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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 4th April 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

MR JUSTICE FREEDMAN

R E G I N A

- v -

NICHOLAS BRIDGE

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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Mr M Magarian QC appeared on behalf of the Applicant

J U D G M E N T

LORD JUSTICE SIMON: I shall ask Mr Justice Sweeney to give the judgment of the court.

MR JUSTICE SWEENEY:

Introduction

1. This is a renewed application for leave to appeal against conviction, and for a representation order, following refusal by the Single Judge.

2. On 15 June 2018, at the conclusion of his trial in the Crown Court at Hove before His Honour Judge Gold QC and a jury, the applicant was convicted of the murder of Anthony Williams (aged 36) who was stabbed to death by the applicant (then aged 18 and now aged 19) in a flat in Horsham in Sussex on 19 September 2017. On 13 July 2018, the applicant was sentenced to imprisonment for life, with a minimum term of 24 years. The applicant's co-accused, Daniel Onofeghare, who is two years older than the applicant, was convicted of the manslaughter of Anthony Williams, and was sentenced to a twenty year extended sentence, comprised of a custodial term of fifteen years and an extended licence period of five years.

The Facts

3. The facts are set out in the Criminal Appeal Office Summary.

4. For present purposes it suffices to relate that in 2017, prior to the fatal events, the applicant and Onofeghare were involved together in county lines drug dealing in Horsham. There was evidence from two witnesses (Nicholas Lancaster and Craig Lee) that the applicant was in possession of a large and distinctive survival knife.

5. On 18 September 2017 Anthony Williams, who was said to be a rival drug dealer, attended at an address in South Holmes Road in Horsham with an associate called Graham Court, where, wearing balaclavas and armed with a basketball bat, they robbed Onofeghare of a quantity of drugs.

6. It was the prosecution case that the following day at around 5pm, and accompanied by a man called Lam, whose presence enabled them to gain entry, the applicant and Onofeghare went to a flat in Parkway in Horsham, where Anthony Williams was with others, in order for the applicant to carry out a revenge attack upon Williams; that the applicant was armed with the large survival knife to which we have already referred; that despite Williams' initial attempt to grab a basketball bat to defend himself, the applicant used the knife to stab Williams at least five times, including the fatal stab, delivered with severe force, in the back; that Onofeghare, who was holding a weapon of some sort, ensured that the others present did nothing to help Williams; and that thereafter the applicant and Onofeghare made good their escape from the flat. However, they were arrested within an hour at Littlehaven Railway Station where the applicant (who said that he had been stabbed in the groin) was found to be in possession of a rucksack containing the knife (which had Mr Williams' blood on it) and a small Nike bag with a BB gun inside it.

7. In subsequent interviews by the police, the applicant admittedly lied. He denied that he was involved in drug dealing and that he had had any disagreement with Williams. Otherwise, his account was that he had gone to the flat to buy cannabis; that the knife was not his; that Williams had come at him with the knife and had stabbed him with it in the groin; that he had managed to take the knife off Williams; and that whilst Williams had continued to attack him and tried to strangle him, he had used the knife in self-defence.

8. In addition to the two witnesses as to the applicant's possession of the knife prior to the fatal events, the prosecution called three eyewitnesses from the flat: Colin Martin, Ricky Eyres and Matthew Hitchens. The prosecution also called Dr Chapman, a forensic pathologist, as to the

deceased's injuries; Ms Howells, a forensic biologist, as to blood distribution at the scene; Mr Lanham, another forensic biologist, as to his experiments with the knife and the applicant's clothing and his conclusion that the cuts in the groin area of the applicant's clothing had not been made by the recovered knife (which, it was not disputed, was the knife used to stab Williams); and evidence from the officers involved in the arrest and interview of the applicant, and the recovery of exhibits, including a bloodied baseball bat that was found in the flat at Parkway with the applicant's palm print on it.

