Neutral Citation Number: [2024] EWCA Crim 1543

Case No: 202302502 B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT MANCHESTER**
**MRS JUSTICE YIP**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th December 2024

**Before :**

**THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION,**
**LORD JUSTICE HOLROYDE**
**SIR STEPHEN IRWIN**
and
**MR JUSTICE HILLIARD**

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**Between :**

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| **THOMAS EDWARD CASHMAN** | **Applicant** |
| **- and -** | |
| **REX** | **Respondent** |

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**Mr Cooper KC and Ms Appleton** (instructed by **Keaney and Co**) for the **Applicant**
**Mr McLachlan KC and Mr Riding** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 20th November 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 13th December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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WARNING: reporting restrictions apply to this case. An order was made in the Crown Court under section 46 of the Youth Justice and Criminal Evidence Act 1999 in relation to a witness in the case. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance about reporting restrictions, ask at the court office or take legal advice.

**Sir Stephen Irwin:**

1. In this case the applicant sought leave to appeal his convictions after refusal by the Single Judge. He also sought an investigation by the Criminal Cases Review Commission, pursuant to section 23A of the Criminal Appeal Act 1968. At the hearing on 20 November 2024 we refused those applications. We now give our reasons.

Background

2. On Thursday 30th March 2023 in the Crown Court at Manchester following a trial before Mrs Justice Yip and jury, the applicant was convicted of murder, attempted murder, wounding with intent and two counts of possessing a firearm with intent to endanger life.

3. On Monday 3rd April the applicant was sentenced. He received sentences of life imprisonment in relation to the murder and attempted murder counts, with significant concurrent sentences in relation to the other offences. The period of 42 years, less 182 days spent on remand, was specified as the minimum term under section 322 of the Sentencing Act 2020 to be served in relation to the murder. Subsequently, he has had his application to reduce the sentences rejected by this court.

4. The facts of this case are well known. The applicant was convicted on the basis that he pursued and attempted to murder Joseph Nee, and that in the course of his pursuit he shot through the front door of a house in Kingsheath Avenue, Liverpool, killing Olivia Pratt Korbell aged 9, and injuring her mother Mrs Cheryl Korbell. He carried two firearms and he also injured Joseph Nee.

5. Although the case arose in Liverpool, the trial was transferred to Manchester so as to avoid any risk of local connections in Liverpool affecting the trial process or the jury. Those directions were given by Mrs Justice Yip. The trial had proceeded for 25 days when verdicts were returned on Thursday 30th March.

6. As we have indicated, the facts of this case became very well known. It was the focus of intense national interest. Press coverage was high and the proceedings were followed closely in the media.

7. As would be expected, consideration was given to the precautions necessary to protect the integrity of the trial. The jurors were of course sequestered from contact by any witness, whether for the prosecution or the defence.

8. Inside the court building, jurors are managed so that they have contact only with each other and with an identified range of court officials, particularly ushers. Jurors spend their time in the court building in separate designated assembly rooms, in the courtroom, or in their retiring room. A retiring room is always quietly situated away from any public access. The jury use such a room not merely for the time when considering their verdicts at the close of a trial, but for adjournments or periods when they are not in the courtroom, for example when the court is engaged in legal argument. Court staff always know the whereabouts of the jury, once they are gathered in the building. When jurors retire to consider their verdicts, jury bailiffs are sworn to keep the jury in "some private and convenient place" to protect them from interruption. Such arrangements are commonplace in Crown Courts.

9. When jurors are selected and sworn, or have affirmed, for service on a jury, each is given a leaflet setting out their obligations. It is entitled "Your Legal Responsibilities as a Juror". The leaflet emphasises the importance of the role and their responsibilities. It reads in part:

> "As a juror you have taken a LEGAL OATH or AFFIRMATION to try the defendant based ONLY on the evidence you hear in court. …
>
> If you do not follow the rules in the Notice, you may be in CONTEMPT OF COURT and committing a CRIMINAL OFFENCE…
>
> It is ILLEGAL for you to LOOK for any information at all about your case on the INTERNET or ANYWHERE ELSE during the trial…
>
> …during the trial you CANNOT DISCUSS the case with FAMILY, FRIENDS or ANYONE else…
>
> COLLECTIVE RESPONSIBILITY OF YOUR JURY
>
> The jury MUST ACT AS A GROUP to make sure that everyone on the jury follows the oath you have each made to follow these rules.
>
> WHAT DO I DO IF I THINK ANY OF THESE RULES HAVE NOT BEEN FOLLOWED?
>
> If you think any of these rules have not been followed during the trial it is extremely important that you TELL THE COURT about this IMMEDIATELY, but do not discuss it with your fellow jurors or anyone else.
>
> To tell the Court, you can speak with your USHER or JURY OFFICER or you can write a note to the JUDGE and give it to the usher.
>
> WHY DO I NEED TO FOLLOW THESE RULES?
>
> It is your DUTY to REPORT any BREACHES of these rules by anyone, including any juror. This is necessary to ensure the trial is FAIR.
>
> If every juror does not follow these rules the TRIAL may be STOPPED, the jury dismissed and the trial will have to start again with a new jury."

