Neutral Citation Number: [2025] EWCA Crim 241

Case No 2024/02280/B1 & 2024/02289/B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Lucraft KC
T20237104

Royal Courts of Justice
The Strand
London WC2A 2LL

Thursday 27 February 2025

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
LADY CHIEF JUSTICE OF ENGLAND AND WALES

MR JUSTICE GOSS
and
MRS JUSTICE YIP DBE

Between :

CONSTANCE MARTEN **MARK ALTON GORDON**	**Applicants**
- and -	
REX	**Respondent**

- -

Mr T Fitzgibbon KC and Mr T Godfrey appeared on behalf of the Applicant Constance Marten
Miss N Crinnion appeared on behalf of the Applicant Mark Alton Gordon

Mr T Little KC and Mr J Smith KC appeared on behalf of the Crown

Hearing date: Thursday 27 February 2025

- -

APPROVED JUDGMENT

This judgment was handed down *ex tempore* on Thursday 27 February 2025 in Court 4.

Note – This judgment is subject to an order made pursuant to section 4(2) of the Contempt of Court Act 1981 postponing publication of the fact of these applications for leave to appeal against convictions, the submissions made at the hearing and the outcome of the hearing until further order or the conclusion of the retrial, whichever comes first. This is in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

Thursday 27 February 2025

The Lady Carr of Walton-on-the-Hill, CJ :

1. This judgment is subject to an order made pursuant to section 4(2) of the Contempt of Court Act 1981 postponing publication of the fact of these applications for leave to appeal against convictions, the submissions made at the hearing and the outcome of the hearing until further order or the conclusion of the retrial, whichever comes first. This is in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

Introduction

2. On 15 January 2024, the applicants stood trial at the Central Criminal Court on an indictment containing five counts. All of the alleged offences related to the life and death of their baby, identified as Baby A. Count 1 charged them with concealment of the birth of Baby A between 28 December 2022 and 27 February 2023. Count 2 charged them with cruelty to Baby A between 4 January 2023 and 27 February 2023. Count 3 was a charge of causing or allowing the death of Baby A between the same period as count 2 and was an alternative to count 4, a charge of gross negligence manslaughter of Baby A. Count 5 was a charge of doing acts tending and intended to pervert the course of justice by concealing the body of Baby A between the same period.

3. The jury retired to consider their verdicts on 30 April 2024. On 23 May 2024, they returned guilty verdicts on counts 1, 2 and 5. They were unable to reach verdicts on count 3 or 4 and were discharged from returning verdicts on those counts on 19 June 2024. Sentence was adjourned pending a retrial on counts 3 and 4. That retrial is listed to commence next Monday, 3 March 2025.

4. Applications by both applicants for leave to appeal against their convictions have been

referred to the full court by the Registrar.

The Factual Background

5. The applicant Constance Marten is 37 years of age. The applicant Mark Gordon is 50 years of age. They had been in a relationship since about 2016. During the period covered by the indictment they had no home. Constance Marten became pregnant in early 2022 with Baby A. This was to be her fifth child. Her four previous children had been taken into care and adopted. This fifth pregnancy and the subsequent birth were concealed from family and friends, healthcare professionals and social services. Baby A was born around Christmas 2022, the precise date being in dispute.

6. The prosecution case was that the applicants had decided to go on the run and off grid with their newborn baby. There were no antenatal or postnatal medical checks. Baby A was not born in a hospital; the birth was not registered and social services were evaded.

7. A car in which the applicants were travelling on 5 January 2023 caught fire. The applicants ran away before the fire fighters arrived, leaving most of their possessions behind, including baby clothing and equipment. A decomposing placenta was found in the car which alerted the authorities to the recent birth of a child.

8. A nationwide alert went out, accompanied by intense media coverage. The applicants travelled around the country, ending up in a tent (the tent) just outside Newhaven in West Sussex on 8 January 2023. At some point after their arrival in Newhaven, Baby A sadly died.

