Neutral Citation Number: [2019] EWCA Crim 1736

Case No: 201803344

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON HULL
(HHJ Kelson QC)
(T20187023)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th October 2019

Before:

LORD JUSTICE MALES
MRS JUSTICE CUTTS
and
HIS HONOUR JUDGE DEAN QC

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Between:

REGINA	**Respondent**
- and -	
COLIN CADAMARTRIEA	**Appellant**

- -
- -

Richard Wright QC and **Paul Genney** (instructed by **Robinsons**) for the **Appellant**
Bernard Gaitshill (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 11th October 2019

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Approved Judgment

Order pursuant to section 4(2) of the Contempt of Court Act 1981 that this judgment must not be published until the conclusion of the retrial

Lord Justice Males:

1. On 18 June 2018, in the Crown Court at Kingston upon Hull before HHJ Kelson QC and a jury, the appellant Colin Cadamartriea (now aged 65) was convicted of murder. He now appeals against conviction with the leave of the single judge. The issue on the appeal is whether his conviction for murder is unsafe on the ground that he did not receive a fair trial after his counsel withdrew at the conclusion of his evidence.

2. In addition he renews his application for leave to appeal against his sentence of life imprisonment with a minimum term of 20 years following the refusal of that application by the single judge.

The prosecution case

3. The appellant and the deceased, a man called Jarrod Marsh, were both residents of a hostel which consisted of six bedrooms and a communal area. Both men became residents of the hostel in October 2017, shortly after their (separate) release from prison. Both were alcoholics.

4. On Saturday 20th January 2018, at about 1 pm, the appellant stabbed Mr Marsh once in the neck with a kitchen knife in the communal area of the hostel. The blow was fatal and, although the emergency services attended, Mr Marsh was pronounced dead at the scene at 1:30 pm. The appellant had been drinking heavily and was calculated to have as much as 266 mg of alcohol per 100 ml of blood in his body at the time of the stabbing.

5. The prosecution relied on the evidence of Laura Hudson, another resident of the hostel. She said that on the day of the stabbing the appellant was agitated and was complaining that Mr Marsh had stolen £200 from him, which he had spent on drink. The appellant had a knife on the floor of his bedroom and said that he was going to stab Mr Marsh with it. He said that he wanted to hurt him. She said that she pleaded with the appellant not to do so and went downstairs, where she spoke to Mr Marsh and told him that the appellant wished to hurt him. Mr Marsh then went upstairs and returned with a can of lager which it appeared that he had taken from the appellant's room. He said that the appellant had threatened to stab him, but that he was not bothered. Ms Hudson went upstairs to her room and, shortly afterwards, heard two screams.

6. Ms Hudson described also a background of shouting and arguing between Mr Marsh and the appellant, including an incident of violence between them a few weeks before the stabbing when Mr Marsh had lost his temper and grabbed the appellant round the throat, and another occasion only a few days before the stabbing when she had seen the appellant in the hostel carrying a knife. Another resident, Kevin Cooper, also gave evidence about arguments between the appellant and Mr Marsh.

7. The appellant had 38 previous convictions for 91 offences, including convictions for violence, but the only serious conviction for violence was for inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 for which he had received a sentence of two years imprisonment in March 2017.

8. The pathologist, Dr Kirsten Hope, gave evidence that only mild to moderate force would have been required to cause the fatal wound. She said that the location and angle of the wound in Mr Marsh's neck were such that it was difficult to imagine a scenario in which it could have been caused by accident or by a knife held at waist level with the deceased lunging or running onto it. Rather, if the men were standing facing each other, it was likely that the knife was wielded above waist height and then thrust into the deceased's neck in an overarm motion.

9. It was not the prosecution case that the appellant intended to kill Mr Marsh, rather that he intended to cause him serious harm and on that basis was guilty of murder.

The defence case

10. The appellant was interviewed and gave an account to the effect that the stabbing was accidental. He admitted holding the knife when the fatal blow was delivered in the communal area of the hostel, but said that it went into Mr Marsh's throat by accident when Mr Marsh jumped up off the sofa where he had been lying. He admitted that he had taken the knife downstairs with him, but said that he had no intention to use it.

11. However, this case was not pursued when the appellant's Defence Statement was served, by which time he was represented (as he was during the trial) by very experienced leading counsel, Mr Tim Roberts QC, and his junior Ms Joanne Jenkins.

