Neutral Citation Number: [2023] EWCA Crim 1477

Case No: 202301561 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
JUDGE KUBIK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2023

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE FARBEY
and
HIS HONOUR JUDGE KEARL

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Between :

KAHN ABDUL	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Narita Bahra KC (instructed by **Mi Solicitors**) for the **Appellant**
Graham Russell (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing dates : Thursday 30 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

LORD JUSTICE WILLIAM DAVIS :

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. We shall refer to the complainants in this case as C1 and C2.

Introduction

1. On 13 April 2023 in the Crown Court at Birmingham (Her Honour Judge Kubik KC and a jury) Abdul Khan was convicted of assault by penetration and rape of C1 and rape of C2. His application for leave to appeal against conviction has been referred to the full Court by the Registrar.

2. Two issues have been raised by Narita Bahra KC on behalf of the applicant. First, it is said that there were failings by the prosecution in their disclosure duties, both general and particular, which mean that the trial was unfair and the convictions are unsafe. Second, when the jury were considering their verdicts, one juror sent a note to the judge complaining about the approach being taken to the evidence by the other jurors. It is argued that the judge failed properly to deal with the note. Rather than allowing the trial to continue, the jury should have been discharged. Moreover, since the trial, the juror who sent the note has written to the court setting out her concerns in greater detail. Ms Bahra submitted that the Criminal Cases Review Commission should be directed to investigate. In the first instance, that would involve the juror being asked questions to elucidate the matters set out in her letter.

The factual background

3. The events involving C1 and C2 occurred in similar circumstances but approximately 3 years apart. In the early hours of 13 October 2019 C1 was in Pryzm nightclub in Broad Street in the centre of Birmingham. Her evidence was that she was very drunk. She recalled seeing the applicant in the nightclub. She then had a clear memory of being in the passenger seat of a car being driven by the applicant. The applicant had driven to an industrial estate at St Margaret's Road in Washwood Heath which was about 4 miles away from Broad Street to the east of Birmingham city centre. He had parked the car. Once there, the applicant had put his hand under her clothing and forcefully inserted his fingers into her vagina. He then had got out of the car and walked round to the passenger side. He had opened the passenger door and forced his erect penis into C1's mouth. C1 said that, after the oral rape, she had told the applicant that he could put his penis into her mouth again if he promised then to let her go. Her evidence was that she said this because she was afraid that the applicant was going to kill her. In the event, C1 was able to get out of the car and to seek help at a nearby house.

4. Abdul Barki lived at the house to which C1 went. His evidence was that, at around 3.20 a.m., he heard loud banging on the front door of his house. When he went to the door, he could hear a female screaming and saying "please let me in". He opened the door to find a female who turned out to be C1. She seemed to be very scared. She was shaking. Mr Barki allowed her into the house. At her insistence he called the

police. When the police arrived, they observed that C1 appeared to be very upset. She seemed to be intoxicated whether due to drugs or alcohol. C1 gave an account of events at the nightclub and in the car similar to the account she gave in evidence.

5. The applicant was arrested and interviewed on 16 November 2019. He said that he had met C1 in the nightclub on 13 October. He had never seen her before. They had danced and exchanged kisses in the nightclub. They had left together and gone to his car where there had been further kissing. The applicant explained that he then had driven to St Margaret's Road which was a street known to him. What happened thereafter had been consensual. C1 had asked the applicant to insert his finger into her vagina. She had volunteered to perform oral sex on him. She only became upset when the consensual sexual activity was over. She said that she had a boyfriend, that she was religious and that the applicant was Asian. She then ran off.

