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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
Mr Justice Globe

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2018

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE KING
and
THE RECORDER OF WINCHESTER HH JUDGE CUTLER CBE (SITTING AS A JUDGE OF THE COURT OF APPEAL, CRIMINAL DIVISION)

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Between:

TAHIR AZIZ **Applicants**
MOHIBUR RAHMAN
NAWEED MAHMOOD ALI
KHOHAIB HUSSAIN

- and –

THE QUEEN **Respondent**

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- -

Mr K Vaughan QC (appearing pro bono) for the **applicant Tahir Aziz**
Mr J Bennathan QC and Ms D Cooper (appearing pro bono) for the **applicant Mohibur Rahman**
Mr S Kamlish QC and Ms C Oborne (appearing pro bono) for the applicant Naweed Mahmood Ali
Mr R Menon QC (appearing pro bono) for the applicant Khobaib Hussain

Mr G Patterson QC and Mr W Emlyn-Jones for the Respondent

Hearing dates: 18th October 2018

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JUDGMENT

Lord Justice Holroyde:

1. After a long trial at the Central Criminal Court before Globe J and a jury, these four applicants were convicted of an offence of engaging in conduct in preparation of terrorist acts, contrary to section 5(1)(a) of the Terrorism Act 2006. The particulars of the offence were that between 25th May 2016 and 27th August 2016, with the intention of committing acts of terrorism, each of the applicants engaged in conduct in preparation for giving effect to that intention. On 3rd August 2017 they were all sentenced to life imprisonment. In the cases of Rahman, Ali and Hussain, the minimum term specified by the judge was one of 20 years. In the case of Aziz a minimum term of 15 years was specified. All four applicants have applied for leave to appeal against conviction. Aziz has also applied for leave to appeal against his sentence. Their applications were refused by the single judge Openshaw J. They were renewed to the full court. At the conclusion of the hearing of the renewed applications, we reserved our decision, which we now give.

2. Counsel for the applicants all appeared *pro bono*. We are grateful to them for their willingness to attend and to make oral submissions on that basis.

3. We summarise the principal features of the case very briefly. For convenience, we shall refer to the applicants by their surnames. We intend no disrespect in doing so.

4. In the summer of 2016, officers of the West Midlands Police established a fake business in Birmingham called Hero Couriers. They did so as part of an undercover operation intended to observe and engage with Hussain and Ali, who were suspected of involvement in terrorism-related activity. A number of undercover police officers played the roles of members of staff at Hero Couriers. In particular, an undercover officer known as Vincent posed as the manager. Another undercover officer, whose evidence featured prominently at trial, was known as Andy.

5. Ali and Hussain were next door neighbours in Birmingham. In 2011 they had both travelled to a training camp in Pakistan, and both had been convicted of a terrorism offence after they had returned to this country. Whilst they were serving their sentences, they met Rahman, whose home was in Stoke-on-Trent. He too was serving a sentence for a terrorism offence, in his case relating to the possession of copies of Inspire magazine. Aziz was a friend of Rahman, also resident in Stoke-on-Trent. He had no previous terrorism-related convictions. All four men had been seen together on the 21st August 2016, when they were in a park near Rahman's home and, it was alleged, were undertaking covert surveillance techniques.

6. Hussain began to work at Hero Couriers. He was followed a few weeks later by Ali, whose first shift was on 26th August 2016. On that day, Ali arrived for work in his Seat car. The police intended to take the opportunity, whilst Ali was out making deliveries, to install a covert listening device in that car. The evidence adduced by the prosecution was that in the course of that operation, a JD Sports bag, multicoloured and with a draw string, was found underneath the driver's seat. Inside the bag were found a partially-constructed pipe bomb, an implement described as a meat cleaver with the word "kafir" inscribed on it, an imitation hand gun, a number of shotgun cartridges, gaffer tape and paper tissues. Evidence was given by Vincent that he had seen Hussain in possession of an identical JD Sports bag on previous occasions. In cross examination, however, Vincent conceded that he did not assert it was the same bag. The defence case, in a

nutshell, was that none of the applicants had any knowledge of the bag containing the pipe bomb, and that it had been planted in the Seat car by dishonest police officers.

7. Later on 26th August 2016, all four applicants were arrested. Aziz was arrested in his car. A samurai sword was found next to the driver's seat. Also found were two mobile phones and a CD with recordings of Jihadist nasheeds. Searches of the homes of the four applicants resulted in the seizing of electronic devices and material which the prosecution alleged showed an extremist Islamic mind set. When interviewed under caution, the applicants for the most part remained silent. Ali and Hussain denied any knowledge of the JD Sports bag. Ali made a prepared statement to the effect that the only person who would have had access to his car on 26th August 2016 was Vincent, who had asked for the keys before Ali went out on a delivery trip.

