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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 19 February 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE FARBEY DBE

THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE GOLDSTONE QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

R E G I N A
v
IDRIS HAMOU
EBRAHEM GOGO
HOSHANK JOJO

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Miss C Guiloff appeared on behalf of **Hamou**
Mr M Neofytou appeared on behalf of **Gogo**
Mr C Meredith appeared on behalf of **Jojo**
Mr M Hillman appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 17 December 2018, after a trial in the Crown Court at Canterbury before a judge and jury, these three applicants, together with a fourth man, Bogdaniel Boer, were convicted of an offence of conspiracy to assist unlawful immigration to a Member State. The particulars of the charge in the trial indictment were that the four accused:

> "… between the 1st day of January 2017 and the 26th day of June 2017 conspired together to do an act, namely arrange the transportation of a Syrian National into the UK, which facilitated the commission of a breach of immigration law by an individual who was not a citizen of the European Union, knowing or having reasonable cause for believing that the act facilitated the commission of a breach of immigration law by that individual, and that that individual was not a citizen of the European Union."

2. On the same date the applicants Idris Hamou and Hoshank Jojo were each sentenced to 12 months' imprisonment. The applicant Ebrahem Gogo was sentenced to 15 months' imprisonment and Bogdaniel Boer to 18 months' imprisonment.

3. The three applicants now apply for leave to appeal against their convictions. Hoshank Jojo in addition applies for leave to appeal against his sentence. Their applications have been referred to the full court by the single judge.

4. For convenience, and meaning no disrespect, we shall hereafter refer to those involved in the case by surnames only.

5. The three applicants are Syrian. At the trial, and before this court, they have been collectively referred to for convenience as "the Syrian defendants" in order to distinguish them from Boer, who is Romanian. Gogo and Jojo are brothers. They have two other

brothers, Acheed and Shaya, who at the material time were living in Holland.

6. During the period covered by the indictment all four accused were living in the United Kingdom. Jojo's wife, Noorjehan Kudja was in Syria. Jojo wished her to join him in this country. The charge of conspiracy related to an attempt to bring Kudja into this country illegally.

7. The prosecution alleged that Boer was recruited to travel to Holland by car and ferry and there to collect Miss Kudja from an address written on a piece of paper recovered by the police. That was the address of Shaya, the brother of the applicants Gogo and Jojo.

8. On 25 June 2017 Boer, accompanied by Miss Kudja, intended to drive through the Channel Tunnel to this country. He was however stopped near Calais. He made an unsuccessful attempt to persuade officials that Miss Kudja was his wife, and in support of that pretence he presented the genuine identification documents of his own wife. He was arrested and brought back to the United Kingdom for questioning. Miss Kudja was returned to Calais. At a later date she flew to this country and claimed asylum.

9. When interviewed, Boer admitted that he had been trying to bring Miss Kudja into the country but said that he had been under pressure from others. He referred to his employer's brother, named as Andy Adon, who he said had introduced Boer to Miss Kudja's husband, known as Sher, and his brother Ebrahem, all of whom were Arab. It was the prosecution case that Andy Adon, Sher and Ebrahem were the applicants Hamou, Jojo and Gogo respectively. Boer went on to say in his interview that he felt compelled to do as he was asked because he wanted to maintain his work relationship with his employer and also because he was fearful of what might happen if he did not

comply.

10. In the course of the police investigation, mobile phones belonging both to Boer and Miss Kudja were seized and examined. The phone log had been cleared from Miss Kudja's phone, but it was established that there were post-arrest calls from that phone to numbers attributed to Jojo and Gogo. Investigation of Boer's mobile phone showed that Jojo's phone had attempted to call him 33 times in the period of 20 hours after his arrest. Further, cell site data showed that Gogo's phone was in Kent on the afternoon of 25 June 2017.

11. There was also evidence of contact between Hamou's mobile phone and Boer's phone. On 21 June Boer's phone had sent to Hamou's phone a picture of the identity card belonging to Boer's wife. There was also text message contact in connection with the booking of a ferry ticket and multiple calls and messages both before and after Boer's arrest.

12. As a result of these investigations, both Gogo and Jojo were later arrested on dates in January and February 2018. When interviewed, Gogo answered all questions. He denied any involvement in an attempt to bring Miss Kudja into the country illegally and put forward innocent explanations for the various circumstances relied on against him. Jojo gave a prepared statement in which he denied involvement and thereafter made no comment. Hamou denied any involvement in a conspiracy to bring Miss Kudja to the United Kingdom, but said he had worked with Boer in 2014, was Facebook friends with him and had recently contacted him about renting a house. Hamou's Facebook account was in the name Andy Hamou.

13. The case put forward by the prosecution against the defendants was that there was an inescapable inference to be drawn that the three applicants and Boer were together involved in an agreement to bring Miss Kudja illegally into this country. The prosecution intended to rely on the telephone communications between the accused, the relationship between the applicants and Miss Kudja, the paper bearing the Dutch address which had been found in Boer's car and entries in Gogo's diary which contained a page headed "Horshan balance", a list of money and an entry "£5,000" crossed out next to the words "Nora's fees".

14. The case to be presented for the applicants was that they were not involved in a conspiracy to bring Miss Kudja to this country and that the evidence had been completely misinterpreted. Others may have been responsible for such an attempt, including possibly an uncle named Hamoudi or a brother named Shaya, but it was nothing to do with the applicants.

