IN THE BIRMINGHAM CROWN COURT

Case Nos: T20148410/8152,
T20157061 & T20157968

Date: 29/11/2016

BETWEEN :

REGINA

-and-

FAZAL EILAHI KHAN
ASIF IQBAL
HAROON KHALIQ
USMAN ALI
PIER ZADA KHAN
MOHAMMED AHMED

"Operation Viscount 2"

R U L I N G
ON DEFENCE APPLICATIONS
ON (A) RECUSAL AND (B) ABUSE OF PROCESS
Hearing – Leamington Crown Court – 1st November 2016

INTRODUCTION

1. This is my Ruling on two matters which arise as a result of submissions made by Mr Kamlish QC at a preliminary hearing before me on 1st November 2016 at Leamington Crown Court. Mr Kamlish QC appeared for the fifth defendant in *"Operation Viscount 2"*, Pier Zada Khan (D5), having previously represented the first defendant Fazal Khan (D1) against whom the Crown had discontinued. The other four defendants were also represented at the hearing. A third re-trial of this matter is fixed to commence on 9 January 2017 (estimate 4 weeks).

Procedural History

2. This case has had a long, and somewhat unedifying, history.

3. The prosecution case is that on 2nd July 2014 there was a major incident of serious violence in Grantham Road, Sparkbrook, involving two rival groups, an Afghani group and a Pakistani group, which led to death and injury. Members of both groups were subsequently arrested and charged.

4. In early 2015, a trial took place before HHJ Thomas QC at Birmingham Crown Court of seven members of the Afghani group for murder and conspiracy to cause GBH (*"Operation Viscount 1"*). It was alleged that they were the 'away team' and had driven, with others, to the scene in a convoy of four cars, equipped with weapons. All were acquitted of murder, but four were convicted of the conspiracy.

5. A second trial took place in the summer of 2015 before HHJ Patrick Thomas QC of 5 members of the Pakistani group, comprising the named Defendants (*"Operation Viscount 2"*). These were essentially said to be the 'home team'. Fazal Eliahi Khan (D1) and Pier Zada Khan (D5) are brothers. Another brother was the man who was killed. The other Defendants (D2, D3 and D4) are friends of the Khans. D1, D2, the man who died and D5 are said by the Prosecution to be seen running towards the scene of violence wearing heavy clothing, including balaclavas, and carrying weapons. D2, D3 and D4 admit their identifications from the CCTV material. D1 and D5 disputed the CCTV identification. The indictment in *"Operation Viscount 2"* originally included two counts of attempted murder, as well as other charges of violence. The jury acquitted the counts of attempted murder, but could not agree on the other charges.

6. A first re-trial commenced on 11th January 2016. The Court heard evidence in chief from the CCTV co-ordination officer, DC Mather, who gave evidence as regards the identification of the Defendants at the scene. However, the first Defendant, Faizal Khan (D1), then sacked his counsel team (who in any event indicated that they felt they had to withdraw). Mr Kamlish QC then appeared on behalf of D1. He immediately applied for the jury to be discharged on the basis that he was not, in fact, available to conduct the case. Mr Kamlish QC apparently said that he took the case on without knowing it had actually started, and if he had known that it had he would not have taken it on. In the circumstances, HHJ Patrick Thomas QC clearly felt he had no option but to accede to that application.

7. A second re-trial then commenced before HHJ Thomas shortly thereafter with an estimate of 6 weeks. Mr Kamlish QC raised a number of preliminary issues. The first concerned disclosure by the Prosecution of the materials and instructions given to DC Mather prior to him examining the CCTV evidence and his working notes. The Judge ordered the Prosecution to make further disclosure. This led to the return of DC Mather to the witness box in a *voire dire* and subsequent submissions from the defence that he was not a witness of truth and submissions by the defence that his evidence ought to be excluded under s.78 of PACE.

8. Before the Judge could rule on the admissibility of the evidence of the CCTV officer, DC Mather, Mr Kamlish QC raised several arguments of the following hew. He submitted that the failure of the prosecution to instruct a visual imagery expert demonstrated 'bad faith' by the prosecution and an intention to avoid finding evidence which might assist the defence. He then proceeded to launch a wide-ranging 'abuse of process' argument against the prosecution. As evidence of 'bad faith', Mr Kamlish QC relied *inter alia* upon a note by the CPS of a conference in July 2014 with the original prosecuting QC ("Crown Counsel I"). The note read simply *"Visual imagery – avoid expert if poss"*. Mr Kamlish QC then cast aspersions upon all those involved in the prosecutorial process and implicated the police, the CPS, Crown Counsel I and his successor prosecuting QC (" Crown Counsel II") in what he said was 'bad faith' in relation to the instruction or use of DC Mather to give evidence CCTV evidence. Mr Lithman QC, the then Counsel for D5, raised a question of 'abuse' in relation to DC Mather's evidence but and specifically repudiated any intention of impugning the integrity of present or previous Crown Counsel.

9. A concern immediately arose because both Crown Counsel I and II are serving Circuit Judges and any requirement for them to appear in the trial involved obvious complications. The then Counsel for the Prosecution ("Crown Counsel III"), immediately contacted Crown Counsel I by telephone and asked him to consider what

his position would be if he was called to give evidence. Mr Kamlish QC sought to criticise Crown Counsel III for contacting Crown Counsel I on the telephone. I reject that criticism – the trial was on-going and time was of the essence.