9. The prosecution's primary case on count 2 was that the couple camped out with their baby for over six weeks, moving between camping spots and thereby exposing the baby to cold, during which time Baby A died. They alleged that the applicants wilfully neglected or exposed

Baby A to the elements and in a manner likely to cause "unnecessary suffering or injury to health". On the prosecution's case, their actions were deliberate; they knew what they were doing and what they were failing to do. It was said that they had ample opportunity to do something different, but they chose not to. The prosecution relied upon the history of the applicants, the findings of the Family Court and the adoption of their previous four children, a series of events and their travels with various sightings from December 2022 onwards, through to their arrest on 27 February 2023. These events included sightings on the streets of East London in December 2022, and a visit to a German Doner Kebab restaurant.

10. On all occasions when interviewed prior to 1 March 2023, the applicants declined to say anything. On 1 March 2023, the remains of Baby A were found in a plastic shopping “Bag-for-Life” in a shed with a broken windowpane, together with the tent and food remains.

11. In subsequent interviews, Constance Marten said that Baby A had passed away. She could not be exact as to the date, but it was probably three days after the car had exploded in the Harwich area. She had had Baby A in her jacket, fallen asleep holding the baby, and when she awoke the baby was not alive.

12. The prosecution expert evidence from Dr Nathaniel Cary, a consultant forensic pathologist, and Dr Marnerides, a perinatal and children's pathologist, who conducted a joint post-mortem examination, was that the cause of death was unascertained. Neither hypothermia nor smothering could be excluded.

13. In opening the case, the prosecution invited the jury to reject Constance Marten's explanation as to how Baby A died, but contended, expressly, that the charges would still be made out even if the cause of death was smothering, rather than hypothermia.

14. Neither applicant served a Defence Case Statement at any stage. Nor did they serve any expert evidence in advance of trial. However, Constance Marten gave evidence and maintained that she and Mark Gordon had cared for their baby appropriately in all respects, if unconventionally. They had not wilfully neglected or exposed Baby A to undue cold, or to the elements in any way likely to cause her unnecessary suffering or injury to health.

15. Mark Gordon did not give evidence.

16. Expert evidence served during the course of trial was called by the defence.

The Grounds of Appeal

17. Both applicants seek leave to appeal against their convictions on count 2. Mark Gordon also seeks leave to appeal against his convictions on counts 1 and 5.

18. On count 2, Constance Marten's grounds of appeal can be summarised as follows. It is suggested that the judge erred by:

> (i) Rejecting the submission that there was no case to answer on count 2;
>
> (ii) Failing properly to direct the jury as to the ambit of count 2;
>
> (iii) Misdirecting the jury as to the basis for a conviction on count 2; and
>
> (iv) Taking partial verdicts.

As a result, it is argued that the trial was rendered unfair and the conviction on count 2 unsafe.

19. Mark Gordon's grounds of appeal in relation to count 2 overlap with those of Constance Marten. It is suggested that the judge erred by:

(i) Not directing the jury that they must not convict on count 2 on a basis other than smothering or exposure to cold;

(ii) Not asking the jury for the factual basis of their adverse verdict on count 2;

(iii) Not amending the directions in respect of count 3 after the decision in *R v ATT & BWY* [2024] EWCA Crim 460 (*ATT*), a judgment handed down whilst the jury were in retirement, but before they returned any verdicts;

(iv) Taking partial verdicts; and

(v) Refusing the defence applications to discharge the jury.

20. Mark Gordon raises a further discrete ground relating to counts 1 and 5, namely, that in the light of the jury sending a note seeking assistance as to the standard of proof after they had returned verdicts on counts 1, 2 and 5, the unanimous verdicts returned on those counts cannot be viewed as safe.

21. In oral submissions for both applicants, attention has been focused on the complaints made in relation to the directions of the judge as to the ambit and basis for conviction on count 2.

22. A full Respondent's Notice has been served on behalf of the prosecution. It says in terms that none of the grounds of appeal are arguable and that most are wholly misconceived.