9. The defence case was that the applicant had acted in self-defence. He accepted in evidence that he was dealing in drugs at the material time; that Onofeghare was also involved in drug dealing; and that (before the fatal events) he had been aware that Onofeghare had been robbed on 18 September. He denied that he routinely carried a weapon and said that the two witnesses who had described seeing him with a knife prior to the fatal events were lying. He said that he had been invited to attend the flat in Parkway on 19 September by one of the witnesses who had been there and that he now believed that he had been lured there so that Williams could attack him. As soon as he had entered the address, Williams had attacked him with the knife and had stabbed him in the groin. He had managed to take the knife from Williams and had stabbed him several times in order to defend himself, during which Williams had tried to take hold of a bag. The applicant had left the flat with the bag and the knife. He had known that Williams was injured, but had not thought that his injuries were fatal.

10. Neither side called Lam, who had accompanied the applicant and Onofeghare to the flat.

11. The judge delivered his summing-up in two parts. The principal directions of law were given before speeches in the first part. In the second part, after speeches, further directions of law were given and the evidence was summarised.

The Grounds of Appeal

12. There are seven grounds of appeal. It is convenient to set them out in the following, broadly chronological, order:

> (1) The judge erred in commenting on the truthfulness of the witness Hitchens in relation to his drug use. This comment would have undoubtedly served to bolster his credibility in the eyes of the jury and was further reinforced when the judge advised the jury that he was a more credible witness as he was in employment.
>
> (2) The judge's questioning of the applicant undermined his defence of self-defence. The applicant had already addressed the issue of stabbing the deceased in the back during the tussle for the knife and the judge's questioning on the topic was unnecessary.
>
> (3) The judge failed to explain the relevance of the bad character evidence in relation to the prosecution witnesses. The direction that he gave during the summing-up only served to undermine the challenge to the credibility of those witnesses.
>
> (4) The judge erred in directing the jury that, if they accepted Mr Lanham's evidence, "it blew the defence out of the water". Mr Lanham’s evidence was not pivotal to the case and the comment risked usurping the jury's function as the judges of the facts.

(5) The judge failed sufficiently to address the issue immediately above following the defence challenge.

(6) The judge undermined trial counsel in front of the jury by making unfair criticisms of the cross-examination of the co-accused (namely asking the co-accused whether he had any mental health issues) and of his closing speech (as to the failure to take a witness statement from Lam, and as to the dangers of racial prejudice).

(7) The judge erred in refusing the defence application to discharge the jury. The cumulative effect of the judge's various interventions could have left the jury in no doubt as to his view of the credibility of the defence case.

Ground 1

13. As we have already indicated, Mr Hitchens was one of the eyewitnesses to the fatal events. His evidence was in considerable dispute. At the end of it, on 30 May 2018, the judge asked him about four topics, namely: to expand on what he had seen when, earlier in his evidence, he had described Williams as defending himself; his use of heroin over many years and the fact that he had also held down a job; his caution for possession of a Stanley knife; and the fact that the flat in Parkway was somewhere that someone could go to buy Class A drugs (see transcript Vol I). In introducing his questions about drug use and employment, the judge said this:

> "Forgive me for asking personal questions but you present slightly differently to other witnesses who have preceded you but you have told us very frankly that you yourself were a Class A drug user at the time.
>
> …
>
> … and you have admitted, and, I mean, obviously from what you say you have fairly regularly been in possession of heroin over the years. You very frankly admitted that."

14. In summing up on 12 June 2018, and having earlier given full standard directions as to the jury's supremacy on all issues of fact, the judge said this (transcript Vol VII at page 34C):

> "Let me turn to Matthew Hitchens, a gentleman who was holding down a job at the time; whether you regard him as being a slightly different category of witness in terms of potential reliability is of course a matter entirely for you. The assessment of these witnesses are all a matter for you, but despite his long term and freely admitted difficulty with drugs, he seemed to be able to cope with it and present himself, certainly in court … in a rather more fluid and convincing way than either Mr Eyres or the other gentleman whose evidence I have reminded you of, Colin Martin."

