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2010/0939/B1 (6)

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT OXFORD (1)
MR JUSTICE SAUNDERS
ON APPEAL FROM THE CROWN COURT AT HARROW (2)
HIS HONOUR JUDGE GREENWOOD
ON APPEAL FROM THE CENTRAL CRIMINAL COURT (3)
HIS HONOUR JUDGE BEAUMONT QC
ON APPEAL FROM THE CROWN COURT AT NEWPORT ISLE OF WIGHT (4)
HIS HONOUR JUDGE WHITE
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE UPON TYNE (5)
HIS HONOUR JUDGE FAULKS
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN (6)
HIS HONOUR JUDGE BROWNE QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE HUGHES
and
MR JUSTICE BEAN

Between :

R
- v -
Benjamin Thompson (1)

R
-v-
Jason Crawford (2)

R
-v-
Ahmed Gomulu (3)

R

-v-

Christopher Allen (4)

R

-v-

David Blake (5)

R

-v-

Kamulete Kasunga (6)

Mr M. Swift QC and Mr P.J. Stage for the Appellant

Mr A. Edis QC for the Crown (1)

Mr J. Israel for the Appellant

Mr A. Edis QC and Mr G.E. Heimler for the Crown (2)

Mr A. Metzger for the Appellant

Mr J. Rees QC for the Crown (3)

Mr R. Germain for the Appellant

Mr A Edis and Miss K. Lumsdon for the Respondent (4)

Mr T. Moran for the Appellant

Mr J. Smith for the Respondent (5)

Mr M. Swift QC and Mr M. Aslam for the Appellant

Mr A. Edis QC for the Crown (6)

Hearing dates : 25th -27th May 2010

Approved Judgment

Lord Chief Justice of England and Wales:

1. The common features of these six cases is alleged jury irregularity. They were heard together. We emphasise at the outset that allegations of this kind rarely trouble the Court of Appeal. The overwhelming majority of jury trials proceed without jury irregularities. Generally speaking, if these problems become apparent during the course of the trial itself, they must be addressed and handled by the trial judge. Depending on the context he may give further directions to the jury, if necessary in severe and unequivocal language (*R v Smith* [2005] 1WLR 704), which he may or may not combine with discharging an individual juror or indeed, in the ultimate analysis, the entire jury. It is therefore to be expected that any irregularity will have been addressed and cured during and as part of the trial itself.
2. Much more difficult problems arise when after the verdict has been returned, attention is drawn to alleged irregularities. This may take the form of a complaint from a defendant, or his solicitors, or in a very few cases it may emerge from one or more jurors, or indeed from information revealed by the jury bailiff. It is then beyond the jurisdiction of the trial judge to intervene. Responsibility for investigating any irregularity must be assumed by this court. In performing its responsibilities, it is bound to apply the principle that the deliberations of the jury are confidential. Except with the authority of the trial judge during the trial, or this court after the verdict, inquiries into jury deliberations are “forbidden territory” (per Gage LJ in *R v Adams* [2007] 1 Cr App R 449). If any complaint about jury deliberations is received by the trial court after verdict it is immediately referred to this court and whether the complaint has been received from the court of trial or by this court directly, the practice is to examine each case to see whether or not, exceptionally, further inquiries ought to be made, and if so, to invite the assistance of the Criminal Cases Review Commission to conduct the necessary inquiry.
3. In *R v Mirza; R v Connor and Rollock* [2004] 1 AC 1118, the House of Lords explained the reasons which underpin this rule in terms which require no repetition in this judgment. (See, in particular, Lord Slynn at paras 47-55, Lord Hope, at paras 113-123, Lord Hobhouse at paras 142-146, and Lord Rodger, at paras 163-172). The rule against any investigation or inquiry into jury deliberations is a rule of admissibility; evidence about the deliberations of the jury is therefore inadmissible.
4. The rule is subject to two narrow exceptions. The first arises if it emerges that there may have been a complete repudiation of the oath taken by the jurors to try the case according to the evidence; examples include a decision arrived at by the casting of lots or the toss of a coin, or the well-known case of the use, or rather misuse, of an Ouija board. If there are serious grounds for believing that such a repudiation may have taken place, this court will inquire into it, and may hear, *de bene esse*, evidence, including the evidence of jurors themselves, in order to decide whether it has happened. If it has, the verdict will inevitably be unsafe, and any resulting conviction will be quashed.

5. The second exception arises in cases where extraneous material has been introduced into the jury deliberations. The verdict must be reached, according to the jury oath, in accordance with the evidence. For this purpose each juror brings to the decision-making process, his or her own experience of life and general knowledge of the way things work in the real world; that is part of the stock in trade of the jury process, and the combination of the experience of a randomly selected group of twelve individuals, exercising their civic responsibility as a collective body, provides an essential strength of the system. However, the introduction of extraneous material, that is non-evidential material, constitutes an irregularity. Examples are provided by earlier decisions of this court. They include telephone calls into or out of the jury room, papers mistakenly included in the jury bundle, discussions between jurors and relatives or friends about the case, and in recent years, information derived by one or more jurors from the internet. All this is familiar territory, and no citation of authority is needed. Where the complaint is made that the jury has considered non-evidential material, the court is entitled to examine the evidence (possibly after investigation by the CCRC) to ascertain the facts. If extraneous material has been introduced into the decision making process, the conviction may be quashed.

