



# CORNWALL STREET

## BARRISTERS

### Briefing Note

#### **A RARE CASE IN WARWICK CROWN COURT – s.46 CRIMINAL JUSTICE ACT 2003**

#### **INTRODUCTION**

1. Highly unusual events unfolded during the case of R v. Leslie Allen (LA) in Warwick Crown Court recently in which the sanctity and integrity of the jury was brought into question. This resulted in the rare occurrence of the judge becoming adjudicator of both law and fact. This summary of key events is based directly from the ruling of HHJ Lockhart QC during the trial. A deliberate and logical approach based on the relevant authorities was followed throughout; with HHJ Lockhart QC dealing with the ruling under the following heads:
  - a. The Factual Background.
  - b. The Law.
  - c. The Submissions.
  - d. The Ruling.

#### **FACTUAL BACKGROUND**

2. The defendant LA was on trial for 3 offences: 2 of PWITS controlled drugs, (count 1 cocaine and count 2 cannabis) and a third count of possessing a controlled firearm (a pepper spray). The prosecution alleged LA as a major drugs wholesaler, relying on the large quantities of drugs and the pepper spray found at his residence coupled with text traffic from his mobile telephone.
3. The allegations were denied by LA. The defence case centred around the fact none of the drugs belonged to LA and that others had abused his 'open house' and 'open car' policies which his friends and associates were accustomed. Further evidence, which included a confession in open court by one witness who stated the drugs were, in fact, under his control at the relevant time, (this witness was immediately arrested upon leaving court). The defence were to say the prosecution could not make the jury sure of LA guilt as a result.
4. The Capital Gym in Coventry was relevant to the case as it was formerly owned and run by LA. The defence called in evidence a number of witnesses who came forward to indicate they had been assisted by LA and others at the gym during periods of difficulty in their lives, which included problems with drugs and the criminal justice system.
5. The prospective jurors were asked to indicate if they had any link to the gym during the selection procedure. No prospective juror provided the court with any such indication and selection was completed in the usual manner. The trial proceeded and summing up was concluded on 19/11/18 and in the afternoon the jury retired to consider their verdicts. No verdicts were reached by that evening and the jury were sent home until the morning of 20/11/18.



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### **'Rogue Juror'**

6. On the morning of Tuesday 20<sup>th</sup> November 18, two notes were received from separate jurors expressing concerns over juror 1. These concerns were based on the fact juror 1 had made it clear he was linked to the Capital Gym and to a pub mentioned in evidence. Hearing counsel HHJ Lockhart QC duly discharged juror 1 on grounds that he should never have been on the jury in any event. It then transpired that juror 1's mobile telephone, which should have been switched off in a locked cupboard in the jury room, was in fact switched on and flashing in a manner that made it plain to the other jurors it may have been recording during deliberations.
7. Seizure of the mobile telephone was ordered for examination at that stage as to whether a recording was made or not. HHJ Lockhart QC reassured the jurors that if any such recording was found, it would never find its way into the public domain. The remaining 11 jurors indicated they could return just and fair verdicts. Arguments were heard from both sets of counsel and the trial was allowed to continue.
8. Analysis of the seized mobile telephone continued overnight and on the morning of 21/11/18 prosecution counsel sought to see the judge in Chambers to reveal the findings. The application was allowed and the prosecution revealed material in the public domain following the order for disclosure to the defence in accordance with s.46(2) Criminal Justice Act 2003. Despite the sensitive nature of the material HHJ Lockhart was satisfied that whilst revelation of the material might involve an offence under s.20D Juries Act 1974, the position was covered under s.20E (2) of the 1974 Act in that he was 'Judge dealing with the proceedings and disclosure was being made for the purposes of dealing with the case'.
9. Authorities were considered and the case of *R v H [2004] 2 AC 134 HL*, the order was made for a transcript of the call to be revealed to the defence with only names redacted. This was in order to ensure the defence might better be able to make submissions.
10. The analysis revealed a recording of a telephone call made on the evening of 19/11/18 between juror 1 and his mother. The timing of the call being material in that it was made after jury deliberations had begun. A transcript of the call was made available and provided clear evidence of detailed discussion between juror 1 and his mother regarding the jury deliberations. It was clear that the mother of juror 1 was also in contact with a third party regarding the case.