23. We turn first to the challenge to the convictions on count 2.

The Rejection of the Submission of No Case to Answer

24. The submission of no case to answer was advanced on the basis that there was no or insufficient evidence to show that Baby A was hypothermic, or at risk of hypothermia, or was otherwise neglected in the tent. Further, it was submitted that what was said to amount to child cruelty by way of the applicants' account amounted to nothing more than an exhausted mother accidentally falling asleep after breastfeeding.

25. Constance Marten seeks to maintain those submissions on the application before us. It is argued again that the evidence fell short of a *prima facie* case that her conduct was likely to have the effect of causing unnecessary suffering or injury to Baby A's health. The cause of death could not be ascertained, and the pathological findings did not point to trauma, malnutrition or failure to thrive.

26. The judge ruled that on count 2 it was important to look at what was needed to establish the offence. It was not that the baby was cold, such that her health was affected; nor that the exposure caused death. What was required was evidence that the applicants exposed or neglected the child in a manner likely to cause unnecessary suffering or injury to health. The judge held that it was a matter for the jury to consider whether the taking of a newborn baby, without adequate clothing or any access to a heat source, into the countryside in a tent in the winter months amounted to exposure and/or neglect in a manner likely to cause unnecessary suffering or injury. He stated that the case had been opened to the jury on the basis of two possible options – exposure to the cold, or smothering through co-sleeping – and that either could be the unlawful act on this count.

27. This ruling was entirely consistent with the manner in which the judge went on to direct

the jury on count 2 in his written directions (at paragraph 10). He directed the jury that they would have to look at the circumstances as they were in late December through to mid-January, or beyond (on the Crown's case). They would consider all the circumstances, including the weather, how the applicants were living, the way they used the tent, resources and the like. He then posed two questions:

> "Are you sure there was any failure to provide warmth and shelter from the cold, any failure to feed the baby and any failure to provide it with medical assistance if the baby became cold? Are you sure they used and slept in the tent in conditions and in circumstances in which they were unable to care for her properly, including how the baby slept and was that likely to cause unnecessary suffering or injury to health?"

28. In our judgment, the judge was plainly right to reject the submission that there was no case for Constance Marten to answer on count 2. The jury was entitled to look at all the evidence as to how the applicants had treated Baby A during her short life. That included stills from CCTV footage of Baby A wearing only a sleepsuit when out in the cold, and other images from which it could be inferred that Baby A was being carried in a plastic bag. It was open to a jury, properly directed as they were, to conclude that Baby A was exposed to the cold in a way that would cause unnecessary suffering.

29. Exposure to the cold was not the sole basis upon which the jury could convict on this count. It was also open to the jury to conclude that, by remaining on the run with inadequate resources, the applicants had become exhausted and reduced themselves to a state where they were unable properly to care for Baby A and where the risk of smothering was greatly increased. Although co-sleeping was not in itself, without more, unlawful, the manner and the circumstances in which it occurred could amount to neglect likely to cause unnecessary suffering and/or injury to health. This was a matter for the jury. To the extent that it was necessary for the jury to draw inferences as to the likely effect of the applicants' actions on a

newborn baby, there was a proper evidential basis for the jury to do so. We reject the submission that the jury were required impermissibly to speculate. We conclude that the judge's approach was legally and factually correct. There is no merit in this ground of appeal.

Ambit and Basis of Count 2

30. We turn to the ambit and basis of count 2. The first aspect upon which both applicants rely arises out of events which occurred whilst the jury was deliberating on their verdicts. In the course of the trial, the jury raised many, many questions by way of jury notes, both during the evidence and in retirement. Indeed, in total, the judge received 181 notes from the jury.

31. On the ninth day of the jury deliberations (20 May 2024), the jury sent a note containing the following question (note 168):

> "In count 2, fourth element, can we consider before the [applicants] arrived in Newhaven and those actions that do not concern camping? For example, can we consider evidence of their handling of [Baby A]?"

The judge, after hearing submissions from counsel, responded in the following terms:

> "The short answer to your question is yes. Those of you who have got the route to verdict, you will recall that question four on count 2 is, 'Are you satisfied so that you are sure that they neglected or exposed the baby in a manner likely to cause unnecessary suffering or injury to health?’"