Collective Responsibility

6. The verdict of the jury, whatever it is, is delivered in open court in their presence. It is the verdict of them all (or where appropriate, the statutory majority). They have collective responsibility for the verdict. What has perhaps not been sufficiently emphasised thus far is that the collective responsibility of the jury is not confined to the verdict. It begins as soon as the members of the jury have been sworn. From that moment onwards, there is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed. Where it appears that a member of the jury may be misconducting himself or herself, this must *immediately* be drawn to the attention of the trial judge by another, or the other members of the jury. So, if for example, an individual juror were to be heard saying that he proposed to decide the case in a particular way regardless of his oath to try it on the evidence, or he were demonstrating a bias based on racism or some other improper prejudice, whether against a witness or the defendant, these things must be reported to the trial judge. So must outside interference, such as imparting information or views apparently gathered from family or friends, or using a mobile telephone during deliberations, or conducting research on the internet. The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.
7. Recent research (Thomas: *Are Juries Fair?*, February 2010) addressed the risk that a substantial proportion of jurors may not know, or be uncertain about what they should do if they are concerned that something improper or irregular has occurred or is occurring amongst them. With this concern in mind we have examined both the material sent to potential jurors before trial and the directions commonly given by judges at trial, after the jury is sworn, as exemplified by those given in the cases now before us. None was unfair or deficient. We believe, however, that the material supplied to potential jurors could with advantage be strengthened. We invite Her

Majesty's Court Service to consult the Judicial Studies Board (JSB) on how best to explain the collective responsibility of jurors examined in the previous paragraph.

8. The directions given by trial judges should underline unequivocally the collective responsibility of jurors for their own conduct. We do not attempt to lay down a standard form of words. We anticipate that an appropriate explanation of this responsibility can usually be combined with the kind of general introduction to the duties of the jury which judges deliver immediately after the jury is sworn. This fits naturally with the explanation of the basic rule, that they have just taken an oath to try the case on the evidence heard in court. It fits equally comfortably with the explanation to jurors that their discussions will always be respected as confidential, but must be confined to themselves, and not extended to include family and friends. The direction to report any concern or possible irregularity among their own number can be combined readily with a similar direction to report any approach made to them by any third party, and the anxieties that such directions are capable of generating can be allayed, if the judge thinks it helpful, by explaining that such occurrences are rarely encountered. Jurors should readily understand that any irregularity, if unusually it should it occur must be brought to the attention of the trial judge immediately, since precisely because of confidentiality and collective responsibility for the verdict, it will be too late to do so after the end of the trial. There is useful guidance which can be adapted to the needs of any individual case in the recent new edition of the JSB Bench book.

Deliberations

9. Jury service is not easy; it never has been. It involves a major civic responsibility. Among individual jurors there will be a vast range of personality and characteristics. By their very nature some trials require jurors to address deeply sensitive human problems. Some discussions will be tempestuous, with powerful arguments, and counter arguments, and in such cases discussions by their nature will be exhausting. Our confidence in the jury system ultimately depends on the belief that, whatever the difficulties involved in the process, after reflecting on the views expressed by the other members of the jury, each juror will be faithful to the dictates of his or her conscience based on examination and analysis of the evidence, so that those who cannot agree with the views of their colleagues stand firm by their consciences. Jurors now have the opportunity to dissent, and a verdict of a statutory minimum number of jurors, may be accepted. We acknowledge the danger that a juror who is in a minority may be disturbed at his or her failure to persuade the other jurors to his or her point of view, and where the majority has convicted, to the sensitivity of a dissenting juror that an injustice may have been done. There are occasions when it is difficult to avoid the conclusion that a post-trial letter to the judge complaining about different aspects of the process of deliberation is no more than a protest at the verdict. In the end, however, confidence in the system of trial by jury is at least in part dependent on the belief that jurors do not violate their consciences, and that they are capable of resisting pressure from any source, including that of their fellow jurors, and, like the jury at the Old Bailey in the historic trial of William Penn and William Meade that they will forthrightly mind "their privilege" and not give "away their right".

10. The latest research canvasses the suggestion that some jurors might welcome “more information on how to conduct their deliberation”. Like any other body of individuals called to examine evidence before reaching a conclusion, the way in which different groups may decide to proceed is individual. We know that different people concentrate in different ways, and that some are voluble and reach their conclusions as a result of discussions, while other prefer quiet thought. What is needed is guidance from the judge which reminds the jury that each member has an equal responsibility for the verdict, that it is inevitable that different views will be expressed about different features of the case, and there must be reasonable give and take between the members of the jury, with an opportunity for each to be heard and his or her opinions considered. No formula can be prescribed.

Use of the Internet

11. The use of the internet has expanded rapidly in recent years and it is to be expected that many, perhaps most, jurors, will be experienced in its use and will make habitual reference to it in daily life. It has already impacted on the court in cases such as *R v Karakaya* [2005] 2 Cr App R 5, *R v Marshall and Crump* [2007] EWCA Crim 35 and *R v Thakrar* [2008] EWCA Crim 2359; see also the experience in New Zealand, *R v B* [2008] NZCA 130. Just as it would in any other instance where it was satisfied that extraneous material had been introduced, the approach of this court is to make inquiries into the material. If, on examination, this material strikes at the fairness of the trial, because the jury has considered material adverse to the defendant with which he has had no or no proper opportunity to deal, the conviction is likely to be unsafe (*R v Karakaya*). If the material does not affect the safety of the conviction, the appeal will fail.
12. It is, however, apparent, that the use of the internet is so common that some specific guidance must now be given to jurors. We agree with the approach adopted in the current JSB Bench Book. Jurors need to understand that although the internet is part of their daily lives, the case must not be researched there, or discussed there (for example, on social networking sites), any more than it can be researched with, or discussed amongst friends or family, and for the same reason. The reason is easy for jurors to understand. Research of this kind may affect their decision, whether consciously or unconsciously, yet at the same time, neither side at trial will know what consideration might be entering into their deliberations and will therefore not be able to address arguments about it. This would represent a departure from the basic principle which requires that the defendant be tried on the evidence admitted and heard by them in court. Again, we do not purport to lay down a standard form of words; the sense of the message is familiar to all judges. What matters is that it should be explicitly related to the use of the internet. We recommend a direction in which the principle is explained not in terms which imply that the judge is making a polite request, but that he is giving an order necessary for the fair conduct of the trial. Such a direction will naturally fall to be given at the outset of the trial, in the same way as the direction as to collective responsibility addressed earlier in this judgment.