15. Before coming to events at trial, it is necessary to refer to the procedural history of this case, which is important. Following his arrest, Boer was sent for trial on his own. Indictment T20170399 charged him with a substantive offence of assisting unlawful immigration to a Member State contrary to section 25 of the Immigration Act 1971. The particulars of the charge alleged that he had committed that offence on 25 June 2017. Boer's defence to that charge was to be one of duress and he gave instructions to those representing him, including at a conference on 5 December 2017. Soon after that conference the solicitors representing him completed a certificate of readiness relating to what at that stage was expected to be a trial of Boer alone.

16. It appears however that later in 2017, and at a time before the three applicants were

arrested in 2018, Boer left this country and did not thereafter return. That fact was unknown to the prosecution, to those representing the applicants and to the court for many months.

17. Following the arrest of the three applicants, they were sent for trial. Indictment T20187073 charged them with conspiracy to facilitate illegal immigration to a Member State. The particulars of that charge were that the three applicants "On or before the 25th day of June 2017 conspired together with Bogdaniel Boer to facilitate the commission of a breach of immigration law by an individual who was not a citizen of the European Union."

18. At a plea and trial preparation hearing on 20 June 2018 the applicants were arraigned on that indictment and pleaded not guilty. The judge gave directions. The court log of that hearing recorded that the prosecution intended to join the two indictments, that is to say the indictment against these applicants and the indictment against Boer alone. No objection was raised at that hearing. A note was placed on the digital case system in relation to both indictments making clear that the prosecution intended to seek joinder.

19. On 25 June 2018 there was a directions hearing in Boer's case. This was conducted with Boer's counsel attending by telephone. Neither Boer, nor any of the applicants, nor any of the applicants' representatives were present. The court log of that hearing recorded:

> "Now a four-handed trial. Counsel for Boer raised no objection."

20. It seems clear as a matter of inference that nothing was said to the court that day to

indicate that Boer had left the country some six months earlier and had not been heard of by his representatives since then.

21. Although it was clear to everyone by that stage that the prosecution intended to seek to join the indictments so that all four accused could be tried together, no formal application was in fact made as Rule 3.21 of the Criminal Procedure Rules requires. It follows, since there was no written application by the prosecution, that there was no written response on behalf of any of the accused. We are bound to say that we think it very unfortunate that the prosecution did not make the necessary written application. The failure to do so had two consequences. First, it contributed to a later misunderstanding by the trial judge, to which we will come shortly. Secondly, it meant that minds were not focused as they should have been on precisely what application would be made and whether any defendant would object to it. Instead, the case was allowed to move towards a trial date in late November with nothing being done to address the state of the indictment.

22. When the day came for trial, on 26 November 2018, the three applicants were present and represented. Boer was absent but was represented by counsel who indicated that he was willing to continue to act. Only then did it emerge that Boer's legal representatives had had no contact with him since late 2017. Thus, nearly a year had gone by without the court being informed that Boer had fallen out of contact with his legal representatives.

23. Prosecuting counsel, noting that the two indictments had not in fact been joined as yet, made a number of applications. He sought joinder of the indictments, amendment of the joined indictment so that the particulars of offence were in the terms of the trial indictment which we quoted at the start of this judgment and trial of Boer in his absence.

Counsel acting for Boer raised no objection to any of those applications. Counsel for the three applicants did. They argued against joinder. In the alternative they argued for severance and they submitted that for the three applicants to stand trial jointly with the absent Boer would result in incurable prejudice for the applicants.

24. The judge on 28 November 2018 ruled as follows. As to joinder, he held that the two indictments were properly joined. He did so primarily on the basis that the administrative hearing on 25 June 2018 had already resulted in joinder. The judge noted that no written application had been lodged but said that it was a case in which joinder was so obviously justified that in the absence of any objection the Crown could be forgiven for dispensing with superfluous documentation. As to the defence objection that they had had insufficient time to prepare to deal with this application, the judge said that he had allowed sufficient time and that there was no prejudice as a result of the breach of Rule 3.21. The judge further ruled that any issues as to prejudice would properly be considered in relation to severance rather than to joinder.

25. The judge then considered the application to amend the indictment into the form of the trial indictment. He concluded that the desired amendment created no substantial difference and so caused no unfair prejudice to the three applicants. Nor would it cause any unfair prejudice to the absent Boer, who had admitted in interview and in a defence case statement that he had been party to an agreement with others to commit the offence, albeit that he had acted under duress. Although Boer could not be arraigned on the joined and amended indictment, the judge held that this was not a bar to him being tried jointly. In this regard he relied on the decision of this court in R v Burton [2018] EWCA Crim 2485. The judge therefore permitted the amendment.

26. As to the trial of Boer in his absence, the judge concluded that Boer had waived his right to be present at his trial by voluntarily absenting himself in full knowledge of the likely consequences. The judge noted that Boer had given a full interview, had given full instructions (albeit not in respect of evidence served since he had absconded) and was represented by counsel. The judge held that there was a clear public interest in the case being tried and that Boer was a central figure in an offence which everyone agreed had been committed. Subject to the issue of severance, to which he would come, he said that separate trials of a single conspiracy were undesirable.

27. As to severance, the judge noted the argument that it was not clear from Boer's interview whether he was referring to people by nicknames or alternative names and whether he was referring to any of the applicants. The judge nonetheless held that what was said in that interview either did amount or at least might amount to a cut-throat defence as between Boer and one or more of the applicants.

