Neutral Citation Number: [2021] CA (Bda) Crim 16

Case No: Crim/2020/02 & 05

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION**
**THE HON. ACTING JUSTICE ATTRIDGE**
**CASE NUMBER 2018: No. 028**

Sessions House
Hamilton, Bermuda HM 12

Date: 03/11/2021

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL SIR MAURICE KAY**
**and**
**JUSTICE OF APPEAL GEOFFREY BELL**

**- - - - - - - - - - - - - - - - - - - - -**

**Between:**

**(1) KATRINA BURGESS**

**(2) CLEVELAND ROGERS**

**Appellants**

**- v -**

**THE QUEEN**

**Respondent**

Mr Charles Richardson (Compass Law Chambers) for the 1st Appellant
Ms Susan Mulligan (The Legal Aid Office) for the 2nd Appellant
Mr. Carrington Mahoney and Ms Karen King Deane (DPPs Office) for the Respondent

Hearing dates: 8th, 9th 10th, 11th and 16th June 2021

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**JUDGMENT**

**KAY JA:**

**Introduction**

1. Following a trial in the Supreme Court before Acting Justice Attridge ("the Judge") and a jury, Katrina Burgess and Cleveland Rogers, were convicted of the premeditated murder of Marcus Gibbings ("the Deceased"). They were later sentenced to life imprisonment, with a recommendation that they each serve 25 years before being eligible to be considered for parole. They now appeal against their convictions.

**The Case in a nutshell**

2. The appellants are half siblings. The events with which this case is concerned took place in October 2006; Burgess had been in a volatile relationship with the Deceased. They had cohabited in an apartment at 10 Derwent Lane, Pembroke Parish, but that relationship had come to an end by October, and both had moved out of the Derwent Lane apartment to separate addresses.

3. On 26 October 2006, the body of the Deceased was found lying in a pool of blood in the apartment. He had been stabbed to death. The case for the prosecution was that he was killed by Rogers, at the behest of Burgess, who, although not present in the apartment at the time of the murder, had lured the Deceased there on a pretext.

4. Many years passed before there was sufficient evidence for anyone to be charged with the murder. Eventually, two women, both former girlfriends of Rogers, provided evidence that Rogers had confessed to the murder. Catrina Card, with whom he had been living at the time, said that he had admitted to being the killer in the immediate aftermath of the murder. Danielle Foley, with whom Rogers was living with between 2013 and 2015, said that he had admitted in 2014 to being the murderer.

5. At the trial, these two witnesses were pivotal. The Judge directed the jury that unless they accepted the confession evidence, they must find Rogers not guilty. That evidence was not admissible against Burgess. The evidence against her was circumstantial. It included evidence of a phone call between her and the Deceased on the evening of 25 October, in which she arranged to meet him a bit later at "the house". She called him again, at 19:51, but he did not answer and the call went to voicemail. During the course of the evening, she did not go to Derwent Lane. The case for the prosecution was that she spent the time ostentatiously setting up an alibi. Neither Burgess nor Rogers gave evidence at the trial. The Judge told the jury that if they were to find Rogers not guilty they must also acquit Burgess.

**The Grounds of Appeal**

6. Numerous grounds of appeal are advanced on behalf of the appellants. Some are specific to one or other of them, others overlap. I shall endeavour to deal with them under headings, rather than enumerating them all.

*Severance: Burgess*

7. As I have related the principal evidence against Rogers was in the form of confessions, said to have been made to Card and Foley. It is axiomatic that anything he had said to either of the two women was not evidence against Burgess, however much it implicated her.

8. The evidence of Card, in particular, was that Rogers had admitted to having killed the Deceased at the request of, and in return for payment of $5,000 from Burgess. The trial with which we are mainly concerned, was the second occasion on which a trial of the appellants on this indictment had commenced.

9. In 2019, a trial had begun before Simmons J but, unfortunately, it had become necessary for the jury to be discharged at an early stage. At the outset of the earlier trial, an application had been made on behalf of Burgess for severance of the indictment, so that Rogers alone would be tried first with a later trial of Burgess alone if Rogers were to be convicted. On 1 July 2019 Simmons J refused the application for severance. The question of severance was not raised before the Judge at the trial with which we are concerned. Mr. Richardson maintains that he was inhibited from revisiting it by reason of a local practice to the effect that once a judge has ruled on a particular issue, another Supreme Court Justice will not reconsider the issue in the same case. I shall return to this contention later. For the moment, the question is whether the ruling of Simmons J refusing severance was erroneous.

10. It is not uncommon for one of jointly charged defendants to apply for severance on the ground that, if tried together, the applicant will suffer irremediable prejudice as a result of the jury hearing evidence, which, while admissible against the other defendant, is inadmissible against the applicant. Very often, the evidence in question is in the form of a confession by the co-defendant, which also (inadmissibly) implicates the applicant. The basic principle was explained by Lord Widgery CJ in *Lake* (1976) 64 Cr. App. R 172 at 175.

> *"It has been accepted for a very long time in English practice, that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability, that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly, it is accepted practice, from which we certainly should not depart in this court today, that a joint offence can properly be tried jointly even though this will involve inadmissible evidence being given before the jury, and the possible prejudice which may result from that. Of course the practice requires that the trial judge in such a case should warn the jury that the evidence is not admissible, and this trial judge was certainly not lacking in his duty in that regard, because on no less than eleven occasions, he pointed out to the jury that the evidence in question was not admissible*"

See also Lord Steyn in *R v Hayter* [2005] 1 WLR 605 at paragraph 6.

11. In the present case. Mr. Richardson submits that the judge was wrong not to find, "dangerous prejudice", incurable by direction. He refers to unmanageable mental gymnastics required of the jury, who would not have been able to disentangle the admissible from the inadmissible evidence against Burgess, specifically Rogers' confessions to Card and Foley.

12. The starting point is described in Blackstone's Criminal Practice (2019) at paragraph D11.87, where it is stated:

> *"When the prosecution case against one accused (A1) includes evidence that is admissible against him but not against his co accused (A2), there is no obligation to order severance, simply because the evidence in question might prejudice the jury against A2. However, the judge should balance the advantages of a single trial against the possible prejudice to A2, and should consider especially how far an appropriate direction to the jury is really likely to ensure that they take into account the evidence only for its proper purpose of proving the case against A1."*

13. The question for us is whether this is one of those rare cases where the starting point must yield to the need to avoid injustice. Mr. Richardson has referred to a number of authorities. Some seem to me not to be helpful, because they are concerned not with severance as between jointly charged defendants, but with severance of counts relating to the same defendant. See *Sims* [1946] KB 531 and *Newman* [1915] 1 KB 341. The authorities concerned with severance as between jointly charged defendants demonstrate the exceptionality of severance and the reluctance of an appellate court to interfere with the decision of a refusal of severance by the trial judge.

14. In *Lake*, both of the appellant's co-accused had made statements to the effect that the appellant had set up the burglary. The Court of Appeal held that the trial judge had rightly refused an application for severance on behalf of the appellant.

15. In *Moghul* (1977) 65 Cr. App. R 56, the trial judge had ordered severance and the appellant's case was that he ought not to have done so. The Court of Appeal said that the three members of the court would not have ordered severance and that only in very exceptional cases should separate trials be ordered where two or more persons are charged with the same offence.

16. In *Smith* (1966) 51 Cr. App. R. 22, the appellant's two co-accused had made statements incriminating both themselves and the appellant. The trial judge had refused the appellant's application for severance. Both co-accused were acquitted. Although the appellant's appeal against conviction was allowed the Court of Appeal endorsed the trial judge's decision to refuse severance. The reason that the appeal was allowed was that the appellant's conviction was unsafe and unsatisfactory in view of the acquittal of the two co-accused.

17. Finally, in *Miah* [2011] EWCA (Crim) 945, a case of "cutthroat" defences; the fact that one defendant had implicated another in a police interview attracted the observation that that would rarely sustain an appeal on the ground that severance should not have been refused. Even the fact that the co-defendant who had given such a police interview had not given evidence, and had advanced the defence of diminished responsibility that had involved the hearsay factual narrative from expert medical witnesses, had not necessitated separate trials.

18. In my judgement, there is nothing in the authorities that requires a conclusion that the refusal of severance in the present case was erroneous. When considering this issue, it is important to keep in mind that a criminal trial is an organic process. A pre-trial ruling on severance is made when the judge does not know how the trial will develop. For example, whether either or both defendants will give evidence, or if they do, what they will say. Any prejudice which is quantified at the time of the ruling may increase or decrease as matters unfold. Simmons J acknowledged this in her ruling, when she said that the issue of severance might be raised again, if warranted. In the event, there was no further application, either to Simmons J or the Judge at the trial with which we are concerned. Mr. Richardson says that he felt inhibited about making such an application because of a local convention which prevents an application that has been refused by one Supreme Court Justice being made before another. If there is such a convention, it is misconceived. Where there is a change of circumstances, and the interests of justice require it, a case management decision, including one on severance, can be revisited, either by the original judge or a different one: see section 476D of the Criminal Code Act 1907.

19. As it happens, I do not consider that in the present case there was a change of circumstances, such as would have justified a further application. If one concludes, as I do, that the ruling of Simmons J refusing severance was unimpeachable, the next issue is whether the Judge gave sufficiently robust directions to the jury on the inadmissibility, as against Burgess, of the contents of Rogers' confessions to Card and Foley. Mr. Richardson submits that he did not. I reject that submission. At an early stage of his summation, the Judge directed the jury that (subject to one exception to which I shall refer at a later stage of this judgement):

> *"The evidence of what Mr Rogers is alleged to have told [Card and Foley] can only be considered by you in the case against Mr Rogers. You must not consider that evidence when you come to decide if the prosecution case has been proved against Ms Burgess."*

20. He referred to this direction again five pages later. He returned to it again when summarising Card's evidence about Rogers having described being paid by Burgess to commit the murder. At the end of his summary of Card's evidence, he reminded the jury in strong terms of his direction as to its inadmissibility against Burgess. He did the same again when he reviewed the evidence of Foley. His directions cannot be faulted in this regard. Mr. Richardson submits that they were undermined by his conflating the cases against the two defendants, but I can find no justification for this complaint.

