Neutral Citation Number: [2019] EWCA Crim 1002

Case Nos: 2018 04425/4476/4479/4463 C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT OXFORD
HH Judge Pringle QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13.6.2019

Before:

LORD JUSTICE SIMON
MR JUSTICE JAY
and
HH JUDGE PICTON
(sitting as a judge of the Court of Appeal)

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Between:

Regina	**Respondent**
and	
Connor Woodward **Carlos Spencer** **Otman Lamzini** **Rashaun Stoute**	**Appellants**

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Mr Michael Borrelli QC and **Ms Fiona Robertson** (instructed by Hallinan Blackburn Gittings & Nott LLP) for the appellants
Mr Stuart Trimmer QC and **Mr Michael Roques** for the prosecution

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Approved Judgment

Lord Justice Simon:

Introduction

1. This case raises some of the issues that may arise when the jury separates during the course of deliberating on their verdicts to allow jurors to take pre-booked holidays.

2. On 2 October 2018 in the Crown Court at Oxford (HHJ Pringle QC) the appellants were convicted of murder (count 1) and were subsequently sentenced to terms of life imprisonment.

3. One co-defendant, Yousef Koudoua, was acquitted of murder; and another co-defendant, Yasine Lamzini was convicted of manslaughter as an alternative to count 1. In addition to those charged with murder, two co-defendants, Alfie Sims and Saffon Fakir were convicted of conspiracy to pervert the course of justice (count 2); and two other co-defendants, Yamina and Allal Lamzini, were convicted of perverting the course of justice (count 3).

4. This appeal only concerns the four appellants: Conner Woodward, Carlos Spencer, Otman Lamzini and Rashaun Stoute, who appeal against their conviction with the limited leave of the single judge.

A summary of the case

5. During the evening of 1 June 2017, Christopher Lemonius was assaulted by a group of men, some armed with weapons, in an alleyway in the Blackbird Leys area of Oxford. As a result of this attack the victim suffered multiple injuries from which he died.

6. The prosecution case was that the four appellants were part of this group; that they had either actively participated in or encouraged the attack; and that Sims, Fakir, Yamina Lamzini and Allal Lamzini (who were Otman and Yasine Lamzini's parents) had played a part in hiding the truth of what had happened that evening from the police.

7. The prosecution suggested that a possible motive for the attack had been an earlier incident in which Yasine Lamzini was stabbed. It was suspected that Kofi John Welch, an associate of Christopher Lemonus who was with him on the night of the murder, may have committed the stabbing.

8. The two groups had been in Blackbird Leys Park shortly before 11 pm where they had engaged in a violent confrontation. The altercation spilled out into Cuddesdon Way, and Christopher Lemonius had become separated from his group. He had retreated into an alleyway that ran along the back of Jourdain Road. No.2 Jourdain Road was the home of the Lamzini family, and he had run into their garden and then into the back of their house. From there he had been dragged and attacked by a number of men.

9. The prosecution case was each of the appellants had played an active part in the fatal assault. Woodward had been armed with a pole, Spencer with a piece of wood and Stoute with a machete. Otman Lamzini had punched, kicked and stamped on Christopher Lemonius, and had not, as he alleged, been acting in self-defence.

10. The prosecution relied on a number of pieces of evidence. First, cell-site evidence in relation to the appellants' movements. Second, closed-circuit television (CCTV) footage and evidence from a police officer who identified the appellants and their movements in the relevant areas at the material times. Third, evidence from eyewitnesses in relation to the early part of the incident (the confrontation in and around Blackbird Leys Park). Fourth, evidence from eyewitnesses in relation to the attack on the deceased. Fifth, DNA evidence implicating each of the appellants in the fatal attack: a golf club discarded in Watlington Road which contained the deceased's blood and further pieces of a golf club found in the alleyway which also contained the deceased's blood; a hat found inside the Lamzinis' property which contained Stoute's DNA; a piece of wood found in the alleyway which contained the blood of both the deceased and Otman Lamzini; the top end of a golf club found in the alleyway which contained the DNA of both the deceased and Spencer; gloves found in the back garden of the Lamzinis' property which contained the blood of the deceased and DNA of the brothers Otman and/or Yasine Lamzini; fingerprints on the outside of the kitchen door of the Lamzinis' property which were a match for Woodward. Sixth, evidence that none of the clothing worn by the appellants that night nor any of their mobile telephones were recovered. The prosecution invited the inference that these items had been discarded as part of an active plan to pervert the course of justice. Seventh, the failure of Otman Lamzini to mention relevant facts in his police interview. Eighth, the inferences to be drawn from the failure of each of Woodward, Spencer and Stoute to give evidence in their defence at trial.

