Neutral Citation Number: [2022] EWHC 2544 (Admin)

Case No: CO/4147/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN BRISTOL CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

SHANNON ALICE SAUNDERS	**Claimant**
- and –	
BRISTOL MAGISTRATES COURT	**Defendant**
- and –	
CROWN PROSECUTION SERVICE	**Interested Party**

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- -

Edward Hetherington (instructed by **Allen Hoole Solicitors**) for the **Claimants**
The **Defendants** were unrepresented
Peter Grieves-Smith (instructed by the **Crown Prosecution Service**) for the **Interested Party**

Hearing dates: 6 October 2022

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Approved Judgment

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Mr Justice Chamberlain:

Introduction

1 By this claim, Shannon Saunders challenges a decision of two lay justices sitting at Bristol Magistrates' Court on 30 September 2021 to grant a prosecution application to adjourn her trial, which was listed on the following day. The application was made because the prosecution had failed to comply with a direction to serve the evidence of a witness or warn him to attend. Ms Saunders says that the justices should have refused the adjournment. She submits that their decision to adjourn was unlawful because they demonstrated bias against her, failed to give adequate reasons, took into account an irrelevant consideration and reached a decision that was *Wednesbury* unreasonable. She invites me to quash that decision and direct the justices to acquit her.

Factual background

2 In the early hours of 4 June 2021, Shannon Saunders was driving a vehicle which collided with some bollards. She was arrested and taken to the police station where she was required to give a blood sample. In circumstances which are contentious, the custody doctor was unable to take a sample of blood. She was charged with a single offence of failing to provide a specimen of blood for analysis contrary to s. 7 of the Road Traffic Act 1988. Ms Saunders was bailed to attend Bristol Magistrates' Court on 22 July 2021. She did so and entered a not guilty plea.

3 Initial details of the prosecution case had been provided to Ms Saunders' representatives. At the hearing on 22 July 2021, the parties completed a Preparation for Effective Trial (PET) form. This is designed to collect from the parties the information the court will need actively to manage the case and to record the directions made.

4 The form asks: "Does the prosecutor intend to serve more evidence?" To that, the "Yes" box was ticked and the words "Statement from Dr, any BWV" added. Under "Anticipated defence(s)", the "reasonable excuse" box was ticked. Under "Issues", the following words appear: "I agreed to blood being taken but the doctor was unable to get a sample. He tried one arm then the other by which time I ended up having a panic attack. I do not like needles and I suffer badly with anxiety. I did consent. I deny being obstructive." Three prosecution witnesses were listed: two police officers and the custody doctor, who was not at that point identified by name. The time estimated for the doctor's evidence was 15 minutes in chief and 15 minutes in cross-examination.

5 Directions were given for the service of a statement from the custody doctor and CCTV of the procedure and service of unused material by 19 August 2021. The CPS was given 14 days in which to confirm witness availability. The trial was adjourned to 1 October 2022 with a time estimate of 2 hours and 45 minutes, including 30 minutes for deliberation and decision.

6 On 28 September 2021, the CPS informed the court and the defence that they had received a written statement from another police officer, whom they intended to call to give oral evidence. The defence responded asking "Where is the statement from the custody doctor?" and indicating that the doctor was required to attend trial.

7 On 30 September 2021, the CPS filled in an Application to Change Trial/Other Contested Hearing. They gave 28 September 2021 as the date when it was discovered that the witness was unavailable. The reason for the witness's unavailability was given as follows:

> "This is a charge of failing to provide blood where the Defendant claims that she did not refuse to provide blood, she had a panic attack. At the first hearing there was no statement or even the name of the Doctor who carried out the blood procedure. As a result we asked witness care (this was also put on the PET) to warn the custody Doctor.
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> A statement was eventually supplied by Dr waring [sic] who carried out the blood procedure, but the police witness care unit did not warn the witness to attend. We have been notified that the Dr has never been warned and it is crucial for the witness to attend given the issues raised by the defence."