28. The judge referred to the submissions of defence counsel that the indictment should be severed because joint trial would cause prejudice and embarrassment to these applicants in their defence. He referred to the alternative argument that even if severance were to be refused, evidence relating to Boer's interview should be excluded on grounds of fairness, pursuant to section 78 of the Police and Criminal Evidence Act 1984.

29. The judge then referred to a number of decided cases conveniently summarised at paragraphs 1-293 to 1-296 of the 2019 Edition of Archbold, in which it had been held for example that a defence of duress being advanced by one co-defendant would not in itself be sufficient to justify separate trials and that separate trials would not necessarily be justified where one defendant had implicated a co-accused in interview, but then did not

give evidence confirming the contents of that interview. The judge accepted that what Boer said in interview was inadmissible hearsay against the applicants, but he rejected an argument that the mental gymnastics required of the jury would prove impossible. He said that although Boer was absent from the outset of proceedings rather than having absconded during the trial, that did not make a material difference. He further noted that the point had been made that whereas a defendant who refused to give evidence would be the subject of a direction which would permit the jury to draw an adverse inference from his silence, the same would not apply to a defendant who was absent altogether. The judge accepted that this was a real distinction but did not consider it to be material.

30. The judge further recognised that the account put forward by Boer in interview might be insufficient to discharge the evidential burden falling on a defendant who relied upon duress and that accordingly the defence of duress might ultimately have to be withdrawn from the jury. That however was an issue which he could not fairly assess until all the evidence had been heard. Whilst an adverse decision on that issue would clearly affect Boer, the judge said it would not affect the applicants. Finally, the judge rejected a submission that the jury might in the light of Boer's absence speculate, having regard to what Boer had said in interview, that he had been threatened by one or more of the applicants.

31. The judge went on to invite counsel for the applicants to consider whether from their point of view it was not better for Boer to be absent, rather than for him to be present and giving evidence in terms similar to those set out in his interview. Counsel argued that if Boer was present they would be able to cross-examine him and undo any damage he might seek to cause to his co-accused. The judge plainly regarded this as unlikely.

Finally, the judge concluded that the interview should not be excluded pursuant to section 78 of the 1984 Act. Thus the judge permitted Boer to be tried in his absence.

32. The trial accordingly proceeded on the trial indictment against all four accused. Much of the evidence was helpfully reduced to agreed facts. The prosecution had prepared a very detailed schedule which set out relevant phone calls and contact between the accused and the only live witness called by the prosecution was an immigration officer Mr Horan who gave evidence about the matters recorded in that schedule. Mr Horan also gave evidence about the interviews of the applicants. He produced the various exhibits and explained what phone numbers could be attributed to whom. He said that he had not investigated a Syrian number recovered from Miss Kudja's phone which was said to be that of her uncle Hamoudi Kudja because he did not consider it to be necessary.

33. Mr Horan confirmed that Jojo was a man of good character and lawfully resident in the United Kingdom and that Gogo had been fully compliant upon arrest and had provided the password for his phone upon request. Mr Horan confirmed that there was no contact between Hamou's phone and either Miss Kudja's number or the relevant Dutch mobile phone, although Hamou's number did appear in Boer's phone, saved in the 'contacts' section.

34. Mr Meredith, then as now appearing on behalf of Jojo, sought in cross-examination to adduce evidence that when Miss Kudja later flew to this country and claimed asylum she was interviewed by an immigration officer and gave an account of her earlier unsuccessful attempt to enter the country in which she said that it had been her uncle Hamoudi who had organised her travel. The judge refused to permit Mr Meredith to adduce this evidence on the basis that it would clearly be hearsay evidence. The judge

noted that he had been told that Miss Kudja was available to be called as a defence witness if Jojo wanted her account to go before the jury.

35. After some cross-examination by Mr Meredith before the short adjournment, the judge also warned counsel that there may come a stage when he would find it necessary to put a time limit on cross-examination because, as he saw it, counsel was failing to get to the point. He asked Mr Meredith to reflect over the short adjournment about what further topics needed to be covered and notified Mr Meredith that after the short adjournment he would ask for an indication of how much longer counsel would need. When the court sat again, counsel indicated that it was difficult to give an accurate result, but said that he was likely to take most of the afternoon. At that point the judge, referring to his case management duties under the Criminal Procedure Rules and to the overriding objective, set a time of 3 pm for the conclusion of Mr Meredith's cross-examination. That time limit was later enforced.

36. After Mr Horan's evidence had been completed and after a short break, prosecuting counsel, then as now Mr Hillman, disclosed to the applicants' counsel a document which contradicted one aspect of the evidence which Mr Horan had given. Mr Meredith applied to the judge for Mr Horan to be recalled so that this document could be put to him in cross-examination. The judge refused that oral application. He permitted Mr Meredith to make further written representations but that course was not taken.

37. Later in the course of the trial, an agreed fact was agreed between prosecution and defence which effectively embodied the contents of the disclosed document. This enabled Mr Meredith in his closing speech to comment on the contradiction between Mr Horan's oral evidence and the document, and to submit to the jury that the explanation

must be that the oral evidence given by Mr Horan on this topic had been a lie.