8. Other evidence relied upon by the prosecution included the following:

   i) The techniques used to construct the pipe bomb were techniques which had been taught to Hussain when he attended a plumbing course at college.

   ii) The method of construction was also similar to that described in an issue of Inspire magazine.

   iii) The roll of gaffer tape found in the bag had on it DNA which, it was accepted, matched the DNA profiles of Hussain and his sister.

   iv) Hussain, Ali and Rahman had set up a chat group, which they named "the Three Musketeers", using the encrypted Telegram messaging app. The prosecution alleged that communications between them showed that they were frustrated by the lack of action.

   v) Aziz, though not a member of the Three Musketeers group, was regularly in contact with Rahman discussing extreme Jihadist ideology. On 15th August 2016 he told Rahman that he supported all those who fight for the cause of Allah.

9. At trial, three of the applicants gave evidence, but Ali did not.

10. The jury were told from the outset of the trial, in the opening speech for the prosecution, that they could not convict any of the applicants unless they were sure that the JD Sports bag had not been planted in the Seat car on 26th August 2016. At an early stage of the summing up, the learned judge provided the jury with a route to verdict in which the first question was "are we sure that the bag found in the Seat Leon on the 26th August 2016 was not planted in the car by Vincent or his associates?" They were told that if they answered that question "no", their verdict in relation to all four accused must be not guilty. If their answer to question 1 was "yes", the verdict in relation to Ali was guilty and they must consider further questions in relation to the other accused. Question 2, in relation to Hussain, was whether the jury were sure that on 26th August 2016 Hussain was in joint possession with Ali of the bag, or alternatively knew about the possession of the bag by Ali, and in either event was agreeing to play a part in the use of the bag to commit an act of terrorism. Question 3, in relation to Rahman, asked whether the jury were sure that on 26th August 2016 Rahman knew about the possession by at least Ali of the bag found in the Seat Leon and was agreeing to play a part in the act of terrorism. Question 4 was a similar question in relation to Aziz.

11. It is not suggested by any applicant that these were not the correct questions to be considered by the jury. Thus the principal issues which the jury had to resolve were clearly defined.

12. Four grounds of appeal are advanced in relation to the convictions. Not every applicant raises all four grounds, and the applicants differ in the emphasis which they give to particular aspects of their arguments. All, however, make the point that if the conviction of any one of the applicants is arguably unsafe, it must follow in the circumstances of the case that other convictions are arguably unsafe. We have concluded that in considering the applications for leave to appeal, the fairest course is to treat all four grounds as relevant to the case of each applicant, and to proceed on the basis that all four applicants will be able to rely on any arguable ground.

13. In summary, the grounds of appeal first challenge the decision of the learned judge in refusing to discharge the jury, at an early stage of the trial, in the light of the terrorist incident at Westminster Bridge on 22nd March 2017; secondly, challenge the decision of the judge, at the conclusion of the prosecution case, refusing to lift the anonymity orders which he had made in relation to Vincent and Andy; thirdly, challenge the decision of the judge resulting in the discharge of one juror, but not of the jury as a whole, after it had come to light during the summing up that a juror had indicated that she found one of the police officers in the case attractive; and fourthly, allege that the judge's summing up of the evidence given by Vincent was unbalanced and unfair to the accused. Aziz's ground of appeal against his sentence is that, in all the circumstances of his case, a life sentence was neither necessary nor appropriate and the applicant should instead been given an extended determinate sentence. We shall consider these points in turn.

14. The trial began on 1st March 2017. The process of empanelling a jury occupied 4 days. Prospective jurors answered a questionnaire which related not only to their availability for the expected length of the trial, but also about impartiality in trying a case involving a terrorist allegation. There were a number of legal arguments to resolve, which took some time. In the event, prosecuting counsel did not begin to open the case to the jury until the morning of 22nd March 2017. That afternoon, the terrorist incident at Westminster Bridge and the Palace of Westminster occurred. Details of that incident were not fully known by the end of that court day. On the following morning, counsel for all the applicants applied to discharge the jury. Time was allowed for the preparation of submissions. About a week therefore passed before the trial was resumed following the judge's ruling.

15. The submission on behalf of the applicants was and is that the fact of the Westminster Bridge terrorist incident, and the media coverage of it, gave rise to a clear risk of prejudice to the applicants which could not be eliminated by judicial directions to the jury. Counsel argued that the jury should therefore be discharged, and that the trial should recommence in about September 2017 when the damaging effects of the publicity surrounding the Westminster Bridge incident would have abated.

16. Counsel for the applicants helpfully provided the judge with a substantial bundle of material indicative of the nature and extent of the media coverage following the Westminster Bridge incident. It was submitted on behalf of the applicants that this was not simply a case of a terrorist incident occurring in central London at a time when, only a short distance away, four men were standing trial on a charge of an alleged

terrorism offence. It was also a case in which there were significant similarities between the evidence to which the jury would be required to give impartial consideration and features of the Westminster Bridge incident and the matters being reported in the media. For example, both featured the use of a car and a knife; both featured police and MI5 attention being given to men based in the Birmingham area who were said to embrace radical Islamist ideologies; both featured the use of Telegram and other encrypted social media sites. Counsel emphasised that the Westminster Bridge incident was the first incident in many years in which civilian lives had been lost in a terrorist attack. They also emphasised that the allegation of plant would inevitably involve a head on attack on the honesty and good faith of undercover police officers, at a time when media reports were praising the work of undercover police operations against suspected terrorists. On behalf of Rahman and Aziz, who were not directly concerned with the allegation that the bag in the car had been planted, counsel pointed to the prosecution's reliance on "gory and extreme" evidence of mind set on the part of those two accused. It was submitted that, in the light of recent events, the jury would consciously or unconsciously be prejudiced against the accused. In short, it was submitted that the jury would inevitably be under immense pressure to convict, and would be tempted to do so even though the evidence did not prove the offence. The risk of prejudice could not be avoided if the trial proceeded immediately, but could be substantially reduced by discharging the jury and re-starting the trial some months later.