8 I interpolate at this point that the custody doctor was not in fact Dr Waring, but Dr Mars.

9 Under "Reason witness needs to attend to give evidence at the hearing", the CPS said: "The witness was never warned due to not knowing their name and confusion by witness care about who the custody Dr was". Under "What is the impact on your case?" the CPS said: "The Crown cannot prove the case without the witness."

10 An urgent oral hearing was convened before two lay justices (Peter Rainsworth-Evans and Lucy Elmes). The CPS conceded that the failure to warn the custody doctor had been an error but submitted that an adjournment should be granted in the interests of justice. Ms Saunders was represented by a solicitor advocate, Mr Linehan, who referred to Crim PD 24C (Trial adjournment in the magistrates' courts) and the decision of the Divisional Court in *Visvaratnam v Brent Magistrates' Court* [2009] EWHC 3017 (Admin).

11 The Legal Advisor (Emma Reilly) referred the justices to Crim PR 1.2 and Crim PD 24 and noted that the justices should consider whether an adjournment was in the interests of justice. The justices then retired. After about five minutes, Ms Reilly went into their room. The justices emerged a little later to indicate that the application for an adjournment would be granted. The presiding justice (Mr Rainsworth-Evans) said this:

> "It is clear that the prosecution (in its widest aspect) have not made sure of the available dates of the witness and have not ensured that the witness was warned the Doctor being essential to their case. Notwithstanding this we feel it is in the interests of justice to vacate tomorrow's trial. We will allow the application."

12 Pressed by Mr Linehan to expand on these reasons, Mr Rainsworth-Evans added: "The failure on the admin side should not affect the interests of justice." He declined to give any further reasons, whether by reference to the case law to which he had been referred or at all, despite being invited to do so by Mr Linehan and despite being informed that he could properly do so by Ms Reilly.

13 After the hearing, Ms Reilly approached Mr Linehan to tell him what had happened when she went into the justices' room. I take her account from the witness statement she has made for these proceedings:

> "As I entered the retiring room the presiding justice, Mr Rainsworth-Evans was in the process of drafting the reasons for the decision. I asked what the view of the bench was, and Mr Rainsworth-Evans commented to the effect that 'you won't be surprised that we are granting the application'. I asked the justices to explain to me the reasons for the decision. Miss Elmes replied to the effect that it can't be due to admin errors that justice isn't done. I questioned whether it could be properly described as an 'admin error' when the situation is that the prosecution has failed to warn a crucial witness.
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> I asked the Justices to check their thinking by assessing whether they would have granted an application if the application had been made by the defence for the same reasons. Miss Elmes responded that it would depend who the witness was, in this case it is a crucial witness who is missing, this is why they have decided to vacate the trial as the defendant 'can't get away with it because there has been an admin error'. I challenged Miss Elmes' statement. I stated that her thinking that was not correct, the defendant was not "getting away with it" a not guilty plea had been entered so it had not been established that she was responsible for any wrongdoing. I stated the case raised a genuine issue around the appropriateness of the Doctor's decision regarding taking of a blood sample and that it may well be found that the Doctor acted inappropriately in the circumstances of that decision.
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> I further reminded the bench that the expectation that trials proceed as listed on the first occasion is for the benefit of both sides. The defendant was just as entitled as any other witness for a trial to proceed in the expected way and not be subject to the worry of a case hanging over them for longer than necessary. That they should consider that vacating the trial may leave the case outstanding for a further period of months.
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> Miss Elmes stated she may have misrepresented herself and not been clear in expressing her views.
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> I explained it was part of my role to challenge the thinking of the Justices but at this point I was interrupted by the Presiding Justice, Mr Rainsworth-Evans who said that they had reached their decision. Mr Rainsworth-Evans read the reasons he had drafted. I pointed out that the reasons referred to inconvenient dates when it had been made clear in court that the failing of the CPS was not warning the witness and not reference to inconvenient dates. Mr Rainsworth-Evans amended the reasons to reflect that."

