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No: 202000521/B2
**IN THE COURT OF APPEAL**
**CRIMINAL DIVISION**

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 3 March 2020

**B e f o r e**:

**LORD JUSTICE HOLROYDE**
**MRS JUSTICE THORNTON DBE**
**HER HONOUR JUDGE MUNRO QC**
(Sitting as a Judge of the CACD)

**R E G I N A**
v
**MOHAMMED MALLICK**

PROSECUTION APPLICATION AGAINST A TERMINATING RULING UNDER S.58 CRIMINAL JUSTICE ACT 2003

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**Mr A Johnson** appeared on behalf of the **Applicant Crown**
**Mr J Reilly** appeared on behalf of the **Respondent Defendant**

**J U D G M E N T**

**NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY, THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.71 CRIMINAL JUSTICE ACT 2003. IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.**

1. LORD JUSTICE HOLROYDE: This is an application by the prosecution for leave to appeal against a terminating ruling. Reporting restrictions apply to such an application. We shall refer to the defendant in the criminal proceedings as "M".

2. M was charged with offences relating to the management of houses in multiple occupation. He was due to stand trial in a magistrates' court on 24 September 2018. A pretrial review was heard before a District Judge (Magistrates' Courts) on 10 September 2018. M was not required to attend, but he was represented by counsel instructed by the solicitors who were acting for him in the criminal proceedings.

3. In the course of the hearing, counsel informed the court that M was in India, where he had been unwell and had been admitted to hospital. It was not thought that the trial date would be affected, but counsel was directed by the District Judge to keep the court informed and to provide medical evidence if it appeared the trial date would have to be vacated.

4. On 18 September 2018, M's solicitors sent an email to the court and to the prosecution referring to the fact that the trial was listed for 24 September and saying: "Please note, the defendant director, as you are aware, had been taken ill in India. We have today received a medical letter from the hospital he was admitted to. While he was discharged on 14 September 2018, he has been advised to take 15 to 20 days rest before travelling back to the United Kingdom. We therefore ask that the matter be vacated and relisted."

5. Attached to that email was a copy of a faxed document from a hospital in India, certifying that M had been admitted to hospital on 6 September 2018, suffering from "acute GI infection". The document concluded: "He was discharged on 14 September. Advice: before long journey you have to take 15 to 20 days rest with proper medication and diet."

6. The Magistrates' Court granted the solicitor's request. The trial date was vacated and the trial relisted for a date in January 2019.

7. On 26 September 2018, however, two days after the trial had originally been listed, an

employee of the prosecutor saw M sitting in his office. An investigation began. The prosecution obtained evidence showing that on 15 September M, in India, had changed his return flight ticket so that he could travel to England on 18 September. If that evidence is accepted as correct, it follows that M's return travel had been booked after his discharge from hospital and before his solicitors had sent the email asking for the trial date to be vacated.

8. M was charged on indictment with doing an act tending and intended to pervert the course of public justice, the particulars of the charge alleging that he "with intent to pervert the course of public justice, did an act which had a tendency to pervert the course of public justice in that he caused [the magistrates' court] to be informed that he was out of the jurisdiction and that he would not be in the jurisdiction in order to attend a trial fixed to commence on 24th day of September 2018."

9. M's legal representatives applied to have the charge dismissed. That application was refused.

10. At trial in the Crown Court, the prosecution called evidence to the effect which we have summarised. A submission of no case to answer was then made on behalf of M, on the ground that there was no evidence upon which a jury properly directed could convict. The prosecution resisted the application, contending that a jury could properly conclude that the email of 18 September 2018 was sent on M's instructions; that the email conveyed the message that M would not be in the United Kingdom on the day of the trial, which was false; and that in instructing his solicitors to send the email, M must have intended to pervert the course of public justice.

11. Reference was made to cases mentioned in a skeleton argument lodged by the prosecution in response to the earlier application for dismissal, including in particular Hayes [2004] EWCA Crim. 2844, [2005] 1 Cr.App.R 33. We shall return to the relevant case law shortly.

