Neutral Citation Number: [2010] EWCA Crim 1755

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Between :

J, S, M	**Appellants**
- and -	
Regina	**Respondent**

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. This is an interlocutory appeal under section 35(1) of the Criminal Procedure and Investigations Act 1996 against an order made by Wilkie J on 19th February 2010 in the Crown Court at Sheffield that, in accordance with section 44(3) of the Criminal Justice Act 2003, (the 2003 Act) the forthcoming trial of the defendants should be conducted by a judge alone. Leave to appeal was given by the judge. The appeal was allowed at the end of the hearing on 9th June. We adjourned our judgment until the conclusion of the appeal of KS which, as we knew, involved a similar point. Both hearings are now complete. They were heard before different constitutions of the court. Accordingly there will be separate judgments. However, taken together, they provide guidance about the approach to be taken by the Crown Court when the provisions of section 44 (3) of the 2003 Act are under consideration.

2. The defendants face trial on an indictment alleging that they conspired to pervert the course of public justice. The present trial is estimated to last 2 weeks, and we see no reason why it should take any longer. That is an important consideration in the context of both the burdens on the jury of any necessary protection, and its impact on the public, both in terms of cost, and of the inevitably significant drain on police resources.

3. The judge was satisfied that the two statutory pre-conditions to an order for trial without a jury were satisfied. There was evidence of a "real and present danger the jury tampering would take place" at the forthcoming trial, and that notwithstanding any steps reasonably taken to prevent it, the substantial likelihood of it would occur meant a trial without a jury was necessary in the interests of justice. (Section 44(4) and (5)). Section 44(6) identifies three examples of evidence which may lead to the conclusion that a real and present danger of jury tampering exists. Although the list is not exhaustive, one example expressly identified in the legislation relates to cases where "jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants.

A real and present danger

4. In our judgment, having examined the facts, in agreement with Wilkie J, and applying the criminal standard of proof, there is and continues to be a real and present danger of jury tampering. The narrative of events speaks for itself.

Jury Protection

5. Unsurprisingly, on this issue, the defendants suggest that if, in 2008, the Crown was advancing a submission in support of a transfer of the trial away from the North East, but not contending that the trial should not be a jury trial, and there is nothing to which the Crown can point to indicate any further developments, it is difficult to see how an application for a non-jury trial, which was not made then, can be justified now. Particular emphasis is laid on the fact that at the time of the application that the trial estimate was 6 weeks, whereas the estimate for the present trial, as we have indicated, is of the order of two weeks.

6. Wilkie J was unimpressed with most of the arguments advanced on behalf of the Crown. Indeed, in the end, the crucial question which led him to his conclusion was

that, even taken at their least intrusive, protective measures which included jury anonymity, bussing to and from court, location in a courtroom so configured that the jury would not be visible from any public gallery, would be "onerous" and "extraordinary" and, perhaps most important, that "it would be obvious to the jurors that they were being made the subject of significant protective measures". In short he was concerned that once the jury knew they were subject to "obvious and intrusive" measures taken with a view to avoiding any tampering with them, it would "make it next to impossible from them to consider that "self same" question objectively when considering their verdict would be at the forefront of their consideration. In other words, basing himself on the particular considerations identified in the judgment in *R v Mackle and others* at paragraph 33, he was concerned that "the compromise of the jury's integrity in a trial, on these particular issues, would be incurable" and incapable of being dispelled by direction from the judge. Accordingly the protective measures would be unreasonable because they would "subvert the jury's ability "objectively and dispassionately to dispose of the case".

7. The critical feature of the present application for trial by judge alone is that the jury will be a protected jury, subject to probably even more stringent security arrangements than those which were envisaged for the fraud trial. They will be trying a case in which they will inevitably appreciate that the defendants are alleged to have been involved in the tampering of or arrangements for tampering. That undoubtedly creates problems for the judge's management of the jury, and his obligation to ensure that, notwithstanding the protective measures, the trial is fair. We are fully alert to the difficulties faced by juries performing their public responsibilities, particularly in sensitive cases where very heavy protection is deemed necessary. However, given that the estimated length of the trial is 2 weeks we disagree with the judge that the necessary protective measures would either impose an unacceptable burden on the jurors by intruding for a prolonged period on their ordinary lives, or that the jury, properly managed and directed, would be inhibited from giving the case proper attention and whether, convicting or acquitting, returning a true verdict in accordance with the jury's collective conscience.

8. We must emphasise as unequivocally as we can that, notwithstanding the statutory arrangements introduced in the 2003 Act which permit the court to order the trial of a serious criminal offence without a jury, this remains and must remain the decision of last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled. Save in extreme cases, where the necessary protective measures constitute an unreasonable intrusion into the lives of the jurors, for example, a constant police presence in or near their homes, day and night and at the weekends, or police protection, which means that at all times when they are out of their homes, they are accompanied or overseen by police officers, again day and night and at the weekend, with its consequent impact on the availability of police officers to carry out their ordinary duties, the confident expectation must be that the jury will perform its duties with its customary determination to do justice.

9. There is this further, and final, consideration. If during the course of this, or indeed any trial, attempts are made to tamper with the jury to the extent that the judge feels it necessary to discharge the entire jury, it should be clearly understood that the judge may continue with the trial and deliver a judgment and verdict on his own. The

principle of trial by jury is precious, but in the end any defendant who is responsible for abusing this principle by attempting to subvert the process has no justified complaint that he has been deprived of a right which, by his own actions, he himself has spurned.