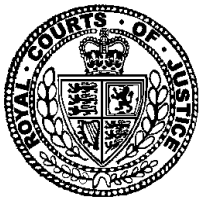

Neutral Citation Number: [2024] EWCA Crim 1278

Case No: 202402750 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MANCHESTER
The Honourable Mr Justice Goss
T20217088

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2024

Before:

LORD JUSTICE WILLIAM DAVIS
LORD JUSTICE JEREMY BAKER
and
MRS JUSTICE MCGOWAN

- -

Between:

R	**Appellant**
- and -	
LUCY LETBY	**Respondent**

- -
- -

Benjamin Myers KC and Fiona Clancy for the Appellant
Nicholas Johnson KC and Simon Driver for the Respondent

Hearing dates: 24 October 2024

- -

Approved Judgment

LORD JUSTICE WILLIAM DAVIS :

1. Lucy Letby was a qualified nurse. She worked at the neonatal unit at the Countess of Chester Hospital. In August 2023 she was convicted in the Crown Court at Manchester after a trial lasting over 10 months of 7 counts of murder and 7 counts of attempted murder. Her victims were very young babies being cared for at the unit. On 21 August 2023 life imprisonment was imposed on each count. A whole life order was made in each case.

2. The jury were unable to agree in relation to 6 other counts of attempted murder. They acquitted Letby of 2 counts of attempted murder. These counts also involved very young babies in her care. In relation to the counts on which the jury were unable to reach verdicts, the prosecution took time to consider whether to seek a retrial. On 25 September 2024 the prosecution announced at a hearing in Manchester that they proposed to retry Letby on one count of attempted murder. The trial was fixed for 10 June 2024. The trial judge, Mr Justice Goss, imposed a reporting restriction pursuant to section 4(2) of the Contempt of Court Act 1981 whereby there was to be no reporting of any matter which would create a substantial risk of prejudice in relation to the trial commencing on 10 June 2024.

3. The background to the case of Lucy Letby is very well-known. It was set out in detail in the judgment of this court handed down on 2 July 2024 in relation to her unsuccessful application for leave to appeal against the convictions in August 2023: [2024] EWCA Crim 748. Her case attracted very substantial publicity as the trial progressed. After she was convicted, there was a great deal of broadcast and other media comment about the horrific nature of her offending. This was the trigger for the reporting restriction imposed on 25 September.

4. On the first day of the re-trial on 10 June 2024 counsel for Letby (who had represented her at the first trial) applied to the trial judge for a stay of the indictment charging a single count of attempted murder. It was submitted that a trial on the indictment would be an abuse of process. It was argued both that Letby could not receive a fair trial and that it would not be fair for her to be tried. The argument was based on the nature and extent of the publicity arising from the first trial. Mr Justice Goss refused to stay the indictment. The trial proceeded. On 2 July 2024 Letby was convicted of attempted murder. On 5 July 2024 she was sentenced to life imprisonment with a whole life order.

5. Letby now applies for leave to appeal against her conviction in July 2024. The sole ground of appeal is that the judge erred in refusing to stay the proceedings. She is represented by leading and junior counsel who have been instructed by her throughout.

6. It is necessary at the outset to say what this application does not concern. Since the convictions in August 2023 there has been significant media coverage of the basis for those convictions. This has involved a critique of the medical and scientific evidence called at the first trial. Some of the public comment has called into question whether Letby ought to have been convicted in August 2023. We are not concerned with the first trial. That was the subject matter of this court's judgment in July 2024. Whether there are or may be issues arising from the first trial which have yet to be the subject of judicial consideration is not for us to say. That would be speculative. This application will not involve any detailed analysis of the evidence called either at the first trial or the re-trial. Our concern is solely whether the trial judge was wrong to rule that Letby

could receive a fair trial in June 2024 and that it would be fair to try her. This will involve principally discussion of the publicity given to her case.

7. The basis upon which a judge in the Crown Court will stay proceedings as an abuse of the criminal process is very well settled. The principles and the authorities establishing them were reviewed comprehensively in *BKR* [2024] 1 WLR 1327 [2023] EWCA Crim 903 at [34] to [50]. The core principles were helpfully summarised in *Ng* [2024] EWCA Crim 493 at [21] to [25]. We do not need to repeat that exercise.

8. The first type of case in which abuse of process may be established is where an accused could not receive a fair trial. In this instance the argument is that the media coverage of Letby's convictions – reflecting in emotive language the nature of the offences and the revulsion at the underlying behaviour – was so great and so sustained that no jury would be able to give the issues in the re-trial fair consideration. It was described to us as a campaign. The extent of the coverage and the notoriety of the case were such that there could be no prospect of any juror's memory of the coverage having faded. No direction given by the trial judge could remedy the position.

