Neutral Citation Number: [2024] EWCA Crim 1201

Case Nos: 202301677 B1 & 202301721 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESSIDE
HHJ SMITH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2024

Before :

LORD JUSTICE SINGH
MRS JUSTICE MAY
and
MR JUSTICE GRIFFITHS

- -

Between :

REX	**Respondent**
- and -	
(1) MATTHEW JAMES BANNER	**Appellants**
and	
(2) PETER BENNETT	

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Stephen Constantine (instructed by **Hewitts Solicitors**) for the **First Appellant**
David Callan (instructed by **Thompsons Solicitors**) for the **Second Appellant**
Anne Richardson and **Richard Herrmann** (instructed by the **Crown Prosecution Service**) for the Respondent

Hearing date: 13 September 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SECTION 46 OF THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999 APPLIES

Nothing may be reported that would tend to identify the victims in this case, whose names are accordingly anonymised in this judgment.

Lord Justice Singh :

Introduction

1. The appellants appeal against their convictions with the leave of the Single Judge.

The proceedings in the Crown Court

2. On 27 April 2023, in the Crown Court at Teesside, the appellant Bennett was convicted of two counts of ill-treatment of a person in care, contrary to section 20 of the Criminal Justice and Courts Act 2015 ("the 2015 Act") (counts 2 and 13). He was acquitted on count 1. The appellant Banner was convicted of five counts of ill-treatment of a person in care, contrary to the same provision (counts 3, 4, 5, 6 and 7). He was acquitted on count 1.

3. On 19 January 2024 Bennett (then aged 54) was sentenced to a total of 4 months imprisonment, suspended for a period of 18 months, which included an unpaid work requirement of 280 hours. Banner (then aged 44) was sentenced to a total of 4 months imprisonment, suspended for a period of 18 months, which included an unpaid work requirement of 280 hours.

4. There were seven other co-defendants, two of whom were convicted on unrelated counts and five were acquitted.

The facts

5. Both the appellants were in senior healthcare roles at Whorlton Hall hospital, where patients were adults with longstanding learning disabilities and significant additional psychological and behavioural needs, who required specialist care. So far as relevant to this case, the patients were detained under section 3 of the Mental Health Act 1983 ("the 1983 Act"). The appellants had received restraint technique training and attended courses on care plans.

6. The allegations came about in consequence of footage at the hospital, obtained over 38 days by an undercover reporter, Olivia Davies, for a BBC *Panorama* documentary. Olivia Davies gave evidence at the trial. The relevant counts on the indictment related to two residents, AD and LH.

7. AD was aged 20 in January 2019 and had been a Whorlton Hall resident since February 2018. She was diagnosed with schizoaffective, autism spectrum disorder and associated challenging behaviour.

8. LH was aged 49 in January 2019 and had been a Whorlton Hall resident since July 2014. She was diagnosed with autism and had difficulties in communicating, often using sign language.

9. At trial the Prosecution case was that the care that the appellants and their co-accused provided to the named residents was not only "devoid of the respect and kindness that

those residents deserved" but amounted to ill-treatment. It was not their case that the residents were being ill-treated all of the time. It was acknowledged that caring for these residents was a "hard demanding job" and that "carers can face complex, difficult, obstreperous, and sometimes violent people" but these difficulties left residents vulnerable to abuse when they should have been treated with "kindness, respect and patience". But "at times" the defendants' attitude and care towards certain residents was "cruel and abusive" and they "effectively belittled and demeaned those they are paid to care for".

10. The incident in Count 2 occurred on 6 January 2019. AD was agitated and the appellants went to her room and told her that, unless she calmed down, the female carers would not come back and three males would be supervising her: this was the subject of count 1, on which the appellants were acquitted. Whilst AD was screaming, Bennett "twanged" a balloon in her room. Although not caught on camera, he asked her if she liked balloons and was showing/describing different coloured balloons to her. When she said "No", he continued to talk about balloons, asking who had brought the balloons in for her. She said that her mother had and he asked her if that was cruel of her mother, if she did not like balloons.

11. Counts 3, 4 and 8 related to incidents that occurred on 11 January 2019. AD was distressed and screaming. Banner had pushed her back into her room in an appropriate manner. Once AD had calmed down, another defendant told her that if the calm behaviour did not continue, then the female carers would be sent away and she would have male carers: this was the subject of count 8, on which the other defendant was acquitted. Banner asked AD if he should tell the other defendant that she wanted two male carers and she continued to scream. Once she had calmed down Banner, from outside the room, asked if she liked balloons. Banner then left and when he returned he asked her again if she liked balloons (the subject of count 4). She continued to scream and he asked whether she wanted three, four, five or six men before saying "we can keep going" (the subject of count 3).