10. With commendable speed, Crown Counsel I sent a detailed and lucid note dated 3rd March 2016 fully explaining his position and recollection of the case ("the Note"). In the Note, Crown Counsel I said his recollection was that the CCTV in the case was of relatively poor quality and he had simply cautioned against the use of 'professional video experts' such as had been used in the *Barton* case since such 'expert' identification evidence could not be said always to be grounded in scientific research (see paragraphs 4k-m). He made the following clear statement denying any imputation (paragraph 5n):

> *"As far as I am concerned the note "avoid expert if possible" should not, under any circumstances, be taken as an indication that I, the police or the CPS were seeking to avoid the instruction of an independent expert in order dishonestly to prevent the production of evidence that might undermine the conclusions that the police had already reached about the identification of certain men. Any such conclusion would be very far from the truth."*

11. It should be noted that it is now common practice in CCTV cases for experienced police officers (such as DC Mather) to be called to give expert evidence on the CCTV on the basis of the well-known principle in *R v. Clare and Peach* [1995] 2 Cr App R 333, *viz* as someone who has spent sufficient time analysing the CCTV footage can be said to have expertise which the jury do not have (and see also *e.g. A-G's Reference (No.2 of 2003)* [2003] 1 Cr App R 21 and *Archbold* 2016, 14-63, 65).

12. On 8th February 2016, the trial judge, HHJ Thomas, recused himself from the case. He did so in view or the 'grave' allegations Mr Kamlish QC was making and the risk that Crown Counsel I might be called to give evidence at the trial. As HHJ Thomas explained, Crown Counsel I in particular was someone personally known to him and a well-known serving Circuit Judge on the Midland Circuit. In these circumstances, HHJ Thomas felt that he could not continue to preside over the trial. HHJ Thomas observed in his recusal ruling:

> *"16. When the material from [the police and Crown Counsel I] was provided on Thursday, I suggested that we should pause before we went any further. Despite my best endeavours, Mr Kamlish QC decided that he wanted to address me, and in the course of what he said he made very clear and grave allegations against the current prosecution team [including Crown Counsel III], but also raised questions about the probity of [Crown Counsel I] and his successors as leading counsel for the prosecution [or] if anything even graver matters."*

13. He observed, after referring to Mr Kamlish QC's skeleton argument dated 3rd February 2016, that Mr Kamlish QC was making *"…a plain allegation of bad faith such as to amount to an abuse of process in all those involved in the decision to rely on a police officer rather than expert evidence to lay the foundations of the prosecution case."* (paragraph 18).

6th May 2016 hearing

14. HHJ Thomas's recusal decision of 8th February 2016 was quickly drawn to my attention by Listing. In my capacity as Presiding Judge of the Midland Circuit, I

ordered that the third re-trial be listed off-Circuit in Liverpool, in view of the then risk of serving Midlands judges being required to give evidence. This drew objection from all Counsel and the parties. Accordingly, I held a directions hearing on 16th May 2016. Mr Kamlish QC appeared at that hearing on behalf of D1. No skeleton argument was provided by Mr Kamlish QC and the precise nature of his 'abuse' argument was unclear. Mr Kamlish QC eschewed any intention actually to call Crown Counsel I or II himself but said he would simply be relying on 'documents' to make his case on abuse. Mr Kamlish QC said that it was the Crown's intention to call them in order to protect their good name. At that hearing, I was informed by Mr Aina QC that the Crown intended shortly to give consideration as to whether to offer no evidence against D1 and, accordingly, the concern about serving judges being required to give evidence would fall away.

15. Shortly thereafter, the Court was informed that the Crown had, indeed, offered no evidence against D1. Accordingly, the problem appeared to have resolved itself. The case was listed for a four to six week trial on Circuit commencing on 9th January 2016.

16. Subsequently, however, it transpired that Mr Kamlish QC had replaced Mr Lithman QC as counsel for D5 and was threatening to raise the same 'abuse' argument again on behalf of D5.

7th October 2016 hearing

17. Accordingly, on 7th October 2016, I called the case in again for mention on an urgent basis. Mr Kamlish QC did not appear but sent his junior, Ms Meads. No skeleton argument was provided by the defence for D5. Instead, Ms Meads simply handed to the Court an email from Mr Kamlish QC to Mr Aina QC which she said explained Mr Kamlish QC's position. In this email, Mr Kamlish QC demanded the following extensive evidence to be served by the Crown in relation to his 'bad faith' argument:

> *"2. Evidence and statements to be served of all previous prosecutors on our claim of bad faith avoidance of the use of experts by the Crown which your predecessor told the court would be called by the Crown. That is [Crown Counsel III] and his 2 juniors, Judges [Crown Counsel I and II] and their 2 juniors the CPs lawyer and the SIO. We will also ask the court to either hear from DC Mather or refer to his transcripts by agreement in order to demonstrate that the Crown continued to use and rely on him throughout the previous trial despite it being crystal clear that he had perverted the course of conduct.*
> *3. An additional category of abuse will be the use by the Crown of the new so called expert. We will need a voir dire hearing on that issue separately as to lack of expertise and deliberate use of a friendly de facto police officer, under the guise of an expert, as opposed to a true independent expert, yet again, in the course of these proceedings. This is not an exhaustive list…"*

18. In the same email, Mr Kamlish QC also equivocated about the need for live evidence on this issue and made the following (misleading) assertion:

> *"On the face of the current papers [Crown Counsel I] pretty much admits the abuse in terms (though he believes he is denying it) and in combination with*

> *the position of the SIO the abuse may well be made out on the papers, thereby obviating the need for some live witnesses."*

19. At no stage did Crown Counsel I 'admit the abuse' as Mr Kamlish QC asserts. Indeed, quite the opposite: as Crown Counsel I explained in his Note, he simply advised that the CCTV work would be better done by an experienced police office versed in CCTV than an imagery expert. This was entirely orthodox advice consistent with common practice in cases involving extensive CCTV evidence (see above).

20. Ms Meads also indicated that Mr Kamlish QC had asked her to submit that I should recuse myself from any further conduct of this matter on the grounds of comments that I had made at the hearing on 16th May 2016, in particular that I had used the phrase 'conspiracy theory' at that hearing, a term to which Kamlish QC objected.

21. In view of the unsatisfactory nature of this state of affairs, I ordered the matter to be re-listed for mention on 1st November 2016 and ordered the defence to serve proper skeletons.

