*992 Regina v Marchese

Court of Appeal

11 February 2008

[2008] EWCA Crim 389

[2009] 1 W.L.R. 992

Lord Phillips of Worth Matravers CJ , Royce , Beatson JJ

2008 Feb 11

Crime—Indictment—Duplicity—Making threats to kill—Appellant charged with single count of making "threats to kill"—Threats made on numerous occasions over nearly one year—Statute providing that single threat to kill constituting single offence—Whether count duplicitous—Whether duplicity rendering count nullity—Whether conviction unsafe—Whether to be quashed— Offences against the Person Act 1861 (24 & 25 Vict c 100), s 16 (as substituted by Criminal Law Act 1977 (c 45), s 65(4), Sch 12)

The defendant was charged with, inter alia, one count of making "threats to kill", contrary to section 16 of the Offences against the Person Act 1861 [1] , the particulars of the offence being that "on divers days" within a period of almost one year she had made threats to kill the complainant. The threats alleged were contained in a series of text and other messages which used similar phraseology. At trial no objection was taken by the defence to the form of the indictment, and the defendant simply denied that she had been responsible for sending any of the messages. The defendant was convicted.

On the defendant's appeal on the ground that the count charged was bad for duplicity—

Held , dismissing the appeal, that under section 16 of the 1861 Act a single threat to kill was a single offence; that, therefore, the threats alleged should each have been separately identified in the indictment and the count charging "threats to kill" was technically duplicitous; but that the rule against duplicity dealt with form, not substance, and the fact that a count was duplicitous did not automatically lead to the quashing of a conviction since a duplicitous count was not a nullity; that it was necessary to consider whether the form of the indictment had resulted in the risk of injustice to the defendant; that, on the facts, there was no basis upon which the jury could

possibly have distinguished one threatening message from another, the issue having simply been whether the defendant had been responsible for the series of messages; and that, accordingly, the form of the indictment had not caused the defendant any injustice (post, paras 42–44, 46, 47–48, 50, 60).

R v Thompson [1914] 2 KB 99, CCA applied .

R v Clarke [2008] 1 WLR 338, HL(E) distinguished .

The following cases are referred to in the judgment of the court:

- R v Clarke [2008] UKHL 8; [2008] 1 WLR 338; [2008] 2 All ER 665; [2008] 2 Cr App R 18, HL(E)
- R v Greenfield [1973] 1 WLR 1151; [1973] 3 All ER 1050; 57 Cr App R 849, CA
- R v Thompson [1914] 2 KB 99; 9 Cr App R 252, CCA

The following additional cases were cited in argument:

- R v Lamb [2006] EWCA Crim 3347, CA
- R v Newland [1988] QB 402; [1988] 2 WLR 382; [1988] 2 All ER 891; 87 Cr App R 118, CA

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The following additional cases, although not cited, were referred to in the skeleton arguments:

- R v Brown (Kevin) (1983) 79 Cr App R 115, CA
- R v Jones (John) [1974] ICR 310; 59 Cr App R 120, CA
- R v Kidd [1998] 1 WLR 604; [1998] 1 All ER 42; [1998] 1 Cr App R 79, CA
- R v Litanzios [1999] Crim LR 667, CA
- R v Merriman [1973] AC 584; [1972] 3 WLR 545; [1972] 3 All ER 42; 56 Cr App R 766, HL(E)

APPEAL against conviction and **APPLICATION** for leave to appeal

On 2 August 2006 in the Crown Court at Southwark before Judge Price and a jury the appellant, Maria Marchese, was convicted of a count alleging that she had made “threats to kill”, contrary to section 16 of the Offences against the Person Act 1861 , as substituted by section 65(4) of, and Schedule 12 to, the Criminal Law Act 1977 . The appellant appealed against conviction, by permission of the single judge granted on 17 October 2007, on the ground that the count on which she had been convicted was bad for duplicity; and renewed her application for leave to appeal against conviction on three other grounds.

The facts are stated in the judgment of the court.