6. The applicant was released from police custody for further investigation to take place. Whatever this investigation may have been, it did not progress to any further action against the applicant prior to September 2022. On 27 September 2022 C2 received telephone calls from the applicant. He said that they had met at Pryzm nightclub about six months earlier and that she had given him her mobile phone number. C2 had no recollection of this. She had only been to Pryzm on one occasion and did not recall meeting the applicant there. In any event the applicant asked C2 if she wanted to "hang out". She agreed but wanted the applicant to understand that nothing sexual would happen between them at their meeting. She said that they could go to see her friend, Kayleigh. The applicant picked up C2 at around 5 p.m. in his car from the college she attended in Staffordshire. They drove into Birmingham. On the journey he offered her nitrous oxide, commonly known as laughing gas, which she inhaled. It made her forget temporarily where she was. The applicant drove into an alleyway off St Margaret's Road in Washwood Heath. He got out of the car and went to a nearby building, telling C2 that he had to open up the place. C2 followed him because she needed to use the toilet. After she had done so, she sat on a settee in the building. The applicant offered her cannabis to smoke. She accepted. Her evidence was that he then tried to kiss C2. C2 said "no". The applicant became angry. He suddenly stood and got undressed. His penis was erect. He got on top of C2 and tried to kiss her face and neck. She tried to push him away. She kept saying "I don't want to do this, get off me". The applicant ignored her. He pulled down her jogging bottoms and pants and he raped her. When she tried to struggle, the applicant put his arm around her neck causing her difficulty in breathing. Eventually the applicant withdrew his penis and ejaculated on C2's jogging bottoms.

7. Because she felt she had no other option, C2 accepted a lift from the applicant back to where she was staying i.e. the YMCA in Birmingham. She went to the room of her friend, Kayleigh. She told her friend what had happened. The applicant had visited the YMCA later that evening. He asked to speak to C2. The person on the reception desk spoke to Kayleigh who said that C2 did not want to see or speak to the applicant. He then left the YMCA. Next day she spoke to a support worker at the YMCA and gave an account of the events in Washwood Heath which was similar to what she later was to say in evidence.

8. The applicant was arrested on 4 October 2022. He said that he had met C2 via Snapchat. They made arrangements to meet. Their purpose was to have sex. They went to the premises at St Margaret's Road. C2 had agreed to this. The sexual

activity which followed was entirely consensual. The applicant described it as rough sex. C2 had asked to be dropped at the YMCA. The applicant had done so. According to him they had agreed to meet again later in the evening. He had gone back to the YMCA later because he had been concerned for C2's welfare. He had seen an ambulance outside and he was worried about the effects of nitrous oxide.

9. The applicant did not give evidence at his trial. He relied on the contents of his interviews with the police. His case was that all sexual activity with C1 and C2 was consensual. Their later allegations of penetrative sexual assaults were false. The prosecution relied on the fact that two young women who had no connection quite independently had complained of serious sexual assaults in the area of St Margaret's Road. This could not reasonably be explained as being a coincidence.

Disclosure

10. The trial commenced on 27 March 2023. The applicant's solicitors had served a defence statement on 9 February 2023. In terms of the case being raised by the applicant, the defence statement mirrored what the applicant had said in his police interview. The primary issue in relation to each complainant was consent. Requests for disclosure were made in relation to the medical history of each complainant, any material relevant to the credibility of any witness and what CCTV was missing and the steps taken to find it.

11. On 10 March 2023 an application pursuant to section 8 of the Criminal Procedure and Investigation Act 1996 was served. The application referred to a wide range of material. Whether there had been a request for disclosure of this material which had been refused is not clear. In any event a request for disclosure raising a significant number of further points was served. Many of the points had no relevance to the issues in the case. Not all of the request was easy to follow. For instance, paragraphs 12 and 13 read as follows:

> "Confirmation of whether ? was spoken to by the police? If so, any notes of what this witness stated?
>
> Why was no statement taken from ?"

12. Three days later on 13 March 2023 another request was made. This posed questions such as "Was a witness statement taken from Kayley Sadler? If not, why not? Was Lucy Satchwell spoken to by the police? If so, provide a copy of police notes of contact with Lucy Satchwell." Again many of the requests appeared to bear no relation to the issues raised in the defence statement.

13. The final request for disclosure was made four days before the start of the trial. This asked for details of how the two disclosure officers who had been involved at different stages of the investigation had carried out their duties and, in particular, where and how CCTV footage which had been thought to have gone missing was located.

14. Where requests were made without any reference to the issues in the case and/or in connection with the process of disclosure, no material was disclosed. The section 8 application which had been served on 10 March 2023 was never pursued before the

trial judge. No other application was made to the judge in relation to disclosure. Thus, if there were any failings in disclosure, these were not put before the judge for determination.