1st November 2016 hearing

Mr Kamlish QC's 'skeletons'

22. In advance of the 1st November 2016 hearing before me, Mr Kamlish QC filed three prolix and repetitive documents with the Court: two skeleton arguments dated 14th and 23rd October 2016, together with a further third document comprising his comments typed in highlighted capital letters on the skeleton argument of Mr Aina QC for the Prosecution. This latter document is not in proper form and is not an appropriate document to put before the court by way of a third skeleton. Furthermore, in this document, Mr Kamlish QC complains, in particular, that his name has been mis-spelt and he inserts the word *"MIS-SPELLING"* capital letters every time his name appears mis-spelt in Mr Aina QC's skeleton. This is not appropriate. Recent guidance as to proper length and form of skeleton arguments in criminal cases is to be found in *R v. James and Selby* (CACD, Rafferty LJ, 12th October 2016), a case in which Mr Kamlish QC was involved. Citations below in capitals are *verbatim* quotations from Mr Kamlish QC's third document.

Mr Kamlish QC's submissions

23. At the hearing before me on 1st November 2016, advanced two arguments. Mr Kamlish QC first made an application that I should recuse myself from any further dealings with this case on the grounds of judicial bias. This recusal application was put in the following terms:

> *"Haddon-Cave J should recuse himself from any further dealings with the case both in Court, and in relation to administration and case progression. Further, that he should have no contact with the trial Judge, once appointed, until after the abuse process hearing".*

24. Mr Kamlish QC advanced a second argument regarding the Court's powers. In summary, he submitted (i) the Court had no power to request that the Defendant submit a skeleton argument on his 'abuse of process' argument; (ii) the Court had no power to make a preliminary ruling as to whether there was an arguable case on any aspect of his 'abuse of process' or require leave to be sought to run such an argument; (iii) only the trial judge had the power to do (i) or (ii) and I was not the trial judge

(and could not be) and the trial was not until January 2017; (iii) it would take him four days to set out his 'abuse of process' arguments; (iv) if the Court purported to rule on any aspect of his 'abuse of process' argument now, he would simply re-argue the matter before the trial judge; and (v) the fact that the Court had listed the matter for hearing now was further evidence of 'bias'. The latter point was put by Mr Kamlish QC in his additional written document in the following manner:

> *"THE ADDITIONAL SUBMISSION IS THAT THE LJ HAS ONLY LISTED THIS LEAVE HEARING AS A DEVICE TO GIVE MORE EFFECT TO HIS BIAS AGAINST THE DEFENCE AND IN FAVOUR OF THE CROWN. [sic]"*

Crown's submissions

25. Both of Mr Kamlish's arguments are firmly resisted by Mr Aina QC for the Prosecution on grounds set out in his helpful skeleton argument dated 19th November 2016. As to Mr Kamlish QC's recusal application, Mr Aina QC submits that there is no basis in law for the Court to recuse itself. As to Mr Kamlish QC's second argument, Mr Aina QC submits that, under modern case management powers and section 40 of the CPIA 1996, the Court does have power to request that a defendant submit a skeleton argument on abuse of process in order that the Court can make a preliminary ruling as to whether there is an arguable case of 'abuse of process'.

ISSUES

26. There are, therefore, three issues to be determined:

(1) First, whether I should recuse myself from any further dealings with this case;

(2) Second, whether the Court has the power to make any ruling at this stage in relation to Mr Kamlish QC's 'abuse of process' arguments, and, if so, what order if any should the Court make at this stage;

(3) Third, whether the trial judge would be able to entertain a further 'abuse of process' application by Mr Kamlish QC.

Recusal Application

The legal principles

27. The relevant principles in relation to judicial 'bias' and 'apparent bias' are well established. I direct myself in accordance with *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2) [2000] 1 AC 119; *O'Neill v. H.M. Advocate (No. 2); Lauchlan v. Same [2013] 2 Cr.App.R. 34, SC*

Mr Kamlish QC's complaints

28. Mr Kamlish QC made a series of 'complaints' in support of his application that the Court should recuse itself for 'bias':

(1) First, that I referred to his 'abuse of process' argument as a *"conspiracy theory"* at the hearings on 16th May and 7th October 2016. In his supplemental document, Mr Kamlish QC said this:

> *"AS PROSECUTION COUNSEL WELL KNOWS BUT SUBMITS TO THE CONTRARY, A CONSPIRACY THEORY IS A DEROGATORY TERM...[AND] USED AS A TERM 'FOR MAD PEOPLE'..."*

(2) Second, that at the hearing on 7th October 2016 I inquired *"Where is Mr Kamlish QC?"*.

(3) Third, that at the hearing on 7th October 2016 I commented *"Mr. Kamlish QC has jumped horses",* a comment which he characterised as '*sarcastic*' and was '*offensive and dehumanising*' to his client. In his supplemental document, Mr Kamlish QC said this:

> *"...DESCRIBING A DEFENDANT ... AS A HORSE AND THE REPRESENTATION OF DEFENDANTS AS A SPORT OR RECREATIONAL ACTIVITY ARGUABLY AMOUNTS TO PROFESSIONAL MISCONDUCT AND BRINGS THE BAR OF ENGLAND AND WALES INTO DISREPUTE. THE LEARNED JUDGE WILL SOON BE REPORTED TO THE JUDICIAL CONDUCT INVESTIGATIONS OFFICE BY SKQC, JUNIOR COUNSEL AND THE DEFENDANT FOR USING THIS TERM. ..."*

(4) Fourth, at the hearing on 7th October 2016, I proceeded *"to entirely misrepresent [sic]"* the salient facts of his earlier abuse of process argument *"in order to denigrate them"*.

