



Neutral Citation Number: [2005] EWCA Crim 177

Case No: 200305215 B5; 200305406 B5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT HARROW
HHJ SANDERS AND A JURY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 2nd February 2005

Before :

LORD JUSTICE JUDGE
DEPUTY CHIEF JUSTICE OF ENGLAND AND WALES
MRS JUSTICE DOBBS
and
SIR MICHAEL WRIGHT

Between:

R
- v -
Momodou

And between:

R
- v -
Limani

J. Bennathan for Momodou
J. Robertson and S.A. Ivill for Limani
N. Rumfitt QC and S. Johnson for the Crown

Hearing dates: 7th and 8th December 2004

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Judge:

1. On 13th and 14th August 2003, after a trial lasting almost four months in the Harrow Crown Court, before HHJ Sanders and a jury, Henry Momodou and Beher Limani were respectively convicted of violent disorder. The same jury acquitted Momodou of count 2, arson, being reckless whether life was endangered. On 15th August each was sentenced to four years' imprisonment. They now appeal against both conviction and sentence with leave of the single judge.
2. There were a number of co-defendants. Kastrioti, Kalu, Gaba and Hrubes were acquitted of violent disorder on the judge's direction. Jacobs, Abdul and Tuka were acquitted by the jury of the same offence. A not guilty verdict was entered by the judge in relation to an offence of arson alleged against Gabo. Another defendant, Mosstaffa, was acquitted on the direction of the judge of both violent disorder and arson. He pleaded guilty to an offence of affray and was sentenced to three months' imprisonment. Before the jury was sworn, Aliane pleaded guilty to violent disorder. A not guilty verdict was entered in relation to arson. He was sentenced to eighteen months' imprisonment.
3. The appeal raises important issues about pre-trial coaching or training of witnesses and about the exercise by a trial judge of his powers when the court has received communications from one or more jurors critical of the conduct of other jurors. Although different grounds were advanced by both appellants, it was agreed that if any ground gave rise to doubts about the safety of the conviction of either appellant, then the conviction should be quashed, irrespective of whether the specific ground had been identified in his notice of appeal.
4. The prosecution arose from a well-publicised, major and notorious disturbance at the Yarl's Wood Immigration Detention Centre (Yarl's Wood), in Bedfordshire on the night of 14th/15th February 2002, some three months after the Centre was opened.
5. The Centre, which was run for the most part by staff of Group 4 known as detention custody officers (DCOs) was divided into four wings, Alpha, Bravo, Charlie and Delta. Females and families were detained in Charlie wing and single males in Delta wing. Association between the wings was permitted.
6. The trigger for events which led to the violence was a problem involving a female detainee known as Eunice. In the morning of 14th February she was involved in some trouble in the Charlie wing office. Not long afterwards, she was found in an unauthorised part of the Delta wing, and when asked to move, she refused. A number of detainees had heard her side of the earlier incident, and demanded to know why she had been refused medical treatment. They were told that she had been seen, and medication ordered. Although there was a degree of unpleasantness, the crowd dispersed, and the atmosphere calmed. Eunice was told that she would not be allowed to visit Delta wing that evening and a message was duly posted in the shift office in Charlie wing where she was detained.