15. Three grounds of appeal relating to disclosure are set out in the written grounds. The general ground put forward is that "the status of the disclosure exercise in this case is incomplete and there were substantial failings by the prosecution". The specific matter relied on is that contact between the officer in the case (D.C. Powell) and the complainants/witnesses was recorded on his computer but this contact was not disclosed. It is said that this caused prejudice to the applicant's defence. The other two grounds relate to D.C. Powell. Complaint is made that the judge refused to order him to be recalled for further cross-examination about an e-mail he had sent to the Crown Prosecution Service. It is further said that the judge failed to direct the jury about the failings of D.C. Powell in relation to disclosure and/or to sum up the evidence relating to those failings.

16. In her oral submissions Ms Bahra argued that there were clear failings on the part of the police and thereby the prosecution in relation to disclosure. Having identified the particular failings (to which we will turn shortly), she said that they were sufficient to cast doubt on the entire process of disclosure. Although she could not specify matters beyond the specific failings which emerged in the course of the trial, she submitted that the convictions had to be regarded as unsafe because there could be no confidence in the disclosure process. She said that it was wrong to put the onus on the defence which was the approach taken by the respondent when it was said that the absence of any section 8 application to the judge undermined the criticisms now being made.

17. We have no hesitation in rejecting that overarching submission. Issues relating to disclosure arose in the course of the trial. Whether they were dealt with appropriately is something to which we will turn. If they were not, they might provide the basis for an argument that the verdicts were unsafe. But, if the issues were resolved one way or the other at the trial, it cannot now be said that, because disclosure was problematic during the trial, there must be failures of disclosure which are still hidden and which would render the verdicts unsafe were they to become apparent. That proposition would be wholly speculative. There are cases where, after the trial, material emerges which, had it been known to the defence at the time of the trial, would have been deployed to undermine the prosecution case and/or to bolster the defence case. This court is then required to consider whether the existence of the material renders the verdicts unsafe. This is not such a case. We are being invited to guess at what might be in the possession of the prosecution which would affect the safety of the convictions. That is not a permissible approach.

18. We nonetheless must consider the particular issues which arose in the trial. First, it became clear that D.C. Powell had had e-mail contact with C1. This emerged when C1 was cross-examined about her level of intoxication. A urine sample had been taken from her which on analysis appeared to show that the level of alcohol was relatively modest. This was inconsistent with her evidence that she was very drunk. Ms Bahra began to cross-examine C1 about her level of intoxication. C1 interrupted the questions to say that she had taken antihistamine before going out on the evening in question, that antihistamine can react with alcohol and that this could explain why she felt drunk. On further inquiry with the witness, it emerged that D.C. Powell had

e-mailed C1 at some point prior to the commencement of the trial and told her of the results of the urine analysis. There is no ground of appeal relating to what D.C. Powell told the witness. It is not said that what he did rendered the trial unfair or the verdicts unsafe. In the respondent's notice it is argued that there is no good reason why someone in C1's position should not be informed of toxicology results. It is not necessary for us to reach any conclusion on the issue. It has not been relied on as a basis for impugning the conduct of the police officer. Rather, it is said that the contact between D.C. Powell and C1 (and other witnesses) was not disclosed. The particular contact to which we have referred emerged by chance. None of the other e-mails or messages was disclosed.

19. When it became apparent that there had been contact between D.C. Powell and the witnesses, a fact which could not have come as a surprise given that he was the officer in the case, there was no further request for disclosure. The request on 13 March 2023 had included a request for disclosure of "logs of police officers dealings with complainants". So far as we are aware, no such logs were disclosed at any point. Of itself, that is not of any significance. The prosecution had a continuing duty to disclose any material which might undermine their case. In the context of this prosecution, that would be anything which might affect the credibility of the complainants. After the e-mail contact became known, there was no reference by the defence to the request on 13 March. There was no application pursuant to section 8 of the 1996 Act. There is nothing in the contact about which we do know – the e-mail telling C1 about the toxicology result – which could be relevant to C1's credibility. In the circumstances we have no reason to believe that the e-mail contact did contain undermining material. Whilst the duty to disclose lies on the prosecution, it is relevant that a request for disclosure had been made but no application was made thereafter to the judge pursuant to section 8. That gives an indication of the view taken at the trial of the significance (or otherwise) of the contact between the police officer and the witnesses.