(5) Fifth, I (together with Mr Aina QC) then proceeded *"to entirely misrepresent [sic]"* what he, Mr Kamlish QC, had said about not intending to call Crown Counsel I and II at an earlier hearing before HHJ Thomas QC and *"[t]he fact that both Crown Counsel and the court agreed in this regard is clear evidence of judicial bias both in favour of the Crown and against the defence.*"

Analysis

29. I reject Mr Kamlish QC's various 'complaints' or an imputation of bias, whether actual or apparent. His points lack any substance. His indignation is at best forensic. I am satisfied that the legal requirements for recusal are not met in this case. I deal with each briefly in turn below:

(1) First, I was right to characterise Mr Kamlish QC's 'abuse' argument as a *"conspiracy theory"* because that is what, in essence, it is. Mr Kamlish QC mistakes acuity for sarcasm. As Mr Aina QC accurately put it, the essence of the defence abuse of process argument is that Crown Counsel, the CPS, the officer in the case all improperly put their heads together and decided to embark on relying on police evidence as expert imagery evidence in order to deny a defendant a credible defence, which, *ex hypothesi* and *selon* Mr Kamlish QC, would have become apparent had the prosecuting agencies relied upon non-police imagery expert evidence. Mr Kamlish QC himself referred to his argument case as one of '*mala fides*' involving a 'scheme' by the prosecution to obtain a conviction by improper means (see further below).

(2) Second, my question *"Where is Mr Kamlish QC?"* was a pertinent inquiry: the hearing on 7th October 2016 had been fixed primarily so that Mr Kamlish QC could attend and explain his 'abuse of process' case in so far as it sought to

implicate previous Crown Counsel and which, therefore, had serious case management implications for the future listing of this case.

(3) Third, my comment *"Mr. Kamlish QC has jumped horses"* was a pertinent observation and an innocuous metaphor: Mr Kamlish QC had indeed suddenly switched from representing D1 to D5, replacing Mr Lithman QC.

(4) and (5) Fourth and fifth, I did not deliberately 'misrepresent' (whether or not in concert with Mr Aina QC) Mr Kamlish QC's arguments in order to 'denigrate' them. The fundamental problem, as I pointed out to Mr Kamlish QC several times, was his singular failure at either the hearings of 16th May and 7th October 2016 to condescend to explain the nature of and basis for his 'abuse of process' argument and his 'conspiracy theory'.

30. In so far as Mr Kamlish QC makes a general complaint that I displayed scepticism as to his argument from the outset, he is right: I was sceptical about Mr Kamlish QC's 'conspiracy theory', involving as it did serious allegations of misconduct against all his current and former colleagues without any apparent proper basis. I was also concerned to ensure that it was dealt with an early stage because of the obvious case management implications. His 'conspiracy theory' allegations have already caused the recusal of one judge and potentially involved the case being transferred off Circuit, with all the delay and inconvenience what this would involve (as witnessed by the immediate objections of all Counsel and most parties to the matter being transferred to Liverpool). Healthy scepticism by the court is, however, very far from having a closed mind. I have at all times been concerned to establish and understand the precise basis for Mr Kamlish QC's 'abuse' arguments. It is only because the Court ordered skeletons to be served that he has been forced to clarify his case so that others involved in the case and the Court could be apprised of what he was actually alleging and against whom.

31. Mr Kamlish QC submitted that there was no power vested in the Presiding Judge of the Circuit, or any other Judge for that matter, to require or hear leave applications in cases where abuse of process is to be argued. He submitted in typically hyperbolic terms: *"The sole reason for this unlawful requirement was the flagrant bias against the finding of abuse expressed at both hearings."* I note that Mr Kamlish QC appears to be in the habit of demanding courts recuse themselves in similar terms (see ***e.g. R v. James and Selby*** (CACD, 12th October 2016 where he alleged that the judge displayed 'flagrant bias' against the applicant and his legal team and his refusal to stay proceedings as an abuse was 'an example of his bias').

32. Mr Aina QC summarised the position succinctly in his skeleton:

> *"[Crown Counsel I] has provided a detailed written explanation as to why he preferred a police officer to be used rather than an expert outside the police force. His explanations cannot be faulted. It is within the experience of prosecution counsel that police officers can spend considerably more time looking at CCTV footage, thereby arriving at safer conclusions than imagery experts from outside the police force. Indeed Kamlish QC was to concede that [Crown Counsel I]'s reasoning did not amount to bad faith: [Transcript] 5.2.16: 17F. In those circumstances there was nothing wrong in both prosecuting counsel (B. Aina QC) and the learned judge expressing some [in]credulity at the proposition that mala fides of an ex parte Bennett type arose simply because the prosecuting agencies had chosen to use a police*

> *officer imagery expert (described in re authorities as 'an ad hoc expert'). Expressing [in]credulity in these circumstances does not amount to judicial bias."*

33. Judges are fully entitled, and on occasions bound, to indicate to counsel at an early stage what is troubling them about the case or particular submissions. This aids early identification of relevant and irrelevant issues and evidence and helps avoid delay and wasted costs. Judges are also fully entitled to call in cases for clarification and further argument. These are essential and important tools of judging and the modern Court process, particularly when court time and resources are increasingly stretched. They are also particularly important when an advocate puts forward allegations which appear on their face to be e.g. implausible, irrelevant, absurd and/or disruptive to the court process. As Sir Brian Leveson has recently emphasised: *"Robust case management at all stages is absolutely essential… "*(see further below).

34. For the above reasons, I decline to accede to Mr Kamlish QC's application to recuse myself.

'Abuse of process' issues

35. The issues are two-fold. First, whether the Court has the power to make any ruling at this stage in relation to Mr Kamlish QC's 'abuse of process' arguments. Second, if so, what order if any should the Court make at this stage.