7. At about 7.30 that evening a number of female detainees gathered outside the shift office on Charlie wing, anticipating a visit to the part of the Delta wing where male and female detainees were able to associate. Eunice was one of the women. In view of the earlier decision, when she sought to go into Delta wing, she was told that she would not be allowed to do so. She began to shout that she wanted to see a supervisor, and that she wanted to go to church in Delta wing. She walked towards the locked security door. Other female detainees followed. Some of them began to shout at DCOs who were present. The security gate was closed. When the security gate was opened, some of the detainees were ushered back into Charlie wing, but Eunice refused to move. She remained with her back against the locked security door, uttering threats. She began to throw her arms about and push at the DCOs, kicking at one of them. An order that she should be restrained was given. When a DCO attempted to carry the order, Eunice either bit or tried to bite him. In the end however she was restrained and brought to the floor.
8. This scene was observed through the window of the locked door by male detainees on Delta wing who were on the other side of the door. They began to bang on it. Some detainees armed themselves with improvised weapons, using chairs and table legs. The window was smashed. Missiles were then thrown through the resulting gap. Although, in the end, none of the detainees in Delta wing broke through the door to achieve the “rescue” of Eunice, the incident escalated very rapidly.
9. We need not describe the way in which an apparently minor matter of organisation and discipline at the Centre erupted into mayhem and destruction during which some of the detainees gained control of the Centre by the sheer force of their numbers and by violent intimidation of staff. Others escaped. The details of individual ordeals need no narration. It is however important to emphasise the vast scale of the disorder.
10. The outbreak of violence lasted for several hours before the police and prison service were able to regain control of the scene. For those who witnessed it, including a number of detainees, the incident was extremely alarming. For those present and directly involved, and under threat of serious injury or even death, it must have been a terrifying ordeal. Violence and the threat of violence was widespread. The building was set on fire, and half of it was effectively razed to the ground. The resulting damage ran into many million pounds. It required the most wide ranging forensic deconstruction of a site ever undertaken in Europe, involving the examination of literally tons of material, to establish that there were no fatalities.
11. The prosecution case against Momodou, well-known in the Centre, physically striking, and easily identifiable, was that he played a prominent part in the incident. He was directly involved in smashing the window in the locked security door, and, after Aliane had damaged a security camera on the ceiling, he pulled it away from the ceiling. He used a metal bar to force open a telephone cash box. He was also alleged to have started a fire. When he was subsequently interviewed, Momodou denied that he was present at the scene, untruthfully asserting that he was at prayers and then had gone straight to his room. Limani was said to be the first person seen on CCTV, waving and encouraging detainees towards the scene of the trouble involving Eunice.

He was also present outside the office when it was besieged, and then again when a number of detainees made their way into Charlie wing, where he was seen to run about the corridor, screaming and shouting. He attacked the door in the manager's office, and ransacked it. Finally, he was alleged to have been one of the detainees who broke through the Delta wing gates, and after assisting the escape of others, escaped himself.

12. The Crown's case that the appellants were involved in the violent disorder was well supported. We shall first summarise the evidence given by DCOs. One, Ram, saw the incident involving Eunice in the lobby. He heard people trying to smash the door into the secure lobby, and when the window was broken, it just missed striking him. The only detainee he saw was Momodou, whom he knew as Henry, with his face at the glass. He could see a number of other detainees behind Henry, without being able to identify them because the background was dark, and the lights were smashed. A second DCO, Gibb, saw Momodou, whom he recognised, punching at the window with his fist. He saw his arm move, and when the glass broke he saw Momodou's face. He identified a number of other detainees, but apart from a good deal of shouting and banging, he could not see what they were doing. The third DCO, Collins, was involved in the efforts to restrain Eunice. When she shouted that she was going to be killed, a number of detainees were extremely aggravated. He knew Momodou, who was holding a piece of metal about 8-12" long, and heard him shout aggressively, "Open the door then". He did not do so. The window was then broken by a piece of metal which he believed Momodou had been holding. He was struck and his elbow was cut by the glass from the broken window. A fourth DCO, Fox, saw a number of detainees, including Momodou, who again, he knew, behind the window to the secure lobby. Momodou was punching "hell" out of the window in the door, which cracked. A solid object came through it which caught Collins. Another DCO, Attwood, thought that the window had been broken by a chair leg. The detainees behind the door included Momodou, who he heard shouting words to the effect, "Fucking get off her, leave her alone, get off my mum". DCO Traynor heard noise coming from the Delta secure lobby. He recognised Momodou as one of those behind the door. In his evidence he attributed the smashing of the window to another of the defendants, but the judge reminded the jury that this description was contradicted by almost every other witness. A number of DCOs identified the appellant as one of those present behind the security door, but did not attribute any particular offensive activity to him. DCO Nandha, stationed in the control room, viewing the disturbance through the CCTV system, saw Momodou smashing CCTV cameras in the lobby with some kind of wooden implement. The CCTV system itself did not survive the fire.
13. The final DCO who gave evidence of events at the scene was Wakefield. He went to the lobby area and saw the smashed window in the door. There were four detainees in a line, one of them "Big Henry", the nickname or description of the appellant Momodou. Momodou and another detainee then left his sight. He heard the sound of furniture breaking in the television room, and other areas, after which Momodou and his companion returned with table legs which were used to attack the door. The lights went out. The walls vibrated. No-one got through the door, but a camera, and metal table legs, were thrown through the door, and a fire extinguisher was discharged. He later went outside the building to the Delta gates when approximately 60-70 detainees rocked the gates until they burst open. He described a scene of great violence, and a

breakaway group of detainees who ran towards the perimeter fence. He was 99% sure that he saw Limani climbing out, a piece of towel used as a face mask falling away while Limani was helping someone else over the fence.