The appellant in person.

Mark Fenhalls (instructed by *Crown Prosecution Service, Headquarters*) for the Crown.

Alison Levitt (assigned by the Registrar of Criminal Appeals) as a friend to the court.

11 February 2008. LORD PHILLIPS OF WORTH MATRAVERS CJ

delivered the following judgment of the court.

Introduction

1 On 2 August 2006, in the Crown Court at Southwark, before Judge Price and a jury, the appellant Maria Marchese was convicted of four offences. They are as follows:

1 "Count 1

1 "Statement of offence

"Harassment, contrary to sections 4(1) and 4(4) of the Protection from Harassment Act 1997 .

1 "Particulars of offence

"Maria Marchese, between 1 October 2002 and 7 September 2003 within the jurisdiction of the Central Criminal Court, you caused Deborah Pemberton to fear that violence would be used against her by your course of conduct which you knew or ought to have known would cause fear of violence to Deborah Pemberton on each occasion in that you sent malicious and threatening texts and messages and made malicious and threatening phone calls that you would cause violence to Deborah Pemberton.

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1 "Count 2

1 "Statement of offence

"Threats to kill, contrary to section 16 of the Offences against the Person Act 1861 .

1 "Particulars of offence

"Maria Marchese on divers days between 1 October 2002 and 7 September 2003 within the jurisdiction of the Central Criminal Court, without lawful excuse you made to Deborah Pemberton threats to kill her intending that Deborah Pemberton would fear that the said threats would be carried out.

1 "Count 3

1 "Statement of offence

“Harassment, contrary to sections 4(1) and 4(4) of the Protection from Harassment Act 1997 .

1 “Particulars of offence

“Maria Marchese between 1 October 2002 and 7 September 2003 within the jurisdiction of the Central Criminal Court, you caused Jan Falkowski to fear that violence would be used against him by your course of conduct which you knew or ought to have known would cause fear of violence to Jan Falkowski on each occasion in that you sent malicious and threatening texts and messages and made malicious and threatening phone calls that you would cause violence to Jan Falkowski.

1 “Count 4

1 “Statement of offence

“Perverting the course of justice, contrary to common law.

1 “Particulars of offence

“Maria Marchese, on 21 January 2004 within the jurisdiction of the Central Criminal Court, with intent to pervert the course of public justice, you did an act which had a tendency to pervert the course of public justice in that you made a false allegation of rape against Jan Falkowski.”

2 The appellant was sentenced on 19 January 2007 to a total of nine years' imprisonment made up as follows: on count 1, 31/2 years' imprisonment; on count 2, 41/2 years' imprisonment concurrent; on count 3, three years' imprisonment concurrent; and on count 4, 41/2 years' imprisonment. The appellant was also made the subject of a restraining order without limit of time and of a compensation order of £18,000 (£9,000 to be paid to each complainant).

3 After the trial the appellant dismissed her counsel. She instructed instead Miss Alison Levitt. Miss Levitt settled an application for leave to appeal against conviction on each of the four counts, and against sentence. That application was settled with considerable skill. From some of the background documents that we have seen, it is plain that Miss Levitt acted with commendable concern for the appellant's interests. None the less, the appellant decided to dispense with Miss Levitt's services.

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4 Having considered her position, Miss Levitt decided that she was no longer in a position to act for the appellant, but offered to be present today in case the court wished for any assistance from her. We accepted that offer. With the consent of the appellant, we invited Miss Levitt to assist the court and to make the submissions that she would have made had she been acting for the appellant. That she did and we are grateful to her. Those submissions were supplemented by some submissions made by the appellant herself, although they added nothing of substance to the submissions that had been made to us by Miss Levitt.

5 The appellant appeals against conviction on ground 1 with leave of the single judge. She renews her application for leave to appeal on the other grounds.

The facts

6 Most of the evidence adduced by the prosecution at the trial was not in issue. The appellant was born in 1961 in Argentina. She came to live in the United Kingdom at the age of 17.