11. The key prosecution witness was Julie O'Dong. She gave evidence that on the night of the incident she was at home in her living room when she heard shouting. She locked the back door and went upstairs to her mother's room. From there she was able to see the alleyway and the back garden of the Lamzinis' property at 2 Jourdain Road. She could see about 6 people in the back garden and alleyway. She knew four of them: Otman and Yasine Lamzini, Connor Woodward and a man she knew as 'Carlos' (Spencer). Some of them wore hooded clothes and some were carrying metal poles, a golf club and a piece of wood. The group were shouting out and asking where Kofi was.

12. She heard a noise coming from the garden and briefly from inside the Lamzinis' property. Someone shouted, 'drag him out'. She saw the victim being dragged out into the garden, where he was beaten by the people she had named and the others.

13. She estimated that the entire confrontation lasted 20 to 30 minutes. She heard someone say, 'finish him, we're going to dead him outside.' She had initially thought that Spencer had said this, but it may have been Otman Lamzini. She also heard someone say, 'what are you gonna do now? You're not a big man anymore for stabbing Yazza.' She said that Otman Lamzini and Woodward were the most vocal during the incident.

14. Her evidence was that Woodward held a pole and used it continuously on the deceased's head and legs; and that Spencer was angry. The deceased was dragged into the alley; and someone shouted, 'we're going to dead him' and 'let's take him to the field and finish him off there.' Woodward and Otman Lamzini seemed to agree with this. She saw Otman Lamzini and Woodward stamp on the deceased and kick him. She did not see Otman Lamzini carrying a weapon; but she saw Spencer carrying a piece of wood and hitting the deceased. The hooded individuals appeared to be male.

One of them had a golf club which he used on the deceased. Another appeared to be interacting with Spencer, and at times trying to calm him down.

15. In cross examination, Julie O'Dong was challenged in relation to her identifications, apart from that of Otman Lamzini. He accepted that he had been there. The witness maintained that Spencer had not only been present during the attack but had actively participated in it. She accepted that the incident was totally unexpected and that she had not contacted the police until two days later, on 3 June. She had lived next door to Otman Lamzini for some time and she would recognise his voice as well as his physical appearance. She did not accept that he tried to intervene and stop the attack.

16. She described the clothing that the hooded men were wearing and confirmed that one had a golf club and another assaulted the deceased by punching him. She knew Woodward quite well. They were friends. She denied that she was seeking attention by giving her evidence. She had heard rumours about the incident; but maintained that her evidence was simply what she had witnessed on the evening in question.

17. The first and second items of prosecution evidence (cell-site analysis and CCTV recordings) was summarised in a detailed 79-page 'chronology' giving details of dates and times. Where the event related to a CCTV image there were details of the camera location, a description of the image and a copy of a small still image. In the case of cell-site analysis there were details of the call type, duration, the calling number and the number called, the area covered and a description of the call. Thus, for example, item 278, a call at 01.14 on 2 June 2017, lasting 2 minutes and 11 seconds from Spencer to Stoute, with broad indication of the cell coverage.

18. The defence of the appellants differed. Otman Lamzini accepted that he was present; but said that he was acting in defence of his brother, Yasine Lamzini. The others denied that they were present or had taken part in any assault.

19. Spencer did not give evidence but relied upon the account given in police interviews in which he answered questions and gave a detailed account of his movements. His case was that he was not in the immediate vicinity and had played no part in the attack on the deceased. He had held a piece of wood at some stage that evening but had discarded it.

20. Stoute did not give evidence in his defence. His case was that, despite the evidence in relation to his hat and the CCTV images which were said to show him close to the vicinity of the alley at the relevant time, he had not been identified as one of the males taking part in the attack on the deceased.

21. In his evidence to the jury, Otman Lamzini accepted that he had punched and kicked the deceased a few times but said that he had acted only to defend his brother. He gave evidence in relation to his personal circumstances and his relationship with each of the co-defendants. He described his movements that evening and how the incident had unfolded.

22. Woodward did not give evidence but relied upon the account given in his police interviews. He denied that he had participated in any attack on the deceased; and a number of points were made in relation to the reliability of Julie O'Dong's evidence.

23. In the cases of Spencer, Stoute and Woodward, the issues for the jury were whether they were sure that each had participated in the attack on the deceased, and if so whether they had intended that at least really serious harm would be caused to him. In the case of Otman Lamzini, the issues for the jury were whether he had been acting in lawful self-defence of himself or his brother, and whether he had intended that either really serious harm or some harm would be caused to him.

