Neutral Citation Number: [2019] EWCA 597 Crim

Case No: 2017/04931/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LEICESTER CROWN COURT
HIS HONOUR JUDGE DEAN QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2019

Before :

LORD JUSTICE GROSS
MRS JUSTICE LAING DBE
and
MRS JUSTICE CHEEMA-GRUBB DBE

- -

Between :

REGINA	**Respondent**
- and -	
Ezekiel Braithwaite	**Appellant**

- -
- -

Matthew Jewell QC (instructed by **Fosse Law**) for the **Appellant**
Gareth Patterson QC (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing date : 17 January 2019

- -

Approved Judgment

LORD JUSTICE GROSS :

INTRODUCTION

1. On 17 October 2017, in the Crown Court at Leicester, before HHJ Dean QC, the Appellant, now aged 21, was convicted of murder.

2. On 27 October 2017, the Appellant was sentenced by HHJ Dean QC to Imprisonment for Life; a period of 21 years, less 213 days on remand was specified as the minimum term under s.269(2), *Criminal Justice Act 2003*.

3. The Appellant was acquitted of attempting to unlawfully and maliciously wound Muzzammil Deen with intent to do him grievous bodily harm, contrary to s.1(1), *Criminal Attempts Act 1981*.

4. The Appellant appealed against conviction by leave of the Single Judge.

5. Two grounds of appeal were advanced on the Appellant's behalf:

   i) The Judge did not leave a version of unlawful act manslaughter for the consideration of the jury ("Issue I: Manslaughter");

   ii) The Judge failed to inform counsel of a message received from a juror and thus deprived the defence of the opportunity of addressing him about it, and thereafter enquiring into the message and applying for the discharge of the jury ("Issue II: The Jury message").

6. At the conclusion of the hearing, we indicated that the appeal would be dismissed and that our Reasons would be given later. These are our Reasons.

THE FACTS AND THE CASES AT TRIAL

7. In short summary, on the evening of 25 March 2017, the Appellant attended a party in Leicester. The deceased, Pedro Godhino, attended the party with his friend Mr Deen. The Appellant and Mr Godhino recognised each other and spoke on at least two occasions. At the time, there was no apparent hostility between them. Mr Godhino and Mr Deen left the party in a taxi, with sisters Jade and Terry Bunsie. The taxi took them to Terry Bunsie's address in Canonsleigh Road, Leicester, collecting food on the way. When they arrived at the address, shortly after 06.00, the Appellant was outside. The Appellant approached Mr Godhino while the latter was still in the taxi and asked him about a suggested inappropriate conversation between Mr Godhino and the Appellant's 15-year old sister at the party. Mr Godhino and the others got out of the taxi. Mr Godhino denied any such conversation with the Appellant's sister. The Appellant took out a knife and made contact with Mr Godhino, who received a fatal stab wound to the chest, penetrating his heart. Mr Deen's jacket was sliced at shoulder level. The Appellant made off in a car. An ambulance was called and Mr Godhino was taken to hospital. He was pronounced dead at 07.18. The Appellant was apprehended the next day at a hotel with his ex-girlfriend. The events in Canonsleigh Road, from the taxi's arrival until the ambulance was called, occurred over a period of about 5 minutes.

8. The Prosecution case was that the Appellant had stabbed Mr Godhino to the chest in anger, intending at the very least really serious harm.

9. In his first Defence case statement, the Appellant denied presence at the scene. Before the trial, however, the Appellant resiled from that position.

10. At trial, the Defence case was that the Appellant had taken out his knife to ward off the deceased. He was in fear of being stabbed by the deceased and so used his knife to fend him off in self-defence. He had no intention of causing any harm.

11. There was no dispute that the Appellant was responsible for the death of the deceased. The issue for the jury was whether they were sure that the killing was unlawful and that the Appellant intended to kill or cause the deceased really serious bodily harm.

THE EVIDENCE

12. It is next convenient to outline, briefly, some of the evidence adduced at the trial and relevant to this appeal, beginning with the Prosecution evidence.

13. The pathologist expressed the view that the fatal stab wound required at least moderate force. There were no defensive injuries on the deceased's body.