7 By about 1997 she was in a relationship with George Attard, who had a history of psychiatric illness. George Attard began treatment at St Clements Hospital in East London, where he saw a consultant psychiatrist, Dr Jan Falkowski, for 30 minutes every two to three months. The appellant occasionally accompanied Mr Attard to these appointments.

8 In late 2001 Dr Falkowski became engaged to Deborah Pemberton. Their engagement was publicised in a National Health Service magazine that was available to patients.

9 Mr Attard was admitted as a voluntary inpatient to St Clements between 22 April and 19 June 2002. The appellant was later to allege that she had been raped by Dr Falkowski when she attended the hospital to visit Mr Attard one day in June 2002.

10 The harassment charges in the indictment relate to the period 1 October 2002 to 7 September 2003.

11 On 25 October 2002, Dr Falkowski and Miss Pemberton received calls on their mobile phones while they were driving down to stay at Miss Pemberton's flat in Poole. The calls were threatening. They were made by both a man and a woman. Dr Falkowski also received anonymous texts which included the words “You will never know how much I feel for you in the last four years”.

12 Dr Falkowski and Miss Pemberton reported this to the Dorset Police. Thereafter they kept a log of calls and texts of this nature that they received. Over the following 11 months they received very many text messages which revealed close knowledge of their personal lives and movements. The messages displayed considerable hostility to Miss Pemberton and to the planned wedding, which was to be held at Salterns Hotel.

13 On 28 October 2002, on their return to London, Dr Falkowski and Miss Pemberton went to a boat that Dr Falkowski kept moored in Limehouse Basin. They found the lights on, when they had been left switched off. Two days later they went to the boat again and found that the gas stove had been turned on, unlit (“the gas incident”). The lock-keeper at the marina, Elizabeth Mills, gave evidence that a woman of Mediterranean appearance had attempted to enter the secure area of the marina, claiming to ***996*** have an invitation to dinner with Dr Falkowski. She described the woman as having orange hair, which was at odds with the colour of the appellant's hair which is black. Later she attended an identity parade at which she did not identify the appellant as the woman whom she had seen, but picked out somebody else.

14 On 30 November 2002, Dr Falkowski received a text message suggesting that Miss Pemberton could “end up in Limehouse Poole”. He also received a note pushed through the door of his flat. Expert evidence later established that this had not been written by the appellant.

15 In the succeeding months calls and text messages were also sent to friends and family, and to Miss Pemberton's place of work. They intensified as the wedding approached. They contained clear death threats, of which a text sent on 22 August 2003 to Miss Pemberton saying “two weeks left before gunman visit u, 6.9 the date” was a typical example.

16 The stress on the engaged couple was very severe. Their relationship was destroyed. They resolved to call off the marriage. However, the Dorset Police asked them to pretend that the marriage was to go ahead in the hope of catching whoever was harassing them.

17 In June 2003 a woman visited Salterns Hotel at which the wedding was to take place. She spoke to Sharon Malin, the chef. Miss Malin later identified the appellant as that woman in an identification parade. Miss Malin's number was found recorded when the appellant's flat was searched by the police.

18 On 5 September 2003, Miss Malin received two texts relating to the wedding. The latter stated, “Please get Jan to call off wedding 6.9.03 many will be dead if they go ahead!”.

19 On the day the wedding was due to take place, 6 September 2003, a flurry of telephone calls were made, some from Bournemouth and some from Poole. The appellant had been in Bournemouth at the time of the former. She later explained this by saying she had got off a train from Waterloo to Poole by accident. Police arrested her after she had emerged from a telephone box in Poole from which a series of further calls had just been made. She was found to have £16 worth of coins in her possession.

20 The appellant's arrest marked the end of the first period covered by counts 1 to 3. In interview she denied making any of the calls. At this stage she made no allegation against Dr Falkowski.

21 Dr Falkowski and Miss Pemberton's relationship having come to an end, the wedding never took place. Dr Falkowski had in fact started a new relationship with Bethan Ancell in May 2003.

