Neutral Citation Number: [2022] EWCA Crim 1511

Case No: **202200524 B1**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
His Honour Judge Nicholas Wood
T20210196

Royal Courts of Justice
Strand, London, WC2A 2LL

17 November 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE YIP
and
MR JUSTICE HENSHAW

- -

Between :

ELVIS SKEETE	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Ms Hannah Thomas (instructed by Saunders Solicitors) for the **Appellant**
Mr Richard Milne (instructed by the CPS) for the **Respondent**

Hearing date: 2 November 2022

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Approved Judgment

This judgment was handed down remotely at 11.00am on 17 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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

Lord Justice William Davis:

Introduction

1. On 26 January 2022 at the Crown Court sitting at Isleworth the appellant was convicted of an offence of rape. On 11 March 2022 he was sentenced to six years' imprisonment. He now appeals against his conviction by leave of the single judge.

2. The appellant was represented by Ms Hannah Thomas. The respondent was represented by Mr Richard Milne. We are grateful to both counsel for their written and oral submissions. We are particularly grateful to Ms Thomas for her assistance with events in the later part of the trial. From the middle of the court day on 18 January 2022 onwards, the jury having retired late on the previous day, the audio recording of the proceedings was so unclear that nothing was transcribed from that point until the end of the trial. Certain events after the jury's retirement were of critical significance to our consideration of the appeal. Ms Thomas had a full digital note of the relevant events. She was able to provide the detail we required. We mention this because there are appeals which come before this court where the failure of counsel to keep a full note and thereby to observe potential irregularities has been the cause of the case being the subject of an appeal: e.g. *Patten* [2018] EWCA Crim 2492; *Sakin* [2021] EWCA Crim 411. In such cases the court will criticise counsel's failure. In this instance Ms Thomas's scrupulous noting of every stage of the proceedings has meant that we have been able to determine the appeal without any doubt as to what happened at the court below. It is only right that we should commend her for her approach to the task of conducting a criminal trial. Defending in a serious criminal case is never straightforward. There are many conflicting demands on counsel. Ms Thomas demonstrated an enviable ability to meet all of those demands.

The facts

3. Given the issues which arise in this appeal no detailed rehearsal of the factual background is necessary. The prosecution case was that in September or October 2008 the appellant, then aged 20, raped CD who was then aged 15. The following year CD told her aunt that she had been raped. CD repeated it to a police officer but declined to make any formal complaint at that point.

4. It was only in April 2019 that CD provided a full account of events to the police by way of an ABE interview. She said that in 2008 she was interested in making music. She had messaged online someone who described himself as "DJ Genesis". She hoped that he would work with her and act as a mentor in relation to her music. Her understanding was that he was the producer for a local rap artist known as "Scruface". They exchanged messages over the following month. CD then invited the person she had been messaging to come to her home in West London one afternoon when she was off school. He arrived at around 3 p.m. with his dog. Her mother and stepfather were out.

5. CD took the man to her mother's bedroom because that was the only room with a television. She needed the screen to show him her music. After about half an hour the man tried to kiss her. CD told him to stop. The man ignored her. He pulled down her lower clothing and raped her. Once he had finished, he warned her not to tell

anyone and left the house. CD did not tell her mother what had happened because she was embarrassed and she was concerned that her mother would be angry with her. It was about five years afterwards that she found DJ Genesis via Facebook. CD said that she sent him a message complaining about what he had done to her. Initially he denied it and then said that she had wanted it. According to her online searches the real name of DJ Genesis was Genesis Asher Skeete.

6. It was as a result of CD's online research that the police were able to identify the appellant as someone who used the name DJ Genesis. In May 2019 he was interviewed under caution after he went voluntarily to the police. His account was that he had never met CD and that he had never been to her address. He gave an account of his whereabouts in 2008. He said that he was in custody on remand from 30 October 2008 until May 2009 in relation to charges in respect of which he was eventually acquitted. He had always used the name DJ Genesis. He had worked with a rap artist named Scruface. However, he was not a music producer. He had never claimed to be one.

7. Because the issue raised by the appellant was whether he knew CD and whether he had visited her house, the police organised a video identification procedure. This took place in November 2019. CD identified the appellant as the man who had raped her. The defence case was that this identification was mistaken. The suggestion was that CD recognised the appellant from seeing his photographs on social media rather than from any incident in 2008.

