IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1555

No. 202001488 B5

Royal Courts of Justice

Wednesday, 13 October 2021

Before:

LORD JUSTICE EDIS
MR JUSTICE TURNER
HER HONOUR JUDGE KARU RECORDER OF SOUTHWARK

REGINA
V
MATTHEW IAN DUNSTER

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MR N. BARRACLOUGH appeared on behalf of the Appellant.
MR J. HASKELL appeared on behalf of the Respondent.

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J U D G M E N T

LORD JUSTICE EDIS:

1 This appeal against conviction comes before the court as a result of leave to appeal having been given limited to one ground by the full court on 23 March 2021. The court on the same occasion granted an extension of time of considerable length in order to enable the appeal to be advanced. There were a number of grounds before the court on that occasion drafted by the appellant himself and the court refused leave to advance all but one.

2 The appeal is against a conviction by a jury on 27 March 2018 at the Crown Court at Bristol by a majority of 11 to one on Counts 1 to 6 and by a majority of ten to two on Counts 7 and 8 on an indictment. Counts 1 to 4 alleged attempted theft contrary to s.1(1) of the Criminal Attempts Act 1981. These were allegations of incidents when it was said the appellant was one of two offenders who used a BMW motorcar to try and force open cash machines by towing them in order to steal cash from within them. Each of those offences was entirely unsuccessful with the result that the allegations were of attempted theft only.

3 It was alleged by the crown that perhaps for that reason the method adopted by the appellant then changed so that Counts 5 and 7 were allegations of causing an explosion contrary to s.2 of the Explosive Substances Act 1883 and Counts 6 and 8 were allegations of theft contrary to s.1(1) of the Theft Act 1968. This set of four offences was alleged to have been committed by the appellant on his own. It was said that he caused an explosion which on each of the two occasions opened the relevant cash machine and that he was on these occasions able to steal the cash. It is of significance to this appeal that in respect of the first of those offences a glove was recovered left at the scene and, in respect of the second, a cigarette lighter was recovered left at the scene. Both of those items were subjected to DNA analysis in relation to samples of cellular material. A sample from inside one of the fingers of the glove was analysed in this way, as was a sample left on the cigarette lighter. We shall return to the detail of all that later in this judgment.

4 The appellant had also pleaded guilty to an allegation of handling stolen goods. He was subsequently sentenced to a total of 14 years' imprisonment. There is no appeal against sentence before us and it is unnecessary to describe how that sentence was structured.

5 We have briefly outlined the facts of these offences already. The BMW motorcar to which we have referred was said to have been present at five of the six offences against cash machines. The offences were all committed between 11 September and 2 November 2017 in different parts of the southwest of England. Various different methods were used in Counts 1 to 4 to attempt to force open the cash machines and tools, similar to tools which had been observed on the CCTV footage in the process of being used, were recovered from the BMW motorcar when the appellant was later arrested and it was seized and searched.

6 The case was a circumstantial case. The trial proceeded largely by way of admissions of facts of the prosecution case. The appellant was called to give evidence in his own defence and called an alibi witness who said that he had been with her on most but not all of the relevant occasions. The circumstantial evidence in summary was as follows.

(a) The appellant was in possession of the BMW motorcar when he was arrested. That motorcar had been seen at some of the offences on CCTV footage and was the motorcar which the offenders had used.

(b) In it were tools and implements in the boot which were similar to the tools and implements which had been used, according again to CCTV footage, to attack cash machines. The BMW actually contained parts of one of the cash machines in the boot, including its safe door.

(c) The prosecution relied on a DNA profile matching the appellant which was recovered from a balaclava found in the car. We do not need to consider that DNA discovery in further detail for the purposes of this appeal, but the prosecution also relied on the two DNA samples, one from the finger of the glove and one from the lighter, which we have already mentioned. The finding of two different items at two different crime scenes, each bearing the DNA of the appellant was very highly probative.

(d) The CCTV evidence showed that there was damage to the BMW motorcar which further proved that it was the BMW motorcar involved, because that car when discovered and examined had very similar damage to it.

(e) There was Automatic Number Plate Recognition evidence showing the movements of the BMW car which were entirely consistent with it having been the BMW motorcar involved.

(f) There were eyewitnesses who gave descriptions of the offenders in relation to Count 4.

(g) Photographic and forensic evidence showed, again, correlation between the damage to the BMW and the cash machines, the location of the balaclava in the BMW and so on.