15. In the course of his submissions in support of this ground, Mr Magarian QC underlined the

fact that the judge had used the words "very frankly" on three occasions when addressing Mr Hitchens, had referred to his holding down a job, and had also thanked him at the conclusion of his evidence for coming to court to help. Mr Magarian submits that these were inappropriate bolsterings of the credibility of a witness whose evidence was in considerable dispute.

16. We disagree. We can see nothing in the judge's summing-up or in his conduct towards this witness which in any way crossed the line and inappropriately bolstered his credibility, or may have done, in the eyes of the jury. There is, in our view, no arguable merit in this ground.

Ground 2

17. On 7 June 2018, at the end of his evidence, the judge asked the applicant for his help on four topics, namely: how he had come to be in possession of the small Nike bag containing the BB gun; the clothing that he was wearing under his tracksuit trousers at the time of the fatal events; the baseball bat that was found in the flat at Parkway (which had the applicant's palm print on it); and the stab wound to Williams' back (see transcript Vol II). As to the stab wound, the judge said this (at 6B):

> "And finally, you have been asked a number of questions about making contact with the knife and whether or not you could recall stabbing Tony. We know from the expert evidence from Dr Chapman that the fatal injury was an injury that he received to his back.
>
> …
>
> And one question one might ask oneself when looking at a case of self-defence is how it is that a man gets stabbed in the back if he is being stabbed in self-defence? Do you see what I mean, because if you have got one against one, facing each other …"

In response, the applicant explained that he did not have a specific recollection, but thought that the wound could have occurred when Williams had been on top of him at one point and he (the applicant) had been swinging the knife around Williams' body.

18. Mr Magarian complained immediately thereafter. He said that the wound to Mr Williams' back had already been dealt with in evidence. However, the judge explained that, from his perspective, it had not been dealt with and that therefore he had thought it right to deal with it (see transcript Vol III at page 2C). The judge added (at 3A):

> "Mr Magarian, if you think I am going to be making a leading speech for the prosecution in my summing-up, suggesting that the fact that he was stabbed in the back therefore means in some way that his defence of self-defence is less likely to be true, I can allay those concerns."

Mr Magarian replied:

> "I am very grateful, your Honour. Thank you."

19. An examination of the transcript of the summing-up shows that the judge was true to his word, as Mr Magarian accepts. Mr Magarian, nevertheless, submits that, because the judge understood that the applicant was saying that he did not have a specific recollection and that that covered any explanation for how the injury to the back occurred, it was inappropriate for the judge to pursue that topic in the way that he did, albeit as part of a number of topics that he dealt with at the conclusion of the applicant's evidence.

20. We see no force in that argument. There was nothing in what the judge did which in any way crossed the line of undermining the applicant's evidence. Rather, it was a perfectly proper question, designed to seek some clarity on an important issue in the case.

Ground 3

21. On 11 June 2018, before the first part of his summing-up that afternoon, the judge heard submissions as to his directions in relation to the bad character of the prosecution witnesses who had variously given evidence as to the applicant's prior possession of the knife and as to the fatal events at the flat. Their previous convictions and other information about the prosecution witnesses were the subject of Admissions 33 to 44. In particular, all save Hitchens had one or more drug convictions, and Eyres had convictions in 2008, firstly, for stealing kitchen knives, and secondly, for having a lock-knife in a public place. Mr Magarian argued that, in addition to credit, the convictions went also to the issues of whether it was more likely that the knife was already in the flat in Parkway and that drug dealing was taking place at that flat (see transcript Vol V at page 6A).