The trial

8. The essential evidence before the jury came from CD, from her mother and aunt in relation to CD's complaints in 2009 and from the appellant. The issues for the jury were twofold. First, had CD been raped as she alleged? Second, if she had been raped, was the appellant the man responsible? Though CD's account of having been raped was tested by the appellant in cross-examination, there was no direct challenge to her allegation of having been raped. His real challenge was to her identification of him as the perpetrator. His case was that CD had alighted on him as a result of her online searches.

9. In relation to the issue of identification, the appellant established the following in the course of the trial:

- There may have been more than one person using the name "Genesis" in the London music industry at the relevant time.
- CD had searched for the name "Genesis" on Facebook and other social media over the period from 2008 onwards.
- His full name did not include "Genesis" whereas CD believed that the man who had raped was called Genesis. His Facebook title was "Asher Genesis Skeete".
- Although CD was firm in her view that the person she met was a music producer, the appellant was only a DJ.
- Whilst CD's evidence was that the man who raped her had come to her house in a large saloon car (and definitely not a small car such as a Polo), he had a small hatchback car in 2008.

- He did not own a dog and he was allergic to dogs, these points being supported by sources other than the appellant himself.

Nevertheless, whether the appellant had been correctly identified was properly a matter to be left to the jury. CD did not resile from the proposition that the man she identified in 2019 was the man who had raped her.

10. The trial commenced on Monday 10 January 2022 although on that day all that happened was that the jury was empanelled. Over the following three days the evidence was called albeit that for a variety of reasons the court did not sit full days. The court did not sit at all on Friday 14 January. On Monday 17 January the judge summed up. The jury retired relatively late in the afternoon of that day. There was no verdict that afternoon. The jury was sent home after having been given the usual warnings in relation to ceasing their deliberations and not discussing the case even amongst themselves. As will become apparent, the jury went home on more than one occasion during their retirement. We understand that the appropriate directions were given on each occasion that this occurred even though, for the reasons already given, we have no transcript of these directions as they were given on each day.

11. On the morning of 18 January the jury sent a note asking whether the appellant's father had owned a dog and whether Scruface had been asked whether he could give evidence. There was no useful evidence on these issues which had been called in the trial. The jury were so informed. After deliberating for most of the rest of the day, the jury asked if they could watch CD's ABE interview. They were told that they could not. However, they were told that they could be reminded of the relevant parts of CD's evidence if they were able to indicate the matters which concerned them. In consequence, they were sent home again. The next morning, Wednesday 19 January, after a short period in retirement the jury provided a detailed note setting out the areas of the evidence about which they needed to be reminded. The judge concluded the jury should be reminded not only the relevant parts of CD's ABE interview but also of her evidence in cross-examination. He also considered that the jury should be reminded of the appellant's evidence which bore on the same issues. The jury were told that they would be given the assistance they required once the material had been assembled. It took a considerable part of the day for counsel to prepare a comprehensive note of the evidence about which the jury were to be reminded. The judge then read out that note. Little was left of the day before the jury once again were sent home.

12. On the morning of 20 January the jury were given the majority direction. Although this was the fourth day of their retirement, the jury in reality had not had much more than a working day actually deliberating. Nothing more was heard from the jury until 3.30 p.m. on the afternoon of 20 January. At that point the jury sent a note which read as follows:

> *There is a concern from a member of the jury that two other members of the jury have close personal experience of sexual assault and rape – and whether this has influenced their verdict. Is this a concern? If not, we have come to a majority verdict*

It was this note and what followed thereafter that gives rise to the appeal. The jury were sent home without any further ado. The plan was for counsel to consider their

respective positions and for submissions to be made to the judge on the following morning.

13. Overnight Ms Thomas prepared and served a skeleton argument which submitted that the whole jury should be discharged in the light of the content of the note sent on the afternoon of 20 January. Counsel came to court on the morning of 21 January ready to argue the point. Unfortunately the judge had suffered an injury to his shoulder overnight. We understand that he was in considerable pain and discomfort. He required hospital treatment. Although he commenced to hear submissions in relation to a discharge of the jury, it became apparent that he could not sensibly complete the hearing of this important application and that the matter would have to be adjourned over the weekend until the following Monday. The jury had come to court ready to continue with the case. Given the content of their note, they presumably thought that the case would conclude one way or the other within a short time on the Friday morning. They were at the end of their two week sitting. Enquiries were made of the jury as to whether sitting on the following Monday would cause any difficulties. Two jurors indicated that it would. One juror had a professional commitment which, were to miss it, would cause a significant financial loss to his company. Both prosecution and defence agreed that, although it was not desirable to lose a juror so far into the deliberations and when a verdict of some kind apparently had been reached, no proper objection could be raised to the discharge of this juror. The second juror also had a work commitment. The juror was due to give a presentation in connection with their employment. It was not apparent that the absence of the juror would cause any financial loss. Ms Thomas argued that the juror did not have insuperable difficulties. Mr Milne agreed. However, the judge decided that both jurors should be discharged. The remaining 10 jurors were sent home and asked to return on Monday 24 January.

