Neutral Citation Number: [2023] EWCA Crim 735

Case No: 202103723 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
HIS HONOUR JUDGE PICTON
T20217041

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 June 2023

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE BUTCHER
and
MRS JUSTICE CUTTS DBE

- -

Between:

REX	**Appellant**
- and -	
PENELOPE JACKSON	**Respondent**

- -
- -

Clare Wade KC (instructed by **Arif & Co**) for the **Appellant**
Christopher Quinlan KC (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 21 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 28 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Cutts DBE:

1. On 29 October 2021 the applicant, then aged 66 years, was convicted after her trial in the Crown Court at Bristol of murder by a majority of 10:2. She was sentenced to imprisonment for life with a minimum term of 18 years pursuant to s.322 of the Sentencing Act 2020.

2. She renews her application for leave to appeal conviction following refusal by the single judge.

3. There was no dispute at trial that the applicant killed her husband, David Jackson, on 13 February 2021. The issues were ones of intent and, if proved, loss of control.

4. The principal issue on this renewed application concerns the adequacy of the judge's direction on loss of control in circumstances where the applicant alleged a long history of coercive control by the deceased in their relationship. There are further issues in the duty of the prosecution to call witnesses disclosed rather than served as part of their case and the release to the press of digital evidence produced in the trial before the end of the trial.

The facts

5. At the time of the killing the applicant had been married to the deceased, aged 78 years, for 24 years. On 13 February 2021, when the country was in lock down, there was a birthday meal for the applicant. The applicant and deceased were present together at their home address. Their daughter, Isabelle, and son-in-law Tom Potterton attended by Zoom. During the meal there was a disagreement between the applicant and deceased which upset her and the meal ended.

6. Shortly afterwards, the applicant sent a message to her daughter which read:

> "Have tried all the websites, useless. If this goes tits, you have this message. No idea what is going on? I love you to the ends of the earth. God blessing."

7. Almost exactly an hour later, the deceased called the emergency services and stated that he had been stabbed by the applicant in the chest. The applicant took over the call from him and informed the emergency operator that she had stabbed her husband. During the call, she stabbed him twice more. She inflicted a total of four stab wounds upon him. Two were to his chest. One was to his abdomen and the other to his thigh. The wounds to the torso caused a catastrophic loss of blood which the deceased could not survive.

The prosecution case

8. The prosecution case was that the applicant had intended to kill the deceased and that there had been no loss of control. She had intended to kill him when she went to his bedroom and inflicted the wound to his chest whilst he lay in bed and when she inflicted the further wounds which proved fatal.

9. Her comments and conduct whilst the deceased was on the phone seeking help, together with comments she made when arrested at the scene and in the custody suite demonstrated her intent and that she had retained her self-control.

10. There was no serious threat of violence to the applicant when she inflicted the wounds. She had invented or exaggerated her claims of domestic abuse in the form of controlling and coercive behaviour during the marriage and her evidence that he had taunted her when she inflicted the first wound did not justify a sense of being seriously wronged.

11. The applicant knew what she had done and why she had done it. At no point did she suggest in a confession note, the 999 call or the conversation with police officers after her arrest that she had lost self-control.

12. To prove the case against the applicant, the prosecution relied on the following:

    i) The 999 call made initially by the deceased in which he said that the applicant had stabbed him. The call was taken over by the applicant who said that she had done so and had done it again. She said "*I have killed my husband, or tried to, because I've had enough."* She was calm and resolute during the call and able to give her address and telephone number before stabbing the deceased again. She repeatedly stated that she was "compos mentis". She refused to follow the instructions of the operator to assist her husband whilst waiting for the ambulance. She said that she knew that the call was being recorded but had had enough of the abuse and nastiness. She told the operator that the deceased was in the kitchen "*bleeding to death with any luck."* She said that she wanted him to die. She said that she had stabbed him three times, once to the shoulder and twice to the abdomen. She said that his death was a dreadful solution for her but was her only way out.