He then reminded the jury of the written direction he had given at paragraph 10, to which we have already referred.

32. The following day, 21 May 2024, the jury sent a further note (note 169), only part of which

could be shown to counsel (because it contained voting numbers). The disclosed part of the note read:

> "[Regarding] 'Neglecting the baby in a manner likely to cause unnecessary suffering or injury to health' as in count 2 question 4' … or 'an act of wilful neglect as in question 3(a). Is it enough for us to find only one example of each of these or is there a degree of persistence that we need to take into account?' [Also] 'Can you please offer us a definition of "unnecessary suffering"? Can you please offer us a definition of "injury to health"?'"

33. In the course of ensuing discussions with counsel, the judge explained that in the part of the jury note which had not been revealed, the jury had indicated that they needed to ask for further assistance <u>apart from</u> that which had already been given in the legal directions and Route to Verdict.

34. There followed a lengthy debate as to how the jury should be directed in response to the jury questions. We have considered the relevant part of the transcript in detail. It reveals how this discussion and the judge's ultimate conclusions unfolded.

35. In summary, the judge was invited by the defence to direct the jury that earlier events – specifically those in East London, including in the Doner Kebab restaurant - would not be sufficient individually or together to amount to neglect. The prosecution made it clear in response that they had never put their case on the basis that the incidents in East London on their own would amount to neglect. However, they did rely on the earlier conduct as demonstrative of the applicants' approach to Baby A. As such, it was evidence, on the prosecution case, that could be taken into consideration on count 2.

36. The essential complaint made on behalf of both applicants was that the new question appeared to be linked to the question which had been asked the previous day, and that there

might be a line of thinking that Baby A had died shortly after arrival at Newhaven. It was suggested that the jury needed clarification on this essential question.

37. In preparing draft directions for discussion in the first instance, the judge included a passage which explained that the prosecution case was not based solely on what had happened on the streets of East London or inside the Doner Kebab restaurant, and that neither on their own nor taken together would be sufficient to amount to neglect. Rather, they were parts of the overall sequence of events.

38. However, during further discussions that followed the circulation of that draft, the judge recognised the potential difficulties arising out of such a direction. The jury had not asked a question about the events in East London. There were many other events which had occurred before the applicants' arrival in Newhaven from which the jury could properly conclude that there had been neglect, depending on their factual findings. In the judge's assessment, to pick out particular incidents such as the visit to the Doner Kebab restaurant risked putting a focus on those matters, when the jury might well not even have been thinking about them. Thus, having considered the competing arguments, the judge concluded that the correct direction, which he went on to give, should be in the following terms:

> "I reminded you yesterday of paragraph 10 of the legal directions [which] sets out the full direction on unnecessary suffering or injury to health and included in that paragraph is the need for you to look at the circumstances as they were in late December through to mid-January and, the Crown say, beyond. … In relation to the question above, your focus should be on that sequence of events from late December onwards. In essence, the answer to the question you have asked is yes, it is sufficient to find an example of each and it does not require a degree of persistence.
>
> You also ask for a definition of 'unnecessary suffering' and 'injury to health'. These are ordinary English words or phrases and you will need to apply your own understanding of those words to what is set out in the legal directions and Route to

Verdict."

39. We have considered carefully the directions given by the judge, his reason for directing the jury in the manner in which he did, and the evidence at trial, as summarised in the summing up.

40. We should record at the outset that we reject the submission for Constance Marten that count 2 was not a standalone count. Count 2 served two purposes. Those purposes were potentially linked, but they were separate. Count 2 was both a standalone count and a necessary stepping stone for counts 3 and 4, depending on the basis of a conviction on count 2. Count 2 was put on two alternative bases: first, that the applicants exposed Baby A to the cold in a manner likely to cause unnecessary suffering or injury to health by going into the countryside and living in a tent with inadequate clothing and lodging, having already travelled across England over the course of a number of evening; secondly, and alternatively, that even if the jury could not be sure, or rejected that Baby A died of cold, they could still be sure that the method and circumstances of the treatment of Baby A - primarily by co-sleeping when it was cold both outside and in the tent, and Constance Marten was exhausted - was neglect. A fair reading of the prosecution's opening confirms that this was the prosecution case, even before Constance Marten had given evidence.