22 Following the appellant's arrest, Dr Falkowski realised the connection between her and Mr Attard and ceased to treat him. The appellant complained to the hospital about this decision.

23 On 8 December 2003, the Crown Prosecution Service informed the appellant that it had decided not to pursue the charges that the police had brought. No explanation has been given for this decision. Shortly thereafter, Dr Falkowski received a threatening phone call. Both he and his secretary recognised the voice of the appellant. Dr Falkowski reported the matter to the police.

24 On 31 December 2003, Miss Pemberton's flat in Poole was entered (“the burglary”). Nothing was taken, but lights were left on, windows left ***997*** open and objects moved around. Police believed that keys had been used to effect the entry.

25 The appellant was arrested for the second time on 21 January 2004. When interviewed on this occasion she alleged that Dr Falkowski had raped her in June 2002 after placing drugs in a drink he offered her at the hospital. She produced a pair of her pants which she said she had retained in order to support her allegation. On forensic examination Dr Falkowski's sperm (identified by DNA) was found in these pants.

26 The appellant's allegation led to the arrest and charge of Dr Falkowski with rape. Dr Falkowski denied any sexual relations with the appellant. Further forensic examination carried out on behalf of the defence established that the pants also contained a partial match with DNA from Bethan Ancell. Dr Falkowski and Bethan Ancell gave evidence of disturbance to rubbish bags outside his flat into which he had placed condoms that they had used between May and December 2003.

27 On 12 August 2005, the Crown offered no evidence against Dr Falkowski and the charges against him were dropped.

28 Thereafter the appellant was re-arrested and charged with harassment, making threats to kill and perverting the course of justice.

The trial

29 The conduct stated in the indictment to constitute harassment was the sending of texts and messages and the making of telephone calls. At the trial the appellant's then legal team did not object to the leading of evidence relating to the gas incident or the burglary. Instead they submitted strongly to the jury that there was no evidence that the appellant was responsible for them.

30 The defence of the appellant in relation to counts 1 to 3 was that she did not dispute that calls had been made or that messages had been sent, but she contended that she was not responsible and did not know who was. In relation to count 4, she said that she had in fact been raped by Dr Falkowski and that it was not true therefore that she had made a false allegation. The jury clearly did not believe her.

Sentence

31 The judge deferred sentence in order to receive reports. The pre-sentence report confirmed that the appellant remained fixated on Dr Falkowski and was likely to present a risk to him of further harassment. She persisted in seeing herself as the true victim. Her personality was exceptionally devious. It was difficult in such cases to make sound proposals to the court.

32 A psychiatric report concluded that the appellant did not suffer from any mental illness such that a mental health disposal would be appropriate. She continued to present a risk towards others, particularly men with whom she wished to form a relationship.

33 The appellant was sentenced on 19 January 2007 in the manner we have described. The judge found that there had been a sustained and terrifying campaign of threats to kill and harassment

with a multitude of texts of a threatening and abusive nature. The effects on the complainants had been considerable. The appellant had gone to extraordinary lengths to ***998*** obtain evidence and to make a false allegation of rape. Dr Falkowski had been suspended from work and might never fully recover his practice. It was difficult to imagine a more serious case of harassment. A lengthy sentence was inevitable.

Grounds of appeal

34 The appellant sought leave to appeal against conviction on the four grounds settled by Miss Levitt: (1) count 2 was bad for duplicity; (2) the evidence of the gas incident and the burglary was not admissible and should not have been admitted; (3) if, contrary to the primary submission, it was admissible, the judge failed properly to direct the jury as to this evidence; and (4) there was no case to answer on count 3; the messages sent to Dr Falkowski were not threatening, but affectionate.

35 The appellant also sought leave to appeal against sentence on two grounds: (1) that she was sentenced on an incorrect factual basis; and (2) the total sentence of nine years' imprisonment was manifestly excessive.

