Neutral Citation Number: [2024] EWHC 692 (Admin)

Case No: AC-2024-LON-000141

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before :
THE PRESIDENT OF THE KING'S BENCH DIVISION
THE HON. MR JUSTICE HOLGATE
THE HON. MR JUSTICE HILLIARD

- -

Between :

(1) PAUL YUSUFF
(2) MATTHEW YUSUFF
(3) MOUSSA TRAORE — **Applicants**

- and -

THE GOVERNOR OF HIS MAJESTY'S PRISON BELMARSH — **Respondent**

- and –

(1) THE CENTRAL CRIMINAL COURT
(2) THE CROWN PROSECUTION SERVICE
(3) THE GOVERNMENT LEGAL DEPARTMENT — **Interested Parties**

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Mr Kerim Fuad KC and Ms Fiona McAddy (instructed by **Spence & Joseph Solicitors Limited**) for the **First Applicant**
Ms Felicity Gerry KC and Ms Jade Gambrill (instructed by **Sperrin Law Limited**) for the **Second Applicant**
Ms Tana Adkin KC and Ms Ranjeet Dulay (instructed by **LF Law Ltd)** for the **Third Applicant**
Mr Myles Grandison (instructed by the **Government Legal Department) for the Respondent**
Mr Jonathan Hall KC and Mr William Davis (instructed by the **Crown Prosecution Service) for the Second Interested Party**

Hearing dates: 1 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp, P.:

Introduction

1. On 29 October 2022, Adrian Keise died after being stabbed twice in the back and once in the shoulder outside the Cubana Bar near Waterloo Station. Between 6 November 2023 and 11 January 2024, the applicants, Paul Yusuff, Matthew Yusuff and Moussa Traore, stood trial at the Central Criminal Court before His Honour Charles Gratwicke (a circuit judge sitting in retirement) on an indictment which was amended during the trial to contain three counts. On count 1, each of the applicants was charged with murder. On count 2, each of the applicants was charged in the alternative with manslaughter. On count 3, the first applicant was charged with having a bladed article in a public place contrary to s.139(1) of the Criminal Justice Act 1988.

2. It was not in dispute that the first applicant had stabbed Mr Keise. It was the prosecution case that the second and third applicants had acted as secondary parties to the murder or manslaughter. In relation to count 3, the prosecution alleged that the first applicant had taken to the scene the knife that he used to stab Mr Keise. That was denied by the first applicant. He said that he picked it up from the ground. He did not know where it had come from, but Mr Keise may have dropped it. Otherwise, the applicants' defence was that during the incident they acted in lawful self-defence and/or defence of another.

3. On 1 December 2023, at the close of the prosecution's case, the judge upheld a submission of no case to answer made by the third applicant on the charge of murder. On the judge's direction, the jury therefore returned a not guilty verdict in relation to him on count 1. Charges of manslaughter against all three applicants were then added to the indictment.

4. The issue before concerns what happened after the jury had retired to consider their verdicts and were brought back into court to be given a majority direction.

5. The jury retired to consider their verdicts on 20 December 2023 (there were potentially six verdicts in all, depending on the outcome of the charges of murder). One juror became seriously overnight and was discharged. There were 11 jurors from then on. On 22 December 2023, the trial was adjourned for the holiday period.

6. The jury resumed their deliberations on 10 January 2024. That afternoon, the jury sent the judge a note. The judge told counsel he had received the note; he could not reveal its contents, but in consequence of what was said, he proposed to bring the jury back into court and give them a majority direction. The jury were brought into court, and in accordance with the usual practice, the clerk of the court asked the forewoman to stand and answer the questions that were put to her. Again, in accordance with the usual practice when a majority direction is to be given, the forewoman was asked whether the jury had reached verdicts in relation to all defendants. That question was asked of course, as a precursor to giving the jury a majority direction, the need for which had plainly been foreshadowed in the jury's note. To the evident surprise of those in court, the forewoman answered yes.

7. In view of that answer, the clerk, after checking briefly with the judge, proceeded to ask the jury in respect of each count on the indictment, whether they found the particular defendant to whom that count related, Guilty or Not Guilty. In respect of each count

her reply was "Not Guilty"; and then to the subsequent question (whether that was the verdict of them all) she said it was. The judge then discharged the applicants and the jury.

8. Within a few minutes of the court rising however, the judge received a communication from the jury. We have not seen any record of that communication, but the judge asked them for a note (and having asked for the court to be reassembled) told counsel in the case in the absence of the jury, the substance of what was said. In short, their forewoman had made a mistake when answering the questions put to her; and the jury had not reached unanimous verdicts in respect of any of the counts they were required to consider. The judge having heard brief submissions from counsel about what was to be done, did not accept, as he had been invited to by counsel for the applicants, that the verdicts should stand nonetheless, or that the court was *functus*. He revoked his direction for the discharge of the applicants and of the jury. The jury were brought back into court, given a majority direction in conventional terms, and invited to retire to continue their deliberations. The applicants remained in custody. More detail of the precise sequence and timing of these events is provided at paras 70 to 80 below.

9. The court adjourned at the end of the afternoon, and on the following day, 11 January 2024, the jury returned a not guilty verdict on count 3 (the bladed article offence) against the first applicant. The jury were unable to agree verdicts on the remaining counts, that is count 1 of murder and count 2 of manslaughter and they were discharged on the same day. The applicants were remanded in custody and remain in custody (no applications for bail have been made).

10. On 19 January 2024, at a mention hearing before the judge, the prosecution confirmed they would proceed with a retrial, the date of which has provisionally been fixed for 2 December 2024.

The present proceedings

11. Between 13 and 15 January 2024, the applicants each issued applications under the Civil Procedure Rules (CPR), rule 87 for a writ of habeas corpus directed to the respondent, the Governor of HMP Belmarsh, for their immediate release.