(h) There was telephone evidence from the appellant's own telephone relating to internet searches and text messaging which were said by the prosecution to support the contention that he had been responsible for those attacks. In relation to that evidence the appellant's explanation when he was asked about it at his trial was that he was simply showing an interest in the offences which had been committed by other people, because he was by then aware of the police interest in him. Those text messages were quite unambiguous in their plain meaning and it was open to the jury to infer from them that their author, the appellant, had in fact been involved in the offences which they described.

(i) The appellant had been asked to give the police the password for his iPhone and had refused to do that. The judge gave an appropriate direction in that regard about how the jury might use that piece of evidence and no criticism is or could be made of that. The judge also later gave a direction on the significance of the appellant's undoubted failure to mention when questioned things that he later relied upon in his defence at trial. The appellant had said almost nothing to the police, but at trial gave evidence in detail seeking to explain the circumstantial case of the prosecution, but not, as we have said, seeking to challenge the facts on which it was based.

7 The position was, therefore, a difficult one from his point of view.

8 The ground on which the full court gave leave was expressed by HHJ Tayton QC giving the judgment of the court in these terms:

> "We are of the view that it is arguable that further evidence from the forensic scientists' statements over and above that contained in the agreed facts should not have been given to the jury after retirement and that this may have affected the safety of the convictions. We therefore think it right that this matter should be considered by the full court, which can also decide whether to give further guidance on this area of procedure."

9 We shall in a moment turn to the events which occurred during the retirement of the jury which give rise to that ground of appeal. However, it is appropriate to preface that consideration with the observation that it follows from the decision of the full court that there is no arguable criticism of the overall fairness of the trial or of the judge's summing-up in which he placed the issues fairly and comprehensively before the jury for their decision.

10 After they had retired the jury sent out a note. The note contained a number of questions all about the DNA on the glove and on the lighter. The note began as follows:

> "Re. agreed fact 74, which reads, 'the Forensic Scientist concluded the probability of obtaining this matching result, if the major portion of the DNA originated from somebody unrelated to Matthew Dunster is less than one in one billion'."

11 That is really an observation rather than a question and relates to agreed fact 74, which was an agreed fact concerning the DNA on the inside of one of the fingers of the glove.

12 The next part of the jury note said this:

> "DNA profiling. We are wondering about the DNA on the glove and lighter. With regard to the other sets of DNA, we understand we don't know who the contributors were but how strong were their profiles? Were they also a billion to one from one person?"

13 The note concluded with this question:

> "Can you transfer your DNA into your own glove from shaking hands with another person? Feels a bit unclear. Thank you."

14 The judge dealt with the note in the appropriate way. He caused the court to be convened in the absence of the jury and read the note to the parties and into the record. He embarked upon an analysis with the assistance of counsel of the note and concluded that in relation to the two questions, namely, first, how strong were the other profiles and the secondary transfer issue, that the agreed facts did not provide the answers. He therefore went to the original witness statements of the forensic scientists (different forensic scientists had analysed each of the two samples) to see whether they contained the answers to the jury questions. There was some further discussion in the report about the glove in relation to the minor portion of the DNA in the mixed profile, but there was nothing in the relevant witness statements about the phenomenon which is sometimes described as "secondary transfer". He referred to his understanding that there was no longer an absolute rule prohibiting additional material being placed before the jury after they had retired and expressed his preference for helping the jury, if it was possible to do so. At one point he said:

> "I think it would be unfortunate from the defendant's point of view if they got the impression that you cannot transfer DNA by shaking hands. It's tempting to say if we had had the DNA expert here all these matters could have been explored, but of course with DNA evidence one has to be careful because you can go on and on in relation to these things and so there is great merit in the simplicity that we have got from the agreed facts. On the other hand, the question having been raised, subject to what Mr Clough [counsel who then appeared for the appellant] has to say, I might be inclined just to try to be a bit more helpful than simply saying 'I am sorry. That is the evidence. You are not going to hear any more'. Mr Clough, what do you say?"

15 To this Mr Clough replied:

"I agree entirely, your Honour. The jury have asked the question. It is a perfectly reasonable question in my opinion and I think that if we can be helpful to them then we should."

16 After some further discussion, the judge put to both counsel a direct question as follows:

"Do you both agree that despite the fact that they are in deliberations there is no reason why they cannot be given this additional agreed evidence?"