14. Jade Bunsie spoke of arriving at her sister's address. The Appellant looked angry and was raising his voice. When they got out of the taxi, the Appellant was shouting at the deceased and Mr Deen, in connection with the conversation with his sister. According to Ms Bunsie, the deceased tried to calm the Appellant down and did not himself shout. According to her evidence, the Appellant kept shouting and pushing the deceased; the deceased stepped back, and the Appellant punched him in the chest. It sounded as if the deceased was winded. The deceased then started walking down the road. Immediately after what she had described as the "punch", she saw the Appellant swing round and slash Mr Deen's coat. Mr Deen had been standing behind the Appellant. This was the first time she saw a knife; it was in the Appellant's hand – the same hand he had used to "punch" the deceased. She told her sister (Terry Bunsie) that she thought the deceased had been stabbed.

15. Terry Bunsie described seeing the Appellant as soon as the taxi stopped outside her address. The Appellant was near the deceased's door. The deceased paid for the taxi and then got out. The Appellant said, "what did you say to my sister?" The deceased looked shocked; the Appellant angry. The deceased denied any inappropriate conversation and tried, unsuccessfully, to calm the Appellant down. The Appellant continued to be aggressive. She thought that Mr Deen was also trying to calm things down. She went inside her flat and came out when her sister came running in to tell her what she had seen.

16. Mr Deen said that everyone was happy in the taxi. He too described the Appellant being angry with the deceased, when the taxi arrived at Ms (Terry) Bunsie's address – and the deceased trying to calm the Appellant. Mr Deen spoke of coming around the front of the car, seeing the Appellant pull out a knife and stabbing the deceased in the chest. The Appellant seemed angry and calm at the same time. The deceased had been standing with his arms open and down. He thought a fight was going to start, so when he saw the Appellant stab the deceased, he stepped forwards to split them up.

At that point, the Appellant slashed downwards towards his shoulder, cutting his jacket. He ran across the road and the Appellant said, "Keep running, keep running, you pussy". The Appellant then ran to a car and drove off. He ran to the deceased who was lying face down on the footpath. He turned him over; the deceased's eyes were already closed. Cross-examined, he said that he did not see the deceased put his hand to his waist as if to get a knife or see him step towards the Appellant.

17. The Appellant gave evidence in his own defence. He had spoken to the deceased at the party; it was a friendly conversation and there had been no hostility. He was then told about the allegedly inappropriate conversation between the deceased and his sister. He felt "slightly angry", as he loved his sisters.

18. He left the party to deliver cannabis somewhere but took the opportunity to see if he could find the deceased. He just wanted to speak to him. He did so when he saw the taxi pull up outside Terry Bunsie's address. The Bunsie sisters went indoors. He asked the deceased what he had said to his (the Appellant's) sister; he was not angry or aggressive. The deceased responded, saying "What the fuck are you on about?". Voices became raised; he wanted the deceased to come back to the party to apologise. An argument followed.

19. He had been carrying a knife – for his own protection as he had previously been robbed of his cannabis at knife point. He believed that the deceased was a drug dealer who would carry a knife. The deceased approached him and put his hand to his waistband as if reaching for something. He feared and believed the deceased had a knife. He pulled out his own knife to keep the deceased away from him by fending him off. He denied striking out, poking or punching with his knife. The deceased was moving towards him and he felt contact was made. He did not intend contact; he did not intend to hurt or kill. He did not think the deceased had been injured. The deceased pulled away and went down the street. Mr Deen came towards him with his hands raised. He thought Mr Deen was going to "slash" him, so he "slashed" to keep him away. He did not intend to hurt him. Thereafter, he ran and did not shout out. He threw the knife into a river after he heard that the deceased had died; he also threw the clothes he had been wearing into a bin.

ISSUE I: MANSLAUGHTER

20. *(A) The debate at trial and the direction given:* Leading counsel then appearing for the Appellant submitted that, although not the Defence case, on the facts it was open to the jury to find the Appellant guilty of involuntary manslaughter. The Appellant's evidence was that he had no intention to injure when he drew out the knife and used it to fend off the deceased. If the jury accepted that evidence, the Appellant might still be convicted on the basis that the Appellant had committed an unlawful and dangerous act, which all sober and reasonable people would inevitably realise must subject the victim to at least the risk of some harm. The unlawful and dangerous act in question was the carrying and taking out of the knife.