41. Looking at the evidence at trial and the summing up, it appears that no great emphasis was placed on the events in East London during the trial. As indicated, it was never the prosecution case that count 2 was based upon events in the Doner Kebab restaurant, or the applicants' handling of Baby A on the streets of East London. Indeed, Mr Little KC informed us that he had made a point during cross-examination that Mark Gordon could be seen positively to support the baby's neck on one occasion. There was limited reference to these events in the prosecution opening and no detailed mention of them in the summing up. They essentially

provided context. The images taken from the CCTV footage in East London provided some evidence of how the applicants treated Baby A, including the manner in which she was clothed in cold weather.

42. Having heard all the evidence and the way in which counsel had addressed the jury, the judge was well placed – indeed best placed – and able to assess the significance of the particular events in East London in the context of the case as a whole. He also had in mind the evidence of other incidents which could be viewed as amounting to neglect.

43. Jury note 169 had to be viewed in the context of the very large number of notes that the judge had already received. The judge was right to observe that there was nothing contained within note 169 to link it to the note from the previous day. Even if the jury or some of their number were following a line of thinking that Baby A had died shortly after arriving in Newhaven, that did not prevent them from legitimately examining the evidence across the whole period of her life. The judge had directed them that they were to make a finding as to when the baby had died and then, in the light of that finding, consider all the circumstances.

44. The applicants in fact acknowledge that the direction at paragraph 10, to which we have referred, was perfectly proper. It invited the jury's attention to circumstances across the whole period from late December up until the baby's death, whenever they found that to be. The jury were perfectly entitled to examine all of the evidence before them of the manner in which Baby A had been treated by the applicants when reaching their verdicts on count 2.

45. The judge gave obviously careful consideration to the directions to be given to the jury following the relevant notes. He explained why he did not include the passage about the event of East London, namely that doing so would risk bringing focus to events that may well not have been in the jury's mind and which were not the subject of the questions asked.

46. We consider that the judge's approach was entirely permissible and that the directions he gave on count 2, including those given in answer to jury questions, were proper. They focused the jury's attention on the correct issues in the context of all the evidence that had been heard. That disposes of the first aspect of the challenge to the conviction on the ambit and basis of count 2.

47. The second aspect relates to a suggestion on behalf of Constance Marten that the judge misdirected the jury at paragraph 16 of his original directions by stating that co-sleeping could be an unlawful act for the purpose of count 2.

48. When dealing with count 3, and echoing his ruling on the halftime submission, the judge directed the jury thus:

> "If you were not sure that [Baby A] became hypothermic through exposure to cold, you would need to consider whether you are satisfied so that you are sure that the death was as a result of smothering when asleep. On this limb of the case you would need to be satisfied that they both knew that there was a significant risk of serious harm from co-sleeping in the circumstances that existed at the time in the tent. On this you will need to consider the warnings given in the past and the impact of living off the grid in 2022/2023, the exhaustion they both experienced through sleep deprivation, the description of how [Baby A] was positioned, as well as your conclusions as to when she died, and whether the [applicants] were on the move in the countryside pitching their tent in different places. You will also need to be sure that the circumstances in which [Baby A] was smothered amount to an unlawful act by one or both of the [applicants], rather than an accident.
>
> …
>
> … The prosecution say that [Baby A] was exposed over time to the extreme cold in a tent, without proper access to heating, accommodation, or adequate clothing and food that would give rise to hypothermia for a newborn baby. On the second limb of unlawful act through co-sleeping, as to what had been said before about the dangers, the question, I remind you, is whether

> in the light of these factors you are sure, looking back objectively, that there was a significant risk of serious physical harm being caused to [Baby A]. For the purpose of that question you are only entitled to take into account such of these factors as you are sure were deliberately caused or omitted by one or other of the [applicants] (or by both)."

