist in the defence application to vacate the plea because Mrs Connors was not a witness to the assault and the change in her evidence does not diminish the force of the prosecution case when looked at as whole. If there were to be a fresh trial, she would no longer be relied on as a witness of truth for the Crown.

ix) An extremely serious assault took place on the complainant. She has not retracted or altered her statements to police. She is the only witness to the assault, and, other than the brief reference to "Baxter" has consistently named the Applicant as her assailant. Immediately after the reference to "Baxter", she named the Applicant as her attacker when asked to "tell the truth".

51. Ms Gardiner submitted that the conviction is unarguably safe, and leave to appeal should be refused on all grounds of appeal.

Discussion

52. The applications for extensions of time, leave to call fresh evidence and leave to appeal have all been referred to the full court by the Registrar. We need not rehearse the reasons why the applications were not lodged in time, because we are satisfied that, if there be any merit in the grounds of appeal, we would grant the necessary extensions.

53. Whilst, as confirmed in Drew, a court has a discretion until a defendant is sentenced to vacate a plea of guilty, it is an exceptional course generally reserved to cases in which there is evidence of equivocality suggesting that the defendant's mind did not go with the plea or some change of circumstances since the plea which would render it unjust not to allow the plea to be vacated.

54. Where a defendant pleads guilty and subsequently appeals against his conviction, this court reviewed the relevant principles in McCarthy**,** upon which Mr Bird relied. The court identified two principles which reflect that a defendant is only allowed to vacate a plea in the circumstances we have described.

55. The first principle is derived from R v Boal [1992] 95 Cr App R 272. This court will not take the exceptional course of intervening unless a defendant, through no fault of his own, has been deprived of a defence which it believes would probably have succeeded. However, the court warned:

> "This decision must not be taken as a licence to appeal by anyone who discovers that following conviction (still less where there has been a plea of guilty) some possible line of defence has been overlooked. Only most exceptionally will this Court be prepared to intervene in such a situation. Only, in short, where it believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been done. That is this case. It will not happen very often."

56. The second principle, as stated in R v Nightingale [2013] EWCA Crim 405; [2013] 2 Cr App R 7, is that, because a defendant charged with an offence is personally responsible for entering his plea, in exercising his personal responsibility, he must be truly free to choose whether to plead guilty or not guilty. In other words, at the time he pleads guilty, his mind must go with the plea. However, as Lord Judge CJ said in Nightingale (at [11]):

> **"**The principle does not mean and cannot mean, that the defendant making his decision must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence."

The Lord Chief Justice went on (in [12]) to emphasise that a defendant is "entitled to be given and should receive forthright advice" from his lawyers.

57. Mr Bird drew our attention to, and relied upon, McCarthy at [78]**,** where the court said

> "Before the applicant could properly and freely plead guilty to an offence of wounding with intent contrary to section 18, his advocate had to explain all the elements of the offence to him and the applicant had to understand that he was thereby accepting that when he stabbed the complainant he intended to cause her really serious bodily harm."

58. The court, having analysed the evidence, said:

> "79. … We can find no reference to Mr Wallace [i.e. defence counsel] ever explaining to the applicant in appropriate terms the nature of the intent necessary to constitute a section 18 offence; not even in Mr Wallace's own account. Mr Wallace's advice on sentence and his email to his instructing solicitors both seem to equate taking the knife to the scene with the

> necessary intent for a section 18 offence. A plea of guilty on the 'full facts' was said to be on the basis that the applicant, rather than the complainant, was in possession of the knife. No mention is made of the applicant's intending to cause really serious bodily harm when he stabbed [the complainant].
>
> 80 …
>
> 81. In our view, this is one of those exceptional cases where we should intervene. We are far from confident that when the Applicant pleaded guilty to the offence of wounding with intent he had a proper understanding of the elements of the offence. In that sense, his freedom of choice was improperly narrowed. It cannot be argued that he had no defence on a charge of wounding with intent. The prosecution case on wounding and offensive weapon may have been strong, but the applicant may have persuaded a jury his appalling behaviour did not extend to intending to cause really serious bodily harm…".

