Neutral Citation Number: [2023] EWCA Crim 1358

Case No: CA-202203058-B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
His Honour Judge Henderson
T20177747

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2023

Before :

LADY JUSTICE MACUR DBE
MR JUSTICE GARNHAM
and
MRS JUSTICE STEYN

- -

Between :

Rex	**Respondent**
- and -	
Rashid Mahmood	**Appellant**

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- -

Mr Charles Sherrard KC for the **Appellant**
Mr Paul Mitchell for the **Respondent**

Hearing dates : 2 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Macur LJ :

1. On 12 December 2018, Rashad Mahmood, "the applicant" and his co-accused, Ashgar Khan were convicted of conspiracy to fraudulently evade the prohibition on the importation of a controlled drug (diamorphine).

2. On 14 December, 2018 they were each sentenced to 18 years imprisonment.

3. The applicant was represented at trial by Jerome Lynch KC leading Ayoub Khan instructed by Hussain Solicitors. He is now represented by Mr Sherrard KC and applies for an extension of time of 1,377 days for leave to appeal against conviction.

4. It appears that Mr Sherrard KC was 'engaged' in June 2019 to investigate and advise whether there are any grounds of appeal against conviction. The grounds of appeal were settled on 12 September 2022.

5. The reasons given for delay are summarised in the final paragraph of the advice on appeal as "The nature of having to instruct fresh counsel, await responses from previous solicitors, deal with medical issues including Covid and suffering a stroke, has meant that this application has been delayed significantly." However, it is said that the merits of the application weigh in the balance and that the only person who has been disadvantaged is the applicant who remains a serving prisoner.

6. There is no issue regarding the judge's directions in law or summing up. The grounds of appeal are summarised in the Mr Sherrard's advice and grounds of appeal to be:

   "Having given very careful consideration to the test as set out in *R-v-Day* [2003 EWCA Crim 1060], and appreciating the difficulty in mounting such an appeal, whether out of time or not, the sheer accumulation of incompetence, laziness and negligence by all members of this appellant's legal team is such as to demonstrate that there were identifiable errors rendering the trial process as both unfair and unsafe. Furthermore, it is also submitted that in a case where a defendant, advised or not, elects not to give evidence, the impact of the closing speech is even greater. When the essence of his defence, as run through the trial, is undermined by his own counsel, it cannot be said, thereafter, that the conviction was nevertheless safe."

7. The applicant has subsequently sought leave to adduce fresh evidence pursuant to s23 Criminal Appeal Act 1968, namely witness statements which address, in some respects, the alleged failings of the applicant's trial representatives. The rolled-up application has been referred to the full Court by the single judge.

8. Mr Mitchell appears for the respondent; he was trial prosecution counsel in the court below.

The Facts

9. In late 2014 the UK Border Force identified and intercepted two consignments from Pakistan, leading to an investigation by the Birmingham office of the National Crime Agency. That enquiry led to the arrest of Khan in October 2014. He was bailed whilst enquiries continued. In April of 2015 another consignment was identified by the UK Border Force at Manchester Airport which eventually uncovered evidence of another consignment and of the links to the earlier consignments.

10. The consignments were sent to the U.K. from Pakistan using normal commercial parcel services. Each parcel was sent to, or intended for, addresses in the West Midlands that were connected to the applicant and the co-accused Khan. Three of the four consignments were intercepted, and drugs were seized. The three parcels contained 14.845kg of powder containing heroin at average purities of around 62%. The wholesale value was more than £400,000 and the potential street value was almost £2 million.

11. Each parcel was sent by an agent in Pakistan called Kings Cargo. All the fees were paid in cash. The consignments were linked to the applicant through mobile telephone numbers to make arrangements for deliveries.

12. The same consignee name, Muhammed Afzal, and the same mobile telephone number was given at the time of the consignment arrangements made in Pakistan.

13. In relation to the first two consignments there was a clear spike of communication between the applicant and the co-accused Khan and a shared contact that they had in Pakistan called 'Sha Nar'.

14. On 19 September 2014 the first consignment arrived at Birmingham Airport. The two parcels for 'Muhammad Afzal' were labelled as containing clothes. The fees had not been paid and the parcels were held at Cargo Lord. The mobile number given was called but there was no reply and so the parcels remained at the warehouse.