49. In our judgment, the criticism levelled at paragraph 16 of the judge's directions is misconceived. That direction related to count 3 and the way in which the jury were to approach their findings on count 2 when considering count 3. Count 3 and count 4 required the jury to engage with the cause of the baby's death. Findings of neglect could amount to the unlawful act for the purpose of the more serious counts, only to the extent that they materially contributed to the death. The directions on count 3 did not affect the way in which the jury were to approach count 2, about which they had been properly directed. In any event, the judge was right to direct the jury that they could consider whether co-sleeping in the circumstances that it occurred could amount to neglect. We refer back at this stage to the judge's ruling on the submission of no case to answer.

50. On counts 3 and 4 the prosecution's primary case was exposure, and their secondary case was smothering. That position did not change during the trial.

51. We can identify no arguable error in any of the directions given by the judge on count 2, and no arguable grounds for contending that the verdicts on that count were returned on an impermissible basis such as to render the convictions unsafe.

<u>Decision not to amend the Judge's Directions of Law in respect of Count 3</u>

52. On Sunday 19 May 2024, the decision of the Court of Appeal in *ATT* was brought to the judge's attention. On Monday 20 May 2024, it was submitted for Constance Marten that the decision should lead to the withdrawal of count 3 from the jury. By this stage the jury had been

deliberating for five days. After submissions and a consideration of the decision in *ATT*, the judge was of the clear view that there was no need to delay the jury deliberations.

53. On Tuesday 21 and Wednesday 22 May 2024, there was an application for the jury to be discharged primarily on counts, 2, 3 and 4, but in effect on all counts, on the basis that the impact of *ATT* was such that the legal directions and the entire case required a radical re-think. The only safe course to be adopted was to discharge the jury on counts 3 and 4, and 2, because they were all connected factually.

54. The judge ruled that he saw no reason to discharge the jury, or to withdraw any counts from the jury, or to alter the directions that he had given. He observed that *ATT* was an authority for the proposition that, in order to found liability for an offence of causing or allowing the death of a child, there needs to be a risk to the requisite standard and extent in existence before the infliction of any injury. In the judge's view, the jury should be permitted to continue to deliberate.

55. It was submitted to the judge that any verdict in respect of count 3 would, in the light of *ATT*, be unsafe. However, that argument does not arise here, as Mark Gordon was not convicted on count 3. But it is also argued on Mark Gordon's behalf that the alleged misdirection impacted on count 2 and count 4, as inevitably there will have been an overlap in the jury's deliberations on all three counts. It is said that the problem could not be cured by any direction and that the judge was thus wrong to refuse to discharge the jury altogether.

56. We do not agree. The judgment in *ATT* had no impact on count 2, on which the jury were properly directed as to the elements required to found conviction. Any argument as to the proper directions to be given to the jury, or the impact of the judgment in *ATT*, may be advanced at the retrial of counts 3 and 4 as necessary. As a ground of appeal in relation to count 2, the

argument is misconceived.

The Taking of Partial Verdicts

57. On 22 May 2024, the jury sent a further note setting out that they had reached unanimous verdicts on counts 1 and 5. The note made clear that the verdicts were ones of guilty.

58. On 23 May 2024, a further note was received from the jury disclosing that they had reached a unanimous verdict on count 2 and set out the basis on which they had done so. Again, the note made clear that the verdict was one of guilty.

59. At about the same time, a yet further note was received from the jury seeking assistance in relation to part of the legal directions relating to count 4.

60. The judge decided to sit in chambers in relation to these three notes and to indicate to all counsel, with the applicants present, that his intention was to take partial verdicts. Although he could not then share the contents of the notes on the verdicts reached by the jury, it seemed to him that in order for all counsel and the applicants to understand how best guidance could be given on the third note, it would be easier to do so once the verdicts that the jury had reached had been taken.