12. The incident in count 5 happened on 28 January 2019. AD had been intermittently screaming and, when Banner entered the room, AD screamed and said "No". Notwithstanding this Banner remained in the room and danced to the words that AD was repeating. He kept asking her whether she wanted him to stay and told her that he and another defendant would remain if she did not calm down. He asked her about balloons as that would take her mind off things. He pretended to forget her name and fist pumped when she screamed and repeated words. He left the room saying that he would not listen to her and singing "Olivia knows she likes to muff dive".

13. The incident in count 6 happened on 21 February 2019 when AD was distressed. Banner told a female carer to come out and turn the room light off. He asked AD if she liked balloons because, he told Olivia Davies, he was curious.

14. The incident in count 7 happened on 22 February 2019. AD was screaming and Banner stood at her open door and asked her if she liked balloons to which she said 'sorry' and he laughed, said it was weird and left.

15. The incident in Count 13, which concerned LH, happened on 28 February 2019. When LH was using sign language, Bennett spoke French to her and when she came out of the room he "bounc[ed] suddenly towards her, causing her fear".

16. The appellants gave evidence at the trial.

17. Bennett was of good character and gave evidence that he had started at Whorlton Hall in 2009 and by 2016 had been promoted to senior healthcare assistant. In 2018 he had some time off work as a result of a nervous breakdown. The things that AD did not like would change and that often "you could not keep up". In respect of count 1, the 'man button' referred to was a button which featured a stick man. He came up with the term so that, if AD needed help, she should press the man button. In respect of count 2, he had gone to her room and seen a pile of balloons and had just picked one up. He accepted that he could be heard fiddling with the balloons by twanging them but said that he just had them in his hand and was fiddling with them but this was not done deliberately to annoy AD. In respect of count 13 he said there was no purpose in speaking French, it was not contradictory to the care plan and was not ill-treatment. He had moved from his chair because on a couple of previous occasions she had scratched a healthcare assistant and he thought she was going to do the same to him.

18. Banner was of good character and gave evidence that he had not much experience. He had started at Whorlton Hall in 2017 and had received the standard training. He understood AD's preference for female carers was as per the care plan but "I am on the scene, and I felt it was appropriate to put the women out of sight. She was unsettled with them, and so the protocol…would be to put them out of sight." When he said that there were more men coming "his thinking behind this was because this was, in fact, a statement of the natural consequences of her remaining unsettled. It would be a question of more men turning up, and his conversation with [AD] at that stage was all about trying to regain a hold on the situation, trying to avoid, as he was keen to do, the alternative of her getting drugged up or pinned to the floor – that is to say medicated or restrained".

19. In respect of counts 4, 5, 6 and 7, he did not think that balloons being snapped could be heard on the footage and that where he was referring to balloons was a distraction technique designed to de-escalate and calm AD down. On the footage he had been asked by Olivia Davies why he mentioned balloons and he said "Well, it's just a daft question that I throw out to somebody that is unsettled."

20. In respect of count 6, he said that he had been asking her if she liked balloons, not to taunt her or to be cruel.

Rulings by the trial judge

21. After the close of the prosecution case, counsel made a submission that there was no case to answer on various counts. Both written and oral submissions were made. The prosecution filed a detailed written response to the submissions of no case to answer.

22. Counsel for Bennett submitted that, on count 2, AD was frequently supplied with items which she could manipulate with her hands and balloons were one such item. The reference to balloons could not amount to ill-treatment. Likewise ill-treatment was not made out in count 13: speaking in French was not in contravention of her care plan and Bennett's movements had an innocent explanation.

23. Counsel for Banner submitted that, on count 3, there was no ill-treatment and there was no prohibition on the use of male carers in AD's care plans. On counts 4, 5, 6 and 7, the discussions amounted to nothing more than "secondary strategies" to distract and calm AD and ill-treatment was not made out. In the alternative the evidence was of such a tenuous nature that no jury, properly directed, could convict on it.

24. The Judge ruled that the counts in relation to the appellants would be left to the jury. He outlined the ingredients of the offence (ill-treatment) and noted that the prosecution did not have to prove that any suffering or injury to health was caused. He said it was common ground that the term "ill-treatment" should be given its ordinary meaning. For example, the Oxford English Dictionary defines it as: "ill-treatment, n. Bad or unfavourable treatment; rough handling; harsh or unsympathetic dealings". The behaviour alleged should not be viewed in isolation but in the wider context of the case.

Directions to the jury

25. With the agreement of the parties, the Judge helpfully gave written directions of law to the jury at the outset of the trial. The Judge took the jury through these on 13 March 2023.