14 Ms Reilly went on to explain what happened after the hearing:

> "I was conscious that the decision was likely to prompt an application to state a case or for judicial review. With that in mind the advocates remained in court. There was a post hearing discussion with the advocates and an agreed note of hearing was set out to be circulated by Mr Linehan to aid in

> recollections in drafting or responding to any representations. I don't believe that this has actually be circulated at the time of drafting this statement, however I also completed a briefing note for my own use and to assist my Legal Team Manager, who was away at the time, but I knew would need to be informed of this matter. I have referred to those notes in the making of this statement. My notes are available if required at any point.
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> Following this I considered that Mr Linehan should be made aware of the comments made in the retiring room. I raised the need for a further conversation and Ms Gethin indicated that she did not want to be included in that discussion so myself and Mr Linehan withdrew to another room.
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> I initially discussed the practicalities of any application with Mr Linehan as I knew I was away for significant parts of October on leave. Mr Linehan indicated that he would endeavour to expedite any application. I did raise concerns about the observation of Miss Elmes, particularly, in the retiring room and advised Mr Linehan that I would be taking the matter up with the Bristol Legal Team Manager, Angela Shean, on her return from holiday, which I did."

Pre-action correspondence

15 A pre-action letter was sent on 11 October 2021. In its response, the defendant, Bristol Magistrates' Court, set out a full explanation of what had happened on 30 September 2021, from Ms Reilly. The answer to the complaint that the decision was irrational and reached in bad faith was as follows:

> "We accept that one of the Justices expressed an inappropriate consideration about the potential for the defendant to 'get away with it due to an admin error' this was challenged by the Legal Advisor, but was not openly challenged by the other member of the bench leading there to be a concern that the view expressed was shared or condoned by the other Justice sitting. In the absence of other clear reasons indicating how the bench had reached the decision they did it is difficult to exclude the possibility that the decision of the bench was reached by taking into account irrelevant matters. The terminology used by the Justice, although it was later stated that she had not expressed herself correctly, inevitably suggests a prejudging of the matter and an inclination to conviction when the Justice had no basis upon which to reach that conclusion."

16 The answer to the complaint that the decision showed "clear bias" was as follows:

> "As noted above the Justice did latterly seek to distance herself from the comment, once challenged. However, the fact that an experienced Legal Adviser of 20+ years experience felt it necessary to draw it to the attention of the defence as her perception (the Legal Adviser's) was that at least in part the decision had been reached on an incorrect application of the caselaw etc and the comment, not challenged by an experienced colleague magistrate, had to lead to a perception of bias towards the CPS. This must lead to a risk that the decision was improperly reached. The absence of any clear reasons

> to provide an explanation that could override that perception mean that it is impossible to assess the real reasoning behind the decision."

History of proceedings

17 In the meantime, after a further case management hearing on 20 October 2021, the trial had been relisted for 10 December 2022. This claim was issued on 7 December 2021, with an application for urgent consideration seeking interim relief. On the following day, Bourne J granted an injunction restraining the Magistrates' Court from hearing the trial until further order.

18 In its Acknowledgement of Service, the defendant indicated that it did not intend to make a submission, but exhibited its response to the letter before action and a witness statement from Ms Reilly confirming what had been said in that letter.

19 In its Summary Grounds, the CPS submitted that there was a case against Ms Saunders even without the evidence of the custody doctor, because the two police officers had witnessed what happened when she was required to give blood. Thus: "It was clearly desirable that [Dr Mars] give oral evidence but whether Dr Mars was crucial to the case is open to question". The CPS went on to say that the words "getting away with it", spoken by Miss Elmes to Ms Reilly, were "inappropriate" and that the court did not explain why it was in the interests of justice to adjourn the case. Nonetheless, it was submitted, the court must have appreciated that its duty was to do justice between the parties and "this was not one of those exceptional cases where the Magistrates Court did not exercise their discretion properly".