12. In the alternative, they apply under CPR 87.5(d) for permission to apply for judicial review. The way in which the case is put for each applicant is not identical. In broad summary however, the claims seek to quash: (i) the decision of the judge on 10 January 2024 (he having found that the jury verdicts were given in error) to revoke the discharge of the applicants and of the jury and to remand the applicants in custody; and (ii) the decision of the judge on 11 January 2024, to discharge the jury and to allow the prosecution to apply for a retrial. The relief asked for is a mandatory order requiring the Central Criminal Court to enter not guilty verdicts on all relevant counts in relation to each applicant and that the applicants be released from prison.

13. The Central Criminal Court, the Crown Prosecution Service (CPS) and the Government Legal Department (GLD) have been joined by the applicants as interested parties. The GLD acts as solicitor for the respondent. The Central Criminal Court has taken no part in these proceedings.

14. For the reasons set out below, we have concluded that the applicants' continuing detention pending their retrial is lawful; this court has no jurisdiction to judicially review the decisions under challenge; the applications for judicial reviews are accordingly not arguable and all applications before us including the applications for a writ of habeas corpus, must be refused.

15. It is common ground that there is no immediate right of appeal to the Court of Appeal, Criminal Division. The applicants have indicated that they may challenge their (continued) prosecutions as an abuse of the process. In the event that those challenges (if made) are unsuccessful and/or if any applicant is convicted at the retrial, then subject to the issue of leave being given, the correct route of challenge will be by way of appeal to the Court of Appeal, Criminal Division.

Habeas Corpus

16. We start with the applications for habeas corpus.

17. On 28 April 2023, the Central Criminal Court made orders remanding each of the applicants in custody pending trial. The custody time limit was extended to 10 November 2023. No point has been taken about the validity of those orders.

18. The trial began on 6 November 2023, inside the custody time limit for the purposes of section 22 of the Prosecution of Offences Act 1985. The jury were discharged on 11 January 2024, because they were unable to reach verdicts on five counts. This did not amount to an acquittal on any of those counts (*R v Robinson* [1975] QB 308). Their remand in custody continued pending a retrial (Archbold (2024) at para 4-320). The orders previously made for the applicants to be remanded in custody continued in force and continue to be in force. They have not been set aside by any court.

19. The applicant's challenge to their continued detention depends upon their contention that the judge's decisions on 10 January to revoke the discharge of the jury and of the applicants so that the jury could continue to deliberate, were unlawful. Mr Kerim Fuad KC on behalf of the first applicant, for example, submitted that after the applicants and the jury were discharged the trial on indictment came to an end, and with it the orders made in November 2022 for their remand in custody. It followed that the court was *functus officio,* there was no court order in place authorising the continued detention of any of the applicants and the respondent had no defence to the applications for habeas corpus (we deal below with the associated submission using the same building blocks, that it also followed that applicants should be granted the relief sought by way of judicial review). Ms Felicity Gerry KC on behalf of the second applicant adopted Mr Fuad KC's submissions; and emphasised in particular, the constitutional importance of the writ of habeas corpus in enforcing the right to liberty.

20. The short answer to these applications for habeas corpus is that relied on by the respondent and the CPS. The Governor had been and remained obliged to comply with the warrants of the Central Criminal Court remanding the applicants in custody. There was nothing on the face of the warrants to indicate that any of them was unlawful. The Governor was bound by those orders, which were valid unless varied or set aside by a superior court, or in the proper exercise of the court's own jurisdiction: see *R v Governor of Brockhill Prison ex parte Evans (No.2)* [2001] 2 AC 19, 45H to 46B and *R (Lunn) v Governor of HMP Moreland* [2006] 1 WLR 2870 at [22]); *Jane v*

Westminster Magistrates' Court [2019] 4 WLR 95 and *Cosar v Governor of HMP Wandsworth* [2020] 1 WLR 3846.

21. There is a crucial difference between an order which is invalid on its face and an order which is *prima facie* valid but liable to be set aside. An order in the second category must be obeyed by the party to whom it is directed, i.e. the Governor. Thus, where a Governor receives an order for a remand in custody which is valid on its face, no claim may be brought against him even if that the order was improperly issued, or the court had no jurisdiction to make it. See *Governor of Brockhill Prison* [2001] 2 AC 19 at 45H to 46G.

22. It is an important principle of the administration of justice that an order made by a court of competent jurisdiction, made in the exercise of that jurisdiction, is valid and binding unless and until it is varied or set aside by that court or by a superior court. The same applies to an order which is valid on its face, but which was made in excess of jurisdiction. It is necessary that this should be the case to preserve the authority of the courts and the orderly administration of justice and to ensure that those who are required to comply with orders may be confident that they may lawfully do so : see *Lunn* at para 22.

23. In *Jane*, the Divisional Court decided that a person ordered to be extradited could not challenge by habeas corpus the decision of a district judge not to discharge him (where that decision was made because reasonable cause had been shown for a delay in complying with the time limit for extradition). The lawfulness of the decision of the district judge could only be challenged by judicial review. The order made by the court for the detention of the requested person provided lawful authority for the Governor to detain him, even if the judge's decision not to discharge him was liable to be set aside (see paras 46 to 47). This accorded with the analysis by the Court of Appeal in *R v Secretary of State for the Home Department ex parte Cheblak* [1991] 1WLR 890 and in *R v Secretary of State for the Home Department ex parte Muboyayi* [1992] QB 244 and of the Divisional Court in *R v Oldham Justices ex parte Cawley* [1997] QB 1.

24. In *Cheblak*, Lord Donaldson MR said at 894D to E, that a writ of habeas corpus will issue where someone is detained without any authority or where the person who purportedly authorised detention had no power to do so. Habeas corpus is not available however where the decision-maker had a power to make the decision challenged, but it is said that that decision was vitiated by an error of law or procedural error. Such a decision is lawful unless and until it is set aside by a court of competent jurisdiction.