The progress of the trial

24. The trial began on 2 May 2018, with an 8-10 week estimate, with the jury in waiting being told that it would conclude by mid-July. They were selected on the basis that they would be able to sit for a trial of this length and did not have pre-booked holidays during this period. A helpful schedule prepared by Ms Robertson shows how the trial became delayed. Some of the delays were unavoidable: for example, relatively minor issues with the jury and witnesses. Some of the delays were of the type that can occur in any trial due to what is a dynamic process: for example, making arrangements for a site visit and non-systemic issues with technical equipment, as well as the illness or incapacity of crucial participants in the trial. However, many other delays were plainly avoidable or capable of being ameliorated. In the former category were the frequent delays to the trial because the defendants were delivered late from the prisons where they were being held on remand. In the latter category, was other work that the Judge had to undertake as the Resident Judge.

25. The importance of starting each day on time is particularly relevant in the present case; but it applies to every case in the Crown Court. We would add that, where trial counsel has a commitment in an appeal to the Court of Appeal in another case, it should be possible to accommodate the hearing so as to cause the minimum disruption to a trial.

26. The many delays in the present case had a knock-on effect; and the number of days on which the court did not sit at all during the trial is both striking and unsatisfactory.

27. The prosecution closed its case on Friday 6 July. The jury then heard the cases for the defendants, including the appellants, in the week of 9 to 13 July. On Monday 16 July, the parties made submissions on the legal directions that the Judge would give. The court did not sit on 17 July and the prosecution closing speech was concluded on 19 July. There was then a 3-day period from Monday 23 to Thursday 26 July when the court could not sit due to the illness of leading counsel for one of the defendants.

28. By this stage it was clear to all concerned that the case would overrun into a period when some of the jurors had pre-booked holidays.

29. On 26 July, the Judge raised a suggestion that the trial should be adjourned so as to accommodate the three jurors who had pre-booked holidays. For most of the trial there had been 11 jurors, due to an accident suffered by one of them early in the trial. The Judge indicated that, with his summing up likely to begin on 1 August (Wednesday), the jury would probably retire on the following Monday (6 August) and continue their deliberations on 7, 8 and 9 August.

30. On 30 July, there were specific discussions between the Judge and counsel about a break in the jury deliberations and a resumption on 29 August.

31. On 2 August, an application was made to discharge the jury before the case was summed up on the basis that the jury would be unlikely to reach verdicts before the 3-week holiday period began. The Judge refused this application. It is unnecessary to dwell further on the application, since the refusal of the application is not the subject of any ground of appeal. We would add, however, that the Judge was fully entitled to the view he took. An alternative argument was also advanced that the Judge should defer his summing up until the jury had returned at the end of August, which the Judge also rejected. Again, no proper criticism of that decision can be made.

32. He began his summing up on Thursday 2 August and concluded on Monday 6 August. The jury was given a written copy of his directions on the law and a written document providing routes to verdicts in relation to each of the ten defendants. In addition, they had copies of the 79-page 'chronology', a document headed 's.10 Admissions' running to 137 paragraphs, and transcripts of the interviews with Spencer and Woodward.

33. The jury retired to consider their verdicts at 13.14 on 6 August. Before asking them to retire, the Judge told them that they should not feel under any time pressure; that they would stop their deliberations on 8 August for the pre-booked holidays; and that they would return to court and resume their deliberations on 29 August.

34. The jury considered the verdicts for the rest of 6 August, as well as 7 and 8 August. On 8 August, the jury asked for some of the CCTV images to be played to them.

The first break in deliberations

35. On 8 August the Judge told the jury to stop their deliberations and directed them not to talk about the case when they were away from court, during what he described as 'a welcome break.' Following the departure of the jury on 8 August, he discussed with counsel what directions should be given to them when they returned at the end of August. He invited the parties to prepare short summaries of the prosecution and defence cases so that he could remind the jury of the salient points when they returned.