17. It is well established by the decisions in *Re Medicaments (No2)* [2002] 1WLR 779 and *Porter v Magill* [2002] 2AC 357, and it was common ground between the parties in their submissions, that when considering questions of possible bias, the issue is whether a fair minded and informed observer would conclude that there was a real possibility or real danger that the tribunal of fact was biased. In his written reasons for refusing the application to discharge the jury, the judge referred to that principle, and also to further principles:

> "First, that the principal safeguards of the objective impartiality of a jury lie in the trial process itself and the conduct of the trial by the judge, and the system of trial by jury is based upon the assumption that a jury will follow instructions they receive from the judge: see *Montgomery v HM Advocate* [2003] 1AC 641.
>
> Secondly, the fact that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, a fair trial will be possible. In considering that question, a judge may have regard to his own experience and that of fellow judges as to the manner in which juries normally perform their duties: see *Abu Hamza* [2007] 1 Cr App R 27".

18. The judge noted that it was implicit in the making of an application to adjourn, rather than an application to stay the proceedings, that the defence accepted that the risk of prejudice would at some point in time be capable of being cured by judicial direction. He emphasised that the question was whether a fair trial was possible if the case continued. He did not accept a submission that nothing would be lost by adjourning a trial which had so far been running for about four weeks. Nor did he accept the submission that the right thing to do was adjourn the trial, because there was no

guarantee that the trial would be able to proceed on the next occasion. In this regard, the judge said:

> "Sadly, terrorist attacks occur at inopportune moments. The point is made that this the first of its type since 2005. However, one should not ignore the deaths of Lee Rigby in 2013 and Jo Cox in 2016, as well as many, many foreign terrorist incidents, any of which could cause the re-emergence of publicity issues in the media for a whole variety of reasons. A related consideration must necessarily be the unintended consequence that a discharge of a jury may encourage sympathisers or others with ulterior terrorist motives to commit terrorist acts to frustrate the process of terrorist trials. All these matters demonstrate that the legal principles should be strictly applied. It is they, not anything else, that provide the answer to this application."

The judge went on to accept that there was a risk of possible bias arising from the events and the aftermath of what had happened at Westminster, but did not accept the submission that that risk could not be dealt with by the trial process and judicial direction. He did not agree that there were such close similarities between the events at Westminster, and the allegations in this trial, as to make bias inevitable and correction impossible. Nor did he accept the submission that the jury would not be able to consider the mindset evidence dispassionately. He concluded:

> "My conclusion is that there is no evident necessity or high degree of need for the discharge of the jury. I do not accept the proposition that a fair minded and informed observer would conclude that there is a real possibility or danger that the jury properly directed would be biased. I am satisfied that appropriate directions are possible and not impossible following the events and media reporting of what happened at Westminster. I am satisfied that with such directions a fair trial will take place. The trial can and should continue now. It does not require an adjournment until about September."

For those reasons, the application to discharge the jury was refused.

19. As he had said he would do, the judge went on to give the jury very clear directions about the need for them to consider the evidence dispassionately, and not to be influenced by the events at Westminster. The terms of those directions are not criticised: rather, the submission is that no direction could cure the risk of prejudice.

20. The second ground of appeal relates to the decision of the judge refusing an application made on behalf of the applicants, at the end of the prosecution case, that the anonymity which had at an early stage been granted to the witnesses Vincent and Andy should be lifted. On behalf of the applicants Ali and Hussain in particular, it was submitted that the effect of the anonymity had been that the defence had been precluded from investigating and testing issues relevant to the credibility of the evidence of those witnesses. In particular, it was submitted, there had been no opportunity to investigate or test any previous allegations made against either Vincent or Andy of planting evidence; to know whether or not the fingerprints and/or DNA of either Vincent or

Andy were on the JD Sports bag or any of its contents; or to investigate whether Vincent might have possessed, purchased or been able to purchase any of the items found in the bag. It was further submitted that there had been an improper failure by the police to investigate those matters, and a failure by the prosecution to ensure that there was proper investigation of them. The submissions appear to have been made in strong terms.

21. In his written reasons given on 19th June 2017, the judge summarised the circumstances in which the anonymity orders had been made, some of the submissions in that regard having been heard *in camera*. He noted that Vincent had initially given evidence to the jury over a period of 10 days, with extensive cross-examination by counsel for both Ali and Hussain. Later in the trial he was recalled for further cross-examination over a period of 5 days. Therefore, there had been 15 days during which Vincent's credibility had been subject to thorough examination and cross-examination. Andy had given evidence over 3 days. As the judge put it, "no stone has been left unturned about the undercover operation generally and the events of 26th August. Put simply, there is abundant evidence upon which the jury will be able to focus upon the credibility of Vincent and Andy's evidence."