14. Limani was also seen earlier via the CCTV cameras by Nandha, stationed in the control room. He saw Limani near the prayer room, waving those behind him towards the core of the trouble. He reported tables being broken and their legs removed, and then used to hit cameras. A DCO present in the gym, O'Donnell, heard loud banging saw a group of ten detainees trying to come through the gym door. He recognised Limani as one of them. DCO Burns was at the family area, trying to assist. She described how she was confronted by one male detainee, demanding her keys, and another who ripped her radio from her shoulder and then broke it. She was threatened and abused. She saw some fifty men running about, the only one of whom she could identify was Limani. She spoke to him directly, addressing him by name, seeking his help to avoid fire danger to families trapped in the block. DCO Curtis underwent a particularly unpleasant ordeal. He was one of those besieged in the wing office. At one stage a hole appeared in the wall. A lighter came through it on a couple of occasions. A fire extinguisher was sprayed into the office. The mob chanted, "Burn Group 4, burn". He saw some light coming through the hallway and recognised Limani as one of the mob.
15. Two detainees gave relevant evidence. Chidawanyika saw detainees running about, smashing windows and furniture. He saw Momodou in the telephone room, using an iron bar to try and open the telephones. He identified Limani as one of those who kicked at the manager's door. Having helped some DCOs make their escape from the building, on his return, Chidawanyika walked past the telephone room, where he saw Momodou trying to extract, using a metal bar, coins. Another detainee, Lawal, heard the noise made by Eunice at the start of the incident and saw her being restrained. He alleged that she was being beaten up. He saw a crowd, which included Momodou, at the door, trying to force open the door. Momodou helped to smash the glass in the window using a piece of metal. He saw Aliane smash a camera with a fire extinguisher. Momodou then helped to dislodge it. He was later to describe Momodou setting fire to the building.
16. When he was interviewed on 10th April, Momodou denied any involvement in the incident. He was in the chapel when the lights went out, and he then went to his room and stayed there for about ten minutes. Although he later saw a number of others doing damage, he had no personal involvement whatever. When he was interviewed later, on 8th July, he denied having anything to do with the fire. Limani was interviewed on 13th March and 20th May. He claimed that he was watching television when he heard that a woman detainee had been beaten up. He had no involvement in the incident. When the fire first started he went outside, but he denied threatening any member of staff or that he had helped any detainees to escape.
17. Neither appellant gave evidence at trial.

18. The summing up was meticulous and comprehensive, and indeed gave significant prominence to the submissions on behalf of the defendants. No fair criticism could be directed by either appellant against the directions of law or the broad balance of the summing up. We must therefore first consider the submission that the judge ought to have acceded to a submission on Momodou's behalf that the trial should be stayed as an abuse of process. This submission was simultaneously developed by Mr Bennathan to support his contention that in any event the matters he relied on demonstrated that Momodou's conviction was unsafe. We shall examine the arguments, bearing in mind, as Mr Bennathan submitted that we should, any potential cumulative effect on the fairness of the process and the safety of the conviction.

Abuse of Process

Absent Defence Witnesses

19. The main contention before the judge arose from the circumstances in which the Home Office continued to return former detainees at the Centre to their countries of origin. None of them was wrongfully returned, that is, in contravention of any principles or regulations which govern asylum decisions. In each case the removal of the detainees was lawful. However, the Home Office arranged to "flag" the identity of detainees who were due to be removed and gave the police 72 hours notice of the intention to do so. This procedure enabled the police to ask for reconsideration in the light of any possible evidence which the detainee might provide. This facility was not made available to the solicitors for the defendants. Plainly, until there were defendants and solicitors acting for them, there was no-one to whom such notification could be given. The complaint is that the same 72 hour facility was not extended to them when it became practicable to do so.
20. In due course the police provided such information as they could about contact details for former detainees identified as potential defence witnesses. This process began many months after the original offences were committed, and the attitude taken by the Crown was that there should be no disclosure of any such details unless and until an individual defendant listed former detainees who might be of assistance to him. The object was to avoid a defendant discovering the identity of detainees who had already been removed and thereupon asserting that the particular detainee was a key witness, whose absence from the country itself supported an abuse of process argument.
21. In due course the Crown admitted that three former detainees identified on Momodou's behalf had been deported, Penineh Ndeti to Kenya on 26th February 2002, Bamidele Adebajo, to Nigeria on 20th March 2002, and Kevin Nelson, to Jamaica on 10th May 2002.
22. This complaint has to be analysed in its chronological context. Momodou was at liberty until 10th April, when he was arrested and interviewed. Although he did have solicitors acting for him in connection with asylum proceedings, they were not at that stage retained in connection with any possible criminal proceedings. He was released