12. The appellant's Defence Statement was drafted by counsel and signed by him on 21st April 2018. It stated that the appellant would plead not guilty to murder but would plead guilty to manslaughter and would rely on the statutory partial defence of loss of control. A summary was given of the evidence which the appellant would give, which referred to violence and bullying behaviour towards the appellant and other residents by Mr Marsh from soon after his arrival in the hostel in October 2017. The appellant said that Mr Marsh had been aggressive towards him on a daily basis and had threatened to kill him on more than one occasion. He was aggressive and controlling towards other residents and was particularly violent and aggressive when in drink. Although the appellant tried to stay away from Mr Marsh, they had rooms on the same landing so this was difficult to do. In January 2018 the appellant was due to receive benefit money of £210, but Mr Marsh contrived to divert the money to his own bank account and spent most of it on drink. This led the appellant to develop a justifiable sense of being seriously wronged.

13. A number of incidents followed. On or about 18th January the appellant was very agitated about the money which Mr Marsh had stolen from him and took a knife with which he was going to confront him and frighten him. However, he was persuaded by Ms Hudson not to do so. On the following day Mr Marsh burst into his room while the appellant was drinking a can of cider and punched him to the ribs and kidneys, after which he trashed the appellant's room. Later the same day the appellant saw Mr Marsh lying on the sofa in the communal room downstairs surrounded by cases of beer which the appellant believed had been bought with his benefit money. Mr Marsh had a knife in one hand and a bottle of vodka in the other and was very drunk.

14. On 20th January, the day of the stabbing, there was a further argument about the stolen money, after which Mr Marsh again burst into the appellant's room, assaulted him and stole his last can of drink. He then went back downstairs and was boasting to the

other residents about what he had done, thereby humiliating the appellant. The appellant went downstairs and demanded his money back, but Mr Marsh denied that he had done anything wrong. Ms Hudson spoke to the appellant and he told her what Mr Marsh had done, that he had no money and that his room had been trashed. Later that morning he went downstairs again, carrying a knife. He was carrying it because he was scared of Mr Marsh, feared more violence and wanted to confront him about the money. Mr Marsh was lying face down on the sofa, drinking from a bottle of vodka. The appellant said that he wanted his money back, but Mr Marsh jumped off the sofa and turned to face him. The appellant had the knife in his right hand and lunged towards Mr Marsh at waist level, aiming the knife towards Mr Marsh but not specifically at his throat. He panicked and the knife went into his throat. The appellant left it there and Mr Marsh fell to the floor.

15. The Defence Statement said that the accumulation of things both said and done by Mr Marsh caused the appellant finally to lose control and to deliver the fatal force.

16. It was not suggested in the Defence Statement that the stabbing was accidental or that it was done in reasonable self defence. By indicating that a plea to manslaughter by loss of control would be entered, as it subsequently was, the appellant was accepting that he had stabbed Mr Marsh deliberately and unlawfully, intending to cause him at least really serious harm.

The trial

17. The prosecution did not accept the manslaughter plea and accordingly the appellant was tried for murder. It is necessary to set out in some detail the course of the trial, the circumstances in which defence counsel ceased to represent the appellant, and events thereafter.

18. The case was opened by the prosecution on the basis that the only issue was loss of control. The prosecution witnesses were called and were cross-examined by Mr Roberts. They included Ms Hudson and Mr Cooper, as well as a third resident of the hostel who had actually witnessed the stabbing, but who was so intoxicated that his evidence (which did not correspond with that of other witnesses) was not relied on by either party. Mr Roberts cross examined the witnesses in accordance with his instructions, that is to say that the appellant had stabbed Mr Marsh as a result of losing control of himself. It was not suggested to the factual witnesses or to the pathologist that the stabbing could have occurred accidentally. Nor was any case put in cross examination that the stabbing could have occurred either accidentally or in reasonable self defence.

19. The appellant gave evidence on Wednesday, 13th June 2018, the fourth day of the trial. He was examined in chief in accordance with the account given in his Defence Statement. He described the background, including the daily humiliations inflicted upon him and the theft of his benefit money. He said that on the day of the stabbing he had a knife and wanted to harm Mr Marsh with it, but was initially talked out of doing so by Ms Hudson. Mr Marsh had then barged into his room, punched him to the kidney, knocked him onto the bed and smashed up the room, after which he left taking the appellant's last can of lager. The appellant felt himself "cracking up" and "had taken enough". He went back downstairs with a knife in his hand and spoke to Mr Marsh, who was lying on the sofa with a bottle of vodka in his hand, about getting

his money back. Mr Marsh jumped up and lunged at him. The appellant lunged forward with the knife, wanting to hurt Mr Marsh who had pushed him too far by stealing his money, leaving him destitute, and beating and humiliating him. He stated in terms that the stabbing was not an accident and that he did not suggest that he was acting in reasonable self defence. Rather, everything had come to a head and Mr Marsh had robbed and beaten the appellant until he could take no more.