10. As the Jury Notice explains, juries must reach their decisions on the basis of the evidence and nothing else. All juries are reminded of that critical obligation repeatedly during a trial and in every summing up. In a case such as this, which is widely reported and engages close public attention because of the strong sympathy of the public with

the victims of such a crime, juries are warned more than usually strongly about this obligation. It is inevitable in such a case that the families and friends of those who serve on such a jury are closely interested, once they know that a relative or friend is one of the jurors. It is natural and understandable that the juror is asked about the case. Judges are familiar with the problem, and emphasise to jurors the obligation not to talk about the case, to avoid the risk that views are expressed based on the press coverage and not on the evidence. Indeed, jurors are often advised by the judge to avoid reading about the case in which they are engaged, or watching or listening to broadcast media or communications in social media about the case precisely to avoid the risk that they might possibly be influenced by views expressed, or material contained in such reports, rather than focusing exclusively on the evidence given in the trial.

11. In this case, Mrs Justice Yip took all the steps which might be expected. She was also concerned that the jurors should not be made anxious or distracted from their obligations by the steps taken to protect them from any intrusion, or by the necessary measures to maintain security. This case was tried in a court building where a number of serious cases requiring careful security overlapped with this.

12. It is helpful to give just one or two examples of the directions and indications given to the jury by the judge. It is not necessary, and indeed would hardly be practical, to seek out every occasion on which the judge ensured the safety and security of the jury or reinforced to them their obligation to decide the case only on the evidence.

13. Immediately following the swearing of the jury on 6th March 2023, the judge addressed them as to the arrangements:

> "I just want to say a couple of things about the arrangements for this trial. You already know a little bit about the case and you will appreciate that it is the sort of case that is likely to attract significant public and media interest, and I'm going to say a little bit more about things that you might see reported in a moment. You may also be aware from seeing things on the news that this is not the only high profile case going on in this building at the moment, and so there are likely to be a lot of journalists, a lot of footfall generally in this court building, and also you won't be at all surprised to hear that there is likely to be a lot of security around the building. That shouldn't affect you as jurors at all. You may not see anything because you will be coming in as jurors, but I mentioned it now because if you are aware of a heavy police presence in and around the building, you shouldn't be surprised by that, you shouldn't be worried about that, it is all perfectly normal when we have got high profile cases going on in this building."

14. The judge went on to explain that there were arrangements being made to accommodate the press in other rooms both in Manchester and in Liverpool from where they would be able to follow the proceedings remotely.

15. We now quote a short extract from the first moments of the judge's summing up to the jury, after the evidence and speeches from counsel were complete. On the morning of Monday 27th March she said:

> "You should decide this case only on the evidence that you have heard in court. You should approach the evidence calmly and dispassionately and not by instinct, prejudice or assumption. You must not be influenced by any emotional reaction or sympathy you may have for anyone involved. I told you at the start that you might be aware of heightened security around the court, and should not be concerned or influenced by that. The fact is that this is a high profile case where the defendant faces very serious allegations and the arrangements reflect that. They have no bearing on whether the allegations are true. That is for you and you alone to decide. I also remind you to put anything you may have seen or read about the case during the trial out of your mind. It is your view of the evidence as a whole as heard in court that matters."

16. In the last minutes before they retired to consider their verdicts, the judge said this to the jury:

> "Remember the rules that I gave you at the beginning. Do not under any circumstances be tempted to start making your own researches at this stage. You have all the evidence that you need to determine your verdicts."

17. Those passages illustrate the context relevant to these applications.

The Basis of the Applications

18. The applications are based upon a suggestion that jury irregularities may have affected the outcome of the trial. The matter arises as follows. The applicant's solicitor is Thomas Keaney. The applicant having been convicted on Thursday 30th March, Mr Keaney was at home on Sunday 2nd April, the day before his client was due to be sentenced. He received a telephone call from a man whom he describes as "Male 4" asking Mr Keaney to meet him. Mr Keaney was not surprised by this, suspecting that Male 4 might be a new prospective client. Often prospective clients do not wish to speak over the telephone. Mr Keaney did not know and does not know the identity of this man. Mr Keaney went to meet Male 4 that day.