25. In *Muboyayi*, it was held that habeas corpus could not be used to challenge a prior administrative decision, namely a refusal of leave to enter the United Kingdom under the Immigration Act 1971, upon which a decision to detain pending removal had been based. That detention could not be impugned unless and until the underlying immigration decision itself was set aside in proceedings for judicial review.

26. In *Cawley*, the Divisional Court decided that a committal warrant by justices for non-payment of a fine failed to comply with a statutory requirement that it state the relevant grounds upon which the court had been satisfied that the warrant should be issued. That failure did not however render detention under the warrant unlawful and so was not a matter which could be raised by habeas corpus. The warrant was valid unless and until set aside in an application for judicial review: see pp 11 to 16 and 18 to 19.

27. In *Jane*, the Divisional Court acknowledged at paras 65 to 67, the criticisms that had been made of *Cheblak* and *Muboyayi*, and therefore of *Cawley* by the Law Commission for example and elsewhere. The court decided however that it should follow *Cheblak, Muboyayi* and *Cawley*. The law had been fully argued in the last two cases. They had not been decided *per incuriam*.

28. In *Cosar*, the Divisional Court held that habeas corpus could not be used to challenge an agreement made by a district judge with a requesting authority under section 35(4) of the Extradition Act 2003 to extend the time limit for surrendering a person pursuant to an extradition order. That agreement did not replace or supersede the order previously made under section 21(4) remanding the requested person in custody upon the making of the order for extradition. It was that order which provided lawful authority for the detention, and it was a complete answer to a writ of *habeas corpus.* At most, if the agreement under section 35(4) were to be quashed in an application for judicial review, then the requested person could make an application for discharge to be considered by a district judge under section 35(5). But unless and until the remand order and/or the extradition were set aside, the detention would remain lawful. The Divisional Court followed *Cheblak, Muboyayi* and *Jane* (see paras 44 to 49).

29. The applicants sought to distinguish this line of authority on the basis that the Crown Court became *functus officio* on 10 January 2024 after the return of the not guilty verdicts and the discharge of the jury and the applicants.

30. We address the merits of the *functus officio* submission below. But the attempt to deploy that argument in this context is untenable. It is plain that in the interests of justice a judge in the Crown Court has a power to consider whether a mistake has been made in the giving of a verdict and to correct it (by revocation) even if that verdict is one of guilty and the jury has been discharged. See for example, *R v Andrews* [1985] 82 Cr. App. R 148 and *R v Aylott* [1986] 2 Cr. App. R. 169.

31. There are constraints on the exercise of this power which we address below. But the important point is that the power exists. When considering whether to exercise that power, the judge is not *functus officio* in relation to the trial on indictment. In particular, if the power is exercised in respect of a not guilty verdict, and the jury continue to deliberate neither he nor the jury are *functus officio*.

32. An error of law in the exercise of that power does not alter the obligation of a Governor to comply with any order remanding a defendant in custody or warrant reflecting the same; and that remains the case unless and until the remand order in question is set aside.

33. In this connection, paragraph 1.17 of Prison Service Order 4600, the applicable guidance, correctly describes the position:

> "The defendant remains in the custody of the court while awaiting trial and it is only by order of the court that the custody can be brought to an end. Case law has found that the Governor's only **responsibility** is to hold the defendant in accordance with the terms of the warrant…"

34. The remand orders made by the judge provide a complete answer to habeas corpus. The applications for habeas corpus are refused.

Judicial review

35. We turn next to the applications for judicial review. The question that arises is whether this court has jurisdiction to review the decisions in issue before us, centrally, the decisions to revoke the discharge of the jury and the discharge of the applicants.

36. We start with the relevant legal framework.

37. Section 29(3) of the Senior Courts Act 1981, as amended provides:

> "(3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court."

38. Section 29(3) thus confirms that the High Court has the same jurisdiction to make mandatory, prohibiting and quashing orders in relation to "the jurisdiction of the Crown Court" as it does in relation to an inferior court, except for the jurisdiction of the Crown Court "in matters relating to a trial on indictment." It is that particular part of the Crown Court's jurisdiction which is excluded from judicial review.

39. *In re Smalley* [1985] AC 622, Lord Bridge stated at pp 642-3 that section 29(3) excludes judicial review in relation to:

    (i) The trial of a defendant who pleads guilty on arraignment;

    (ii) Any decision affecting the conduct of a trial on indictment whether given in pre-trial directions or during the course of the trial;

    (iii) A verdict given by the jury, or a sentence passed.

40. Lord Bridge explained that one objective of (ii) is to prevent legal challenges seriously delaying a trial. He added that he was intending to provide a "helpful pointer to the right answer in most cases" and not a definition of the phrase which Parliament had used in section 29(3) but had chosen not to define (p.643H to 644A).

41. In *Smalley*, it was held that an order estreating the recognisance of a surety for a defendant who does not surrender to his bail at the Crown Court cannot affect the conduct of his trial in any way. Accordingly, section 29(3) does not exclude a challenge by judicial review to the making of such an order. On the other hand, a pre-trial order potentially affecting the composition of the jury at trial is an order affecting the conduct of the trial and therefore could not be challenged by judicial review: see *R v Sheffield Crown Court ex parte Brownlow* [1980] QB 530.

42. *In re Sampson* [1987] 1 WLR 194, the trial judge in the Crown Court had directed the defendant's acquittal. He went on to order the defendant to pay a contribution towards

the costs of his defence under the Legal Aid Act 1974. The defendant had no right of appeal against that order. The House of Lords held that section 29(3) of the 1981 Act prevented him from challenging that order by judicial review. Lord Bridge stated that certain orders made at the end of a trial are excluded from judicial review as "relating to trial on indictment", not because they affect the conduct of the trial, but because "they are themselves an integral part of the trial process" (p196F).