    ii) Second, the prosecution relied on comments made by the applicant to police officers who attended the address. These were recorded on body worn cameras. On her arrest for attempted murder, she replied "*Hopefully it's not attempted."* She repeated comments that she hoped her husband was dead.

    iii) Third, the prosecution relied on the evidence of the officers at the scene who, amongst other things found a notepad which contained a note written by the applicant headed "confession" and "to whom it may concern". In that note, the applicant said that she had taken so much abuse over the years. The deceased was a good father, but the mask slipped that night. She concluded that she accepted her punishment and "*may he rot in hell."* The prosecution alleged that this was written before she had stabbed the deceased and was a prediction of what she was about to do.

    iv) Fourth, the comments made by the applicant following her arrest and on her arrival in the custody area of the police station. She was assessed there by a mental health nurse and was calm, able to engage appropriately and answer questions clearly.

v) Fifth, evidence from the pathologist as to the number of stab wounds, their depth and the force with which they were inflicted. It was the Crown's case that they were not inflicted as a result of loss of control.

vi) Evidence from family and friends which provided insight into the character, personalities, relationship and marriage of the applicant and deceased. They had witnessed no more than bickering between them. None had witnessed physical violence or considered the deceased to be controlling.

13. The applicant provided a prepared statement in her police interview in which she gave the background of her relationship with the deceased. She spoke of an incident when she had been threatened with violence by the deceased on 23 December 2020 and the meal on 13 February 2021. She denied any intention to kill or cause harm to the deceased. Thereafter she made no comment to questions asked of her.

The defence case

14. The applicant accepted that she was guilty of manslaughter. It was her case that she did not have the intent for murder.

15. Further the applicant said that she had lost control in the context of her being a long-term victim of domestic abuse at the hands of the deceased who had become increasingly more controlling, isolating, violent and abusive during the course of the marriage and it was this, together with the combination of words used by him on 13 February 2021 whilst thrusting his face towards her which had triggered her eventual loss of self-control.

16. In her evidence, the applicant said that she did not know what she was doing when she killed her husband. She said that she loved him and did not want to hurt him. She had been babbling when she spoke to the emergency services and did not know what she was saying. She said that she had not meant to kill the deceased.

17. On 13 February, she had gone to bed following the meal, upset because the deceased had ruined it. She was in despair, thinking about all she had given up for him. She decided to kill herself, using a knife she had taken to the bedroom to protect herself against the deceased. She confronted him with it in the spare room and told him he could not do "this" anymore. He goaded and belittled her, telling her that she was pathetic. At this point she lost self-control and inflicted the first wound to his chest with the knife.

18. She left the bedroom, put the knife down in the kitchen and wrote the confession note. She described it as her confession for having stabbed the deceased in the chest. She had lost all self-control and had not intended to cause him really serious harm.

19. When the deceased telephoned the emergency services, she said he taunted her saying she could not even get that right and was pathetic. His face was close to hers with his neck extended. The appearance of his eyes was indicative of him being horrible and she stabbed him again, this time to the abdomen. She had not helped him when asked to do so by the paramedic on the 999 call; neither had she stemmed the bleeding or got towels when asked to do so as she was scared of him and physically could not move.

20. In support of her defence that she had lost self-control, the applicant described the deceased as being at times an abusive husband who had physically and mentally mistreated her. She had concealed his controlling and abusive behaviour from others. She relied on the following examples of his controlling and coercive behaviour:

    i) There had been jealousy from the deceased from the outset. He required her to demonstrate an unwavering commitment;

    ii) He insisted that the applicant's youngest daughter, Isabelle, was presented to everyone as his biological daughter so they presented as a family unit. This isolated the applicant from friends and family who knew the truth. There could be no reference to the applicant's past. The deceased cultivated a "them" and "us" mentality which alienated others outside of the relationship. She was not permitted her own friends. They socialised only jointly;