19. Male 4 was not a new client. He wanted to speak about the Applicant's case. Male 4 gave an account involving three other unnamed and unidentified men. Male 4 had a friend, who is described by Mr Keaney as Male 3. Male 3's father is described as Male 2. Male 4 told Mr Keaney that Male 2, the father of Male 4's friend, had met a juror in the case. The description of the meeting is expressed in these terms:

> "Male 4 had a conversation with Male 3. Male 3 had told him that his father Male 2 was in the pub with the Juror Male 1 (before the case concluded).
>
> Male 1 had told Male 2 that he was sitting on the jury on the Cashman case. He didn't discuss the case in detail but Male 1 told Male 2 over a pint…….. that the police had given them all

> panic alarms and said if anyone approaches you or your family you must press the alarm immediately.
>
> Male 2 had informed his son Male 3 about this who then informed Male 4.
>
> Male 4 informed me that **he knew about this before the verdicts** [emphasis added] but kept it to himself as he was scared as he knew that the Juror shouldn't have been speaking about the case and he did not want to get into trouble or arrested.
>
> **After Mr Cashman was found guilty** [emphasis added] Male 2 had then asked Male 1 what happened as he was saying he was not guilty. Male 1 then informed Male 2 that the police had "been in" to see the jury and informed the jury that there are things they should know. The police had produced a folder of evidence that the jury had not been privy to… Male 1 told Male 2 that after seeing the evidence he and all the other jury members had no option but to find Cashman guilty. Male 1 explained to Male 2 that the bundle had all transcripts of what Paul Russell had said to the police and other information about Cashman.
>
> Male 2 informed Male 3 in conversation. Male 3 then Informed Male 4.
>
> Male 4 relayed all this back to me when I met him on 2nd April 2023.
>
> Male 4 then relayed to me evidence concerning Paul Russell which he was informed of by Male 3. In particular I recall him saying words to the effect of "do you know how you lost the case" I replied "no". He went on to say "the jury had been supplied a folder of evidence that consisted of Paul Russell's transcripts and further information regarding the defence application to transfer the case out of Liverpool". In particular in relation to the latter he was told from Male 3 what was in the application to have the case transferred."

20. Paul Russell was the applicant's co-defendant. Russell had pleaded guilty to assisting an offender (the applicant). He played no part in the applicant's trial, and was sentenced to 22 months imprisonment.

21. Mr Keaney went on to explain that he had drawn these matters to the attention of counsel on Monday 3 April. The judge had been informed, but by then the trial having finished and the verdicts having been returned, the judge was unable to take any action. In the traditional legal language, the court was *functus officio*: the business of the trial was finished, the sentence being a further step in the proceedings.

22. The applicant's grounds of appeal were dated 23rd July 2023. Counsel for the applicant cannot then have had access to Mr Keaney's statement, since that was not signed until 19 October 2023.

23. Mr Keaney tells us that he made his statement of 19 October from memory. We were not informed whether any contemporaneous or near contemporaneous notes were made at or soon after 2 April. Mr Cooper told the court that during the intervening time, efforts had been made to identify Males 1 to 4, but without result. They remain anonymous.

The submissions

24. Mr Cooper KC for the applicant suggested that this account, if accepted, would provide evidence of two irregularities. First, the panic alarms would represent an irregularity, because such a step was not known to or sanctioned by the court, and might well have disrupted the careful way in which the judge had dealt with security in addressing and reassuring the jury. It might have affected them or prejudiced them against the applicant. Second, the introduction of a body of material prejudicial to the applicant in the way described would obviously be an irregularity. Thus he submitted that both matters should be investigated and leave to appeal considered on the basis of the outcome of the investigations.

25. Mr McLachlan KC for the Crown accepted, that the introduction of prejudicial material to the jury in the way suggested, would constitute an irregularity. He submits that the issue of the panic alarms might do so, depending on the view taken by this Court.

26. Mr Cooper did not argue that there was as yet evidence sufficient to provide the basis for granting leave to appeal. His real application was that we should order an investigation by the Criminal Cases Review Commission ("CCRC") and review the matter when the results are available. He suggested that in relation to the panic alarms point, the investigation would be easy and would thus be a proportionate step. It would be a simple matter to ask the jurors whether they had been provided with panic alarms. In relation to the introduction of prejudicial material into the jury room during the retirement to consider the verdicts, Mr Cooper accepted that would be more complex, involving not merely speaking to jurors but investigating security records, any other material recording movements within the court building over a period and potentially interviewing a number of court staff. However, he said both should be done.