20. The second issue relates to a statement from a Mr Mujtaba. Until very shortly before the trial, the prosecution had not disclosed the 2019 CCTV footage from the nightclub. It had been available but the prosecution had failed to adjust the search parameters in respect of the relevant computer system. The footage eventually retrieved showed the applicant and C1 inside the nightclub and immediately outside the nightclub after they had left together. Visible on the footage was Mr Mujtaba. He was a friend of the applicant. The applicant had been aware of his presence on the night in question. The crime log kept by the police officer who was in charge of the case prior to the events relating to C2 (not D.C. Powell) had an entry which indicated that Mr Mujtaba had made a statement to the police. This statement was not disclosed. When D.C. Powell gave evidence, he was cross-examined about the statement. He refused to accept that his predecessor must have taken or caused to be taken a statement from Mr Mujtaba. In re-examination D.C. Powell accepted that the crime log showed that such a statement existed. He said that he had taken no steps to retrieve it. Once his evidence had been completed, D.C. Powell did retrieve the statement. On 4 April 2023 it was disclosed to the defence. Mr Mujtaba was summoned to give evidence the next day. His statement referred to video material he had taken on his mobile telephone. He had not retained this material which was a Snapchat video. The police had taken a copy of it. At the point at which Mr Mujtaba's statement was disclosed, the copy of the video could not be located.

21. Mr Mujtaba was called to give evidence on behalf of the applicant. Ms Bahra was still examining him in chief when she was informed that the copy of the Snapchat video had been found. The judge permitted a break in the evidence whilst Ms Bahra watched the video material. Having viewed it, Ms Bahra continued her examination of Mr Mujtaba in the course of which she played the video material.

22. We do not know what Mr Mujtaba said in his evidence before the jury. However, we have a copy of his witness statement. In his statement he described the behaviour of the applicant with C1 which appeared to be friendly. The two of them were standing very close to each other and laughing and talking. The applicant then left with C1 holding her hand. There is no reason to suppose that he said anything to contradict that in his oral evidence. We have not seen the video material. Ms Bahra submits that, had the video material been disclosed with the witness statement, Mr Mujtaba would not have been called. This submission is put baldly. Why disclosure of the video material would have had that result is unclear. It was suggested in the course of the hearing that the material provided some ambiguity as to the nature of the interaction between C1 and the applicant. Beyond that we were not given any detail of its damaging effect. We have seen stills from the CCTV footage from the nightclub. There is nothing in that footage which shows anything adverse to the applicant.

23. If the video material was adverse to the interests of the applicant, it is not clear to us why in itself it was disclosable material. If that were the situation, what if the statement and the video material had been available to the prosecution from the outset? We cannot see that the prosecution then would have been obliged to disclose the video material. The defence would have been on notice that calling Mr Mujtaba presented a risk and a decision might have been taken not to call him. What happened was not a deliberate failure or refusal to disclose material. Rather, there was incompetence on the part of someone in failing to find the material until the very last minute.

24. In her written submissions Ms Bahra said that the late disclosure "caused prejudice to (the applicant's) defence". We are not persuaded that there was any such prejudice. However late the disclosure may have been, it was made eventually. The applicant was able to call the witness, a witness whose identity was always known to him. Nothing in relation to Mr Mujtaba led to unfairness of a kind which affected the safety of the convictions. We observe that no application was made to the judge following the late disclosure of the video material. The respondent submitted in the course of the hearing that there could have been an application to exclude the material pursuant to section 78 of the Police and Criminal Evidence Act 1984. That submission was misconceived. Section 78 is concerned with evidence upon which the prosecution proposes to rely. At best the prosecution would have used the video material in the course of cross-examination of a defence witness. That would not have brought the material within section 78. However, the judge could have been asked to prevent the prosecution from using the material pursuant to her inherent jurisdiction to maintain the fairness of the trial. Had it been thought that the effect of the material was sufficiently damaging, application could have been made to discharge the jury. In the event, the defence decided to play the material to the jury during the witness's evidence in chief.

25. The third issue is connected to the events surrounding the disclosure of Mr Mujtaba's statement. Before he gave evidence, Ms Bahra invited the judge to inform the jury in some way that the statement had only been disclosed the day before. The judge declined to give any direction or require the prosecution to make an admission to that effect. Once the witness had given evidence, the prosecution made admissions in relation to the witness's statement. The jury were told that the police had taken a statement from him in about October 2021 but that the statement had not been disclosed to the defence until 4 April 2023. Further, the video material produced by the witness was not disclosed to the defence until the witness was part way through his evidence.