21. Before leaving the question of severance, I should refer again to the case of *Hayter*. The ratio of the decision of the majority of the House of Lords is accurately described in the following terms in the head note:

> *"When in a joint trial the case against the defendant depended on the prosecution proving the guilt of a co-defendant, and the evidence against the co-defendant consisted solely of his own out of court confession, then that confession would be admissible as against the defendant only insofar as it went to proving the co-defendant's guilt; that the admissibility of the confession as against the defendant*

> *was subject to two conditions. First, that the jury was sufficiently sure of its truthfulness, to decide that on that basis alone, they could safely convict the co-defendant. And secondly, that the jury were expressly directed that when deciding the case against the defendant, they must disregard entirely everything said by the co-defendant in the confession, which might otherwise be thought to incriminate the defendant; that at the end of the prosecution case, the defendant would have a case to answer, because the jury could properly find that the co-defendant was guilty on the basis of his own confession, and then go on to find that the fact of the co-defendant's guilt coupled with any other evidence incriminating the defendant was sufficient to prove his guilt."*

22. In the present case, Mr Mahoney told Simmons J that he was not relying on *Hayter* on the issue of severance. It seems to me that this was a generous concession. He could have relied on it. Moreover, *Hayter* illustrates how the consequences of Rogers' confessions, if accepted as accurate and true by the jury, could never be expunged from the case against Burgess, even in a separate trial. If Rogers had stood trial first and had been convicted, the prosecution could and would have adduced his conviction – but not the fact or details of his confessions – in the subsequent trial of Burgess. Mr Richardson accepts this.

23. Accordingly, the question of prejudice in the joint trial was not as great as it might first have seemed. The second jury would have known that Burgess' half sibling was the murderer of her estranged partner, who, on the evidence admissible against Burgess, if accepted by the jury, had lured him to the apartment. It is true that the second jury would not discover that Rogers' confessions included an account of being paid by Burgess to carry out the murder, but the prejudice resulting from the hearing that in the context of the joint trial is to some extent lessened by what they would have undoubtedly have heard in a separate trial. For all these reasons, I reject the submission that the judge was wrong to refuse the application for severance.

*Hearsay Evidence: Burgess*

24. This ground of appeal is essentially a fallback submission which arises on the failure of the severance ground. Mr. Richardson submits that if it was appropriate for there to be a joint trial, the Judge ought to have excluded parts of the evidence of Card and Foley, which were particularly prejudicial to, but inadmissible against Burgess. The legal peg upon which he seeks to hang this submission is section, 93(1) of the Police and Criminal Evidence Act 2006, which provides:

> *"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*

25. Mr. Richardson acknowledges that no application on behalf of Burgess, pursuant to section 93(1) was made at trial, but he submits that the unfairness was so obvious that the Judge ought to have excluded the evidence of his own motion. His particular concern is with the parts of Card's evidence, in which she said that Rogers had confessed to murdering the Deceased at the request

of, and in return for payment from Burgess, and that she, Card, had played a part in recovering some of the money from Burgess after the murder. The judge was assiduous in directing the jury at numerous parts of the summation that, as a matter of fundamental principle, the evidence of Card was, save for one exception, inadmissible against Burgess. The exception was her evidence that on one occasion after the murder, she had telephoned Burgess at the request of Rogers. The judge told the jury that that was direct evidence admissible against Burgess. Its relevance was to establish communication between Rogers and Burgess in circumstances where the evidence suggested that prior to October 2006 they did not have much to do with each other.

26. I do not consider that there is any force in Mr Richardson's submission. If, as I have concluded, it was appropriate for there to be a joint trial, it would be unreasonable to expect the Prosecution to omit reference to important aspects of the evidence, admissible against Rogers. The evidence, (if accepted) that he had confessed, not only to the murder, but also to doing it for financial reward, established motive on his part, which was important in the context of the evidence that he did not have a close relationship with Burgess.

27. In *Lobban* [1995] 2 All ER 602, Lord Steyn said at page 613j:

> *"The practice is generally to order joint trials, but their Lordships observed that ultimately the governing test is always the interest of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge, to the effect that the statement of one co-defendant is not evidence against the other. And that duty the trial judge fulfilled in the present case by emphatic and repeated directions that the last paragraph of Russell's statement was irrelevant to the case against Lobban. The judge could not have been more explicit. For all these reasons, the ground of appeal under consideration is rejected."*

28. That resonates in the present case. The directions given to the jury were indeed, "*most explicit*". Mr Mahoney tells us that the Judge told the jury, after Card and Foley had given evidence, that what they had attributed to Rogers was not evidence against Burgess. We do not have a transcript of what he said at that stage, however he repeatedly addressed the issue in his summation. At an early stage, He said:

> *"Specifically in this case that relates to the entirety of the evidence of Miss Card, and Miss Foley and the confessions alleged to have been made to them by Mr Rogers save perhaps for one limited exception which I will refer to you when I consider the evidence from Ms. Card. That evidence of what Mr Rogers is alleged to have told them, can only be considered by you, in the case against Mr Rogers. You must not consider that evidence when you come to decide if the prosecution case has been proved against Ms Burgess."*

29. Later, when summarising the evidence of Card, he said:

> *"You will remember my direction to you, however, ladies and gentlemen, which you must accept, and that is that, as a matter of law this is no evidence against Ms*

*Burgess, and you must not consider this evidence when you come to deliberate upon the case against Ms Burgess. It is, as you have seen from the further and better particulars of the prosecution's case against Ms Burgess, no part of their case against Ms Burgess, that she paid Rogers to commit the offence, and I must direct you that as a matter of law there is no evidence against Ms Burgess that she did pay Mr Rogers. This evidence is evidence that you may only take into account when you come to consider the case against Mr Rogers. It is not evidence that you can take into account when you come to consider the case against Ms. Burgess."*

30. He reiterated that at the end of his summary of Card's evidence (transcript page 402), and also in relation to Foley's evidence (transcript page, 414 to 415).

31. In my judgement he dealt with the issue comprehensively, and it would have been inappropriate for the evidence admissible against Rogers to be redacted or excluded. As in *Lobban* the safeguard was, "*emphatic and repeated directions"*

*No Case to Answer: Burgess & Rogers*

32. At the conclusion of the Prosecution case, submissions were made on behalf of both appellants that they had no case to answer. The Judge rejected both submissions. Each relies on a ground of appeal to the effect that the judge was wrong.

i) Burgess

33. The evidence against Burgess was circumstantial. It was both simple and subtle. Its important features were that at the end of what had become an acrimonious relationship, the Deceased had moved out of the apartment at Derwent Lane. According to the evidence of Vernon Charles, at the memorial service for the Deceased, Burgess told him that she had called the Deceased on 25 October and arranged to meet him at the Derwent Lane apartment. There was evidence from telephone records that she made such a call at 7:51pm. The Deceased went to the apartment. Burgess did not.

34. The Deceased was murdered at the apartment. Subsequently, at the memorial service, Burgess told Vernon Charles that two men had come from Trinidad and killed Marcus. There is nothing to support that. Later she told the Deceased's mother on a phone call to Trinidad that it had been a robbery that had gone wrong. Again, there is nothing to support that. On the contrary, the Deceased's expensive watch and his wallet containing cash and credit cards were still with him when his body was found the following day. There was no sign of a forced entry to the apartment. Also, on Burgess' call to the Deceased's mother in Trinidad, she pressed her to call her back after she had spoken to an investigating officer to pass on anything she had learned from the officer.

35. The Prosecution also relied on the evidence of what the Judge described as her "*alleged concocted alibi*". There were, of course, two sides to that evidence – on behalf of Burgess it was relied upon as being exculpatory – but if the jury were to reject its genuineness, it had probative inculpatory potential.

36. It was by reference to all the aforesaid matters that the Judge held that Burgess had a case to answer. He referred to the authority of *R v G and F* [2013] Crim LR 678, including the following passage:

> *"The test being, whether a reasonable jury, not all reasonable juries, could on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the Prosecution case at its highest, then the case must continue. If not, it must be withdrawn."*

37. He then said this:

> *"Applying the test in Galbraith, and those principles, I am satisfied on the evidence against Ms Burgess, taken at its highest, that it would be properly open to a jury, properly directed, to reach the inferences contended for by the Prosecution, in this case, and on that basis alone I would hold that there is a case for Ms Burgess to answer."*

38. The reference to "*on that basis alone"*, indicated that the Judge felt it unnecessary to consider the decision of the House of Lords in *Hayter* (supra). It is clear from the transcript of the argument that the judge found *Hayter* difficult. He may not be alone in that. However, it seems to me that it is clearly authority for the proposition set out in the headnote to which I referred earlier. Applying that to the present case, it would permit the jury, properly directed, to decide that the confession evidence against Rogers proved that he was the murderer and that the proven fact that he was the murderer (but not the details of his confession, which implicated Burgess) was admissible against Burgess.

39. There is one further piece of evidence not considered by the Judge at this stage in his consideration of the case against Burgess. In her evidence, Card described an occasion some weeks after the murder when, at the request of Rogers, she called Burgess. Her evidence about that call was that Rogers had called her at work, and said, *"Trina's not answering. Call her and ask her if she's got that message for me"*. She said that her understanding was that, "*message*" was understood to mean, "*money*". The transcript of evidence proceeds as follows:

> *"**Q:** Did you call her?*
> ***A:** I did.*
>
> ***Q:** Did you speak with her?*
> ***A:** Yes.*
>
> ***Q:** What did you tell her?*
> ***A:** Cleavy is trying to get a hold of you.*
>
> ***Q:** Who?*
> ***A:** Cleavy is trying to get a hold of you.*

***Q**: Yes.*
***A**: I'll call, she said, I'll call him later."*

40. She had earlier said she had had to call Burgess on an occasion for the money, which was admissible against Rogers. but, without further preparation of the ground by additional questions, not against Burgesss. I mention this evidence because it demonstrates a connection between Burgess and Rogers beyond the fact that they are half siblings. Subject to a further point (to which I shall return), in my judgement, the Judge was correct to find that Burgess had a case to answer, both for the reasons he gave – which were sufficient – and for tan additional reason. He could also have held that the *Hayter* principle further strengthened the case for the Prosecution on the basis that, if the jury were sure that Rogers was the murderer, that was evidence admissible against Burgess; that the murderer of the man she had agreed to meet at Derwent Lane, but in the event did not, was her half sibling. This point may not have been made to the Judge.