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11. Argument was heard first under s.46 (2) and then s.46(3) CJA 2003 as to whether the remaining 11 jurors should be discharged, both parties made submissions that discharge was appropriate given the facts. HHJ Lockhart QC then gave an extempore judgment setting out that:
  - a. He was minded to consider discharging the jury.
  - b. It was on the grounds of the material set out in the transcribed telephone call recording.
  - c. Representations had been heard.
12. The judge was sure that jury tampering had taken place and that it was therefore appropriate to discharge the whole jury. The judge was mindful of the dicta set out at para 4.334 of Archbold and applying R. v. S. (K.) [2009] EWCA Crim 2377; [2010] 1 Cr. App. R. 20 found nothing but discharge would meet the justice of the case. The jury were called back into court and thanked for their service before being discharged. (Further concerns expressed by the discharged jury later that day were dealt with by HHJ Lockhart QC before they were willing to leave the building).
13. Having discharged the jury under s. 46(2) and (3) CJA 2003, the judge then moved to hear submissions under ss. 46(3) and (4) CJA 2003.

## THE LAW

### *Statute*

14. The issue of determination here was whether or not the trial should proceed without a jury under s.46(3) CJA 2003 or whether the trial should be terminated under s.46(4) CJA 2003.

46.-

  - (1) *This section applies where-*
    - (a) *a judge is minded during a trial on indictment to discharge the jury, and*
    - (b) *he is so minded because jury tampering appears to have taken place.*
  - (2) *Before taking any steps to discharge the jury, the judge must-*
    - (a) *inform the parties that he is minded to discharge the jury,*
    - (b) *inform the parties of the grounds on which he is so minded, and*
    - (c) *allow the parties an opportunity to make representations.*
  - (3) *Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied-*
    - (a) *that jury tampering has taken place, and*
    - (b) *that to continue the trial without a jury would be fair to the defendant or defendants; but this is subject to subsection (4).*



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*(4) If the judge considers that it is necessary in the interest of justice for the trial to be terminated, he must terminate the trial.*

*(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.*

*(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.*

#### **Case Law**

15. The authorities relied upon derive from under s.46, in particular **Archbold 4.334** was helpful. It set out that; as to the decision whether to continue the trial without a jury or terminate it when the jury have been discharged under s.46 on account of jury tampering, the judge may only order that the trial continue without a jury if tampering has been established to the criminal standard; however, it is not necessary to determine whether or not the defendant was involved in the tampering (R v. McManaman , below).
16. Given that one of the purposes of the legislation is to discourage jury tampering and given also the huge inconvenience and expense for anyone involved in a retrial, to reduce any possible advantage accruing to those who are responsible for jury tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, a judge faced with this problem should order the trial to continue; the fact that he has been invited to consider material covered by public interest immunity principles, whether during the trial or in the course of considering the application, should not normally lead to self-disqualification: R v. Twomey followed in R. v. Guthrie (Riccard), above.
17. However, the judge should not order that the trial should continue without the jury where there would be a perception of bias in the tribunal: R. v. S.(K.), above (applying the test approved in Porter v. Magill; Weeks v. Magill @ 4-53, and finding such a perception in an unusual and extreme case in which the judge had personally been involved in nine previous trials directly concerned with the fraud in which the appellant was alleged to have been a central figure, in which others had been convicted on the basis of their complicity with the defendant, and as a result of which the judge was aware of a vast body of information affecting the defendant of which the defence would have been ignorant and which therefore would not have been addressed in the trial).
18. The case of R v. McManaman [2016] 1 Cr App R 24 was also considered in detail. In particular the passage at paragraphs 26 and following: this section is headed "Fairness to the Defendant and the Interests of Justice."
  26. *Under s.46(3)(b) that the judge had also to be satisfied that it would be fair to the defendant to continue without a jury, unless (under s.46(4)) it was in the interests of justice to terminate the trial.*
  27. *In Twomey, Lord Judge CJ observed at [20]*