26. None of the foregoing provides a basis for any legitimate complaint. The ground of appeal which arises from the evidence of Mr Mujtaba is that the judge erred when she did not order D.C. Powell to be recalled for further cross-examination arising from the content of the e-mail he sent to prosecution counsel which accompanied the Mujtaba video material on the morning of 5 April 2023. D.C. Powell already had been cross-examined in relation to disclosure issues. As well as the e-mail contact he had had with the complainants, the late disclosure of 2019 CCTV footage from the nightclub and the existence of a witness statement from Mr Mujtaba, he was asked about the failure of the police to preserve CCTV footage from the YMCA which was relevant to the events concerning C2. The purpose of the cross-examination was to establish that the disclosure exercise had been conducted inadequately and without a full appreciation of the duties which lay on the prosecution. Whether that assisted the jury in determining the core issues, namely whether C1 and C2 had consented to sexual activity with the applicant, is not for us to say. What is clear is that the nature and extent of the disclosure exercise was fully ventilated before the jury.

27. The e-mail D.C. Powell sent to prosecution counsel enclosing the Mujtaba video material included this sentence: "I cannot believe there was no mention of these on the report though **I believe they will assist us more than him** because she does not look like she is happy". Ms Bahra wished to cross-examine D.C. Powell about this comment. She proposed to ask whether it represented his understanding and approach throughout in relation to disclosure. The judge refused to permit the cross-examination of D.C. Powell to be re-opened. We do not have any record of her ruling. The application in writing asserted that the content of the e-mail was "astounding". It described the highlighted words as "alarmingly concerning". It was said that they showed that D.C. Powell had no understanding of his duty when investigating a crime alleged against a man of previous good character. We consider that this does not follow from the content of the e-mail which, it is necessary to remember, accompanied material which was being disclosed. On the face of it the police officer was commenting that the video material arguably did not assist the defence. For what it is worth his view was the same as was suggested on behalf of the applicant during the hearing. This casual comment did not provide any proper basis for an assertion that he did not understand the disclosure process.

28. In any event, the officer had been cross-examined at substantial length at an earlier point in the trial. Insofar as the jury were assisted by evidence on this question, they had ample material with which to work. Cross-examination about the e-mail accompanying the Mujtaba video material would not have provided any assistance which they did not already have. Even if there were a sustainable argument that the

judge ought to have permitted such cross-examination, the judge's decision could not be said to have rendered the trial unfair.

29. The final point raised in relation to disclosure relates to the way in which the judge summed up the disclosure issues to the jury. The judge split her summing up. She directed the jury on issues of law. We have a transcript of those directions. Thereafter counsel addressed the jury. We are told that both counsel dealt with the issue of disclosure. The prosecution acknowledged that there had been unexplained and inexcusable delays by the prosecution between the events in 2019 concerning C1 and the complaint made in 2022 by C2. They accepted that there had been errors in disclosure, in particular the loss of CCTV footage and the late disclosure of a witness statement and video material. As for the defence, to quote from the grounds of appeal "the defence closing address focused on the investigatory, disclosure failings and missing information identified during the trial process, in the case brought against a man of good character".

30. Unfortunately we do not have any record of the second part of the judge's summing up which dealt with the evidence. Whether because of a failure of the recording system or some other reason, no transcript is available. It is said that the judge did not deal with the evidence elicited from D.C. Powell in cross-examination. She did not summarise "the key failings" of the officer nor did she direct the jury as to the potential effect of such failings on the ability of the defence to meet the prosecution case. Because we do not have a transcript, we do not know what (if anything) the judge said about D.C. Powell's evidence. The safest course is to assume that she said nothing. The respondent's notice does not suggest otherwise. We do not know whether the judge was invited by the defence to add to her summary of the evidence. It is not suggested in the grounds of appeal that she was and that she declined the invitation. In those circumstances, we proceed on the basis that nothing was said to the judge drawing her attention to the lack of reference to D.C. Powell's evidence relating to disclosure.

31. The purpose of a summing up of the evidence is to deal with the significant parts of the evidence going to the real issues in the case. The almost invariable judicial preface to that part of the summing up is an indication to the jury that the summing up will be selective in terms of the evidence to which it will refer and that they should take into account all of the evidence insofar as it assists them in reaching verdicts in accordance with the judge's directions of law. It has not been suggested that the judge departed from such an introduction. We shall assume that the jury were directed in those terms.