20. In cross examination, however, the appellant gave a different account. In particular, he said (as we understand it for the first time) that Mr Marsh had a knife of his own when the appellant first went downstairs to confront him, although he later agreed that this could have been a delusion or a figment of his imagination. He said that when he went downstairs the second time he had done so to frighten Mr Marsh and was not planning to stab him. At that point he was in control of himself. When Mr Marsh jumped off the sofa towards him, he felt frightened. Every time he confronted Mr Marsh, he was beaten. He said that he was out of control when he stabbed Mr Marsh, but he also said at various times that he had been acting in self-defence, taking the knife downstairs because he had seen earlier that Mr Marsh had one, that he did not intend to harm Mr Marsh and that it was an accident. He was taken to parts of his interview where he had not mentioned loss of control, but said that he knew what he was doing and was thinking clearly, but had "lost it".

21. At the end of the cross examination the judge requested Mr Roberts to re-examine in order to clarify what the appellant's defence now was. In re-examination the appellant said that the stabbing was accidental. When Mr Marsh came towards him, he put his hands up automatically and the knife went into him accidentally. He said that he was simply defending himself. He said also that he did not intend to harm Mr Marsh, but only to frighten him. Thus three defences were suggested, accident, self defence and lack of intent, none of which had been foreshadowed in the Defence Statement or in the earlier conduct of the trial, and each of which at one point or another had been expressly contradicted by the appellant's own evidence. These defences were inconsistent with loss of control, which would only arise if the stabbing was deliberate, not in self defence and with the intent to cause at least serious harm.

Withdrawal of defence counsel

22. When the appellant's evidence concluded, the judge commented (in the absence of the jury who had been released for the remainder of the day) that Mr Roberts would need to take instructions, to which Mr Roberts responded that he would need to obtain clarification as to what defence he was instructed to put forward to the jury in his final speech. He expressed concern that, while it was not unusual for a defendant to contradict himself under cross examination, the evidence in re-examination had been elicited by him as part of the defence case. The judge gave Mr Roberts time to take instructions, but expressed doubt whether the appellant would be able to provide any real clarification in view of the fact that he had been intoxicated at the time of the stabbing.

23. After the break Mr Roberts informed the judge that he and his junior were professionally obliged to withdraw from the case. He offered to return on the following day "when your Honour would give what I anticipate would be the only available direction to the jury, that they should be discharged from further consideration of this case, but I am making a presumption there". The judge's

immediate response was that he saw no reason to discharge the jury, a position with which prosecution counsel (Mr John Thackray) expressed agreement.

24. After further discussion with Mr Thackray about the issues which would need to be left to the jury, the judge turned for the first time to the appellant and addressed him directly:

> "I understand why your legal team have now withdrawn from the case. They told [me] they are professionally embarrassed or for professional reasons. The only issue left is whether I discharge this jury tomorrow and you have another trial another day in front of another jury, or whether I carry on with this jury tomorrow.
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> My instincts at the moment are to carry on with this jury tomorrow. Now that being the case, before your barristers had to withdraw, they would have made your speech for you. They would have made a closing speech gathering together the arguments on your behalf. If I do not discharge the jury tomorrow, you will have an opportunity, if you want, to address the jury yourself."

25. The judge added that the appellant would be able to do this in whatever way was least intimidating for him and advised him to make some notes or to write out in advance what he proposed to say.

26. Next morning Mr Thackray confirmed that the prosecution's position was that the case should continue. He submitted that it had involved calling a number of vulnerable witnesses and that the interests of justice required it to continue. After some discussion about whether the prosecution would be entitled to make a closing speech when defence counsel had withdrawn, and observations by the judge that the case was now "massively complicated", Mr Thackray suggested that the representation order could be transferred to new legal representatives, who could be given some time together with the existing defence team's notes on the evidence, either to assist the appellant in giving his closing speech or making it for him. (In fact the existing defence team had already arranged for a new firm of solicitors to attend court in case the judge agreed to transfer the representation order). The judge then turned to Mr Roberts, who was by now present simply to assist the court and was not representing the appellant, and asked whether new counsel if appointed would have the same difficulty in making a closing speech as Mr Roberts had. Mr Roberts' response was that the same difficulty would remain:

> "In discharge of my continuing duty to the court to assist, and not in any way seeking to represent Mr Cadamartriea because we have been professionally embarrassed and withdrawn from that position, that same difficulty would remain, because the defences which Mr Cadamartriea resurrected in the course of cross examination have not been explored in evidence on his behalf, either with his own evidence or in cross-examining the other witnesses, so there is an absence of evidence elicited in support of those defences during the trial, so it would be a

> question of counsel trying to make bricks without straw, in our evaluation."