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*“...given that one of the purposes of this legislation is to discourage jury-tampering,, and given also the huge inconvenience and expense for everyone involved in a retrial, and simultaneously to reduce any possible advantage accruing to those who are responsible for jury-tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial”.*

28. We agree with that observation and consider it accurately expresses the intention of Parliament in relation to s.46. The description of the decision under s.44 to conduct a trial without a jury as “the decision of last resort” (see [8] of *R. v J, S & M* [2010] EWCA Crim 1755; [2011] 1 Cr. App. R.5 (p.42)) is not relevant or applicable to the decision under s.46. We consider therefore that a judge should approach the question in relation to s.46(3) and s.46(4) with the observations in *Guthrie* as to the course ordinarily to be taken firmly in mind when determining whether he/she is satisfied that it would be fair to a defendant to continue a trial without a jury.

29. We accept that the present case was a case where there was little independent evidence as to whether the complainant consented to sexual intercourse. The medical evidence was that the bruising sustained by the complainant was consistent with the use of force but also with vigorous sexual intercourse. No trace of any drug was found in her blood, the the test was carried out late. Text messages exchanged between the complainant and the defendant showed they had been on amicable terms,

30. In our view, the judge was right to be satisfied it was fair to the defendant that the trial continue without a jury and the interests of justice did not require him to terminate the trial. The assessment of credibility of witnesses is an ordinary part of a judge’s duty. Furthermore, a defendant has under s.48(5) of the CJA 2003 the additional protection of the requirement of a reasoned judgment. Thus where credibility is assessed by a judge the assessment must be justified by careful reasoning. If the decision is adverse to the defendant, this court can subject that reasoning to careful analysis and scrutiny. The position of the defendant was therefore fully protected. It was entirely fair and in the interests of justice to continue the trial without the jury.

19. HHJ Lockhart QC also considered the first instance decision of Goss J in the case of *R v. Hussain* T20167475. In that very serious case of homicide the jury had been tampered with and the learned Judge had decided to accede to an application for the trial to continue and move to a judgement as to guilt or innocence.

20. In that case it was significant that the Judge reminded himself that he had heard no applications for non-disclosure, read nothing more than was available to the jury. Further and significantly for this case he said:

a. “It was not necessary for me to determine by whom or at whose behest these approaches had been made and no details of any investigation have been revealed to me. I make it clear that I have not addressed my mind to endeavouring to reach a conclusion as to who was or may have been responsible for the jury tampering or on whose behalf. Accordingly, I wholly ignore for the purposes of my decisions the fact that



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some people sought to influence the outcome of this trial and I certainly do not hold it against any of the defendants that this occurred and that the jury had to be discharged.”

21. HHJ Lockhart QC stated that in his judgment the law is clear and it is; a Judge being sure that jury tampering has taken place will in all ordinary circumstances order that a trial will continue provided that this can be a fair trial. The judgement to be made is one that takes into account all of the matters set out in the legislation and in the authorities of R v. Twomey and R v. McManaman.

### THE ARGUMENTS

#### *Prosecution*

22. The prosecution submission relied heavily on the paragraphs of R v. McManaman set out above. It submitted that such events are rare and the legislation as interpreted by the case law is specifically designed to cater for situations such as this.

23. The prosecution pointed out that all of the evidence is complete and that the trial had been fair. It was pointed out that the prosecution evidence had been largely agreed. The prosecution drew attention to the provisions of section 48 CJA 2003 and the considerable protection afforded by a reasoned judgement being given which would be the subject of scrutiny.

24. The prosecution invited the Court to rule that the case should proceed under section 46(3) CJA 2003 and that it was in the interests of justice for the trial to continue.

#### *Defence*

25. The defence rehearsed the points that had been argued at paragraph 12 of the judgement in R v. McManaman. Defence counsel argued that the court should find that this was an unusual situation where the interests of justice would not be well served by proceeding to continue with the trial. It was further submitted that here a juror seemed to be seeking to ingratiate himself with the defendant perhaps for financial reasons.

26. It was pointed out that this had all the hallmarks of a case where juror 1 had taken it upon himself to act in this way and that this could in no way be laid at the door of the accused. This was the act of a young man who had derailed the trial for his own purposes. It was said that in those circumstances it would not be fair to deny him his right to jury trial. This would visit upon his client the consequences of the acts of another to which the accused could not be linked.