15. On 8 October 2014 the second consignment arrived. Fees were owed and again there was no answer to the mobile number. Mr Bukrari, the managing director of Cargo Lord, eventually contacted Kings Cargo in Pakistan and was provided with a different telephone number, which transpired to be one of the numbers attributed to the co-accused Khan.

16. On 10 October 2014, Mr Bukrari called the 'Khan' number. There was no answer, but shortly afterwards, Cargo Lord received a phone call from someone who identified himself as 'Mr Ali' and who asked about the parcels in the second consignment. He was told that the fees needed to be paid and he said that he would pay them the following day in cash. The fees were paid by the co-accused Khan on 13 October 2014.

17. On 10 October 2014 'Mr Ali' using the Khan number called Cargo Lord about the first consignment. Initially he denied being the same person who had called previously about the other consignment but eventually accepted that he was the same.

18. Cargo Lord contacted Border Force who came and removed the parcels. Over 10 kg of pure 'export quality' heroin, was found concealed within both consignments. On 13 October 2014, Khan attended the offices of Cargo Lord to collect the second consignment. He was later arrested by officers of the National Crime Agency.

19. Khan's mobile handset also had another SIM card for a different number which had also been used to call Cargo Lord. During this period Khan was in contact with the applicant's number. Following Khan's arrest, the applicant activated a new mobile phone to contact Khan.

20. In April 2015 Cargo Lord received an email from King Cargo in Pakistan asking them to deliver a consignment to the same address as had been nominated for the second consignment. The address was owned by Aftab and Sijaad Hussain. The applicant contacted Aftab Hussain by mobile phone in September 2014, at a time when the delivery of the second consignment was being arranged.

21. DPD received calls relating to this April 2015 delivery from a mobile telephone number, the SIM card for which was placed in the same handset used by the applicant to speak to Khan after his arrest. Also used in the same handset was a SIM card in relation to another number which was later to be used in relation to the fourth consignment.

22. DPD found no-one at home when they attended to deliver this parcel. The parcel was left with someone in a neighbouring pharmacy. It was not recovered. Immediately after this there were numerous attempts to call Aftab Hussain by using a mobile number attributable to the applicant. This was the first communication since the second consignment.

23. The fourth consignment arrived at Manchester Airport on 18 April 2015. The consignment was found to contain 4.130kg of high purity heroin. The packages were meant to be delivered by Wolves Couriers. On 22 April 2015 Wolves Couriers called a mobile number attributable to the applicant to enquire about payment. At the conclusion of that call, another SIM card was used in the same handset to call 'Sha Nar', then Khan and finally Wolves Couriers. Wolves Couriers were told that the £1,600 owed would be paid in cash and if there was nobody at the delivery address, to deliver to the neighbouring premises. These premises were the Bentley Lane Auto Centre which was next door to the applicant's company, AJK Travel and Amans Properties. The applicant and the co-accused Botos spoke on the evening of 22 April 2015 and on 23 April 2015. On 23 April 2015, the co-accused Botos paid the £1,600. The applicant spoke to him immediately thereafter, before calling 'Sha Nar'.

24. This delivery was expected on 23 April 2015 at 10:00 a.m. No delivery was made but officers visited the location. At 12:00 p.m. they found the applicant, the co-accused Khan and another standing outside the premises.

25. The applicant was arrested on 13 April 2016. A solicitor from 'West Midlands Solicitors' attended the applicant during his two police interviews. The applicant remained silent, but hand written prepared statements were 'read into' the record, detailing how he knew other persons of apparent interest to the police investigation and denying any participation in a drugs conspiracy. The applicant accepted that one mobile number belonged to him, but denied knowledge of four other 'dirty' numbers that were attributed to him and had obvious relevance to the drugs conspiracy. He said that he used his phone only for innocent and entirely legitimate purposes; others had use of his phone from time to time when he left it in his business premises. He had known the co-accused Khan for a long time and the co-accused Botos as a mechanic.

26. Following arrest and pre charge the applicant changed his solicitors to Hussain Solicitors in 'late' 2017 for the stated reason of "a conflict of instructions". The applicant says he was manipulated into doing so by the constant advances made by Mr Basharat Hussein who was also representing his co-accused, Khan, to the applicant's

friends and family members, deriding the competence and expertise of 'West Midlands Solicitors'.