20 As to remedy, the CPS said this:

> "If the case should not have been adjourned and the erroneous decision is quashed one remedy the Court might wish to consider is whether to remit the case to the Magistrates Court for trial albeit with the CPS only entitled to call PCs Curtis and Burr on this issue."

21 Permission was initially refused on the papers by McGowan J but then granted after a hearing on 15 March 2022 by Steyn J, who also gave directions for the substantive hearing.

22 Steyn J's order included directions:

(a) for the defendant and any interested party wishing to contest or support the claim to file and serve any detailed grounds, written evidence and documents within 28 days, but permitting them to rely on their Summary Grounds if they notified their intention to do so to the other parties and the court within the same period;

(b) for the filing and service of skeleton arguments by the claimant no less than 14 days before the hearing and by the defendant no less than 7 days before the hearing;

(c) for the parties to agree a paginated and indexed hearing bundle and to lodge it in hard copy and electronic form not less than 14 days before the date of the hearing; and

(d) for the parties to agree an authorities bundle and to lodge it in hard copy and electronic form not less than 7 days before the hearing.

Procedural defaults

23 In many judicial review claims, a defendant or interested party who has resisted permission decides after permission has been granted not to continue to contest the claim or to contest it on limited grounds only. The grant of permission may cause the defendant or interested party to re-evaluate the merits of the claim. Alternatively, matters may have moved on such that there is no longer any point in contesting the claim. The Administrative Court Judicial Review Guide ("the Guide") provides at para. 15.3.5.3 of the 2022 edition (reproducing para. 15.3.6 of the 2021 edition) as follows:

> "The duty of cooperation with the Court means that defendants and their representatives have an ongoing duty to consider whether their defence remains viable, particularly after the grant of permission."

24 This is one reason why the requirement that a defendant or interested party serve Detailed Grounds is so important: it provides an early indication of whether the claim is still contested following the grant of permission and, if so, on what grounds.

25 In this case, Steyn J permitted the defendant and interested party to indicate that their Summary Grounds would stand as Detailed Grounds. This reflected CPR 54A PD, para. 9.1(1), which makes clear that a party should take this step only if all relevant matters have already been addressed in the Summary Grounds. The Guide provides further that, before taking such a step, the party should consider whether the material in the Summary Grounds is sufficient to discharge the duty of candour and cooperation with the court: see para. 10.1.4.3 of the 2022 edition.

26 In this case, the CPS did not file Detailed Grounds. Its Summary Grounds were exiguous, equivocal and unclear. They did not explain on what basis it was now said that the case could have proceeded without evidence from Dr Mars when, in the application for an adjournment, the contrary had been submitted. They appeared to accept that there was a failure to give adequate reasons without saying so in terms and did accept that Miss Elmes' comment had been inappropriate. At the same time, however, they invited the court to reject the submission that the justices did not exercise their discretion appropriately, without explaining why. The result was that neither the Court nor Ms Saunders had a clear indication whether the claim was still being defended or, if so, on what grounds. This was a serious procedural failure.

27 Matters were made worse because the CPS did not file a skeleton argument on time or at all. A party who wishes to be heard at a hearing but has not filed a skeleton in accordance with applicable directions must apply for relief from sanctions: *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin) (Singh LJ). No such application was made. Counsel did not explain the absence of skeleton argument at any time before the start of the hearing.

28 The procedural failures were not restricted to the CPS. Although Ms Saunders' representatives lodged a hearing bundle, it was not in the format stipulated in the Guide:

see para. 21.4 of the 2022 edition (reproducing Annex 7 to the 2021 edition). The requirement for an index or table of contents to be hyperlinked to the pages or documents it refers to, is of particular importance. That was not complied with, which meant that the electronic bundle was very difficult to navigate.