38. Following the close of the prosecution case, the applicant Jojo gave evidence in which he put forward innocent explanations for the circumstances on which the prosecution relied. Jojo said that he had had nothing to do with his wife being at the address in Holland of his brother, nor with the giving of that address to Boer with a view to Boer collecting Miss Kudja and bringing her to this country. He said he had not told either Gogo or Hamou that he had been alerted to the fact that his wife was coming to this country, although he had spoken to them both on 25 June. He said he did not know that Hamou was also in contact with Boer at the same time. The other applicants Gogo and Hamou did not give evidence.

39. At the conclusion of all the evidence, the judge heard submissions on a number of issues. He ruled that on the evidence the defence of duress was not in law available to Boer and that he would therefore withdraw that defence from the jury.

40. Counsel for Gogo and Hamou, then as now Mr Neofytou and Miss Guiloff, applied in the light of that ruling for the jury to be discharged. Mr Meredith on behalf of Jojo made a submission to the effect that the trial indictment alleged a closed conspiracy and that evidence of any involvement on the part of Hamoudi, Shaya or anyone else would provide Jojo with a defence in law on the basis that the conspiracy would thus be shown to be a legally separate conspiracy.

41. The judge rejected those various submissions. He said that there was no defence available to any of the applicants on the basis that others may have been involved in the agreement. That did not of course affect their factual case that any conspiracy was

between Boer and others but not with them.

42. The judge then gave directions of law to the jury before counsel's closing speeches. It is relevant to the issues on this appeal to note the following features of those directions. The judge explained to the jury that he had ruled as a matter of law that Boer's account of events did not amount to sufficient evidence for the defence of duress to be available to him. The judge continued at page 4C:

> "Accordingly, he does not seem to have any defence in this case. Nevertheless, he has pleaded not guilty and, as with all defendants in all cases, you can only find him guilty if you are sure that he is guilty."

43. The judge went on to direct the jury that they must not speculate about the reasons why Boer had left the country and was absent from his trial, adding:

> "It remains the case that Mr Boer pleaded not guilty."

44. The judge directed the jury that whilst Boer's account in interview was evidence in his case, that which one defendant said in interview could not be evidence against any other defendant. The judge told the jury that they could not use what Boer had said in his interview as evidence against any of the others, adding "That is an important point." The judge went on to explain what was meant by a conspiracy, saying:

> "A conspiracy simply means an agreement to commit a criminal offence."

45. He went on to say at page 6C to E:

> "Where four defendants are charged with a conspiracy, it is entirely possible that other people beyond those four may have been involved in that conspiracy as well, but in this case the prosecution must prove that each of these four defendants agreed with at least one of the other three to help bring about the illegal immigration of Noorjehan Kudja. It makes no difference whether or not anyone else agreed to play some part in the plan also; uncle Hamoudi, Shaya, Acheed or whoever. Playing a part could include, for example, actually bringing the illegal entrant into the UK, which is what Mr Boer attempted to do; recruiting the driver; going to Kent to receive the migrant when she arrived; helping with the planning; helping with communications; providing money to cover fees or expenses, or even just providing encouragement whether in person or by telephone.
>
> For each defendant, if he agreed with at least one of the others to assist in some way in the attempt to bring Ms Kudja across the Channel, then he is guilty."

46. The judge later provided the jury with a route to verdict which was to similar effect.

47. Later in the summing-up, the judge criticised Mr Meredith for having suggested in his closing speech that Mr Horan had been caught out lying under oath. The judge commented that Mr Meredith had not put it directly to the officer that he had been lying and so Mr Horan had not had an opportunity to answer that serious allegation.

48. Finally of relevance for present purposes, the judge gave directions as to the inferences

which could be drawn from the silence of the two applicants who had not given evidence and he gave directions as to the good character of Boer, limited to propensity, and as to the applicant Jojo. In relation to the former, the judge's direction included the following, at page 21B:

> "It is up to you to what extent you find that each of these defendants' decision not to give evidence should count against him, and how likely you find it is that an innocent person might have made that decision."

49. Following the speeches of counsel, the judge summed up the evidence. The jury retired and as we have indicated ultimately returned guilty verdicts on all four accused. The judge, rejecting a submission on behalf of Jojo that there should be an adjournment to obtain a pre-sentence report, proceeded to sentence the four accused as we have indicated.

50. In their written grounds of appeal and their oral submissions, the applicants collectively challenge the judge's rulings on the issues of joinder, amendment, severance and the trial in absence of Boer. Similarly, all three challenge the judge's decision not to discharge the jury after he had decided that the defence of duress must be withdrawn in Boer's case. Other grounds of appeal are advanced by individual applicants and we will deal with those before coming to what we see as the most substantial issues. For the respondent, Mr Hillman resists all of the grounds of appeal.

51. On behalf of Gogo, Mr Neofytou submits that the judge was wrong to refer as he did to a defendant playing a part in the conspiracy by encouraging others. We are not persuaded by this submission. Under the provisions of section 1 of the Criminal Law Act 1977, the

essence of the offence of conspiracy is the making of an agreement that a course of conduct will be followed which will amount to the commission of a criminal offence. The prosecution must therefore prove against each accused that he agreed to a course of conduct which one or more of the parties to the conspiracy would carry out and which would amount to an offence. But it is not necessary for the prosecution to prove against an individual accused that he intended to play an active part in that agreed course of conduct. To take the most obvious example, the criminal mastermind who organises and directs his co-conspirators, whilst keeping himself well away from any active involvement, will be guilty of conspiracy. It seems to us that the judge's reference to 'encouragement' was not happily worded and it would have been better to omit that phrase in order to avoid any risk of misunderstanding. But the direction did not undermine the judge's clear instruction to the jury that they must be satisfied that an individual defendant entered into an agreement to commit a criminal offence. The reference to the need for an active participation was, if anything, more favourable to the accused than was appropriate.