The decision of the single judge

36 These applications came before the single judge on 17 October 2007. He granted leave to appeal against conviction on the first ground only. He refused leave to appeal against sentence.

37 The single judge indicated that ground 1 was “just” arguable. Where there were multiple threats to kill on different occasions, possibly by more than one woman, it was arguable that there was a technical defect in the indictment. Whether it meant that the conviction was unsafe was much more uncertain.

38 As regards the other grounds, the evidence of the gas incident and the burglary was properly admitted and the direction to the jury adequate. The issue for the jury was whether the appellant was responsible. It was absurd to characterise the messages to Dr Falkowski as “affectionate”. There was plainly a case to answer in relation to the harassment of him.

39 The single judge did not give leave to appeal against sentence. He expressed the view that the case was extreme and that a severe sentence entirely proper.

Duplicity

40 We shall deal with the first ground on which leave to appeal was given. It relates to count 2. That count was described in the indictment as “threats to kill, contrary to section 16 of the Offences against the Person Act 1861 ”. The particulars were:

“Maria Marchese on divers days between 1 October 2002 and 7 September 2003 within the jurisdiction of the Central Criminal Court, without lawful excuse you made to Deborah

Pemberton threats to kill her intending that Deborah Pemberton would fear that the said threats would be carried out."

41 Miss Levitt submitted to us that there is no such offence as making multiple threats to kill. The offence under section 16 of the Offences against the Person Act 1861 , as substituted by section 65(4) of, and Schedule 12 to, the Criminal Law Act 1977 , provides: ***999***

"A person who without lawful excuse makes to another *a* threat, intending that that other would fear *it* would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years." (Emphasis added.)

Therefore a count on the indictment which refers to more than one threat to kill is duplicitous, unless it can be shown that the offence is a continuing offence, as in the "general deficiency" cases.

42 Section 3 of the Indictments Act 1915 provides:

"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

Miss Levitt submitted that "a count … should be drafted with sufficient detail to inform the court and the defence as to the exact nature of the factual allegation and so as to eliminate the possibility of a conviction on either of two alternative bases". Miss Levitt submitted that no count should contain more than one allegation unless the allegations can properly be categorised as a continuing offence. Rule 4(2) of the Indictment Rules 1971 (SI 1971/1253) provides: "Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count …" As can be seen, section 16 of the Offences against the Person Act 1861 provides for a single threat as a single offence. The model indictment in *Archbold's Criminal Pleading Evidence and Practice* , 2007 ed, para 19–125 (in accordance with the statute) refers to a single threat. The rationale for this is clear: the intention of Parliament was that in relation to each threat the jury must decide whether the defendant intended the victim to fear that it would be carried out. It is trite law that duplicity is a matter of form rather than of evidence. It is ordinarily necessary to look no further than the count itself. Miss Levitt concluded that it was plain that count 2 was defective for duplicity on its face in the use of the phrases "on divers days" and "made threat *s* to kill".

43 We accept the submission that count 2 of the indictment was technically duplicitous. Duplicity is normally apparent from the face of the indictment, and it was in this case. The indictment alleged repeated incidents of a single offence on "divers days" within a period that spanned nearly a year. The threats relied upon during this period were numerous texts and other messages, each of which would have been capable of being separately identified in the indictment.

44 That is not the end of the matter, however. The rule against duplicity deals with form. There are good reasons for the rule. If separate offences are rolled up into a single charge, there will often be a danger that the jury may convict in circumstances where the required majority is sure that the defendant committed the offence charged, but not sure that he committed it on the same occasion. Equally, if a count is duplicitous, the trial judge may be left in the position when he comes to sentence of being unsure of the basis upon which the jury convicted.