27. The applicant was charged and his case sent for trial. A PTPH (plea and trial preparation hearing) took place on 5 October 2017 and trial date was set for 16 April 2018.

28. On 22 January 2018, Mr Hussein saw the applicant but did not take a proof of evidence at that time. On 22 March 2018, Mr Ayoub Khan, representing the applicant, unsuccessfully applied to break the fixture. There still was no proof of evidence. A defence statement, prepared by Mr Ayoub Khan was served on 23 March 2018. It had been 'forwarded' to the applicant by Mr Hussein for his signature, which he appended. The applicant complains that this was indicative of Mr Hussein's lack of client care and attention to his case. However, we note the defence statement is unexceptional and CPR compliant. There is no suggestion that it contains error or misrepresented the applicant's case which was:

(i) he did not commit the offence for which he is indicted or any offence at all;
(ii) he had lived in the Walsall area for over 30 years and been involved in the setting up of a coach company AJK Coaches since 2003 with a Mohammed Iklaq;
(iii) in the past he had employed numerous people who would have access to his phone and did so, whilst it remained in the office; relatives and friends have also used the phone;
(iv) he had called numbers in Pakistan, including "Sha Nar" in relation to resolving a family feud following the death of an individual within the UK.
(v) he disagreed with the accuracy of the prosecution call log; Whatsapp communications had not been properly contextualised;
(vi) he could not recall making specific trips to Nottingham and Coventry;
(vii) calls/texts sent to Jozef Botos would have been in relation to work;

The defence statement indicated that the defence would seek to instruct a cell site analyst and sought particularised disclosure from the prosecution.

29. On 11 April, and therefore only days before the trial, the prosecution sought to break the fixture because of the unavailability of a mobile telephone expert witness. The case was put back until December 2018. The applicant's proof of evidence had still not been sought.

30. In the meantime, Mr Ayoub Khan had provided "urgent" written advices dated 5 March 2018 on obtaining prior authorisation for the instruction of a "mobile phone cell site expert" and a "telephone analyst". Mr Ayoub Khan believes that he had first been instructed in the February/March 2018. His written advice was therefore timely.

31. An expert report was commissioned from a "mobile forensics analyst" with instructions to consider, amongst other peripheral issues, the correlation between calls made on the applicant's accepted mobile number and the 'dirty' numbers. The report was prepared by Mr Halane of AK Forensics Ltd and is dated 18 November 2018. Understandably, it was not relied upon at trial for the report concluded that it was not possible to address the instructions meaningfully in the absence of cell site material. No independent cell site report was obtained. No further information was supplied to Mr Halane.

32. Mr Sherrard has criticised the report and maligned Mr Halane's expertise to prepare the same, no doubt as a route to criticise Mr Hussein. It appears that time and, no doubt, a significant amount of money has been misspent on the hire of a personal investigator to examine Mr Halane's credentials in order to examine the possibility that Mr Hussein had committed a fraud on the Legal Aid Fund.

33. We say straight away that we fail to understand how this advanced the applicant's extant application or served his interests. We do comprehend that the late instruction of an expert, despite Mr Ayoub Khan's 'urgent advices', and the failure of Mr Hussein to follow through, may have supported an application to this Court to receive as fresh evidence any expert reports subsequently commissioned. However, there is no such application and Mr Sherrard confirms that no such reports have been commissioned in the time since his instruction.

34. On 18 November, after some considerable agitation by the applicant's friends and family, Mr Hussein met with the applicant and expressed his view that the prosecution had a strong case against the applicant and suggested a change of plea. Nevertheless, the applicant wished to proceed to trial. Consequently, Mr Hussein advised him (i) not to seek a further expert report and (ii) to secure the services of a leading counsel, Mr Jerome Lynch KC.

35. A comprehensive proof of evidence was finally taken from the applicant, on the assumption, Mr Hussein said, that he would give evidence at trial. Significantly, Mr Sherrard submits, the applicant has always denied ever having had possession of making use of a dirty phone.

36. A fee was agreed for the instruction of Mr Lynch on a private basis. Although he arranged to speak to the applicant in remote conference prior to trial, this was appointment was cancelled by Hussein solicitors. Mr Lynch attended on the first day of trial. The case was adjourned to enable him to take instructions after the Prosecution opening. There now appears to be little dispute that Mr Lynch spoke with the applicant and members of his family throughout the trial in the short adjournment and at the end of the court day.