Written material for jurors

13. One of the cases before us raises a question related to the written material provided by the judge for the jury. The trial judge must decide whether to reduce his directions of law, or some of them, into writing, or whether written steps to verdict which may be particularly useful if there are several possible basis for conviction, or several possible offences, or defences to consider, may be of assistance to the jury. It has become much more common for a written extract of the central or critical part of the directions of law, or written steps to verdict, to be provided. Whether either practice will be helpful to a jury in a particular case must remain for the judgment of the judge. In a single issue case he may conclude that no document is needed. In others, he may be concerned that reducing directions to writing would either burden the jury with over-long material or would isolate, potentially unfairly, and give prominence to, some parts of the directions rather than others. In others, it will be apparent that either the central parts of the legal direction will be helpful if reduced to writing, or, more often perhaps, that a one-page “steps to verdict” written analysis will enable the jury to remember the more discursive legal directions and apply them systematically. If the former practice is adopted, the judge will make it clear to the jury that the written document does not cover every area of law and that the directions given orally are equally binding on them. All such written documents will of course be discussed with counsel before they are finalised, and the court associate must ensure that a copy of the final version handed to the jury is preserved on the court file.

14. We can now address each of the present cases.

Benjamin Thompson

15. Benjamin Thompson was acquitted of attempted murder but convicted (majority verdict 10/2) on 16 October 2009 at Oxford Crown Court before Saunders J and a jury of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act.

16. On 29 April 2009 the young woman with whom he had been in a relationship was stabbed four times with a 6” long serrated blade kitchen knife. She was stabbed first in her left side, and after she fell to the floor Thompson sat on her and stabbed her again in the shoulder abdomen and chest. The knife was pushed slowly in to her chest, and he told her that she would die. Her injuries were severe. She was fortunate to survive. The prosecution case was that the appellant had attacked his victim without warning, and that from his words and actions it was clear that he intended that she should die.

17. Thompson’s case was that he had acted in self defence. She had attacked and injured him with a knife, and fearing that he would pass out and that she would then kill him, he picked up another knife and stabbed her to protect himself. The stab wounds to the chest, side and shoulder were inflicted deliberately, but in necessary self defence, and the fourth wound, to her abdomen, was caused accidentally as she pulled him on top of her.

18. The trial was full of emotional intensity, as the relationship between the appellant and the complainant was analysed and described in great detail to the jury. The issue was whether Thompson was acting in lawful self defence at the time when he inflicted the injuries, and if not whether he intended to kill the complainant, or cause her really serious injury.
19. No complaint is directed at the conduct of the trial or the summing up.
20. The case was opened on 5th October 2009. The jury retired on 13th October. During its retirement the jury displayed no inhibition against seeking further directions from the judge as and when necessary. At 12.35 on 15th October an appropriate majority direction was given. By 16th October no less than four notes were received and the judge directed the jury as appropriate. On 16th October it was known that neither the judge nor two of the jurors would be available during the afternoon. Shortly before 12.05 the judge received a fifth note from the jury which stated that given “a little more time” the jury would be able to deliver a verdict. Counsel for the appellant submitted that the jury deliberations should be postponed until the following Monday morning. The judge disagreed. At 12.05 he directed the jury in open court that they should continue their deliberations, emphasising in unequivocal terms that they were not and should not feel under any pressure to deliver their verdicts that day. The majority verdict was returned at 13.10. On 8th December 2009 the appellant was sentenced to 6 years’ imprisonment. A later application by the Attorney General for the sentence to be treated as unduly lenient, and increased, was rejected by this court. (see [2010] EWCA Crim 748)
21. “Some six days” after the verdicts, four jurors came to court. They described to members of court staff how stressful they had found the trial, and one of them wondered whether she was entitled to write to the appellant while he was in prison. They also sought to initiate discussions about events at trial. That was stopped. They were told that their concerns, if any, should be put in to writing. On 28th October 2009 a letter was sent to Saunders J by one of the jurors, “with the full support of five other jury members” who appended their signatures. Thereafter a number of letters were written by one juror to the applicant, expressing sympathy for him, but conscientiously not offering any comment about the trial, the jury deliberations, or the verdict.
22. The letter was written “after a week of soul searching”, on the understanding that the verdict could not be altered, but in the hope that “calm reflection” would “help...to draw a line under this experience and the result we were part of”.
23. The letter raises a number of concerns felt by the writers. They were “initiated” in to the case at speed, and the pressures were “relentless” because of the “nature and content of the case”. The deliberation period was “mentally exhausting” and jurors sought to put their points of view across but not every member of the jury approached their responsibilities “in the way we would wish to be spoken to ourselves”. Although the writer was the foreman, a different person was elected to chair the

meetings, but he showed “very strong views and lack of interactive skills with others”, and “little compassion to he more intimidated jury members”.

24. One juror “pulled five pages of questions” due to homework he had completed on the internet, relating to the case and legal terminology, completely disregarding “the judge’s instructions that they should not do this”. Indeed, although we cannot be sure whether it was written in consequence of reference to the internet or not, it is correct that the second jury note, sent early on 15th October, sought detailed further directions on the law. On the last morning the jury decided to change the chair, and the juror reacted in an “appalling and aggressive manner”.
25. The letter then speaks of “the added embarrassment of a juror falling asleep during the case”, and suggest that this juror lacked “good coherent communication skills”. This it was stressed did not represent “discrimination against any UK resident”, from which we assume that the first language of this juror was not English.
26. The letter then goes on to record that because of “mental exhaustion and pressure by the self-employed members” among the jury, they were “perhaps” knee-jerked into an answer that we have “more readily fought and disagreed with having the weekend to re-group and compose ourselves individually”. The letter goes on to record that “you did offer us this, however in the deliberating room it is difficult to deal with this situation when emotions are running high and self-employed people were so reluctant”.
27. The letter ends by recording that “as a small compassionate group of people we are not going to change the verdict... and must acknowledge the decision was made collectively”.
28. On analysis much of this letter is directed to the jury deliberations in what plainly was an emotionally troublesome trial before which, no doubt fully appreciating its potential for difficulty and stress, the trial judge had given the jury very detailed and unequivocal directions about their responsibilities. Much of the content of the letter is related to the stress of the deliberation process and the way in which the jury proceeded. This is clear *Mirza* territory and inadmissible. Mr Swift sought to relate the passages in the letter about the debate among the jury on the morning before the verdict was reached, to the submission by defence counsel that the trial should be adjourned until the following Monday. The short answer to this submission is that the judge handled the issue of timing impeccably, in the context of an express note from the jury that with a little more time they would be able to deliver a verdict, at the same time emphasising that they should not feel under pressure to deliver their verdicts that day. In effect, Mr Swift is asking us to engage with the information in the letter about the process of deliberation to bolster his argument that the judge’s refusal of defence counsel’s application was wrong, and in effect, demonstrated to be wrong by the contents of the letter. We cannot do this, but even if we could, we can see no fault in the approach taken by the judge, and no reason to doubt that at the time when the jury verdict was reached, it did represent the conscientious conclusion of the majority who