26. The directions included a written direction on the elements of the offence under section 20 of the 2015 Act. In relation to the offence of ill-treatment, the Judge said that the prosecution needed to make the jury sure of two things. First, that the defendant engaged in deliberate conduct which can properly be described as ill-treatment. Secondly, either the defendant knew that they were inexcusably ill-treating the resident or were reckless as to whether they were inexcusably acting in that way. The Judge also made it clear that the prosecution do not have to prove, for an allegation of ill-treatment, that any suffering or injury to health was caused by the conduct.

27. When the Judge came to sum up the case to the jury, on 21 April 2023, he reminded the jury of those written directions of law in a split summing up, dealing with matters of law before closing speeches from the advocates.

28. The Judge also gave the jury a written route to verdict. In relation to the offence of ill-treatment, the route to verdict reflected what the jury had in the written direction of law.

Submissions on behalf of the appellants

29. The appellant Bennett has been granted leave to advance the following four grounds of appeal:

    (1) The Judge should have acceded to the submission of no case to answer on count 2; the behaviour could not be described as ill-treatment but was a distraction technique. The statement of her mother confirmed that AD was frightened of the

sound that a balloon made when it popped. Balloons and other inflatable objects were provided to AD by her mother so that AD could manipulate them safely. It was documented that she was ambivalent to balloons and that this depended on her mood. Her care plan made no mention of a balloon phobia.

(2) The Judge should have acceded to the submission of no case to answer on count 13; the behaviour could not be described as ill-treatment. There was no reference in any documentation that she should be spoken to in English.

(3) The prosecution had opened the case that the behaviour by the appellant was "cruel and harsh"; the Judge did not use these words which appear in reputable dictionaries and he should have done.

(4) The unchallenged evidence of Sarah Bennett renders the conviction unsafe on count 2; she gave evidence about AD's possession and purchase of balloons which suggested that AD frequently had a desire to purchase balloons.

30. The appellant Banner has leave to advance the following two grounds of appeal:

(1) The Judge erred in that he failed to withdraw counts 3, 4, 5, 6 and 7 from the jury after a submission of no case to answer. The conduct alleged could not properly amount to ill-treatment.

(2) The Judge erred in that he failed to give the jury a proper definition of ill-treatment so as to include the words 'cruel and abusive behaviour,' as relied upon by the prosecution. No direction was given on the meaning of ill-treatment.

31. On behalf of the appellant Bennett we had written grounds of appeal by the late Mr Andrew Rutter, who appeared at trial, and a skeleton argument from Mr David Callan who also appeared at the hearing before us. On behalf of the appellant Banner we had written submissions in the perfected grounds of appeal from Mr Stephen Constantine. We are grateful for the concise oral submissions we heard from Mr Constantine and Mr Callan. We are also grateful to Ms Anne Richardson, who appeared for the Crown with Mr Richard Herrmann.

32. Although the grounds of appeal on which each appellant has been granted leave to appeal are not identical, it became clear at the hearing before us that there is no material difference between their submissions. In substance they submit the following:

(1) The Judge failed to give an adequate definition of the term "ill-treatment". For example, the Judge made no reference to adjectives such as "cruel" or "abusive", although those had featured in the Crown's opening to the jury. The appellants submit that it is one thing to engage in what may be regarded as unprofessional behaviour but that does not mean that Parliament intended it to be criminal. They also submit that the various dictionary meanings of the term "ill-treatment" are so broad that, without further assistance, the jury may have applied a meaning which was so broad that it would unacceptably cover conduct which ought not to be regarded as criminal. For example, the Oxford English Dictionary gives the following definition: "bad or unfavourable treatment; rough handling; harsh or

unsympathetic feelings". The Cambridge Dictionary gives the following definition: "the act of treating someone badly, especially by being violent or by not taking care of them". The Collins Dictionary gives the following definition: "harsh or cruel treatment".

(2) The second main submission advanced on behalf of the appellants is that, however wide the definition of ill-treatment may be, there was insufficient evidence before the jury upon which they could reasonably convict and therefore the case should have been stopped at half time on the relevant counts. For example, in relation to Count 2, it is submitted on behalf of Bennett that there was unchallenged evidence from his wife, Sarah Bennett, at the trial, to the effect that AD clearly had a desire to possess balloons on several occasions and therefore any reference to balloons by Bennett could not amount to ill-treatment, as it was commonly known that she chose to engage with balloons. In relation to Count 13, it is submitted that there was no reference in LH's care plan that she should not be spoken to in any language other than English. There is no other basis to conclude that speaking in a foreign language for only a few words would amount to ill-treatment on any interpretation. The same is submitted in relation to Bennett rising from his chair as LH advanced towards him.