37. Mr Lynch was leading Mr Ayoub Khan. Mr Ayoub Khan was also engaged in other cases and was not always present at trial. Mr Hussein made infrequent attendances to the court during the trial. He says he was not present when discussions took place between counsel and the applicant concerning whether the applicant would give evidence.

38. The progress of the trial appears to have been unexceptional. There is no suggestion that Mr Lynch was unable to cross examine prosecution expert witnesses on general points of interpretation of the data by reason of Mr Hussein's lack of instructions. The agreed facts went through careful drafting and discussions between counsel before reaching their final form. Mr Mitchell indicates, by reference to a track changed document, that Mr Lynch was fully involved in the redrafting of 'agreed facts.' It is said that "the applicant's representatives were careful to make sure that the agreed facts were accurate and did not go beyond those things which could not be challenged." There is no criticism of Mr Lynch's conduct of the case, save in respect of the applicant's failure to give evidence and a comment made in his closing speech as we indicate below.

39. In the event, Mr Lynch indicated at the conclusion of the prosecution case that the applicant did not intend to give evidence. He was asked by the judge, in the presence of the jury:

> "Have you advised your client that the stage has now been reached at which he may give evidence and if he chooses not to do so, the jury may draw such inferences as may appear proper from their failure to do so."

Mr Lynch responded: "I have given him detailed advice on that".

40. The applicant did not give evidence at trial, and neither did his co-accused Khan. In the latter case there is a signed endorsement, in conventional terms indicating that he had been advised of his ability to give evidence, had been informed that an adverse interference could be drawn if he did not, but had decided of his own free will not to do so. No such endorsement is available in the applicant's case.

41. The trial proceeded to counsel's closing submissions. The prosecution highlighted the detail of the mobile phone and cell site evidence, including not only the correlation between the movement of the 'dirty' phone SIM cards used in the applicant's accepted mobile handset but also the messages sent from applicants accepted mobile number at the time of the consignments. Further, they referred to the applicant's association with the addresses to which the consignments were to be delivered and his attendance at the scene and anticipated time of delivery of the fourth consignment. Mr Mitchell also commented on the applicant's silence throughout police interview and at trial.

42. Mr Lynch KC's closing speech extends over 10 pages of transcript. He indicated "six separate issues… five of which are very short and the sixth is about the telephone evidence, which is… crucial in this case". The first five dealt with the applicant's failure to give evidence and his effective good character; the passage of time; the use made by drug conspirators of 'innocent' and 'respected' members of the community and the unlikelihood that the applicant would use his own address to receive a consignment of drugs; Botos' knowledge of other 'Rashids' and the description of the man who had involved him; caution about 'inferences' that may otherwise be drawn from innocent events. The sixth was the "telephone evidence which is … at the heart of this case, and part of the reason, …, why it took so long to charge this man. The year between the events and him being arrested and charged [was] because the telephone evidence was so complicated. The case, you may think, stands or falls on that telephone evidence. If the phone evidence doesn't make you sure that he is guilty, you may think that whatever else there is there that wouldn't be enough because if it were they wouldn't have waited a year before they charged him."

43. The speech went on to critique the prosecution telephone evidence in considerable detail. Exception is taken on the applicant's behalf to one sentence, approximately two thirds of the way through the speech, namely:

> "So we would caution you, members of the jury, to be careful about what you read into these statistics. It is easy to blithely say, as has been said: well it never called this, it never did that, and how can it be possible that it could ever possibly be in somebody else's hands and not be his phone, or they're together at the same time and it must be therefore in his hands? Not if it's a relative (a close one) or a friend (a close one) and they're using that phone. As I said to you before, and I hope I have made it clear and

forgive me if I belabour the point, I'm not saying it has never been in his hands. We're not saying that he didn't pick up the phone and then use it to call Pakistan or something like that." (Emphasis added)

44. The applicant was convicted, as was Khan. Mr Ayoub Khan provided the applicant with negative advice on appeal.

The applications made in support of permission to appeal

45. Prior to lodging the grounds of appeal, Mr Sherrard consulted with all members of the applicant's trial legal team in accordance with the procedure mandated in *R v Jason Trevor McCook* [2014] EWCA Crim. 734. Mr Hussein responded by letter dated 23 October 2021, Mr Ayoub Khan by letter dated 31 March 2021 and Mr Lynch by letter dated 30 March 2021.

