Taking the wrong track? *Arthur* and good character directions?

R (on the application of Arthur) v Blackfriars Crown Court [2018] 2 Cr App R 4 (DC)

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I. INTRODUCTION

The Divisional Court's judgment in *R (on the application of Arthur) v Blackfriars Crown Court* (hereafter '*Arthur*') is of significance in relation to questions of both criminal procedure and the law of evidence. First, it raised the issue of the proper procedure to be followed for the judicial review of a refusal to state a case for the Crown Court. Second, it is notable as one of the very few reported cases following the Court of Appeal's landmark judgment on good character evidence in *Hunter*,[1] and as an example of the contentious case where adverse inferences are drawn from a defendant's silence in police interview (pursuant to s.34 of the Criminal Justice and Public Order Act 1994) despite the submission of a prepared written statement.

II. THE FACTS IN *'ARTHUR'*

The facts can be stated briefly. The case concerned a persistent neighbour dispute between the claimant, Mr Arthur (A) and a Mr Williamson (W), which stemmed from the use of the shared balcony outside their respective flats. A was convicted at Highbury Corner Magistrates' Court of an offence of common assault on W. On the day in question, A had taken some photos of a ladder outside W's front door, which he believed encroached onto his window. An altercation followed when W challenged A about this conduct, which resulted in W sustaining a bloody nose after A punched him. W was restrained by his wife, but the report is then unclear exactly of what makeshift weapon W was in possession - a walking stick or metal pole, or even, perhaps, a standard lamp, as the report refers to a 'standing lamp'. A was subsequently arrested and in his police interview exercised his right to silence but submitted a written statement, prepared with his solicitor, in which he denied assaulting W. A appealed unsuccessfully to the Crown Court and applied to the Divisional Court for judicial review of the Recorder's decision to refuse to state a case in respect of four questions.

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[1] *Hunter* [2015] EWCA Crim 631.

III. THE LEGAL ISSUES

a) Refusal to state a case

The first issue related to the procedure where a claimant applies to review judicially a court's refusal to state a case. The claimant received a document, signed by the Recorder 'On behalf of the Crown Court' and entitled 'Official Decision', which provided the Recorder's answers to four questions and amounted to a refusal to state a case. The claimant, relying on r.35.2(5) of the Criminal Procedure Rules, argued that this document had no status and that only the judgment transcript from the time of conviction should be considered by the Divisional Court. As the Director of Public Prosecutions, an interested party, was able to argue the matter on the basis of the judgment and without recourse to the Recorder's more detailed reasoning, the issue did not arise for argument. Nevertheless, the Divisional Court addressed the matter when it considered the substantive issues in the appeal.

The Court found it was settled law that a Crown Court sitting in an appellate capacity must provide reasons for its decision[2] and that permission for judicial review of a court's refusal to state a case should normally be granted on the basis of a reasoned judgment.[3] As the justices in the magistrates' court are permitted to expand on or 'amplify' their reasons,[4] the Divisional Court inferred that the same would apply to the Crown Court sitting in its appellate capacity. Goss J, who gave the lead judgment, suggested that it would be helpful if the Criminal Procedure Rule Committee might formulate further guidance on the procedure, but it may be a moot point whether the position should be different where it is the Crown Court and not a magistrates' court that has declined to state a case. Arguably, one might expect the Crown Court judgment to have been fully reasoned in the first place and further amplification of it may raise a suspicion of the *ex post facto* rationalisation deprecated by the Divisional Court in both *Marshall v CPS*[5] and *R v Snaresbrook Crown Court*.[6]

The claimant's substantive appeal was on four grounds. One related to the Court's omission to consider inconsistencies between the accounts of W and his wife. The Divisional Court held that the Court's reasoning was sufficient and that it was unnecessary to address expressly each point made by the claimant. Two further grounds related to the claimant exercising his right to silence at the police station.

b) The right to silence provisions

The claimant's argument that he had been convicted wholly or mainly on the basis of his silence was dismissed as contrary to the facts, given that the court had the benefit of seeing and hearing witnesses. However, it was further argued that no adverse inference, pursuant to s.34 of the Criminal Justice and Public Order Act 1994,[7] should have been drawn from his