    iii) The evidence of Charlotte Revelly who had hidden letters and photographs of the applicant's previous husband, Isabelle's biological father, at her request;

    iv) The deceased had caused criminal damage to property in their home;

    v) Following the suicide of the deceased's son, there were a series of incidents of violence by the deceased towards the applicant. These included her being thrown down a set of stone stairs, being punched in the face and, at a family barbeque, being headbutted with a knife being held to her throat. The applicant had counselling about his violence;

    vi) The deceased frequently made threats that he would wake Isabelle at night and tell her of her true paternity which terrified the applicant;

    vii) The deceased was violent to her in front of Isabelle, waking her on one occasion when she was aged 7 or 8. He broke a mother's day gift that she had bought the applicant in front of her;

    viii) Incidents of sexual violence had taken place about which the applicant had been too ashamed to tell anyone;

    ix) The deceased was verbally aggressive, demanding and demeaning towards the applicant. He belittled her in front of her friends. On occasions he grabbed and shook her, calling her a thing. He became irritated if she was considered by him to be too loud or annoying for expressing her opinions. She would be subjected to periods of silence where the deceased would ignore her;

    x) On 23 December 2020, the applicant recorded on her phone an incident where, following an argument over the remote control, the deceased told the applicant to "*fuck off to bed before I throw this (a wine glass) at you.*" He threatened her with a poker and broke the conservatory window where she had locked him in because she was frightened. The applicant called the police after the deceased left the house as she was worried about him. When the police arrived and noticed bruising to her arms, she minimised what had happened and did not wish to pursue a prosecution;

xi) On 13 February 2021, the applicant had bruising to her upper arms when brought into custody. These were caused when the deceased grabbed and shook her because she had been talking to Isabelle about him;

xii) The deceased had medical issues and treatment which the applicant linked to his behaviour. She spoke of the burden placed on her whilst she cared for him including cleaning him if he soiled himself and clearing up when he threw food that she had cooked onto the floor, made appointments for the deceased including contacting hospitals on his behalf and ran her life according to his needs. This involved cooking his meals at certain times, all the housework, shopping and gardening whilst being told she could not do anything right. She was not permitted to do anything on her own and had to be with the deceased at all times.

21. The applicant had not appreciated that she was being coercively controlled until after she had been remanded in custody where she felt safe and could speak about her experiences without feeling ashamed.

22. She further relied on her good character.

Issues for the jury

23. The issues for the jury were whether they were sure that the applicant had intended to kill the deceased or cause him really serious harm. In deciding whether she had such intent, the jury were directed by the judge to consider what she did and said at the time of the killing as well as before and afterwards. For example, they had to consider the significance of the confession note.

24. If they accepted that the applicant had such intent, the jury had then to consider the defence of loss of self-control. In this regard, the jury had to consider first whether the applicant had in fact lost her self-control, second, if so, what the trigger was for any loss of self-control and third whether someone in her circumstances might have lost her self-control. In this context, a significant issue in the trial was the degree to which the applicant was or was not the subject of domestic abuse on the part of the deceased.

Ruling on the calling or tendering of witnesses

25. In advance of the trial, the prosecution disclosed the witness statements of Isabelle and Tom Potterton, Patricia Jackson and Karen Fisher, to the defence as unused material.

26. The defence applied during the trial for these witnesses to be called by the prosecution or tendered for cross-examination or, alternatively, for the judge to call the witnesses himself. It was submitted that they were all credible and capable of belief. The defence should be allowed to cross-examine them as opposed to calling them, avoiding an unfair advantage to the prosecution of being able to cross examine them.

27. Ms Wade KC, who acted for the applicant as now, submitted that Isabelle and Tom Potterton were direct witnesses to the lead up to the offence as they were present at the Zoom meal. Further, Isabelle could give an account of the bickering between her parents, the events of 23 December 2020 and of the domestic violence towards her

mother. She supported her mother's account in relation to the threats made by the deceased to reveal her true paternity, an aspect of the deceased's controlling and coercive behaviour.