46. Three grounds of appeal were drafted:

Ground 1: The legal representatives of Mr Mahmood failed in their role to adequately prepare the defendant's case including taking proper instructions and providing advice as to the merits of whether to give evidence or not.

Ground 2: Given that the Crown's case was that it was specifically the appellant who was using the 'dirty drugs phones', Leading Counsel's concession in his closing speech, contrary to all instructions, that the defendant had in fact handled and used one of the said phones, was such as to render his subsequent conviction unsafe. The concession in the closing address was without any form of consultation and would have been catastrophic to the appellant's case before the jury especially given that he hadn't given evidence.

Ground 3: The appellant had no proper advice from trial counsel regarding whether to give evidence or not. None of the competing arguments were addressed and no formal advice offered as to the consequences and adverse inferences that would flow. Grounds 2 and 3 should be read and considered together in all the circumstances.

47. The single judge determined that it would be "inappropriate to grant permission to appeal given the long extension of time needed. The matters raised in the advice on appeal do raise sufficiently serious concerns about the nature and quality of your defence representation at trial to merit the attention of the full court, though that does not mean it will be persuaded that your conviction is unsafe, or arguably unsafe. Of particular concern is the inability of the former defence representatives to produce any document signed by you, recording that you received advice on whether to give evidence and that you had decided of your own free will not to do so knowing the implications of that choice. There was such a document in the case of your co-accused, Asghar Khan. Former junior counsel asserts that such a document was signed by you …As far as I am aware, junior counsel has not since forwarded any notebook. Leading trial counsel has only given an account of what you "would have" been advised. … In your witness statement of 31.10.22 for your proposed appeal, you say … that you were persuaded not to give evidence by Mr Hussain and junior counsel. Normally, I would not accept that if it were contradicted by the former defence team but the absence of any signed endorsement by you, taken together with other concerns, does cast doubt on the quality of your representation at trial and on that point in particular."

48. The matter was set down for hearing. Directions were given that the applicant file a document setting out the areas of disagreement with the responses of his previous trial representatives and for them to respond as appropriate.

49. We have heard evidence from the applicant and Mr Mohammed Iklaq, who attended with him throughout the trial, Mr Lynch, Mr Ayoub Khan and Mr Hussein.

The evidence

Solicitor Client Care

50. The applicant's oral and written evidence identified his early formed and continued belief that his case had been inadequately prepared by his solicitor. We need not record the litany of complaints he makes in this regard, some of which are entirely irrelevant to the application although not to his sense of grievance and which may feature in any referral he may decide to make to the Solicitor's Regulatory Authority. However, having heard the evidence of Mr Hussein, we are in no doubt that the applicant's dissatisfaction with the client care afforded by his solicitor was amply justified.

51. Mr Hussein candidly admitted that he had not attended upon the applicant after the 22 January 2018 until 18 November 2018, and then only after the insistence of a delegation of the applicant's family and friends who had been endeavouring to secure his attention by phone calls and mobile messages. It was clear that Mr Hussein had not prepared a proof of evidence until November 2018, despite the prospective earlier trial date in April 2018, which was not aborted until days before. He had been late in actioning the instruction of expert evidence, and then had not 'followed through' with the further information that had been required.

The applicant giving evidence

52. However, the applicant's evidence in cross examination by Mr Mitchell in relation to his complaints against trial counsel was far less convincing and differed from the contents of his written statement and evidence in chief. That is, he accepted that he had talked "a lot of time" to 'one or other' of his barristers about the case every day before or after court sessions, although he could not now recall what they discussed. Initially he said he was told "don't go into the witness box", but then amplified his answer saying, they were "talking about phones – that was the case against me- and whether I would give evidence. I was told I did not need to. I said OK." In re-examination he said, "It scared me that Mr Hussein said they'd ask me questions" and explained he was scared because "they pressure you – and I can't explain, my English is not good enough". However, he then confirmed that an interpreter was available to him.