22. In relation to the specific disadvantages alleged by the defence, the judge considered whether there had been a material change in circumstances since the orders were made such as to justify discharge or variation of the orders pursuant to section 91 of the Coroners and Justice 2009. As to the first matter, the judge referred to the evidence of both Vincent and Andy that they had clean disciplinary records as police officers and had been subjected to intensive vetting in order to become undercover officers. Andy gave evidence that four complaints had been made against him, all of which were a long time ago and none of which was found to have any substance. There was nothing for the prosecution to disclose in that regard. Vincent gave evidence that false allegations are often made by criminals against police officers, including allegations of plant, and there probably had been such an allegation made against him; but he could not remember when that might have happened, and in any event there had never been any formal complaint and disciplinary process. The judge rejected the defence submission that it was necessary to know the identities of Vincent and Andy in order to follow up lines of enquiry about any past allegations of plant. He accepted the prosecution's submission that any such enquiries would be speculative, would relate to events a long time ago which had never led to any unfavourable disciplinary process, and that any material that might emerge was unlikely to pass the test of admissibility under section 100 (1)b of the Criminal Justice Act 2003. As to the second and third matters, the judge accepted that further lines of enquiry might have been pursued by the police but was satisfied that those investigating had not fallen below the standards required of them under the Code of Practice and the Attorney General's Guidelines on disclosure. He concluded that there had been no material change of circumstances since the anonymity orders were made which necessitated their discharge or variation.

23. The third ground of appeal relates to circumstances that arose during the judge's summing up. It was brought to his attention, by court staff, that an enquiry had been received from a press representative who had overheard a conversation in the courtroom about a juror enquiring whether a particular police officer in the case was single. The officer concerned was a Detective Sergeant Chambers, whose credibility was in issue

in the trial. The judge caused enquiries to be made, from which the following facts emerged:

i) A juror, to whom we shall refer as Juror 1, had stated that she found DS Chambers attractive.

ii) Another juror, Juror 2, had said to the usher words to the effect "you know Juror 1 fancies the officer. Try and find out if he's single".

iii) A few days later, after the comment had been repeated to her, the usher reported it to the court clerk.

iv) The court clerk did not at that stage tell the judge.

v) The matter only came to the attention of the judge as a result of the press enquiry.

24. It was submitted on behalf of the applicants that DS Chambers was an important witness whose credibility had been challenged; that one juror was attracted to him; that another juror had tried to obtain information about him; that no other juror had said anything about this to the court; that there was actual or apparent bias in relation to juror 1; that the rest of the jury, particularly juror 2, were complicit; that there was accordingly actual and apparent bias in relation to the whole jury; and that there was no remedy, so that the whole jury must be discharged.

25. The judge, having heard submissions, required jurors 1 and 2 to answer a number of written questions. He accepted the answers given by juror 1 as frank, and was satisfied that, although she had light-heartedly referred to finding DS Chambers attractive, she was able to give impartial consideration to the evidence in the case. He did not accept that juror 2 (who denied having made any enquiry of the usher) had been frank, and discharged her.

26. The judge in his ruling on this issue again referred to the test in *Re Medicaments* and in *Porter v Magill* of whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility or real danger that the tribunal of fact was biased. The test related to perceived bias as well as actual bias. He noted that partiality for a witness did not necessarily mean partiality for the party calling the witness. He declined to ask questions of the remaining jurors, taking the view that there was no evidence that any other juror had actively sought to obtain information about a witness and that he could properly regard the failure of any juror who knew about these matters to report it to the court as a minor breach of their responsibilities.

27. When he later explained to the jury what had happened, the judge expressed his disappointment that other jurors, at least some of whom he was satisfied must have been aware of what was happening, had not brought the matter to the attention of the court. He reiterated the duties of jurors in very clear terms.

28. The fourth ground of appeal, advanced on behalf of the applicants Ali and Hussain, is that the judge's summing up in relation to the evidence of Vincent was unbalanced and unfair, and amounted to advocacy in support of the prosecution case. It is submitted that the judge adopted an approach to the evidence of Vincent which was obviously different from the way in which he summarised the evidence of other witnesses.

Particular complaint is made that in the course of his lengthy summary of Vincent's evidence, the judge posed a number of rhetorical questions which the jury might or might not wish to consider. It is submitted that in doing so he failed to accompany any of the questions with any of the many points which the defence would wish to make in answer to those questions. Thus, it is said, the jury were given an incomplete and distorted picture of Vincent's evidence and the prosecution were unfairly assisted to repair the damage which had been caused to Vincent's credibility in the course of cross-examination. Given the implausibility of the proposition that Ali had given his car keys to Vincent when he knew there was a partially-constructed bomb under the driver's seat, and given that Vincent was centrally implicated in the allegation of planting of evidence and that his credibility was crucial to the prosecution's case, it is submitted on behalf of the applicants that these deficiencies in the summing up render the verdicts unsafe.