14. On 24 January the judge was able to sit normally. He heard full argument from both sides in relation to the application by Ms Thomas for discharge of the entire jury. Her argument in summary was: the note sent on the afternoon of 20 January indicated the possibility of bias on the part of one or more jurors; it would be essential to establish the facts in relation to such bias were the trial to continue; that could not be done since the jury were in retirement and, on the face of it, had reached a verdict; the only safe course was to discharge the jury. The prosecution submitted that discharge of the jury without any further step being taken was inappropriate. Rather, the jury should be given further directions to ensure that they decided the case only on the evidence.

15. The judge gave an oral ruling. For the reason we have given, there is no transcript of the ruling. However, we have Ms Thomas's detailed note of the relevant parts of the ruling. We also have a note from the judge provided pursuant to CPD VI 26M.40. Thus, it is clear that the judge considered the provisions of CPD VI 26M.26. He decided that this was not a case in which isolation of any particular juror or jurors was practicable or appropriate. He agreed with the proposition that he could not ignore the content of the note and take no action. He considered whether action was possible which would ensure that any verdict of the jury was safe and fair. He reviewed the authorities to which he had been referred including *Porter v Magill* [2001] UKHL 67 and *Sander v UK* (2001) 31 E.H.R.R. 44. *Porter v Magill* informed him of the test to be applied when assessing bias. *Sander* was a case involving particular facts in which the appellate court in this jurisdiction had concluded that the trial judge had conducted a sufficient inquiry after a note had been received from a jury whilst in retirement.

The Strasbourg court had concluded otherwise. We shall deal with that case in more detail later in this judgment. The judge found that the proper course was to assess what was necessary to meet the test in *Porter v Magill* by reference to the particular facts of the case. His conclusion was that the right course was to require the jury to consider a written questionnaire setting out four questions.

16. The judge prior to delivering his ruling had provided counsel with draft questions to be posed to the jury. Having delivered the ruling, the judge heard submissions from counsel in relation to the proposed questions. Ms Thomas's submission was that the questions were wholly inadequate to deal with the apparent bias on the part of two jury members. The judge did not agree. The jury were brought into court. Each juror was provided with a typed copy of the questions. The document was in the following form:

QUESTIONS FOR THE MEMBERS OF THE JURY
NAME OF JUROR:

JUROR NUMBER:
You must answer these questions on your own. You must not discuss the questions or your answers with any other juror.

Q 1: Have you followed my legal directions throughout the trial?

A1:
Q.2: Have you, throughout the trial, remained faithful to your oath or affirmation to try this case fairly and to come to a verdict based only on the evidence?

A2:

Q3: Do you feel able to continue and remain faithful to your oath or affirmation?

A3:
If the answer to any question is NO then you MUST say so.

If the answer to all three questions is YES:

Q4: Would any verdict you may come to be based only on the evidence?

A4:

The judge told the jury what he required them to do. He said nothing about why he was requiring them to answer the questions. By this time there were only 10 jurors. The jury were told why two of their number were no longer part of the jury, namely that personal reasons prevented them from continuing to serve into a third week.

17. Each juror answered yes to every question. They were asked to confirm their answers in open court. By the time that this point was reached, it was late in the court day. Because the majority direction given by the judge the previous week was no longer applicable, it was necessary for the judge to redirect the jury in relation to any potential majority verdict. The judge decided that it would not be appropriate to give the revised direction late in the day. He was reinforced in the decision by the fact that the court could not sit on 25 January. Therefore, the jury were sent home. On the morning of Wednesday 26 January the judge gave the jury a revised majority direction based on the reduced membership of the jury. After a further retirement of approximately an hour, the jury returned a majority verdict i.e. one on which 9 of them were agreed.