17 Mr Clough said "I agree, your Honour" and Mr Haskell (counsel who appeared for the prosecution at trial and before us) said similarly "I agree." The judge then had the jury back in and gave them the answers, as he had suggested he would, in the terms which had been expressly agreed by counsel. We propose to explain the effect of that by setting out agreed facts numbers 71 to 88 as they were before the jury and interpolating into agreed facts 72 and 85 what the judge added to them and then by setting out in addition the additional narrative which he gave to the jury on the subject of what we have described as secondary transfer. The new parts, received after retirement, are in bold type below.

"• [71] The police sent the finger shaped piece of material (exhibit SB/5) for examination and a mixed DNA profile was recovered from the inside surface of the glove finger.

• [72] Ross Ferguson is a Forensic Scientist employed by Cellmark Forensic Services. He was asked to provide a statistical evaluation of the DNA profile recovered from exhibit SB/5.

• 'Mixture, clear complete major profile determined, majority of DNA appears to be of male origin, suitable for comparison, major portion only, minor portion not suitable for routine statistical analysis, major portion only [and then] match obtained.'

• [73] Ross Ferguson confirmed that the inner surface of exhibit SB/5 indicated the presence of DNA from at least three contributors. The clear complete major DNA profile matched the reference DNA profile from Matthew Dunster.

• [74] The Forensic Scientist concluded that the probability of obtaining this matching result if the major portion of the DNA originated from somebody unrelated to Matthew Dunster is less than one in one billion.

• [75] The Forensic Scientist evaluated the findings as providing extremely strong support for the proposition that the DNA originated from Matthew Dunster.

• [82] The Crime Scene Investigator seized an orange lighter (exhibit KM/2) From the ground near to the trail of burning on the tarmac leading to the ATM.

• [83] The police sent the orange lighter (exhibit KM/2) for examination. Swabs were taken from the lighter and a mixed DNA profile was recovered.

• [84] James Beard is a Forensic Scientist employed by Cellmark Forensic Services. He was asked to provide a statistical evaluation of the DNA profile recovered from exhibit KM/2. If a person is found to be a potential contributor to a mixed DNA profile the preferred method for determining the significance of this is to calculate the 'likelihood ratio'. This is expressed in terms of how much more likely the DNA profile is if one of the propositions is true rather than the other.

> • [85] James Beard confirmed that swabs from the orange lighter (KM/2) indicated the presence of DNA from at least three contributors. **'It was not possible to determine a clear major contributor of DNA to this result, however in the scientist's opinion, the result was suitable for comparison purposes.'** All of the components in the reference DNA profile of Matthew Dunster were represented, such that in his opinion, Mr Dunster could be a substantial contributor to it. **'The nature of the result is such that this finding is not suitable for routine statistical evaluation and consequently the Forensic Scientist undertook a statistical evaluation using probabilistic genotyping software. [So it's a special type of software.] And I have considered the following two alternatives [says the scientist].'**
>
> • [86] The Forensic Scientist considered two propositions:
>
> i. The DNA has originated from Matthew Dunster and two unknown individuals; or
>
> ii. The DNA has originated from three unknown individuals.
>
> • [87] The Forensic Scientist concluded that the first proposition is one billion times more likely than the second. The Forensic Scientist cannot say how or when the DNA profile came to be deposited.
>
> • [88] The Forensic Scientist evaluated the findings as providing extremely strong support for Matthew Dunster having contributed some of the DNA rather than none."

18 This is how the judge described secondary transfer:

> **"Particles of DNA can be transferred by [what we call] secondary transfer. Particles of DNA can be transferred by secondary transfer. One explanation for the DNA mix in the glove finger may be that three different people, Matthew Dunster and two unknown individuals, have, at different times, worn the glove. Another explanation may be that one has shaken hands with others and so deposited a DNA mixture of all three in the glove that way'... I'm just going to add, there are obviously other things you can imagine which might result, because DNA can be transferred, giving rise to that mix being deposited in that glove. Perhaps I should just end by saying, you know, one mustn't, certainly not with scientific evidence indeed with any evidence, as I said to you in my summing up, you know, speculate beyond the sort of facts that you have. So we've added to them based on the scientific evidence in the case and, and facts that are, are agreed between us. Obviously, I'm not forbidding it, but can I just give an indication, we're unlikely to be able to take any of that much further. All right?"**

The Law

19 As we have observed, the learned judge acted on the basis that there was no longer a firm rule which prohibited him doing what he accepted was the provision of additional material to a jury after it had retired. We, therefore, need first to consider what the law is in relation to that subject and whether he was entitled to embark on the course on which he did embark in law.