The legal principles

36. The relevant modern principles of 'abuse of process' were usefully summarised by Sir Brian Leveson in *R v. Crawley* [2014] EWCA Crim 1028 at para.17-18 as comprising two essential categories: first, whether the accused can no longer receive a fair hearing; and, second, where a stay is necessary to protect the integrity of the criminal justice system. Sir Brian Leveson said:

> *"…there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried… Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort".*

37. The threshold for a stay on the grounds of 'abuse of process' is a high one (see ***e.g.*** *Warren v. AG for Jersey* [2012] 1 AC 22 where despite serious conduct in that case which included misleading the Jersey Attorney-General and the Chief of Police, and the authorities of three foreign States, the Privy Council refused to order a stay).

38. It is well-established that non-disclosure is not, in itself, an abuse of the Court's process (*per* Lord Hughes in *R v. Asiedu* [2015] EWCA Crim 714 at [24], another case in which Mr Kamlish QC levelled accusations of bad faith and abuse of process on the part of prosecution).

Mr Kamlish QC's 'abuse of process' arguments

39. Mr Kamlish QC objected to being required to set out his 'abuse of process' arguments in the form of a skeleton at this stage. He said that this was only a step which the trial judge could take. He is wrong about this. The Court has wide modern

case management powers to ensure the proper administration of justice (see further below).

40. Mr Kamlish QC, having been ordered to serve a skeleton, has now listed five 'abuse of process' arguments which he puts in the following terms [sic]:

a. ***"Mala fides approach to the adducing of identification evidence against defendants.*** *From the outset of this investigation the Crown, namely all Prosecution Counsel including those currently instructed and the CPS, in conjunction with the Senior Investigating Officer have sought to incriminate Defendants by deliberate bad faith decisions in relation to the obtaining of visual imagery evidence. The note from [Crown Counsel I], the transcript of the evidence of the SIO, the transcript and witness statements of DC Maher and the disclosed CPS note in combination, establish this head of abuse."*

b. ***"Prosecutorial bad faith which has arisen since the end of the third trial****: The Crown, having disposed of DC Maher as a result of his perjury, attempted a second imagery analysis via another police officer. This attempt failed in respect of Pier Zada Khan and Fazal Khan. This resulted in the offering of no evidence against Fazal Khan. However, in respect of Pier Zada Khan the Crown tried again with a third imagery analyst, the two previous attempts to identify him having, for forensic purposes, failed. This inconsistent approach in seeking to obtain a conviction, trying too hard, as opposed to the statutory duty of an open minded investigation, is an act of bad faith. The inconsistent approach cannot be justified and if the Court does not stay proceedings on the basis of a bad faith approach to the obtaining of evidence we will argue that the evidence of the newly instructed 'experts' should not be admitted due to the circumstances in which it was obtained pursuant to s78 PACE 1984."*

c. ***"Instruction of new 'experts' in bad faith.*** *The Crown claim that they are now using an independent expert, when in fact they are fully aware that the 'expert' only works for the police, (we observe this from the cv provided) does not have the required expertise and the methodology deployed is not consistent with the accepted use of imagery experts in criminal cases. In evidence, when questioned with regards to the police refusal to use independent imagery experts in this case the SIO indicated that discussions had taken place between West Midlands Police and the now newly instructed firm and that an agreement was reached for their evidential scale to be amended accordingly so that identifications made would be more positive."*

d. ***"Manipulation of the Criminal Process:*** *The fact that the Crown during the third trial in bad faith, knowing that DC Maher's evidence could not be presented to the Jury due to fabrication and perjury, sought to cause HHJ Thomas QC to recuse himself by threatening to call Learned Judges known to HHJ Thomas QC in order to rebut the defence claims of Abuse. This manipulation by the Crown is now compounded by the fact that the Crown has reversed its position and in doing so, have avoided having to offer no evidence against Pier Zada Kahn at the same time no evidence was offered against Fazal Khan. It has always been the Crown who have threatened to call Learned Judges, not, as the Court and the Crown repeatedly claim, the defence."*

e. "Seeking to rely on the demonstrable bias of Haddon-Cave J by agreeing that there should be an application by the defence for leave to make an abuse argument before the trial judge. *The Crown accepted, at the hearing that one of the defence abuse arguments was based on R v Horseferry Road Magistrates' ex parte Bennett [1993] 3 All Er 138, 151 HL, the leading case on abuse of process in criminal proceedings. Despite accepting this the Crown then went on to agree with Haddon–Cave J that the court "has no jurisdiction" to hear such an argument."*

Forensic abuse

41. In my judgment, what Mr Kamlish QC has sought to do in this case is both improper and illegitimate. The technique which Mr Kamlish QC has employed is transparent: he has taken two separate strands of the case – namely, (a) the note of Crown Counsel I's advice in conference in July 2014 *"Visual imagery – avoid expert if poss",* and (b) the fact that criticism has been made of DC Mather's evidence and prosecution's CCTV disclosure at the second re-trial in January 2016 - and extruded these and sought to apply them chronologically and pseudo-aetiologically to 'taint' every Crown Counsel, individual and organisation involved in preparing the prosecution case from 2014-2016 and thereby create the illusion of a wide-scale prosecution conspiracy, in effect, to pervert the course of justice, without any basis in fact. No-one it appears is immune from inclusion in Mr Kamlish QC's 'conspiracy theory': he has sought indiscriminately and variously to implicate (i) the Police, (ii) the CPS, (iii) the SIO, (iv) all prosecuting QCs (Crown Counsel I, II, III and IV), (v) all junior Counsel, and (v) the new CCTV experts, Acume.

42. In my view, Mr Kamlish QC is himself engaged in a form of forensic abuse. His aim appears to be disrupt and derail the third re-trial against his new client (D5), the case having been dropped against his first client (D1). The Courts are, however, astute to protect against this sort of irresponsible conduct by Counsel in violation of the Overriding Objective of the Criminal Procedure Rules and professional ethics (see further below).