36. Between 8 and 29 August, attempts were made to produce these written summaries. This proved difficult. The defendants objected, with some justification, that the first version of the prosecution summary was not a summary of the prosecution speech to the jury, but rather a document which addressed points which had been made by counsel in their closing speeches for the defence. Those representing Yasine Lamzini, Yousef Koudoua and Saffon Fakir raised specific points of objection to the prosecution document; and it was replaced by a more appropriate summary based on Mr Trimmer QC's closing speech. Each of the ten defendants produced their own summaries. However, there was no uniformity of approach: some were in bullet-point form, others more in the nature of a narrative summary, some short, some long. There were, in the words of Mr Borrelli QC, 'stylistic differences.' In the event, it was agreed by most, if not all, counsel that the documents could not be used to remind the jury of the salient points raised by prosecution and defence; and that there was insufficient time for the Judge to prepare his own summary. As Mr Borrelli put it in argument before us, 'the ten different summaries would have likely served more to confuse than assist the jury.' In any event, nothing further was said about the facts when the jury returned. We will return to this matter later in the judgment.

37. Mr Borrelli made detailed suggestions as to what the Judge should say to the jury which included telling them that, if they found if they were unable to reach true verdicts, due to the break in their deliberations, they should say so.

38. The Judge sensibly followed this course to this extent:

> Now you have written directions on the law which I gave to you, and you have route to verdicts, and you no doubt will remind yourself of those when you start your deliberations today. But you also, in this case, members of the jury, have a huge amount of material: you've got 149 paragraphs of agreed facts, remind yourself briefly of those when you retire. You've got a lot of schedules, you've got a lot of photographs, you've got a lot of material which you'll need to just re-familiarize yourself with when you retire.
>
> You've also got notes, which I know some of you made during the course of the evidence, you've got notes I know that some of you made during the course of counsel's speeches, so take some time just to remind yourself of the contents of those notes. We, of course, trust that having reminded yourself of all of that, you will recall the evidence and continue to try to reach verdicts upon which you are all agreed. If you need reminding of any of the evidence in this case, don't hesitate to send a note and I will remind you of the evidence that was given during the course of the trial.

39. He also reminded the jury again that they should not feel under any pressure of time to reach verdicts.

40. When they retired again on Wednesday 29 August, it was envisaged that they would sit for a further five or six days. In the event the court did not sit on 30 August so as to allow a juror to attend an important wedding. The jury continued their deliberations on Friday 31 August and on Monday 3 September, when a jury note was discussed. The note asked the Judge for reassurance that they would not return to court until Tuesday 25 September, 'i.e. we are not in court 6-24 September inclusive.' The jury's concern arose from a second tranche of pre-booked holidays. Mr Borrelli on behalf of the defendants, having referred to his earlier submission that the jury should have been discharged before the first break, submitted that a further adjournment made 'the situation even more untenable', and applied again for the Judge to discharge the jury. This application was refused, with the Judge noting that the jury clearly did not envisage any difficulty in coming back after a further adjournment, 'which is an interesting insight into their … thinking.'

41. When the jury returned to court, the Judge told them that they would not be required to sit on the case from 6 to 24 September, and that they could return on 25 September if they needed further time.

42. The jury continued their deliberations on 3, 4 and 5 September. At the close of the court day on Wednesday 5 September, the Judge told the jury to cease their deliberations and return to court on Tuesday 25 September. He also repeated the

warnings he had given before about not discussing or carrying out any researches into the case.

The second break in the jury deliberations

43. In fact, the jury were not able immediately to resume their deliberations on 25 September. They did not do so on 25 and 26 September due to one of the jurors being unwell. On 27 September, the jury retired again to consider their verdicts. Unlike previously, the Judge did not mention the written material that was available to them in retirement or that, if they needed to be reminded of any evidence in the case, they could send him a note and he would remind them of it.

44. The jury continued deliberating on Friday 28 September and Monday 1 October, when at the close of the court day the Judge received a note about verdicts.

45. On Tuesday 2 October, the Jury returned their verdicts as we have set out above.

The arguments

46. Although Mr Borrelli made no criticisms of the directions of law or the summing up, he submitted that, by the time the verdicts were returned against the appellants, 8 weeks had passed since the conclusion of the summing-up and over 11 weeks since the evidence had concluded. He reminded the Court of the overriding objective in CPR Part 1.1 (1)(e) of dealing with cases efficiently and expeditiously. He argued that the Judge should have discharged the jury from reaching verdicts no later than 5 September. The trial process had become wholly disjointed by delays which had resulted in the jury separating for periods of 20 and 22 days during retirement, without any sufficient reminder of the evidence. The primary witness against the appellants, and the only witness to identify them at the scene and as being specifically involved in the assault, was Julie O'Dong. Her evidence had concluded some 2½ months before the jury retired and nearly 4½ months before their verdicts were returned. The delays inevitably reduced the jury's ability to retain the evidence and the points made in relation to it on the appellants' behalf. The period was also too long for the court to be able to exercise any form of judicial control over the most important period of the jury's function. The interruptions to their deliberations fundamentally undermined their quality; and the substantial risk of lapses in recollection could not be cured by documents, such as might be possible in other cases. The protracted jury deliberations were incompatible with a fair trial process and rendered the convictions unsafe.