29 Given this catalogue of procedural failures, it would have been open to me to adjourn the hearing and require the failures to be remedied in the interim. I considered adopting that course, but given the relatively narrow compass of the issues, I decided to proceed to determine the claim. In future, parties may expect defaults of this kind to result in adjournments and consideration may be given to costs or other sanctions (including wasted costs orders).

Law

30 The overriding objective in a criminal case includes dealing with the case efficiently and expeditiously: see Crim PR 1.2(e). Crim PR 1.2 provides as follows:

> "Each participant, in the conduct of each case, must—
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> (a) prepare and conduct the case in accordance with the overriding objective;
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> (b) comply with these Rules, practice directions and directions made by the court; and
>
> (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective."

31 The court too has an obligation to further the overriding objective when exercising any power given to it by legislation: Crim PR 1.3(a).

32 Crim PD 24C.1 provides as follows:

> "Courts are entitled to expect the parties and other participants to adhere to Crim PR 1.2 (The duty of the participants in a criminal case) and to prepare accordingly for the trial to proceed on the date arranged. The court will expect communication between the parties and with the court regarding any issues which are likely to affect the effectiveness of any trial: Crim PR 3.2(2)(b)-(e). In particular, any revision of the information provided in the preparation for effective trial form must be reported to the court and each other party well in advance of the trial, not at trial or shortly before; and in considering any application to adjourn a trial the court will regard as especially significant any failure in this respect. Any communication should clearly identify the issue and any direction sought and should require reference to a legal adviser or case progression officer. The parties and other participants are entitled to expect the court and its staff to adhere to Crim PR 1.3 (The application by the court of the overriding objective) and to conduct its business accordingly.

> If relevant Criminal Procedure Rules, Criminal Practice Directions and judicial directions for trial preparation are followed, an effective trial on the date arranged will be the result."

33 In *Visvaratnam*, the claimant was charged with driving while unfit through drugs. On the day long set for his trial, the prosecution intended to rely on the evidence of a doctor whose evidence was critical to the case. The doctor's evidence had not been disclosed to the defence and the doctor had not been warned to attend. Another vital witness, a forensic scientist, had been warned but had indicated well before the trial date that he was unavailable. Yet no application to adjourn was made. The prosecution applied on the day of the trial to adjourn the case, providing no explanation for their failure to serve the evidence of the doctor, or warn him, or to apply for an adjournment once the unavailability of the forensic scientist was known.

34 Openshaw J (with whom Elias LJ agreed) emphasised, by reference to previous authority, the critical importance of robust case management by magistrates: see at [8]. He underlined the salience of the overriding objective of dealing with cases efficiently and expeditiously: [9]-[10]. He noted that it was well established that the High Court could intervene where an adjournment was granted with no, or inadequate, reasons: [11]. He continued:

> "14. In considering the competing interests of the parties, magistrates should examine the likely consequences of the proposed adjournment and its likely length, bearing particularly in mind the need to decide the facts while memories are fresh. The reason that the adjournment is required should be examined, and if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment; likewise if the party opposing the adjournment has themselves been at fault will favour an adjournment.
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> 15. Magistrates should also take appropriate account of the listing history of the case, whether there have been earlier adjournments, and, if so, who has made the application and upon what grounds. It is the court's duty to balance all these matters so as to do justice between the parties and they should give reasons for their decisions."

35 On the facts of the case, Openshaw J had "no doubt that the magistrates were wrong to grant this adjournment". The Court quashed the decision to adjourn, from which it followed that "the claimant should be acquitted": [20].

36 In *Balogun v Director of Public Prosecutions* [2010] EWHC 799 (Admin), [2010] 1 WLR 1915, the Divisional Court considered an appeal by case stated from a decision of magistrates to adjourn a case involving driving with excess alcohol because of the unavailability of a police officer who was a key witness. Leveson LJ (with whom Cranston J agreed) held that the judge had failed to submit the application to the appropriate rigorous scrutiny: see at [27]. Since the proceedings had continued and resulted in a conviction, the proper course was to grant the claimant permission to apply for judicial review of the conviction, dispense with all procedural requirements and quash the conviction: [33].