43. I can divine no proper basis for Mr Kamlish QC's 'conspiracy theory'. In my judgment, there is no proper inference of 'abuse of process' or 'bad faith' to be drawn, prospectively or retrospectively, from strand (a) or (b) above of the sort that Mr Kamlish QC seeks to trail. For the avoidance of doubt, I emphasise the following points. First, there is no proper basis for disbelieving Crown Counsel I's explanation for his advice in conference (which, in any event, is self-expanatory). Second, there is no proper basis for suggesting that this advice was the *genesis* of an on-going conspiracy by everyone involved in the prosecution case, including all prosecuting counsel, to bring forward 'bent' police CCTV evidence at the trial (as Mr Kamlish QC put it). Third, there is no proper basis for suggesting that, because DC Mather's evidence was said to be unsatisfactory and/or the CCTV disclosure inadequate, this was somehow the product of a 'conspiracy' by everyone involved in the prosecution case, including all prosecuting counsel, to pervert the course of justice. Fourth, in summary, there is no proper basis for alleging misfeasance or malfeasance, by anyone involved in preparing the prosecution case, in particular by Crown Counsel I, II, III and IV or junior counsel.

Case management implications

44. At the present time, the Court's pressing and legitimate concern is one of case management. The Court has a continuing duty to ensure the proper and smooth administration of justice.

45. As Mr Kamlish QC is aware, his allegations of impropriety against in particular Crown Counsel I and II, have potential implications for the future conduct of this case. In the event that (i) either Crown Counsel I and II was required to give evidence at the third re-trial, or (ii) they felt obliged to do so in order to preserve their good name, or (iii) if the Court was required materially to this consider or direct the jury at the trial as to allegations of *mala fides* against Crown Counsel I and II, or (iv) (as HHJ Thomas QC indicated was a risk) Mr Kamlish QC sought to change his mind about insisting on Crown Counsel I or II being called, it would be necessary for the matter to be transferred off Circuit. This is because Crown Counsel I and II are full time Circuit Judges and well known on the Circuit; Crown Counsel I now sits in the West Midlands and Crown Counsel II now sits in the East Midlands. Any time taken up with this matter would also involve cause considerable disruption to the administration of justice and their own lists.

46. Further, similar considerations apply to Crown Counsel III and IV, who are well-known and distinguished silks on the Midland Circuit.

47. Mr Kamlish QC had eschewed any no intention of calling Crown Counsel I or II (or, it appears Crown Counsel III). Mr Aina QC has also said that he does not intend to call them. Nevertheless, the spectre of their involvement, directly or indirectly, in the event (*e.g.* of Mr Kamlish QC changing his changing his mind as HHJ Thomas QC presaged), means that the nettle has to be grasped.

Defence submissions

48. Mr Kamlish QC submits, however, that the court has no power to make any order at this stage in relation to his 'abuse of process' arguments and that only the trial judge can do so. He is, opportunistically, supported in this submission by Mr Raggatt QC, Mr Webster QC and Mr Abdi for the other defendants. Mr Singh, however, for D6 takes a more principled approach and submits that the Court is entitled to hear the abuse matter, which he rightly describes as raising issues of principle and practice, but submits that the trial judge would be entitled to re-visit the matter if it was raised again at the hearing.

Apparent bias

49. Mr Kamlish QC also raised, in this context, a question of 'apparent bias' and submits that I personally should not make any order at this stage in relation to his 'abuse of process' arguments, whether by way of case management or otherwise, because of my acquaintance with Crown Counsel I and II as Presiding Judge of this Circuit. I have already indicated that I will not be sitting on the trial in any event, but, in my view, there is no difficulty or impediment in me conducting this case-management exercise and ruling on certain obvious matters.

Troubling aspects

50. There are several particularly troubling aspects to Mr Kamlish QC's approach to this case. First, the random, vague and unparticularised nature of his abuse allegations. Second, his willingness to accuse individuals and former professional colleagues of wrongdoing without any proper basis. Third, the vacillating nature of

Mr Kamlish QC's allegations. HHJ Thomas records Mr Kamlish making 'grave allegations' against Crown Counsel I (see above). Mr Kamlish QC then appeared to concede that there that there had been no *mala fides* by present or past prosecution counsel, *i.e.* Crown Counsel I or II or III (*Transcript, pages 15F, 16B; 16H, 17C-F; 20H-21A; 22D; 23C, 31C).* However, his recent written and oral submissions sought to revive wild allegations of 'bad faith' against *all* Crown Counsel involved in the case, with no-one apparently immune from the taint, including Mr Aina QC (*i.e.* Crown Counsel IV). Mr Kamlish QC peppered his capital letter response to Mr Aina QC's skeleton with allegations such as the following:

> *"6. … COUNSEL HAVE NOT TAKEN THE TIME TO READ OUR SUBMISSIONS WHICH STATE THAT ALL CROWN COUNSEL, INCLUDING MR AINA QC AND [CROWN COUNSEL I] ARE GUILTY OF BAD FAITH ABUSE OF PROCESS."*
>
> *"15. … [CROWN COUNSEL I] HAS ACTED IN BAD FAITH."*

51. When questioned by me directly at the hearing on 1st November 2016 as to precisely what he was alleging, Mr Kamlish QC eventually said in terms that that he was alleging that Crown Counsel I was party to a *mala fides* 'scheme' to procure D5's conviction by improper means. I agree with Mr Aina QC that it is difficult to see how this lies with Mr Kamlish QC's previous concessions or how Mr Kamlish QC could could now properly raise an *ex part Bennett* abuse of process argument against Crown Counsel I, II or III (or IV). In my view, Mr Kamlish QC cannot and for him to attempt to do so would, itself, be an abuse (see further below).

Modern case management powers

52. The Court's immediate concern, however, is in relation to the proper case management of this case and the impending third re-trial.

53. Mr Kamlish QC's technical submission was the Court simply had no power at this juncture to rule on his 'abuse of process' at this juncture and the matter had to be left to the trial and the trial judge.