29. It is further submitted that the summing up in relation to Vincent's evidence was unfair because of "a number of particularly glaring omissions": namely, failures to remind the jury of a number of points made by the defence about the incredibility of Vincent's evidence.

30. The prosecution respond to these criticisms by submitting that the passages in the summing up about which complaint is made were within the bounds of legitimate comment, identified questions which the jury were likely to ask, and gave rise to no unfairness.

31. We turn to summarise the application for leave to appeal against sentence in Aziz's case. Aziz is now nearly 39 years old. He has 6 previous convictions for 12 offences, none of which was terrorism-related. The most serious was in 2002, when he was sentenced to 5 years' imprisonment for offences of supplying Class A controlled drugs. His personal circumstances are that he is married, with two young children, and at the time of his arrest was working in two jobs to support his family.

32. The judge in his sentencing remarks referred to the guidance on sentencing for offences of this nature which was given by this court in *Kahar* [2016] 2 Cr Appellant R (S) 32. He found that the offending of which the applicants had been convicted fell towards the bottom of level 2 and the top of level 3 in the levels identified in that case. At p11 of the transcript, he said:

> "The messages on 25 August suggest an attack was imminent, albeit not necessarily immediate. It is at least likely that some further work needed to be done to the pipe-bomb. What needed to be done, though, was neither significant nor difficult. The use of the pipe-bomb by itself could have been catastrophic. However, that was not the only possible means of attack. The events of Manchester and London Bridge demonstrate the terror and irreparable serious damage to life that can result from the use of explosives and bladed weapons. I am satisfied that there was sophistication and professionalism in the planning as evidenced by the contents of the bag, the purchase of the phones, the use of a secure Telegram messaging channel and anti-surveillance tactics. So far as Ali, Hussain and Rahman are concerned, it was also longstanding in that such preparations

> were ongoing over many weeks, such that frustration and impatience was evident in the messages of 25 August, which messages are in themselves further evidence of the imminence of an attack. So far as you are concerned, Aziz, the jury's verdict means you willingly latched on to the planning that had been ongoing and became part of whatever was about to happen.
>
> The nature and length of time over which I am satisfied in each case radicalisation and the commitment to idealistic extremism has now existed and, I am satisfied, continues, is such that I regard all four defendants as a continuing danger to the public. There is no estimate, still less a reliable one, as to the length of time any one of the four will remain such a danger. In my judgment there is no available sentence, even by way of an extended sentence, that will ensure the safety of the public other than the imposition of a life sentence. I have kept in mind the fact that a life sentence is a sentence of last resort. However, my conclusion in each case is that he seriousness of the offending justifies such a sentence. In these circumstances, pursuant to the provisions of s225 of the Criminal Justice Act [2003], I am obliged to impose a sentence of imprisonment for life."

33. In relation to the length of the minimum term, the judge drew a distinction between Aziz and his three co-accused, because Aziz did not have the aggravating feature of a previous conviction for a terrorism offence, and because his radicalisation was not as long-lasting. He was however satisfied that when Aziz eventually aligned himself with what was going on, he became a willing and active group member in relation to an extremely serious offence and a lengthy minimum term was therefore necessary. In those circumstances he set the minimum term at 15 years.

34. It is submitted on Aziz's behalf that although the authority of *Kahar* permitted the judge to impose a life sentence, it did not lead inevitably to such a sentence. In deciding whether an extended sentence would be sufficient the judge had to have regard to the level of Aziz's involvement in the crime, and his personal circumstances. The fact that the judge drew such a marked distinction between Aziz and the other applicants in relation to the minimum term shows, it is submitted, that those two considerations were strongly in Aziz's favour. The judge should in those circumstances have imposed an extended sentence.

35. The grounds of appeal against conviction have been set out at length and in detail in the written and oral submissions, all of which we have considered. Although it is not necessary for us to mention every single point which has been made, we have them all in mind in reaching our decision. The issue for us at this stage is whether it is arguable that the convictions are unsafe on one or more of those grounds.

36. The first ground of appeal against conviction relates to an issue of jury discharge which was within the judge's discretion. We have to consider whether it is arguable that the judge's ruling was wrong in law, or was a decision which was outside the ambit of decisions reasonably open to him. It is well established that where a trial judge has carefully considered all relevant matters, this court will be slow to interfere with his or her decision as to whether a jury should be discharged.

37. The Westminster Bridge incident, and the subsequent media coverage of it and of its aftermath, certainly called for careful consideration of whether the trial would be fair if it continued after only a short interruption. The judge was clearly fully alive to the matters which concerned defence counsel. He had regard to the relevant case law, and correctly directed himself in law, in particular as stated by this court in *Abu Hamza*. The fact that Hughes J (as he then was) felt it necessary and appropriate to adjourn the trial in the circumstances of *Abu Hamza's* case does not mean that Globe J was obliged to reach a similar decision in the circumstances of this case. It was for him as the trial judge, with his knowledge of the case and the issues likely to arise, and with his feel for the atmosphere in the courtroom, to determine whether a fair trial was possible. He was entitled, and correct, to have regard to judicial experience as to the manner in which juries normally perform their duties, and to take into account that none of the publicity directly related to any of these applicants personally. It is in our judgment impossible to argue that he could not reasonably reach the decision he did. On the contrary, he put forward clear and cogent reasons for his decision, and was entitled to conclude that the fair-minded and informed observer would not see a real possibility that the jury, properly directed, would be biased. He was also entitled to take into account that no period of adjournment, however long, could be guaranteed to avoid the risk of media attention being given to some further terrorist incident which might be said to prejudice the defendants in their defence.