21. The question of a manslaughter direction was debated at some length between counsel and the Judge, including by way of an extended email exchange over the weekend. This says much for the diligence of all concerned, even if (perhaps) less than ideal for re-tracing subsequently precisely how matters developed. With hindsight, and with respect, it would have been helpful at the conclusion of the email exchanges for the

Judge to have produced a ruling – however brief – in a single place, pulling the threads together. In the event, nothing turns on that and it suffices to focus on the direction actually given.

22. The Judge made it clear to the jury that there was no dispute as to the Appellant having killed Mr Godhino. There were, however, very different accounts of how the Appellant came to be responsible for Mr Godhino's death. The Judge began by outlining the Prosecution case of deliberate stabbing, before continuing as follows (Transcript, I(a), at pp. 5-6):

> "On the other hand, Braithwaite says that he was not aggressive in confronting Godhino, rather Godhino's response was aggressive and that Godhino moved and Deen was positioned in ways that led Braithwaite who says he believed both Godhino and Deen carried knives to think he was about to be attacked. Braithwaite says that he produced the knife to defend himself. Braithwaite's own evidence about what happened immediately after he produced the knife was, you might agree and it is a matter for you, not easy to follow.
>
> He said that he was aware of some contact with Godhino who he claimed had been moving towards him but he said he was not aware that Godhino was stabbed or hurt at all. Essentially, though, Braithwaite was accepting that it was him producing the knife that led to and caused Gohino's death. He says he produced the knife only in self-defence, only to ward off and intended no harm to be caused.
>
> Well, was the killing unlawful? A killing is not unlawful and cannot be murder if it was or may have been as a result of an accident or if it was or may have been a killing in self-defence. In this case it is not suggested that the stabbing was accidental but you must decide whether it was or…may have been a killing in self-defence….."

23. The Judge then dealt in an orthodox manner with the defence of self-defence. He recorded the Prosecution case that this was a deliberate attack which had nothing at all to do with self-defence. Aside from the witness evidence, the Appellant had realised that his initial reaction to the charges – silence and then the assertion that he was not present at all – would not wash. The Prosecution submitted that the Appellant had fabricated a lie, namely, that he thought he was about to be attacked. The Judge went on to summarise the Appellant's case on self-defence, before saying this (Transcript, I(a), at pp. 7-8):

> "If you are sure this was a deliberate stabbing not in self-defence then before you could say that Mr Braithwaite was guilty of murder you would also have to be sure that when he stabbed Godhino he intended to kill him or at least to cause him really serious injury.

> Again, you may agree but it is a matter for you with what was suggested during the trial, that deliberately to stab someone in the chest must involve an intention to kill or at least to cause really serious injury. If Braithwaite, though, did not or may not have intended to kill or cause really serious injury then your verdict will be not guilty of murder. If you are sure he was not acting in lawful self-defence and sure he intended to kill or sure he intended to cause really serious harm your verdict would be guilty of murder.
>
> What if you conclude that when he stabbed, if that is what you do conclude, he did not intend to kill or to cause really serious injury but intended to cause some harm, harm falling short of grievous bodily harm? If that was your conclusion then your verdict would be not guilty of murder but guilty of manslaughter."

24. It will be apparent that a case of manslaughter was left to the jury – but not in the form for which the Defence had contended.

25. *(B) The rival cases on the appeal:* For the *Appellant*, Mr Jewell QC (who did not appear at trial) submitted that the fundamental issue was whether the jury were sure that the Appellant had deliberately stabbed the deceased. Only if the answer to that question was "yes" would issues such as self-defence and/or lack of intent arise.

26. What had, however, been omitted was the possibility of unlawful act manslaughter on a different footing. This possibility could arise from a reasonable view of the facts and, though improbable, was not impossible.

27. If the Appellant's evidence was accepted by the jury as wholly true, then he would have been entitled to be acquitted of both murder and manslaughter.

28. The need to leave unlawful act manslaughter to the jury in the form for which the Defence contended arose from the possibility of the jury accepting part but not all the Appellant's evidence. Thus:

> "…the jury may have been sure….that the appellant did not honestly believe he was about to be attacked. If they rejected that part of his account, but concluded that his account of his physical actions was, or may have been, true, then a conviction for unlawful act manslaughter would have been available to them."