27. The judge's question and this response elided two distinct issues. One was whether new counsel if appointed would be professionally embarrassed in the same way as Mr Roberts and his junior. The other was whether new counsel would be able, "making bricks without straw", to say anything helpful to the appellant in a final speech.

The judge's rulings as to the further conduct of the trial

28. The judge did not invite the appellant to say anything or ask him for his views. Instead he gave his ruling on how to proceed. After describing the way that the appellant's evidence had departed from the case advanced by him through Mr Roberts and that this had led to the withdrawal of defence counsel, he noted that he was left with two decisions to make.

29. The first was whether to discharge the jury. As to this, the judge decided not to discharge the jury and gave five reasons for his decision. First, he was concerned that if he did so, there was no reason to expect that the same problem would not arise again, by which we understand him to have meant that new counsel instructed for a fresh trial would also find themselves professionally embarrassed and would have to withdraw. Second, he said that it would not be unfair to the appellant to proceed as he had given his evidence, been cross-examined fairly, and had said what he wished to say about the circumstances of Mr Marsh's death. Third, he referred to the vulnerability of the prosecution witnesses who had found giving evidence stressful and uncomfortable, so that it would be unfair to them to require them to give evidence again. Fourth, the cost of a retrial was a factor, albeit not paramount. Fifth, the appellant had brought the situation about. As to this, the judge made the following important finding:

> "The defendant has brought this about. He has not necessarily deliberately, wilfully and consciously brought the situation about, and I am sure that he never envisaged his legal team withdrawing when he gave his evidence. Their withdrawal is a very severely complicating factor in this case."

30. Overall, the judge's view was that the appellant's trial had been fair so far and would continue to be so.

31. The second question for the judge was whether to transfer the representation order to enable the appellant to be represented for the remainder of the trial. He decided not to do so for two reasons. The first was that this would cause delay while a new team became acquainted with the case. The particular issue concerning the judge was that several members of the jury, who had been summoned to serve for two weeks, were now in their third week, with the risk of going into a fourth week if the case did not conclude by the following day. The judge expressed great unhappiness about that prospect. The second reason was that the judge agreed with Mr Roberts' view that the same difficulties would arise for a new team "because the defendant's evidence resurrected defences which have not been explored in the evidence thus far. There was therefore an absence of evidence in support of the new defences which have been raised at trial. His [Mr Roberts'] words were that his view is that the new team would

be probably having to try and make bricks without straw". Accordingly a transfer of the representation order would not solve the problem:

> "Therefore Mr Roberts and his team have to withdraw, I will not discharge the jury, and I am afraid I see no benefit in the suggested possible transfer of the representation order to a new team. There is no doubt that the case is legally very complicated, but that is a problem for myself and the prosecution."

32. Having given his ruling, the judge enquired whether anybody had spoken to the appellant that morning, to which Mr Roberts replied:

> "I have only just acquainted [the appellant] with the reason for our attendance, our continuing duty to the court, and I have explained to him that we have drawn some procedural matters overnight to the attention of the Crown, without seeking to represent him in any way, and apart from that, no. No one has spoken to the appellant about the situation or the trial or how it will continue.

33. The judge then asked the appellant whether he was in a position to make a closing speech, to which the appellant said that he was.

34. Turning to Mr Roberts the judge commented that he presumed there was no point in asking the appellant what he wanted in terms of representation, because the decision to withdraw was for counsel and not the appellant so that what the appellant wanted in this regard did not matter. Mr Roberts confirmed that it was his decision to withdraw and that in his view he was compelled to do so.

The trial continues

35. As the evidence had concluded, all that remained were closing speeches and the judge's summing up. After further discussion between the judge and Mr Thackray as to the legal directions which would be given, the judge turned to the appellant and told him that at about midday Mr Thackray would make his closing speech and that the appellant should make notes, if he wanted to, of anything with which he disagreed, so that he could address the jury accordingly. Mr Thackray offered to provide the appellant with a copy of his closing speech in writing, so that the appellant could consider it overnight before making his own speech the next day, but the judge's immediate response was that the appellant would be making his speech that same afternoon.

36. Later that morning, when the jury came in, the judge told them that the defence team had withdrawn and directed them that this did not assist the prosecution to prove its case and must not be held against the appellant, and that the jury must not speculate about why the defence team had withdrawn. He added that because the appellant was not legally trained, the jury must make "massive allowances" when he came to make his own speech. Mr Thackray then made his closing speech to the jury. It lasted between 40 and 50 minutes.