Analysis

33. We reject the first way in which the submissions for the appellants are put. There was no requirement for the Judge to define the term "ill-treatment" beyond what he had said in his written and oral directions of law.

34. First, the term is an ordinary one of the English language and should not be given any judicial gloss. Parliament has used the term in a number offences of this type, going back at least to section 1 of the Children and Young Persons Act 1933 ("the 1933 Act"). The same term appears in section 127 of the 1983 Act. It has not been suggested that this has caused difficulty to juries or otherwise in the many decades that they have had to apply similar legislation. As the term "ill-treatment" is an ordinary one of the English language, juries can be expected to understand what it means and apply it without the need for dictionary definitions.

35. Secondly, it is clear that the Judge carefully drafted his direction of law on the offence by reference to the decision of this Court in *R v Newington* (1990) 91 Cr App R 247, at 254, where Watkins LJ said:

> "All of those considerations demanded a very careful direction as to *mens rea*. In our judgment the judge should have told the jury that for there to be a conviction of ill-treatment contrary to the Act of 1983 the Crown would have to prove (1) deliberate conduct by the appellant which could properly be described as ill-treatment whether irrespective of [this is a typographical error in the law report and should read 'irrespective of whether'] this ill-treatment damaged or threatened to damage the health of the victim and (2) a guilty mind involving either an appreciation by the appellant at the time that she was

> inexcusably ill-treating a patient or that she was reckless as to whether she was inexcusably acting in that way."

36. Both the elements of the offence, including the mental element, need to be proved by the prosecution. The words "properly" and the word "inexcusably" are important in this context. They will constrain the potential breadth of the term "ill-treatment" to proper bounds, as intended by Parliament. In *Newington* the Court deprecated attempts by the Judge in that case to go beyond the wording used by Parliament. We also would deprecate such attempts.

37. It is also notable that there is an important distinction between the wording of section 1 of the 1933 Act and the later legislation such as section 127 of the 1983 Act and section 20 of the 2015 Act. Parliament has chosen not to include the further requirement, which does appear in section 1 of the 1933 Act, that the treatment must be likely to cause injury or harm. This was a significant distinction in the wording as between the 1933 Act and the 1983 Act, to which this Court drew attention in *Newington*, which was decided in 1990. When Parliament came to enact the 2015 Act, it can be taken that it was content to legislate on the basis of the interpretation which had been given by this Court in *Newington* to the materially identical provision in the 1983 Act.

38. Thirdly, what counsel say in speeches, including here the opening speech by the Crown, does not constitute either evidence or a direction of law to the jury. Directions of law come from the judge. In this case they were given to the jury in written form, as was a written route to verdict. Helpfully, the written directions of law were given to the jury at the outset of the trial. This was done with the agreement of all parties. The defence did not suggest at that stage that any further definition of "ill-treatment" needed to be given to the jury. We can see no reason why the Judge should have done so. To the contrary, we consider that the way in which the Judge handled this sensitive case was exemplary.

39. Turning to the second main way in which the submissions are put on behalf of the appellants, these squarely raise issues of fact which were classically for the jury to decide and not for the Judge nor for this Court. The jury had the whole of the evidence before them. This included the film footage, the relevant parts of which we have also seen. They could make their own mind up, for example, about what the appellant Bennett's motivation was when he rose from his chair towards LH. There was certainly a case for him to answer. In due course he did give evidence at the trial and gave his explanation, which was clearly rejected by the jury in light of his conviction on Count 13.

40. Similarly, in relation to the incident concerning balloons, there was an issue of fact for the jury to decide at the trial as to whether what was done by way of "twanging" the balloon was an effort in good faith to use a distraction technique so as to calm AD down or whether it was inexcusable ill-treatment, with the requisite mental element, either knowledge or recklessness. Again, there was a case for the appellants to answer and they had the opportunity to give evidence in response to the prosecution case after the Judge had rejected the submission that there was no case to answer.

41. In our judgement, the questions which this case raised on the relevant counts against these appellants were classically ones for the tribunal of fact (the jury) to decide after hearing all the evidence. The trial Judge cannot be criticised for leaving these issues to the jury in accordance with the judgment of this Court in *R v Galbraith* [1981] 1 WLR 1039, at 1042 (Lord Lane CJ).

42. Finally, we note that the jury clearly took their task seriously in this trial. They acquitted the appellants on Count 1. This illustrates the point that they were well able to decide for themselves whether what they saw and heard in the evidence as a whole constituted the offence of ill-treatment in accordance with the direction of law which they had been given by the Judge.

Conclusion

43. For the reasons we have given these appeals are dismissed.