The unlawful act in question was the production and holding of the knife, in the context of a fast-moving incident – where, on the Appellant's account, the deceased was moving towards him.

29. As became clear in argument, this version of manslaughter entailed, first, the jury being sure that the Appellant was not acting in self-defence and was brandishing the knife unlawfully. Secondly, the jury (on this hypothesis) would not have been sure that the Appellant had deliberately stabbed the deceased. Thirdly and accordingly, the

jury needed to accept that the deceased impaled or may have impaled himself on the knife, so sustaining the fatal injury.

30. It was to be noted that, at trial, Prosecution counsel (then appearing) had himself contemplated a direction in similar form.

31. The Appellant submitted that the Judge had fallen into error in failing to leave this version of manslaughter to the jury. If so, it was difficult to say that the conviction was safe.

32. For the *Crown*, Mr Patterson QC (who also had not appeared at the trial), submitted that the Judge had been correct not to leave the form of manslaughter for which the Defence contended to the jury. The actual facts of the case did not permit such theoretical findings. The real issue, to which the witness evidence had gone, was whether the jury was sure that the Appellant had deliberately stabbed the deceased. The jury's rejection of self-defence must have involved their being sure that the Appellant had deliberately stabbed the deceased, as submitted by the Prosecution. It was to be underlined that the real focus on self-defence in the present case had gone to the first limb; the Prosecution case had not been that the Appellant's actions had "gone over the top". As Mr Patterson expressed it:

> "…it would have been unrealistic to suggest that if they [the jury] were sure that the appellant did not act in self-defence when he caused the knife injury to the deceased, they could nonetheless be sure that when he caused the knife injury he was merely showing the knife to the advancing deceased in the way he described in his evidence. By rejecting self-defence the jury was rejecting the appellant's account as to how the injury was caused."

The Judge's decision was no less correct because some Judges might have left this version of manslaughter to the jury. A "compromise" verdict, comprising a different form of manslaughter had been left to the jury (as summarised above); the version left was not fanciful and the jury was thus not confined to a stark "all or nothing" choice. In any event, the conviction remained safe.

33. *(C) The legal framework:* The statutory framework governing an alternative verdict of manslaughter in the case of a person tried for murder, is contained in s.6(2) of the *Criminal Law Act 1967*, which provides as follows:

> "On an indictment for murder a person found not guilty of murder may be found guilty – (a) of manslaughter….."

34. The relevant principles, as to leaving the lesser alternative verdict of manslaughter to the jury when a defendant faces the more serious charge of murder on the indictment, were summarised by Gross LJ in *R v Barre* [2016] EWCA Crim 216; [2016] Crim LR 768, at [22], distilled from *R v Coutts* [2006] UKHL 39; [2006] 1 WLR 2154, *R v Foster* [2007] EWCA Crim 2869; [2008] 1 WLR 1615 and the discussion in *Archbold* (now found in the 2019 edition at paras. 4-533 and 7-99):

> "1. The public interest in the administration of justice will be best served by a judge leaving to the jury any obvious alternative offence to the offence charged. The tactical wishes of trial counsel on either side are immaterial. As observed by Lord Bingham in *Coutts* at [23]:
>
> 'A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.'
>
> 2. Not every alternative verdict must be left to the jury. Plainly there is no such requirement if it would be unfair to the defendant to do so. Likewise, there is a 'proportionality consideration': *Foster* at [61]. The alternative need not be left where it would be trivial, insubstantial or where any possible compromise verdict could not reflect the real issues in the case (*ibid*). The requirement to leave an alternative verdict arises where it is 'obviously' raised by the evidence, it is one to which 'a jury could reasonably come' or, put another way, 'where it arises as a viable issue on a reasonable view of the evidence': *Foster* at [54]; *Coutts* at [85].
>
> 3. Subject to the above framework, whether in any individual case an alternative verdict must be left to the jury is necessarily fact specific. In this context, the trial judge will have 'the feel of the case' which this court lacks: *Foster* at [61].
>
> 4. Where an alternative verdict is erroneously not left to the jury, on an appeal to this court the question remains as to whether the safety of the conviction is undermined: *Foster* (*loc cit*)."