37. When the court resumed in the afternoon, the judge invited the appellant to make his speech, which the appellant did from the dock. It lasted less than one minute and was, in its entirety, as follows:

> "Yes, sir. There's nothing much to add. Everything I say I can remember from yesterday. I'd just like you please to take into consideration I was bullied and beaten and robbed by a man who was 32 years younger than me. I'd just had enough. I just wanted to scare him in the way he scared me on a daily basis. I did not mean to kill him but he jumped up and he frightened me, he was in my face and I jumped up and I frightened him. I did stab him and I have to be guilty of manslaughter. I didn't murder him. He pushed me – he pushed me too far. That is all I can say. (Inaudible) say this to them."

38. The judge proceeded immediately to his summing up. He emphasised to the jury repeatedly what he regarded as the complexity of the legal directions in the case and directed that the jury must not hold the withdrawal of the defence legal team against the appellant. He left to the jury all of the potential defences which had been raised, namely (in this order) accident, lack of intention to kill or cause really serious injury, self defence and loss of control. He provided them with written legal directions and a route to verdict which he had prepared. He explained to the jury that the appellant had said different things at different times in his evidence and that he (the judge) had sought to deal with everything that had arisen out of the appellant's evidence, especially out of fairness to the appellant now that his legal team was not there. When he came to summarise the appellant's evidence, he repeated that there was no doubt that the appellant had said contradictory things, adding that he had had a lot to drink, so that the jury might not be surprised if his evidence was inconsistent in some respects and they should not judge him too harshly on that account.

39. The summing up concluded and the jury retired at 11 am on the Friday morning. They deliberated for the remainder of the day and returned on the Monday morning. They reached a unanimous guilty verdict in the course of that morning.

The grounds of appeal

40. The written grounds of appeal were settled by Mr Paul Genney before a number of transcripts were available and before Mr Roberts and Ms Jenkins had provided the further information referred to below. It is fair to say that, rather than contending positively that the conviction was unsafe, the grounds raised a series of questions as follows:

(1) Should defence counsel have withdrawn?

(2) Did the judge direct the jury correctly concerning the withdrawal of defence counsel?

(3) Should the jury have been discharged?

(4) Should the judge have allowed an adjournment for new counsel to be instructed either to make the closing speech for the appellant or to advise him about it?

(5) Was it right for prosecution counsel to make a closing speech?

(6) Were the tone and content of the prosecution closing speech fair?

(7) What directions were given by the judge regarding these matters?

41. This led to a waiver of privilege by the appellant, as a result of which we have a full and detailed explanation from Mr Roberts and Ms Jenkins of the circumstances which led to their withdrawal. In summary, they explained that when they saw the appellant after he had given evidence, he confirmed that he wanted them to make a case for self defence, accident and lack of intention which they regarded as being in direct contradiction of the instructions which he had previously given, on the basis of which they had prepared and presented his case at the trial. It was their judgment that to do so would mislead the court and would require them to devise facts or submissions which were not based on evidence elicited by them in support of the case, and accordingly that they were required to withdraw. It is apparent that their view was that if the appellant had done no more than give evidence in cross examination which contradicted his previous instructions, that would not have caused an insurmountable problem, but that the position was insurmountable because they had themselves elicited such evidence in re-examination and the appellant had confirmed that he wanted them to run accident, self defence and lack of intention in the closing speech.

42. Following this waiver of privilege, the grounds of appeal have been refined by Mr Richard Wright QC and Mr Genney who represented the appellant on the appeal. It is now accepted that defence counsel were entitled to withdraw, that the judge's explanation of the withdrawal and his directions to the jury regarding it were appropriate, that prosecution counsel was entitled to make a closing speech and that the tone and content of the speech were measured and appropriate. It is submitted, however, that the effect of counsel's withdrawal was nevertheless to render the proceedings unfair and the conviction unsafe. Two points are now taken. The first is that the jury should have been discharged and a fresh trial ordered. The second is that the representation order should have been transferred so that a new defence team could be instructed, either to make an application for discharge of the jury or in order to make a closing speech on the appellant's behalf or assist him to prepare such a speech. Mr Wright pointed out that the appellant was not even asked for his views about either of these points, but was simply told by the judge what he was going to do. The appellant was, in a vivid phrase, "an unrepresented spectator in his own trial for murder".