37 In the course of the hearing, I drew counsels' attention to *Miah v Crown Prosecution Service* [2018] EWHC 3208 (Admin), where the Divisional Court dismissed an appeal by case stated from a decision to adjourn a trial of charges under the Malicious Communications Act 1988 on the application of the prosecution, again because of the unavailability of witnesses for which the prosecution was at fault. In that case, however, the case stated contained full reasons for the decision, showing that the justices had considered the relevant authorities and factors, including the seriousness of the offences (which involved the sending of faeces through the post, carrying contamination risks to members of the public). The Divisional Court (McCombe LJ and Phillips J) held at [13] that the justices were "well within the ambit of their proper discretion to adjourn this case".

Submissions for Ms Saunders

38 For Ms Saunders, Mr Edward Hetherington submitted that this was a case in which the nature of the defence had been set out very clearly at the first opportunity. The need for evidence from the custody doctor (whose identity was not then known) was properly flagged. Directions had been given for his statement to be disclosed and served. The defence had asked why his statement had not been served on 28 September 2022, in advance of the trial, in a genuine attempt to ensure the case was ready for trial. His unavailability flowed from two procedural failures which were entirely the fault of the prosecution: first, the failure to disclose and serve his statement as directed; and second, the failure to warn him to attend for trial.

39 Crim PD 24C.1 and the case law were to like effect. There was a strong presumption that summary trials should take place on the date fixed. Where applications for adjournment are made by one party, procedural failings by that party tell strongly against the application. Any decision to adjourn must be cogently reasoned, by reference to the Criminal Procedure Rules and Practice Directions and the relevant case law.

40 In this case, the justices concluded that the adjournment was in the interests of justice but gave no reason, let alone an adequate reason, for reaching that conclusion. On the authorities, that would be enough on its own to vitiate the decision to adjourn. But Miss Elmes' comment that Ms Saunders "can't get away with it because there has been an admin error" supplied a further ground of challenge, because it suggested a presumption that Ms Saunders was guilty of the offence with which she was charged. A fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased (applying the test in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357). Such an observer would bear in mind the context that a Legal Advisor with over 20 years' experience thought the comment sufficiently concerning that, unusually, she disclosed it to Ms Saunders' representative.

41 As to remedy, Mr Hetherington relied in particular on *Balogun.* In that case, the Divisional Court quashed the conviction, having concluded that the adjournment should not have been granted. The present case was *a fortiori*, because there was no conviction. The reasoning suggested that the proper relief was an order quashing the decision to adjourn and, given the Crown's own express statement that the case could not proceed without Dr Mars, a direction to the justices to acquit Ms Saunders.

Submissions for the CPS

42 For the CPS, Mr Peter Grieves-Smith accepted that the CPS had offered the justices no adequate explanation of why the statement of Dr Mars had not been obtained earlier or why he had not been warned to attend on 1 October 2021; and nor was any such explanation available now. He accepted that the reasons given by the justices for adjourning were brief to the point of inadequacy and that Miss Elmes' comment would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. Even if a more charitable reading of Miss Elmes' comment might have been possible against the background of a properly reasoned decision, the combination of the comment and the inadequately reasoned decision meant that the test for bias was met.

43 Nonetheless, although the decision they gave did suffer from the two defects identified (inadequate reasons and appearance of bias), the justices could properly have decided to adjourn. Despite the prosecution's procedural failures, the offence had taken place less than 4 months before and there was every prospect that an adjourned trial could be accommodated shortly. The police officers had attended court and there was a body of other material about Ms Saunders' conduct.