35. *(D) Discussion:* Applying those principles, we are not persuaded that the Judge was in error in not leaving to the jury the alternative version of manslaughter contended for by the Defence. Our reasons follow.

36. First, it strikes us as remote from the real issue/s at trial, going to the stark dispute between the Prosecution case, that the Appellant deliberately stabbed the deceased (with whatever intent of which the jury were sure) and the Defence case that the Appellant was or may have been acting in self-defence.

37. Secondly, on the evidence, we struggle to see that there was room for this alternative. As already foreshadowed, this alternative entailed the jury rejecting *both* self-defence and the Appellant deliberately stabbing the deceased. It required the jury accepting that the deceased impaled or may have impaled himself on the knife brandished by the Appellant, sustaining the fatal injury in that manner. Additionally, the Appellant must have done enough with the knife (as accident was disclaimed) but not sufficient to amount to a deliberate stabbing. Articulating the constituent elements of this finely tuned alternative is itself not at all straightforward. It emphatically does not arise obviously from the evidence. It is, in our judgment, both artificial and wholly unreal

to see it as a viable alternative on a reasonable view of the evidence, and one to which a jury could reasonably have come.

38. Thirdly, for completeness, we are not at all dissuaded from our view by the fact that both trial counsel professed attraction for some such direction in respect of the further alternative. With respect, we prefer the Judge's "feel" for the case to those submissions of counsel then appearing.

39. Fourthly and as set out above, a version of manslaughter *was* left to the jury, relating to the Appellant's intent when stabbing the deceased. We agree with Mr Patterson that this alternative was not fanciful – and entertain little doubt that, had *it* not been left to the jury, complaint would have been made on the part of the Defence as to its omission. Furthermore, the lesser alternative that was left to the jury went a long way towards catering for the danger highlighted in *Coutts*, remarked upon in *Foster* (at [60]) and neatly summarised by Professor Hungerford-Welch in his Commentary on *Barre* ([2016] Crim LR, at 770)*:*

> "The real tension in such cases [i.e., where no lesser alternative is left to the jury] arises from the possibility that the jury will decide that the defendant is not guilty of the offence on the indictment, but is guilty of 'something'. This in turn raises the risk that either the jury will convict him of the more serious offence to ensure he does not escape punishment altogether (which would clearly be unfair on the defendant), or else acquit him even though they….are sure that he is guilty of some criminality (thus leaving criminality unpunished)."

40. Fifthly, the mere fact that some Judges might have given a direction extending to the alternative version of manslaughter postulated by the Defence, seems to us neither here nor there. Error on the part of this Judge in this trial has not been shown. It follows that it is unnecessary to consider whether, had the Judge been in error, the conviction would have remained safe.

41. For the reasons given, we dismissed this Ground of Appeal.

ISSUE II: THE JURY MESSAGE

42. *(A) Introduction:* At the end of day one of the Judge's summing up (which extended into a second day), the Judge received a message, through his usher, from a member of the jury. It appears that the juror had asked (possibly on behalf of other members of the jury as well) whether, after verdicts had been returned, they would be able to leave the building by a separate exit so that they did not encounter people who had been in the public gallery during the trial.

43. The Judge regarded this as a jury management issue that he was not required to notify to counsel and the parties at that stage. The Judge's response to the jury as a whole was as follows:

> "Whatever verdicts you reach in this case, reaching verdicts and then announcing verdicts will end your jury service. Should you then wish to leave the building by a private exit so that you

> do not in doing so encounter any member of the public then arrangements will be made for just that."

44. In consequence, it would seem, of receiving the message from the jury (see below), the Judge included the following direction in the summing up:

> "…..you must approach your deliberations with open minds, and you must reach your verdicts based upon considering all the evidence that you have heard, and the directions of law that I have given you."

45. After the jury had returned their verdicts, the Judge informed counsel in open Court that he had received the message and how he had dealt with it. He had not required the message to be reduced to a contemporaneous note.