43. Mr Bernard Gateshill appeared for the prosecution on the appeal as Mr Thackray has now been appointed to the Circuit Bench. He submitted, in a written Respondent's Notice and orally, that the judge was entitled in the exercise of his discretion to continue with the trial, in particular because the prosecution had called three vulnerable witnesses and it would be unfair to them if they had to give their evidence again and because even if the appellant had not intended to bring about the withdrawal of his defence team, it was nevertheless his change of account which had caused this to occur. He acknowledged that it would have been preferable if the judge had allowed a new defence team to assist the appellant with his closing speech, but submitted that this too was a matter for the judge's discretion and that in any event the conviction was safe in view of the overwhelming nature of the evidence against the appellant.

44. We are grateful for the assistance received from both counsel.

The legal framework

45. The only question for us is whether the conviction is unsafe (see section 2 of the Criminal Appeals Act 1968), but a conviction which is the result of an unfair trial is almost inevitably unsafe. The test which we have to apply was explained by Hughes LJ in *Williams (Derron Anthony)* [2006] EWCA Crim 1457, a rape case in which counsel withdrew on the fifth day of the trial after the prosecution witnesses had given their evidence and all that remained of the prosecution case was the defendant's interview. The defendant (who wanted to challenge the accuracy of the interview record) asked for new representatives, but the judge made clear that the trial would have to continue and declined to allow the defendant new representation. She found that the defendant had made it impossible for his counsel to continue to act, that he was deliberately endeavouring to manipulate the system (he had already dispensed with his legal representatives on two previous occasions) and that he was capable of marshalling the relevant material, giving his own evidence in an orderly way, and making a closing speech to the jury. This court held that there was nothing unfair about the trial taken as a whole. The following passages are of particular relevance:

> "42. The statutory question for this court on an appeal against conviction is whether the conviction is safe. We agree, however, that if the trial, taken overall, was unfair, it is very likely, if not inevitable, that it will follow that a conviction emerging from it is unsafe. … We observe only that we are not be taken as ruling that every incident in a trial, however small, to which the adjective 'unfair' might be applied, will necessarily have the consequence of rendering the conviction unsafe. The question is whether the process of trial was, taken overall, unfair and thus a breach of Article 6 of the European Convention on Human Rights.
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> 43. We do not dissent from the proposition that improperly to deprive a defendant altogether of legal representation is very likely to render his trial unfair and his conviction unsafe. … It does not, however, follow from that case [*Golder* (1977) 88 EHRR 524], or any other, that a defendant to a criminal charge who has three sets of solicitors plus counsel for much of the trial and who then takes a stance on some point which prevents his trial lawyers from continuing is dealt with unfairly if the trial is not interrupted for him to instruct yet further lawyers. The question in such a case is whether the order of the judge that the trial continue did or did not amount to such a denial of representation as to render the trial as a whole unfair.
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> 44. … Once again, it does not follow that if a defendant is represented, but through his own action makes it impossible for his counsel to continue, it is unfair to require the trial already embarked upon to proceed.
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> …

> 60. … we are satisfied that there was nothing unfair about this trial taken as a whole by reason of the fact that the appellant was unrepresented from the point at which counsel withdrew. He was not deprived of representation by the court, nor by the criminal justice system. He had been given representation and in abundance. He was deprived of it by his own actions."

46. It is apparent, therefore, that the question whether the withdrawal of defence counsel renders a trial unfair must depend on all the circumstances of the particular case. These will include the nature and complexity of the issues, the stage at which the defendant becomes unrepresented, the extent to which the defendant is responsible for the withdrawal, and whether and to what extent the defendant is able effectively to take part in the remaining stages of the trial. All these matters and no doubt others call for a careful assessment by the judge in order to determine both whether the trial should continue and whether an opportunity should be afforded for the instruction of a new defence team. It may be appropriate for the latter question to be approached in stages, for example for new lawyers to be instructed in order to consider with the defendant whether an application should be made to discharge the jury.

47. We would accept that these questions call for an exercise of judgment which may be finely balanced, and that the judge is entitled to bear in mind such matters as fairness to prosecution witnesses, particularly in the case of vulnerable witnesses (including complainants in sex cases, although that is not this case). Thus in *Kempster* [2003] EWCA Crim 3555 Mantell LJ said that:

> "35. … The judge has a discretion whether or not to grant an adjournment so as to permit fresh counsel to be instructed. The discretion has to be exercised with regard to the interests of justice in the particular case. The interests of the defendant, but also those of the prosecution, the witnesses and the public have to be taken into account. We have had regard to these principles, and to the provisions of Article 6."