43. *In re Ashton* [1994] 1 AC 9, the House of Lords decided that a decision by the Crown Court to stay a prosecution as an abuse of process on the grounds of delay was a decision relating to trial on indictment. The House reaffirmed the guidance given in *Smalley* and *Sampson*. Lord Slynn said that the expression "an integral part of the trial process" can include an order made before, during or at the end of a trial. For the purposes of section 29(3), a distinction should not be drawn "between an order as to how and when a trial is to be held and an order which decides whether there shall or shall not be a trial." An order made on an application to stay proceedings for abuse of process is clearly "an order affecting the conduct of the trial", irrespective of whether the order is that the proceedings shall be stayed or not stayed (p20 B-C). In other words, the exclusion applies to a potential challenge by judicial review brought by either the prosecution or the defence. Lord Slynn referred to the risk of delay to criminal trials which could otherwise occur and "the extent to which remedies are otherwise available to the parties in criminal proceedings." He said that if convicted, a defendant can appeal to the Court of Appeal, even if a successful appeal may not be as speedy or efficacious as a judicial review before trial (p20F).

44. In *R v Manchester Crown Court ex parte DPP* [1993] 1WLR 1524, the judge quashed an indictment alleging that an MEP had dishonestly obtained by deception monies for expenses from the European Parliament. He declined jurisdiction on the grounds that it would be necessary for the court to interpret the Parliament's rules, and the trial would infringe the Parliament's sovereignty and breach principles of comity. The Divisional Court decided that judicial review of that decision was not excluded by section 29(3) and quashed the judge's order as being wrong in law. The House of Lords allowed the defendant's appeal on the basis that the order was a matter relating to trial on indictment. A question as to whether there is jurisdiction to try a person on indictment must "relate to" trial on indictment (p1529E).

45. Lord Browne-Wilkinson noted that cases in which it had been decided that judicial review is available include those in which the order was made under a wholly different jurisdiction to trial on indictment, for example binding over an acquitted defendant; or where an order had been made against someone other than the defendant, for example, the forfeiture of third-party property used by the defendant in the commission of an offence. Accordingly, a further "helpful pointer" on the scope of the exclusion in section 29(3) is whether the decision sought to be reviewed is one arising in the issue between the prosecution and the defendant formulated by the indictment. If it is, then to allow it to be challenged by judicial review may delay the trial and that remedy is probably excluded by section 29(3). If not, the decision is collateral to the trial, judicial review will not delay that process and so is probably not excluded (p1530 C-F).

46. Lord Browne-Wilkinson endorsed the approach taken in *Ashton*. Although the inability of a defendant to challenge the decision of the Crown Court by judicial review means that he has to endure a full trial, he is not otherwise prejudiced. If convicted, he can

appeal to the Court of Appeal and challenge the erroneous decision. If acquitted, he is not prejudiced (p1529H to 1530A).

47. Notwithstanding the restrictions imposed on the jurisdiction of the High Court by section 29(3) of the 1981 Act, the High Court *can* intervene by judicial review where a judge in the Crown Court makes an order *without* jurisdiction: see for example, *R v Maidstone Crown Court ex parte Harrow London Borough Council* [2000] QB 719, 742E to 743B and *R (DPP) v Sheffield Crown Court* [2014] 1 WLR 4639. Similarly, judicial review is available where there has been a jurisdictional error of such gravity, or the legal defect was so severe, as to deprive the Crown Court of jurisdiction: *R (DPP) v Aylesbury Crown Court* [2018] 4 WLR 30 at paras 7 to 8.

48. In *R (TM Eye Limited) v Crown Court at Southampton* [2022] 1 WLR 1114 this court applied those principles at paras 68 to 72. It recognised that there would be some circularity if the test for the court to decide whether to intervene was simply the conventional grounds for judicial review. It also noted the potential difficulty of distinguishing cases where a particular order was made without jurisdiction from those involving a mistaken exercise of jurisdiction. Nonetheless, it concluded that a judge's decision to refuse a private prosecutor's application for payment of its costs out of central funds under section 17 of the Prosecution of Offences Act 1985, solely on one irrelevant ground, namely an assumption as to the apparent wealth of "the effective prosecutors" was "a jurisdictional error of sufficient gravity to take the case out of the jurisdiction of the Crown Court" (para 73). However, the claim for judicial review failed because a second decision made by the judge refusing to vary his first decision could not be impugned.

49. As to the power of the trial judge in the Crown Court to allow a verdict of the jury to be corrected even after they have been discharged, as stated at para 30 above, a judge in the Crown Court has the power to consider whether a mistake has been made in the giving of a verdict and to correct it (by revocation) even if that verdict is one of guilty and the jury has been discharged.

50. In *R v Andrews*, a husband and wife were tried for child cruelty. The jury having indicated that they had reached unanimous verdicts, the foreman delivered verdicts of guilty for the wife and not guilty for the husband, who was then discharged. Ten minutes later, whilst counsel was mitigating for the wife, the jury passed a note to the judge which said: "we thought we found [the husband] guilty of wilful neglect." The judge had the husband brought back into court and the jury then returned a verdict of guilty on the count of wilful neglect.

51. It was held that where a jury seeks to alter a verdict given by the foreman, the judge has a discretion as to whether to allow the alteration to be made, taking into account all the circumstances of the case. Particularly important considerations are the length of time which has elapsed between the original verdict and the moment when the jury express their wish to alter it, the probable reason for the initial mistake and the necessity to ensure that justice is done not only to a defendant but also the prosecution. The fact that a defendant has been discharged is a further consideration but is not necessarily fatal to a decision to alter a verdict from not guilty to guilty. There was no possibility of the jury changing their mind because of something they had heard after the original verdict was given. The mistake had probably occurred because the jury had been expecting an additional question relating to a specific verdict of wilful neglect if they did not find

assault to have been proved in view of the directions the jury had previously been given. The judge had been entitled, and indeed right, to exercise his discretion by allowing the initial not guilty verdict to be altered in order to rectify a plain mistake and to do justice in the case (pp 152, 154 and 155). The court refrained from deciding whether the discretion could not be exercised if the jury had been discharged and had dispersed, because that did not arise on the facts of the case (pp 154-5).