54. In my judgment, it is quite wrong to suggest that the Court is somehow impotent to deal with this sort of matter in advance of the trial itself. In my view, Mr Kamlish QC's stance is redolent of a bygone age of criminal practice and procedure which is very 'last century'. Today, the Court is armed with formidable modern case management powers and positively encouraged to use them to ensure (a) the efficient conduct of trials, (b) that advocates do not waste the Court's time and (c) the overall smooth running of the administration of justice.

55. I rehearse these powers below so that there can be no doubt about them.

The Criminal Practice Directions and "the Overriding Objective"

56. The starting point is to have close regard to the *"Overriding Objective"* as enunciated at the beginning of the Criminal Practice Directions. I highlight below three well-known key precepts: (a) the importance of identifying the (real) issues as early as possible, (b) the criminal justice system is not a 'game' but a search for the truth, and (c) it is not for parties to obstruct or delay trials in order to secure some perceived procedural advantage, or to take unfair advantage of others' mistakes:

> ***"CPD I General matters 1A: THE OVERRIDING OBJECTIVE***
> *1A.1 The presumption of innocence and an adversarial process are essential features of English and Welsh legal tradition and of the defendant's right to a fair trial. But it is no part of a fair trial that questions of guilt and innocence should be determined by procedural manoeuvres. On the contrary, fairness is best served when the issues between the parties are identified as early and as clearly as possible. As Lord Justice Auld noted, a criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent.*
> *1A.2 Further, it is not just for a party to obstruct or delay the preparation of a case for trial in order to secure some perceived procedural advantage, or to take unfair advantage of a mistake by someone else. If courts allow that to happen it damages public confidence in criminal justice. The Rules and the Practice Directions, taken together, make it clear that courts must not allow it to happen."*

57. The new era of modern case management was heralded by Judge LJ in cases such as *R v. Jisl* [2004] EWCA Crim 696, where he said at paragraph 116-118:

> *"Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and the case must be prepared and conducted accordingly.....The objective is not haste and rush, but greater efficiency and better use of limited resources by closer identification of and focus on critical rather than peripheral issues.*"

Change of culture

58. The change of culture was emphasised by the President of the Queen's Bench Division, Sir Brian Leveson, in his *"Review of Efficiency in Criminal Proceedings"* (HMSO January 2015) (at paragraph 281):

> *"Robust case management at all stages is absolutely essential… A change in culture so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case is essential."*

The Criminal Procedure Rules and the "overriding objective"

59. Modern case management is defined by the *"overriding objective"* which is that criminal cases must be dealt with 'justly'. Dealing with a criminal case justly includes *"dealing with the case efficiently and expeditiously"* (Rule 1 CPR 2013: *Blackstone para. D4.2***)**. Rule 1.2 states that each participant in the conduct of each case must prepare and conduct the case in accordance with the 'overriding objective'. Rule 1.3 states that the court must further the 'overriding objective' in particular when excising any power given to it by legislation (including the Criminal Procedure Rules).

60. The Criminal Procedure Rules provide in terms (Rule 1(g) highlights the principle of 'proportionality') (emphasis added):

"The overriding objective

1.1.*—(1) The overriding objective of this new code is that criminal cases be dealt with justly.*
(2) Dealing with a criminal case justly includes—
(a) acquitting the innocent and convicting the guilty;
(b) dealing with the prosecution and the defence fairly;
(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
(e) dealing with the case efficiently and expeditiously;
(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
(g) dealing with the case in ways that take into account—
(i) the gravity of the offence alleged,
(ii) the complexity of what is in issue,
(iii) the severity of the consequences for the defendant and others affected, and
(iv) the needs of other cases.

61. Rule 3.2(2)(a) stresses that the Court is concerned with the *"real issues"*, *i.e.* not imaginary or irrelevant issues:

"The duty of the court
3.2.*—(1) The court must further the overriding objective by actively managing the case.*
(2) Active case management includes—
(a) the early identification of the real issues;
(b) the early identification of the needs of witnesses;
(c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
(d) monitoring the progress of the case and compliance with directions;
(e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
(g) encouraging the participants to co-operate in the progression of the case; and
(h) making use of technology.
(3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible."

62. Rule 3.2 imposes a duty on parties to assist the Court in clarifying the *"issues"*:

"The duty of the parties
3.3.*—(1) Each party must—*
(a) actively assist the court in fulfilling its duty under rule 3.2, without or if necessary with a direction…."

63. Rule 3.5(h)(i) requires parties to identify the "issues" to be identified in writing

> ***"The court's case management powers***
> ***3.5.****—(1) In fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules.*
> *(2) In particular, the court may—*
> *(a) nominate a judge, magistrate or justices' legal adviser to manage the case;*
> *(b) give a direction on its own initiative or on application by a party;*
> *(c) ask or allow a party to propose a direction;*
> *(d) receive applications, notices, representations and information by letter, by telephone, by live link, by email or by any other means of electronic communication, and conduct a hearing by live link, telephone or other such electronic means;*
> *(e) give a direction—*
> *(i) at a hearing, in public or in private, or*
> *(ii) without a hearing;*
> *(f) fix, postpone, bring forward, extend, cancel or adjourn a hearing;*
> *(g) shorten or extend (even after it has expired) a time limit fixed by a direction;*
> *(h) require that issues in the case should be—*
> *(i) identified in writing,*
> *(ii) determined separately, and decide in what order they will be determined; and*
> *(i) specify the consequences of failing to comply with a direction."*

Rule 3.20 CPR

64. Mr Kamlish QC sought to place reliance on Rule 3.20 of the Criminal Procedure Rules. This is misconceived. Rule 3.20 CPR provides for a defendant who wishes to argue abuse of process to set out his arguments in a skeleton argument. The Rules provide for the skeleton argument to be served so that any abuse of process argument can take place at a pre-trial hearing. I required the defence to provide their skeleton argument in order that an abuse of process argument could take place at a pre-trial hearing, namely, that to be held on 1st November 2016. I also directed the prosecution to provide a response in accordance with the rules. Rule 3.20 therefore lays down the requirements for a defence 'abuse of process' application. It does not give the defence *carte blanche* to hold an 'abuse of process' *in terrorem* over a trial; or somehow grant defence immunity from case management decisions in relation to 'abuse of process' arguments threatened or presaged in advance of a trial.