59. However, although McCarthy is of course useful in setting out the principles to be applied, we consider that the extent to which the application of those principles to the individual facts of McCarthy is very limited indeed. It is axiomatic that each case must be considered on its own facts; and there are important differences in the facts of the case before us and those in McCarthy.

60. In McCarthy, the defendant wrongly believed that he was pleading guilty to section 20. Here, (i) the Applicant had a previous conviction for section 20, (ii) Mr Williams and the Applicant had on the first day of the trial discussed the possibility of the prosecution accepting a plea to section 20, to discount it; (iii) the Applicant then, on the second day, said without prompting and without reference to any basis of the plea, that he wanted to plead guilty to section 18 – he raised the issue first; and (iv) Mr Williams believed, and the judge found, that the Applicant was well aware that he was pleading to causing grievous bodily harm with intent.

61. Mr Williams accepted that he did not discuss intent/recklessness with regard to the amount of harm with the Applicant at this stage. However, in the circumstances, we consider Mr Bird's submission that Mr Williams should have advised the Applicant that, by pleading guilty to section 18, he was accepting that he intended to cause the complainant grievous bodily harm is empty. The Applicant never suggested that, whatever the basis of the plea might be, he did not intend to cause such harm. Mr Williams did not consider there was any possibility that the Crown would accept a plea to section 20. Ms Gardiner, who was prosecuting counsel at trial said it was ludicrous to suggest that such a plea would be acceptable. She had rejected such a suggestion the previous day, and there is no suggestion that that refusal was not passed on to the Applicant.

62. Nor did Mr Williams discuss self-defence with the Applicant. He said that he had considered it, once the basis of plea had been drafted, but only to dismiss it. He considered that, even if the complainant had threatened the Applicant with a knife, there was no possibility of a self-defence defence succeeding on the basis of his plea as drafted. The judge agreed that Mr Williams was not obliged to advise on self -

defence. Whilst we accept some counsel may have referred to self-defence in their discussions with a defendant in these circumstances, to dismiss it, we agree. On the basis of plea, by the time the Applicant hit the complainant, he (not she) had the knife and, although she was biting his finger, she offered no other threat. In the circumstances and in the face of the force the Applicant used and the injuries caused, it is inconceivable that a self-defence defence would have succeeded.

63. Was there anything else which might have undermined the unequivocal nature of the plea? As we have described, the suggestion that there should be a guilty plea came from the Applicant. Mr Williams, mindful of the Applicant's vulnerability and the stressful events which had led to his loss of composure and removal from the court room, was clearly well aware of the Pritchard criteria. He was careful to note the demeanour and the extent of the Applicant's understanding during the conference. He noted that, although anxious as many defendants are in similar circumstances, he was perfectly lucid. Mr Williams was careful to ensure that no pressure was exerted, even though in his opinion the proposed basis was unlikely to be accepted. At all relevant stages the Applicant signed documents and endorsed the brief, in apparent understanding.

64. Given the history as we have described it, unlike in the case of Mr McCarthy, the Applicant could have been in no doubt that he was pleading to section 18 and that a plea to a section 20 offence would not be acceptable to the Crown.

65. Mr Bird suggested that the unequivocal nature of the plea may have been undermined because the plea was tendered before a basis of plea had been agreed or even fully discussed with the Crown. But the Applicant was well aware of that; and he knew that the plea as drafted was not acceptable to the prosecution. He had said that he wanted to plead guilty before any basis of plea had been considered; and, in those circumstances, he was advised that, if a basis could not be agreed, then it would be a matter for the judge and not the jury.

66. After arraignment there was further discussion between Mr Williams and the Applicant. The Applicant was advised that the judge would probably reject his account and that he would lose credit for his plea if he pursued a Newton hearing, but he was adamant that what he had said was true. He signed a further endorsement of the brief to this effect.