47. In support of these submissions he referred to a number of cases to which we refer further below: *People v. Santamaria* (1991) 229 Cal App 3d 272; *R v. Kellard, Dwyer and Wright* [1995] 2 Cr App R. 134; *R v. Rember and Richards* [2004] and *R v. A, Heppenstall and Potter* [2007] EWCA Crim 2485.

48. For the Crown, Mr Trimmer, accepted that the progress of the trial was slow and that there had been two lengthy breaks during the jury's deliberations; but he submitted that the prior delays were not as extreme as in the case of *R v. Heppenstall.* There was no criticism of the Judge's summing up; and his decision not to discharge the jury was in accordance with the overriding objective in the Criminal Procedure Rules. Further, the jury were rightly directed that there was no pressure of time to come to a decision.

Much of the evidence was agreed in the form of s.10 admissions, and the jury were able to consider this evidence and the chronology, as well as the written directions, during their deliberations. The live evidence was correctly summed up by the Judge and the jury were directed that they could be reminded of the evidence if they so wished. The jury sent various notes during the course of their deliberations, none of which indicated that they were struggling to recollect the evidence. While he accepted that the delays in the case were far from ideal, they did not have such an adverse effect on the proceedings so as to render the convictions unsafe.

Decision and conclusion

49. Jury service is a public duty which inevitably involves disruption to the lives of those called to serve. Jurors are entitled to consideration in relation to their individual needs (for example, medical or other similar and necessary appointments); and this consideration, within appropriate limits, also extends to the collective needs and comfort of the jury. Thus, when there are delays with periods during which a jury is not in court, judges will try to explain, in so far as they are able, why a jury is kept waiting. It is a necessary courtesy.

50. Another feature of the consideration shown to juries arise in relation to pre-booked holidays. It is recognised that if these have to be cancelled, it is likely to cause loss and expense, quite apart from disappointment and annoyance. If there is a risk of a trial continuing over a holiday period, a court will make enquiries to determine whether jurors in waiting have pre-booked holidays. Where possible the jury will be empanelled with these considerations in mind, see for example CPR Part 1.2(d), which deals expressly with the need to respect the interests of jurors; see also CPDVI Trial 26D3. However, there will be cases (particularly long cases) where the convenience and even the needs of the jury must cede to the wider interest of trying cases in accordance with the Overriding Objective.

51. The applicable regulations, whose effect is set out in the Juror Manual at §§27.1-7, provide that a juror can make a claim for the cost of a lost pre-booked holiday, subject to certain conditions. (1) The trial must be over-running and the judge must decide that the juror cannot be discharged from the jury. (2) Any claim is limited to the daily financial loss allowance for 10 days. The daily financial loss allowance is currently either £32.47 (4 hours or less per day) or £64.95 (over 4 hours per day). It follows that the maximum claim is £649.50 and may be £324.70. (3) There must be satisfactory evidence of the amount of any lost deposit, including booking and payment confirmation, and the lost deposit must not be the subject of insurance. (4) The cost of rebooking holidays and flights will not be reimbursed. (5) The reimbursement will not extend to losses in relation to anyone other than the juror; and not accompanying family or friends.

52. The constraints on reimbursement of the cost of a cancelled family or accompanied holiday (if such it is) are plain. Nevertheless, it may provide an alternative to letting the jury disperse on the basis of pre-booked holidays

53. The Judge was entitled, if not bound, to consider the potential difficulties caused to jurors by the case overrunning; and no complaint is made of his decision to allow a jury a three-week period away from the trial while they were in retirement, so as to allow some of them to go on pre-booked holidays.

54. The proposal that the jury would be assisted by summaries of the prosecution and defence cases proved to be unworkable. It required self-discipline on the part of the prosecution not to deal with points made in the closing defence speeches, and on the part of the defence not to take into account points made in the summing up which were regarded as adverse. In the event, the intention to present the Judge with agreed statements of case failed; and by the time this was clear to everyone, the jury were ready to resume its deliberations. In our view, the proposal of summaries which the Judge would read out was likely to be problematic. We would add that a judge is entitled to ask for and to receive material which will assist him or her in reminding the jury of the evidence; but ultimately such guidance to the jury is the responsibility of a judge.

