# R v John Austen CHIVERS [2011] EWCA 1212

The victim, Paul Jones, was stabbed to death by Chivers. There were two stab wounds to his chest, each of which penetrated his heart.

The picture presented by the prosecution evidence was that both men were up for a fight. They were neither of them strangers to violence. Both had several convictions for offences of violence, both had been drinking and post mortem analysis showed that the deceased had a high level of cocaine in his blood. In the fight the deceased was knocked or forced to the ground. The two men separated and the deceased went towards the boot of his car to find a tool. Immediately after the fatal stabbing, witnesses who went to the aid of the deceased as he was lying on the ground said that he had a monkey wrench tucked inside the waist of his trousers. Seeing the deceased go to the boot of his car, Chivers disappeared into his house, shortly to emerge bare chested and carrying a large kitchen knife. From that moment on the prosecution evidence was to the effect that Chivers was the aggressor.

When he came out of the house with the knife his intention was purely deterrent; he wanted the deceased to leave. He held the knife in front of him and told the deceased to go, but the deceased was having none of it.

In addition to leaving to the jury the defences of self-defence and accident which Chivers advanced, the judge, after consulting counsel, also left to the jury the possibility of convicting Chivers of manslaughter by reason of provocation, which Chivers's counsel did not ask the jury to consider and indeed was contrary to Chivers's case. The judge gave the jury written directions on the principal matters of law, including provocation, which he had circulated to counsel in advance and which counsel agreed were appropriate.

Three grounds of appeal are advanced by Miss Elliott, who did not appear for Chivers at trial. **The first ground is that the judge failed to direct the jury properly on provocation**.

**The second ground of appeal concerns the form of direction given by the judge regarding Chivers's previous convictions for offences of dishonesty**. At the close of the prosecution case the judge gave permission for the prosecution to put in evidence the previous convictions of Chivers, both for violence and for dishonesty. In relation to the dishonesty convictions, he did so because of the way in which the defendant had attacked certain prosecution witnesses, which went beyond disputing the accuracy of their evidence and included accusations of lying to the court.

Chivers originally sought leave to appeal against the judge's decision to admit evidence of the dishonesty convictions but that was refused by the single judge and the application has, sensibly, not been renewed.

The criticism is not that the judge was wrong to admit the evidence but that he was wrong in his direction about it.

The way in which the evidence was introduced following the judge's ruling was that the jury were provided with written admissions, one of which was as follows:

"The defendant has the following relevant convictions for offences of dishonesty ..."

There followed a list of eight convictions over a 20-year period between 1998 and 2008, the latest of them being in May 2008. The convictions were for aggravated vehicle taking, shoplifting, obtaining property by deception, taking a motor vehicle without consent, theft, handling stolen goods, obtaining by deception, and theft. The prosecution relied not on the seriousness of those offences, because they were not particularly serious as offences of dishonesty go, but on their number.

The judge began his directions about character by dealing in some detail with the evidence about convictions for violence of both Chivers and the deceased. He repeatedly emphasised that they were part of the overall material and that the jury should not exaggerate their importance.

**The final ground of appeal relates to the judge's direction about the inference which they might draw under section 34 of the Criminal Justice and Public Order Act 1994**. Although the terms of the section are very well known, we set them out because of the particular argument in the present case. The section provides:

"1) Where, in any proceedings against a person for an offence, evidence is given that the accused (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings ... being a fact which, in the circumstances existing at the time, the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, section (2) below applies.

(2) Where this subsection applies ... (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper."

Chivers was interviewed on six occasions. In the first four interviews he answered questions put to him. He declined to answer any further questions in the fifth and sixth interviews. The prosecution identified a number of matters on which Chivers relied in his defence and which he had not mentioned in his first four interviews, or obviously in the fifth or sixth interviews. The judge considered three of these to be of sufficient potential significance to merit being put to the jury as matters capable of giving rise to an adverse inference.

The most significant of them was Chivers's claim that the second stab wound was accidental and happened when he had stumbled. This had not been mentioned by him in any of his interviews.

The judge then proceeded to identify the three matters not mentioned in those interviews and which the jury might regard as significant omissions of matters which he was later to rely in his evidence. The judge then moved on to the fifth and sixth interviews,

Now let me draw this together. The failure to mention facts or the remaining silent is but one part of the case. You cannot and should not convict the defendant of any offence simply on the basis of these failures, but if you conclude that they are failures in the way that I have described, you can use them to support the prosecution case."

There is, in our judgment, a defect in that passage. Whereas in relation to interviews 1 to 4 the judge identified the matters relied on by Chivers in his evidence which he had not mentioned in his interviews, when it came to interview 5 he said only:

"There is a big difference between what some of the of the eye witnesses say and what the defendant has to say".

He did not identify those matters or, more particularly, what matters were being relied on by Chivers in his evidence which he might reasonably have been expected to mention in interview. The feature of reliance is important.