67. Mr Williams conceded that he did not, in terms, discuss with the Applicant at this stage self-defence, intent or recklessness. We have already dealt with the submission that the failure to give that advice rendered the plea equivocal and the conviction unsound. In our firm view, it did not arguably do so. But, in any event, these matters do not lie at the heart of this application. The Applicant does not now wish to say that he hit the complainant but in self-defence and/or without any intention to cause her really serious harm. He wishes to say that he did not hit her at all, and indeed was not there. He was somewhere else with his (unnamed) alibi. Whatever else, the plea was unequivocal in its acceptance that he was present and hit the complainant. He now seeks to rely on a defence which, even if (contrary to our firm view) Mr Williams' advice on intent and self-defence were deficient, in our view, subject to the second ground, it was entirely his own fault that the defence was not raised at the relevant time.

68. In respect of the second ground – that the conviction is arguably unsafe because the Applicant pleaded guilty on the basis of Mrs Connors now discredited statement – we do not consider that the proposed new evidence satisfies the test prescribed in section 23 of the Criminal Appeal Act 1968, i.e. we do not consider that it is necessary or expedient to admit it. In coming to that conclusion, we have particularly taken into account the factor at section 23(2)(b), i.e. whether the evidence may afford any ground for allowing the appeal. We do not consider that it does.

69. Mrs Connors' evidence was, at best, peripheral. The crucial evidence was that of the complainant, the only eye witness to the assault. She has been consistent in her account in ABE and in the YouTube footage that the Applicant is responsible for her injuries. She has not subsequently suggested otherwise. In our view, the fact that Mrs Connors lied as she did does not undermine the complainant's evidence, nor is it evidence supporting the proposition that the *complainant* is devious. At no point has Mrs Connors suggested either that the complainant asked her to lie, or that she advised the complainant to lie. Indeed, the opposite is the case: it was when Mrs Connors told her daughter to tell the truth in the ambulance, and then that the complainant named the Applicant as her attacker.

70. In relation to the evidence of Mrs Connors, the highest the point can be put, is that, in her original statement, she asked her daughter a leading question as to who attacked her, and that statement is now discredited. But the fact that Mrs Connors asked that leading question, if it were so, has always been part of the evidence and was so at the time the plea was entered; and the change in Mrs Connors' evidence does not in our view have any adverse impact upon the evidence of her daughter which, subject to the brief mention of "Baxter", has consistently said that her attacked was the Applicant.

71. In our view, the new evidence does not arguably afford any ground of appeal, nor would it (if available at the time) arguably have changed the plea made, nor does it arguably undermine the safety of the conviction. We refuse the application to admit that evidence, and with it leave to appeal on that ground.

Conclusion

72. Neither the judge, nor we, in the circumstances of this case discern any deficiencies in the advice given by Mr Williams or in the approach he took. He handled the stressful situation cautiously and carefully. He took care to ensure that the Applicant could engage with and follow the advice he was given. By the time the Applicant said that he wanted to plead guilty to the section 18 offence, Mr Williams had considered and discussed the possibility of a plea to section 20, and it had been ruled out. The Applicant was aware that there was a difference between an offence under section 18 and one under section 20 and that a plea to section 20 would not be accepted. Given the basis of his plea and the extent of the injuries he accepted having caused, a defence to section 18 on the grounds of lack of intent was unrealistic. Having taken down the basis of plea, Mr Williams had considered the possibility of a self-defence defence and had ruled it out. The judge considered he was right to do so. We agree. Whether the force used by the Applicant amounts to "excessive self-defence" remains a matter he can argue at a Newton hearing and was not an issue for a jury. The Applicant's instructions were clear. His plea was unequivocal. The proposed new evidence concerning Mrs Connors does not make it less so.

73. We have concluded that there are no arguable grounds for vacating the Applicant's guilty plea, or for considering the verdict unsafe. In the circumstances, all of the applications before us are refused.