Criminal Procedure and Investigation Act 1996

65. Mr Aina QC helpfully pointed to section 40 of the Criminal Procedure and Investigation Act 1996 ("CPIA 1996"). Section 40 provides wide powers for the Court to make rulings:

> *"**40. Power to make rulings.***
> *(1) A judge may make at a pre-trial hearing a ruling as to—*
> *(a) any question as to the admissibility of evidence;*

(b) any other question of law relating to the case concerned.

(2) A ruling may be made under this section—

(a) on an application by a party to the case, or

(b) of the judge's own motion.

(3) Subject to subsection (4), a ruling made under this section has binding effect from the time it is made until the case against the accused or, if there is more than one, against each of them is disposed of; and the case against an accused is disposed of if—

(a) he is acquitted or convicted, or

(b) the prosecutor decides not to proceed with the case against him.

(4) A judge may discharge or vary (or further vary) a ruling made under this section if it appears to him that it is in the interests of justice to do so; and a judge may act under this subsection—

(a) on an application by a party to the case, or

(b) of the judge's own motion.

(5) No application may be made under subsection (4)(a) unless there has been a material change of circumstances since the ruling was made or, if a previous application has been made, since the application (or last application) was made.

(6) The judge referred to in subsection (4) need not be the judge who made the ruling or, if it has been varied, the judge (or any of the judges) who varied it.

(7) For the purposes of this section the prosecutor is any person acting as prosecutor, whether an individual or a body."

66. Thus, section 40 (1) CPIA 1996 makes it clear that a judge may make at a pre-trial hearing a ruling as to any question of law relating to the case concerned. A ruling may be made of the judge's own motion (section 40 (2) (b)). A ruling has a binding effect from the time it is made until the case against the accused is disposed of (section 40 (3)). Any judge may discharge or vary a ruling if it appears to him that it is in the interests of justice to do so (section 40 (4), (6)) (see generally *Blackstone*, para D15.45).

67. I reject Mr Raggatt and Mr Bennett's suggestion that the power under section 40(1) is limited and does not include questions such as the present, which they incorrectly characterised as a 'terminating ruling'. Section 40(1) is of general application.

68. As Mr Aina QC succinctly puts it, in modern times a judge has a public duty to be robust and ensure public money is not wasted on legal arguments which are fundamentally flawed. In these circumstances, the Court would be failing in his public duty if he did not take a robust approach.

69. For these reasons, in my judgment, it is well within the Court's powers under the CPR and section 40 CPIA 1996 to make such binding rulings as are appropriate regarding Mr Kamlish QC's abuse of process arguments as now formulated.

DECISION

70. As will be apparent from the above, in my view there is no proper basis in law or fact for any of Mr Kamlish QC's expanded 'abuse' arguments.

71. However, for present purposes, I confine my decision simply to what is necessary at the time, namely, a determination in relation to Mr Kamlish QC's 'bad faith' case in so far as it relates to Crown Counsel I, II, III and IV (and junior counsel). In my judgement, there is absolutely no basis for Mr Kamlish QC's imputations of 'bad faith' by Crown Counsel I, II, III or IV. The Note of the conference in 2014 by Crown Counsel I fully and properly explains the basis upon which a police CCTV expert rather than an 'expert, expert' was instructed in accordance with common practice (see above). The fact that DC Mather's evidence and the CCTV disclosure was later the subject of criticism in no way give rise to any imputation against Crown Counsel. No ground has been articulated or evidence put forward that would even suggest a *prima facie* case of misconduct. I am satisfied that the legal requirements under the second limb of *Crawley* i.e. executive *mala fides*, could never be met in this case and *ex parte Bennett* abuse cannot properly be argued in relation to Crown Counsel I-IV. Mr Kamlish QC's allegations against Crown Counsel I-IV (and junior counsel) are scurrilous and without foundation and should never have been made.

72. Accordingly, pursuant to my powers under section 40 of CPIA 1996 and the CPR, I rule that the Defence are not entitled to raise any argument by way of 'abuse of process' or 'bath faith' that implicates Crown Counsel I-IV and/or junior counsel.

73. I will invite Counsel to agree the form of an appropriate order.

January 2017 re-trial

74. If Mr Kamlish QC seeks to re-open this aspect of his 'abuse' argument, this will be a matter for the trial judge to deal with prior to or at the start of the third re-trial fixed for January 2017. An attempt to re-litigate the matter might itself amount to an abuse. As to the rest of Mr Kamlish QC's 'abuse' arguments, if pursued, these will be matters for the trial judge to consider and determine as necessary. Because I do not regard there is any material risk of Crown Counsel I-IV being required to give evidence at the third retrial or being in any way concerned therewith, I am content for the matter to remain listed on Circuit. Parties will be notified of the precise date and venue of the third re-trial shortly.

Professional conduct issue

75. This is a case in which, regrettably, Mr Kamlish QC has made indiscriminate and scurrilous allegations of *mala fides* at his present and former colleagues, as well as numerous other individuals and organisations, without regard to his professional responsibilities, or his duty to the Court, or the CPR, or the Overriding Objective. When challenged by the Court, he has resorted repeatedly to accusing the Court of 'bias'. His conduct is unbecoming of a barrister and is to be deprecated. His conduct falls to be considered under Rule C65.7 of the current Code of Conduct of the Bar of England & Wales.[1]

[1] Rule C65.7: *"You must report promptly to the Bar Standards Board….if you have committed serious misconduct".* The Guidance C96 includes conduct that poses *"a serious risk to the public."*