



Neutral Citation Number: [2010] EWCA Crim 1756

Case No: 2010/01468/D5

**COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM**  
**MR JUSTICE FLAUX**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/07/2010

**Before :**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**MRS JUSTICE RAFFERTY**  
and  
**MR JUSTICE MACKAY**

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**Between :**

**KS**  
**- and -**  
**Regina**

**Defendant**

**Respondent**

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Hearing dates: 5<sup>th</sup> and 6<sup>th</sup> July 2010  
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**Approved Judgment**

## **The Lord Chief Justice of England and Wales:**

1. This is an interlocutory appeal by KS (the defendant) under section 35 (1) of the Criminal Procedure and Investigations Act 1996 against an order made by Flaux J at Birmingham Crown Court on 15 February 2010 that his forthcoming trial for offences of assisting another to obtain the benefit of criminal conduct and, further, converting or transferring the proceeds of criminal conduct, both contrary to Section 93 of the Criminal Justice Act 2003 (the 2003 Act) should be conducted without a jury. The appeal was allowed at the end of the hearing on 6<sup>th</sup> July. We adjourned our judgment in order to reflect on the issues raised in the appeal and in the earlier appeal of J.S.M. heard on 9<sup>th</sup> June.
2. The circumstances in which Flaux J was required to address the problem of trial by jury or trial by judge alone, are fully explained in the judgment of this court in *R v KS* [2009] EWCA Crim 2377. In very brief summary, this court upheld the decision of HH Judge Alexander QC at the defendant's trial that the jury should be discharged on the ground of jury tampering, but decided that, on the basis of a perception of possible bias against the defendant, the trial should not continue before him, without a jury.
3. The question of trial by judge and jury or judge alone was remitted for decision to the Presiding Judges of the Midland Circuit. Flaux J was satisfied, first, in accordance with section 44 (4) of the 2003 Act, there was a real and present danger that jury tampering would take place at a forthcoming trial with a jury and second, in accordance with section 44 (5) of the Act, that despite any reasonable steps which might be taken to prevent such jury tampering, the likelihood of such tampering was "so substantial" that the interests of justice required the trial to be conducted without a jury (section 44(5) of the 2003 Act). Accordingly the order under appeal was made. Although it is not necessary to repeat the language of section 44 (4) and 44 (5) of the 2003 Act, we underline that although the considerations identified in these two subsections are distinct, and must both be established before an order for trial by judge alone can be made, the context and nature of the threat of jury tampering falls for examination when the question raised by section 44 (5) and the reasonableness of proposed protective steps arises for consideration. The proposed protective measures must be proportionate to the threat.
4. What is immediately striking about the present proceedings is that relatively minor attention appears to have been directed to the nature of the jury tampering which actually took place before Judge Alexander. Nothing in the material we have seen adds anything to what was known about the nature of the jury tampering which led to his decision. This was the tenth trial, arising from a very substantial VAT fraud. It was not until the summing up had concluded, and the jury was in retirement, that any suggestion of jury tampering arose. Until then no protective steps had been taken in any of the trials. We now know that the process of suborning one of the jurors had begun rather earlier in the trial, and it is clear that if the problem had immediately been drawn to the attention of the judge, before he began his summing up, he would almost certainly have discharged the single juror who was involved in the process of tampering and contamination rather than the entire jury which was not. As it was, given the late stage which the trial had already reached, although the activities which led to his decision involved a single juror, the judge had no option but to discharge the entire jury.

5. The problem arose because of regular contact between members of the jury and members of the public (but not the defendant himself) who gathered together throughout the trial for the purposes of having a smoke. As we explained in the earlier judgment the risk of jury contamination, at any rate in relation to trials lasting more than a day or two, was “inevitable”. We are prepared to approach this appeal on the basis that the associate of the defendant who became involved in jury tampering was alert and would continue to be alert to the possibility if an appropriate opportunity appeared to arise. However this is very far from the kind of case, with which each member of the court is familiar, where individual jurors were identified, and contact with them made away from the precincts of the court, or its immediate vicinity.
6. Given the clear evidence that one of the jurors in the trial before Judge Alexander was suborned, and that he failed to notify the court of the improper approaches made to him, and the material drawn to our attention at the PII hearing, we accept that an undoubted level of threat to the trial process is established. If the opportunity were to arise at any stage there is a realistic threat that it would be taken, as it was taken at the earlier trial. At the same time we can detect no evidence of careful planning or the risk of careful planning to threaten, or intimidate, or bribe, or even dissuade the jury, or any juror from returning a true verdict. The risk in this case is nothing like as strong as the kind of threat identified in J, S, and M. What is more, we have also to bear in mind:
  - (a) That the casual arrangements for smokers at Northampton Crown Court which enabled members of the public freely to mingle with jurors in sociable pleasantries, thus giving the opportunity for contact, will never be repeated;
  - (b) that in the vast majority of but, we accept, not all, cases, any juror who may be approached will inform the court so that preventive action may quickly be taken; and
  - (c) if the jury has to be discharged because of contamination, as this defendant fully appreciates, the consequence would almost certainly be that the judge would continue the case and reach and explain the reasons for his verdict.

Considerations like these should always be borne in mind when the Crown makes an application for trial by judge alone.

7. Taken together, in themselves, these considerations provide a very powerful persuasive argument, against any further jury tampering. And it is at this stage of the argument that we are unable to agree that the requirements of section 44(5) of the 2003 Act have been established. Major Crown Courts, dealing with heavy criminal cases, are quite accustomed to dealing with levels of threat far higher than that posed in this case. In our judgment a fairly limited level of jury protection could reasonably be provided which would sufficiently outweigh the potential threat of jury tampering. The necessary decisions will, of course, be made by the trial judge, but on the material we have seen, appropriate protection for this jury would be likely to be established at a fairly low level. Seven options were drawn to our attention at the PII hearing, the first at the lowest level, and the seventh at the most serious. We emphasise the link between the nature of the threat and danger of jury contamination, and the steps reasonably available to be taken to reduce the risk to manageable proportions and

caution against any unduly alarmist proposals, alarmist, both in the sense of the likely adverse impact on the members of the jury themselves, and on the drains on precious police resources of providing them. The new statutory arrangements do not undermine, but rather confirm, the need for the issues of jury protection to be handled in a realistic and proportionate way.

8. We shall not comment further save that our present view of the realities of this case is that reasonable precautions for the protection of the jury against possible contamination would fall somewhere between the first and second options, marked by an unequivocal direction to the jury, no doubt repeated from time to time, about their collective responsibility for the verdict and the proper conduct of all members of the jury, as well as appropriate warnings about the need to continue to examine the evidence objectively and dispassionately. (see *R v Thompson and others*, [2010] EWCA Crim 1623)
9. These are the reasons why this appeal was allowed.