52. On behalf of Gogo and Hamou, criticism is made of the direction to which we have referred in which, when dealing with inferences from silence, the judge spoke of how likely the jury might find it to be that an innocent person might have made the decision not to give evidence. By itself, in our view, this is not a point which could cause us to regard the verdicts as unsafe. It was however a phrase which should not have been included in the direction and we keep it in mind when we consider other grounds of appeal advanced on behalf of the applicants.

53. Counsel for Gogo and Hamou also complain that the effect of the direction as to

inference from silence and of the good character direction given in relation to propensity in Boer's case, but not given in relation to these applicants, added to the prejudice which they suffered by their joint trial with the absent Boer. In our view, the directions were not wrong in law and these points of criticism would not in themselves assist the applicants. We do however see some force in the point, to which we will shortly come in more detail, that the contrast between the position of the absent Boer and the applicants who were present in the dock added to the complexity of the task which confronted the jury.

54. On behalf of Jojo, Mr Meredith submits that he was denied a fair trial because the judge curtailed the length of cross-examination and so prevented counsel from exploring a number of topics. We have read the lengthy written submissions on this issue, but we are not persuaded by them. The judge was plainly correct to prevent the introduction of hearsay evidence about what Miss Kudja had said when interviewed by an immigration officer. The judge was not thereby reversing the burden of proof by obliging the defence to call her as a witness; he was merely applying the law as to hearsay and pointing out an alternative course which was available to Jojo if he wanted that evidence to be before the jury. The judge was also correct not to permit questions in cross-examination which, to put it at the lowest, ran the risk of opening a back door through which the witness Mr Horan might be led into adducing the hearsay evidence which the judge had rightly excluded. As to the imposition of a time limit, we think it unfortunate that this situation arose. Having read the transcript we understand the judge's frustration and feeling that there was a failure to get to the relevant points with reasonable speed. We would add, with respect to Mr Meredith, that at times the cross-examination appeared to be no more than a fishing expedition in which it was hoped that something might emerge which

could provide some justification for alleging bad faith on the part of the prosecution. The time limit imposed by the judge was a severe one, but it did not leave counsel with insufficient time to ask those questions which properly could be asked. It is regrettable that in this way one defence counsel was treated in a manner in which others were not, but we are not persuaded that the course adopted by the judge amounted to a material irregularity or to denied Jojo a fair trial.

55. We do however take the view, with respect to the judge, that it was unfair for him in his summing-up to criticise Mr Meredith for not having put to Mr Horan an allegation which he had been unable to put because his application for further cross-examination had been refused. Again this is not a point which in itself could assist the applicant, but we take it in conjunction with other points to which we will shortly come.

56. The final subsidiary point to which we must refer is the argument advanced on behalf of Jojo in relation to the significance of the terms of the indictment. The particulars of offence limited the way in which the prosecution could put the case. The case against a particular applicant could only succeed if he was proved to have entered into an agreement with at least one of the other three. Evidence establishing only that he had entered into an agreement with someone else would not suffice. But the broader proposition for which counsel contended was misconceived, as the judge rightly concluded.

57. We now come to what we see as the substantial issues in this case. Given that the prosecution's allegation was that all four accused were parties to the same conspiracy, the usual and obviously desirable course would be for all four to stand trial together. We agree with the judge's analysis of case law showing that features such as a cut-throat

defence or one defendant giving an account in interview which incriminated a co-accused but was not then supported by sworn evidence, will not necessarily provide compelling arguments in favour of an order for separate trials. We also agree with the judge's view that he should consider the issues of joinder, amendment, severance and trial in absence "in the round", because although these were discrete issues, they were in the circumstances of this case closely intertwined. The same applies to the issue of the application to discharge the jury at a late stage of the trial.

58. We have therefore considered all these matters "in the round". We sympathise with the judge, who had a difficult task, but with all respect to him we take the view that he fell into error in his rulings on these linked issues.

59. First, it seems clear that the judge was mistaken in thinking that an order for joinder of the two indictments had already been made well before the trial date by another judge. As we have indicated, an application had certainly been foreshadowed at earlier hearings but no application had in fact been made as it should have been. In itself, this mistake would not be fatal to the judge's ruling, because he sensibly added that if he was in error in this regard he would in any event order joinder on the basis of the oral application made to him at trial. But the mistake in our view appears to have contributed to a belief on the judge's part that there was no valid objection to joinder of the four accused on the amended trial indictment.