27. Mr McLachlan submitted in writing, and shortly orally to us, that this material lacked all credibility.

The law

28. The relevant provisions of the Criminal Appeal Act 1968 read:

> "s23 - Evidence
>
> (1)For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—
>
> ……
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to— (a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> ……..
>
> 23A - Power to order investigations.
>
> (1) On an appeal against conviction or an application for leave to appeal against conviction, the Court of Appeal may direct the Criminal Cases Review Commission to investigate and report to the Court on any matter if it appears to the Court that –
>
> (a) in the case of an appeal, the matter is relevant to the determination of the appeal and ought, if possible, to be resolved before the appeal is determined;
>
> (aa) in the case of an application for leave to appeal, the matter is relevant to the determination of the application and ought, if possible, to be resolved before the application is determined;
>
> (b) an investigation of the matter by the Commission is likely to result in the Court being able to resolve it; and
>
> (c) the matter cannot be resolved by the Court without an investigation by the Commission.
>
> ……..”

29. The power to order investigations by the CCRC has been used in a restricted number of cases, examples being *McCluskey* (1994) 98 Cr. App. R. 216, *Baybasin* [2013] EWCA Crim 2357 and *Farah* [2023] EWCA Crim 731. However, each turns upon its own facts. In *Baybasin*, for example, specific accusations were made against identified jurors. In *Farah*, there was eyewitness evidence, including by counsel, of a meeting between a juror and a police officer, which gave rise to concern. These fact-specific decisions provide no support for the application made here.

30. It is clear that the provisions of section 23 and 23A are complementary and require to be read together. For fresh evidence to be received by this Court it must be capable of belief: (s23(2)(a)). No evidence will be capable of belief if it is inherently fanciful. No investigation should be ordered in an application for leave to appeal unless that investigation is likely to result in the resolution of the matter in question: (s23A(1)(b)).

Our conclusions

31. For present purposes we accept that the introduction of prejudicial material to the jury, if established, would be a jury irregularity, and that it is at least arguable on the facts of this case, that the clandestine issue of personal panic alarms to the jurors might amount to a jury irregularity.

32. There is no admissible evidence before the court. The contents of the conversation with Male 4 represent multiple hearsay, in circumstances which would not persuade this court to admit the material as evidence under any of the gateways set out in the Criminal Justice Act 2003.

33. Moreover, even if the existing material were in evidential form and could be heard, it would not represent credible evidence of jury irregularity.

34. Firstly, the conditions under which this "information" was supposedly obtained and then passed on make it inherently improbable from the start. By chance, a juror in a Manchester trial meets a man in a pub, who knows people from Liverpool, and then talks about the case in breach of every warning. That has to happen not once but twice over, since Male 4 – Mr Keaney's informant at the end of the chain - says he knew about the introduction of personal panic alarms before the verdicts. But then after this applicant was found guilty, there was what had to be a further conversation between Male 1 and Male 2, explaining that the convictions were obtained by the introduction of prejudicial material into the jury room.

35. Next, none of these individuals have been identified or allowed themselves to be identified. Mr Cooper was clear in addressing us to explain the length of time between the end of the trial, and the filing of these grounds, that efforts were being made to clarify who these men were, how the conversations came to take place, and no doubt to put this material into a form more likely to be admitted in evidence: statements from Male 1 the juror and Male 2 his pub contact no doubt being the likeliest objective. Nothing has been achieved. That sequence of events, perhaps better described as non-events, adds to the inherent unreliability of the story.

36. Then there is the inherent improbability of what it is claimed took place. Is it feasible to think that the jury were given personal panic alarms by police officers without that fact coming to the notice of court staff and thus to the judge? The nature of the alarms is not specified, and so it is not clear if they are said to be fixed panic alarms attached to the jurors' houses, or some form of portable panic alarm to be carried by the juror.

37. It seems inconceivable that 12 jurors would have been supplied with either kind of device, were told it was a secret, and thus that they were not to reveal what had happened; and then all twelve complied, suppressing any mention of the supply or fitting of the alarms. Yet, if it is not suggested the jurors were instructed to keep quiet and complied, then it is also very hard to see how they would not have spoken casually about the matter in front of the ushers or other court staff, with whom they were in daily contact. If we are considering alarms fixed to houses, that would require specialist fitting, with engineers going to jurors' homes. There would have been questions about when the alarms would be removed, about making good the buildings, about avoiding cost and so forth. There would have been an obvious question about whether a juror who activated an alarm on the house should inform the court: it is inconceivable that some conversation would not have taken place with court staff. There is no suggestion that it did.