55. We acknowledge that difficulties may arise when a judge attempts to summarise what has already been summarised in a summing-up. Nevertheless, in some cases it may be necessary to remind the jury of the material evidence and the parties' case in relation to it.

56. In the present case, the jury were assisted by the route to verdict and the written directions of law, as well as the other documentary material which provided a clear structure within which they could work through their verdicts. In addition, it was made clear that if they required assistance in relation to a particular piece of evidence, they could ask the Judge to remind them. In many cases, and in the present case, jurors will have made notes of what they think is the important evidence; but being reminded by a judge will ensure that all jurors are in the same position.

57. In our view the real issues on this appeal are: (1) whether the Jury should have been allowed to continue their deliberations on 27 September, after the second break; (ii) what, if any, further assistance should have been given at that point; and (iii) whether the continuation of the trial to verdicts rendered the process unfair, and the verdicts unsafe?

58. As to (i), although there had been two three-week breaks, the jury had been in retirement for 8 days, and there was nothing to indicate that they had difficulty in considering their verdicts. The question then is whether there is some over-arching principle which precluded the jury being permitted to continue their deliberations on 27 September. In our view there is not. In each case, a judge will have to consider whether the time has come when the case should be withdrawn from a jury. The length of breaks when a jury has not been in retirement will be a factor; but it is a fact sensitive question, and trial judges will be in a good position to assess the situation.

59. As to (ii), we have already set out our views as to the utility of providing a summary of the evidence and the points made on each side. As to Mr Borrelli's submission that the Judge should have reminded the jury on 27 September of the written materials which would assist them, as he had on 29 August, we accept that some judges might have followed this course. However, it would have amounted to little more than telling the jury about what they had in the jury retiring room, which of course they would see when they returned there. Nevertheless, we consider that it would have been prudent to tell the jury that they could ask him to remind them of any points of evidence on which they were unclear.

60. As to (iii), the issue here is whether, looking at the matter overall, the six-week period spent away from the case rendered the trial unfair and the verdicts unsafe.

61. The passage to which we were referred in the American case of *People v. Santamaria* (above) is a useful common-sense reminder of the fallibility of memory after a prolonged interruption in deliberations. However, the case itself concerned an entirely different and much more confined regime of jury separation. Section 1121 of the California Penal Code confined the period of 'continuance' to matters of necessity. The California Court of Appeal expressed concern that the jurors would be subject to prolonged exposure to outside influences during the 11 days while their deliberations were suspended. In our view the decision does not greatly assist in the present case. Since the introduction of s.13 of the Juries Act 1974, juries can separate after they have retired to consider their verdict. The current guidance as to what the jury should be told is conveniently set out in Blackstone 2019 at D19.8, by reference to *Oliver* [1996] 2 Cr App R 514:

> (1) The evidence has been completed and it would be wrong for any juror to seek or receive further evidence or information of any sort about the case; (2) they should decide the case on the evidence and the arguments seen and heard in court, and not on anything seen or heard outside the court; (3) they should not talk to anyone about the case save to the other members of the jury and then only when they were deliberating in the jury room; (4) they should not allow anyone to talk to them about the case unless that person was a juror and he or she was in the jury room deliberating about the case; (5) on leaving the court, they should set the case on one side until they retire to the jury room to continue the process of deliberating about their verdict. It is desirable for the direction to be given in full on the first dispersal by the jury, and for a brief reminder to be given at each subsequent dispersal. Further directions in relation to access to and use of exhibits are addressed by Crim PD VI, §§ 26L.1 to 26L.3.

62. The jury were warned in these terms in the present case at all relevant stages.

63. In *Kellard, Dwyer and Wright* (above) the court was concerned with the safety of a conviction following a trial that lasted 252 working days. The appeal did not directly raise the period of retirement; but two passages in the judgment of this court are relevant.

64. At p.147F, the court observed:

> As already noted, the appellants say that the strain imposed on all connected with the trial was intolerable. The main impact would have been on the jury who were of course unused to the pace of court procedure. It is submitted that the jury could not over such a period of time give sufficient concentration to evidence of activities with which they are likely to be unfamiliar. Furthermore, it is said that the jury was likely to be

> resentful of the fact that the length of the trial was so much greater than they had been advised at the outset.