52. In *R v Aylott*, the appellant and his co-defendant were both charged with murder, and with manslaughter in the alternative. After a majority direction was given, the jury sent a note to the judge containing voting numbers. In court, and in response to a question from the judge, the foreman stated that the jury would be unable to reach any verdicts. The judge then discharged the jury and adjourned the court. He went to his room and was then told that the jury had reached a verdict. Three minutes after the adjournment, the court with the jury present, was reconvened. The jury then retired, whilst counsel and the judge considered the position. It does not appear that the judge told the jury not to deliberate any further (pp 170-171).

53. In fact, the judge had misread the jury's initial note. It concerned only the co-defendant, not the appellant. About 20 minutes later, the jury sent a second note stating that they had reached a unanimous verdict in respect of the appellant. Some 44 minutes after their initial discharge, the foreman stated in open court that the jury had reached unanimous verdicts in relation to both the appellant and his co-defendant before their first note had been sent and their initial discharge. The jury were then asked to retire again whilst further legal submissions were made. Eventually, about 1 hour 24 minutes after the judge had discharged the jury, he checked again with the foreman in open court that the jury had reached unanimous verdicts on both defendants before they had sent their first note. The jury then delivered unanimous verdicts, finding the appellant guilty and his co-defendant not guilty of murder. The jury were unable to reach a verdict on manslaughter against the co-defendant and were then (and finally) discharged (pp 172-4).

54. The Court of Appeal held that there was no fixed principle or rule that states that once a jury has been discharged a judge cannot receive a verdict from them after revoking the order for their discharge. Here, the discharge of the jury had been based on the judge's mistake in relation to the jury's first note. It was clarified that the jury had in fact reached unanimous verdicts before they were first discharged, which the judge had been entitled to receive by revoking that discharge. The jury had remained together and had not spoken to anyone outside their number. The fundamental principle is that the courts are concerned to do justice in the particular case. Fairness is important to defendants and also to the public. Here, the interests of justice required the verdicts to be taken.

55. The court will not investigate what happened prior to the giving of a verdict where the jury disperses and a mistake is not indicated until significantly later, for example, the following day (see for example, *Lalchan Nanan v The State* [1968] AC 860; and *R v Millward* [1999] 1 Cr. App. R. 61).

56. *R v Tantram* [2001] EWCA Civ 1364 concerned allegations of two conspiracies to defraud against a number of co-defendants. After 5½ days of deliberation, and before any majority direction had been given, the jury sent a note stating that they had reached five unanimous verdicts and two 11 to 1 verdicts but were undecided on the remaining

verdicts. They sought guidance on the "undecided verdicts." About 20 minutes later the jury came into court. The foreman said that the jury had reached unanimous verdicts on all bar one defendant. He then gave ten unanimous verdicts, three of which were guilty and the remaining seven not guilty. About 27 minutes later, the jury sent a second note saying that they were unhappy with what had happened. They had simply asked for guidance on the "undecided verdicts." They had not been ready to give their verdicts. In two cases, their foreman had said not guilty when they were undecided. After legal submissions, the jury returned to court at 5.23pm, about 1 hour 20 minutes later. The judge asked the jury to retire to write a note explaining on which counts were the verdicts in error. At 5.50pm, a third note stated that the jury were undecided on seven counts. The implication was that they had only been unanimous on four counts, whereas their first note had said that they were unanimous on five and they had returned ten unanimous verdicts. The next morning the jury were released until the beginning of the following week. They were given strong warnings not to talk to anyone about the case.

57. The following week, the judge decided that the four unanimous verdicts which the jury had not sought to alter should stand. He allowed the jury to continue to deliberate on the other allegations. On the second day of that week, the jury returned majority verdicts of guilty against two defendants.

58. The Court of Appeal accepted that the judge had had a discretion as to whether to allow the jury to amend their verdicts, but, not without hesitation, it said that he had exercised it in a way which was not open to him. The court was concerned about the 27 minute delay between the jury leaving the court room and their second note, in which there had been an opportunity for further deliberation. In addition, the differences in the jury's notes on the number of unanimous verdicts showed the possibility of jurors' minds having changed. That possibility was sufficient to undermine the reliability of the amendments to the unanimous verdicts and rendered subsequent convictions differing from those verdicts unsafe.

59. In *RN v R* [2020] EWCA Crim 937 the appellant faced two counts. At 3.12pm on the second day of their deliberation, the jury unanimously acquitted her on count 2 without any dissent. The jury were allowed to separate for the evening but just after 3.35pm they were called back into court to continue deliberating on count 1. No issue was then raised about the correctness of their verdict on count 2. About 40 minutes later, the judge was told by an usher that the foreman was dissatisfied about the manner in which he had delivered the verdict on count 2. A new foreman then returned a verdict of not guilty on count 1 and confirmed the correctness of the not guilty verdict on count 2. It was only after the jury had retired again that a message was sent to the judge saying that a mistake had been made. The explanation appears to have been that there was confusion between the questions posed in the route to verdict and the questions asked by the clerk of the court when taking verdicts (paras 20 to 22). The following morning the judge clarified his directions to the jury and allowed them to carry on deliberating. They then returned verdicts of guilty on both counts. The judge did not establish with the jury that either or both of the not guilty verdicts previously returned were incorrect before he allowed them to carry on deliberating. Prosecuting counsel described this as a "confusion case" (paras 12 to 24).