[2] *R v Harrow Crown Court, ex p Dave* [1994] 1 WLR 98.
[3] *R v Blackfriars Crown Court, ex p Sunworld Ltd* [2000] 1 WLR 2102.
[4] *Marshall v CPS* [2015] EWHC 2333.
[5] *Ibid.*
[6] Unreported, 4 March 1999.
[7] Section 34 (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; or (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact; or (c) at any time after being charged with the offence, on being questioned under section 22 of the Counter Terrorism Act 2008 (post-charge questioning), failed to mention any such fact, 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, subsection (2) below applies. (2) Where this subsection applies— (b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998; (c) the court, in determining whether there is a case to answer;

omission to mention when interviewed that W tried to attack him with a 'standing' lamp. It was contended that it could not be argued that the lamp should have been raised by A in his police interview because there was no evidence before the Court, as the Crown had failed to adduce evidence of the questions that were asked in interview. However, the Divisional Court held this not to be material and focused on the fact that the defendant had maintained his silence except for submitting a prepared written statement, which made no reference to the lamp. This is the well-known strategy of handing in a written statement prepared by a solicitor and accused in order to meet the s.34 provision. The broad effect of s.34 is that a jury may draw adverse inferences if the accused relies on a fact at trial, which he could reasonably have been expected to mention in his interview or on charge. However, it is clear that adverse inferences may only be drawn from the failure to mention a fact and not simply from the failure to answer questions. Therefore, a fact mentioned in a prepared statement will amount to 'mentioning a fact' for the purpose of avoiding an adverse inference at trial.[8]

On the one hand, the advantage for an accused of submitting a prepared statement in interview, for example, where the facts are complex and have not been fully disclosed by the police, is that he or she will not have to respond further to police questioning and the accompanied risk of self-incrimination. However, on the other hand, the danger of such a strategy is that adverse inferences are drawn at trial because when giving evidence the accused elaborates much more on matters from his or her interview[9] or, as in *Arthur*, makes a significant omission from the prepared statement.[10] Whether the additional facts given by the accused in evidence at trial are simply putting 'flesh on the bones'[11] of a prepared statement, rather than 'embellishing' it, as was found in *Arthur*,[12] may be finely balanced. As the Divisional Court observed, that is the risk to which the accused exposes himself or herself if he or she relies on a prepared statement,[13] but it is submitted that where it is a missing detail, such as the identity of an item used in an assault, as in *Arthur*, such inferences are not properly drawn. However, the ground of appeal in *Arthur* that is of most significance is that the court did not direct itself on or pay regard to the credibility aspect of the claimant's good character.

c) Good character directions

The Recorder in *Arthur* directed the Court that the defendant's good character "made it less likely that he would act in the way that has now been alleged against him".[14] That is, the defendant's good character could be taken into account because it affected his propensity to offend. However, his direction omitted to mention that good character was also relevant to the defendant's credibility as a witness.

The form of a good character direction has been settled law for many years.[15] The Court of Appeal in *Vye*[16] laid down a basic structure for a mandatory good character direction that

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and (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.

[8] *Knight* [2004] 1 Cr App R 9 [10].

[9] Eg *James* [2018] EWCA Crim 285.

[10] *Turner* [2004] 1 All ER 1025; *Parradine* [2011] EWCA Crim 656.

[11] *McGarry* [1999] 1 WLR 1500.

[12] *R (on the application of Arthur) v Blackfriars Crown Court* [2018] 2 Cr App R 4 [21].

[13] *Ibid.*

[14] *Ibid* [13].

[15] For a full account of the law on good character, see Richard Glover, *Murphy on Evidence* (15th edn, Oxford University Press 2017) ch 14.