on bail. He was re-arrested on 8th July, and interviewed in the presence of his solicitors, in relation to an offence of arson. He was again released on bail. By the time the detainees identified on Momodou's behalf were identified as potential witnesses, they had all been removed from the country. No-one suggested that the removal of failed asylum seekers, and these three witnesses in particular, represented anything more than the ordinary workings of the asylum system, or that the process was improperly motivated by a desire to create difficulties for Momodou's defence. Practical reality has its demands. In any event the jury were made aware of the absence of these witnesses, and directed accordingly. This was not an abuse of the process.

Informal identification by photograph

23. Complaint was made at trial that the management of Group 4 encouraged their staff to show photographs of different detainees both to DCOs and indeed other detainees. The purpose was to encourage the identification of offenders. No records were kept of these procedures. The complaint was linked with a further concern arising from evidence that someone had pinned a cutting from a local newspaper in the staff room, showing photographs of some of the defendants. Precisely which DCOs saw which photographs was never established. When they gave evidence they could, of course, have been asked whether they had seen any photographs, and if so, whether they had used them for the purposes of identification.
24. The complaints were fully ventilated before the jury. The judge expressly warned that any purported identification of a defendant which may have been influenced either by a photograph or from the newspaper cutting itself would undermine the reliability of any purported identification.
25. We are not here considering applications by any other defendants. The judge was plainly right to conclude that despite any risks arising from this procedure, the case should be tried by the jury and not halted by the judge. In practical terms, the reality of this complaint is that given Momodou's striking physical presence, the use of photographs would not have contributed to any mistaken identification. Either the witnesses who recognised or said they knew him were honest, or they were lying. These were not mistakes produced by a photograph. The case Momodou was advancing at trial was that he was indeed present in the area behind the security door shortly before trouble erupted, and the issue was whether or not the witnesses who said that he was in fact participating in the violent disorder were right or wrong. Limani, too, was recognised by or known to witnesses who described his activities. The same considerations apply. In any event no specific prejudice or problem arising from the circulation of these photographs was drawn to our attention in respect of either appellant.
26. In summary, while we agree with the judge's criticism of the use of the photographs, and the display of the newspaper cutting, neither of these convictions is undermined by what happened.

Witnesses called by the prosecution at trial

27. Three separate areas for the arrangements for prosecution witnesses need attention. We cannot avoid a lengthy narrative of the essential facts. The background is the immediate aftermath of the incident. For reasons which will immediately become obvious, we deliberately refrain from describing it as a “riot”. Two problems, with no direct bearing on the question of the guilt of any defendants needed urgent attention. It was suspected that one or more individuals had died during the incident. However until the major scientific investigation was concluded, and it was affirmatively established that no-one had died, Group 4, as the company responsible for Yarl’s Wood, was suspected of corporate manslaughter. Group 4 was simultaneously considering and eventually started civil proceedings against the Bedfordshire Police Authority, seeking compensation under the Riot Damages Act 1886. In short, quite independently of the criminal process involving individual defendants, and the potential involvement of Group 4’s employees as witnesses to the incident, it was directly involved, both as a potential defendant to criminal proceedings and as a claimant in civil proceedings.
28. When the incident was eventually brought under control, an immediate process of group counselling was organised by Group 4. The Independent Counselling and Advisory Service (ICAS) was immediately retained. The organisation provides therapeutic services for those involved in traumatic incidents. Staff were seen in group sessions known as a “trauma de-brief”. These sessions lasted in total between 2 and 3 hours, with each session facilitated by two clinicians, each one of whom was either a chartered psychologist, or a counsellor registered with the British Association of Counselling and Psychotherapy. The initial trauma de-brief sessions were not counselling sessions as such, but took the form of structured discussion about feelings and reactions after the incident, with the clinicians managing the content of the discussion with the aim of assessing the therapeutic needs of those attending. These sessions were organised in groups and took place between 19th and 20th February. The groups made up of those who had apparently been together on the night of the disturbance. No notes were made of the discussions, and the sessions took place before any members of staff had made witness statements to the police. The precise arrangements were not fully clarified until the very end of the trial.
29. With counsel’s assistance we have been able to identify the witnesses relevant to these appeals who participated in the trauma de-briefings. Gibb, Ram, Collins, Fox, Wakefield and Nandha, as well as Attwood and Traynor, attended ICAS sessions. So did O’Donnell and Burns. Gibb, Fox and Attwood attended together in the same group. Collins and Wakefield attended in another group.
30. The witnesses gave various descriptions of these events. Ram said that he did not discuss the incident with his colleagues, but he had received one and a half hours counselling some three or four days after the incident. There were six present in his group, talking about their experiences. He thought Sylvia Burns was one of them. After the incident Gibb was asked to identify any one of the detainees who was involved in the incident. He made a list of them before he had access to any records