9. The second type of abuse arises when it would offend the integrity of the criminal justice system for a trial to proceed. Where that type of abuse is alleged, any prejudice to an accused has to be balanced against the public interest in trying serious criminal offences. In this case the submission is that, following the convictions in August 2023 and before the making of the reporting restriction on 25 September 2023, police officers and representatives of the Crown Prosecution Service engaged in sustained hostile commentary about Letby's offending. There was reference to further investigation into her activity at the Countess of Chester Hospital suggesting that her criminality went far beyond the offending represented by her convictions. It is argued that the police and the CPS knew that a re-trial was at least a possibility. In those circumstances, it was completely unacceptable for them to engage in public discourse in the way that they did. That behaviour by those involved in the prosecution process offends the integrity of the criminal justice system so as to require a stay of the proceedings.

10. These submissions were made to Mr Justice Goss. Having accurately set out the principles to be applied, he dealt with them concisely in his written ruling as follows:

I am satisfied that any prejudice to the defendant from the publicity in the media is not such as to preclude the defendant from having a fair trial. The evidence of her convictions will be in evidence before the jury. It will be subject to the necessary directions to the jury as to the use to which they may and may not put this evidence; they will also receive a direction as to the importance of reaching their verdict on, and only on the evidence placed before them and nothing else. Experience has shown that juries can be relied upon faithfully to follow such directions. The media coverage will, in any event, have been diluted by the 'fade factor' since the verdicts in the original trial were reported.

In relation to the second limb of abuse justifying a stay, even applying a broad interpretation of 'misconduct,' none of the matters raised by the defence, individually or collectively, amounts to misconduct. Even if any do, it does not justify the remedy of last resort of a stay on the grounds of abuse of process when weighing the public interest in ensuring those charged with crimes should be tried against the competing interest of maintaining confidence in, and the integrity of the criminal justice system.

Unfairness to the defendant is not required in relation to this limb: the focus is on whether a stay is appropriate in order to safeguard the integrity of the criminal justice system. The matters raised by the defence can be addressed and accommodated by the trial process, including any suggestion of malpractice or financial or other motives for untruthfulness on the part of any witness. The accounts witnesses have given of events at any time are all matters of record and available to be adduced and challenged in the trial process. The fairness of the trial is not compromised, nor could the court's sense of justice and propriety be offended or public confidence in the criminal justice system be undermined by the trial proceeding.

11. This was an exercise of judgment by the judge. Thus, we must assess whether his decision was wrong. This is to be contrasted with the exercise of a discretion where we would be considering whether the decision was one open to a reasonable judge. Having said that, we must give substantial weight to the fact that Mr Justice Goss had been the judge throughout the proceedings. He had conducted the first trial. He was fully aware of the factual nature of the case to be put to the jury in the re-trial. To that we must add the fact that his experience as a criminal judge is unrivalled. Thus, his judgment must be afforded very considerable respect.

12. As is apparent from the judgment handed down by this court on 2 July 2024 the first trial involved a wealth of scientific and medical evidence from an array of expert witnesses. In relation to the counts of which Letby was convicted in August 2023 the evidence was circumstantial. Some of the evidence related to Letby herself. Reliance was placed on the following matters: her ubiquitous presence when babies died or suffered collapse; creating false entries on documents with the apparent intention of concealing her unlawful activity; taking home handover documents apparently connected to the babies who had died or collapsed; searching Facebook for the families of babies who had died; making statements in private notebooks consistent with guilt. A great deal of expert evidence was called. Various causes of death or intended death were identified: air embolus caused by air being injected into the vasculature via intravenous lines; air forced down a nasogastric tube; insulin poisoning; overfeeding with milk; trauma. These alleged causes of death were the subject of expert evidence. This evidence was challenged in the course of the trial, particularly in relation to the proposition that babies had died because of an air embolism caused by deliberate injection of air. Letby gave evidence denying any unlawful act towards any baby in her care.

13. The case against Letby which was tried in June and July 2024 did not rely on any expert evidence to demonstrate the unlawful act carried out by her. Rather, the prosecution relied on the evidence of a Dr Jayaram, a consultant paediatrician who worked at the neonatal unit. The baby who was the subject of the trial was extremely premature and had been intubated on her arrival on the unit. Shortly afterwards Dr Jayaram came to the area where the baby was being cared for to find Letby by the baby's cot. The monitor showed that the baby had a dangerously low blood oxygen level (desaturation). Letby was doing nothing to assist the baby whether by administering oxygen or calling for assistance. The cause of the desaturation was that the endotracheal tube had been dislodged. The prosecution case largely depended upon the jury accepting the evidence of Dr Jayaram. His evidence was the subject of significant challenge, the suggestion being that his account of Letby's acts and omissions was wrong.