65. The court added this passage at p.149A, which has some resonance in the context of the present appeal:

> The first question to be decided is whether the length of the trial in itself is a sufficient ground for characterising these convictions as unsafe or unsatisfactory. The Court is firmly of the opinion that it is not. If it were otherwise, cases would have to be tried within a time limit.
>
> The correct approach is to consider whether the length of the trial created a situation at any point whereby a fair trial was not possible. Does the case reveal any feature which tends to establish that any of those taking part in the trial were by reason of its length unable to discharge their function?
>
> The most important of those concerned in the trial was the jury. If it was unable to understand the evidence, or the directions it received were not reliable or accurate, there would be grounds for saying that the convictions were unsafe. It is evident that the jury itself manifested no such incapacity. One of their number had to be discharged at an early stage but thereafter their attendance at the trial was assiduous. On no single day when the court was sitting over this long period was a jury man or woman ever late. A succession of notes were passed to the court during the course of the trial, some merely checking that the jury had the right documents, some asking more weighty questions but demonstrating the jury's close attention. With the exception of one jurywoman who is the subject of criticism on behalf of Kellard in a separate ground of appeal. there was no complaint during this appeal of any shortcomings on the part of the jury, neither was any application made for its discharge on this ground during the course of the trial. There is perhaps a tendency in the legal profession to underrate the capacity of juries in this country. While it is not a feature of this case, it should not be too readily assumed that a Jury cannot properly understand a case merely because of its length. Juries might well resent such condescension. Certainly during the present case, notwithstanding its length**,** no complaint was ever made that the jury did not comprehend what was going on, nor did any such admission come from the jury. Furthermore, the jury showed some discrimination in their verdicts by acquitting Wright on count nine.

66. In *Rember and Richards* (above), this court addressed a complaint that the jury was allowed to disperse during its deliberations for 9 days over a Bank Holiday as had been envisaged if the trial were to overrun. The court made a number of general observations:

> 57. Such a break in the deliberations of a jury is to be avoided if it can possibly be avoided. There are all sorts of dangers which can arise if too long is to pass between a jury dispersing at the end of one day's deliberations and their reassembling for their next day of deliberation. For obvious reasons, which include the fact that there may be events which occur during that week which may affect the way in which a juror or more than one juror looks at the case which are nothing to do with the evidence, it does not allow for control of a jury which the court must seek to achieve during any period when the jury is considering its verdicts and which essentially should only result in a jury being dispersed for the shortest periods possible and only if again possible overnight. The period in this case might also have had an effect, as [the appellant's counsel] submits, on the jury's memory of the evidence which they had heard.

67. The court considered the effect of the dispersal and concluded that what happened did not render the verdicts unsafe.

> 59. … In the light of the evidence which was before the jury and in the absence of anything to suggest that the jury was in any way put in real difficulty as a result of the fact that they were dispersed for those nine days, we cannot see anything to support the conclusion that the verdicts were unsafe.

68. In *A, Heppenstall and Potter* (above), the court had to consider the issues that arose from a trial which had been estimated to last 4 months and had in fact lasted approximately 11 months. There were 235 available sitting days, on which the court had only sat 132 days, and rarely a full day. This was due to a combination of factors: for example, sitting *Maxwell* hours and prolonged breaks for national and juror's holidays. As the court observed at [21], the first break was extended because a juror had booked a holiday over Easter and the judge, in the light of the over-run, allowed that juror to take a holiday, 'this was to set a disastrous precedent'.

69. At [38] the court gave a warning of general application:

> Once the judge had taken the decision that he could not allow one juror a holiday without allowing the jury those holidays which they had booked, in the belief that the trial would be over, disruption was inevitable.

70. It is clear that when considering breaks for holidays a trial judge should establish the guiding principles for granting adjournments to allow for jury holidays and should stick to them.

71. In *A, Heppenstall and Potter*, there had been further breaks for jurors' holidays, school half-term, and a juror's business commitments in June (15 days), July (18 days) and July to September (43 days), October to November (17 days). Relevantly for present purposes, the jury deliberated for 3 days before a 17-day break and returned verdicts the day after returning.

72. The Court set out principles of general application:

> 29. The overriding requirement of a criminal trial is to ensure that the accused is fairly tried. The rules of practice are designed to achieve that result. (If authority is needed, see e.g., Lord Bingham in *Randall v R* [2002] 2 CR.App.R.17, 267 at page 273 paragraph 1. That is the overriding objective of the Criminal Procedure Rules (see 1.1 of the Criminal Procedure Rules 2005 S.I.2005 No 384). This court must remind itself that its jurisdiction is limited to assessing whether the convictions are safe. Not every departure from good practice will render a trial unfair but:
>
> > The right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.' (Lord Bingham at paragraph 28 in *Randall*).