28. Ms Wade submitted that Patricia Jackson, the deceased's first wife, could give relevant evidence as to the deceased's behaviour towards her whilst married and that he was controlling. Without this evidence, the jury only had the evidence of Sheila Taylor, the deceased's second wife, and were deprived of the whole picture.

29. She submitted that Karen Fisher, the deceased's eldest daughter, could give relevant background evidence of threats made to the applicant with a knife in Germany in the early stages of their relationship.

30. Ms Wade accepted that many of the authorities on the subject of the Crown's duty to call witnesses concerned a refusal to call those whose statements had been served upon the defence as opposed to those which had been provided by way of unused material. She submitted however that it is by no means clear that the principles at common law do not apply to both served and unused witnesses. Further, she submitted that these authorities predated the Criminal Procedure Rules and the overriding objective to achieve justice which they have imported.

31. The issue in this case was one of domestic abuse in the form of controlling and coercive behaviour which had been hidden from family and friends. Any evidence which went to that issue should have been called by the prosecution. In the event that the prosecution refused to call these witnesses, the judge should exercise his discretion and power to do so.

32. The prosecution submitted that the judge could not order the prosecution to serve, then call any witness whose statement had been disclosed as unused material. Neither the Criminal Procedure Rules nor the Criminal Practice Direction empowered the court to do so. There was a distinction between witness statements served and those disclosed. The defence application concerned disclosed statements. The prosecution had a discretion about which witnesses to call and there was no obligation to call witnesses whose statements had been disclosed but never relied upon as part of the prosecution case. The defence were free to call the witnesses themselves and were not prejudiced by so doing.

33. The judge ruled that there was no legal foundation for the assertion that the court could compel the prosecution to call the witnesses. Even if the court did have the authority to order the prosecution to call the witnesses, the judge would not do so. They had not been served as part of the prosecution case. They were available to the defence and there was no impropriety in the prosecution choosing not to call them. The discretion exercised by the prosecution appeared reasonable. The witnesses were available and compellable. It was not necessary for the court to call the witnesses to ensure a fair trial. This was not an unusual case where the court should do so. It was a matter for the defence to decide whether to call the witnesses at the relevant stage of proceedings.

34. In the event the defence called Isabelle and Tom Potterton as witnesses during the presentation of their case.

Ruling on the release of digital footage to the Press

35. On 18 October 2021, the press made an application to the court for the audio and video footage which had been played to the jury to be released to them. This was considered by the court on 19 October, just before the applicant was due to give evidence.

36. The defence objected to the release of this material at this time. Ms Wade submitted that these would not normally be released until after the end of the trial. The principle of fair and accurate reporting could be confined to what had been said in court and there was no need to release the material to the media. There would be no control over the use of it which could affect the fairness of the trial.

37. The prosecution did not object to material which had been shown in evidence in the trial being reported and released to the media.

38. The judge ruled that footage limited to what had been seen in the trial could be released to the media. The jury would be told that video footage may come into the public domain via the press and that they should only review that material in the context of the trial when they were alone in their room once they had gone into retirement.

39. On 21 October 2021, the defence raised with the judge that the footage released to the media had appeared on YouTube with various comments posted, prejudicing the administration of justice, not just in relation to the jury but also the witnesses to be called. The judge confirmed that an advisory had been sent by the Press Office for the comments on that platform to be removed and that the jury, in accordance with the directions given, would not look at them.

The summing up on loss of control

40. During his summing up on this issue, the judge set out the test which the jury had to apply and the questions the jury had to ask themselves in coming to their verdict. In relation to each question, the judge set out the case of both the prosecution and defence.