32. Where a particular factual issue has been dealt with at length in closing either by the prosecution or the defence or both, this may mean that a failure by the judge to deal with the issue is of no material significance in relation to the fairness of the trial or the safety of the verdicts so long as the issue is not of central importance. In this case, it is not suggested that the judge failed to deal with any matter which went directly to the credibility of C1 and/or C2. Nor is it said that she failed to explain how the jury should approach issues such as C1's distress as seen by Mr Barki or the complaints made by C2 to her friend, Kayleigh, and to the support worker at the YMCA. Those were matters on which directions to the jury were essential. The evidence concerning disclosure was not central to the jury's task. In the respondent's notice it was described as being "of nugatory value". We consider that this is too dismissive.

However, the evidence was collateral to the principal issues in the case. The evidence had been dealt with at length in counsel's speeches. In those circumstances we are satisfied that the judge's failure to deal with it did not cause unfairness or render the verdicts unsafe. Had it been otherwise, the judge would have been asked to remedy the position at the conclusion of her summing up.

33. For all these reasons we conclude that none of the matters relating to disclosure gives rise to any arguable ground of appeal.

The jury in retirement

34. The jury retired to consider their verdicts at some point on 11 April 2023. On the morning of 13 April 2023 when they had been deliberating for over a day a juror sent a note. It read as follows:

> "I don't feel that the trial has been fair to Mr Khan because it seem the jury has racially profiled him without even considering the evidence. I have not felt comfortable for the last two days at all, from the moment we went into initial deliberation. All other 11 members within 15 minutes had made a decision. This did not sit right with me, nor did it did it make sense a two-week trial led to a 15-minutes decision."

35. Ms Bahra submitted that the judge should investigate the position with the individual juror whether addressing her in person in court or by seeking further details in writing from the juror.

36. The judge declined to follow that course. Adopting a sequential approach, she applied CPD Part VI 26M which was the practice direction then in force. She determined that it was not necessary or correct to seek further detail of the matters set out by the juror in the note. She said that there had been no suggestion of any inappropriate racial comment or any overt racial overtone to the jury's deliberations. Her conclusion was that the best way forward was to ask the jury as a whole whether they considered that they could try the defendant on the evidence without any bias. She had been referred to *Skeete* [2022] EWCA Crim 1511 where that procedure had been adopted and approved. Although the nature of the note in *Skeete* was different, the court in *Skeete* had in mind cases where issues of racial bias had arisen.

37. The judge set out the questions which would be put to the jury in writing for each juror to consider individually. They were as follows:

"Have you followed my legal directions throughout the trial?

Have you throughout the trial remained faithful to your oath or affirmation to try this case fairly and come to a verdict based only on the evidence and without any racial bias?

Do you feel able to continue and remain faithful to your oath or affirmation without racial bias?

If the answer to any question is no, you must say so.

If the answer to those questions is yes, would any verdict you may come to be based solely on the evidence without racial bias?"

38. Ms Bahra said that she did not consider that the jury, given what they know the consequences would be, would answer those questions truthfully. She foreshadowed an application to discharge the entire jury. However, she accepted that, if a series of questions was to be posed, the judge's formulation was appropriate.

39. The judge decided that it would not be appropriate to read out the note in full. The issue which required elucidation was whether racial profiling could be excluded as playing a part in the jury's deliberations. Reference to jurors having reached a quick decision would not assist in that task. Thus, when the jury were brought into court, the judge explained the delay by saying "…The reason why there's been a delay is because I've received a note from one of you raising concerns about potential racial profiling or bias". She went on to emphasise that the jury had to consider the case without reference to any prejudice or bias. Rather, their verdicts had to be based on the evidence they had heard. The jury then were given copies of the questions so that each juror could answer the questions in writing. They went to their room in order to do so. It was by now close to 1.00 p.m. The jury returned the documents setting out their answers to the questions within a few minutes. All of the jurors answered every question in the affirmative. However, one juror had added a rider to her answers, namely "I do not feel comfortable deliberating with the jury further".