20 An account of the history of the rule that no new evidence may be given to the jury after retirement can begin in 1952 and with the case of *R v John Owen* [1952] 2 QB 362. After considering a number of earlier cases, of which only *R v Browne* [1944] 29 Crim App R 106

was really on point, the Lord Chief Justice, Lord Goddard, decided to lay down a rule in clear terms saying:

> "In any case we think it right to lay down that once the summing-up is concluded, no further evidence ought to be given. The jury can be in reply to any question they may put on any matter on which evidence has been given, but no further evidence should be allowed."

21 The reasoning of the court in *Owen* is that any other course may give rise to an unending passage of evidence, cross-examination, submissions and counter-submissions and so on at a stage when the parties have both closed their cases and neither had sought to reopen them. The court said this:

> "The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that whether it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex v. Browne*, the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put upon it. A witness might be called who would then be open to cross-examination and the defence might then apply to call further evidence in answer."

22 In *R v Wilson* [1957] 41 Crim App R 226 that passage was repeated by the Lord Chief Justice, with emphasis, and applied and followed in a case where the jury's question was "apparently irrelevant" unlike that in *Owen* and where the appellant was "obviously guilty". The court declined to apply the proviso in s.1(4)(i) of the Criminal Appeal Act 1907, because to do so would "in effect overrule Owen's case." Plainly, in these two decisions the court laid down a firm rule of general application. There have been some relevant statutory changes since those days. At that time the test for allowing the appeal was different and the court had no power to order a retrial. From 1 January 1996 the Court of Appeal has been concerned only with the safety of convictions and does not proceed by a two stage process identifying irregularities and then, secondly, considering whether to apply the "proviso", as it was called in the language of the day. Since the enactment of s.7 of the Criminal Appeal Act 1968 it has had the power to order a retrial. The court in *Wilson* said that it would have ordered a retrial if it had power to do so.

23 The acquisition by this court of the power to order a retrial, however, is not a reason to doubt the earlier cases. In *R v Corless* [1972] 56 Crim App R 341 the court applied the rules in *Owen* and *Wilson* in a case where counsel agreed that in answer to a jury question after retirement the jury could be told that Haslingden was about eight miles from Blackburn and about four miles from Accrington. The conviction was quashed and, so far as can be seen, no retrial was ordered. This was perhaps the high watermark of the rigidity of the suggested rule.

24 In *R v George John Davies* [1976] 62 Crim App R 194 something of a relaxation of the rule occurred. The rule itself was not doubted. It was held that the provision of witness statements to the jury after retirement, which they had not seen before, was an irregularity and should not have happened. However, the court went on to consider what the consequences of that irregularity were and "applied the proviso." The jury had asked for two witness statements of a witness who had given oral evidence. They were aware of them because evidence about their existence had been given. The first of them had been put line by line to the witness in cross-examination. They asked the usher if they could have these two witness statements and the usher obtained them from the court clerk and supplied them

without more ado to the jury. That was later discovered. The court declined to quash the conviction.

25 In relation to the rule in *Wilson* the then Lord Chief Justice expressed puzzlement about Lord Goddard's words which are quoted above, saying:

> "We are not able to understand why it should be regarded as an overruling of *Owen's* case. If there is an irregularity, it seems to us that that irregularity with all its faults must be considered and the question must be posed every time on the facts of the individual instant case: does this give rise to a miscarriage of justice? If the answer is no, it seems to us that effect must be given to the obvious intention of Parliament."

26 The intention of Parliament was expressed in the then wording of s.4(1) of the Criminal Appeal Act. So, even before the change in the wording of that provision, in January 1996 the rule under consideration had been relaxed in its effect.

27 Coming to more modern times, in *R v Karakaya* [2005] EWCA Crim 346 the court had to consider the significance of the discovery of documents downloaded by a juror from the internet in the jury room after the jury had delivered the verdicts and left court. The court addressed the problem by considering the material and concluding that it was not satisfied in the light of its contents that the convictions were safe. They referred to the authorities mentioned above, among others, and summarised the principles as follows:

> "24. It is easy, but superficial, to dismiss these rules as purely technical or procedural. In truth, they reflect something much more fundamental. If material is obtained or used by the jury privately, whether before or after retirement, two linked principles bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally however, we need to remind ourselves of them."