60. At para 32 Fulford LJ said:

> "For our part, we consider that it should be emphasised that although the judge has a discretion in these circumstances, if there has been a material opportunity for further discussion after the verdict in question was delivered, thereby potentially leading to a change of mind, no amendment to the conviction or acquittal should be permitted. In this context – although it is not necessarily determinative – of clear importance will be whether the jury promptly indicated that the verdict needed correcting, and whether the court thereafter dealt with the issue straightaway and before any significant further deliberations occurred, or might have occurred, thereby excluding the risk of a change of view on the part of one or more jurors."

61. At para 37 Fulford LJ went on to say that "this was not a clear-cut instance of a jury indicating that there had been a mistake in the way the verdicts had been delivered, with that indication being provided promptly, and the matter being resolved in circumstances which excluded the possibility of any further deliberations and a change of mind." Accordingly, the appeal against conviction was allowed.

The parties' submissions

62. As we have already indicated, Mr Fuad submitted that after the not guilty verdicts and the discharge of the jury, the trial on indictment came to an end, and the court was *functus officio*. In those circumstances, he submitted that the decisions of the judge sought to be reviewed did not arise in the issue between the prosecution and the applicants formulated in the indictment, and section 29(3) of the 1981 Act was not engaged. Further, judicial review in these circumstances would not conflict with the underlying rationale of section 29(3), namely, the need to discourage satellite litigation which may disrupt criminal trials and/or the availability of an adequate remedy by an appeal under the Criminal Appeal Act 1968 to the Court of Appeal. See *R (KL) v Central Criminal Court* [2021] QB 831 at paras 53(1) and (3).

63. Mr Fuad accepted that a trial judge has a discretion to allow the jury to correct a verdict which has been returned unless, he says, they have been discharged and allowed to disperse. But that discretion he submitted cannot be exercised so as to allow a verdict to be altered where, in the circumstances, it is possible that one or more members of the jury changed their mind about the verdict already returned, rather than simply saying what the foreman had said in court did not represent the jury's position at that stage. Here, as in *RN v R*, there was time and opportunity for further discussion within and without the jury

64. Mr Fuad sought to reinforce his argument by relying upon the acquittal of the first applicant on count 3 during the morning of 11 January. He said the jury had been directed that they had to answer the questions in the route to verdict in the order there set out. Thus, they were required to reach verdicts on counts 1 and 2 before turning to count 3. It can therefore be inferred that the jury had reached verdicts on counts 1 and 2 "at some stage," suggesting that they had subsequently changed their minds on that issue.

65. Mr Fuad further submitted that the unanimous "not guilty" verdicts in this case were taken in accordance with the law. They were taken in the presence and hearing of the jury, and without any dissent from a member of that jury. Accordingly, it is to be presumed conclusively that each juror agreed with each of those verdicts (*R v Roads* [1967] 2QB 108). In such circumstances, the court will not receive subsequent evidence that the jury was not in fact unanimous (*Lalchan Nanan*).

66. Ms Gerry adopted Mr Fuad's submissions, as did Ms Tana Adkin KC on behalf of the third applicant. In addition, Ms Gerry KC referred to *R v Tantram* and to a range of cases in which a court had been found to be *functus officio*, albeit not in the context of a trial on indictment or criminal matters. Ms Gerry submitted that the judge's decision to allow a discharged jury to continue to deliberate was an opportunity for them to change their minds and not simply to correct a mistake already made. Ms Gerry also criticised the judge for asking the forewoman only once whether she had made a mistake in saying that unanimous verdicts had been reached, rather than putting the question separately in relation to each of the six verdicts. Ms Adkin advanced an alternative line of argument. She referred to the importance of the presumption of innocence and submitted that a verdict of not guilty entered without dissent in court followed by the discharge of the jury must stand. She sought to distinguish the immediate correction of a mistaken verdict of guilty from a correction made after the jury's discharge. A mistake in giving such a verdict in the latter case, she submitted, is incapable of being "corrected". A court may not investigate the deliberations of a jury and has no discretion to accept a correction of a not guilty verdict.

Discussion

67. It is well-established on the authorities that a judge has a discretion to allow a verdict of the jury to be corrected even after they have been discharged, and the submission made by Ms Adkin that the judge has no such discretion is contrary to authority. The trial judge is not therefore *functus officio* when deciding whether to exercise that discretion; such an issue, where it arises, clearly does so in relation to the issue between the prosecution and the defendant formulated by the indictment within the meaning of section 29(3) of the 1981 Act and cannot be challenged by judicial review. The judge's decision may determine whether the defendant is guilty or not guilty at that stage, or whether the trial is to continue. The decision affects the conduct of the trial and is an integral part of the trial process. A challenge by judicial review could significantly delay the trial process. In the event of any of the applicants being convicted at a retrial, they will have a right of appeal to the Court of Appeal, Criminal Division in relation to the judge's decision to accept the correction of the verdict and to revoke the discharge of the jury. It follows that, in principle, section 29(3) of the 1981 Act prevents a challenge by judicial review to the exercise of the discretion to accept a jury's correction of its verdict and to revoke the discharge of that jury.

68. Further, whilst this court may intervene by way of judicial review in relation to an order made by a judge during a trial on indictment which the judge had no jurisdiction to make, or to address a jurisdictional error of sufficient gravity as to take the order out of the jurisdiction of the Crown Court, the decisions made by the judge in this case involved no error of law and lay well within the ambit of the discretion which he was empowered to exercise.

69. As the authorities demonstrate, the legitimacy of the exercise of the discretion to allow a verdict of the jury to be corrected, even after they have been discharged, is fact sensitive; and for the purposes of this part of the argument, it is necessary to refer in more detail therefore to what happened in this case.