61. The prosecution submitted that it was a matter for the court as to how to proceed, but that they supported the suggested approach. On behalf of both applicants, whilst again it was acknowledged that it was ultimately a matter for the court, they invited that no verdicts be taken.

62. It is now submitted that the judge was wrong to take partial verdicts. It is said that counts 2, 3 and 4 were intrinsically linked, in that the conduct capable of being cruelty was the same

conduct said to have been the cause of Baby A's death. Thus the jury should not have been permitted to reach a verdict on any single count, without determining all counts together.

63. As the parties recognise, the power to take partial verdicts is a discretionary one: see Criminal Procedure Rules 2020, rule 25.14.3H, and Criminal Practice Directions 2023 at 8.6.5. The discretion is a broad one. We do not consider it arguable that the judge erred in the exercise of his discretion. Although the jury's findings on count 2 were undoubtedly relevant to their consideration of counts 3 and 4, as we have already indicated, the counts required separate analysis. The fact that the jury reached verdicts on count 2 before completing their deliberations on counts 3 and 4 is indicative of them following the judge's legal directions which required them to consider whether the applicants neglected or exposed their child, before considering whether that neglect or exposure caused death. The judge considered that he would be in a better position to give further directions on count 4 once the verdicts had been delivered. This was a sensible conclusion, bearing in mind that the jury had informed the judge of what their verdicts were. It would have been artificial for the judge to seek to direct them on the basis that they remained undecided on count 2. There was no impediment to the verdicts that the jury had reached being returned then, leaving the jury to consider the separate outstanding issues in relation to the other counts. There is therefore no proper basis for arguing that this court should interfere with what was the exercise of a judicial discretion to take partial verdicts.

Failure to ask the Jury for the Factual Basis of their Adverse Verdict on Count 2

64. For Mark Gordon it is submitted that the judge erred in declining a request to ask the jury to indicate the basis of conviction on count 2, and that clarification should have been sought as to the factual basis of the verdict. It is suggested that if the jury had convicted on the basis of clumsy physical handling, this would not be a proper basis for the verdict to stand. It is not a separate ground advanced for Constance Marten, but it is also contended on her behalf in the course of submissions that the judge erred in declining the request to ask the jury to indicate

the basis of conviction.

65. In our judgment, this criticism is misconceived. The jury had in fact indicated in a further note sent before verdicts were returned (note 172) that they had reached the guilty verdicts on the basis of wilful neglect. Generally a jury will not be asked the basis for conviction. In this case the judge asked the foreman to confirm what was set out in the note. There was no requirement to do anything more. We consider that it would have been inappropriate to descend into any further clarification of the factual basis of the verdict. There is no reason – only speculation – to think that the jury had not followed the judge's directions on count 2, or otherwise strayed outside the proper ambit of that count.

Jury Question on Standard of Proof

66. It is suggested for Mark Gordon that the jury should have been discharged because the verdicts that the jury returned on 23 May 2024 in respect of counts 1, 2 and 5 could not be viewed as safe in view of the jury's request for assistance on 3 June 2024 on the standard of proof.

67. The note asking for assistance on 3 June asked:

> "How sure is it necessary to be with regards to question 4 in count 3 – i.e. does this mean sure beyond reasonable doubt, or 100 per cent certain?"

The judge answered this question in a conventional manner, and following the approach set out in the Crown Court Compendium. No complaint is or could be made about that direction.

68. The jury could not have been discharged from giving verdicts on counts 1, 2 and 5 at that stage, as their verdicts had already been delivered. The only issue for us is whether this matter

renders those verdicts arguably unsafe. We conclude that it does not. The terms of the note demonstrate that any possible ambiguity in the jury's minds operated in a manner only favourable to the applicants: if anything, they may have applied a standard of proof higher than was necessary when considering their verdicts on counts 1, 2 and 5.

Conclusion

69. In the result, therefore, there are no arguable grounds that the convictions of the applicants on any of the counts is unsafe. Accordingly, these applications for leave to appeal are refused.

70. We remind everybody again of the reporting restriction order made under section 4(2) of the Contempt of Court Act 1981.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