reached it. For similar reasons we cannot investigate the alleged absence of coherent communication skills, which was converted by Mr Swift in his attractive arguments into the inability of the juror to understand English. If this were the case, the deficiency would have emerged much earlier, at the very outset of the trial when the juror was sworn. It is not clear whether the assertion that the juror fell asleep was directed to a part of the trial, or the course of the deliberation. Either way, this should and would have been dealt with during the trial itself, or during the deliberations. If during the trial, it will have been remedied by the judge, and on the face of the description of the nature of the jury deliberations, it is improbable that the juror will have fallen asleep without at least one other member of the jury waking him up.

29. The final question arises from the allegation relating to the internet. The use of the internet would, for the reasons we have given, have constituted an irregularity. Assuming that the allegation is correct, the juror had disregarded unequivocal instructions by the judge. The letter does not suggest that the juror, or anything he or she said to the other members of the jury, led them, in dereliction of their duty, do other than follow the directions in law given by the judge, as supplemented by him in answer to the numerous notes in which the jury sought further directions. Given the detailed way in which the letter is expressed, we are satisfied that if there had been any reason to believe that the verdict of the jury had been reached on the basis of the researches conducted by the juror on the internet rather than the judicial directions (which were impeccable) the letter would not have ignored such an important consideration.
30. On the basis of the material in the letter which it is permissible for us to consider, were satisfied that notwithstanding the irregularity drawn to our attention, no further investigation of the misuse of the internet is required. The jury verdict is not unsafe. The appeal is dismissed.

Jason Crawford

31. Jason Crawford was convicted on 21 January 2010 at Harrow Crown Court before His Honour Judge Greenwood and a jury of two counts of possession of class A drugs (cocaine) with intent to supply. The verdict was unanimous.
32. Crawford was stopped by the police on 31st January 2009. He was in possession of a substantial quantity of cocaine. His home address was searched. A further quantity of cocaine was found, along with drug dealing paraphernalia. He pleaded guilty to simple possession of the drugs on the basis that he had a drug habit and that the cocaine was for his personal use. The prosecution rejected this plea and contended that he was in possession with intent to supply. This simple issue was decided by the jury adversely to the appellant.
33. No complaint is directed at the conduct of the trial or the summing up. The issue in this appeal is confined to complaints about or arising from the jury deliberations.

Sentence was adjourned, the judge making it clear that a custodial sentence would be under consideration.

34. After the jury dispersed, two of them spoke to a police officer. They asked him what would happen to Crawford. He told them that the judge had mentioned a custodial sentence. They seemed surprised and said they felt sorry for him. Prosecuting counsel saw the conversation taking place. Just in case he might assist, he joined the group. One juror asked him whether he thought the appellant was guilty, and naturally he declined to answer and said no more.
35. On the following day, according to the solicitor for Crawford, a female juror telephoned him, expressing unhappiness at the verdict, and asserting that she had been put under immense pressure by other jurors to change her decision. She referred to her conversation the previous day with the police officer, and said that she wished to write to the sentencing judge because she was adamant that the appellant was not guilty. She said that another juror, who she named, had also been put under great pressure to change her verdict. On 28th January she sent an email to the solicitors suggesting that the second juror had drafted an email which she wished to sent to them, but in the result no such email was received.
36. Accepting the integrity of the solicitor for the applicant, and assuming further, that the individual who spoke to him was indeed a member of the jury which had convicted the appellant, this appeal is proceeding on the basis of disclosures by the juror of her complaints about the pressures exerted on her during the jury deliberations and it is confined to those deliberations. This is classic *Mirza* territory. Material of this kind, whatever form it may take, is inadmissible. No ground of appeal has been established. The appeal is dismissed

Ahmet Gomulu

37. Ahmet Gomulu was convicted on 22nd September 2008 at the Central Criminal Court before the Recorder of London (His Honour Judge Beaumont QC) and a jury of murder and wounding with intent contrary to section 18 of the Offences Against the Person Act 1861.
38. These convictions arose from fatal injuries suffered by the deceased, and a stab wound sustained by one of his friends on the afternoon of 27 December 2007 in Islington. The deceased suffered two knife wounds, one in his leg and the other to the upper left chest which penetrated to a depth of 80mm, transfixing the upper left lobe of the lung and cutting the vein which runs from the heart to the lung causing uncontrollable blood loss and his death at the scene. His friend sustained a 1½” stab wound just below the ribs.
39. There was no dispute that all these injuries were inflicted by the appellant. He left the scene and was arrested three days later. In a prepared statement, setting out the

defence developed at trial, he alleged that the victims had stared at and confronted him, and one of them had produced a knife. He managed to disarm him, and then swung the knife about to deter the attackers. He tried to run away from the scene but was chased and caught. Throughout he was simply trying to ward off the attack and not aiming to stab anyone. He was in fear, and acted in self defence. During the incident the deceased had grabbed at him, and tripped, falling to the ground pulling the appellant with him. The appellant fell on top of the deceased whilst still holding the knife, and this must, unintentionally, have caused the injuries.