41. When it came to consideration of the qualifying trigger, the judge told the jury that the defence contended that this was a marriage during which the applicant was regularly the victim of violence at the hands of the deceased and that the jury must view the events on the night in question in that context. He told them that the defence case was that the applicant had grounds to fear serious violence from her husband particularly in light of the threats he had made with the poker on 23 December 2021. The account from the applicant should be assessed in the context of the marriage as a whole, during which the applicant claimed to have regularly been the victim of violence at the hands of her husband, controlling and isolating behaviour on his part and efforts at belittling her and mistreating her in the various ways she described in her evidence.

42. The judge said this:

> "The defence argument is that domestic abuse, both physical and mental, as the defendant related that to you, the cumulative

> impact of that history, the laying on of the final straw, as the events of that night have to be assessed by reference to the history of it might be termed, had the effect of causing her to lose it, either by reason of a fear of serious violence and/or by reason of what David Jackson said and did that night, assessed in the context of the relationship as a whole. As she put it many times in evidence, she had coped until she could not."

43. The judge set out the defence case in similar terms on the issue of whether someone in the same circumstances of the applicant might have lost self-control. Again, he reminded them of the defence argument, specifically that the jury needed to consider the years of domestic abuse and incremental harm that was caused by being treated in the way that the applicant described – controlled, throttled, pushed, belittled, sworn at, subjected to silence, dehumanised by being referred to as a thing and threatened as recently as 23 December 2021 with a poker.

44. The judge specifically directed the jury on the question of domestic abuse. He directed them that one of the issues in the trial was the degree to which the applicant was or was not the subject of domestic abuse on the part of the deceased. He summarised the prosecution case on this topic as "*insofar as there was friction in the marriage the defendant is choosing to exaggerate and/or invent behaviour on the part of David Jackson in order to support a defence of loss of control."* The judge went on to summarise the defence case that the deceased was at times an abusive husband who mistreated the applicant both physically and mentally, that she was a victim of what is now termed coercive and controlling behaviour. The defence also suggested that the applicant adopted a strategy of seeking to conceal from others, even those closest to her, the reality of her life and how her husband was behaving towards her.

45. The judge directed the jury not to approach the question of domestic abuse with any misguided stereotypical thinking; for example, thinking that a partner who is assaulted by the other in a relationship would immediately walk out. He gave them further examples of such misguided thinking.

46. When he came to sum up the evidence, the judge reminded the jury of the applicant's evidence in full, including her evidence about her life and her relationship with the deceased.

Grounds of appeal

47. Ms Wade relies on four grounds of appeal to support her contention that the applicant's conviction is unsafe:

    i) First that the judge erred in not directing the jury on the individual and cumulative nature of matters which went to the gravity of the trigger for the purpose of the partial defence of loss of control. This is the principle ground upon which the applicant relies.

    ii) Second that the judge erred in directing the jury that the Crown's case was that the applicant had invented and exaggerated the domestic abuse in order to support her defence of loss of control in circumstances where such an allegation had not been put to the applicant in the course of cross-examination.

iii) Third that the judge erred in not acceding to the defence application for the witnesses we have identified at [25] to be tendered by the prosecution or, alternatively, in not exercising his discretion to call the witness himself and;

iv) Fourth that the judge was wrong to order that the digital footage of the 999 call, arrest and detention of the applicant on 13 February 2021 should be released to the press during the course of the trial rather than postponing it until after the verdict. This had the effect of prejudicing the administration of justice, in particular because witnesses yet to give evidence could or would have had sight of it and/or causing the perception of bias. As such it rendered the trial unfair.

48. As to the first, Ms Wade points out that for the partial defence of loss of control to succeed, the loss of control does not have to be sudden. Matters with no temporal nexus to the index offence but which have a cumulative impact can go to comprise the trigger of things done or said which constitute circumstances of an extremely grave character and cause the accused to have a justifiable sense of being seriously wronged. She submits that in a case such as this, where the defence relied on the overall pattern of abuse as opposed to the effect of individual incidents, it is incumbent on the judge to analyse each individual component of the cumulative history of the matters going to s.55(4) of the Act. The judge's approach in reciting the applicant's evidence was insufficient.