46. After the conclusion of the trial, the Judge circulated a note ("the Note") to counsel in the following terms:

> "On 16 October after I had risen for the day (now halfway through summing up) and after the jury had departed, I was informed by my usher…that a juror had asked (possibly on behalf of more than just himself) whether after verdicts had been returned they would be able to leave the building by a separate exit so that they did not encounter people who had been in the public gallery during the trial.
>
> I regard this as a jury management issue and an issue that does not require to be notified to the parties at the moment. If it were communicated the information would be passed to Braithwaite's family (some of whom have been in the public gallery during the trial) with possible consequences in relation to their behaviour in court and after verdicts. I intend to send a message to the whole jury tomorrow saying: 'Whatever verdicts you reach in this case, reaching verdicts and then announcing verdicts will end your jury service. Should you then wish to leave the building by a private exit so that you do not in doing so encounter any member of the public then arrangements will be made for you to do just that that.' After verdicts and after the jury have departed I will notify counsel of the steps I have taken. In view of what has occurred I intend to direct the jury that when they retire and begin their deliberations they must have open minds about what their verdicts will eventually be and must decide the case based on the evidence they have heard and the directions of law I have given."

47. *(B) The rival cases on the appeal:* For the *Appellant*, Mr Jewell submitted that the Judge should have notified counsel of the communication from the juror at the time. The failure to do so constituted an irregularity. In the event, there had been private communications between Judge and jury in relation to matters expressed which might have affected the relevant juror's (or jurors') view of the case. The message should

have been reduced to writing so that consideration could have been given to its true interpretation and the reason it had been sent. Potentially, this was a case of a jury irregularity, now dealt with by the *Criminal Practice Directions 2015 (as amended)*, at VI, 26M. An enquiry might have been appropriate and, depending on its outcome, some steps may have been necessary in relation to one or more members of the jury, including (possibly) the discharge of the jury. The course followed by the Judge prevented any of these further actions being taken and raised concerns as to the safety of the conviction.

48. For the *Crown*, Mr Patterson submitted that the Judge had been entitled not to notify counsel of the message from the jury. The message meant no more than it said and did not disclose any jury irregularity. In any event, no further enquiry had been called for. Further and in any event, there was nothing whatever to cast doubt on the safety of the Appellant's conviction. The jury's mixed verdicts of themselves disclosed the care and fairness of the approach they had taken.

49. *(C) Discussion:* In our view and with great respect, the Judge's failure to notify counsel of the message from the jury and his response to the jury – it would seem via the court staff and jury bailiff – gave rise to a material irregularity. The private communications between Judge and jury, however unintentionally, offended against the principle of open justice.

50. The background is itself at least a little curious. On the material before us, there is no suggestion of any prior poor behaviour from those in the public gallery. Nonetheless, we are prepared to assume that there was concern on the part of one or more jurors, looking ahead to the stage when verdicts would have been given, as to how they would leave the Court building.

51. As it seems to us, on receipt of the message the Judge ought to have asked for the message to be reduced to writing. In that way, there would have been a clear record and any doubts or ambiguities could more readily have been explored. For instance, it would have paved the way for rapidly flushing out the nature of any concerns, if concerns there were, underlying the message. Moreover, we do not think that the course to be followed by the Judge is answered by labels; even if the matter was one of "jury management", that does not necessarily determine the appropriate way of dealing with it. The Appellant indeed submits that it was inconsistent for the Judge to categorise the exchange with the jury as one of ("mere") "jury management" and yet add a direction to his summing up and circulate the Note after the event. There is a degree of logical force in this submission, but it should not be pressed too far; both the additional direction and the subsequent communication with counsel could be seen as prudent precautionary measures. That said, the mere fact of the Judge's concern to take those measures should perhaps have rung a warning bell as to the desirability of notifying counsel at the time.