12. The judge held that the second (not the first) limb of Galbraith 73 Cr.App.R 124 applied: there was some evidence, but it was so tenuous that a jury properly convicted could not find M guilty. The submission of no case to answer therefore succeeded.

13. The basis of the judge's ruling was explained as follows at page 3D to E of the transcript:

> "... there is no evidence directly that this defendant caused the medical certificate to be sent. There is no direct evidence that he requested his solicitors to ask that the trial be vacated. There is no direct evidence that he instructed them that he was going to be out

> of the jurisdiction; and the inference as to that, the prosecution rely on an interpretation of an email which does not, in terms, say that he won't be in the jurisdiction. But, further than that, in order for a jury to convict they would have to take the step of saying not only do they draw the inference that he instructed his solicitors but, also, that he had the necessary intent.".

14. The judge later added:

> "I am clear that the inferential leaps required in this case are leaps too far..."

15. The prosecution, complying with all necessary formalities, gave notice of their intention to appeal against that terminating ruling and gave the necessary undertaking pursuant to section 58 of the Criminal Justice Act 2003. They did not invite the judge to direct that the appeal be expedited and the judge did not do so. The jury were therefore discharged.

16. So it is that the matter comes before this court. The advocates, both of whom appeared below, have made their submissions on the basis that if leave to appeal be granted, this court will proceed to determine the appeal.

17. For the prosecution, Mr Johnson accepts that there was no direct evidence that M instructed his solicitors to apply to vacate the trial date, but submits that direct evidence was not required. Relying on Hayes he submits that a solicitor representing a defendant in criminal proceedings acts as the defendant's agent for that purpose, and has ostensible authority to write to the court on his behalf. The evidence here was not tenuous. A jury could reasonably infer that M caused his solicitors to send the email, the natural meaning of which is that M would not be back in the United Kingdom on the date fixed for trial, and as a result the trial date was vacated. Mr Johnson argues that the very act of sending the email by solicitors on the record as acting for M gave rise to a clear inference that they wrote on his behalf and in accordance with his wishes.

18. Mr Johnson accepts that the prosecution case certainly depended on inferences, but submits that they were inferences which the jury could properly draw and did not require any impermissible leaps. If the jury were satisfied that M had caused the email to be sent, when he had already arranged to fly back to the United Kingdom six days before the listed trial date, Mr Johnson submits it is difficult to see what intent he could have had other than to pervert the course of justice.

19. On behalf of M, Mr Reilly acknowledges the force of the case law on which the prosecution rely, but submits that there was no evidence that M caused the email to be sent. Mr Reilly suggests that the natural inference was that the solicitors had sent the email and its attachment in response to the direction given by the District Judge. In any event, he argues, the email did not say that M would be out of the jurisdiction at the time

listed for trial: the attachment was concerned with M's health, not with his ability to be in a particular place at a particular time. Mr Reilly further submits that each stage of the prosecution case relied on a suggested inference, and the judge was correct to conclude that these involved a leap too far.

20. We agree with the judge that there was no merit in the submission initially made on behalf of M, to the effect that there was no evidence at all that M had committed the offence charged. We do not however agree with the judge's conclusion that the evidence, taken at its highest, was not such that a jury properly directed could properly convict upon it.

21. We consider first the three cases which have been cited to us. In Turner (1975) 61 Cr.App.R 67, the prosecution were permitted to adduce evidence as to what had been said by defence counsel when making a speech in mitigation for the defendant in a different case. The judge held that the statement by counsel was admissible as an admission made by an agent acting within the apparent scope of his authority. This court upheld that decision. At page 82, Lawton LJ giving the judgment of the court, stated three "elementary principles":