45 Objection to the fact that a count is duplicitous should be taken before the arraignment. If it is not and, as in this case, the trial proceeds to a ***1000*** verdict, the question then arises as to whether the fact that a count was duplicitous must automatically lead to the quashing of the conviction. Up to 6 February 2008 Miss Levitt would have had some difficulty in submitting that it should. It was determined nearly 100 years ago in R v Thompson [1914] 2 KB 99 , by this court, that the fact that a count is duplicitous will not automatically lead to the quashing of the conviction. In that case the appellant had been charged with incest. The appellant was charged with having committed the offences "on divers days between the month of January 1909 and 4 October 1910". A second count charged him with having committed offences "on divers days between 4 October 1910 and the end of February 1913". In giving the judgment of the Court of Criminal Appeal (sitting five strong), Lord Isaacs CJ observed, at p 103:

"At the hearing before this court it was not, and indeed it could not be, disputed that the appellant had not thereby suffered any embarrassment or prejudice at the trial, inasmuch as in the depositions and during the trial offences were proved on specific dates of which the appellant had had ample notice, and for which the defence was fully prepared."

At p 104, Lord Isaacs CJ stated:

"We dismissed this appeal on the ground that, even assuming that the objection raised after plea to the defect in the form of indictment was not taken too late and that the appellant could have moved in arrest of judgment, no substantial miscarriage of justice had occurred, and that we were, therefore, bound to give effect to the proviso in section 4(1) of the Criminal Appeal Act 1907 , which is as follows: 'Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.' If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form we should have felt bound to quash the conviction whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection."

46 That duplicity is a matter of form not substance was confirmed by Lawton LJ when giving the judgment of this court in R v Greenfield [1973] 1 WLR 1151 , 1156. Miss Levitt has however submitted that R v Thompson [1914] 2 KB 99 is no longer good law by reason of the decision in R v Clarke [2008] 1 WLR 338 . The issue in that case was as to the effect of a trial that had taken place in circumstances where the indictment had never been signed. Their Lordships held that in those circumstances the indictment was a nullity and the trial consequently of no effect.

This finding was founded upon the conclusion of their Lordships as to the intention of Parliament. In his speech Lord Bingham of Cornhill said, at paras 18–19:

"18. What did Parliament intend the consequence to be, when it enactedsections 1 and 2 of the [Administration of Justice (Miscellaneous Provisions) Act 1933], if a bill of indictment was preferred but not signed by the proper officer? That, as I think both parties agree, is the question***1001*** to be answered in this case. Although section 1 has been repealed and section 2 has been amended, it is not suggested that the answer to the question has changed. The 'always speaking' principle has no application. The answer to the question now is the same as should have been given then. It is inescapable: Parliament intended that the bill should not become an indictment unless and until it was duly signed by the proper officer.

"19. It is necessary to ask a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable: Parliament intended that there could be no valid trial on indictment if there were no indictment. Parliament has never enacted, with reference to proceedings on indictment, a provision comparable withsection 123 of the Magistrates' Courts Act 1980 , but even that section has received a restricted interpretation: see New Southgate Metals Ltd v Islington London Borough Council [1996] Crim LR 334 –335."

47 We do not accept that the effect of the reasoning of their Lordships in R v Clarke is to render a nullity a count in an indictment which is duplicitous. Miss Levitt wisely did not suggest that failure to comply with the requirements in relation to avoiding duplicity would have invalidated the entire indictment. She submitted that, if a single count did not satisfy the requirements of the statute and the rules, no subsequent trial in relation to that count could have any validity. It has always, as we understand it, been accepted that a count which does not comply with the rules can be amended in the course of a trial. That of itself, so it seems to us, demonstrates that such a count is not devoid of effect. We do not consider that R v Clarke has overruled the clear decision in R v Thompson [1914] 2 KB 99 which is entirely in point on the facts of this case.

48 In consequence it is necessary to look at the facts of the case to see whether the form of the indictment resulted in the risk of injustice to the appellant. The first point to note is that no objection was made to the form of the indictment by counsel for the defence. It would thus not appear that counsel was embarrassed in the conduct of the appellant's defence by the form of the indictment. In the circumstances we can understand why this was so. Most of the threats in question were made in a lengthy series of text or other messages using similar phraseology. There was no basis upon which the jury could possibly have distinguished one message from another. The issue before the jury was simply whether the appellant had been responsible for the series of messages.