49. Further, Ms Wade submits that such an analysis was important for the purpose of the jury's understanding of the loss of control itself. The important feature of this case was the entrapment which the applicant felt from years of coercive control and from which she found it impossible to find a way out. It was important to look at why this seemingly surprising and meaningless killing came at the end of what appeared to be a happy marriage.

50. Ms Wade submits that the direction of the judge in this case placed undue emphasis on violence when the reality was that the previous acts of violence had served as a function of control as opposed to harm in its own right. She submits that without the analysis required, the jury could not appreciate that the circumstances of entrapment through coercive and controlling behaviour were of an extremely grave character which caused the applicant to have a justifiable sense of being seriously wronged.

51. As to the second ground, Ms Wade submits that it was never put to the applicant through a lengthy cross-examination that she had exaggerated or invented the extent of the domestic abuse to support the defence of loss of control. The judge was therefore wrong to summarise the prosecution case in this way.

52. As to the third ground, Ms Wade essentially repeats the submissions that she made to the trial judge set out at [27]-[32] above. She invites the court to give guidance on how the Criminal Procedure Rules have impacted on the prosecutor's duty to call witnesses.

53. On ground 4, Ms Wade accepts that there is no evidence that any of the jury were exposed to the footage or public postings upon it. Her primary submission is that the judge has the power under s.4(2) of the Contempt of Court Act 1981 to order that publication of any report of the proceedings be postponed where it appears to be

necessary to avoid a substantial risk of injustice in those proceedings. In this case, the effect of the decision not to withhold the release of the footage meant that the defence witnesses, which included the daughter of the applicant and deceased, were exposed to it.

Respondent's Grounds of Opposition

54. In written submissions on Ground 1, the respondent submits that the judge's directions were impeccable and conspicuously fair to the applicant. They accurately reflected the live issue between the prosecution and defence as to the true nature of her relationship with the deceased. It was for the jury to determine that issue and apply the legal directions to that factual issue. Specifically, the judge made it clear that it was open to the jury to consider the events of the night in question in the context of the marriage as the applicant portrayed it. Thereby the judge did direct the jury to assess the gravity of the trigger by reference to the cumulative nature of her treatment at the deceased's hands as they found it to be.

55. On Ground 2, the respondent submits that the judge was correct to summarise the prosecution case in the way that he did. It reflected the way that the case was opened, the fact that the prosecution had called witnesses whose evidence of the relationship as they saw it differed from the applicant's evidence and the way that she was cross-examined. It was obvious to all that the prosecution did not accept her portrayal of the marriage.

56. As to Ground 3, the respondent's position remains the same as that before the judge – that the judge had no power to compel the prosecution to call or tender the named individuals as witnesses. The respondent had a discretion which witnesses it relied upon. These individuals had never been served as part of the prosecution case. Deciding not to rely upon them was within the reasonable range of decision making by a prosecutor. In the event the jury heard evidence from two of them. No unfairness flows from the decision not to call them as part of the prosecution case.

57. As to Ground 4, the respondent submits that the material in question had been adduced in the trial and was in the public domain. The media were entitled to report what the applicant said and did in the 999 call and body worn footage. There was no lawful prohibition to the material being released at this stage. The judge was entitled to conclude that there was nothing to prevent reporting of this material. He correctly directed the jury about their approach to it. There is no evidence that the jury saw the footage and any complaint of prejudice is pure speculation.

58. The respondent submits that the evidence of murder in this case was overwhelming. Individually or collectively the grounds do not demonstrate that the convictions was even arguably unsafe.

Discussion and conclusion

59. We have reflected on the submissions ably made by Ms Wade, but we find ourselves unable to accept that this applicant's conviction is arguably unsafe.