14. Mr Justice Goss was provided with a very substantial body of digital material showing the level of publicity. The defence compiled a schedule of media content intended to give examples of the kind of coverage there had been. The schedule contained links to particular online reports or articles. Of the 64 entries on the schedule, 59 related to coverage in the days following the final verdict of the jury in August 2023. Most of the coverage was close to the date of the verdict though it continued sporadically until 25 September 2023. We have read all of the material. In written submissions Mr Myers KC and Ms Clancy have emphasised the following:

    - Daily Mail podcasts in August and September 2023 including discussion with the police officer in charge of the investigation and a police officer who interviewed Letby. The former referred to Letby being able to manipulate others at the unit so that she was able to get away with murder. The latter spoke of Letby being one of the worst murderers of modern times.

    - A Talk TV recording of an interview with one of the main prosecution expert witnesses in which he said that what Letby had done was beyond belief.

    - Similar posts by Channel 4 News and Sky News.

    - Reports in more than one media outlet that the police were investigating further possible cases of the death of babies being caused by Letby. The reports referred to the police looking into 4,000 admissions of babies into the unit.

    - BBC Panorama documentary with interviews with parents, police officers and a doctor from the hospital.

    - Newspaper and online references to Letby making comparisons with Myra Hindley and Rose West and describing her as evil.

    - Adverse comments by leading politicians including Rishi Sunak about Letby's failure to attend her sentencing hearing.

15. The submission to Mr Justice Goss and repeated to us was that the reporting of the trial and its aftermath was emotive. Although the factual presentation of the offending as found by the jury was accurate, its effect was overwhelming and prejudicial. To use the language of the written submission "the vitriolic nature of public comment and the prejudicial matters reported created exceptional prejudice". Because the prejudice created was based on a trial which had already taken place, it could not be ameliorated by directing the jury to concentrate on the issues in the trial. Given the quantity of adverse material, there could not be any fading from memory of what had appeared online, in the press and on television.

16. We do not accept this argument. The outcome of the first trial undoubtedly led to an unusually large amount of publicity and online debate. That is because, on its facts, the case was extraordinary. Simply because the extent of the publicity was much greater than normally would be the case of itself did not generate prejudice. For a neo-natal nurse to murder 7 babies in her care was a startling fact. Even if no police officer or other commentator had said anything about Letby being comparable to other notorious murderers or used extreme adjectives to describe her, the mere fact of her offending would have created that effect. In relation to the more emotive language used, the fade

factor would be significant. From 25 September 2023 onwards the reporting had been limited. What would remain in jurors' minds would be the fact of Letby's offending.

17. That fact was before the jury as evidence in the case. The judge directed the jury about the previous convictions in these terms:

….if you are sure that the defendant's convictions do show that she has such a tendency (to commit offences of this type) then this may support the prosecution case that she attempted to murder (the baby). It is for you to say whether it does and, if so, to what extent, but you must not convict her wholly or mainly because of those convictions. The fact that she has been convicted of the offences in the past does not prove that she has committed this offence on this occasion. Her previous convictions may only be used as some support for the prosecution case if, having assessed the evidence, you are satisfied that it is right so to do.

18. In those circumstances we conclude that the judge was right to find that Letby would be able to have a fair trial. We take into account the fact that almost all of the material of which complaint now is made emerged in the week immediately following conviction. The prosecution relied on what they termed "the fade factor". We consider that they were right to do so.

19. In our judgment it is of some significance that the critical issue for the jury was whether they were sure of the evidence of Dr Jayaram. Legitimate criticism could be made of his evidence. Although he believed that Letby had deliberately dislodged the endotracheal tube, he had said nothing at the time nor for many months thereafter. There was an inconsistency between his evidence and the contemporaneous records. The nature of the case being considered by the jury was fact specific. Had the jury known nothing of the outcome of the previous trial, the publicity surrounding it would have been a significant factor. Since the convictions were in evidence, the publicity was of far less effect. The prejudice came from the jury knowing that Letby had been convicted of 14 offences of murder and attempted murder. That prejudice was outweighed by the probative value of the convictions. Had it been otherwise the convictions would not have been admitted in evidence.