27. Defence counsel sought to contrast the case of R v. McManaman where there was inference to be drawn linking the conduct of the juror to the family in some way. It was submitted that the learned judge should find that the interests of justice were not met by a continuation of the trial without a jury.



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### **RULING**

#### ***The Finding of Jury Tempering***

28. HHJ Lockhart QC found himself persuaded that the actions of juror 1, that of his mother and at least one other were an attempt to tamper with the jury. The tampering was plainly effective in some way as he was discussing what had gone on in the jury room with others.

29. Juror 1 was discussing in terms of how many dissenters might be needed to ensure the defendant was acquitted. There was also discussion of advantage. Furthermore, the matter had been discussed more widely than just between juror 1 and his mother and so, as was conceded by the defence, it looked as though there was a conspiracy to do this going on.

30. As a result of these facts, the learned judge was sure that jury tampering had occurred.

#### ***Involvement of the Defendant?***

31. Firstly, the 2003 Act does not require that the tampering of the jury must be proved to have involved the defendant. This was a situation where the learned judge could not be sure (as was the case in *R v. Hussain*), that the fault for the jury tampering falls at the door of the defendant. However, he was sure this is a situation where tampering by someone alongside the juror has taken place, such is self-evident from the transcript of the call that all have seen and considered.

32. HHJ Lockhart QC stated that as a result, he was sure that the case was one where he could be sure that jury tampering has been arranged by others for the perceived benefit of the defendant. The learned judge stated that in his judgment the concern here must be the protection of the jury. Here there was evidence that the juror has dishonoured his oath, the provisions of the Act are clear and there are sound reasons for the maintenance of the efficacy of trial by jury why that is so.

33. In this case in making a finding of tampering the learned judge was not required to find that the accused was involved in that. He stated that if the situation was that he was driven on strong evidence to make such a finding then that might affect any decision to continue with the trial; such a finding might in some circumstances make it unfair for the judge to trial the accused. HHJ Lockhart QC stated clearly that is not the situation here.

#### ***Fairness to the Defendant and the Interests of Justice***

34. It was stated the following features were important:

- a. The case had run for in excess of one week.
- b. The prosecution evidence was called in short compass and the majority of the evidence was agreed.



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- c. The defence have called a large number of witnesses to the facts all of whom have been cross examined by the prosecution.
- d. Other witnesses to character were also called.

35. HHJ Lockhart QC stated that he was wholly unpersuaded that the facts as analysed out above gave rise to a case which is unusual in the sense described by the authorities. The jury here has been tampered with and in the ordinary course of events this will result in the trial continuing. In his judgment none of the features raised by the defence give rise to any unusual feature such that would make it inappropriate to continue with the trial. Plainly the juror was connected in some way to the Gym and then he sought to influence the trial with others. Even if this was unconnected to the defence this does not make this an unusual case as was submitted to the court.

36. There was no material heard by the learned judge other than the evidence that the jury have received and he stated to have no knowledge of the accused other than that provided in the trial; nearly all of that to the advantage of the accused. HHJ Lockhart QC went on to state that he can assess that evidence fairly and come to clear conclusions on the facts; assess the credibility of all the witnesses but particularly those called by the defence, which is where the real dispute in the case arose in accordance with ordinary principles, reminding himself of the burden of proof.

37. In terms of the law, the learned judge stated that he can direct himself in accordance with the directions previously agreed by counsel which were drafted and given to the jury. He went on to state that a reasoned and reviewable judgement pursuant to section 48 of the 2003 Act will ensure the trial is fair.

38. HHJ Lockhart QC also found there would be huge inconvenience and expense involved in a retrial. Further, he found that continuing the trial reduces any possible advantage accruing to those who are responsible for jury tampering or for whose perceived benefit it has been arranged by others, and this will ensure that the trial should proceed to verdict rather than end abruptly in the discharge of the jury.