38. Moreover, we see no basis on which it could be argued that the judge's decision did in fact result in an unfair trial. In the event, about four months passed between the date of the Westminster Bridge incident and the jury's retirement. Further terrorist incidents occurred in Manchester and on London Bridge, but no application was made for the jury to be discharged following either of those incidents. More than once during the trial, and in the summing up, the judge gave the jury firm directions as to the need to try the case on the evidence and to set aside emotion. After the London Bridge incident he gave a specific direction that the jury must notify him of any concerns, but no juror indicated any difficulty about trying the case on the evidence. It is submitted that the jury must have failed to follow the directions, and must have been influenced by factors other than the evidence, because the defence case was very strong and yet the jury convicted the applicants. It must however be remembered that none of the applicants made a submission of no case to answer. There may have been tactical reasons why that was so, but we have no doubt that there was evidence on which the jury, properly directed, could properly convict each of the applicants. It is therefore not possible to infer from the verdicts that the jury cannot have focused on the evidence. We reject the submission, and we see no other basis on which it could be said that the jury could not or did not obey the judge's directions.

39. As to the second ground, the judge had granted anonymity orders at an early stage of proceedings, on 23rd March 2017. By s88 of the Coroners and Justice Act 2009, the court may only make such an order if certain conditions are met. The conditions include, by s88(4), that "having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial". By s89, the judge in deciding whether the statutory conditions were met was required to have regard to a number of specified factors, and such other factors as the court considered relevant. The specified factors are listed in s89(2) as follows:

> "(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
>
> (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
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> (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
>
> (d) whether the witness' evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
>
> (e) whether there is any reason to believe that the witness (i) has a tendency to be dishonest, or (ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
>
> (f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court."

40. The judge in making the orders for anonymity considered the statutory provisions, considered the leading case of *Mayers* [2009] 1 WLR 1915, and was satisfied that the statutory conditions were fulfilled. The ground of appeal relates not to the making of the anonymity orders but to the application to set aside those orders at the end of the prosecution case. That application was made pursuant to s91 of the 2009 Act, which provides:

> "(1) A court that has made a witness anonymity order in relation to any criminal proceedings may in those proceedings subsequently discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 88 and 89 that apply to the making of an order.
>
> (2) The court may do so (a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, (b) on its own initiative.
>
> (3) The court must give every party to the proceedings the opportunity to be heard (a) before determining an application made to it under subsection (2); (b) before discharging or varying of its own initiative.
>
> (4) But subsection (3) does not prevent the court hearing one or more parties to the proceedings in the absence of a defendant in

> the proceedings and his or her legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.
>
> (5) "The relevant time" means (a) the time when the order was made, or (b) if a previous application has been made under subsection (2), the time when the application (or last application) was made."

41. The question for the judge was therefore whether there had been such a material change of circumstances since the orders were made as to make it appropriate to discharge the orders in relation to Vincent and Andy. Having addressed the three issues which the defence contended they had been precluded from investigating and testing, he concluded that there had not been a material change.

42. The applicants argue that there had been a very substantial change of circumstances because, they assert, the evidence of Vincent and Andy had been discredited in cross-examination. However, even if we were to accept for the purpose of this submission that the points made in cross-examination were as powerful as counsel suggest, they were by definition points which were before the jury, and to which the jury could give such weight as they saw fit. The anonymity of Vincent and Andy had not prevented the defence from making those points. The witnesses had been cross-examined at great length, and the applicants' counsel were able to make important points challenging the honesty and reliability of the prosecution evidence. In particular they were able to make important points as to when Vincent's notes had been made, as to the contents of text messages passing between police officers, as to inconsistencies in the prosecution evidence and as to contacts between prosecution witnesses. The jury had ample material on which to assess the credibility of these two important witnesses.

43. The issue at this stage, accordingly, is whether in some other respect the anonymity orders had arguably prevented the applicants from making points which they would otherwise have been able to make, and whether their inability to make those points had arguably rendered the trial unfair and the convictions unsafe. As we have indicated at paragraph 20 above, three points have been raised in this regard.

44. As to the first, the question of whether either Vincent or Andy had been the subject of any previous allegation of planting evidence had been raised and had been answered by each of the witnesses. A disclosure note was provided by the prosecution to the defence on 23rd May 2017 (about three weeks before the application to discharge the anonymity orders was made), which said:

> "1. The prosecution continue to discharge their obligations in respect of disclosure, including in respect of material pertaining to the background and character of the anonymous witnesses, including Vincent and Andy.
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> 2. Records confirm that Vincent has never been the subject of a formal complaint whilst acting in any capacity in law enforcement, and he has a clean disciplinary record.