41. Cases based on circumstantial evidence depend on the rejection of innocent coincidences. A jury would be entitled to conclude that the juxtaposition of Burgess' arrangement to meet the Deceased at the apartment and her failure to attend with the attendance of her half sibling who murdered the Deceased (with no evidence of robbery, or other motive) was beyond coincidence. Mr Richardson emphasised to us that the case which Burgess was being required to answer was one of premeditated murder. He postulates alternative scenarios on the hypothesis that Burgess was indeed party to the luring of the Deceased to the apartment to be confronted by Rogers. The submission is that Burgess might have had the *mens rea* required for a joint offence of, say, grievous bodily harm, or something less, but might not have contemplated or intended that Rogers would kill the Deceased.

42. In his written submission, Mr. Richardson stated that, "*It is nothing short of wild speculation that she somehow must have arranged for Rogers to be waiting at that location <u>to kill</u> the deceased",* and, accordingly, there was no case of premeditated murder for Burgess to answer.

43. It is not unusual for a secondary party to seek to distance himself from the full extent of the primary offender's *actus reus*: for example, "I only wanted to frighten the victim, and never contemplated that my co-accused would cause him serious injury to, or, kill him". Such cases raise complex issues of fact and law. In the present case, however, at the time when the Judge was required to rule on the submission of no case to answer, there was no recognisable issue that Burgess may not have shared Rogers' *mens rea*. Without more, if the jury were satisfied that Rogers murdered the Deceased following a plan whereby Burgess would lure him to the apartment, they would be entitled to infer that Rogers had done what he had agreed to do. In this respect, it is Mr. Richardson who is inviting speculation. There was a basis for an inference of premeditated murder.

ii) Rogers

44. In his ruling the Judge said that the no case submission on behalf of Rogers was based on the second limb of *Galbraith*, and contended that the evidence of Card and Foley was tenuous, inherently weak, vague and inconsistent with other evidence. The Judge rejected the submission by reference to this well-known passage in the judgment of Lord Lane CJ in *Galbraith*:

> *"Where the prosecution evidence is such that the strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

The Judge concluded that the present case against Rogers was just such a case.

45. In her written submissions, Ms. Mulligan referred to numerous features of the evidence of Card and Foley which, she said, so undermine their credibility that the epithets "tenuous", "inherently weak", "vague" and "inconsistent" accurately describe their evidence. The written submissions on this issue extend to some 10 pages. I do not propose to repeat the details here. In summary, they related to the lack of contemporaneous reports of the confessions; the continuation of the relationships with Rogers after the confessions; alleged collusion between the two women; their current animosity towards Rogers and a common desire to ensure that he remained in custody; inconsistencies between Card's evidence on such matters as the timing of events on 25 and 26 October; her description of Rogers' clothing, particularly footwear; the difficulty of reconciling some of her evidence with aspects of the forensic evidence; the fact that both Card and Foley described Rodgers, as "looking up at the ceiling" when he uttered his confessions; errors in Card's evidence about the precise circumstances of her hearing of the murder on the broadcast media; and the circumstances in which the two women came forward with their accounts, so many years after the murder, and of their dealings with the police at that time.

46. It must be acknowledged that this is a long list of points. Ultimately, however, they are classically jury points. At no stage did either Card or Foley resile from the central feature of their evidence that Rogers had confessed to the murder. Inconsistencies and errors are hardly surprising after so many years. The Judge gave the jury conventional directions on the passage of time, and inconsistences. It is one thing to be inconsistent and wrong about such things as times and clothing 14 years after the event, quite another to misremember or to fabricate a confession to murder. The assessment of the essential truth or mendacity of the confession evidence was entirely a matter for the jury and the Judge was plainly correct to reject the submission on behalf of Rogers of no case to answer.

*Abuse of Process*

47. Both appellants seek to challenge the safety of their convictions on the grounds that they were obtained as a result of an abuse of process. However, their grounds of appeal in this regard are different.

i) Burgess

48. The aspect of the trial upon which Burgess seeks to rely as an abuse of process relates to a telephone call which went from her workplace phone to the Deceased's cell phone at 9:07:55 on the night of 25 October. Telephone records establish that such a call was made and that it was not picked up by the Deceased but went to his voicemail. It lasted 33 seconds. In a witness statement

made the following day, Burgess said that she had left a message to the effect that she was heading to the Lobster Pot for something to eat, and that from there she would go to her father's house.

49. There was undisputed evidence that she did indeed go to the Lobster Pot, soon after making that call; and that she left that restaurant later in the evening and eventually arrived at her father's home between four and five o'clock in the morning. Burgess' account of the voicemail and its content were received in evidence through cross examination of Chief Inspector Cardwell. Although the Police had possession of the Deceased's phone from, at the latest, 28 October, no steps were ever taken to retrieve the voicemail.

50. PC Cabral physically examined the phone on 1 November and made a list of the most recently logged calls that had been received, sent or missed, together with the most recent text messages. However, he did not attempt to access the voicemails. There was a great deal of evidence about what later transpired between the Police and the service provider, M3 Wireless, but I do not propose to rehearse the detail.

51. It is clear that the Police did not take steps diligently, or at all, which would have enabled them or M3 Wireless on their behalf to retrieve the voicemail. When cross examined, Chief Inspector Cardwell did not dispute that Burgess had left a voicemail. He also accepted that what she had said in her written statement about the contents of the voicemail was subsequently verified – the visit to the Lobster Pot and later going to her father's house. At trial, armed with the evidence which had been given by Chief Inspector Cardwell, and other officers, together with the evidence of, in particular Ms Aisha Pace of M3 Wireless, Mr. Richardson asked the Judge to stay the prosecution of Burgess as an abuse of process. He submitted that as a result of "*somewhere between gross negligence and deliberate omission*", the investigating officers had failed to obtain and retain the best evidence of the contents of the voicemail.

52. In his ruling the Judge rejected the submission of "*deliberate omission*" on the basis that there was no evidence of bad faith, nor had any suggestion of it been put to the police witnesses. In my judgement, he was correct to do so. What Mr. Richardson was and is entitled to submit is that the failure by the Police to take timely steps to access the voicemail was plainly inept. The reality seems to be that Chief Inspector Cardwell, and presumably his colleagues, took the view that what Burgess had said in the voicemail was less important than the fact that the Deceased did not answer the call, which caused the Chief Inspector to infer that by the time the voicemail was left, the Deceased was already dead.

53. Having referred to some of the authorities, to which I shall return, the Judge refused the abuse of process application. He reasoned as follows:

> *"Applying the principles set out in (the authorities) to the instant case, I return to the proposition above as to where we find ourselves, and that is in a position where the defendant has made clear to the police, which is now in evidence before the jury what she says was the content of the message. And whilst the prosecution may not be in a position to agree that that is what was said, or even that a message was a left at all, they are certainly by reason of the failure to obtain and/ or retain it, not in a position to contradict Ms Burgess. In these circumstances, I'm unable to say*

*that on the balance of probabilities, I am satisfied that the trial process, including any directions that I may give, is unable adequately to deal with any prejudice caused to the defence by the absence of the voicemail."*

54. The ground of appeal on this issue simply pleads that the Judge erred in law when he refused to stay the proceedings as an abuse of process. It is common ground that there can be cases in which the loss, destruction, or failure to obtain evidence may sustain an abuse of process application, but it is apparent from the authorities that such cases are very rare.

55. In *R (Ebrahim) v Feltham Magistrates' Court* (2001) 2 Cr. App. R. 23 Brooke LJ observed that:

> "*The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between."*

He continued (paragraph 27)

> *"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case. For example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film, or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."*

56. In *DPP v Fell* [2013] EWHC 562 (Admin) Gross LJ observed at paragraph 15:

> *"The burden of proof is on the party seeking a stay. The standard of proof is a balance of probabilities, a civil standard. The party seeking a stay must make good to the civil standard that, owing to the missing evidence, he will suffer serious prejudice, to the extent that no fair trial can be held, and that accordingly, the continuance of the prosecution would amount to a misuse of the process of the court…The grant of the stay in a case such as this is exceptional. It is effectively a measure of last resort. It caters for, and only for, those cases which cannot be accommodated with all the imperfections within the trial process. It is of course a very different situation, where evidence has gone missing, through some serious culpability, or bad faith on the part of the prosecutor or investigator…"*

57. There are copious other statements to like effect. In his written and oral submissions Mr Richardson was severely critical of the failure of the Police to obtain evidence of the contents of the voicemail, even though they had had opportunities from the physical examination of the cell phone by PC Cabral, through to the execution of search warrants and dealings with M3 Wireless. It is not necessary for me to include a detailed description. As I have said, I accept that ineptitude on behalf of the police is clearly established on this issue. The question is whether it has resulted

in such prejudice and unfairness to Burgess that it necessitated the staying of the proceedings against her.

58. The point most heavily stressed by Mr Richardson, is that if the jury had been able to listen to the voicemail, they would have been able to assess the tone and candour of Burgess' voice, and this might have led them to reject the case against her – that she was a party to a premeditated murder.

59. In his written submissions. he asserted that she, "*had lost the benefit of evidence, independent of herself; that on her case would have corroborated the statement she had made to the police on 26 October*". With the benefits of such evidence, he submitted, the jury would have had cogent material, against which to test the evidence of Vernon Charles and the Pierres. Plainly, the Judge rejected similar submissions in his ruling. The question for us is whether he erred in law by so doing. In my judgement he did not. I base this conclusion on the following matters.

60. First, the trial process had ensured that Burgess's account of the voicemail, given in her witness statement very soon after the murder, was before the jury.

61. Secondly, the trial process would have enabled her to repeat and amplify that account by giving evidence, although she chose not to do so (as of course, was her right).

62. Thirdly Chief Inspector Cardwell, when cross examined, had seemed to accept that Burgess had left the voicemail, in the terms which she had set out in her witness statement.

63. Fourthly, the Prosecution, while unable formally to admit the terms of the voicemail or even that any words had been spoken at all, could not and did not dispute Burgess's account of it.

64. Fifthly, if the voicemail had survived, and had been before the jury, the issue would have remained the same – had it been an inconsequential message left by an innocent woman? Or, was it part of a devious plan to distance her from a murder to which she was a part? References to what might have been gleaned from Burgess's manner and tone are pure speculation.

65. Sixthly, counsel's references to independent corroboration are unimpressive. The source, Burgess herself, was not independent. The material, for that reason, was not capable of being corroborative in the legal sense, and the account of the voicemail which she had given was not contradicted or actively disputed.

66. Seventhly, in this part of the trial Burgess benefitted from, and the Prosecution was undoubtedly embarrassed and prejudiced by, the forensic exposure of the police ineptitude

67. Eighthly, the judge having concluded that any prejudice to Burgess could be cured by appropriate directions in his summation, proceeded to give appropriate directions.