20. Before leaving the issue of whether Letby was able to have a fair trial we must deal with the position of Dr Jayaram. Mr Myers and Ms Clancy argued that the position of Dr Jayaram was especially problematic. He had given evidence in the first trial when the jury had disagreed on the count where his evidence was critical. Following Letby's convictions he had been interviewed by a variety of outlets and had commented on social media about the case. The schedule of material relating specifically to him indicates that he ceased to comment once it was known that there was to be a re-trial in relation to the count with which he was particularly concerned. But the submission is that his public statements prior to that were "extraordinary" given his position as a witness. We do not agree with that proposition. We have reviewed the material relating to Dr Jayaram with care. We could not identify any matter relating to Letby which significantly departed from the evidence he gave in the two trials. He made comments about the extent to which those with overall charge of the neo-natal unit bore responsibility for what had occurred. This could not have prejudiced the case against Letby. In the course of the re-trial Dr Jayaram was cross-examined about what he had said in one interview he had given after the first trial. This was not in order to criticise

the fact that he had been interviewed. Rather, the content was used to make a forensic point on behalf of Letby as to what the witness had said previously about her actions.

21. The argument in respect of the second type of abuse is that the police and the Crown Prosecution Service made comments after the verdicts in August 2023 which were unacceptable and inexcusable. In the course of the argument before Mr Justice Goss Mr Myers accepted that those comments were not made in bad faith. Nor did they amount to misconduct. My Myers categorised them as "ill-judged". Nonetheless, he argued then – as he does now – that what the prosecution and the police said meant that the trial would (and in the event did) offend the integrity of the criminal justice system.

22. Police or prosecutorial misconduct is generally recognised as the first requirement in any finding of this species of abuse. The cases cited at [35] to [43] of *BKR* confirm this. We accept that misconduct in the conventional sense is not the only basis for concluding that it would not be fair to try a defendant. That is clear from the citation of *Norman* [2016] EWCA Crim 1564 in *BKR*. However, for criminal proceedings which would be fair to the accused to be stayed, something very much out of the ordinary must have occurred. Mr Myers said that the police "had embarked on a media campaign….in emotionally charged circumstances…" We consider that this is an overstated description of what police officers did. The trial of Lucy Letby was a matter of national public interest. Once the trial had concluded, there was an inevitable demand on those with a close knowledge of the case to speak to the media. What was said by police officers was not wholly restrained. They described the offending as horrifying and the person responsible as evil. But they did so after a jury had found that Letby had murdered 7 babies. The notion that after a substantial criminal trial police officers involved in the investigation should not speak with a degree of freedom to the media is fanciful. If a person is convicted of multiple offences of the kind with which we are concerned, what the police say about the person is bound to be hostile. It hardly could be otherwise. It does not make the comments of the police akin to misconduct.

23. It is said that this case was different because there was at least the prospect of a retrial. This did not materially affect the position. Letby had been convicted of 7 counts of murder and 7 counts of attempted murder. She was sentenced for those offences. The trial judge did not impose any restriction on reporting of the sentencing exercise. Nothing said by the police officers went beyond what would have apparent to the jury as soon as they were told of the nature and extent of the other offending.

24. Reporting of the outcome of the first trial included material relating to continuing investigation by the police. It was reported as follows:

Police are now investigating 4,000 admissions made into neo-natal units at the Countess of Chester Hospital and at the Liverpool Women's Hospital, where Letby spent time training, between 2012 to 2016.

The probe is a continuation of Operation Hummingbird, the investigation into the deaths and non-fatal collapses at the Countess of Chester Hospital.

Detective Superintendent Paul Hughes, who led the investigation, said: 'This does not mean we are investigating all 4,000. It just means that we are committed to a thorough

review of every admission from a medical perspective, to ensure that nothing is missed throughout the entirety of her employment as a nurse.

25. In written submissions Mr Myers and Ms Clancy said that the remarks of the police officer were "lamentable". We disagree. The officer said that, in light of the findings of the jury, it was appropriate to review the entirety of Letby's career as a nurse. That was an unexceptional comment. The figure referred to was simply the number of babies who had passed through the relevant units during the relevant period. The police officer cannot be criticised if journalistic hyperbole thereafter created a false impression.

26. The judge identified that to stay a criminal trial because it would offend the integrity of the justice system always will be the remedy of last resort. It is an exceptional step to take. It was not justified by the circumstances in this case. The judge was entirely correct to find that it would not be unfair to try Lucy Letby for the single offence of attempted murder.

27. It follows that we refuse her application for leave to appeal against conviction. We repeat what we said earlier. This application related to a narrow legal issue. Nothing we have said can contribute to any debate about the wider case against Lucy Letby.