22. The judge dealt with bad character in the second part of his summing-up, which began on 12 June 2018. He reminded the jury that the witnesses had convictions as set out in the Agreed Facts; that it was the defence case that drug dealing was going on at the flat in Parkway and that the applicant and Onofeghare had been lured there to be attacked; that the witnesses' convictions included past involvement in drugs; that, looked at in the round, the jury might have little difficulty in concluding that at least some drug dealing, whether regularly or irregularly, was going on from the flat; and that any convictions for violence were of only limited value, they may think, as none of the witnesses were alleged to have done anything violent at the material time (see transcript Vol VII at page 16A-17C). Further, when dealing with the evidence of Martin and Eyres (at pages 25B-29E of the same transcript), the judge reminded the jury that Martin had agreed that the flat was a crack den; that he had been involved in drug dealing in 2002 and 2005; and that Martin had said that a woman had been to the flat prior to the fatal events in order to buy heroin. As to Eyres, the judge reminded the jury about his cross-examination as to his 2008 convictions; the fact that he had admitted having had a baseball bat at the flat, and the fact that it had been suggested to him that he had had the knife at the flat all along.

23. There was no suggestion either during or after the summing-up that any of that was deficient. Mr Magarian nevertheless submits that the judge failed adequately to reflect the matters upon which the defence had sought to rely.

24. In our view, there is no merit in that argument. The learned judge's summing-up sufficiently covered all the material ground.

Grounds 4-7

25. There is considerable overlap in these grounds of appeal, and thus we consider them

together. Consideration of them must necessarily begin with Mr Magarian's cross-examination of Onofeghare on 8 June 2018. In our view, a fair reading of the transcript (Vol IV at pages 2A-3C) shows that Mr Magarian cross-examined Onofeghare about the content of a recorded telephone call that Onofeghare had made from prison to a friend (even though it was, of course, not admissible against the applicant), and that the two of them (Onofeghare and Mr Magarian) soon became at cross-purposes with each other. Onofeghare endeavoured to explain, perfectly reasonably from his point of view, that when he had said things during the call such as "we went after with him with shanks" and "we were going mad", he was relating what he had understood the prosecution case to be, and his view that the whole situation was mad; whilst Mr Magarian, for his part, was trying to underline that there was no evidence that Onofeghare had done any of the things that he otherwise appeared to be attributing to himself in the call. At all events – and these things happen – Mr Magarian clearly failed to understand what Onofeghare was trying to say, and he chose to continue as follows:

> "Q. Do not take this the wrong way. I am not being disrespectful. Do you have mental health problems?
> A. No, I do not.
>
> Q. Have you ever had?
> A. No, I haven't.
>
> Q. A mental health assessment?
> A. No, I haven't."

No more was said about that until, as we shall see, the judge raised it on 13 June 2018, prior to summing up Onofeghare's case.

26. On 11 June 2018, in the first part of his summing-up, the judge directed the jury (see transcript Vol VII at page 5H) that they must not guess or speculate about anything that was not covered by the evidence; and (at page 6C-E) gave firm directions that what was required of the jury was a clinical analysis of the evidence, with their verdicts reflecting the conclusions that they had come to on the evidence, unaffected by emotion.

27. Mr Magarian made his closing speech on 12 June 2018. In relation to the absent Lam (the man who had accompanied the applicant and Onofeghare to the flat), Mr Magarian said this (see transcript Vol VI, page 2G):

> "Of course, Jimmy is someone the prosecution have not called in this trial before you and there is an admission that the defence have not called him either. Well, we could not call him, of course, because we would not have been able to cross-examine him. You cannot cross-examine your own witness. That is one of the basic rules of evidence. …"

28. Later, at the end of his speech, Mr Magarian said this (which he robustly defended during his submissions to us this afternoon):

> "I am going to now make myself very unpopular with you with

> my last words and I do so with some diffidence. But please bear with me. Imagine, if you will, a white defendant facing a murder trial and he is accused of killing a black man, and all the prosecution witnesses are black, and all the jurors are black, and indeed all the barristers are. Well, that white defendant might be sitting there thinking, 'Goodness me, I mean, what chance have I got here?' You know, 'I'm accused of killing …'
>
> You can see why I am a little bit sensitive about raising such a toxic issue with you but we hear so much – quite rightly in our society and, believe me, I am not the most politically correct person in the world – but we hear a lot about diversity and talk about these issues. I know you will approach the question fairly and open-mindedly, and I know you will check. We all have prejudices, but you will check yourself to make sure they do not come up.
>
> In America, they have a ridiculous system of a jury being – they can choose the racial make-up of the jury. Well, we do not have such a silly system in this country because we can rely on the good sense and fair-mindedness of the jury. And on those words, I thank you for your patience and I have finished before I said I would."