60. We accept the submission that a loss of control does not need to be sudden for the defence to succeed and that it can be triggered by the cumulative impact of a pattern

of events, specifically in a relationship which has been characterised by coercion and control. That was plainly understood by the judge who directed the jury accordingly. We agree with the Respondent that in so doing the judge was scrupulous in connecting the events of the 13 February 2021 with the much longer history of abuse alleged by the applicant.

61. On the question of the qualifying trigger, he could not in our view have been clearer in telling the jury of the defence case that the applicant had lost her control against the background of a coercive and controlling relationship. We do not accept that the judge over-emphasised the violent aspect of the deceased's behaviour. On repeated occasions, he spoke of the alleged abuse being both physical and mental and made reference to the allegations of controlling and isolating behaviour, belittling and mistreating her.

62. The judge properly summed up the applicant's evidence about her relationship and the context in which she said that she had lost her self-control. It was ultimately a matter for the jury as to whether they accepted that evidence and if so, having been properly directed, whether this amounted to a defence of loss of control.

63. On Ground 2, we cannot accept that the judge wrongly summarised the prosecution case on the issue of the level of domestic abuse within the applicant's marriage. The prosecution had in opening identified as an issue for the jury to decide as the evidence unfolded whether the applicant was accurate in how she characterised her relationship with the deceased. It was abundantly clear from the cross-examination as a whole that the prosecution asserted that the applicant had exaggerated the level and frequency of the abuse she had suffered. This can only have been to support the defence that she put before the jury. The judge was in our view entitled to summarise the Crown's case in the way that he did. He then fairly set out the defence case on this point.

64. We find no merit in Ground 3. In this case, as a proper exercise of its discretion, the prosecution chose not to rely on the statements of the individuals concerned. As all the case law helpfully set out in Ms Wade's written submissions makes clear, the prosecution is under no duty to call witnesses whose statements have never formed part of its case. The long-standing legal principles governing the calling of witnesses set out in *R v Russell-Jones [1995] 1 Cr App R* 538, if followed, ensure a fair trial and are entirely compatible with the overriding objective of the Criminal Procedure Rules to deal with cases justly. In this case, the principles were followed and the prosecution, in accordance with their obligations, properly disclosed their statements to the defence. The defence thereby had the opportunity to call the witnesses themselves and indeed did call Isabelle and Tom Potterton. No unfairness ensued.

65. We consider the judge right not to have called the witnesses himself. As this court made clear in *R v Roberts (1985) 80 Cr App R 89* this is a power which should be carefully and sparingly exercised. We see no reason for him to have done so in circumstances where the defence could call the witnesses themselves.

66. We are also unpersuaded that the judge's decision in relation to the release of digital evidence to the media renders the applicant's conviction arguably unsafe. As Ms Wade concedes, the press regularly report evidence during a criminal trial including what can be heard and seen in digital footage. It is always possible that the jury and any witness yet to be called could read such reports. Such a risk is routinely dealt with

by judicial directions to the jury. It is open to any party to advise their witnesses to the same effect.

67. It may be that in some cases a judge will determine that the provisions of s.4(2) of the Contempt of Court Act 1981 are met and that material should not be released and published until the conclusion of the case. However, each application must be determined on its own facts.

68. On the facts of this case, we consider that the judge was entitled to permit release of the footage concerned. Only that which had already been played in court was released. The judge properly directed the jury about it and there is no evidence that any juror saw any post adverse to the applicant, still less that they were influenced as a result. Similarly, there is no evidence that any defence witnesses saw or were influenced by the footage. Any assertion of prejudice on the part of the applicant is in our view entirely speculative.

69. We find ourselves in complete agreement with the single judge that there is no merit in any of the grounds advanced nor in the combination of grounds. There is no material irregularity and no basis upon which the safety of the conviction could be challenged. This application is accordingly dismissed.