53. Mr Mahmood Iklaq, gave evidence that he had been present throughout the trial, and supported the applicant beforehand in attempting to secure Mr Hussein's attention. He repeated, or endorsed, many of the applicant's complaints against Mr Hussein. He recalled that the applicant had always said that he would give evidence but would need "training". He said that Mr Hussein and Mr Ayoun Khan had spoken to the applicant in Urdu, saying that Mr Lynch would do a better job, but he was not told what the jury "would" think if he did not give evidence. The applicant was not asked and did not sign anything in his presence. Mr Iklaq confirmed that he had sent a message to Mr Ayoub Khan immediately after the conviction, praising all the legal team for their endeavours

on the applicant's behalf and agreed he had not previously raised any compliant about the conduct of the trial.

54. We regarded Mr Iklaq to be somewhat partisan but nevertheless found him to be a credible witness overall save where his evidence implicitly differed in his recollection of the discussions regarding whether the applicant should give evidence as compared with that not only of Mr Lynch and Mr Ayoub Khan, but also the applicant himself.

55. Both Mr Ayoub Khan and Mr Lynch were categorical in their evidence that the applicant was advised of the 'pros and cons' of him giving evidence at trial, including when in the presence of family members. Mr Lynch said he had been brought into the case at late notice. He arrived on the first day of trial and requested the judge adjourn the case after the prosecution opening to allow him to talk to the applicant. The judge agreed. "Right at front of the conference was whether [the applicant] would give evidence. I would have said "see how the case progresses to see if it is desirable or not".

56. Mr Lynch said he had challenged the prosecution evidence realistically. There were inherent difficulties in the applicant's explanations for the circumstantial evidence against him. Decisions had to be made whether the applicant should give evidence bearing in mind "the dynamics of the trial" and not just the state of the 'sterile' evidence.

57. Mr Ayoub Khan said that he had always anticipated that the applicant would give evidence and his view was that the applicant should give evidence to 'explain' the circumstantial evidence. However, there had been several discussions as the trial progressed, he was being led by an experienced silk, and he deferred to him. He cannot now recall all of his conversations with the applicant, and could not confirm or deny that he may have said words to the effect that Mr Lynch would do a better job at explaining things than the applicant.

58. Mr Lynch said his firm view was that the applicant should not give evidence, but he discussed the matter fully with the applicant and his cousin (whom we presumed to be Mr Iklaq) who the applicant 'greatly' relied on.

59. Mr Ayoub Khan recalled that the final discussion on this topic took place after the prosecution had closed its case. There were discussions between counsel and the applicant in the presence of family members, and the applicant had then gone to talk with his co-accused Khan. Subsequently the applicant said he did not wish to give evidence. Mr Lynch said that he had responded truthfully when the judge made the conventional inquiry required by section 35 Criminal Justice and Police Act 1984, responding in terms to the suggestion that he had not done so by saying that he "was not in the habit of lying to judges".

60. Mr Ayoub Khan said that his usual practice was to write out a standard form endorsement in his counsel's note-book for any defendant who decided not to give evidence to sign. He would not send it to his solicitor. He thought he had done so in this case but could no longer find his notebook which had been lost amidst re-arrangements of home office space during the Covid lockdown. Mr Lynch said that he had not prepared a written endorsement and expected his junior counsel to do so as a matter of best practice.

61. We are not satisfied that a written endorsement was made and offered to the applicant to sign. We are satisfied that it is likely that the applicant was told by Mr Ayoub Khan, in or out of the presence of Mr Hussein, that Mr Lynch would make a 'better job' of it, effectively absent the applicant's evidence. However, we unhesitantly accept the evidence of Mr Lynch and Mr Ayoub Khan regarding the advice tendered to the applicant as to him giving evidence or not. We found both counsel to be credible and straightforward witnesses who had some actual recollection of the case. Mr Lynch's answer to the judge's section 35 (of the Criminal Justice and Public Order Act 1994) inquiry was compelling evidence. What is more, the applicant's evidence in cross examination tended to corroborate what they said.

The Closing Speech

62. Mr Ayoub Khan said that he had not discussed each and every aspect of the closing speech with Mr Lynch and had not been present for it. Mr Iklaq gave evidence that Mr Lynch had told him that he intended to suggest that someone else had used the phone but said he had not realised that Mr Lynch would accept that the applicant might have done so. Mr Lynch accepted that the applicant had always sought to dissociate himself from the phone but said it appeared from the discussions he had with the applicant that it "might have been possible" that he had picked up the phone and made an "innocent" call to Pakistan, and that he had floated the possibility with the applicant that it would be appropriate to make this concession in the closing speech to 'confess and avoid'. He had no note of it, and was not now certain that he had specific instructions to do so, but he would not have made the 'contentious' concession in the closing speech unless he had discussed it first with the applicant.