> "First, a duly authorised agent can make admissions on behalf of his principal... Secondly, the party seeking to rely upon the admission must prove that the agent was duly authorised... Thirdly, whenever a fact has to be proved, any evidence having probative value and not excluded by a rule of law is admissible to prove that fact: circumstantial evidence is just as admissible as direct evidence. Whenever a barrister comes into Court in robes and in the presence of his client tells the judge that he appears for that client, the court is entitled to assume, and always does assume, that he has his client's authority to conduct the case and to say on his client's behalf whatever in his professional discretion he thinks is in his client's interest to say. If the Court could not make this assumption, the administration of justice would become very difficult indeed. The very circumstances provide evidence first, that the barrister has his client's authority to speak for him and secondly, that what the barrister says his client wants him to say. Counsel should never act without instructions, and they seldom do."

22. In Hayes the defendant was charged with causing grievous bodily harm with intent. His defence at trial was that he had not caused any injuries to the complainant, who must have hurt himself in a fall. This court held that the judge had been correct to permit cross-examination of the defendant on the basis of a letter sent by his solicitors to the prosecutor, in which it had been said that the defendant was prepared to accept that he had caused actual bodily harm and was prepared to plead guilty to an offence contrary to section 47 of the Offences Against the Person Act 1861. It was held at paragraph 18 that

the letter had been admissible against the defendant as a previous inconsistent statement made by him because "the appellant's solicitors were the appellant's agents. They had ostensible authority to write such a letter and no competent solicitors would write such a letter without instructions to do so." We should note in passing that Mr Johnson particularly relies upon that decision as showing, if it be necessary to show, that the principles stated in Turner is not confined to the situation in which counsel appears robed before a court in the presence of his client.

23. In Newell [2012] EWCA Crim. 650, [2012] 2 Cr.App.R 10, the prosecution were permitted to cross-examine the defendant on the basis of something stated in a form completed by the advocate who had represented him at a plea and case management hearing. This court held that the entry on the form was in principle admissible as a previous inconsistent statement by the defendant, though it should have been excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984. The court followed the decision in Hayes, saying at paragraph 22:

> "In our view, an advocate plainly has implied actual authority to do what is normally incidental, in the ordinary course of his profession, to the execution of the advocate's express authority: see Bowstead on Agency, 19th Ed (2010), para 3-027. Recording a matter on a PCMH form is incidental to that which the advocate has been authorised to do - to conduct the defence of a client. Even if the advocate had no implied authority, as the client had said something different to what he recorded, the advocate would have ostensible authority to do so as regards the court on the principles set out in *Waugh v HB Clifford & Sons* [1982] Ch 374 and in *Turner*."

24. In each of those three cases the prosecution had relied upon a statement made by a defendant's legal representative as an admission, or a previous inconsistent statement, by the defendant himself. The circumstances of the present case are somewhat different, but we have no doubt that the relevant principles are the same.

25. Here, it is common ground that the solicitors were acting for M in the criminal proceedings before the magistrates' court. Their email of 18 September 2018 to the court and to the prosecution was headed with the case reference number and explicitly referred to M and his trial date. It requested that the trial date be vacated and gave the reasons for that request. It is, in our view, clear that a reasonable jury properly directed could infer that the email and its attachment were sent on M's instructions. The very fact that the solicitors sent the letter gives rise to the inference that M had caused them to do so. As matters stood at the end of the prosecution case, there was no other apparent explanation for the solicitor's possession of the medical document and no other apparent explanation

for their sending their letter. The absence of direct evidence to which the judge referred did not mean that the jury could not reasonably draw that inference. Nor did the fact that the District Judge had directed that evidence must be provided if the trial date was to be vacated.

26. As to the meaning of the letter and its attachment, it is in our view equally clear that a reasonable jury properly directed could conclude that it was a request for an adjournment of the trial date on the ground that M, by reason of his recent ill-health and hospital admission in India, had been medically advised not to undertake a long journey until 15 to 20 days after his discharge from hospital and would therefore be remaining in India until after 24 September 2018. As matters stood at the end of the prosecution case, that was in our view the obvious meaning. With all respect to the judge, the observation that the email letter did not say in terms that M would not be in the jurisdiction fails to give due weight to the solicitor's use of the word "therefore", which seems to us plainly to mean that M would not be in the jurisdiction on the trial date because he had been advised not to travel.