29. Absent the jury, and still on 12 June 2018, the judge raised Mr Magarian's comments about Lam. Ultimately, Mr Magarian accepted (transcript Vol VIII at page 4A) that, having reflected on it, there was some validity in the judge's criticism and that maybe he had invited some degree of speculation insofar as Lam was concerned. For his part, the judge said that he would deal with the issue as neutrally as he could. Nothing was said at that stage about the comments that Mr Magarian had made at the end of his speech.

30. The judge then commenced the second part of the summing-up. He began his remaining directions of law (see transcript VII, page 14G-16A) by underlining that the jury had to try the case on the evidence and must not speculate about evidence that they did not have, such as any evidence from Lam, as to which it was desperately important that the jury did not speculate about what Lam might have said. The judge continued that the jury might have had the impression from Mr Magarian's speech that the prosecution had somehow done something wrong in relation to Lam and explained that Lam's interview had been served on the defence, that the defence were entitled to see if it helped them, and that it was in law open to one defendant to call Lam and for the other to cross-examine him. The judge concluded by saying:

> "The bottom line is that you must not speculate about what he might have said if he had been called. As I say, try the case on the evidence you have, not on the evidence you do not have."

31. As part of his directions to the jury in relation to expert evidence (transcript Vol VII, pages 19A-20A), the judge summarised the evidence of Mr Lanham and stressed that his conclusion that the damage to the groin area of the clothing that the applicant had been wearing (namely,

tracksuit bottoms, two pairs of shorts and boxer shorts) had not been caused by the knife that had killed Mr Williams was hotly in dispute. The judge returned to Mr Lanham (at pages 42C to 44B of the same transcript). He summarised Mr Lanham's evidence in chief, his cross-examination, and his emphasis in re-examination that, when reaching his conclusions, he had taken into consideration the potential movement of both the person holding the item that had caused the cut and the wearer of the clothing, including that both may have been moving. The judge concluded as follows:

> "Well, there it is, ladies and gentlemen. That evidence is hotly disputed by the defence, and [is] potentially very important, because if Mr Lanham is right, ladies and gentlemen, if the knife did not cause that cut, then it rather blows [the applicant's] defence out of the water, you may think, because if that knife – his whole defence is centred around the fact that he is only responding to an initial attack from Mr Williams with that knife, and if that knife did not cause the injury it is difficult to see where that defence would be going but, as I say, that is my comment, it is a matter entirely for you to judge the facts of this case, not for me, but that is potentially important evidence about which you are obviously going to have to make a decision."

32. The judge then summarised the remainder of the prosecution evidence, after which he summarised the evidence of, and on behalf of, the applicant. After the jury had been sent home for the night, Mr Magarian raised with the judge what he had said latterly about Mr Lanham. Mr Magarian asserted that they were sweeping remarks that had usurped the jury's function (see transcript Vol VII, page 54F-56B). The judge suggested that Mr Magarian and prosecuting counsel should confer and consider the matter overnight, which they did.