40. At Birmingham Crown Court juries routinely are released from their deliberations over the lunch adjournment. Therefore, the jury did not deliberate any further once they had answered the questions posed by the judge. By the time the court was ready to sit again after lunch, the juror who had sent the first note had sent another note. It read: "I do not want to continue my jury any further. I don't feel comfortable. It's mentally affected me. Please retire me. I simply can't do it no more." The judge concluded that this did require an inquiry of the individual juror. The juror came into court on her own. The judge asked the juror two questions, namely "are you able to carry on and focus on the evidence and return a verdict according to your evidence without any racial or any other sort of bias? And are you able to concentrate on that task in order to reach a verdict one way or the other?" The transcript did not record the juror's response. Presumably the juror was not close enough to a microphone. However, the juror was then asked to go behind the door leading into the jury area. The judge said that the juror had given a clear indication she could no longer adhere to her oath to return a verdict according to the evidence. Both counsel agreed that this was the effect of what the juror had said. Both counsel agreed that the juror had to be discharged. Ms Bahra submitted that the jury as a whole should be discharged. The judge disagreed. In the event the jury continued with their deliberations as a jury of 11. They reached unanimous verdicts very shortly after the discharge of the juror who had sent a note.

41. Two grounds of appeal are put forward arising from the events of 13 April. First, the judge erred in failing to make adequate enquiry of the juror who sent the first note. Second, the judge should have discharged the whole jury whether upon receipt of the first note or once it became apparent that the juror who had sent the note was not able to continue serving on the jury. It is argued that the judge ought to have enquired of the juror what was meant by "….the jury has racially profiled (the applicant) without even considering the evidence…." Ms Bahra acknowledges that any inquiry into the

deliberations of the jury ordinarily would be impermissible. However, such inquiry can be undertaken when it emerges that there may have been a complete repudiation by the jurors (or some of them) of their oath to try the case according to the evidence. Given the judge's decision not conduct that inquiry, she ought to have discharged the entire jury. The exercise conducted by the judge could not remedy the mischief revealed by the juror's note.

42. In our view the judge dealt with the first note sent by the juror in an entirely appropriate manner. The note referred to the juror's discomfort from the point at which the jury had begun to deliberate. Therefore, any further inquiry of the juror prima facie was bound to trespass into forbidden territory. The rationale for the bar on any such inquiry was set out recently in *R v Essa* [2023] EWCA Crim 608 at [32]:

> The reason for the common law principle to which we have referred is that it is a necessary and integral part of the jury system that the deliberations of a jury must remain confidential. Without that general rule, the jury system would be seriously undermined. Those summoned to perform jury service would do so in a state of constant anxiety as to whether anything said during their deliberations would, without more, become the subject of speculation and perhaps investigation. The exceptions to the rule are accordingly narrowly defined, and it will only be in the most exceptional circumstances that this court will direct an inquiry into how a jury's verdict was reached.

43. The thrust of the juror's concern was the fact that the other members of the jury apparently had reached a decision very quickly which the juror felt was wrong. Her reference to "racial profiling" was equivocal. In those circumstances, the approach taken by the judge met the requirements of justice. In *Gregory* (1998) 25 EHRR 577 a note was received from the jury when they were deliberating in these terms: JURY SHOWING RACIAL OVERTONES. 1 MEMBER TO BE EXCUSED. The trial judge in that case dealt with the matter by giving firm directions to the jury about their duties as jurors to reach a verdict based solely on the evidence. His approach was approved by the Court of Appeal and the court in Strasbourg. The judge in this case went further than the judge in *Gregory* even though the note with which she was dealing arguably was less explicit than the note in *Gregory*. The jury here were informed that an issue had arisen in relation to possible racial bias. In that context, they were asked a series of questions designed to identify if such bias might be playing a part in their consideration of the case. We do not accept Ms Bahra's argument that jurors would not answer the questions truthfully. If the judge had dealt with the situation simply by giving clear directions to the jury, she could not have been criticised. It could not have been argued that the jury would have ignored the directions. That would be to prejudge the jury's views. In fact, the judge both gave such directions and administered the questions. We consider that the course she adopted met the situation fully.

44. We do not accept the submission that the whole jury should have been discharged. When the note was first received, this step would have been grossly premature. The discharge of the juror who had sent the note did not change the position. She had said that she could no longer adhere to her oath as a juror. That meant that she could not

continue. The other jurors had said that they could reach verdicts being faithful to their oath to try the case on the evidence as opposed to any prejudice or bias. The discharge of the single juror did not affect their position.