27. The prosecution adduced evidence showing that by the time the email letter was sent, and therefore necessarily after the instructions to send it must have been given, M had already booked his return flight to the UK for 18 September 2018. Indeed, his flight had taken off several hours before the email was sent. The jury were clearly entitled to accept that evidence as accurate and reliable, and were therefore entitled to find that the basis on which the adjournment was sought was untrue and that M knew it to be untrue.

28. If the jury drew those inferences, they were entitled to draw the further inference that by instructing his solicitors to request an adjournment of the trial date on an untruthful basis, M intended to pervert the course of justice. As matters stood at the end of the prosecution evidence, no innocent explanation was apparent for M to seek an adjournment on an untruthful basis.

29. We do not regard the drawing of each of these inferences as requiring any impermissible leap by the jury, still less "a leap too far".

30. We emphasise that we are concerned only with the evidential position at the end of the prosecution case. Whether all of the inferences on which the prosecution relied would in fact be drawn by a jury at the conclusion of all the evidence is, of course, a different question. But at the time when the judge's ruling was made, we have no doubt that there was a case for M to answer. The judge, with respect, was wrong to withdraw the issues from the jury; that decision was not properly open to her.

31. We therefore grant leave to appeal. We allow the prosecution's appeal against the judge's

ruling that there was no case for M to answer. We reverse that ruling and order that a fresh trial take place in the Crown Court. We will now hear submissions about consequential matters.

32. Gentlemen, that concludes the judgment. To deal with consequential matters, it seems to us that in the light of what you have both helpfully told us, including the fact that the appeal against the conviction is pending in the Crown Court at Luton and that a number of judges for one reason or another are in any event unable to hear that aspect of M's proceedings, we think it would be better for the case to go to a different Crown Court Centre and we would therefore direct that the fresh trial take place in the Crown Court at St. Albans before a different judge. Is there anything either of you wish to say, further to what you have already said?

33. MR JOHNSON: My Lord, no.

34. LORD JUSTICE HOLROYDE: As to reporting restrictions, the statutory provisions in section 71 of the Criminal Justice Act 2003 say that subject to certain exceptions, which we will identify in a moment, no publication shall include a report of this application for leave or this appeal. We may order that that provision is not to apply, either generally or to a specified extent. Where there is a single defendant (as in this case) and he objects to our disapplying any part of the normal statutory provision, then we could only make that exception if, having heard from the defence, we were satisfied that it was in the interests of justice to do so.

35. The statutory exceptions permit the reporting of the identity of the court and the name of the judge, the name, age, home address and occupation of the defendant, the offence or a summary of it with which he is charged, the names of counsel and solicitors in the proceedings, the date and place to which proceedings have been adjourned, any arrangements as to bail and whether for the purpose of the proceedings representation was provided to the defendant under LASPO. Then there is a final relevant provision preserving any other power the court may have to restrict publication for good cause.

36. So, Mr Johnson, on behalf of the prosecution first, what submissions, if any, do you want to make about what if any reporting restrictions there should be?

37. MR JOHNSON: I would not invite the court to relax the statutory restriction. Sometimes there are cases where reporting principles are established, where it is of great assistance to the profession for the reporting restrictions to be at least to some extent relaxed to allow widespread circulation of the judgment. It seems to me that firstly this is a somewhat unusual case where the judgment of the court is unlikely to be one of which the profession needs to become aware immediately but moreover it will be somewhat

difficult for the restrictions to be relaxed in a way that enabled the case not to be linked in the way it was reported to this respondent. It may be that it is the sort of case that is unlikely to attract the attention of the popular press and so comes to the attention of potential jurors, but nonetheless it does not seem, in the Crown's submission, that this is an appropriate case for the restrictions to be relaxed.