33. On the morning of the following day, 13 June 2018, and having taken instructions, Mr Magarian applied for the jury to be discharged. In support of that application, he relied upon: first, the questions that the judge had asked the applicant on 7 June 2018 about the stab wound in the back and implied that the judge had said in a glib fashion "How can this be self-defence?", which, it was said, was an unacceptable judicial question; second, the fact that on one occasion, in front of the jury, the judge had said that Mr Magarian was being repetitive (albeit that Mr Magarian accepted that he had been repetitive on that occasion); third, the judge's "blows out of the water" comment in relation to Mr Lanham (as to which the judge said that he was prepared, without conceding that what he had said was wrong, to revise it along the lines suggested overnight by prosecuting counsel in email correspondence to which all had been a party); and fourth, the judge's comments about Mr Hitchens. The combination of those four matters was such, Mr Magarian submitted, that there was nothing that the judge could say to repair the damage that had been done to the fairness of the trial.

34. Once he had ensured that there was nothing else that Mr Magarian wished to submit in support of his application to discharge the jury, the judge then raised two issues with Mr Magarian (see transcript Vol VII at pages 67E-71B), namely, his questioning of Onofeghare on 8 June 2018 about mental health problems and the comments at the end of his speech on 12 June.

35. As to Onofeghare, Mr Magarian accepted that there was no evidential basis for his questions. After that, the judge said to counsel for Onofeghare that he was concerned that there

was a potential unfairness to Onofeghare if the jury were left with some vague, unspecified impression that he had some mental health problem about which they had not heard, and that he needed to correct that. Counsel for Onofeghare agreed with that course.

36. The judge then turned to the comments that Mr Magarian had made at the conclusion of his speech. He explained that he had observed the body language of the jury in response to those comments and was concerned that they could rebound against the applicant in a way that Mr Magarian had not intended and did not want to happen. For his part, Mr Magarian said that he had acted after discussing the issue with the applicant and the applicant's father, and that he had simply been trying to ensure fairness for a black defendant with an all-white jury because sometimes prejudice can creep in.

37. Thereafter, the judge ruled against Mr Magarian's application to discharge the jury (see transcript Vol VII, at pages 71C to 72C). He said that he fundamentally disagreed with the submission that nothing he could say could repair such damage as he had done. The judge then carried on with the remainder of his summing up (see transcript Vol VII, pages 73G-87G).

38. He dealt with the evidence of Mr Lanham again (at pages 84F-85G). He explained to the jury that the colloquial phrase that he had used was no more than a shorthand way of saying that the jury were entitled to conclude, if they thought it right, that the cuts to the applicant's clothing were not caused by the knife, and that therefore the applicant was not telling the truth about Mr Williams attacking him first, which was relevant to the defence of self-defence. However, he emphasised, matters of fact were entirely for the jury, who were at liberty to agree or disagree with him as they thought right. The judge continued that Mr Lanham's was only part of the evidence and that they had to bear in mind Mr Magarian's submissions in relation to Mr Lanham's evidence, namely that the whole science of assessing cuts and articles said to have made them was dubious and that Mr Lanham's qualifications as a forensic biologist related principally to DNA and blood distribution, rather than analysis of cuts in clothing; and that there was no other explanation advanced which explained the cuts to the clothing, other than as alleged by the applicant.

39. As to the comments made by Mr Magarian at the conclusion of his speech, the judge said this (see transcript Vol VII pages 85H-86F):

> "And finally, ladies and gentlemen, I just want to turn for a moment to Mr Magarian's final submission to you, that he made at the conclusion of his closing address. You may recall he concluded his closing speech with a submission that he said might make him unpopular and that he advanced with some diffidence, and he went on to pose a situation where you were on trial as a white person accused of killing a black person in front of a black judge being tried by an all black jury in a case conducted by black barristers, and asked how you would feel in those circumstances.
>
> Well, ladies and gentlemen, I sensed some discomfort amongst you, not surprisingly, at the gist of that submission and what Mr Magarian was driving at. It was an ill-judged submission that should not have been made, capable of being interpreted by you as a warning not to allow any consideration of racism to unwittingly creep into your deliberations. I know that you will apply the same careful consideration to the facts of this case as

> you would to any other. It goes without saying that the fact that both of these defendants are black has absolutely no bearing on the important decisions that you have to make in this case.
>
> Our system of jury trial has a long and illustrious history. Everyone is equal before the law, irrespective of racial origin, personal wealth or standing in the community. The jury system ensures equality before the law, irrespective of status or racial origin. It is potentially deeply offensive to suggest to you that you might allow any such consideration to affect your deliberations. Please do not let any irritation that you may have felt at Mr Magarian's closing remarks to affect you in any way. I am quite sure that he was not intending in any way to offend you, if indeed he did. Perhaps this is all me just being over-sensitive, but these two young men will, I know, receive the fair and balanced consideration of the evidence against them that their respective cases deserve, and I frankly will not tolerate any suggestion to the contrary."