40. The issues were clearly identified to the jury. No complaint is directed at the conduct of the trial or the summing up, which it is accepted was impeccable. The issue in this appeal is the possibility of jury misconduct, or at any rate irregularity: it has nothing to do with jury deliberations.
41. The concerns arise in this way. After conviction the appellant's family described to his solicitor how they had observed a man who had been present in the public gallery throughout most of the trial. Later investigation identified this individual as the deceased's brother. He was seen by a neighbour of the defendant's family. She had attended the trial for some 6 days, but did not know the defendant or his family, except for one brother who was a distant acquaintance. She reported that during one of the lunch breaks she had seen the deceased's brother, sitting talking to one member of the jury, and in proximity to three other jurors. It was also reported that the deceased's brother had been seen by the appellant's father giving members of the deceased's family some kind of "thumbs up" when the verdicts were imminent, in a way which might lead to the conclusion that he knew in advance what the verdict would be.
42. The court invited the Criminal Cases Review Commission to investigate all the relevant considerations, and it has done so with its customary thoroughness and objectivity. At the hearing we heard the evidence, *de bene esse*, of Elif Urger, and Kahit Gomulu, the appellant's father, and Salif Uoduridiss, the deceased's brother. Elif Urger struck us as a decent, honest young woman, doing her best to assist the court: and even allowing for their personal emotional involvement in the case, we were similarly struck by the appellant's father and the deceased's brother. In the end, on close examination, there is nothing in the concerns to which the court's attention was drawn. In particular it is clear that Elif Urger may well have seen the deceased's brother talking, during a luncheon adjournment, to a black man. She thought this man was a juror. In fact, from time to time, the deceased's brother took his lunch with a male relative of much his own age. What, however, is clear was that the witness had very limited opportunity indeed to see the man who she thought was a member of the jury. She saw him once, a very brief glance, in which she espied the profile rather than the full face of the man to whom the deceased's brother was speaking. The view was from some distance away, and indeed through railings. She did not immediately recognise the individual as a juror, although she had been attending the trial, and she accepted that although she believed that he was a juror, she could not be sure. The appellant's brother adamantly denied that he had had any contact with any juror. He understood the principle that required that he should not in any circumstances speak to a juror. We accepted his evidence. As to the possibility of any contact with three

other jurors, Miss Urger's evidence came to no more than that she had seen three white women walking in the same garden area where the deceased's brother was talking to his relative. She was sure that one of the women was a juror, and the other two looked as though they may have been. She saw no conversation. All she saw the appellant's brother turn round and smile in their direction.

43. The attention of the appellant's father was first drawn to the deceased's brother because of his note-taking, which he readily accepted he had been making, in his capacity as a photo journalist, and because of his interest in the case. After the jury retired, and he was informed that the jury had reached its decision, a group of people gathered by the doors, and the appellant's father heard the deceased's brother telling them, in effect, that they must behave "as if everything was OK". The deceased's brother agreed that he had said to the members of his own family that they should not make a noise when the verdict was to be delivered, or they would be thrown out.
44. In summary, after investigation, there is not a shred of evidence to suggest any jury misconduct or irregularity. Very much more potent evidence would have been required before we should have contemplated further investigations of the juror whose conduct was impugned.
45. The appeal is dismissed.

Christopher Allen

46. Christopher Allen was acquitted of two counts of rape (counts 2 and 3) and two counts of indecent assault (counts 4 and 5) but convicted on 15 July 2009 in the Crown Court at Newport, Isle of Wight, before Judge White and a jury of one count of rape (count 1) and one count of indecent assault (count 6). The guilty verdicts were unanimous.
47. The allegations against Allen arose from a sexual relationship between him and the complainant, which began in 1992 and ended in April 1994. When they met the complainant was 15 years old, and the appellant was 20. She became pregnant, and gave birth to her son some 3 months after her 16th birthday. The relationship was turbulent, and did not last long. After the separation she suffered an emotional breakdown, and then underwent many years of psychiatric treatment. He subsequently became an alcoholic. There were prolonged proceedings in the Family Court. She made a complaint of rape in 1996. He was not charged, on the basis that the complainant's mental health was too fragile, and the potential for further damage to it so great that criminal proceedings at that time would be inappropriate.
48. In 2007, during the course of an investigation of Allen's association with another under-aged girl, the police re-visited the complainant. She asserted that during their relationship she had been repeatedly raped by him. These allegations, together with

the complaints made in 1996, form the basis of the allegations against him. Counts 1 and 6 related to the 1996 complaints.

49. The remaining counts identified specific occasions of rape and indecent assault which were disclosed in November 2007, but had been omitted from the earlier complaint.
50. The defence case was that throughout the relationship between them, their sexual activity had been entirely consensual. This was the essential issue for the jury.
51. It is suggested that the judge misdirected the jury on consent, and that he should have discharged the jury on two separate occasions, first, after the complainant had given evidence that the appellant had “done to someone else what he had done to her and that he was not going to continue getting away with it”, and second, when it emerged towards the end of the trial that there was a real danger that the jury had become aware of the fact that the appellant was facing a second long trial.
52. We shall deal first with the grounds unrelated to the broad jury questions which arise for consideration in this group of appeals.
53. The first time any question of discharging the jury arose was in the course of the complainant’s evidence in cross examination. She was asked to explain the omission from her evidence to the Family Court the incident referred to in her ABE interview which occurred on the last day when she and the appellant lived together. She replied “I do not want anybody else to know exactly the same as every other woman in that situation doesn’t either. I didn’t want anyone to know what he did. I didn’t want to talk about it. I know that he has done it to someone else; I am not doing it for me, I am making sure he does not do this to anybody else because he is not going to continue getting away with this...”. We are told that the complainant spoke very softly, and indeed that the relevant tape had to be listened to many times before the transcript of the questioned answer could be provided.
54. The judge addressed the application to discharge on the basis that this outburst “could have meant anything” and that when put in the context of the entire case, its impact would not be prejudicial to the defendant. In any event the matter could be dealt with in the course of summing up. Having considered the submissions, we can see no reason to doubt that this was a perfectly sensible decision, within the ordinary ambit of judicial control over the trial. In the end the issue was clarified for the jury by a formal admission that the police had investigated the defendant’s relationship with a young female and no sexual offences had been disclosed. The judge’s summary of the evidence could not have been more favourable to the appellant. He said “well you know from your admission that there is no suggestion at all that there has been anything wrong with Mr Allen’s relationship with this young girl whom he has been seen about with. None whatsoever”. That was more than generous. There had been suggestions of concern, and indeed they were due to be addressed at the appellant’s second trial, which raises the distinct jury related ground of appeal. But as to the way

in which the evidence of the complainant on this topic was addressed, no justified complaint has been established by the appellant.