38. If we are considering portable panic alarms, then jurors would be carrying them with them to and from court. Once again, it seems inconceivable they would not have come to the attention of court staff.

39. Perhaps even more incredible is the proposition that police officers were able to gain illicit access to the jury retiring room, show them the bundle of prejudicial material, and remove the material again, all without detection. We find it impossible to conceive how such a visit would have gone undetected by court staff as it happened. We are also unable to accept the suggestion that all twelve jurors who were visited in that way and presented with material which was not evidence in the case, breached the obligations so sternly expressed to them in the Jury Notice and failed to bring that to the attention of court staff or the judge. The jury will have been warned time without number that they must only decide the case on the evidence, and must ignore all other public comment, and private questions and opinions addressed to them. Yet it is inherent in the scenario advanced that they then not only received this material in an obviously clandestine and illicit way, but then suppressed that fact, all of them ignoring the repeated injunctions to decide the case only on the evidence given in court, not one of them choosing to report the intrusion into the jury room despite the instructions in the Jury Notice, and all of them changing their verdicts as a result.

40. For those reasons, there would be very serious doubts as to whether this material could be regarded as credible so as to satisfy s23(2)(a), even if witness statements affirming the accounts received by Mr Keaney were now to be produced. In our view, the single judge was obviously correct to say that this material lacks credibility.

41. Indeed it can fairly be said that the story advanced is fanciful, and as matters now stand, is suggestive not of a possible miscarriage of justice, but rather of a crude attempt to subvert convictions properly reached.

42. It is also necessary to consider s23A(1)(b). The applicant faces the initial, substantial difficulty that he seeks an investigation into allegations raised by a man who does not wish to be identified and has not assisted Mr Keaney's enquiries. There is for that reason an absence of detail which (if there were any substance in the allegations) could assist the CCRC's investigation and so assist this court. Moreover, and in any event, we are unable to accept Mr Cooper's submission that the enquiries which he submits should be made of the jurors – particularly in relation to the alleged panic alarms – would be straightforward and "proportionate". If the suggestion relating to panic alarms had any credibility, a single question would not (as was submitted) be sufficient to resolve the point. Before the enquiry could be mounted, there would have to be detailed preparations, and it may be that potentially intrusive steps would need to be taken at the jurors' homes or elsewhere.

43. Enquiry about the suggested visit to the jury room would undoubtedly be more complex, and would involve more than questions to the jurors. Enquiry of court staff, the police officers carrying out security duties at the court building, the judge's clerk, and in particular the jury bailiffs who took an oath to keep the jury secure, would all be complex and difficult. There would be two alternative bases for enquiry. Either the visit was carried out so that it was undetected by any of those people, something which would require wide investigation as to how that might possibly have happened. In the alternative the visit was connived at by one or more of those members of staff, in which case there would be a complex enquiry as to who that might possibly be and who therefore was potentially concealing their connivance.

44. It is no straightforward matter to initiate enquiries of this kind. As exemplified by the reaction of the jurors who were questioned in *Baybasin*, this is an intrusive and difficult

process. It represents a considerable imposition on jurors who have by definition already had their lives disrupted by serving on a jury, particularly in a long and serious case such as this. It is costly in resources and time, both for the CCRC and the court. The test is not whether the enquiry is "proportionate" but rather that laid out in the statute: is the investigation likely to resolve the matter. No such step should be taken unless there is a credible matter to be considered, fulfilling the requirements of s23(2), and even then, not unless the investigation proposed may sensibly bring resolution.

45. In any event, the suggestions made in this application are incredible, and in our view no investigation should be directed in this case. Where there is a question of a possible investigation, this Court will consider very carefully whether the statutory test can be met. If yes, then an investigation can properly be ordered. However, such investigations must not be initiated where the existing material lacks all credibility, as here, on the simple assertion that an investigation might produce a rabbit out of a hat.

46. It was for those reasons that we dismissed the applications. Having received helpful submissions from both parties, we direct that this judgment may be cited, notwithstanding that we have refused leave to appeal. We are very grateful to Mr Cooper and Ms Appleton for acting pro bono, but we are not persuaded that we should, exceptionally, grant a representation order.