Actually, the judge would not have been able to do so, for this reason. The evidence before the jury about interview 5 was a written summary. The interviewing officer began by recording that the police had given disclosure of statements made by some of the witnesses in the street and he continued:

"Before I go into what the witnesses have said, following your consultation with [your solicitor] is there anything further you would like to say about this incident?"

Chivers replied: "Well I, truthfully, I've -- I've -- I feel like I -- I've given you -- give enough explanation of what I'm going to say. It's four tapes it has gone on for now. I have been instructed not to say anything else."

The officer said that it was nevertheless for Chivers to decide whether he wished to answer the questions which he was now going to be given an opportunity of answering. The summary continued and concluded as follows:

"**The officer then read to the defendant the accounts of various witnesses** (who are not named). The defendant exercises his right to remain silent and replies 'no comment' to all questions."

Quite properly, the jury did not have the witness statements. Nor were they given details of any specific question which was put to Chivers. So they had no means of knowing whether something on which he relied in his evidence was a matter which he could reasonably have said in answer to some question put to him, when they had no knowledge of the form of questions which were put.

Mr Chambers QC, for the prosecution, submits that the jury was entitled to infer that what must have been read out in the interview and formed the subject of the questions was what various eye witnesses in fact went on to say in their evidence. ***That is an incorrect approach***. As we have mentioned, quite properly the jury were not supplied with the prosecution witnesses' statements to the police, and ***it would have been wrong for prosecuting counsel to have said to the jury, "Members of the jury, I would like you to know that all my witnesses have come up to proof"***. If it would be wrong for him to say that overtly, it would be equally wrong to invite the jury to infer that this must have been the case, to guess what questions based on that evidence had been put to Chivers, and to conclude that matters on which he now relied in his evidence were matters which he ought to have mentioned in answer to some particular question previously put.

In his argument, Mr Chambers identified three particular matters which he said Chivers should have mentioned in the 'no comment' interviews and only came out with at the trial. Two of these were concessions that evidence given by certain prosecution witnesses was correct. The argument ran that it could be inferred that Chivers was guilty because he had declined to take an earlier opportunity of conceding that facts asserted by the prosecution were correct. There is a serious error in this approach. As a general proposition, a jury cannot draw an inference of guilt from Chivers saying something in evidence which is accepted on all sides as being true, merely because he had not said it on a previous occasion. That would be tantamount to treating mere silence as evidence of guilt, which is not the law. Section 34 is aimed at somebody who produces a positive explanation relied on in evidence when, if truthful, he might have been expected to have mentioned it on a previous occasion. If it is accepted as being truthful, the premise for suspecting that it is a late false attempt to deceive the jury disappears.

In the circumstances of the present case, we consider that Chivers's solicitors' advice to offer no comment in the fifth interview was well understandable. Chivers had been interviewed at length on 5 August about what happened on the occasion of the killing, and he had been questioned and had answered questions on the following day about his relationship with Dominique, Painting and others. Transcripts of those interviews ran to 120-pages. As the judge said in his summing up, the account given by Chivers accorded with the substance of his evidence, apart from his failure to mention the three matters about which the judge gave a tailored direction.

In the fifth interview it appeared that the police were proposing not simply to ask him questions about some particular point of importance on which they had fresh information that could be summarised, or on which Chivers's previous answers had been unclear or contradictory. ***Rather it appears that they were proposing to question him line by line on the statements of various witnesses***. We have not seen a full transcript of the interview but we were told that it ran to a large number of pages. From the prosecution's submissions today, it wanted to ask Chivers about could have been put quite shortly. It was that the police now had a body of evidence that Chivers had advanced towards the deceased, who had retreated hands in the air. However, what transpired was not that they put some question simply designed to elicit his answer to that point. ***What they embarked on was something much more in the nature of pre-trial cross-examination, albeit that Mr Chambers demurs at the use of the word "cross-examination".***

Chivers's solicitor's view that his client had said enough to explain his case was a fair view and we do not consider that it would have been fair to draw an adverse inference from Chivers declining to be questioned at that stage on every sentence in every witness statement. We reiterate that we are not here dealing with a case in which Chivers had prevaricated in explaining his case in previous interviews or where the purpose of the further questions was simply to fill some particular gap or to clarify some uncertainty arising from his evidence, or to obtain his comment on some new point which was of such importance that he should have an opportunity to comment on it.

However, we do not consider that the wrong direction about the no comment interviews in an otherwise impeccable summing up makes the conviction unsafe. The jury were entitled to draw adverse inferences from Chivers's failure to advance matters on which he later relied in evidence when he had the opportunity to do so, subject to provisos which the judge mentioned.

Accordingly, this is not a case in which no section 34 direction should have been given. A section 34 direction was appropriate. The defect was in adding the passage mentioned about the no comment interviews.

Miss Elliott submitted that this significantly changed the case against Chivers to his detriment. We are not so persuaded. The case against Chivers was powerful. We do not believe that there is any real possibility that the verdict could have been different if the jury had been told that, whilst they might draw adverse inferences from his failure in the first four interviews to say, for example, anything about the fact that the second stabbing was accidental, they should attach no significance to the fifth and sixth interviews.

The appeal was dismissed.