55. The second question is whether the judge misdirected the jury by failing to give them a proper direction about the meaning of consent in the context of the allegation of rape. We have examined the summing up. The judge gave a clear direction of law, in which he used the word “consent” accurately in context, explaining the difference between consent and the refusal or withdrawing of consent in the context of a long-standing sexual relationship. “A partner” he said, “is always entitled to say “No” and someone only consents legally if they agree by choice and where they have the freedom and capacity to make that choice. Having said that, consent does not necessarily have to be spoken. It can be implied from people’s behaviour in the way that they respond to each other...you don’t enter into a form of contract every time you have sex with somebody. It does have to be more than simply giving up a struggle when you are making it clear you don’t want it and just letting things happen. There is a dividing line...”
56. Later in the summing up, from time to time, the judge used the word “want” in effect, as synonymous for consent. Thus, summarising the prosecution case he said, “when she made it clear she didn’t want to that he pressurised her into sex” and later, that what she was saying in a nutshell was that “she made it clear on a number of occasions that she didn’t want it”. In the context of evidence relating to the use of a condom he summarised her evidence “when I said I didn’t want it with a condom he should have respected that but he didn’t”.
57. Our attention has been drawn to the decision in *R v DT*, unreported 17th February 2000 where, in answer to a jury question, the judge redirected the jury repeatedly used the word “want” rather than “consent”. This constituted misdirection because there was “plainly a difference between the meaning of the word “consent” and the meaning of the word “want”. In many relationships there will often be occasions when the woman does not want sexual intercourse – the word “want” connoting a wish or desire for sexual intercourse – but where she does consent to it in law”. In the context then under consideration Pill LJ observed that there was “a plain difference, when considering a state of mind, between wanting something and consenting to it”, and went on to emphasise that it was of “particular importance that the word “consent”, and only the word “consent”, should be used when the alleged rape occurs in the context of cohabitation or a continuing relationship”.
58. Taken in isolation from that context we, of course, acknowledge the difference between “consent” and “want”, particularly in the context of a long-standing sexual relationship. In the present case, however, the judge gave detailed and impeccable directions to the jury on the proper approach to the question of consent, without the possibility of any confusion between what the complainant may have wanted and what she may have consented to. He used the word “want” in his summary of the evidence in the context of the use of the word “want” by the complainant herself. We can find nothing to suggest that this jury could possibly have been misled into approaching the problem of whether or not sexual intercourse was consensual on the basis that the

appellant should be convicted if the prosecution proved not simply that the complainant did not consent to sexual intercourse but that she did not positively want to have sexual intercourse. In short, in this case, the concerns identified in *R v DT* did not and do not arise.

59. We can find nothing which occurred at trial, and nothing in the summing up, which renders the conviction unsafe.
60. We must now return to the second decision by the judge on an application that the jury should be discharged. It arose in quite different circumstances, and was related to the possibility of the jury in the present case becoming aware of the fact that the appellant faced a second jury trial. Thus it had nothing to do with the deliberations of the jury, but with the possibility that something may have gone wrong with the process outside the jury room.
61. The facts need a little detailed description. Once again, we are indebted to the Criminal Cases Review Commission for conducting the necessary investigation, and producing the material of which what follows is a summary.
62. The trigger for the investigation into issues of jury management was that the appellant was due to face a second trial for abduction. The new jury panel was summonsed to attend court on 13th July to provide a jury for this second and indeed other trials in the list. In the meantime on 10th July the jury in the current trial (who we shall describe as the first jury) were asked to be at court for 12 noon on 13th July.
63. On 13th July the new jury panel were told that they might have to serve for 4 weeks, and indeed once in court the panel was informed that the trial might last 5 weeks. The jury was empanelled. Those members of the panel who were not selected then left the court room in the company of an usher while the selected jury (the second jury) were warned not to talk about the case to anyone and they left court. Those who were not selected were then brought back into court and given a similar warning.
64. The first trial did not resume until 14.00 hours because of travel difficulties. The defence closing speech was given. The jury was sent home until the following day when they would hear the summing up. On 14 July, before the first jury returned into court, one of the ushers reported that a member of the first jury, possibly in the presence of other members of the jury, had asked the question whether it was true that there was a “five week trial following this one?” The usher reported that she could not say anything and made no further comment, but reported it appropriately. When the matter was raised with the judge, after a discussion, the judge decided that nothing should be said to the jury in answer to the question raised with the usher. The first jury went into court. The summing up began. The lunch adjournment was reached. Thereafter counsel for the appellant applied for the jury to be discharged. The judge said that court staff would ask all members of the jury panel whether they had spoken to anyone on the subject.