45. We conclude that no arguable ground of appeal arises from the events of 13 April 2023.

Post conviction letter from the juror

46. After the trial the Crown Court at Birmingham received a letter from the juror who had sent the first note and who subsequently was discharged from the jury. The letter inter alia stated:

47. "….some members of the jury had racially profiled Mr Khan and pushed others for a guilty verdict. The reason I say this is because early in the trial I heard a few jury members talking as we were leaving court and overheard them say "it's the same kind", "they should all be deported, it would be easier" following this comment they laughed and giggled and I was left speechless with my head hanged down. After hearing these words and the trial resuming, I was left disgusted but not sure what to do as we were not allowed to discuss the case. What shocked me even more was that before we even got into deliberation the case was being discussed by the others in the jury, making passive remarks on a daily basis.. They were discussing openly and they are going to give a guilty verdict for Mr Khan which I thought was very unjust. I did not speak to anyone about this as I did not know what to do as we are under oath.

48. On the 12th April 2023 we went into deliberation and within 15 minutes the jury found Mr Khan guilty. There was a lot of pressure from certain jury members who were stronger and I felt like others just felt forced to follow suit. I was the only person who said I did not agree with the decision I was being forcefully persuaded by other more stronger members very aggressively….in my opinion he (the applicant) deserved another trial on the basis that all the evidence was not considered and that the judge/jury was biased & racist & that it wasn't fair."

49. Ms Bahra submits that this letter requires investigation by the Criminal Cases Review Commission. In the first instance the juror should be asked a series of questions designed to elaborate on what she has said in her letter and thereafter should be invited to make a witness statement encompassing the contents of her letter together with any additional information. In the course of the hearing we asked Ms Bahra what the next step thereafter would be assuming that her witness statement was in line with the contents of her letter. She said that the other jurors would have to be interviewed by the CCRC and that the court thereafter would have to consider what evidence, if any, should be called at a further hearing.

50. This approach inevitably would lead to an investigation into the deliberations of the jury. We repeat the reasoning for such an investigation being forbidden save in exceptional circumstances. The two examples given in *Thompson* [2010] 2 Cr App R 27 of where this might be permissible are where there is evidence of a complete repudiation by the jury of their oath to reach verdicts based on the evidence and where there is evidence that the jury considered extraneous material from the internet or the like. The former situation will arise for example where the jury has tossed a coin to decide on the verdict or used a Ouija board. The events described in the juror's letter

do not come near either of the situations in which an investigation into the jury's deliberations might be permitted. The gathering of evidence by the CCRC inevitably would be a fruitless task.

51. The high point of the juror's allegations of racial bias was her overhearing members of the jury making comments that appeared to have a racial connotation as they were leaving court at an early stage of the trial. Whether these comments were directed at the applicant in particular or were merely more generally derogatory is impossible to say. The juror's letter does not allege any further reference to race. She speaks of jurors discussing what the verdict would be prior to their retirement. She refers to some jury members being stronger in character than others who placed pressure on other members of the jury. Her core complaint – just as in the note she sent on the morning of 13 April – was that the other members of the jury reached a verdict very quickly in a case where she thought that there was some merit in the defence. This does not require any further investigation by the CCRC. The letter does not provide any basis for a conclusion that the jurors who convicted the applicant were or might have been biased.

Conclusion

52. In October 2019 C1 was taken to a quiet area in Washwood Heath after she had met the applicant for the first time in her life at a nightclub in Birmingham. After sexual activity between them, she ran to a nearby house of a complete stranger in a distressed state. She demanded that he call the police. As soon as the police arrived she said that the sexual activity had been non-consensual. In September 2022 C2 was taken to the same area in Washwood Heath. She had never met the applicant before so far as she was aware. After sexual activity she very quickly told a friend that she had been raped. C2 made her allegation wholly unaware of C1's allegation. C1 and C2 did not know each other. The applicant did not give evidence at his trial. Given those circumstances it would not be surprising for a jury to reach a conclusion adverse to the applicant within a relatively short time.

53. For all the reasons we have given, we are satisfied that there are no arguable grounds of appeal. We refuse the application for leave to appeal against conviction.