[16] [1993] 1 WLR 471.

consisted of the two 'limbs' of propensity and credibility. This was confirmed by the House of Lords in *Aziz*[17] and remains the law.[18] Prior to these judgments, the obligation to direct the court on an accused's good character was unclear. At one time directions on good character appear to have been at the complete discretion of the trial judge. In *Aberg*[19] it was argued that following *Bliss Hill*[20] the omission of a good character direction was a misdirection and good grounds for appeal. However, Lord Goddard CJ held that so long as the summing-up was otherwise fair, an omission to direct on good character was no reason to quash a conviction.[21] His Lordship distinguished *Bliss Hill* on the basis that it was concerned with a faulty good character direction rather than no direction, and held that defendants had no *prima facie* entitlement to a good character direction at common law, although one could be provided at the judge's discretion.

Arguably, the more recent case of *Hunter*[22] has returned the law to a positon where good character directions are again a matter for the trial judge's discretion rather than law. However, before we consider this, we should first address briefly what is meant by 'good character' in a criminal trial. Its meaning, perhaps surprisingly for a term that is often central to criminal trials, is somewhat contentious. In *Rowton*[23] a thirteen-strong Court of Crown Cases Reserved held that character witnesses were permitted to testify as to the accused's "general reputation in the neighbourhood in which he lives" in order to show "the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged".[24] Importantly, evidence of specific good acts and individuals' opinions were held to be inadmissible, although the absence of previous convictions or other indications of bad character were admissible. It is commonly stated that the rule is "more honoured in the breach than in the observance"[25] and in *Hunter* the Court of Appeal inferred that *Rowton* could be departed from, but it is evident that it remains good law in England and Wales[26] and other jurisdictions.[27]

The Court of Appeal in *Hunter* asserted that the circumstances in which good character directions were given had 'been extended too far' to include unmeritorious defendants,[28] but acknowledged that it was, nevertheless, bound by the House of Lords decision in *Aziz*.[29] However, with respect, the Court appeared to misinterpret the judgment in *Aziz*, in which Lord Steyn outlined a mandatory rule that "prima facie the directions must be given" where a person is of good character.[30] In *Aziz*, 'good character' was broadly understood to mean that the defendant's 'general reputation' was good, encompassing no previous convictions (or none that were relevant) and no other relevant 'bad character'. In contrast, the Court of Appeal adopted a much narrower definition of 'good character', so that an accused

[17] [1996] AC 41 (HL).
[18] *Hunter* (n 1) [78].
[19] [1948] 2 KB 173.
[20] *Broadhurst; Bliss Hill* (1918) 13 Cr App R 125. This case was concerned with a firm of solicitors located at 19 Queen Square, Wolverhampton.
[21] *Smith* [1971] *Crim LR* 531.
[22] *Hunter* (n 1).
[23] (1865) Le & Ca 520.
[24] *Ibid* 529-530.
[25] D Ormerod & D Perry (eds) *Blackstone's Criminal Practice 2019* (Oxford University Press 2018) para F14.30.
[26] *Butterwasser* [1948] 1 KB 4; *Redgrave* (1982) 74 Cr App R 10 and *Gunewardene* [1951] 2 KB 600.
[27] Eg Northern Ireland: *Grimes* [2017] NICA 19; Australia: *Attwood v R* (1960) 102 CLR 353; Canada: *McMillan* [1977] 2 SCR 824; *Dees* [1978] 40 CCC (2d) 58; in Ireland, *The People (at the suit of the DPP)*, *Prosecutor v Ferris* [2008] IR 1, and in Hong Kong, *HKSAR v Poon Ching Ki* [2009] 3 HKC 149.
[28] *Hunter* (n 1) [20] and [70].
[29] *Aziz* (n 17).
[30] *Aziz* (n 17) 53E.

with any previous convictions, however minor or old, could not be regarded as being of good character. Thus, Hallett LJ stated such a defendant is not of good character 'in the proper sense'.[31]

After *Hunter*, it may be that a judge will direct that the defendant can be treated as being of 'effective good character', provided any bad character is 'old, minor and irrelevant'. However, as Hallett LJ insisted these words must be read conjunctively,[32] the circumstances in which an accused will qualify as being of either 'absolute' or 'effective' good character appear to be very limited. Further, as the matter is entirely at the judge's discretion, the Court of Appeal emphasised that it would be 'very slow' to interfere with the exercise of that discretion.[33] The shift from a mandatory to what is now, in essence, a discretionary rule has had the effect of far fewer appeals being brought on the grounds of a judge's omission to provide good character directions.