68. As regards the summation, it included a number of relevant passages. At an early stage, the Judge gave a conventional direction on delay and the passage of time, replete with examples derived from the voicemail issue. Later, when dealing with Chief Inspector Cardwell's evidence the Judge

observed that the Chief Inspector had agreed that he verified everything that Burgess had said about the voicemail. The Judge added:

> *"You may think, ladies and gentlemen, that what the Chief Inspector was saying there is that even if you accept, as he seemed to, that Ms Burgess left that message §§§§that she said she did, and that she then did indeed go to Lobster Pot, that that is not relevant in chief Inspector Cardwell's mind, at least to the question of whether she had previously arranged to meet Marcus Gibbings at Derwent Lane. Of course, the Defence for Ms Burgess, say that her message,"I'm leaving the office. I haven't heard from you. I'm going to the Lobster Pot to get something to eat, and then going to my dad's house. You can reach me on my cell", if you accept that it was left is clear evidence that the meeting was supposed to be at her office. Whether that is an inference that you draw from it or not, of course, is ultimately, ladies and gentlemen, once again, a matter for you"* [p 295 of the transcript.]

69. Mr. Richardson was critical of that passage because the words "If you accept that it was left" left open to the jury a finding that it had not been left, at least in the terms claimed by Burgess. It seems to me, however, that there is no substance in that criticism. The Judge was simply respecting the Prosecution's inability formally to admit the contents of the voicemail. The jury were well aware that they were not actively contradicted or disputed. The summation also included a detailed summary of the evidence of Ms Place of M3 Wireless, which already illustrated the shortcomings of the investigation.

70. For all these reasons, I am satisfied that the Judge did not err in law in his ruling on abuse of process or in the way in which he dealt with the issue in his summation. This part of the Police investigation was plainly inept but was not such as to render the trial unfair, nor to have made it unfair for Burgess to have to stand trial.

ii) Rogers

71. Rogers' grounds of appeal include a general assertion of abuse of process (ground 1), and more particular grounds (grounds 3 and 7) which state:

> *"[3] The learned trial judge erred in permitting the prosecution to rely on the very late and new opinions of Dr. Obafunwa (pathologist), some of which were heard for the first time during the evidence, regarding photographs and items the Crown had not previously indicated it would be relying upon.*
>
> *[7] That the cumulative effect of late disclosure, lost evidence and pre-existing delay caused unfairness, and should have resulted in a stay of proceedings, or at the very least, a mistrial when it became clear that the appellant could not properly make full answer and defence during his trial."*

72. I shall refer to the pathologist as Professor Obafunwa, a status which he has attained since the events of 2005.

73. Although grounds three and seven seem to be advanced variously by reference to both admissibility and abuse, ultimately they come down to a submission of irremediable unfairness. The centrepiece is the expert evidence adduced by the Prosecution, especially that of Professor Obafunwa, but they also extended to the evidence of the forensic scientist, Ms Janice Johnson, together with some complaints about the factual evidence.

i) Professor Obafunwa

74. No murder weapon has ever been recovered in this case. Three days after the murder, and on the instructions of the Coroner, Professor Obafunwa carried out a post mortem examination. His report dated 26 December 2006 described multiple stab wounds. It stated

> *"The serrated appearance of wounds 13, 18, and the long arm of 6 will suggest the use of a blade, which is serrated with intervals of four to five millimetres. The fact that wounds, 9, 11 and 22 show a single blunt margin (which are medially directed) will suggest a single edged blade as having been used. Furthermore, while the length of the blade will be approximately 14 centimetres, the width is likely to be 3 to 3.5 centimetres. The latter assertion can be based on the inner limb of the wound 6 and also the vertical limb of the inverted L-shaped cut on the left side of the polo shirt in its upper part"*

75. It was only when Card came forward as a witness in 2015 that the Police received information about the provenance of a murder weapon. The re-arraignment of the defendants at the trial with which we are concerned took place on 15 January 2020. At that point, no further evidence from Professor Obafunwa had been served That remained the case until 10 February 2020, very shortly before he was due to give evidence.

76. Catrina Card, when providing her account to the Police, had referred to a knife that had gone missing from the apartment she was sharing with Rogers at the time of the murder. At a later date, she was asked by the Police to look at some photographs of knives to see if any resembled the one that had gone missing from the apartment. She identified one, a photograph of which is in the Record of Appeal, page 477. One edge was serrated, the other plain.

77. In June 2018, Detective Inspector Redfern emailed a copy of that photograph to Professor Obafunwa in Nigeria, and asked if such a knife could have caused the fatal injuries. In a telephone conversation he told Detective Inspector Redfern that he was unable to express an opinion because he did not know the dimensions of the knife. Nothing seems to have happened after that until Professor Obafunwa arrived in Bermuda to give evidence on 9 February 2020. At a meeting in the DPP's office, he was asked by Detective Inspector Redfern if a single weapon could have caused the injuries. He said that it was possible that a single weapon with both serrated and straight sides could have caused the injuries. He proceeded to make a short statement which was emailed to Rogers' legal representatives at 9:12am on 10 February, the day when it had been anticipated that Professor Obafunwa would give evidence. It stated:

*"Having reviewed the photographs of the injuries, it is possible that a single weapon having both a serrated and straight sides could have produced the injuries seen"*

78. The Prosecution also indicated that it intended to put in evidence a number of autopsy photographs, which had previously been provided to the Defence as unused material.

79. With justification, Rogers' legal representatives were aggrieved by the sequence of events. At 2:15 pm on 10 February, Mr. Daniels, who was then leading Ms Mulligan, made an application for a mistrial, or alternatively, an adjournment. The Judge refused the former, but granted the latter, and allowed counsel for both Rogers and Burgess to meet with Professor Obafunwa at court in the absence of the Prosecution. In the course of that meeting, Professor Obafunwa produced drawings of two knives, one of which resembled the one that had been selected by Card. After that, the Judge ruled that Professor Obafunwa's evidence should not commence until Rogers' legal representatives had an opportunity to consult an expert.

80. Ms Mulligan undertook to keep the court informed as to progress. At 10:41pm on 11 February, Ms Mulligan, emailed the court and the Prosecution in the following terms:

*"Making our best efforts to accommodate Dr Obafunwa, the court and the jury, while still fulfilling our duty to Mr Rogers, we can offer the following potential solution: Mr. Daniels will prepare to cross examine all witnesses called in the morning. I will remain out of court to do the necessary further preparation and should be in a position to proceed with Dr. Obafunwa's evidence by 2pm tomorrow"*

81. By that time, Ms Mulligan had been in contact with the well-known forensic pathologist, Professor Christopher Milroy.

82. Just after 2pm on 12 February. Professor Obafunwa commenced his evidence in chief. It did not entirely replicate his witness statements. He said:

*"I came to the conclusion that it has to be a knife with serrated margins, particularly close to the tip…when you look, if we remember that I mentioned some superficial incised wounds that were not so deep, it showed serrations, so it has to be close to the tip. I mentioned a blunt end in my earlier presentation. That bruise, due to the blunt end, like I said, could have come close to the point of the termination of the blade. So on the surface, there could be delay. I think in my report I made mention of a single edge blade. But when you look at the injuries that I showed, of course, that single edge blade that I mentioned, is because of that blunting in the very simplistic sense. But if you imagine a blade with serrations particularly close to the tip,. some blunting there.. A knife with that kind of configuration, could have been used"*

83. Before commencing cross examination Ms Mulligan protested in the absence of the jury. There was a dispute about whether she renewed the application for a mistrial, but at the very least she asked for more time. The Judge ruled that the best way forward would be for Ms Mulligan to

commence her cross examination, and at an appropriate point to indicate that she was not in a position to complete it. Professor Obafunwa's evidence would then be adjourned until Ms Mulligan had had the opportunity to consult further with Professor Milroy. That is what happened. Professor Obafunwa returned to court six days later, 18 February, and completed his evidence. A week after that, on 25 February, Professor Milroy was called by Ms Mulligan, to give evidence.

84. Ms Mulligan says that Professor Obafunwa was a very difficult witness to cross examine. The lengthy transcript tends to show that there were elements of irresistible force and immovable object. Mr Mahoney summarises the totality of the pathology evidence in this way.

> *"Both experts agreed the existence of wounds with serration suggesting a blade with serrated edges and wounds with straight edges suggested a blade with a straight edge. Both also agreed that separate knives (one serrated bladed, and one straight edge bladed) could have caused the injuries. Both also agreed that one cannot rule out the possibility of a single knife with double serrated-edged blade, and partially -straight edge blade, could have been used"*

85. Having read the transcripts, I consider that to be a fair summary. I have no difficulty in accepting that the development, production and presentation of the Prosecution's forensic pathology evidence was lamentable. However, that is not sufficient in itself to give rise to an operative abuse of process. The question is whether it significantly affected the fairness of the proceedings. In my judgement it did not. When Rogers and his legal representatives were taken by surprise by late, unexpected or inconsistent disclosures they were given time within which to marshal their attacks. They had the benefit of their own eminent forensic pathologist. The result was that by her assiduous, tenacious and skilful cross examination, Ms Mulligan was able to neutralise the aspects of the evidence of Professor Obafunwa, which naturally concerned her. When the Judge came to summarise the case for the Prosecution against Rogers at the end of his summation, he did not even mention the forensic evidence. He made it clear throughout that the case against Rogers depended on the jury's assessment of the evidence of Card, and Foley.

ii) The Footwear Evidence

86. The Deceased had arranged to meet his workmates after his visit to the apartment in Derwent Lane on the night of 25 October but they received no message from him. The following day they went looking for him and, around midday, they went to Derwent Lane where they discovered his body. When the scene was examined by Ms Johnson, she identified three separate and distinct shoe sole impressions in blood on the floor. One was attributable to the Deceased's footwear. In 2008, the police seized items of footwear from the address where Rogers was living with Catrina Card. They included his construction work boots size nine and a half, wide. At trial, Ms Johnson gave evidence that, based on class characteristics of similar physical size, shape, outsole tread design and wear patterns Rogers' boots could have been the source of one of the patterns deposited in the blood near the Deceased's body.

87. Ms Mulligan is very critical of Ms Johnson's evidence and complains that Rogers was denied a proper opportunity of challenging it. Her complaints include (1) the information which resulted in the search warrants and the search warrants themselves have not survived; (2) footwear obtained

from the Deceased's friends who found his body was returned to the owners with the result that it could no longer be examined by a defence expert; (3) photographs and prints of that footwear were no longer available; and (4) Ms Johnson was no longer able to produce her contemporaneous notes. It was also suggested that Rogers' boots which had been seized in 2008 had "gone missing" until 2019 but that does not have seem to have been the case.