48. Although the interests of the public must be taken into account, we would not accept, even bearing in mind the pressures on the criminal justice system and the needs of other litigants, that the need to complete the trial within its original estimate is a factor of significant weight. A substantial delay is one thing (cf. *Ulcay* [2007] EWCA Crim 2379, [2008] 1 WLR 1209 at [36] where the judge was held to be right to have refused a lengthy adjournment in circumstances which the defendant had himself procured), but an adjournment of a day or so in order to take stock and, if necessary, allow new representatives to be properly instructed is another. If that is what fairness requires, that is what needs to happen. There is a danger that pressing on regardless may lead to errors being made and, importantly, to a situation where justice is not seen to be done.

49. Ultimately the question is whether the trial, taken overall, is fair. While there are other factors which may need to be taken into account, the primary focus must be on fairness to the defendant.

Discussion

50. There is now no issue whether Mr Roberts and Ms Jenkins were entitled to withdraw. It is accepted that they were. In any event this was a matter for their professional judgment and not for the court (*Williams (Derron Anthony)* at [54] and *Ulcay* at [28]). Their withdrawal put the judge in a difficult position and it is clear that he was acutely conscious of the need to ensure so far as possible that the appellant was not prejudiced by the withdrawal and that the trial remained fair. To that end he sought Mr Roberts' assistance as to further procedural steps, although that assistance was not and cannot be regarded as having been given on behalf of the appellant; he gave the appellant some advice about preparing a closing speech and allowed him to make it from whatever place would be most comfortable for him; he sought to take account of all relevant factors in determining whether the trial should continue and whether new representatives should be instructed; and he gave what are accepted to have been appropriate directions about the withdrawal of the defence team not only when the jury returned but also in the course of the summing up.

51. Despite these steps, however, we have in the end concluded that the trial was not fair, for the following reasons.

52. First, the allegations against the appellant were extremely grave. It was a murder case in which he faced a sentence of life imprisonment with a lengthy minimum term which might well mean that he would spend the remainder of his life in prison. The issues were, in the judge's view, "massively complicated". We are not ourselves convinced of this description, as essentially the case was one where, by the close of the evidence, the appellant was seeking to advance a number of inconsistent defences each of which at one point or another had been expressly contradicted by his evidence or disclaimed by him. That is not an entirely unfamiliar situation, not least in a case where the evidence is heavily affected by the consumption of alcohol. Undoubtedly, however, the jury would need careful guidance in legal directions and a route to verdict to pick their way through the various defences which they would need to consider.

53. Second, the judge found that the appellant had not deliberately engineered a situation in which his lawyers would have to withdraw. On the contrary, he found that this was something which the appellant had not even contemplated (see [29] above). Although in one sense the situation which arose was caused by the appellant, this was therefore a very different situation from cases such as *Kempster*, *Williams (Derron Anthony)* and *Ulcay* considered above, where the defendant's manipulation of the system was in each case a highly material consideration.

54. Third, it was apparent that the appellant himself would be completely unable to have any input into the remaining stages of the trial. Legal directions would inevitably have to be formulated without any defence input. It was equally apparent that the appellant was unlikely to be able to formulate a coherent closing speech on his own behalf. It is fair to say that the extreme brevity of his speech, lasting less than a minute, appears to have taken the judge by surprise, but even so it cannot have been expected that the appellant would be able to say much in his own defence, not least as the judge himself had commented to Mr Roberts that he doubted whether the appellant would be able to provide Mr Roberts with any real clarification of the nature of his case (see [22] above).

55. Pausing there, the effect of the judge's decisions, therefore, was that a defendant facing allegations of the utmost gravity, who had not intended to lose his counsel and who would be unable to play any effective part in the remaining stages of the trial, would be without representation for an important part of the case. This was a strong step to take, for which a compelling justification would be needed. We examine below whether there was such a justification.

56. Fourth, even if the judge had not in fact predetermined that he would not discharge the jury without hearing argument, we have to say that this was the impression which he gave. In the event he never did hear argument about this, either from the appellant himself or from new legal representatives. While the appellant may not have had anything to contribute himself on this question, it is striking that his views were never sought, even though the judge had been told that the appellant had been given no advice by his existing team as to how the trial would continue (see [32] above). Further, there was no reason, as it seems to us, why the representation order could not have been transferred to the new solicitors who were present at court, even if only to enable them to take instructions from the appellant on this point and, if appropriate, to instruct counsel to apply for the discharge of the jury.

57. Fifth, in our judgment the reasons given by the judge for his rulings do not withstand scrutiny. We would accept that it would have been open to the judge, taking account of the factors which we have mentioned, to conclude that the jury should not be discharged and that the trial should continue. However, we cannot accept that the judge was right to refuse to transfer the representation order to enable new solicitors and counsel to be instructed.