This is borne out by the way the Divisional Court dealt with the appeal in *Arthur*. The Recorder's omission to direct clearly on the credibility limb of good character was dismissed as unimportant because, although not mentioned expressly, it was considered the Court would have had it in mind. The Divisional Court was able to pray in aid the Court of Appeal's assertion that, unlike in the past, a misdirection on good character "will not usually be fatal"[34] to the safety of a conviction. However, this overlooks an important fair trial reason for the provision of clear and complete directions on good character.

The European Court of Human Rights has held that art. 6(1) of the European Convention obliges courts to give reasons for their judgments in both civil and criminal proceedings as a safeguard against arbitrariness.[35] However, as juries do not provide reasons for their verdicts, the Grand Chamber has held that it, nevertheless, remains important that both the defendant and the public should be able to understand the reasons for a conviction. In lieu of a reasoned verdict the Grand Chamber indicated in *Taxquet v Belgium* that appropriate safeguards would be:

> …directions or guidance by the presiding judge to the jurors on the legal issues arising or the evidence adduced… forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.[36]

Following *Taxquet* it has been argued that for jury trials to remain fair and for verdicts to maintain their legitimacy, judicial directions must be 'relatively full'.[37] Accordingly, where relevant, it is necessary that good character directions should be included in a properly structured summing up'[38] as part of this overall 'framework of fairness.'[39]

As we have seen, the Crown Court sitting in its appellate capacity is already obliged under common law to provide reasons for its judgment. However, it is submitted that it is also important that it should direct itself properly on good character, so that it is clear to both the defendant and the public that both limbs of the direction –propensity and credibility - have

[31] *Hunter* (n 1) [70].
[32] *Morgans* [2015] EWCA Crim 1997 [14].
[33] *Hunter* (n 1) [89]-[98]. See also *Martin* [2016] EWCA Crim 474.
[34] *Hunter* (n 1) [89].
[35] *Taxquet v Belgium* (2012) 54 EHRR 24 [90]; *Ruiz Torija v Spain* [1994] 18390/91 [29]; Lester, Pannick & Herberg *Human Rights Law & Practice* (3rd edn, LexisNexis 2009) [4.6.39].
[36] *Taxquet v Belgium* (n 35) [92]; *Lhermitte v Belgium* [2016] 34238/09 [68] (Grand Chamber).
[37] P. Duff, 'The compatibility of jury verdicts with article 6: *Taxquet v Belgium* [2011] 15(2) *Edin LR* 246, 250.
[38] Lord Judge, *The Safest Shield* (Hart 2015) 209.
[39] *Taxquet v Belgium* (n 35); see also *Judge v United Kingdom* (2011) 52 EHRR SE17; *Lawless* [2011] EWCA Crim 59 [28].

been addressed in its deliberations. It is regrettable that the court in *Arthur* omitted to do so and, moreover, it is contended that this was inconsistent with the mandatory nature of the good character direction provided for by the House of Lords in *Aziz*.

IV. CONCLUSION

In view of the absence of appeals on good character evidence since *Hunter*, the result of the appeal in *Arthur* was not unexpected. However, it does serve to underline that the consequences of *Hunter* are that good character directions will be given less often and omissions to direct a jury (or the court) will not usually be fatal to the safety of the conviction. Nor was it surprising that the court found little problem with the Crown Court's treatment of the s.34 issues. However, there was a clear contrast between the Divisional Court's relaxed treatment of the Recorder's omission to direct properly on good character and his more exacting approach to the accused's failure to mention some detail in his defence at the police station that he later relied on at trial. It is submitted that the reverse should apply. That is, there should be a return to the mandatory good character direction, required by the House of Lords in *Aziz*.

In addition, further leeway should be given to accused, such as Arthur, who elaborate at trial on their account at the police station in a way that may be properly characterised as putting 'flesh on the bones' of their defence rather than merely 'embellishing' it. The line between the two may often be a fine one to draw, but it is contended that the accused should normally be given the benefit of any doubt.