The grounds of appeal

18. There are four grounds of appeal. Two relate to the issue of bias. They are interlinked. First, there was evidence of apparent bias amongst the jury. Because the jury were in retirement, it was impossible to conduct any kind of investigation of the relevant jurors such as asking what impact their experience had had on their deliberations. In those circumstances, the only reasonable course open to the judge was to discharge the entire jury. Second, even if some investigation was feasible, the exercise conducted by the judge in response to the jury note which raised a concern about the influence of jurors' personal experiences on their verdict was insufficient. The questions posed by the judge lacked any context. The judge should have set out the content of the note so that the jury were aware of why they were being asked about their ability to try the case on the evidence. In the absence of any contextual background, the enquiries made of the jury would not provide accurate information about their approach to the case and/or as to the effect of any bias on their deliberations.

19. The other grounds are secondary. They relate to events after the receipt of the jury note on 20 January. It is said that the judge fell into error when on the morning of 21 January he discharged the second juror who had work commitments which required the juror to give a presentation on the following Monday. These commitments were not such as to require the juror's discharge. Rather, they did not provide any good reason to do so. The error was of significance given that the jury on the face of their note had reached a verdict. It could not be known whether the juror in question was the juror who had expressed concern or was one of the jurors with personal experience of rape. This amounted to a material irregularity.

20. The other irregularity arose due to the break in the jury's deliberations for a period of five days between the afternoon of Thursday 20 January and the morning of Wednesday 26 January. After the sending of the note, the jury were given no directions (other than the conventional directions in relation to separating during their deliberations) until the following Monday when they were given the typed questions. There was a further gap before they resumed their deliberations. It is submitted that, for a jury considering a case of relatively narrow compass, the break in deliberations casts doubt on the integrity of those deliberations such as to render the verdict unsafe.

Discussion

21. We shall consider first the secondary issues raised on behalf of the appellant. Did the decision of the judge to discharge the juror with work commitments amount to a material irregularity? The Criminal Practice Directions set out the approach to be taken by a judge faced with a juror who has a personal difficulty arising unexpectedly in the course of a trial.

> *CPD VI Trial 26H: JURIES: DISCHARGE OF A JUROR FOR PERSONAL REASONS*
> *26H.1 Where a juror unexpectedly finds him or herself in difficult professional or personal circumstances during the course of the trial, the juror should be encouraged to raise such problems with the trial judge. This might apply, for example, to a parent whose childcare arrangements unexpectedly fail, or a worker who is engaged in the provision of services the need for which can be critical, or a Member of Parliament who has deferred their jury service to an apparently more convenient time, but is unexpectedly called back to work for a very important reason. Such difficulties would normally be raised through a jury note in the normal manner.*
> *26H.2 In such circumstances, the judge must exercise his or her discretion according to the interests of justice and the requirements of each individual case. The judge must decide for him or herself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty.*
> *26H.3 In shorter cases, it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors. The power to do this is implicit in section 16(1) of the Juries Act 1974. In unusual cases (such as an unexpected emergency arising overnight) a juror need not be discharged in open court. The good administration of justice depends on the co-operation of jurors, who perform an essential public service. All such applications should be dealt with sensitively and sympathetically and the trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror.*

The Practice Direction makes it clear that a decision to discharge a juror is a matter of discretion to be exercised in the interests of justice. Some examples are given of circumstances which might give rise to a judge considering the discharge of a juror. However, the discretion essentially is unfettered save that the judge making such a decision must be sensitive to the risk of undue inconvenience to the juror being caused by requiring the juror to remain as part of the jury. For the exercise of a discretion to be susceptible to challenge, it must be shown to be outside the reasonable range of decisions open to a judge faced with the particular circumstances of the case.

22. As things turned out, it may have been possible for the juror to have remained as a member of the jury. If the juror's work commitment were restricted to a single day, his absence could have been accommodated on that day. The application to discharge the whole jury did not require the attendance of that (or any) juror. In the event the application failed and the judge determined that the remaining jurors needed to answer a series of questions. The questions were put to the jurors on the afternoon of 24 January. Arguably, that exercise could have been postponed to a time when the juror's employment commitment no longer applied. But this is an exercise in hindsight. When the judge made his decision, he reasonably assumed that the choice was between discharge and requiring the juror to attend on 24 January. Simply by reference to the personal difficulty facing the juror, we do not consider that the decision to discharge that juror was unreasonable so as to vitiate the exercise of the judge's discretion. It was a case management decision well within the appropriate range of responses to the situation which faced the judge.