88. In a case which had remained unresolved for many years, it is not unusual for the contemporaneous material to be incomplete by the time of the trial. Once again, the significance of the deficiency will depend upon the disadvantage or prejudice it has caused to a defendant. In the present case, there are several reasons which lead me to conclude that the disadvantage or prejudice was slight.

89. First, the Judge gave the jury fulsome directions on how the passage of time should be taken into account. He did so in general terms at an early stage in the summation referring to the possibility of *"a danger of real prejudice to the defendants. This possibility must be in your mind when you decide whether the prosecution has made you sure of…guilt."* Two pages later in the transcript he added this specific guidance (page 57 of the Transcript):

> *"Of course it makes it more difficult for the Prosecution also, but ultimately, as we have seen in this case, that has, by way of another example, had the effect of preventing again, in the case of Mr. Rogers, a comparison of footwear impressions from the shoes and boots of people who we do know entered the crime scene, to ascertain whether their footwear could have made the impressions left at the scene also. That is something that the Defence would clearly have liked to have been able to do in this case, but have been prevented from doing so as a result of the delay in these proceedings. Shoes and boots that were seized have been lost or returned to their owners and, save for Angelo James' boots, seized by Detective Don Desilva, the photographs and/or prints of their outsoles have been lost. The fact of their loss may or may not be surprising, given the passage of time, but the effect upon the Defendants' ability to mount a full defence is something you should consider, whilst, of course, maintaining a sense of perspective."*

90. Secondly, it is very apparent from the transcript of the cross examination of Ms Johnson by Ms. Mulligan that the probative value of her evidence about the footprints in the blood was minimal. Rather than set out lengthy passages from the evidence, it is sufficient to refer to the Judge's summary of this (page 309 of the Transcript):

> *So, ladies and gentlemen, the upshot, if you will, of all of that from Ms. Johnson, is that, firstly, the boots identified as being Mr. Rogers' boots, could, based upon class characteristics only, have left the impressions found in blood at the scene. But any number of other shoes or boots with the same class characteristics, including the sole design -– including that sole design which could possibly be the most popular in the World, and is used by many manufacturers, could also have left those impressions in blood at the scene, and she never compared any of the many other comparators seized, by the Police, at the time the photographs and prints from which -– have now been lost, preventing any further comparison.*

91. This was after he had earlier reminded the jury of the concession extracted from Ms. Johnson by Ms. Mulligan that the relevant footprint in the blood could not be specified as a size 9 ½ wide. It fell "*somewhere between a size 7 and a size 11 which is a considerable gap you may think*".

92. Thirdly, and unsurprisingly in these circumstances, when at the end of his summation the Judge came to encapsulate the case against Rogers, he made no reference at all to the footwear evidence. As with other issues, any disadvantage or prejudice to Rogers in relation to this evidence was greatly diluted by the trial process. It simply cannot now sustain a submission of abuse of process.

iii) *Other matters*

93. In addition to the complaints about the expert evidence, Ms. Mulligan submits that it is also relevant to the abuse of process issue that the Defence were provided with no or insufficient notes of meetings between Police Officers and Catrina Card and Danielle Foley between 2015 and 2018, including one meeting in August 2018 at which both witnesses were present. Such notes as were produced did no more than state the date, time and purpose of the meetings. The submission is that with full notes of the meetings the Defence might have had better material with which to explore any animosity of the witnesses towards Rogers, collusion between them, witness contamination and coaching. This is at best pure speculation. The Defence had and took every opportunity to discredit the two women. They succeeded in unearthing some inconsistencies in them and between their evidence and part of the forensic evidence. No issue of abuse of process arises from the omission to take fuller notes. The Judge faithfully reminded the jury that the case for Rogers which had been extensively put to the witnesses in cross examination was that their evidence was tainted by malice, collusion and ulterior motive. Any jury would be well equipped to assess such matters.

94. Finally, having dealt with the specific submissions of abuse it is necessary to stand back to consider whether there might be abuse resulting from the cumulative effects of the matters relied upon by the defence. I am satisfied that no such conclusion can be reached. My overarching conclusion is that whatever defects or deficiencies there were in the evidence were satisfactorily resolved by the trial process.

*The Summation (Burgess)*

95. This aspect of the appeal grew organically in the course of the hearing and became Burgess's ground 9A. It comprises complaints about the summation. In general terms it contends :

> *"The summation…failed to adequately and fully assist the jury to distinguish between the respective cases against the Appellants in a case where it was imperative due to the intermingled nature of the evidence which was inadmissible against and highly prejudicial to [Burgess]. The summation was insufficient and confusing in the context of this case and the following errors occurred…"*

96. The pleaded errors followed in three paragraphs :

*"(a)…the jury were not given adequate directions/instructions, tailored to the facts of this case, to allow them to properly and fully assess the evidence admissible only against [Burgess] in its proper context.*

*(b) …the Judge failed to properly direct the jury, using examples from the evidence, on how to apply the law on aiding and abetting to the facts of this case in the light of the evidence that was NOT admissible against [Burgess]…*

*(c)…the Judge failed to set out for the jury the alternative views which could be taken of the evidence, such alternate views being clearly and demonstrably open on the evidence…"*

97. As regards complaint (a), I do not consider it to be sustainable. The Judge was careful on numerous occasions to emphasise which evidence was, or was not, admissible against Burgess. No doubt he could have arranged his strictures in different ways. That can be said of most summations. However, I am satisfied that the jury were left in no doubt about what they could, or could not, consider as evidence admissible against Burgess

98. Complaint (b) seems to me to be no more than a variation on complaint (a). Again, the jury were made fully aware of how the case against Burgess was that she was a secondary party to the murder. The Judge carefully explained over five pages of transcript (pages 80 – 84) what the Prosecution had to prove to establish Burgess's guilt. In seven places of that part of the summation, he made it abundantly clear that, in order to find Burgess guilty as a secondary party to premeditated murder, the jury would have to be satisfied that she had lured the Deceased to Derwent Lane, knowing and intending that Rogers would kill him there.

99. It is complaint (c) that attracted more substantial legal debate. It raises the question whether the Judge ought to have left to the jury an alternative, lesser, offence, based on a possible finding that Burgess had lured the Deceased to Derwent Lane to be confronted by Rogers but without the knowledge or intention that Rogers would kill him. I have referred to this hypothesis in the context of the rejection of the submission of no case to answer. Mr Richardson submits that, even if there was a case for Burgess to answer on premeditated murder, the issue arose afresh at the stage of the summation because the Judge was duty bound to leave a lesser, alternative verdict for consideration by the jury, notwithstanding the fact that no such request had been made on Burgess's behalf.

100. Mr Richardson develops this submission by reference to *von Starck v The Queen* [2000] UKPC 5, an appeal from Jamaica in which it was held that the trial judge had erred by not leaving the possibility of manslaughter to the jury in a murder trial, where the defence proffered at trial was that the defendant had not killed the deceased but where there was copious evidence from what he had told the police that he had killed her when they were both under the influence of cocaine. If the jury had concluded that his pre-trial statements were or might have been true, there would have been a basis for manslaughter by reason of a lack of the requisite *mens rea* for murder. Lord Clyde said (at paragraph 12) :

*"The function and responsibility of the judge is greater and more onerous than the function and responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in the light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside…if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury…if there is evidence to support…a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them."*

101. Plainly, in that case there was evidence capable of supporting an acquittal on the charge of murder and a conviction for manslaughter.

102. The leading authority in this area is now *Coutts* [2006] UKHL 39, where the proffered defence to murder was accident but the evidence would or might have supported an alternative verdict of manslaughter based on the lack of the requisite *mens rea* for murder. With the acquiescence of defence counsel and the encouragement of the Prosecution, the trial judge did not leave the alternative verdict to the jury. The House of Lords allowed the appellant's appeal. Lord Bingham said (at paragraph 23) :

*"The public interest in the administration of justice I, in my opinion, if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support…I would…confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinary knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial."*

103. It seems to me that the words "any <u>obvious</u> alternative offence which there is <u>evidence</u> to support" go to the heart of his Lordship's analysis.

104. A helpful illustration of the principle can be seen in *Workman [*2014] EWCA Crim 575, where, on a charge of murdering his wife, the appellant's defence at trial had been accident in the course

of self-defence. On appeal, he contended that the judge had erred by not leaving the partial defence of loss of control to the jury. Davis LJ concluded (at paragraph 89):

> *"…sufficient evidence had not been adduced to raise loss of control as an issue and… the judge was justified in not leaving this defence to the jury."*

105. It had been the appellant's evidence that it had been his wife who had been the aggressor and who had lost control.

106. On the basis of these authorities, it is clear to me that the Judge did not err when he omitted to leave a lesser offence to the jury. No such offence was obvious or supported by the evidence. Once the jury had reached the conclusion that Rogers had murdered the Deceased after he had been lured to Derwent Lane by Burgess, there was no evidence to suggest that he had done more than the two of them had agreed he would do. The safeguard for Burgess was that, as the Judge had repeatedly told the jury, they could only convict her if they were sure that she had and shared the intention to kill. Her defence, unlike those of von *Starck* and Coutts, was one of complete denial. In the particular circumstances of this case, there would have been a risk of the Judge undermining that defence if he had invited consideration of a lesser offence which lacked an evidential foundation.

*Jury Issues*

107. Both appellants complain about matters relating to the jury and contend that their convictions are unsafe by reason of one or more of these matters. They fall under three headings which I shall reformulate in the form of questions: i) Were the jury put under pressure of time to return verdicts? ii) Did the jury in fact succumb to such pressure? iii) Is the practice of sequestering juries unconstitutional?

*i) Was there undue pressure?*

108. In Bermuda, there is no provision which enables a jury to separate once they have retired to consider their verdict. They are kept together sequestered until they have reached their verdict, or have indicated that they will not be able to produce a unanimous, or permissible majority verdict. This is in contrast with the position which now obtains in England and Wales, where for some decades a trial judge has been empowered to permit a jury to separate. This has become the norm in criminal trials, although judges sometimes decline to exercise the power where they consider that separation would be inappropriate – for example, where there is a perceived risk of interference.

109. The absence of a comparable power in Bermuda has resulted in a practice of trial judges advising juries that on the day of their retirement it is possible that, if they have not completed their task within the day, they may be sent to and accommodated in a hotel. The purpose of the advice is to enable jurors to make any necessary domestic arrangements and to come prepared for overnight absence from their homes.