73. The court added this:

> 30. It is trite to observe that the fairness of the trial can only be assessed in the factual context of the particular case. But it is not idle to recall that the purpose of the trial process is to give the prosecution a fair opportunity to establish guilt and a fair opportunity for the defendant to advance his defence. The means by which that is achieved is by ensuring that the jury has a reasonable opportunity to retain and assess the evidence laid before it and by the judge directing the jury, fairly, as to the issues which it must determine. Since juries are not required to give reasons for their verdict, the only objective assurance that the process by which the jury has reached its conclusion is rational, lies in the fair conduct of a trial. A rational conclusion demands a fair process. A trial must be managed to enable those objectives to be achieved (see introduction to the Lord Chief Justice's Protocol).

74. These passages, which emphasise the absolute right of a defendant to a fair trial and the means by which it is achieved are relied on by Mr Borrelli.

75. In *A, Heppenstall and Potter*, the court concluded that the summing-up was deficient, adding:

> 47. The effect of the inadequate directions to the jury was aggravated by the substantial disruption to the jury's consideration. Seventeen days, in the context of the disruption which had gone before and the summing-up, constituted far too long a gap between the hearing of the evidence, the arguments

> advanced and the jury's conclusions. It is not possible to have any confidence that safe verdicts were reached at the conclusion of a fair process when so great an interval elapsed during the course of the jury's deliberation.

76. Drawing these strands together we have reached the following conclusions.

77. There can be no general rule which determines that a particular length of time that a jury have been dispersed in the course of its deliberations necessarily renders a trial unfair or otherwise calls into question the safety of a conviction. The issue involves a fact sensitive analysis, as the court recognised in *A, Heppenstall and Potter* (above) at [32].

78. Nevertheless, the following matters may be material, and are material to the present appeal.

79. First, there is the quality of the summing-up. If there are deficiencies in the summing-up, then this may be material, see for example, *A, Heppenstall and Potter* (above) [33]. Conversely, while there is a risk that the length of dispersal will deprive the jury of a fair opportunity to assess the evidence, that risk will be reduced by a careful and meticulous summing-up, see *Kellard and anor* (above) p.150A-C) and *A, Heppenstall and Potter* [33] and [42]. In the present case, the summing up was clear and provided considerable assistance to the jury.

80. Second, it may be necessary to consider the extent and quality of the material that the jury has available on retirement, and the extent to which this will enable them to focus on the issues and the evidence in relation to those issues. As we have noted, in addition to the written directions and the routes to verdicts, the jury in the present case had a considerable amount of written and photographic material. We would note that the greater the quantity of documents available to a jury in retirement the longer the deliberations may take, as the jury works through the documentation.

81. Third, the gap in the jury’s consideration between the summing up and the final verdicts will be relevant to the fairness of the process. The longer the period, the greater the risk that the jury will be unable to remember the evidence summarised in the summing up and the points made by the prosecution and defence. We recognise that the cumulative periods during which the jury was not considering the verdicts in the present case was considerable and unsatisfactory.

82. Fourth, it may be relevant that an application was made to discharge the jury on the basis of the time in retirement at the time. In the present case there was an application. This is not a case in which the grounds of appeal were not foreshadowed by arguments made and concerns expressed at the time. On the other hand, judges must be prepared to make robust case management decisions and expect such decisions to be upheld on any appeal.

83. Fifth, the existence of indications which tend to establish that, by reason of the length of the trial and the retirement, the jury were unable to discharge their functions. In other words, are there indications that the jury were alert and attentive to their task during the trial and (to the extent this can be discerned) during retirement on the one hand; or discontented and distracted on the other? Is there material which shows that

the jury were in difficulties in discharging their task following retirement? In the present case there are no such indications. On the contrary it is clear that the jury were taking their time to work through the charges and the evidence in relation to ten defendants facing different charges before reaching their verdicts. The interruption to this process by discharging them while the defendants were in their charge might well have left them with a justifiable sense of grievance. This would be particularly so if they had already reached verdicts in relation to some of the defendants or on some of the counts.

84. Sixth, the verdicts themselves will be relevant. Do they suggest, for example, that the jury were assessing the evidence in relation to each defendant or were unable to do so? Here, the different verdicts on different charges in relation to ten defendants suggest that the jury had focussed on their task despite the interruptions.

85. In all these circumstances, although we recognise that the second break in the jury deliberations was very far from satisfactory, we do not consider that it resulted in a process that was unfair to the appellants. The prosecution case against the appellants was strong, and we are not persuaded that the verdicts are unsafe.

86. Accordingly, the appeals are dismissed.