65. At 13.40 the first jury returned to court the judge completed his summing up and at 14.30 the jury retired to consider their verdicts. At this stage counsel for the appellant submitted that there had been no formal ruling on his application that the jury should be discharged.
66. The judge reported that in the meantime the Recorder sitting in the other court had asked his jury – some of whom were the unused members of the new jury panel – whether they had mentioned a 5 week trial to anyone, to which they had answered “no”. Two members of the jury panel not selected to serve on any jury had been contacted at home and asked the same question. One had told her husband and employer that there was to be a 5 week trial, the other had mentioned it to no one. Defence counsel nevertheless submitted that a conclusion was inevitable that a member of the second jury had spoken to a member of the first jury.
67. At 16.40, not having reached a verdict, the first jury was sent home. The judge gave instructions that the list for the following day should not refer to the appellant by name.
68. On 15 July the case was listed for hearing, third in the list, without reference to the appellant, and under a number unconnected with the first trial.
69. At 10.52 the jury continued their deliberations, returning their guilty verdict in relation to counts 1 and 6 at 15.38. After the majority direction was given, not guilty verdicts were returned at 16.34 on the remaining counts.
70. On 16 July the judge gave his reasons for the decision that the first jury should not be discharged. Having examined the facts he expressed himself satisfied that all “necessary and appropriate steps were taken to prevent the first jury from knowing about the second trial of Mr Allen, and to prevent the second jury from knowing about the first trial of Mr Allen. And there is no evidence that they did know. All we know is that one of them, and because of that we have to assume all of them, one of them thought another 5 week trial might be coming up. ...it is the sort of vague and limited information which one can imagine can come from any source at any time in any court to any jury. I do not think it comes anywhere near being information which could have affected this juries deliberations in a way adverse to the defendant’s interest”.
71. That explains the judge’s decision that the jury should not be discharged, and on the information then before him, we can see no grounds for criticising his ruling.
72. For the sake of completeness we should add that the second trial did not proceed as intended that week, and commenced on 27th July. The judge decided that the second jury should be discharged because of its possible contamination with knowledge of the first trial. That decision was obviously correct. We emphasise however that to list the second trial, for any purpose, before the first trial of the same defendant had

been completed or while the first jury was still in the building was ill-judged; it would be in any court, let alone a very small court, serving a relatively small population. This must not recur.

73. Thereafter an email was received by counsel for the appellant from a clerk employed by the appellant's solicitor. Several months later, on 9 November 2009, she wrote that she had spoken to her sister and that her best friend (Kate) had served on the jury at the first trial. She said that her sister had reported that Kate found jury service very hard and that she felt sorry for her "especially as I had another one with him". She took this to mean that she knew that there was another court case involving this appellant "after the one she was on". After the information was drawn to the attention of this court the CCRC was asked to undertake inquiries of the court usher, the juror who had approached the court usher, and the juror "Kate". Yet again, the court is grateful to the Commission for the assiduously careful way it has investigated the matter.
74. The Commission's investigation identified the usher in question, but she had no recollection of having been asked a question, explaining that she had an extremely poor memory. The investigation with Kate produced the information that she had become aware of the second trial after the first jury had returned its verdict. She did not accept the accuracy of what she was reported to have said to the sister of the clerk employed by the appellant's solicitors, but she made clear that when the first jury retired to consider its verdict she did not know that the appellant was facing a second trial and had no reason to believe that any of the other jurors was aware of it. She did report that there was a period during the trial when the first jury did speculate about why the case had not been reported in the local media in the Isle of Wight, but any idea that this might be because the appellant was facing further charges was dismissed when the jury were provided with the statement of agreed facts that following a police investigation of an association with a young female "no sexual offences have been disclosed".
75. She explained that she learned of the second trial in a conversation with her mother who is a community psychiatric nurse on the Isle of Wight, who told her about it.
76. Kate accepted that she might have been the juror responsible for making an inquiry of the usher about a long trial, but if she asked the question, it was not related to the appellant.
77. At the end of this investigation the Commission drew attention to the possibility that members of the first jury may have overheard conversations involving members of the jury panel from which the second jury was subsequently drawn, and invited the court to consider whether this possibility was sufficient to justify conducting further interviews with the remaining members of the first jury. The court agreed, and the second inquiry was then put in train. The result of the investigation is clear. There is nothing to suggest that any member of the jury was aware that the appellant was

facing a second trial before the verdicts in the first trial were delivered. No further investigation is necessary or would be appropriate. These convictions are safe.

David Blake

78. David Blake was convicted (by a majority, 11-1) on 19 August 2009 in the Crown Court at Newcastle upon Tyne before His Honour Judge Faulks and a jury of having an article with a blade or point on school premises contrary to section 139 A(1) of the Criminal Justice Act 1988.
79. The prosecution case focussed on CCTV footage which appeared to show the appellant, who was working at a school for disruptive children, holding a folding pocket knife with a cutting blade which exceeded 3” in length. He was said to have opened it with his mouth, and presented it threateningly to a youth who was behaving aggressively and unpleasantly towards him. The defendant asserted that the knife handle which was in his possession at the time had lost its blade, and that the shiny object seen and shown on the CCTV footage was probably his pen. The issue for the jury was whether they were sure that the object held by the appellant was or included a blade.
80. No complaint is made of the conduct of the trial until after the conclusion of the summing up, or of the summing up itself. Complaint is made that the judge failed sufficiently to address the evidence that one member of the jury appeared to be conducting his own experiments, or to give the remaining jurors appropriate directions about any report from the jury about experiments he may have conducted.
81. The trial began during the morning of 18 August 2009. The jury retired at 3.05 pm that day. At 4.20 pm they were allowed to disperse: the judge’s directions included the words “please don’t talk to one another about the case or do any investigations overnight”. The following morning having received a report from court security officials Judge Faulks spoke to counsel in the absence of the jury, explaining that one of the jurors had arrived at court carrying “some implement like a pair of clippers”, which was seized by security. The judge himself had not seen it. The juror’s explanation for possession of the item was that he wanted to demonstrate, using these clippers, to the other jurors – some point in connection with this case”. Therefore he realised that he could not bring a knife into court, so that he brought something else in that would serve the same purpose. The judge asked whether counsel wished to make any submissions before the judge decided whether the juror could, “give a demonstration to the other jurors”. He indicated that his instinct was to say nothing, but counsel for the appellant suggested that the jury should be reminded to “not carry out their own experiments to act upon their own experiments and to simply try the case on the evidence. Because there does remain a...possibility that he will say, “well, I carried out this experiment and this is what happened”. Counsel for the Crown took the same view as the judge. Nothing was said to the jury. The CCTV recording was played again. The jury retired again to consider their verdict.