49 The simplicity of the issue is demonstrated by the very short summary of the prosecution and defence cases given by the judge at an early stage of his summing up. He said:

"'Threats to kill … intending', if you look at it, 'Deborah Pemberton would fear that the said threats would be carried out'. Again, you may think that whoever made these threats must have

had that intent; there were so many, they were so violent. Again, the question is: who? The prosecution said: Maria Marchese. Look at the phone calls. Look, in particular, at the last day, the day of the wedding, coming out of that***1002*** phone box where calls were made from. The defence say: she admitted she was there. She need not have admitted being in Bournemouth. They did not know she had been there. And she accepted one call only, to somebody else, but not to anybody else. The defence concentrate to a degree on that, and [say that] you cannot be sure about it, you cannot be sure she made those phone calls on that day, or indeed on any other day. The prosecution say that you look at all the circumstances, and it drives you to only one person."

50 The evidence linking the appellant to the phone calls made on the day of the wedding was overwhelming. She was caught red-handed emerging from the telephone box from which a series of calls had just been made. She denied having made them. The earlier threats formed an obvious course of conduct. The issue was whether the appellant had been responsible for that course of conduct. The form of the indictment was not calculated to cause any injustice; nor did it. The appeal on the basis of ground 1 is dismissed.

51 We turn to the renewed application for leave to appeal on the three grounds on which leave was refused. In ground 2 it is submitted that the "gas" and "burglary" incidents should not have been admitted in evidence. Alternatively (ground 3), if it was proper to admit them, the trial judge did not deal with them adequately in his directions to the jury.

52 We consider that it would have been preferable for the two incidents to have been particularised on the indictment as incidents of harassment. However, failure so to do was again one of form. The gas incident could properly have been included as a particular of harassment, but the direct evidence that identified the appellant as responsible was tenuous. Elizabeth Mills, the lock-keeper, gave evidence of a woman who tried to enter the secure area and who said that she had an appointment with Dr Falkowski. She described the woman as having orange hair, which did not fit the appellant's description. She failed to pick out the appellant on the identity parade, but picked out somebody else.

53 The burglary incident fell outside the period covered by the indictment. Its relevance, and thus its admissibility, was questionable. If it was relevant, this can only have been on the basis that there were grounds for suspecting that the appellant was responsible for it and that it was all part of a picture of harassment. However, there was nothing directly to identify the appellant as responsible for the incident. Miss Levitt even submitted that there might have been no incident, but merely an imagined burglary, having regard to the apprehension that Miss Pemberton was under at the time.

54 The basis for concluding that the appellant was responsible for both incidents was essentially the remaining course of her conduct, in particular the evidence that she was responsible for the many texts and other messages, and the evidence that supported the case against her on count 4. Close to the time of the boat incident there was reference in the text messages both to the boat that was specifically named and to the Limehouse mooring. Thus the two incidents did not reinforce the prosecution case that it was the appellant who was responsible for the lengthy and persistent course of harassment and threats. Rather it was the course of harassment and

the ***1003*** evidence relating to the communications that strongly implied that it was the appellant who was responsible for the two incidents.

55 Mr Fenhalls on behalf of the Crown told us that he asked counsel for the appellant whether there was any part of the evidence which the prosecution proposed to lead to which objection was taken. He was told that there was not. In fact counsel for the appellant was able to make use of the two incidents by arguing that the evidence did not demonstrate that the appellant was responsible for them and thus that the prosecution's case was open to question. It seems to us likely that the decision not to object to the two incidents was taken deliberately and for what appeared to the defence to be good reason. In all these circumstances their admission cannot now properly found a ground of appeal.

56 As to the direction to the jury, Miss Levitt submitted that the judge should have directed the jury that they should disregard the incidents unless they were sure that the appellant was responsible for them. We do not agree. In so far as they are relevant, these incidents were part of a large number of independent incidents of harassment. It is not the right approach to single out individual incidents and to direct the jury that, unless they are sure when they consider each incident in isolation that the appellant was responsible for it, they should disregard any implication of that incident when considering the others.