> 3. Records also confirm that Andy has a clean disciplinary record. Over the course of his career he has been the subject of a small number of complaints (a total of four), all relating to the period before he began working as an undercover law enforcement officer, a role he has performed for very many years. Each of those four complaints was investigated, and all four were found to have been unfounded; as such Andy was not subject to any disciplinary finding or action. No details of any of the four complaints fall to be disclosed.
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> 4. As regards researching the possibility of either Vincent or Andy having been involved in previous cases involving a defence allegation of 'plant', there is no database which can be searched to identify the lines of cross-examination taken, or the nature of defence cases advanced, on behalf of defendants in other cases involving Vincent and Andy. Vincent and Andy can be asked for their own recollection of any such event.
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> 5. As is apparent from the texts at entries 835 and 836, on 21st March 2017, prosecution counsel had caused the enquiry to be made in general terms. The answers given by Andy in his reply had not been communicated to the CPS. Until the telephone downloads were reviewed, the SIO, the CPS and prosecution counsel were not aware of those particular text messages. They were provided to the prosecution on 1st May 2017 (disclosed to the defence on 3rd May 2017)."

45. In the circumstances of this case, any material relating to previous complaints or allegations which the defence sought to have admitted as evidence of bad character on the part of Vincent or Andy would have to satisfy the requirement of section 100 of Criminal Justice Act 2003 that it be evidence of substantial probative value in relation to an important matter in issue. Nothing has been put before us which provides any arguable basis for thinking that, if the officers were named, the defence would be able to obtain and adduce evidence of bad character which could meet the test of substantial probative value on the issue of the witnesses' credibility.

46. As to the second specific point, it seems to us that the focus of the complaint is on the fact that no attempt had been made to check whether any of the fingerprint and DNA findings on the JD Sports bag and its contents matched either Vincent or Andy. That is not a matter which turns on the anonymity or naming of either witness. It is, as was strongly emphasised in the oral submissions of counsel, a complaint that the prosecution had failed to discharge their duty to investigate anything which might affect the credibility of an anonymous witness. That was a matter which the judge considered when he rejected the application to lift the anonymity orders. He took into account that when an anonymity order has been made, the prosecution must make reasonable enquiries in order to be able to disclose to the defence any information which is capable of undermining the credibility of an anonymous witness. But he also took into account that both the Code of Practice under the Criminal Procedure and Investigations Act 1996 and the Attorney General's Guidelines on disclosure make it clear that what is reasonable will depend on the facts and circumstances of the case, that the police are not required to make speculative enquiries and that "a fair investigation does not mean

an endless investigation". It is relevant to note that Andy was not alleged to have handled the JD Sports bag or its contents. Vincent had emptied out the contents of the bag, and although there was an issue as to whether the manner in which he demonstrated his action could have accounted for the fingerprints which were found, the prosecution had taken the view that there would be no purpose in making the comparison which the defence wanted to be made. The judge, in his ruling, said in this regard that even if Vincent's DNA and/or fingerprints were found on any item from the bag, "Vincent's evidence is such that he either might have touched the bag and its contents on the course of examining and/or moving them, likewise, he may have shed DNA on them simply by being in the near vicinity of them". Having correctly considered all relevant matters, the judge was in our view entitled to reach the decision he did as to the second specific point.

47. It is submitted to us that that the impropriety of the judge's conclusion and ruling is demonstrated by the fact that in his summing up, the judge indicated that the jury might think it unsatisfactory that certain matters, such as whether any DNA or fingerprint on the JD Sports bag matched either Vincent or Andy. It is argued that such an observation to the jury cannot be reconciled with the judge's earlier ruling, and that the ruling must therefore be wrong. We do not accept that submission. When considering the application, the judge had to make his own assessment of the adequacy of the investigation into matters relating to Vincent and Andy. As we have indicated, he was entitled to reach the decision he did. When directing the jury, he had to remind them of relevant features of the evidence and in this regard, he fairly reminded them of the forensic point legitimately made by the defence about the absence of any fingerprint or DNA comparison. The terms in which he did so were helpful to the defence. It was for the jury to decide what weight to give to that point, and to consider whether they could be sure that the burden of proof had been discharged by the prosecution when those possible investigations had not been made. We see no inconsistency in the judge's approach. The fact that in his summing up he raised the point for the jury's consideration does not make it arguable that his earlier ruling was wrong.

48. It is further submitted that all of the disclosure made by the prosecution during the trial came about as a result of cross-examination of prosecution witnesses. That may be so; but the judge was entitled to regard that as a product of the raising of new issues by the defence as the case progressed rather than an indication that there had been a failure of proactive investigation.

49. As to the third specific point, and whether Vincent could have obtained a shotgun cartridge, and/or could have purchased any of the other items found in the JD Sports bag, it seems to us that the submissions are wholly speculative. There was indeed an acceptance by DS Chambers that it would have been possible for Vincent to purchase such items. There is no basis for saying that, if provided with Vincent's true name, the defence would have been able to adduce evidence that he did in fact make such purchases. Although the judge did not require Vincent to answer a question as to whether he held a shotgun licence, there was other evidence that Vincent had attended a police weapons training course and was familiar with shotguns. That being so, we find it impossible to see what further assistance the defence could have gained if provided with Vincent's name.