39. The learned judge was satisfied that in this case it was fair to continue with the trial, in his judgment such a trial can be fair and the interests of justice did not require him to terminate the trial. As a result, the trial would continue to verdicts. HHJ Lockhart proposed to go through his notes of speeches with counsel to ensure that as he came to his judgment on verdicts that he had the arguments well in mind.

### **OBSERVATIONS**

40. For the sake of completeness, it should be noted that on 23/11/18, HHJ Lockhart QC delivered a 14,000 word reasoned judgment whereby the defendant was convicted and sentenced to 13 years imprisonment. Key observations from the case are summarised under the following aspects:

- a. The role of the jury.



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- b. The importance of timely information.
- c. The operation of s.46 CJA 2003.

#### ***Role of the Jury***

41. The events leading up to the ruling summarised above are wholly attributed to the initial actions of the jury itself. Ironically, these acts led to the eventual demise of the jury's ultimate participation in the case. Firstly, the actions of the two separate jurors who alerted the court of concerns over juror 1 (via a note to the judge), were key. This took moral courage by the individuals in question and provides a degree of reassurance in the sanctity of the jury system generally.

42. Secondly, it became apparent that when juror 1 attempted to retrieve his mobile telephone the device was found to be operational within the confines of the jury room and potentially recording deliberations. It was the remaining jurors who alerted the court of this and it appears their integrity as a group was not compromised by the 'rogue' juror. The acts of the jury as a collective were paramount as events unfolded.

#### ***Importance of timely information***

43. From a practical perspective, there is much to be gleaned from the timely approach taken by all parties involved. In highlighting the potential compromise of deliberations, the jury set in motion various agencies that were responsible for conducting a process of; isolate, investigate and inform.

44. In terms of isolate; as soon as the issue was raised, juror 1 was removed from the jury room and had no contact thereafter. The mobile telephone was ordered to be ceased immediately for analysis. Further, juror 1 was arrested and isolated from any further communication with the outside world without delay. The defendant was remanded in custody (previously on unconditional bail), and any form of communication immediately removed. The isolation was conducted in a timely fashion.

45. The initial investigation was conducted overnight and revealed the crucial information highlighting the extent to which juror 1 was involved. The mobile telephone analysis revealed the conversations recorded with his mother and the involvement of a third party. This appeared to show there was some benefit and was pivotal information that led to the criminal standard being satisfied that the learned judge was sure jury tampering had occurred. The initial investigation was effective.

46. The information discovered was used to good effect without delay. The learned judge was informed by the prosecution immediately of the analysis and shortly afterwards the defence was given full disclosure. The jury were brought into court and informed to cease all deliberations whilst the process set out under s.46 CJA 2003 and authorities thereunder was followed. The whole process was completed within a few hours, which was critical considering the jury were still deliberating (and in theory could have delivered a verdict at any time), at the beginning of the day. The timeliness of the provision of this information was key to ensure the trial could continue in the manner explained above.



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### ***The Operation of s.46 CJA 2003.***

47. When dealing with the question whether or not to discharge a jury because of jury tampering a methodical approach is required. First, the learned judge in this case dispatched with the 'rogue' juror after hearing submissions from counsel on both sides. The jury were asked if they still felt able to conduct their duty in accordance with their oath, to which the response was affirmative.

48. Next, once the extent of juror 1's activities was exposed, the question arose of whether to discharge the other 11 jurors. Full disclosure (with only names redacted), was ordered to enable both defence and prosecution to make submissions in respect of this question. Only after these submissions was the learned judge in a position to decide whether or not this was the course to take. Indeed, he was sure (to the criminal standard) that jury tampering had occurred, and this gave no room for discretion. Of note was the fact the analysis also revealed the defendant was in no way directly involved with the incident; which defence counsel was quite right in highlighting with vigour.

49. The final stage was the question as to whether the case should proceed or be terminated. The authorities are quite clear on this matter; if the criminal standard is reached and the judge is sure jury tampering has occurred, the normal course of action is for the case to proceed to verdict without a jury. In this case, counsel were given time (overnight) to form submissions to the learned judge, the jury having already been discharged. Only at this point was the learned judge in a position to deliver the ruling set out in detail above. This measured, analytical approach appears to have delivered a decision that satisfies the requirements of fairness and within the interests of justice.

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