60. This leads to consideration of the second matter which concerns us. The effect of the judge's decisions was to permit the joint trial of the four accused on a charge in respect of which Boer had not been arraigned. True it is that the reason for that is that he had absconded from bail and that he had entered a not guilty plea to the charge which he

initially faced. A trial may in certain circumstances proceed even though the accused has not been arraigned. But as is made clear by the decision of this court in Kepple [2007] EWCA Crim. 1339 at paragraph 17, the circumstances in which that may be done, require the court to be satisfied that the accused has waived his right to be arraigned. In the circumstances of this case, Boer cannot in our judgment be said to have waived his right to be arraigned on an indictment which did not come into existence until about a year after he had absconded, which charged him with an offence of conspiracy over a six month period rather than a substantive offence on a single date, and in circumstances where there was no evidence that Boer even knew of the existence of the amended indictment. It is, we think, a point of significance that the trial indictment was not only completely different from the indictment to which Boer had pleaded not guilty, it was also somewhat different from the indictment which the three applicants had originally faced. No doubt there will be cases in which it can properly be concluded that a defendant has waived not only his right to be arraigned on an indictment of which he was aware before he absconded or misbehaved, but also his right to be arraigned on an amended indictment which does not significantly alter the original charge. There may well be questions of fact and degree. But here, in our view, any finding of waiver would amount to a finding that by absconding from proceedings on the indictment which he originally faced, Boer waived his right to be arraigned on any charge which in any terms accused him of being involved in an attempt to bring Miss Kudja into the United Kingdom illegally. Such an approach was not in our view permissible. There was therefore a real issue, which the judge did not address, as to whether Boer could be tried on a joint indictment in the terms of the trial indictment. It follows that the issue of joinder could not be approached on the basis that no one had raised any objection when,

months earlier, an intention to apply to join the indictments had been indicated in very different circumstances.

61. We would add to this point that we are troubled by the fact that in his summing-up the judge more than once told the jury that Boer had pleaded not guilty. The judge was no doubt seeking only to emphasise that it was for the jury to decide whether the prosecution had proved the case for sure against Boer. But the fact of the matter is that Boer never had entered a not guilty plea to the only charge of which the jury were aware. The statement by the judge that Boer had pleaded not guilty was incomplete without an explanation of the procedural history and was therefore inaccurate.

62. Thirdly, a similar point arises in relation to the trial of Boer in his absence on an amended indictment of which he was unaware. Although Boer's counsel did not challenge joinder on this ground, it seems to us that there was an important point which the judge needed to consider in relation to joinder.

63. Fourthly, we see considerable force in the submissions on behalf of the applicants as to why, even if the four accused were properly joined in a single amended indictment, the judge should have ordered severance so that the applicants were tried separately from the absent Boer. The decision of this court in Hayward [2001] QB 862, approved by the House of Lords in Jones [2003] 1 AC 1, requires a court contemplating a trial in absence to consider amongst other things the question of fairness to any co-defendant. What seems to us to be of critical importance is that there was in this case a highly unusual combination of circumstances. Boer had been caught trying to pass Miss Kudja off as his own wife. Duress apart, the case against him on the substantive charge which he had initially faced was overwhelming and the circumstantial evidence on which the Crown

relied to prove that he was part of a conspiracy was very strong. His defence of duress was always highly likely to be withdrawn from the jury at some stage. The judge was correct to leave that decision as long as possible in case anything emerged which could assist Boer; but it was extremely unlikely that that would happen and therefore extremely unlikely that the jury would ever need to consider the merits of the defence of duress. There was no realistic prospect that Boer would appear during the trial and give evidence. Once duress was withdrawn, the account which Boer had given in interview amounted in effect to an admission of the ingredients of the offence of conspiracy. It could not possibly assist Boer at all.

64. There was, however, a clear risk that the effect of putting Boer's interview before the jury would be to cause prejudice to the defence of each of these applicants. Miss Guiloff on behalf of Hamou points to the fact that Hamou could not be so readily identified from Boer's references in interview as could the other two applicants who were respectively the husband and brother-in-law of Miss Kudja. It does however seem to us, given the phone contacts between the accused and the references to Kudja's husband and brother-in-law, that the jury would be likely to be sure that the men about whom Boer spoke in his interview were the three applicants. As the applicants' counsel rightly submit, the fact that Boer's account in interview was insufficient in law to support a defence of duress does not mean that the account given by Boer could not harm these applicants.

65. The judge concluded that a clear direction that the interview was not admissible evidence against anyone other than Boer would suffice. It must certainly be assumed that the jury would do their best to obey that proper direction, but we fear it would have been very

difficult for the jury to do so. That difficulty was increased by the various matters we have mentioned when dealing with some of the subsidiary arguments. It was further increased because in certain ways, as counsel rightly submit, what Boer said in interview was being relied upon in relation to other accused. In opening, the prosecution actively relied on something said by Boer in his interview about "Andy" as being evidence against Hamou who has used the name "Andy". Then in cross-examination counsel for the absent Boer had used something said in Boer's interview to implicate Hamou in the sending of a relevant WhatsApp message. In closing, in the face of justifiable objection from the prosecution, the judge permitted defence counsel to point out that the applicants had not been named by Boer in his interview.

66. We agree with the submission of the applicants' counsel that points such as these made it all the harder for the jury to keep in mind that nothing which Boer said in interview could be evidence against the applicants. It is understandable that the judge felt it appropriate to let counsel for the accused point out that Boer's interview did not name the applicants, but the fact that he felt it right to do so tends in our view to indicate the risk of prejudice which existed from that interview being before the jury when Boer himself was absent. Furthermore, whilst we well understand why the judge suggested that the applicants might in truth have been better off having Boer tried in his absence, rather than having him in court with them, it was in reality a matter of speculation as to how matters would have developed if all four accused had been present together. More generally we see force in the submission advanced by Miss Guiloff to the effect that the judge in his various rulings did not sufficiently focus on the precise factual matrix which actually obtained rather than on other possible situations.