110. The issue was first considered by this Court in *LeShore and Simons v The Queen* [2016] CA (Bda) 23 Crim, where, after a trial of two defendants which had lasted eight weeks, the jury had retired

at 1:55pm and returned their verdicts at 10:12 in the evening. Notwithstanding the retirement not commencing until after lunch, and the absence of judicial advice, the court rejected the submission of unsafe verdicts by reason of undue pressure. In the course of his judgment Sir Scott Baker P said at paragraph 45:

> *"After a trial lasting for eight or nine weeks with more than one defendant such as the present one there is strong argument for a jury being sent out early in the day and thus having a full day ahead of them for their deliberations. This was not done in the present case and, more importantly, the judge does not appear to have considered what should be done if the jury required more time to reach a verdict within ordinary working hours or a reasonable time thereafter. In the light of s532 of the Code the only course open to the judge was to send the jury to an hotel overnight to resume their deliberations the next morning…. Such a course requires advance planning to ensure that, if necessary, an hotel is available that can accommodate all the members of the jury and the jury officers. It is also desirable that the jury should be alerted in advance to the possibility so that they can make any relevant arrangements to be away from home overnight should the need arise. It is most unfortunate that these steps were not taken in the present case with the result that the jury was left to deliberate late into the evening in the hope that, as eventually they did, they would reach verdicts."*

The former President addressed the subject again in *Saltus v R* [2018] CA (Bda) 13 Crim where he said at paragraph 22:

> *"There needs, in our judgment, to be a standard practice whereby juries are routinely warned at the start of a trial that there is a risk that the problem may arise. They should then be warned more specifically when the time for their retirement approaches, so that they can make any necessary arrangements in case the need arises."*

111. These authorities were further considered and applied in *Smith-Williams* [2019] CA (Bda) 11 Crim, where the trial judge, when advising the jury, in addition to stating that they should not feel under any pressure, also described the hotel scenario as being "no bed of roses" and "almost like a jail". In my judgment, I said at paragraph 31

> *"It would have been better if the judge had not descended into detail about the quality of life in the hotel. However, the question for us is whether, by so doing and in the language in which he expressed himself, he crossed the line such that we cannot be satisfied that the verdicts were unaffected by pressure. I am wholly unpersuaded by this ground of appeal, which Mr. Lynch concedes is, by itself, insufficient to sustain a successful appeal."*

112. Thus, in none of the three previous cases in which this issue was raised was the appeal allowed. As was observed in *LeShore and Simons* (supra), in this area, as in most others, each case depends on its own facts. In the present case there is no record of the Judge having said anything to the potential jurors about the possibility of sequestration before the jury was empanelled or to the

empanelled jury at the commencement of the trial. I shall assume that nothing was said at that stage. However, the judge did alert the jury at least three times as the trial neared its conclusion. The transcript embraces the second and third of those occasions. At the end of the first day of his summation, he said at page 277:

> *"So everything that I've said to you before in respect of preparing yourself, making sure that you have no chores, or other concerns that you have, just get all your scheduling matters out of the way, make sure someone else is taking care of everything for you on Wednesday, so that you have a clear day, with nothing else to concern yourself except deliberating in respect of this matter. Okay?"*

113. His reference to an earlier occasion was probably to 3:40 on the afternoon of 25 February at the close of the case for Rogers, when (Mr Mahoney tells us and no one disputes), the Judge had forewarned the jury about sequestration. That was over a week before their eventual retirements.

114. On the second day of his summation towards its end he said this page 415:

*"Now, I've previously indicated to you, and I hope by now that you have put in place all your plans to make sure that there is nothing that's going to distract you tomorrow, because, as I've told you previously, once you go out to deliberate, the only people that you will have contact with will be each other and the Jury Officers and, through the Jury Officers, the Court. Okay? So if you have any other matters that you need to take care of in respect of tomorrow, so that your way is clear to do nothing other than deliberate in this matter, make sure you take care of those things this afternoon. You'll remember also what I told you previously, in respect of the unlikely possibility, I'll put it that way, that you may have to bring with you or should maybe be prepared to bring with you a small overnight bag, just in case, again, in the unlikely event that you have to go to a hotel tomorrow night. In that regard, I would also ask you to indicate to me, between now and tomorrow morning, but preferably as soon as possible, if you have any concerns in respect of going out tomorrow, and your deliberations in respect of this matter. If you have any concerns in respect of that, bring them to my attention; okay?"*

115. None of the 12 jurors who returned the unanimous verdicts had at any time informed the Court of any personal difficulties that might be caused by a long retirement, or the prospect of sequestration. Against that background, Mr. Richardson, supported by Ms Mulligan, appreciating that his case on this issue was not noticeably stronger than the cases of the appellants in *Leshore and Simons*, *Saltus* or *Smith-Williams* had been, submitted that the true mischief lay in the jury not having been given appropriate warning at the empanelling stage because, by the time the Judge first articulated his advice, the jury were "already locked in" to the trial. His contention was that a potentially inconvenienced juror might more freely ask to be excused at the outset, whereas there might be greater inhibition towards the end of the trial. I do not accept this submission.

*ii) Did the jury succumb to pressure?*

There is no evidence on the record of the trial that the jurors who returned the unanimous verdicts in this case felt pressurised by the timing or other circumstances of their retirement, nor can any adverse inference be drawn from the duration of their retirement. It does not follow that the

seriousness of the case, the presence of two defendants or the duration of the trial, suggested the need for a longer retirement. On the face of it, there is nothing to suggest that the jury did not return true verdicts, according to the evidence, faithful to their oaths and uninfluenced by pressure.

*iii) Constitutionality*

In his written submissions (which he did not amplify orally on this point), Mr Richardson recounted how, in several common law jurisdictions, legislation now permits, but does not usually require, a judge to allow a jury in retirement to separate. He referred to the current position in England and Wales, Australia, New York State, Trinidad and Tobago and Bahamas. Although there is no similar provision in Bermuda, he submits that the continuing prohibition of jury separation violates the constitutional right to a fair trial which is guaranteed by section 6 of Schedule 2 to the Bermuda Constitutional Order 1986. I reject this submission. There is nothing inherently unfair to a defendant about jury sequestration. That is demonstrated by the fact that it is still permitted at the discretion of the trial judge in the jurisdictions where the rule has been relaxed. It is pertinent to record that counsel's researches reveal that there has not been a jury sequestration in Bermuda since May 2010.

**Conclusion**

116. It follows from what I have said that in my judgment, the grounds of appeal, which were relied upon by the respective appellants at the outset of this appeal, must be rejected. In the course of the proceedings other issues relating to the jury became the subject of complaint on behalf of the appellants. As to these, I have read the judgment of the President, I respectfully agree with it, and do not wish to add anything. I would dismiss both appeals against conviction.

BELL JA:

117. I have read the draft judgments of my Lords, and I agree with them. I, too, would dismiss both appeals against conviction.

CLARKE P:

118. I agree with the judgment of Kay JA.

119. I deal in this judgment with the issues that have arisen as to (a) the process of deliberation of the jurors; and (b) whether the evidence which the Court has received in relation thereto is admissible for the purposes of this appeal.

**Mr Daniels' Juror**

120. After the trial, but before the sentencing hearing, Mr Daniels, counsel for Rogers, was in a shop. When seeking to purchase some items he asked at the customer service desk where he could find them. As he did so he recognised that the person working there was one of the jurors at the trial. The juror recognised Mr Daniels, and said that he had been very impressed by the defence led on

behalf of Mr Rogers and that he thought that they had done a great job. Mr Daniels, understandably, did not want to discuss the trial with him; so he just thanked him and laughed, saying something like "Not so great obviously". He started to turn away, believing that the juror would lead him to what he was looking for. But the juror continued, saying that it was not like that. The jury, he said, was split down the middle as to whether to convict or acquit but "*no one was trying to go to a hotel for the night*" and it was getting late; so they (i.e. those in favour of acquittal) just decided to go along with those who wanted to convict so that they could get home. The next day Mr Daniels sought guidance from more senior counsel who, quite rightly, advised him that the correct approach was to reveal the content of the conversation but only to the Court of Appeal on an application brought by counsel.

*121.* In the light of that evidence we thought it right to ask the Registrar to question the foreperson of the jury as to what had transpired, in order that we might consider that evidence *de bene esse*; and decide how to proceed thereafter. Mr Mahoney, for the Crown, submitted to us that the jury and foreperson may have gone too far in asking and answering questions about what had transpired in the jury room, and had placed themselves in peril of prosecution under section 5A of the *Administration of Justice (Contempt of Court) Act 1979.*

122. That section, which is, with immaterial exceptions, in the same terms as Section 5 of the UK's *Contempt of Court Act 1981*, provides as follows:

> "*Confidentiality of jury's deliberations*
>
> *(1) Subject to subsection (2), it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any judicial proceedings.*
>
> *(2) This section does not apply to any disclosure of any particulars—*
>
> *(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict;*
>
> *(b) or in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings, or to the publication of any particulars so disclosed.*
>
> *(3) Proceedings for a contempt of court under this section shall not be instituted except by or with the consent of the Director of Public Prosecutions or on the motion of a court having jurisdiction to deal with it."*

123. The Registrar acted in accordance with my instructions, given on behalf of the Court, and was never in peril of prosecution under this section. It is not possible for the Court to be in contempt of itself – see *R v Mirza* [2004] UKHL 2 at [90], and it cannot be a contempt of Court by the Registrar to do that which the Court has requested her to do, or for the foreperson to answer the Register's questions in such circumstances: *ibid* [139].

**The evidence of the foreperson**

124. In compliance with her instructions the Registrar interviewed the foreperson, under oath, on 11 June 2021. We have a transcript of that interview. In it the foreperson indicated that the position was not as described by the juror who spoke to Mr Daniels. What she said included the following:

(i) At a point in time 11 jurors were in favour of guilty verdicts but she was the "*holdou*t", right until the end.

(ii) The jurors took a quick poll when they first walked in to the jury room (at around 1000) and had further polls several times thereafter. There was a majority of just over half in favour of conviction at the outset.

(iii) When asked what she meant by saying that she was the holdout she was asked whether that meant that she believed that the defendants should be acquitted, to which she said that it was not that at all. She was just questioning what the hard evidence was as in the shoes and people giving statements.