52. In *R v Ball (Linda Sheila)* [2018] EWCA Crim 2896, the trial had been beset by bad weather. There came a point when the jury sent a note to the Judge asking about majority verdicts. Without informing counsel, the Judge told the jury to carry on. The decision of this Court was that there had been a material irregularity. That case was a far stronger case than the present; the jury question there plainly went to a matter central to the trial. Nonetheless, the Court's consideration of the underlying principle

of open justice has resonance for this case. Giving the judgment of the Court, Holroyde LJ said this:

> "19. ….save in the limited situation of an uncontroversial communication raising something unconnected with the trial, it will in almost every case be necessary for the judge to recall the jury if they have asked a question and to answer their question in open court.
>
> 20. ….We have no doubt that Miss Wright [counsel for the Crown] was correct to make her concession that a material irregularity occurred. The answer to the jury's question, namely that they must for the time being continue to try to reach a unanimous verdict, was in itself uncontroversial and we accept that the judge wished to avoid interrupting the jury's deliberations by bringing them back into court to receive that direction. Nonetheless, with all respect to the judge, it was not proper for her to cause her direction to be communicated in the jury room by the jury bailiff. Such a method of communication offends against the important principle of open justice. It gives rise to the obvious risk that in response to the bailiff's statement the jury might be tempted to ask a supplementary question. There is the further obvious objection that there would be no recording of precisely what is said in the jury room. For at least those reasons, the jury bailiff, however experienced and however punctilious, should not have been used in that way.
>
> 21. Moreover, in the circumstances of this case the following of the correct procedure would have provided an important opportunity for counsel, if they wished to do so, to make submissions to the judge as to whether she should not merely direct the jury as to the need for their verdict to be unanimous, but should also reiterate her earlier direction that the jury must not feel under any pressure of time, whether by reason of the adverse weather or for any other reason."

It may be noted that the Court dismissed the appeal as the material irregularity had not cast doubt on the safety of the conviction.

53. In the present case, we understand the Judge's wish not to alert the Appellant's family – but, without being in any way prescriptive, ways could have been found to notify counsel without alerting the public gallery, for example, see CPD IV Trial 26M.12

54. In summary and fortified by the observations in *Ball*, we are clearly of the view that, having received a message from the jury and having had it reduced to writing, the Judge should have notified counsel – who would then have had the opportunity to advance such submissions as they thought appropriate to the Judge. If need be, the jury could have been asked whether there was any matter that they wished to raise with the Judge. That must have been the prudent course and the course consistent with open justice. The failure to do so amounted to a material irregularity.

55. We turn to consider the impact of this material irregularity on the safety of the conviction. In our judgment, the appearance of the matter was more troubling than the underlying reality and we are wholly unable to conclude that it had any impact on the safety of the conviction.

56. First, the terms of the message related to a concern as to exiting the building after verdicts had been reached. We are satisfied that that is the obvious explanation for the message; that is what the message said and there is no reason to suppose that the sender/s did not mean what was said. A concern of such a nature does not begin to disclose any jury irregularity. In that regard there is nothing from which we can tell or surmise that the jury knew whose family members or friends had been attending the trial – even though we have been told that it was the Appellant's rather than the deceased's family who had been in the public gallery.

57. Secondly, while a discussion with counsel would have given the opportunity to clear the air and, if need be, permit some very straightforward inquiry of the juror/s or jury as to the reason for the message, including whether anything was troubling them which they wished to raise with the Judge, it is wholly speculative to suppose that underlying the message was some matter affecting the ability of a juror or jurors to remain faithful to his or their oaths. The Appellant's case on this Ground requires altogether too great a leap – and a speculative leap at that. On any view, there is nothing at all to suggest that, realistically, the discharge of the jury would have arisen for consideration, still less have been required.

58. Thirdly, there is no reason to suppose that the jury did not follow the directions they were given. When initially sworn in, the Judge gave the now standard direction to the jury as to making him aware of any concerns that might arise during the course of the trial. Insofar as they did so through the message, the concern, as already explained, went to departure from the building. The direction given to the jury at the outset, as to deciding the case fairly and in accordance with the evidence, was thereafter reinforced by the Judge's additional direction in the summing up - given, out of an abundance of caution, after receipt of the message. That direction reminded the jury of the need to approach their decision with open minds, in accordance with the evidence and the directions of law the Judge had given. No reason has been shown to suppose, let alone demonstrate, that the jury did not do so.

59. Fourthly, as already recorded, the Appellant was acquitted of the attempted wounding of Mr Deen with the intent to do him grievous bodily harm. That verdict of itself supports the conclusion that the jury approached their task with fairness and care.

60. For the reasons given, we dismissed the appeal on this Ground as well and, hence, dismissed the appeal as a whole.