70. We can start with the afternoon of the 10 January 2024. The court reconvened at 2.26pm in the absence of the jury. As we have already said, the judge told counsel that he had received a note from the jury, the contents of which he could not reveal, but that in consequence of its content, he would give them a majority direction.

71. The jury came back into court at 2.31pm. The clerk of the court then put the following questions to the forewoman:

> "THE CLERK: Madam Foreman, will you please answer my question either 'yes' or 'no'. Have the jury reached verdicts in relation to all defendants on all counts on this indictment, upon which you are all agreed?
>
> MADAM FOREMAN: Yes.
>
> THE CLERK: Have you reached verdicts in relation to all defendants?
>
> MADAM FOREMAN: Yes.
>
> THE CLERK: That is slightly different from the note Your Honour received.
>
> JUDGE GRATWICKE: Well, they have, yes."

72. Plainly, the forewoman's answer came as a surprise to those in court. Indeed, the court log records that the verdict was taken "unexpectedly". Nevertheless, as the transcript reveals, having spoken to the judge in the terms set out above, the clerk proceeded to take the verdicts:

> "Right, I will take the verdicts: Members of the jury, on count one, do you find the defendant Paul Yusuff guilty or not guilty of murder?
>
> MADAM FOREMAN: Not guilty.
>
> THE CLERK: You find him not guilty and that is the verdict of you all?
>
> MADAM FOREMAN: Yes"

73. The same questions were then put in relation to count 1 for the second applicant, count 2 for all three applicants and count 3 for the first applicant. The upshot was that, through

their forewoman, the jury apparently returned unanimous not guilty verdicts on each count, without any dissent from other members of the jury. The judge discharged the applicants and then at 2.35pm the jury. The judge thanked the Bar for their assistance and rose at 2.36pm.

74. At 2.52pm, the court clerk sent an email to the legal representatives simply saying: "come back to court 2 urgently please – issue with the verdicts."

75. The hearing was resumed in the absence of the jury at 3.08pm. The judge said:

> "Within a few minutes of our leaving Court, I was informed that the jury had indicated they had made a mistake. I asked for a note to be written to assist me as to what the mistake was. The note does contain figures and therefore, I cannot make that available, but what is clear from the note is that the jury foreman did not take on board the question 'are you unanimous'? It is clear from the note that they are not unanimous, and I will say no more than that. It seems to me, and I appreciate that I discharged the defendants but that is something that I said, and I am going to revoke that. Whether I am right or wrong in that, may be for another Court to determine, but I am and I propose to have the jury back and give them a majority direction."

76. There followed exchanges between counsel and the judge for just over 10 minutes. Ms Adkin pointed out that the jury had been discharged and submitted that the jury could not be reconvened and allowed to carry on deliberating if potentially a juror could change his or her mind. The judge responded:

> "Well, that is the difficulty that I have with the note, one can only go so far in revealing the contents of the note; I cannot give numbers. But what is clear in my mind, is that this jury or the foreman, made a mistake. Now ultimately, that has to be grasped and my reading of the authorities and what I have been able to do, is where there has been a mistake the Court should endeavour to rectify it and that is what I propose to do. If I am wrong in relation to that, then there is an avenue which you can go down at a later stage if I am wrong, but that is what I propose to do."

77. Mr William Davis for the prosecution referred the judge to Archbold at para. 4.520 (2024 edition) and said this:

> "My reading of the law is that My Lord does have a discretion in these circumstances to allow an alteration where an apparent mistake has been raised immediately. And where there hasn't been any opportunity for a change of mind or further deliberation. From what My Lord has said, that appears to be the

> situation but of course, I've not seen the note to which My Lord is referring."

78. Defence counsel submitted that the jury had been discharged, were *functus officio* and could not be reconvened. The not guilty verdicts had to stand. The judge maintained his position that he was acting in accordance with the law as he understood it to be. Counsel asked for more time to consider the position, but the judge said that "I should have them [the jury] back as soon as I can."

79. The jury returned at 3.21pm. The transcript records what was said:

> "JUDGE GRATWICKE: Madam Foreman, when you came into Court some 10 minutes or so ago or whatever it be, you were asked by the learned clerk whether the jury had reached verdicts upon which they were all agreed, and I think in fact he asked you of that twice. I have received a note that in fact, the position is that you had not reached verdicts upon which you had all agreed, is that right?
>
> MADAM FOREMAN: Yes.
>
> JUDGE GRATWICKE: Thank you, and do I understand that that was a mistake by you?
>
> MADAM FOREMAN: Yes.
>
> JUDGE GRATWICKE: Thank you, members of the jury, in the circumstances I am going to invite you to retire once again and strive to reach verdicts upon which you are all agreed. If you cannot reach verdicts upon which you are all agreed, I can accept a verdict which is the verdict of at least 10 of you, thank you very much, thank you for your time."

80. The jury retired at 3.22pm. At 4.27pm the jury came back into court and the judge sent them home for the day. As already indicated, on the following day, the jury returned a not guilty verdict on count 3 (the bladed article offence) against the first applicant but they were unable to agree verdicts on the remaining counts and were discharged.

81. We have not seen the two notes from the jury referred to above (either the note which gave rise to the judge's decision to give a majority verdict in the first place, or the note sent within a few minutes of the jury's discharge). All counsel were content that we should determine these applications without seeing them. Indeed, Mr Hall submitted that the Juries Act 1974 prohibited this court from seeing that material. We do not find it necessary to decide this point. The issues it raises are not straightforward and we did not hear full argument on them.