(iv) The jury had at least three, maybe four, polls (which were secret as to who voted which way) and the numbers for guilty changed each time. It was, of course, tolerably clear from the discussions what view some of the jurors took.

(v) There was never a point when there was a general feeling that those in favour of acquittal were anxious just to leave – absolutely not

*(vi)* Her position was, until the end, that she was not comfortable saying "Yes" or saying "No"; but was on the fence in respect of both defendants, although the fact that they acted together "*was not an issue".*

125. When asked as to how this issue got resolved she said that she was going to say what she was thinking and that the questioner "*can deduct from that what you need to*". Her evidence then proceeded as follows:

> "A. *Um, essentially, it was the Police evidence was rubbish. Essentially we threw out all of what I call the hard evidence, the statements by the two girls, the shoeprints, I mean, it was it was so, . . .*
> *Q. Mm-hmm.*
> *A. So what we what we actually ended up working on was just a couple of very basic things.*
> *Q. Mm-hm.*
> *A. And a lot of - and mainly it was their behaviour, their action, and the telephone calls.*
> *Q . Mm—mmm.*
> *A. So, um, I can categorically say that we all agreed the evidence wasn't worth the paper it was written on.*

*Q. Mm-hmm*
*A. So that's a that's a definite.*
*Q. Mm- hrrrn.*
*A. What the two girls said, we didn't give that an awful lot of weight.*
*Q. Mm—hmm. Mm—hmm.*
*A. The shoeprint was, you know, it was all so old. Um, I mean, if I, I do have an opinion, I think it was very poorly done.*
*Q. Mmm*
*A. Um, the Police, or the forensic people. Why?"*

126. She went on to say that before the last poll they were down to about 3 in favour of acquittal and that, ultimately, she was the only one in favour of acquittal; and she said *"OK, so you were all – you're all happy with this, this is what you want to do"*. She said a little later that she was not in favour of acquittal but could not commit[1]. She also observed that what stuck out the most with her was "*how little we used the so called evidence*". She did not recall any talk of what happened if there was not a majority verdict, or any concern about what would happen if they could not make a decision that day (a juror who had been anxious because he had to travel that day had been discharged and an alternate was in his place). There was some "*Oh God I don't want to spend the night type stuff*", and a few comments like that; but she did not feel pressure in the least bit that she had to quickly agree or disagree in order not to spend the night (sequestered). Avoidance of sequestration was "*absolutely not*" a key factor in trying to wrap things up. People did not want to spend the night away but "*it kind of stopped at the moaning …obviously we had a job to do. We'd been there for three months*." She went on to say that the voting went from about 7-5, and then 9-3, in favour of conviction; and then everyone was "*on board*" except her and she was on the fence.

127. She was asked about what the juror had said to Mr Daniels, namely that the jury was split down the middle whether to convict or acquit, and no one wanted to go to a hotel for the night, so those formerly in favour of acquittal went along with the others so that they did not have to go there. She was asked if that was accurate in any way and said "*Absolutely in no way, shape or form. That's not my perception".* She did not recall that the jury ever split 6-6 and that (i.e. the avoidance of sequestration) "*was never even an issue".* She could not think of a juror who might have suggested that that was the position. She asked if there was a need for her to say what persuaded her in the end, but the Registrar told her that we did not need to know that; so she said that what she could say was that she was not pressured, or persuaded for any reason other than something which we did not need to know. She did not feel pressured and certainly did not get the feeling that the other members of the jury felt pressured either.

128. In the light of that evidence we considered whether or not further inquiries should be made of the foreperson and/or other members of the jury, and invited submissions on that topic. It was in its response that the Crown submitted that the Registrar had gone too far and, also, that the evidence was inadmissible, evidence about the deliberations of the jury being inadmissible save for two narrow exceptions, as set out in *Mirza,* neither of which, it said, were applicable.

[1] That is what the transcript says: *quaere* whether she said, or meant, was "convict",

129. Ms Mulligan submitted that the evidence taken from the foreperson gave rise to further considerations insofar as the foreperson, although going further in explaining the jury process than was necessary[2], had indicated that the jury did not rely on the evidence of the two girls. This amounted to a complete repudiation of their oaths to try the case on the evidence, the judge having said that they could not find Rogers guilty of murder unless they accepted that the evidence of Ms Card and Ms Foley were reliable and true, and that they could not convict Burgess, if they acquitted Rogers. Further the evidence obtained from the foreperson was admissible. Reliance was placed on the observations of Lord Steyn, the dissenting member of the House of Lords in *Mirza*.

130. In the light of these submissions we addressed the matter afresh. In the course of doing so we considered a number of authorities to which we had not previously been referred and passages in *Mirza* itself to which our attention had not been drawn. I expressed our concerns in a note to counsel of 10 July 2021 and invited further submissions, which we received from Ms Milligan on behalf of Rogers (with which Mr Richardson on behalf of Burgess agreed) and from Mr Mahoney for the Crown. Having taken into account all the submissions made to us, we decided, in the light of the conclusions which I set out below, that no further inquiries of jurors should be made and notified the parties accordingly.

131. Courts at the highest level have, over the past decade, had cause to consider the rules as to the secrecy of the deliberations of the jury. The most significant leading case at the highest level is *Mirza.* It confirmed and established two things. The first was that that there could be no question of a Court acting in contempt of itself by carrying out, *de bene esse*, an investigation into what happened with the jury. The second was that the deliberations of the jury are confidential and secret and evidence about them is inadmissible (and should not be the subject of investigation and examination) if it is evidence only produced after the jury have delivered their verdict (as here). To that rule there are two exceptions. The first is where extraneous material has been introduced into the jury's deliberations. That is not the case here. The other was summarised by the Crown in its submissions to us as being where there is an allegation that there may have been a complete repudiation of the oath taken by the jury to try the case according to the evidence. Ms Mulligan submits that, if what the foreperson says is correct, that is exactly what has happened here.

132. In my view the expression "*complete repudiation*" of the oath has to be considered (a) in the light of the context in which that expression was used in *Mirza***,** and (b) in the light of what the House of Lords does not appear to have intended that it should cover. In *Mirza* Lord Hope said:

> "*123. I would be inclined to make only one modification to the rule that distinguishes, after the verdict has been delivered, between things which are intrinsic to the deliberation process and those which are extrinsic to it. Article 6(1) of the Convention requires that the common law rule be scrutinized carefully, to ensure that it is compatible with the right to a fair trial. So it is arguable that an allegation that* ***the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or by the toss of a coin, can be placed into a different category****. Conduct of that kind, were it ever to occur, would amount to a complete repudiation*

[2] To some extent it could be said to go further than was necessary simply to deal with the evidence of the juror who spoke to Mr Daniels, and not far enough to explain why the foreperson changed her mind, or exactly what view the jury as whole took of the evidence of Rogers' alleged confessions.

*by the jury of their only function which, as the juror's oath puts it, is to give a true verdict according to the evidence.* ***A trial which results in a verdict by lot or the toss of a coin, or was reached by consulting an ouija board in the jury room, is not a trial at all. If that is what happened, the jurors have no need to be protected as the verdict was not reached by deliberation - that is, by discussing and debating the issues in the case and arriving at a decision collectively in the light of that discussion.*** *The law would be unduly hampered if the court were to be unable to intervene in such a case and order a new trial. But that is not the situation which is before us in these appeals."*

[Bold added here and elsewhere]

133. Similarly, Lord Rodger said:

"*165. For these reasons, even though invited from time to time to reconsider their approach, the highest appeal courts have consistently refused to entertain appeals based on the allegation of a juror, made later, that during their deliberations other jurors showed bias,* ***failed to apply the judge's directions or otherwise acted improperly.*** *If that was indeed the juror's view, then the time to make it known was before the verdict was returned - either by sending a note to the judge, or by speaking to the jury bailiff or by declaring the objection in open court. At that stage matters can be investigated and any appropriate remedy given. Once returned, however, the verdict becomes the verdict of the jury as a whole and, as such****, it cannot be impugned by any of the individual jurors who have publicly assented to it****. To hold otherwise would not only call into question the entire status and authority of the jury's verdict but would also expose jurors to pressure, especially from convicted defendants and their associates, to make such allegations.* ***The rule that evidence of alleged impropriety during the jurors' deliberations is inadmissible is thus based both on principle and on practical experience. ……***

*166. The deemed assent of the jurors to the verdict announced by the foreman is of significance when considering another kind of case that is found in the books****: a juror subsequently alleges that one or more of the jurors decided on their verdict by drawing lots, tossing a coin or using a ouija board - the precise mechanism is of no importance. That is not an allegation about the way those jurors deliberated on their verdict but about them reaching their "verdict" by a totally different, illegitimate and irrational process. Therefore, the policy of the law that jurors' deliberations should be kept confidential is no obstacle to admitting such evidence****. The objection is, rather, that, if the jurors really reached their verdict in that way, the juror who later makes the complaint should not have stayed silent and assented to the verdict - and he cannot subsequently undermine it. The factors in favour of upholding that objection are powerful. Since, however, one of the two policies underlying the rule against admitting evidence of what allegedly went on in the jury room is not in play, the case against admitting such evidence is correspondingly weaker in these cases. I would accordingly reserve my opinion on the point, which does not arise for determination in these appeals."*

134. As to point (a), as appears from the passages cited above. the expression "*complete repudiation*" of the jury's function is used as a description of circumstances where the jury does not deliberate at all but uses some non-deliberative means of reaching its verdict of which the toss of the coin, the drawing of lots, and the ouija board are the classic examples. It is, in those circumstances, that the jury as a whole can be said to have declined to deliberate. In the present case, taking what the foreperson said at its highest, it does not seem to me that the case falls within that category. I note, also, that Lord Rodger reserved his opinion on whether the evidence would have been admissible, even if it did.

135. Ms Mulligan submits that the two examples given should not be treated as the only examples of the way in which the juror's oath can be repudiated; but in my view the question is whether the jury used some process which was not one of deliberation but something else. Using "complete repudiation of the judicial oath" as a test replaces what is truly the test with a descriptive characterisation of it.