67. When we step back from these specific arguments and consider the position as a whole, we take the view that the outcome of the various decisions made by the judge was that there was a material irregularity in the course of this trial. Decisions on the sort of issues we are discussing are pre-eminently matters for a trial judge and this court will be slow to interfere with them. We are however persuaded that in the very unusual circumstances of this case, severance of these applicants from the absent Boer should have been ordered at the outset of the trial or alternatively that the jury should have been discharged once Boer's defence of duress had been withdrawn. We are fortified in that view by the consideration rightly pointed out by counsel for the applicants that unusually, perhaps, this was a case in which a separate trial of Boer could and would have been much shorter and much less complicated than a separate trial of the three applicants.

68. For those reasons, we grant leave to each of the applicants to appeal against his conviction. We have heard submissions as to what course should be taken. Mr Hillman submits that if the appeal succeeds this court should order a retrial. We have listened to the objections to that course put forward by counsel for the applicants but in our judgment the interests of justice strongly support a retrial.

69. We therefore grant leave to appeal and allow the appeal. We quash the convictions of each of these appellants (as they now are) and direct that they be retried. We direct that a fresh indictment be served in accordance with Rule 10.82 of the Criminal Procedure Rules which requires that a draft indictment must be served on the Crown Court Officer not more than 28 days after this order. We direct that each of the appellants be re-arraigned on that fresh indictment within two months. We will hear submissions shortly as to the venue for a retrial, as to whether the applicants should be held in custody

or released on bail and as to whether any reporting restrictions may be desirable.

70. It follows from our decision allowing the appeals against conviction that Jojo's application for leave to appeal against his sentence falls away.

71. We would add before concluding our judgment a final observation about case management. We recognise the pressures of work on those engaged in matters in busy Crown Court centres and we recognise that we have the benefit of hindsight. We are however bound to observe that the proceedings in this case would inevitably have taken a very different course if the issue of joinder and amendment had been more clearly identified at the hearings in June 2018 and if the prosecution had at that stage been directed, as they should have been, to make a written application to which the defence could respond so that the issues could be resolved before the trial date. We also have to say that we find it extraordinary that the court, the prosecution and those representing the applicants were unaware until the day of trial that Boer's legal representatives had had no contact with him for almost a year and that his whereabouts were unknown. We have not heard the details because Boer is not represented before us and it would therefore not be fair for us to criticise any particular person. We are however told that the judge was informed at the start of the trial that those representing Boer had made repeated attempts to contact him over the preceding months but had failed. The court should have been informed of those ongoing and unsuccessful attempts at the hearing in June 2018 when the court was plainly contemplating joinder of indictments in the case of a man with whom all contact had been lost for about six months. Further, it appears from what we have been told that in connection with the joint trial only one applicant filed a certificate of readiness. Again, we have not heard full explanations and therefore cannot fairly

criticise, but we find it to say the least remarkable that only one of the four parties before the court should have filed a certificate of readiness and that no action appears to have been taken to chase up the provision of that important document. Had anyone pressed the prosecution to certify readiness they would not have been able to do so without identifying the outstanding issue as to joinder. Had anyone required Boer's advisers to certify readiness, they would not have been able to do so because they had had no contact with him for many months. These several omissions led to important matters only being addressed on the day of trial, which was far too late.

72. Does anybody wish to make any submissions first of all about the venue for retrial? Is there any reason why it should not be Canterbury?

73. MR HILLMAN: My Lord, I certainly have no submissions in that regard.

74. MISS GUILOFF: It is not a proper consideration but all the defendants come from London and so that is onerous on them. Whether that is a proper consideration for this court, I doubt.

75. LORD JUSTICE HOLROYDE: We will direct that the venue for retrial be the Crown Court at Canterbury and we will direct that when the case first appears in that court, pursuant to our directions, it should be listed before the Resident Judge so that directions can be given by him as to the future conduct of the proceedings.

76. Does anyone submit that any reporting restriction is necessary in the circumstances?

77. MR HILLMAN: My Lord, no.

78. MR MEREDITH: My Lord, no.

79. MR NEOFYTOU: My Lord, no.

80. LORD JUSTICE HOLROYDE: Would reporting of this appeal cause any prejudice to anyone at the retrial?

81. MR MEREDITH: My Lord, I cannot conceive of any prejudice.

82. LORD JUSTICE HOLROYDE: It is very difficult to see how. We have been debating arguments of law and, unless anyone can point anything out, it does not seem to me that anything has been said in the course of this hearing that could cause any prejudice to the defendants at their retrial.

83. MR MEREDITH: I respectfully agree.

84. MR NEOFYTOU: Only, I suppose, in relation to the character being reported, but --

85. LORD JUSTICE HOLROYDE: I think all we have said, Mr Neofytou is that no good character direction was given for two of the applicants. That is what the position is likely to be at the retrial.

86. MR NEOFYTOU: My Lord, yes.

87. LORD JUSTICE HOLROYDE: Finally, submissions please about where the applicants should be between now and their first appearance before the Crown Court.

88. MISS GUILOFF: My Lords and my Lady, the applicants are Syrian nationals. They were all on bail throughout the course of the proceedings, unconditional bail. The addresses the court already has on file are the same addresses which they would be

receiving correspondence at and there is no reason to suppose that they have become flight risks since the proceedings so I would invite this court to grant unconditional bail until their next appearance before the Canterbury Crown Court.