82. In our judgment, on the facts of this case, the following factors are significant.

83. No criticism is made, or could be made, of the questions put by the court clerk to the forewoman. The judge had well in mind the relevant legal principles as summarised in Archbold at para 4.520 and applied those principles. The not guilty verdicts were returned at a time when a majority direction had yet to be given and so the jury had to be unanimous on any count on which they returned a verdict. Only shortly before the verdicts were given, the jury sent a note indicating that they were not unanimous. The judge decided to give a majority direction. No member on the jury ever suggested that they had reached any unanimous verdict during the short space of time before they were called back into court at 2.31pm;

84. In this case, it is plain from what happened that the forewoman had made a mistake in saying that the jury had reached unanimous verdicts. This was not a case where the mistake involved the return of not guilty verdicts, when unanimous guilty verdicts had been reached on any of the counts. The jury was discharged at 2.35pm immediately after the last of the not guilty verdicts. They were also discharged from further jury service for the next 10 years. The judge did not do anything which could be taken to suggest that the jury could or should carry on deliberating. Within a short period of time the jury informed the judge that a mistake had been made. As the transcript records, the judge informed counsel that they did so within a few minutes of leaving court; the judge then asked the jury to explain that mistake in a note and they provided a note to the judge. All this must have occurred before the clerk's message to counsel at 2.52pm.

85. The judge said that it was clear from the note that the forewoman had not understood the question: "are you unanimous?" and the jury were not unanimous. That applied equally to each of the counts the jury had to consider. When the jury returned to court, the judge reminded the forewoman of that question, that is whether the jury had reached verdicts upon which they were all agreed. She confirmed the correct position, as in the jury's note, was that the jurors had not reached unanimous verdicts and her statement that they had done so, had been a mistake on her part. In the circumstances, there was no need for the judge to ask the forewoman whether she had made the same mistake in relation to each verdict of not guilty. The clerk's question on unanimity was posed in relation to each count. Her misunderstanding about that question applied equally to her answers in relation to all of the counts and each applicant.

86. Although no juror dissented when the unanimous not guilty verdicts were retuned, it is rather more significant that after the jury had pointed out that a mistake had been made, they produced a note the essential contents of which were confirmed by the forewoman in court before the whole jury and that no juror dissented at that stage. No juror said for example that before 2.31pm the whole jury had reached any unanimous verdict of not guilty. Furthermore, no juror raised any further issue about what had happened during the remainder of the trial.

87. In the circumstances, the jury alerted the judge to what had happened promptly (within a matter of minutes) and there was no real possibility that further deliberations had taken place in the intervening minutes (resulting in any juror changing their mind) before the court was reconvened - as it had to be not least so the matter could be discussed with counsel - at 2.52pm, or before the jury were brought back into court 3.08 pm.

88. Put simply, the jury identified the mistake that had been made by their forewoman promptly; the mistake they identified was consistent with their first note to the judge (that they had not reached unanimous verdicts on any count) and the matter was then sensibly and expeditiously sorted out by the judge (as a matter of logic, the jury's verdict on 11 January under count 3, which in any event did not depend upon whether they had reached any verdict on counts 1 or 2, cannot affect this analysis).

89. It cannot be said in those circumstances, either that the judge made any jurisdictional error of such gravity as to deprive him of the jurisdiction to accept the jury's correction of the verdicts returned; or that he erred in the exercise of his discretion. We have already said that an error of law in the exercise of a judge's power in matters such as these, does not alter the obligation of a Governor to comply with any order remanding a defendant in custody or warrant reflecting the same, and that that remains the case unless and until the remand order in question is set aside. Even if we were to be wrong about this, an application for habeas corpus in this case, would fail on the facts.

Practical guidance

90. Looking at this case realistically, we think it is tolerably clear that the jury forewoman was not expecting to be asked the first question the clerk put to her when she came back into court; and suffered what might reasonably be called, a form of stage fright. We ask a lot of our juries; and particularly the person appointed as foreman or forewoman, who will be faced with questions they are required to answer in public in the somewhat stressful environment of court proceedings. That stress will be exacerbated if the question that is asked is not one that has been foreshadowed or expected. Before leaving this case, we therefore give some practical guidance on jury management which should reduce the risk of any repetition of the problems of the kind that happened in this case.

91. Section 17 of the Juries Act 1974 as amended by the Crime and Courts Act 2013, provides in part as follows:

> "17 Majority verdicts.
>
> (1) Subject to subsections (3) and (4) below, the verdict of a jury in proceedings in the Crown Court … need not be unanimous if—
>
> (a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and
>
> (b) in a case where there are ten jurors, nine of them agree on the verdict.
>
> …
>
> (3) The Crown Court shall not accept a verdict of guilty by virtue of subsection (1) above unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

> (4) No court shall accept a verdict by virtue of subsection (1) or …above unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

92. Rule 25.14 of the Criminal Procedure Rules covers some of the same ground; it concerns the taking of a verdict or verdicts from the jury, including a verdict reached by a majority, and the questions to be asked of the jury before a verdict is taken. Rule 25.14(5) provides, in broad terms, for the jury to be given written assistance.

93. The giving of a majority direction normally arises in one of two circumstances; either because the jury has revealed in a note to the judge that they are split (the judge cannot of course reveal the precise nature of the split) in a manner that persuades the judge (provided the jury have had at least two hours for deliberation) that the time has come having regard to the nature of the case and any other material factor to give a majority verdict; or because the judge considers in accordance with the statutory requirements that sufficient time has elapsed since the jury commenced their deliberations, having regard to the nature of the case and any other material factor, such that a majority direction should now be given.

94. The need will not arise in every case, so we do not consider it necessary to be over prescriptive, and precisely how this is to be done should be flagged up in open court and discussed with counsel; but if a decision has been taken to give a majority direction, we consider that there may on occasion, be cases, where it would be helpful for the jury to be given some forewarning of the procedure that will be followed when they are brought back into court and of the questions the foreman or forewoman will be asked.

Outcome

95. For the reasons set out above, the application in each case for habeas corpus and, in the alternative, for permission to apply for judicial review, is refused.