38. LORD JUSTICE HOLROYDE: The practical difficulty may be, Mr Johnson, as you say, that our decision is really an application of the principles set out in existing case law and, as you suggest, it may be very difficult for any reporter to report our application of the principles without revealing at least some of the somewhat striking chronology of relevant events. So does your submission come to this, that you would not invite us to relax any of the restrictions, but you are content, are you, that the statutory exceptions in subsection 8 should remain in place so the press can report name, address, charge, etcetera?

39. MR JOHNSON: Yes, I cannot see any problem from any of the matters set out in the subsection.

40. LORD JUSTICE HOLROYDE: That is helpful. Thank you. Mr Reilly, is there anything you want to say, either the same or different?

41. MR REILLY: Not really, my Lord, the only thing I worry about is because of the relatively unusual nature of this trial, the impact on any jury members and the ability to evaluate in the St. Albans Crown Court at a later stage. So as restricted as possible.

42. LORD JUSTICE HOLROYDE: The default statutory provisions, if I can put it that way, would, as I have indicated, permit reporting of M's name, address, the offence he is charged with, those who represent him and the other matters I have mentioned. I think you would have to submit that there was a real risk of prejudice to the administration of justice in the fresh trial.

43. MR REILLY: That is what I invite you to consider.

44. LORD JUSTICE HOLROYDE: That is what you invite us to consider?

45. MR REILLY: Yes.

46. LORD JUSTICE HOLROYDE: And that would depend I suppose upon the prospect that

a St. Albans juror at the time of the fresh trial, whenever that may be, would remember at least something about a case in which it was something to do with a man saying he was in India when he was not.

47. MR REILLY: Yes.

48. LORD JUSTICE HOLROYDE: Something along those lines.

49. MR REILLY: Yes.

50. LORD JUSTICE HOLROYDE: Anything else gentlemen?

51. MR JOHNSON: The other matter, the Criminal Appeal Office summary has helpfully directed attention to section 18(2)(a) of the Prosecution of Offences Act 1985 which makes provision where this court reverses or varies a ruling on appeal for such an order as to costs to be paid by the accused and so I make an application pursuant to that subsection and I can hand up a schedule of costs incurred by the applicant, if that assists.

52. LORD JUSTICE HOLROYDE: Yes, perhaps you had better do that. Mr Reilly, is M legally aided for these proceedings?

53. MR REILLY: My Lord, he is not. My Lord, I would resist the application for costs at this stage. It seems to me the proper time is at the end of the trial.

54. LORD JUSTICE HOLROYDE: The proper time for costs in this court is here and now, so if there are submissions you want to make then do by all means make them.

55. MR REILLY: Well, my Lord, I suppose the only submission that really can be made is that this is not the - nothing in the defendant's doing. He has come to this court to resist the application made by Luton Borough Council.

56. LORD JUSTICE HOLROYDE: Except that, just to put the contrary argument for you to address, Mr Reilly, this appeal has taken place because a submission which we have found to be unfounded was made to the judge on his behalf. You can of course make the fair point that this appeal has also been heard because the judge ruled in favour of that submission, but the actual starting point for the whole thing is what I am bound to say seems to me to have been a wholly misconceived application to dismiss, followed by a submission of no case to answer which on our ruling should plainly have failed. Is there

anything else you want to say?

57. MR REILLY: There is nothing I can add to that.

58. LORD JUSTICE HOLROYDE: We will retire to consider those various points. Thank you.

(The court adjourned for a short time)

59. LORD JUSTICE HOLROYDE: We make the following orders:

1. The fresh trial will be heard before a different judge in the Crown Court at St. Albans.
2. There shall be no order as to the costs of this appeal, with the consequence that each party bears their own costs.
3. The reporting restrictions set out in section 71 of the Criminal Justice Act 2003 apply to the making and hearing of this application for leave and appeal, but subject to the exceptions set out in subsection (8) of section 71. Thank you both.



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