89. MR NEOFYTOU: My Lord, I support that. There were no difficulties whatsoever with their bail throughout the trial I am pleased to say.

90. MR MEREDITH: Indeed it might be said on their behalves they travelled from North West London to Canterbury each day of the three week trial, so there were no difficulties. I would invite bail as before.

91. LORD JUSTICE HOLROYDE: We confidently predict that it will not be a three week trial next time. Mr Hillman, is there anything you want to say about bail?

92. MR HILLMAN: Not about bail, my Lord.

93. LORD JUSTICE HOLROYDE: Is there any other matter?

94. MR HILLMAN: The only other matter that troubles me, and my learned friend Mr Meredith mooted it earlier on, is the position in respect of Mr Boer.

95. LORD JUSTICE HOLROYDE: That will be a matter for the trial judge. Any issue as to what is admissible in relation to Boer will be a matter for the trial judge at the retrial.

96. MR HILLMAN: Forgive me, but in respect of his conviction. Mr Boer's conviction.

97. LORD JUSTICE HOLROYDE: There is no appeal before the court or application for leave to appeal before the court in relation to him. If that position ever changes he will need to make an application for leave to appeal out of time and that will have to be

considered in the usual way.

98. MR HILLMAN: My Lord, thank you.

99. LORD JUSTICE HOLROYDE: We will just rise to consider the issue of bail.

100. (The court adjourned)

101. LORD JUSTICE HOLROYDE: Mr Hillman, we will address you on behalf of all counsel. Normally of course at this stage of proceedings the court would direct that any bail application be made to the Crown Court, but given the length of the sentences imposed we think we should address the issue of bail now. We are prepared to grant bail to the applicants between now and their next appearance before the Crown Court, but we propose to require them to reside at the specified addresses, which we will identify in a moment, and we would require them to surrender their passports and not to apply for any international travel documents. We assume no one makes any submissions about that?

102. MR MEREDITH: My Lord, I am just trying to cast my mind back to the question of whether they have already in fact surrendered their passports.

103. LORD JUSTICE HOLROYDE: They may have done. If they have, then they remain surrendered. We need to address the three defendants directly. Mr Interpreter are you able to hear everything I am saying?

104. THE INTERPRETER: Yes.

105. LORD JUSTICE HOLROYDE: Thank you. The three men with you will have to be retried on a similar charge. That will happen again in the Crown Court in Canterbury.

They must keep in touch with solicitors to make sure they are told about the date when they must appear.

106. Mr Hamou, Mr Gogo and Mr Jojo we are going to grant you bail but there are some conditions to your bail. Mr Hamou, you must live and sleep each night at 204 Watford Way, NW4. Do you understand that Mr Hamou?

107. THE INTERPRETER: Yes.

108. LORD JUSTICE HOLROYDE: Mr Jojo, you must live and sleep each night at 101A Wheatley Close, NW4.

109. THE INTERPRETER: Okay.

110. LORD JUSTICE HOLROYDE: And Mr Gogo you must live at the same address and sleep there each night as well.

111. THE INTERPRETER: Yes, my Lord.

112. LORD JUSTICE HOLROYDE: In addition, if you have any passport which has not yet been surrendered to the police, you are required to surrender it to the police.

113. THE INTERPRETER: We have to keep our passports at the police station.

114. LORD JUSTICE HOLROYDE: And you must not apply for any other passport or other international travel document.

115. THE INTERPRETER: Yes, my Lord.

116. LORD JUSTICE HOLROYDE: I have to give you this important warning. If you do

not obey the conditions of your bail you may be arrested and you are likely then to stay in custody. Do you understand?

117. THE INTERPRETER: Understood.

118. LORD JUSTICE HOLROYDE: If you fail to attend court when you should do, unless there is good reason for you to be absent that will be a separate offence.

119. THE INTERPRETER: Understood.

120. LORD JUSTICE HOLROYDE: As you have seen, the case may just proceed without you if you fail to attend.

121. THE INTERPRETER: Understood, my Lord.

122. LORD JUSTICE HOLROYDE: Thank you very much, that concludes this hearing. Thank you Mr Interpreter.

123. MISS GUILOFF: My Lord, forgive me. My Lord and my Lady I do not want to delay matters. I raise this out of an abundance of caution. What the applicants were saying, or appellants were saying, is that their passports have already been surrendered and are at the police station. I believe it has been confirmed by the officer in the case who also understands that to be the position. I only mention it as it may create a difficulty later on when they are trying to effect their bail, that those passports have already been surrendered.

124. LORD JUSTICE HOLROYDE: Yes. If that is confirmed then we will remove any condition that they surrender them, but they must remain surrendered and they must not

apply for any other travel document.

125. MR MEREDITH: My Lord, the only final matter, if I may, and I have no wish to sound mercenary about this matter, but does my Lord extend the representation orders to cover the appeals made by these three applicants?

126. LORD JUSTICE HOLROYDE: I do not think it is necessary. You each have a representation order for today, do you not?

127. MR MEREDITH: Because these matters were assigned to the full court by the Registrar, this was not a case where the single judge, as it were --

128. LORD JUSTICE HOLROYDE: No, but the Registrar granted you a representation order each for today.

129. MR MEREDITH: I am very grateful.

130. LORD JUSTICE HOLROYDE: Thank you. It is very much to your credit Mr Meredith that you are here even in blissful ignorance of that welcome news.

131. MR MEREDITH: Indeed. Thank you very much.

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