23. Ms Thomas argues that the content of the note should have led to a different decision. The note stated that "a member of the jury" had a concern about "two other members of the jury". Moreover, the note indicated that, subject to that concern, the jury had reached a verdict. The judge could not know whether the juror whose discharge was in issue was one of those identified in the note. We agree that the judge did not have that information. There was no means by which he could obtain it. We do not agree that it was of any relevance to the judge's decision in relation to discharge. The context of that decision was a pending application to discharge the entire jury. Were that to succeed, the discharge of a single juror due to personal inconvenience would be of no consequence. Were the application to fail, the judge would have to consider how to address the content of the note. It could not involve any individual investigation with the jurors. The potential absence of one of the jurors mentioned in the note would be irrelevant to whatever course the judge adopted.

24. Did the break in deliberations amount to an irregularity? The mere fact that the jury did not deliberate between the afternoon of 20 January and the morning of 26 January could not possibly amount to an irregularity. This kind of pause in deliberations is not different in kind to the gap which might occur if a jury is in retirement over a public holiday. During the pandemic there was a number of cases where a jury in retirement had to pause in its deliberations whilst one or more of the jurors had to isolate. The gap in those cases will have been longer than occurred in the appellant's case. The complaint here is that no directions were given to the jury to deal with the break in deliberations. We consider that no directions were necessary. The jury were told to cease deliberating on the afternoon of 20 January. On 21 January they were told that the court could not sit that day. This must follow from the fact that two jurors raised personal difficulties in relation to the following week. On 24 January the jurors answered the judge's questions following which they were made aware that the court could not sit until 26 January. The jury would have been in no doubt that they were not to speak about the case until they were back together in the jury room. No other direction was needed. The circumstances were a world away from those in *Woodward and others* [2019] EWCA Crim 1002 where the period between the jury's retirement and the delivery of their verdicts was so long that there was real concern as to the extent to which the jury could retain a proper appreciation of the evidence and the competing submissions. Even in that case – where there were two periods

totalling eight weeks when the jury were not deliberating and no further directions were given – the verdicts were safe.

25. We turn to the principal issues in the appeal, namely whether there was apparent bias on the part of one or more members of the jury and, if so, whether the steps taken by the judge were sufficient. The question the judge had to address in deciding what steps to take was whether a fair-minded and informed observer would conclude that there was a real possibility or danger that the jury would be biased. The primary purpose of the note from the jury was to inform the judge that they had reached a majority verdict. It was written on behalf of the entire jury in that it stated that "we have come to a majority verdict". On the face of it the note was penned by a spokesperson – possibly the person who was to deliver the verdict – reporting the position in relation to other members of the jury. Its natural meaning was that, at some point during the jury's deliberations, two members of the jury had explained that they had close personal experience of sexual assault and rape. A third member of the jury had expressed a concern that this experience could have influenced the verdict of the two members of the jury. This concern was not expressed in terms of any direct assertion that it had led to an influence nor was the nature of the supposed influence explained.

26. The nature of the note in this case was different in nature from the note in *Sander* to which the judge was referred. The note there read as follows:

> *I have decided I cannot remain silent any longer. For some time during the trial I have been concerned that fellow juror are not taking their duties seriously. At least two have been making openly racist remarks and jokes and I fear are going to convict the defendants not on the evidence but because they are Asian. My concern is the defendants will not therefore receive a fair verdict. Please could you advise me what I can do in this situation.*

The defendants in that trial were of Asian heritage. The direct complaint was of racial bias. The bias alleged was such that it would lead the relevant jurors to convict on the basis of such racial bias. What the judge did in that case is not of immediate relevance to us. Suffice it to say that, after he had directed the jury to try the case purely on the evidence and without reference to any prejudices they may have, it transpired that one juror accepted making racist jokes for which he apologised. An appeal to this court against conviction was dismissed. However, the ECHR concluded that there had been a violation of the fair trial requirement in Article 6(1) on the basis that the apparent bias of the jury was not dispelled by the steps taken by the judge. The original note was in such explicit terms that it could not be said with any confidence that the eventual verdict was delivered by an impartial tribunal. The ECHR contrasted the circumstances in *Sander* with those which arose in the earlier case of *Gregory v United Kingdom* (1998) 25 E.H.R.R. 577 where the content of the jury note was vague and imprecise. In *Gregory* the judge had given firm directions to the jury. The ECHR in *Gregory* concluded that this was sufficient to dispel any objectively held fears in relation to bias or partiality on the part of the jury.