40. We have considered Mr Magarian's various submissions in support of grounds 4-7 but, in our view, there is no arguable merit in any of them. In particular, there was no basis at all upon which to imply that Onofeghare had mental health issues. The judge had a duty to ensure that both defendants had a fair trial, and the directions that he gave were appropriate, robust and fair to both. Equally, whilst it would undoubtedly have been better if, at the outset, the judge had summed up the evidence of Mr Lanham in the way that he did in the end, the latter direction (which was not, as suggested, incoherent) ensured the fairness of the applicant's trial in that regard, albeit that it did not repeat every single one of the points made on the applicant's behalf.

41. As to the comments made by Mr Magarian at the end of his speech and the judge's directions to the jury about them, jurors are selected at random, subject only to the law on disqualified jurors and challenges for cause. It has been settled law since the judgment of this court, presided over by Lord Lane CJ in *R v Ford* [1989] QB 868, that the racial composition of the jury panel cannot, of itself, found a challenge or justify the judge in discharging the panel and ordering the summoning of a new one; that it is not the judge's function to alter the composition of the jury panel; that nor should the judge consider a complaint that the panel is not truly random because it contains a lower proportion of persons of a certain race or ethnic group than live in the relevant catchment area; that the mere fact that a juror is of a particular race or holds a particular religious belief cannot found a challenge for cause on the ground of bias; that the judge may not use his power to stand-by or to discharge for the purpose of securing a jury of a certain racial mix; and that there is no principle that a jury should be racially balanced. Those principles were endorsed, after the coming into force of the Human Rights Act 1988, in *R v Smith* [2003] 1 WLR 2229.

42. Jurors swear or affirm to give true verdicts according to the evidence. They are also directed from the outset of every criminal trial that it is their duty to do so, and that each is under a duty to ensure that all comply with that duty. The duty to give true verdicts according to the evidence is further underlined by directions in every summing-up.

43. In our multi-racial and multi-cultural society juries have, time and again, shown themselves well capable, whatever their racial composition and whatever the race of the accused, of acting

responsibly and discharging their duty of determining whether an accused is guilty or not guilty in accordance with the evidence.

44. Whilst a suitably worded comment about the need to guard against unconscious bias in general might be permissible in appropriate circumstances, in this instance there was nothing at all to suggest the existence of any bias (conscious or unconscious) and the judge had already given the appropriate directions to the jury in the first part of his summing-up.

45. In our view, Mr Magarian's comments, which were explicitly concerned with race, created an obvious risk that the jury would be insulted by them and/or have felt under what would have been inappropriate pressure in consequence of them. Thus, in our view, they should not have been made, and certainly not without first seeking the judge's permission to make them, as Mr Magarian ultimately accepts, to his credit, that he should have done. The judge could then have decided whether any direction was required by him which, if anything needs to be said at all, is likely to be the preferable course, and/or whether to permit the proposed comments (or some amended version of them).

46. Had Mr Magarian sought permission, we have no doubt that, rightly, it would have been refused; and nor would the judge have felt it necessary to give any further direction. However, once Mr Magarian had made the comments, the judge had to ensure the fairness of the trial in their wake. In our view, he did so by the directions that he gave. There is no arguable merit in this aspect of the renewed application either; nor, for that matter, in the combination of any of the grounds advanced.

Conclusion

47. For those reasons this renewed application is refused.