57 The judge summed up the facts of this case with commendable brevity. He simply reminded the jury of the story that they had heard. In our judgment his summing up was adequate. There was no danger that the jury would have used the evidence of the two incidents improperly or in a way which was unfairly prejudicial to the appellant. For these reasons we do not grant leave to appeal in relation to ground 2.

58 We turn to ground 4 which relates to count 3. It is said that there was no case to answer on count 3. Miss Levitt submitted that there was no evidence that supported the aggravated form of harassment charged in relation to Dr Falkowski, involving as this did the need to prove that the appellant had the specific intention to cause him fear of personal violence. Furthermore, she submitted that the judge failed to direct the jury as to the need for this element of the offence to be proved. She submitted that the messages to Dr Falkowski were “affectionate”.

59 No suggestion was made at the trial that the text messages sent to Dr Falkowski were not intended to put him in fear of violence. His evidence was that he was rendered distraught by the fear engendered by the campaign of harassment. The single judge took the view that the messages were not affectionate but were threatening. We have with the assistance of counsel considered the schedule of messages that was placed before the jury. They were certainly not affectionate, although some of the comments made to Dr Falkowski (if taken in isolation) might so appear. Messages sent to him included the following:

“06.07.2003, 13.48, please don't marry fdt [initials for a derogatory description of the doctor's fiancee] u can do better look at U ur life is in danger give Pembertos up now before we enter marina yacht will do well to bullet u down.

“16.08.2003, 10.26, R45 been tamper get them out of water before explode.

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“16.08.2003, 10.29, Jan can't go out on race take R47 out of Harmsworth Trophy.

“29.08.2003, 13.44, TRAGEDY AT SALTERNS! In am genuine invited guest at the wee not to be. How are u going to avoid me. We could have met, how many opportunities we lost. Now it will all end in tragedy.

“01.09.2003, 19.42, … 1 last chance, let dt go or ur going too … I make sure it will not be a wedding on 6.9.3.

“03.09.2003, 18.31, U had ur last chanc, its all in SASman's hand.

“05.09.2003, 17.16, cancel wedding. Guman work at Salterns, gun in ready for big feast.

“05.09.2003, 18.55, HOPE U SPOKE TO DREW, CANCEL IT OR IM READY.

“05.09.2003, 21.01, Gunman work at Salterns, gun inside hotel what else can I ask for.”

Those messages demonstrate quite clearly that the threats that were being made were calculated to give rise to fear of personal violence to Dr Falkowski.

60 The judge's direction to the jury on count 3 was as follows:

“harassment of Jan Falkowski. Again, same dates: ‘within the same jurisdiction of the Central Criminal Court, you caused Jan Falkowski to fear that violence would be used against him by your course of conduct, which you knew, or ought to have known, would cause fear of violence to him … in that you sent malicious and threatening text messages, and made malicious and threatening phone calls that you would cause violence to Jan Falkowski.’ Again, ladies and gentlemen, these calls were made. It is entirely up to you. But do you regard them, are you sure they were malicious and threatening phone calls, and that they were made to him, and that he feared that violence would be used against him? He says he was. He was deeply upset. This is a strong man-a man who understands psychiatric problems; a man who is tough. But he was clearly deeply disturbed by what was happening. Again, there is no suggestion that it was not done. The question is: who did it?”

That was really the only question that was before the jury at the trial. The terms in which the judge directed them in relation to that count, setting out clearly all the elements of the offence, were in our judgment adequate for the task. For these reasons we refuse leave to appeal on ground 4. Accordingly, the appeal against conviction is dismissed.

Permission to appeal on grounds 2 to 4 refused .

Appeal dismissed .

J B S ***1005***

1. Offences against the Person Act 1861, s 16 , as substituted: see post, para 41.

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