63. Of some note, Mr Iklaq said that his objection to the speech was because it was too short. Mr Hussein had led the applicant to believe that Mr Lynch would work a 'miracle He had not noted the reference to the applicant's possible innocent use of a 'dirty' phone in the closing speech until pointed out to him in the recent preparations for appeal.

64. Although Mr Lynch was less certain in his evidence on this point, we are satisfied that he did discuss this matter with the applicant before he made his closing speech.

Discussion

65. We are not satisfied that there is a satisfactory explanation which accounts for the significant delay in making this application. As we indicate above in [32] and [33], we are left with a distinct impression that attention has been distracted and unnecessary energy and funds diverted to irrelevant matters. There is a clear disadvantage in expecting witnesses to recall events of more than three years ago. We have nevertheless proceeded to consider the merits of the application if not least in deference to the concerns of the single judge.

66. The relevant principles of law in such an appeal as this is correctly stated by Buxton LJ in *R v Day* [2003] EWCA Crim 1060 at paragraph 15:

> "While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe."

67. Mr Sherrard submits that Mr Hussein's conduct was incompetent and negligent to a significant degree. However, none of the complaints made against Mr Hussein go to the safety of the conviction. The applicant's proof of evidence was available to trial counsel. A defence statement was served. Despite the complaints as to (i) the late instruction of the mobile telephone analyst; (ii) the absence of instruction of a cell site expert or provision of information to the telephone analyst; and (iii) comments about the expert's credentials there has been no attempt to secure such expert reports as 'fresh evidence'. Mr Hussein's deficiencies in the client care he afforded to the applicant has not been demonstrated to have tainted Mr Lynch and Mr Ayoub Khan's conduct of the trial.

68. Mr Sherrard's case in relation to the failure to advise the applicant whether to give evidence necessarily has to be that Mr Lynch and Mr Ayoub Khan are lying in their evidence to this Court, and that Mr Lynch lied to the trial judge when indicating that he had given "detailed advice" to the applicant about it. Great reliance is placed on the absence of any signed written endorsement – in complete disregard of 'best practice'; see *R v Good (Alfie)* 2016 EWCA Crim 1869.

69. We endorse the comments of Simon LJ in *Good* that, "Where a defendant decides not to give evidence, whether following advice or notwithstanding advice, it should be the invariable practice for counsel to make a record of the decision with a summary of the reasons. He should read it out to the defendant, who should then be asked to sign it: see *Bevan* 98 Cr Aoo R 354 and Archbold 2016 paragraph 4-381. This should be done before the time when the judge gives the warning about not giving evidence set out in section 35(2) of the 1994 Act. A photocopy of this endorsement should be made in chambers or in the office of an advocate as a record of the advice and the decision, so as to avoid what is said to have happened in the present case."

70. However, as we indicate above, the lack of a signed endorsement does not persuade us to reject the evidence of Mr Ayoub Khan or Mr Lynch that appropriate advice was tendered to the applicant and that the decision whether to give evidence was an 'informed decision' taken by the applicant after talking to his co-accused Khan, who also did not give evidence.

71. There is only one sentence in Mr Lynch's closing speech to which Mr Sherrard takes exception; he referred to is as "pulling the rug from under the applicant's feet" in the context of a "very powerful" phone evidence case in which anybody in possession of a dirty phone would be regarded as guilty. Mr Lynch disagreed that the comment was 'fatal' to the defence case.

72. We agree with Mr Lynch. Objectively, it may be regarded as a 'throw away comment' amid attempts to persuade the jury of the possibility of coincidence and innocent explanation. We note that absent any evidence to this effect and without any adverse criticism then or now, the speech also contained speculation that someone close to the applicant was in possession of the phones and the difficulty in the applicant giving evidence because of the adverse attention of other (presumably a not towards the co-accused Khan whom the applicant at one point suspected and suggested had 'fitted him up').

73. There is no substantive merit in any ground of appeal. We are satisfied, for the reasons emphasized in the prosecution closing speech and in his submissions which echo those points before us, that there was a very strong prosecution case against the applicant. This conviction is not arguably unsafe.

74. We dismiss these applications.