58. Instruction of new lawyers would have meant the loss of a day or two, but would have enabled them, with the appellant's instructions and the assistance of the existing defence team's notes of evidence, either to make a closing speech for the appellant or to assist him to prepare a speech to make himself. It would also have ensured appropriate defence input into the judge's legal directions and route to verdict. This is not merely an academic point. In fact, because of the haste with which it was prepared, and we note that the judge referred to having to work under pressure to produce these documents in view of the unexpected developments in the case, there was an error in the route to verdict because of the order in which the judge dealt with the various defences. Thus it contemplated that the jury might find the appellant guilty of manslaughter by reason of lack of intent before considering the issue of self defence, which of course (if accepted) would have been a complete defence to manslaughter as well as to murder. In the event, because the jury convicted of murder, no harm was done, but this illustrates the value of taking sufficient time for proper reflection and of defence input.

59. We cannot accept that a delay of a day or two to enable a new defence team to be instructed was too high a price to pay to ensure a fair trial in this case. Moreover, although the judge was concerned about jury availability if the case went into the fourth week of their service, it does not appear that he made any enquiries to see whether this was an actual problem. As it was, the judge was so determined to get the jury out before the end of the week, that he declined Mr Thackray's offer to provide a copy of his closing speech in writing for the appellant to consider overnight and insisted that the appellant make his closing speech on the Thursday afternoon (see

[35] above). In the event the jury returned the following week, apparently without difficulty.

60. Further, the judge was wrong in our judgment to conclude that "the same difficulty" would remain for a new team as had confronted the existing team. The difficulty for the existing team was professional embarrassment as a result of the change in the appellant's instruction. It may be that some counsel would not have regarded themselves as professionally embarrassed but, as we have said, that was a matter for the judgment of Mr Roberts and Ms Jenkins. There is no reason to suppose that a new team would have faced the same professional embarrassment. They would simply have taken instructions from the appellant and advanced his case in their closing speech in accordance with whatever those instructions were. The fact that the appellant had given different instructions to his previous representatives might have caused them a forensic difficulty, but not a professional one. In view of the contradictory evidence which the appellant had given at different times, they might have been faced with the problem of seeking to "make bricks without straw", but that is a problem with which members of the criminal bar are familiar and the edifices constructed in such circumstances sometimes prove surprisingly robust. We have no real doubt that, despite its problems, the appellant's case would have been more effectively presented than it was if new representatives had been instructed.

61. In concluding that "the same difficulty" would arise again, so that a transfer of representation would not solve the problem, the judge therefore failed to distinguish between professional embarrassment and forensic difficulty and took no account of the real assistance to the appellant which new counsel would have provided. We note that at the trial Mr Thackray suggested that the representation order should be transferred (see [26] above). That was a prudent suggestion which the judge rejected. We note also that on appeal Mr Gaitshill accepted realistically that this would have been the preferable course. We agree.

62. We conclude, therefore, that the reasons given by the judge for insisting that the case continue and his refusal to see whether the new solicitors who were available at court could take over the case and instruct counsel were not justified, with the effect that, despite the judge's efforts, the trial was unfair.

63. It remains to consider whether the conviction is nevertheless safe because of the strength of the evidence against the appellant, as Mr Gateshill submitted. As we have said, the appellant admitted the fatal stabbing and, at one or other point in his evidence and by his formal plea on legal advice to manslaughter by loss of control he had expressly negated each of the new defences (accident, self defence and lack of intention) on which he sought to rely. Moreover, it is apparent that the partial defence of loss of control faced formidable difficulties in circumstances where the appellant took the knife downstairs in a state of self induced intoxication. That said, however, we think that the judge was right to warn the jury that, in assessing the appellant's evidence, they would need to make some allowance for his intoxicated state, which might well mean that his evidence contained inconsistencies and could not necessarily be expected to be as coherent as if he had not been affected in this way. We do not think it would be right to conclude that the jury, properly assisted by defence counsel, would necessarily have convicted the appellant of murder and, in those circumstances, we are not prepared to take the exceptional course of saying that even though the trial was unfair the conviction is nevertheless safe.

The sentence application

64. In view of our decision on the conviction appeal, we need say nothing about the renewed application for leave to appeal against sentence.

Disposal

65. The appeal is allowed and the appellant's conviction for murder is quashed. There will have to be a retrial at a venue and before a judge to be determined by the Presiding Judges of the North Eastern Circuit. We make an order pursuant to section 4(2) of the Contempt of Court Act 1981 that this judgment must not be published until the conclusion of the retrial and that the prosecution must notify the Criminal Appeal Office when the retrial has been concluded.