82. After the jury had retired counsel for the appellant was able to investigate the position in greater detail, and he submitted to the judge “to simply do nothing about it allows the risk to develop that he may not try the case on the evidence”, and that in any event, the rest of the jury should be directed that if information about the experiment had been given to them, they should ignore it, and that they should not act on any experiment that might have been carried out either at court or at home. It was submitted that the safest course would be to discharge the juror in question. The judge felt that, 45 minutes after the jury had retired that morning, was probably too late, and that the pot would be best “left unstirred”. And so the matter was taken no further.
83. The jury returned to court for a majority direction at 11.55. At 12.20 they returned with a majority verdict.
84. This was a very short, apparently straightforward case. That was not how it seemed to the jury, whose deliberations lasted longer than the evidence in court. The essence of the prosecution case was the impact made by the CCTV recording, and the conclusions to be drawn by the jury from it. Judge Faulks is a widely experienced and highly respected judge. But on this particular occasion his decision to do nothing, and from the point of view of the jury, to ignore the possibility that the errant juror had or would convey to the remaining jurors something of what he had done, and the result of his experiments, and in particular without any of the other members of the jury being able to check the accuracy of his reports for themselves, was not appropriate. The jury should have been invited to return to court, and the matter investigated, and an unequivocal direction given to them.
85. As it is, we are left with the possibility that material was introduced into the jury deliberation which neither the prosecution nor the defence, had any opportunity to deal, and without directions about the way in which the jury should approach these experiments. This was an irregularity. We have examined the CCTV footage for ourselves. There is no other evidence which might support this conviction. Given the possibility that the jury considered extraneous material, we are left in some doubt about the safety of this conviction. Accordingly it will be quashed.

Kamulete Kasunga

86. Kamulete Kasunga was acquitted of rape and attempted rape (counts 2 and 3) and convicted (majority verdict 11/1) on 20th January 2010 at Wood Green Crown Court before His Honour Judge Browne QC and a jury of assault occasioning actual bodily harm.
87. The allegations against Kasunga arose from his relationship with the complainant. They lived together from August 2007 for about 2 years. In 2008 she made an allegation of assault against him, but withdrew her complaint at trial. The appellant was acquitted. On 29th August 2009 they went together to a shop in Wood Green High Road. She asked the shopkeeper to call for an ambulance following an assault

by the appellant. CCTV footage was seized from the shop and later exhibited, together with the original 999 telephone call. She gave a video interview to the police. In it she alleged that, following a serious attack on her, he ordered her to perform oral sex on him, which she did, and then that he sought to penetrate her from behind, but was unable to get an erection. She said that this was the worst incident that had occurred between them, and that he was only violent when he was under the influence of alcohol and drugs.

88. Kasunga was interviewed. In a prepared statement he denied the allegations, and asserted that he had been the victim of an attack by the complainant and acted in self defence.
89. The appellant sent a letter to the complainant on 2nd September, asking her to forgive him, and asserting that there would be no repetition. He asked her to do her “utmost to have him free”. Thereafter the complainant sought to withdraw her complaint. She wrote to the police, and prosecution, and indeed to the court. The case proceeded. In cross-examination she retracted all her allegations. She said that her account during the video interview was totally untruthful. She had neither been assaulted nor raped. She had made her complaint when she was “tripping out” on drugs. Nevertheless the prosecution alleged that she had told the truth in her video interview with the police, and that the injuries found on her after the 999 call provided strong evidence that her interview account was accurate, and the retraction of her allegation, at any rate in relation to physical violent, was newly minted.
90. On examination at hospital on 29th August multiple grazes and bruises were found behind both ears, and on the neck. There were superficial cuts to the neck, a swollen nose, and bruises around both eyes, and scratches on her forehead. Large patches of contusion grazes and scratch marks in two areas on her back were found, as well as smaller patches of grazes and abrasions scattered on the front of her body, lacerations over both knees and the right shoulder. There were multiple injuries consistent with blows to her head, and a large bruise to the left shoulder.
91. Kasunga gave evidence at trial. The incident began when he told the complainant that the relationship had to come to an end. She went mad and attacked him. He protected himself. He tried to calm her down. He acted only in self defence. She had attacked him and fallen over. She was completely out of control. The day after, she sought desperately to persuade him that the relationship should continue. She offered to perform oral sex. He could not get an erection. There was no further attempt at sexual intercourse.
92. The issues for the jury were clear. No complaint is made of the conduct of the trial, nor when the case was first prepared, of the summing up. Two distinct points arising from the summing up have emerged. The first is that although the judge provided the jury with written directions on the law, these did not include detailed written directions about self-defence. The second question, quite unconnected with the first, is that an individual using the names of one of the jurors wrote to the judge

immediately after the verdict and sentence. The letter explains the juror's "grave concerns that the basis on which we were instructed to make our decision was not the same as the basis on which the defendant was sentenced". The letter then purports to explain the nature of the jury's deliberations, and the basis on which the guilty verdict was reached.

93. This second point is, once again, classic Mirza territory. The letter purports to provide information about the jury deliberations. Even if it did not arise in the context of concern about the sentence, it would be inadmissible. The directions of law were impeccable. They did not appear to cause the jury any anxiety, and they did not seek any further guidance from the judge before returning their verdicts. The letter is inadmissible, and provides no ground of appeal. As to sentence, it was the judge's duty to make up his own mind about the circumstances of the offence, provided that in doing so he remained loyal to the verdict returned by the jury.
94. Quite separately, it is not of itself a ground of appeal that the judge chose to provide some directions of law in writing, and amplified them in relation to self-defence in the course of the summing up. In this case we can well understand why the directions on self-defence were not put into writing. The real issue for the jury was whether the injuries, and the victim's contemporaneous complaint showed that whatever she now said, she had indeed been assaulted. Although self-defence was raised, it was only part of the explanation of the victim's injuries, which were attributed largely to her being drunk and violently banging her head against the floor and a radiator. Not every direction of law is reduced to writing, especially those which may be discursive. There is no requirement that they should be, and provided that they are properly included in the oral directions in the summing up, their absence from the written script does not undermine the safety of any subsequent conviction. Perhaps the judge might have referred in his written directions to the fact that he would, in due course, amplify the self-defence directions when summing up, but this is a counsel of perfection which has no bearing on the safety of the conviction.
95. Accordingly this appeal is dismissed.