44 As to remedy, Mr Grieves-Smith initially submitted, in line with what had been suggested in the Summary Grounds, that I could quash the decision to adjourn and remit the case to the Magistrates' Court for trial with a direction that the CPS be precluded from calling Dr Mars. By the end of the hearing, however, he accepted that this would not be appropriate. Ultimately, he accepted that, if I concluded that the decision to adjourn had been wrong in law (as he more or less accepted it had), the proper remedy was to quash the decision to adjourn and remit the case to the Magistrates' Court with a direction to acquit her.

Discussion

45 In my judgment, this case raises two questions which it is important to keep separate: first, whether the decision of the justices on 30 September 2021 to adjourn was vitiated by a public law error; second, if so, what the remedy should be.

46 As to the first question, both Crim PD 24C.1 and the authorities make clear that applications to adjourn summary trials require "rigorous scrutiny" and decisions on such applications must be cogently reasoned. In this case, what the presiding justice said expressed a conclusion: that an adjournment was justified in the interests of justice. This showed that he had applied the right overarching test, but did not explain <u>why</u> it was in the interests of justice to adjourn the trial. Describing the prosecution's failure to serve Dr Mars' statement or warn him to attend the trial as an "admin error" did not help. Overall, what the presiding justice said did not demonstrate that he had taken account of the factors identified as relevant in the Practice Direction and authorities. The "reasons" were therefore inadequate, as Mr Grieves-Smith candidly accepted.

47 As to Miss Elmes' comment, I accept that lay justices cannot be expected to express themselves with perfect precision at all times, especially when deliberating in private. On its own, the comment could possibly be understood as a short and infelicitous way of

saying that the seriousness of the offence charged told in favour of an adjournment. However, this case involves a combination of features: the lack of adequate reasons for the adjournment decision; Miss Elmes' comment while the justices were deliberating in private; and the reaction of the very experienced Legal Advisor. Taking these three features into account, a fair-minded and informed observer not present when the comment was made would in my view place considerable weight on the reaction of someone who was, particularly someone with Ms Reilly's training and experience. She regarded it as sufficiently concerning to raise it with Mr Linehan. That fact tips this case over the line so that the test for apparent bias is met.

48 It follows that, in my judgment, the decision to adjourn was vitiated by two public law errors: failure to give adequate reasons and apparent bias.

49 The question of remedy is more difficult. Having found that the challenged decision was unlawful, it should no doubt be quashed. But what else should happen? I begin by considering whether it would have been open to the justices to grant the adjournment on the material before them. The authorities do not support the proposition that a prosecution application to adjourn will never succeed if it results from a cause for which the prosecution is culpable. Much will depend on the facts, but Crim PD 24C.1 makes clear that failures to comply with procedural directions will be especially significant and *Visvaratnam* makes clear that the gravity of the breach will be important. The upshot is that successful applications to adjourn will in general require a clear and adequate explanation of the reasons for the default. *Miah* shows that the seriousness of the offence (in that case a triable either way offence, which on the facts exposed third parties to the risk of contamination) may also be significant.

50 In my judgment, the facts of *Visvaratnam* are very similar to those in the present case. The offence charged was materially similar. There, as here, there had been no previous adjournment. In this case, the prosecution failed to comply with the direction to serve the custody doctor's evidence, failed to warn him to attend and advanced no explanation whatsoever for these failures, despite their own positive submission that, without his evidence, they could not prove their case. If the decision to adjourn in *Visvaratnam* was "wrong" (in the sense that it was not open to the justices), the same must be true of the decision here.

51 It follows that, on my findings, the justices should have refused the application to adjourn. Mr Grieves-Smith accepted by the end of the hearing that, if I reached this view, the proper remedy was a direction to acquit. In my judgment, he was right to concede that point. Even assuming that I have jurisdiction to do so, it would not be fair to direct that the trial proceed without the evidence of Dr Mars, given that the prosecution founded their adjournment application on the express contention that they could not prove their case without that evidence.

Conclusion

52 For these reasons, I shall quash the justices' decision of 30 September 2021 to adjourn the case and remit the case to the justices with a direction to acquit Ms Saunders.