28 The court then expressed its decision as follows:

> "27. Applying these principles to the present case, the material obtained by the juror from the internet after the jury had retired, contravened the principles which prohibit the use of information, potentially relevant to the outcome of the case, privately obtained out of court by a juror, as well as the reception of further material after the jury's retirement. Having considered the material, we are not satisfied that these convictions are safe."

29 There had, therefore, been a considerable shift from the rule propounded in 1952 by Lord Goddard, Chief Justice. This was succinctly expressed by this court in *R v Hallam* [2007] EWCA Crim 1495 at para.22:

> "It used to be understood that there was a very firm rule that evidence cannot be admitted after the retirement of the jury, but more recent authorities confirm that there is no absolute rule to that effect. The question is what justice requires."

30 A factor of relevance to that question is whether the new material had been sought by the defence or was perceived to be of assistance to the defendant. The approach in *Hallam* was cited and applied in *R v Khan* [2008] EWCA Crim 1112. The consent of the defendant on the facts of that case was said to be "an end of the matter." The court dealt with it in this way:

> "In our judgment, the fact that the appellant consented to this course of action is really an end of the matter. However, at the very least, if this ground of appeal is to succeed, the appellant must show that in some way he has suffered some prejudice which renders the verdicts of the jury unsafe."

31 We would not hold that the enquiry into the safety of the conviction in cases of this kind must always come to an end if it is shown the defendant consented to what happened. The defendant's consent and in particular the perception that the new material might assist his or her case is plainly highly relevant. However, there may be circumstances in which that consent may have been entirely misconceived, given after inadequate time for reflection or based on inadequate advice. We would not exclude consideration of factors of that kind.

32 As the decision in *Khan* itself demonstrates, it is necessary ultimately to consider whether there was some prejudice which renders the verdicts of the jury unsafe. It follows from all this that a judge considering whether to permit the jury to be given some new information in any form after their retirement must consider the matter not on the basis of some absolute rule, but on what the interests of justice require. When balancing the interests of justice, it will be important to assess the importance of the new material and to give particular, probably decisive, weight to any real possibility that the absence of an opportunity to deal with it evidentially or in closing submissions has harmed the interests of the defendant to any extent. It will not be possible at that stage to reopen the evidence generally or to permit further speeches to be made. If admission of evidence at that stage might disadvantage the defendant because further evidence or submissions are in fairness required, then the choice will be between refusing the request for new information and carrying on, or discharging the jury so that the new material can properly be addressed in the course of a retrial. The situations where this problem may arise will be many and varied and there is no absolute rule to guide the trial judge. On appeal this court will be concerned only with the safety of the conviction, which includes deciding whether or not the trial was fair to the defendant. None of this means that the parties should have a chance to put in whatever new evidence they like after the jury has retired. The default position remains firmly that evidence should be placed before the jury during the parties' cases and not at any other stage. It is likely that new information will only be found to be in the interests of justice at that very late stage in the case on very rare occasions and where in particular:

1. It answers a question asked by the jury;

2. It is neutral or at least incontrovertible; and

3. It is clear that a defendant is not in any way disadvantaged by the stage at which it is admitted.

33 Applying these principles, it seems unlikely that in the modern era a court would quash a conviction on the basis that a jury had been told while in retirement that Haslingden is four miles from Accrington.

34 The editors of Blackstone at D19.12 suggest that CrimPR 25.9(6) has restored Lord Goddard's rule in *Owen*. We do not agree. It says:-

> "Unless the jury (if there is one) has retired to consider its verdict, the court may allow a party to introduce evidence, or make representations, after that party's opportunity to do so under paragraph (2)."

35 This is a permissive provision, and we have said above that the subsequent relaxation of the rule in *Owen* would not permit the parties to call evidence, or make representations after retirement. We have attempted to define its real ambit at [41] above, and there is nothing in that paragraph which is inconsistent with CrimPR 25.9(6). The rule in *Owen* was in two parts: part one prevented the provision of new material to the jury after retirement; and part two required this court to quash all convictions where that rule had been breached. The subsequent decisions show that this court has declined to follow part two of that rule. CrimPR 25.9(6) has nothing to say about the circumstances in which this court will quash a conviction.