50. In relation to this application generally, the judge in our view directed himself correctly in law and considered all relevant factors. He was particularly well-placed to determine

whether there had been any material change of circumstances, having presided over a trial which had by then been running for about 3 months. Although the applicants disagree with his decision, there is no arguable basis for saying he could not reasonably have reached it.

51. Nor is there any basis for saying that the trial was in fact unfair because of the judge's decision on this application. We note that Ali, the one defendant who could give evidence as to whether anything was under the driver's seat when he parked his car on the relevant morning and gave the keys to Vincent, and therefore the one defendant who had personal knowledge of a matter highly relevant to the allegation of plant, did not enter the witness box. The jury were correctly directed that, if the relevant criteria were satisfied, they were entitled to regard his silence as providing some support for the prosecution case.

52. The third ground of appeal relates to a difficult issue which arose unexpectedly at a late stage of the trial. The judge in our view handled the problem skilfully and fairly. He caused appropriate enquiries to be made of Jurors 1 and 2, on the basis of which he was able to make an assessment of what had happened and whether it gave rise to any actual or apparent bias. He discharged Juror 2, a decision which is not the subject of any complaint. He accepted the answers of Juror 1, as he was entitled to do. He came to the conclusion, as he was again entitled to do, that she could continue to serve as a juror: she had not personally made any attempt to find out information about a witness, and she had been forthright in her assurance that she could and would give impartial consideration to the evidence. As to whether Juror 1 and/or the other jurors should be discharged because of individual and collective failures to report what was happening to the judge, he was entitled to decide that no further enquiries were necessary or appropriate and that he could treat the failure of those who knew to make any report as a comparatively minor breach of their duties as jurors. He gave them a very firm reminder of their duties.

53. We are not persuaded that there is any arguable ground on which it can be said that the judge failed to comply with the Criminal Procedure Rules or otherwise made an error of law. In reaching his decision, he was entitled to take into account his observation of the jury during the long trial and his assessment of their attention to the evidence.

54. The fourth ground criticises one section of the summing up. We must consider the criticisms of that section, but we must also have regard to the summing up as a whole and decide whether it is arguable that there was such imbalance in it as to render it unfair to the applicants and to cast doubt on the safety of the convictions.

55. The judge posed a number of questions about Vincent's evidence which the jury might want to consider. He was entitled to do so. On each occasion when he did so, he made it clear that it was a matter for the jury whether they wished to consider the question at all, and it was a matter for them what answer they gave to it. We accept that he did not follow any of the questions with an immediate reference to points which the defence would have wanted to make in reply to the question; but nor did he follow it with any reference to points which the prosecution would want to make. He did no more than identify a question which the jury might want to consider and the alternative ways in which it might be answered. We do not accept the submission that the terms in which the questions were posed were loaded in favour of the prosecution. Nor do we accept that what are referred to by counsel as "case-winning points" were undermined by the

terms in which the judge summed up this part of the evidence. Defence counsel had no doubt emphasised those points to the jury in their closing speeches. There is no basis for saying that the terms of the summing up would arguably have caused the jury to ignore the points if they were otherwise impressed by them.

56. Moreover, we have no doubt that when viewed as a whole the summing up placed the applicants' cases fairly and squarely before the jury. The jury can have been in no doubt about the points relied on by the defendants individually and collectively.

57. Standing back from the grounds of appeal, we have considered whether anything put before us casts doubt on the safety of the convictions. We are satisfied that there is nothing which does so. The jury by their verdicts plainly rejected the allegation that evidence had been planted. Having done so, there was ample circumstantial evidence against each of the accused to support the convictions.

58. As to the sentence in Aziz's case, there was at the time no sentencing guideline in respect of terrorism offences, but detailed guidance had quite recently been given by the Lord Chief Justice giving the judgment of the court in *Kahar*. We recognise of course that the sentence is a heavy one for the applicant. We recognise, as did the judge, that a life sentence must always be a sentence of last resort. Aziz had however been convicted of active involvement in preparing for a terrorist act involving the use of a bomb, the purpose of which was to kill and maim, and also to spread terror. Such conduct can properly result in a life sentence, as *Kahar* makes clear. We accept that it was necessary for the judge to consider an extended sentence; but he did so, and he was unarguably correct when he said that it was not possible to predict when, if at all, Aziz would cease to be a danger to the public safety. For that reason, he was entitled to conclude that an extended determinate sentence could not provide sufficient protection for the public. Having presided over such a long trial, he was in the best possible position to assess the applicant's culpability. It is clear from his sentencing remarks, including the passage which we have quoted at paragraph 32 above, that he directed himself correctly in law. We see no basis on which it could be argued that life imprisonment was either wrong in principle or manifestly excessive. The minimum term reflected the distinctions which could be drawn between this applicant and his co-accused and was not arguably excessive in length.

59. We add finally that, having made our own assessment of the grounds of appeal against conviction and sentence, we also agree with and endorse the reasons given by the single judge for refusing leave on the papers.

60. For those reasons, each of these applications for leave to appeal fails and is refused.