27. The jury note in this instance did not make any direct assertion of bias. It raised a concern that, in a case where the allegation was rape, the personal experience of jurors might have influenced their view of the case. The concern was expressed in vague

and imprecise terms. In her written submissions in the court below in support of the application to discharge the entire jury, Ms Thomas said this:

> *The court has evidence that there are at least two jurors that have brought personal experience into their deliberations (and possibly those of others). Ergo, at least two jurors are therefore not trying the case on the evidence and staying true to their oaths.*
> *The extent that the personal views and experiences of these jurors have featured in deliberations is sufficient for another member of the jury to have written a note to the court outlining their concerns. It follows that both jurors must have raised their experiences with sexual assault and rape before the entire jury during deliberations. What was said or how it was said is not, and can never be, known.*
> *There is a real danger that these two jurors are biased by their own experiences, as per the test in Porter v Magill, that they have taken into account irrelevant considerations in reaching their verdicts, and also that others have been influenced by those irrelevant considerations since they were obviously ventilated.*

We consider that these submissions put the position too high. The evidence was that two members of the jury had particular personal experiences. The fact that they mentioned them at some point when they were trying an allegation of rape of itself does not indicate bias. The jury note did not provide evidence that jurors were not staying true to their oaths. Rather, it expressed a generalised concern of one juror in the light of what the other jurors had revealed of their personal experience. In our view the facts as presented to the judge did not require him to discharge the entire jury. On any view one course reasonably open to him was to direct or otherwise to deal with the jury in terms sufficient to deal with any apparent bias. We note what was said by this court in *Gynane* [2020] EWCA Crim 1348 at [41]:

> *.....this court on appeal cannot interfere with the judgement of the trial judge on an issue of this kind unless it concludes that the decision was outwith the range of reasonable responses to the issue with which the judge was faced….*

We do not consider that the only reasonable response open to the judge was to discharge the whole jury.

28. That does not dispose of the appeal. Ms Thomas argues that, even if it were reasonable to allow the trial to continue with appropriate directions to the jury, the questions posed failed to dispel the possibility of bias. She submits that the jury should have been informed of the content of the note and that it should have been made clear to them that the concern was that jurors were allowing personal experiences to affect their verdict. There then should have been a firm direction that they were to try the case only on the evidence and not by reference to personal experience. She asserts that it is commonplace to place any jury direction into context and that this should have been done in this case. The absence of context meant that the questions asked of the jury did not cure or remove the risk of bias.

29. Just as it is a matter of judgment for the trial judge whether to discharge the jury when confronted with an issue of the kind which arose here, so it is a matter of judgment as to what should be done in the absence of a decision to discharge the jury. How a jury is to be directed in a particular case is susceptible to more than one approach. The

question is whether the approach taken by the judge in this case was outside the range of reasonable responses because it failed to dispel any real danger of bias (that being the question we ultimately have to decide).

30. In determining that issue, the first point to note is that every case will depend on its own facts. Some cases which have been considered at an appellate level have involved directions to the jury referring directly to the issue raised in the relevant jury note. That is not universal. *Gregory* is an example of a case where the judge's direction made no direct reference to the issue which had been raised in a jury note. Second, we are not concerned with what any member of this court would have done in the position of the judge. It is not for us simply to substitute our judgment for that of the trial judge who had the huge advantage of having conducted the trial over the days preceding the events of 20 January and following. Third, the note in this case was, as we already have noted, vague and imprecise. No direct suggestion was made that the personal experience of two of the jurors in fact had influenced their view of the case. Fourth, the note was written by someone, quite probably the juror who was due to deliver the verdict, to tell the judge that a verdict had been reached. This was something about which all of the jurors must have been aware. The verdict reached was contingent. That is something of which the whole jury must have known. There must be a high likelihood that the jury as a whole were aware of the reason for that contingency. In those circumstances, the questions posed to the jurors in reality were not lacking in context.

31. In all of those circumstances we do not consider that it was wrong for the judge to deal with the issue without specific reference to the content of the note or to the context in which he was posing the questions he did. The judge chose to deal with the issue by requiring the jury to answer questions about whether they could reach a verdict based solely on the evidence. This meant that each of the remaining jurors was required to state in terms that they would abide by their oath. Arguably, this was a more robust approach than the one commonly taken, namely directing the jury firmly to reach a verdict based solely on the evidence. We are satisfied that it dispelled any real possibility of bias in the eventual verdict.

Conclusion

32. Notwithstanding the forceful submissions made by Ms Thomas, we are satisfied that the approach taken by the judge fell well within the range of reasonable responses to the issues raised by the note sent by the jury on 20 January and was sufficient to dispel any real danger of bias. The jury's verdict was safe. The appeal is dismissed.