36 We have restated the law and traced it through the decades in order to attempt to give further clarity to the current situation.

Discussion and Decision

37 Applying those principles to the present case and analysing what the judge actually did, we have concluded that he went further than was appropriate. He ought to have directed them that the evidence was closed and that they should consider the significance of the DNA results on the basis of the agreed facts. He could properly also refer to any parts of the agreed facts which were relevant to the questions.

38 The additional material which he gave to the jury was either unilluminating or already apparent from the agreed facts. The additional material is given at three stages. In his additional gloss on admission number 72 the judge gave the jury some further information culled from the report of the expert which simply amplifies in unexplained technical language something which was already apparent from the admissions. The additional comments in relation to agreed fact 85 in relation to the cigarette lighter adds some technical information, but does not change the effect of the agreed fact in any useful way. The agreed facts as drafted showed that the sample on the swabs from the lighter indicate the presence of DNA from at least three contributors. The important question was whether any of the three was the appellant. Who the other two may have been was immaterial to the jury's consideration and there was, in any event, no evidence about that. The addition of the extra technical information which appears in bold in our amended version of agreed fact number 85 did nothing to help the jury to resolve the question. The important material in relation to those agreed facts was already contained in paragraphs 86 and 87; namely, it was one billion times more likely that the appellant had contributed to the sample than that he had not. Agreed fact number 88 summarises its effect in clear terms and the judge would have done better to remind them of the issue, and of the way in which the agreed facts addressed it.

39 In relation to what the judge described in his explanation as "secondary transfer", it was already in the agreed facts that the forensic scientists could not say how or when the DNA profile came to be deposited. If the only way in which the DNA profile could have deposited on the inside of the glove was direct transfer from the wearer, the scientist would have been able to say that. The fact that the scientist did not know how it had come to be there meant that other means of transfer were possible. The jury could have had that explained to them in plain language simply based on the meaning of the material they already had in the agreed facts.

40 In our judgment, it is particularly unwise for a trial judge to go beyond the agreed facts in a case where the parties have carefully prepared them to reflect the agreed scientific

evidence so that it is clear and intelligible. If the court considers on reading the agreed facts that they are not clear and intelligible, that is the time to intervene and to suggest the parties should revise them so that they are clear, intelligible and comprehensive. That process having been completed, and the material having been placed before the jury in the prosecution case, explained by the defendant in his evidence and then been subjected to analysis in the closing submissions of the parties, it is too late to start introducing new material once the jury is out. If, as here, the parties have produced satisfactory agreed facts most relevant questions from the jury can be answered by reference to them.

41 As we have established, the issue for us is not whether the judge acted appropriately in taking the course that he did, but rather whether that course renders the convictions unsafe. We say convictions plural, because although the glove and the lighter only relate to two of the six attacks on the cash machines, the judge did give a cross-admissibility direction and, therefore, if any of the convictions were to be quashed, we would have to consider whether they should all be quashed. At this stage, we are making no observation at all about how we might determine that issue if it arose, because it does not.

42 The material which the judge added to what the jury already knew was, as we have already said, either anodyne in that it added nothing to what the jury already knew from the rather clearer language in the agreed facts or may perhaps have been positively helpful to the appellant's case. The only part of the new material to which that last observation might apply is the explanation of the phenomenon of secondary transfer. It should be recalled, however, that the appellant's case in his evidence was that he might well have worn the glove in question because he used to buy packets of five gloves at a time and wore gloves frequently while working on cars, including the BMW motorcar which was the vehicle used in these offences. Having said that, the viability of secondary transfer as an explanation of the DNA of the appellant on either the lighter or the glove could plainly only benefit him. Having regard to the nature of the material which the judge supplied to the jury, we can find no way in which it might have disadvantaged the appellant. It was either neutral or helpful to him. It seems to us that the fact that both counsel and, in particular, counsel for the defendant agreed in terms to the judge's proposed course, which was exactly the course he then took, is highly material. It confirms our assessment of the material which we have just explained. Plainly, defence counsel at the time took the same view that we did and that is why he accepted the judge's suggestion with, as we have pointed out on the transcript, some alacrity.

43 For these reasons, although we have identified an error so far as the judge's treatment of the questions from the jury is concerned, we are quite satisfied that it does nothing to undermine the safety of these convictions. As we have explained above, they were based on circumstantial evidence which was, taken together, truly overwhelming. For these reasons, this appeal is dismissed.

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