136. As to point (b), paragraph 165 of Lord Rodger's speech indicated that appeals are not to be accepted based on "*the allegation of a juror made later that jurors showed bias or failed to apply the judge's directions or otherwise acted improperly*.". In *Mirza*, itself, one or more jurors were said to have shown bias against a Pakistani accused by questioning why he sought to have an interpreter. But that was held to be no ground for allowing an appeal. Using "*complete repudiation* "as a test risks making admissible evidence produced after the jury's verdict of any significant failure to follow the judge's directions or improper behaviour, when the authorities show that evidence of such failure on part of the jury is not admissible. As Lord Rodger observed at [169]:

> *"In reality the logic of counsel's submission was that the House should hold that, except where manifestly incredible or unreliable, any evidence as to material impropriety or irregularity in the jury's deliberations should be admitted. The House would have to reverse the present rule that such evidence is inadmissible".*

137. Other authorities are to the same effect. In *R v Connor and Rollock*, heard by the House of Lords together with *Mirza*, it was said, in a letter to the court clerk five days after the verdict, that the majority decided to convict both defendants because it would have taken too long ("*we could be here for another week*") to consider the case against them separately, and, in any event, *"this would teach them a lesson, things in life not being fair and innocent people sometimes having to pay the price*".

138. In neither *Mirza* nor *Connor and Rollock* was the House prepared to take into account the matters alleged as justifying setting aside the convictions. This must form part of the ratio.

139. In *R v Davey* [2017] EWCA Crim 1062 the English Court of Appeal declined to regard as admissible evidence produced after the verdict described as follows:

> "*11On the following Monday morning a phone call was received at the court from one of the jurors who complained that she had felt bullied into agreeing to the verdicts as other members of the jury did not want to return to court the following Monday. She also indicated that two other jurors felt the same way. One of those two telephoned the*

*court later in the week and made a similar complaint. Neither of them or anyone else had made any complaint prior to the delivery of the verdicts."*

140. A year after *Mirza* the House of Lords decided *R v Smith, R v Mercieca* [2005] UKHL 12. In that case, a juror wrote to the judge, before the verdict was given, complaining that jury members were behaving disgracefully. The gravamen of the letter was summarised by counsel in the following terms:

> "*The letter showed that the key elements of the judge's summing-up had been wilfully ignored and his directions of law flagrantly disobeyed in that:*
>
> ** Legal directions had not been taken into account;*
> ** The burden and standard of proof had been reversed by jurors;*
> ** Irrelevant matters had been taken into consideration;*
> ** Jurors were speculating rather than considering the evidence;*
> ** Improper pressure had been placed on jurors to return verdicts on all counts because of an erroneous belief that there would have to be a retrial unless verdicts were returned on all counts;*
> ** The verdicts were not true verdicts according to the evidence."*

141. Lord Carswell, who gave the only reasoned speech, accepted that these allegations, if true, contained evidence of misconduct which required the trial judge to take action. He did not think that it would have been appropriate for the judge to have questioned the jurors about the contents of the letter for reasons which he gave at paragraphs [20] and [21]. The judge had two options: (i) to discharge the jury; or (ii) to give a powerful direction as to what the jury must and must not do. The judge was entitled to take, as he did, the second course; but the direction that he gave was not strong enough; and the convictions were therefore unsafe. So the appeal was allowed and the case remitted to the Court of Appeal for consideration of a re-trial.

142. Lord Carswell's speech summarised how the law stands following *Mirza* in these terms:

> *"(1)* ***The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room****: Ellis v Deheer [1922] 2 KB 113, 117-118, per Bankes LJ; R v Miah [1997] 2 Cr App R 12 at 18, per Kennedy LJ; R v Mirza, paragraph 95, per Lord Hope of Craighead.*
>
> *(2)* ***An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin****. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all: R v Mirza, paragraph 123, per Lord Hope of Craighead.*
>
> *(3)* ***There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible****. The House so held in*

*R v Mirza, affirming a line of cases going back to Ellis v Deheer [1922] 2 KB 113 and R v Thompson (1961) 46 Cr App R 72.*

*(4)* ***The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences, e.g. contact with other persons who may have passed on information which should not have been before the jury****: see such cases as R v Blackwell [1995]2 Cr App R 625 and R v Oke [1997] Crim LR 898.*

*(5) When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasion given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence: R v Orgles [1994] 1 WLR 108.*

*(6) Section 8(1) of the Contempt of Court Act 1981 is not a bar to the court itself [3] carrying out necessary investigations of such matters as bias or irregularity in the jury's consideration of the case. The members of the House who were in the majority in R v Mirza all expressed the view that if matters of that nature were raised by credible evidence the judge can investigate them and deal with the allegations as the situation may require: see the opinions of Lord Slynn at paragraphs 50-51; Lord Hope of Craighead at paragraphs 92, 112 and 126; Lord Hobhouse of Woodborough at paragraphs 141 and 148; and Lord Rodger of Earlsferry at paragraph 156".*

143. That case explains that the exception to the rule applies if the allegation is that the jury as a whole declined to deliberate at all. The decision to allow the appeal was on the basis that the judge's direction was not strong enough. It would appear that, if the direction had been strong enough, the House would not have countenanced an inquiry into the misconduct summarised by counsel.

144. It is clear from what the House said in *Mirza* that it was concerned to confirm a clear, bright line rule that the deliberations of the jury should be kept secret, and are not to be inquired into on the basis of evidence given after the jury had delivered their verdict. It did so for a number of reasons of which the principal ones were:

(i) the need for finality once the verdict has been delivered;

[3] In that case, as the House observed in *Mirza* [41], in *R v Miah* [1997] 2 Cr App R 13, the court cited apparently with approval a statement by Darley CJ in *R v Andrew Brown* (1907) 7 NSWSR 290 at p 299 viz:

> "*I have come to the conclusion that the authorities are all one way, and that the Court cannot look at the affidavits of jurymen for any purpose, whether it be for the purpose of granting a new trial,* ***or for the purpose of establishing the misconduct of a juryman*****".**

(ii) the need to encourage jurors to speak frankly without fear of being ridiculed, criticised or harassed thereafter [47] [113]– in circumstances where absence of a secrecy rule might affect candour [52];

(iii) the need to avoid the examination of conflicting accounts by different jurors as to what occurred during the deliberation [47];

(iv) the need to avoid the risk that allegations will be made which are without foundation but which will reduce confidence in the jury system [52];

(v) the protection of the jury from those who may seek to extract from them details of their deliberations in order to foster an appeal, or to pressurise them into making allegations about a supposed fault in their deliberative process; or "*prevail upon them to disavow their genuine verdict on false and affected grounds*[4]" [96]. [98] [100].

145. Lord Hope drew attention to the fact that the rule regarding the secrecy of the jury's deliberations has been held by the ECHR in *Gregory v The United Kingdom* [1997] EHRR 577 to be a "*crucial and legitimate feature of English law"* [108].

146. The House also emphasised the need to resist attempts to water down the rule. As Lord Hope said [116]:

> *"…attempts to soften the rule to serve the interests of those who claim that they were unfairly convicted should be resisted in the general public interest, if jurors are to continue to perform their vital function of safeguarding the liberty of every individual".*

even though:

> "*117 The case for wishing to soften the rule is easy to state…"*

147. Lord Hope also declined [122] to adopt the model of the wording proposed for New Zealand namely:

> "*A person cannot give evidence about the deliberations of a jury concerning the substance of a proceeding except in so far as that evidence tends to establish that a juror has acted in breach of the juror's duty."*

148. In *Mirza* the House, Lord Steyn dissenting, declined an invitation to introduce an exception to the rule which would allow the receipt of evidence tending to establish that a juror had (a) broken his duty[5]; (b) showed bias, as was alleged to have occurred in *Mirza* ; or (c) failed to follow the judge's instructions [161] 165], as it was suggested had happened [39] in *Connor and Rollock*; or (d) that there had been a material irregularity or failure to act properly [165].

[4] Hume, *Commentaries of the Law of Scotland respecting Crimes*, 4th edition (1944) at p.429.
[5] See the declinature of the proposal that the law should adopt the New Zealand model [122]

149. The rigour which courts at the highest level have adopted in applying the rule is shown by the case of *Nanan v The State of Trinidad and Tobago* [1986] 1 AC 860. In that case the accused was sentenced to death having been found guilty of murder by a jury of 12, which by law was required to be unanimous. The judge did not say in the summing up that they could give a majority verdict. The foreman was asked if the jury had agreed on a unanimous verdict; he said that they had, and that the verdict was guilty. The Privy Council held inadmissible affidavits of 3 jurors and the foreman sworn after the delivery of the verdict that they were not in fact agreed, and were unaware, as was the case, that they could not give a majority verdict. That the Privy Council was prepared to uphold the inadmissibility rule in those circumstances even in a case punishable by death, which it did after consideration of a number of authorities, is an indication of the strictness of the principle despite the potential consequences; although whether the Judicial Committee would still take the application of the principle to such an extreme is questionable, particularly having regard to the case of *R v Charnley* [2007] EWCA Crim 1354. It is not, however, necessary to reach any decision on that now.

150. In the light of this line of authority, at the highest level, I regard the evidence of both the juror who spoke to Mr Daniels and the foreperson as inadmissible. The fact that we have received it *de bene esse*, as we were entitled to do, does not make it admissible.

151. I recognise, as did the House in *Mirza*, that the adoption and maintenance of a bright line rule could in some cases lead to unjust results. But the rule exists because of the need for it in the operation of a jury system for determining guilt in criminal cases. As Lord Hope put it at [122] "*The risk of perversity cannot be entirely eliminated. But the balance of advantage lies firmly in favour of preserving the common law rule as a proportionate response to the needs of the jury system*". Members of the jury need the protection of secrecy in order to shield them from those who may seek, for their own advantage or that of others, to discover the approach taken by the jury in any given case, and to protect them from possible harassment, criticism or ridicule. And secrecy contributes to full and frank debate. Evidence produced only after the verdict of the jury has been given is inherently susceptible to inaccurate or warped recollection, which may be fashioned by a particular juror's viewpoint.[6] Further the process of determining what view, in the end, the jury actually took of the evidence is fraught with difficulty, and may well have differed from juror to juror. This is exemplified in the present case by the acute differences between the evidence of Mr Daniels' juror and the foreperson; and by the multiple questions to which the foreperson's testimony gives rise both for her and the other eleven members of the jury. If this type of evidence were admissible it is difficult to see how one could stop short of questioning the entire jury, in a process which would potentially involve raising with each of them any alternative versions of events given by any others, as Lord Rodger recognized at [171] in *Mirza*.

152. Accordingly, I decline to treat the evidence of Mr Daniels' juror and of the foreperson as admissible, or to regard such evidence as forming any basis for a successful appeal.

153. Both appeals are, therefore, dismissed.

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[6] In *R v Thompson* [201] EWCA Crim 1623 the Chief Justice observed that "*There are occasions when it is difficult to avid 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."*