or photographs. He then attended two sessions of group counselling with ICAS. There were seven to eight DCOs in his group, and they discussed their experiences and the effect on them. Collins described what appears to have been the ICAS debriefing which, he said, took place about a month after the incident. The DCOs present talked about what had happened after the incident, but this was a general conversation, and names were not swapped. Attwood described a single one hour counselling session immediately after the incident, followed by a further session some six weeks later. He was told not to discuss the case or the incident, but simply their personal feelings and how the incident had affected them. Traynor did not recollect attending for ICAS counselling. He was the shift manager, and was concerned with the welfare of other DCOs. Nandha described attending a couple of ICAS group meetings. He did not discuss what had happened on the night. The meeting was mainly about feelings. O'Donnell described counselling after the incident.

31. The second area of complaint is and was regarded by the judge and the prosecution, as well as the defendants at trial, as much more significant. As a direct result of the proceedings proposed to be taken by Group 4, in April 2002, a firm of solicitors, highly regarded in commercial and civil litigation, Norton Rose, was instructed to act on its behalf. Shortly afterwards, in late April, arrangements were made for a notice to be delivered to all Group 4 employees who may have been witnesses to the incident from the manager of Yarl's Wood.
32. Taking the form of advice to staff, the notice began by asserting that despite repeated assurances that staff who made statements to the police would be provided with a copy, as a result of the civil dispute between the police and Group 4, Bedfordshire Police was refusing to provide such copies. They were lowering the line between investigation of the incident, and gathering evidence to support the police's own civil claim against Group 4. Staff were asked to bear in mind the advice Group 4 had received from their solicitors. They were reminded that they were "under no obligation to be interviewed" and that any interview notes and statements could be used in any criminal or civil proceedings or public inquiries. If willing to be interviewed by the police, they were entitled to "have a solicitor present at the interview" who would be provided at Group 4's expense. Staff were then advised to ask to be provided with a copy of any statement they might give to the police, and in the event of a refusal, should not sign the statement. If they were invited to sign a statement, they should make sure they had "a proper opportunity to review it carefully", and to ask to take it away for "review" and discussion with their "manager and/or with a solicitor".
33. They were further told to ask the police to specify the criminal offence which was being investigated at the outset of the interview, and only to answer questions related to its stated purpose. They were to answer factual questions, but not make statements of opinion or say "what you think other people may have done or thought". It was pointed out that they might be asked to sign any police notes relating to their interview, but indicated that they did not have to sign them, and "advised" that they should not. "If you do decide to sign the notes insist on a copy. Do not sign until you have had a chance to review the notes carefully ... you may wish to discuss the notes with a manager or solicitor first". Staff were under no obligation to provide their

pocket books, and if asked, they were required to consult with the manager before handing it over.

34. We have not seen the letter sent by Norton Rose dated 25th April 2002 to the Bedfordshire Police. It is however obvious from the response dated 2nd May 2002, that it reflected the contents of a notice to staff, and that the Bedfordshire CID were in possession of a copy.
35. Apart from denying that the police decision not to provide witnesses with copies of their statement arose from the “civil dispute” with Group 4, this letter pointed out that it was “normal practice in criminal investigations” not to provide witnesses with copies of their statements until shortly before they attended court as a witness, “to prevent, or at least minimise the risk of defence allegations of collusion and/or contamination of evidence”. Concern was expressed about a potential conflict of interest between the corporate position of Group 4 itself, and that of its employees, as witnesses. The solicitors were asked to advise Group 4 that their employees were under civic responsibilities to assist the police with their investigation. The advice in the notice, if followed by potential witnesses, “could lead to witnesses having their oral testimony undermined at any criminal prosecution by defence suggestions that their evidence has been influenced by third parties (including third parties who have a supervisory responsibility towards them and/or with whom they have a conflict of interest)”. The relevance of any evidence which a witness might be able to give could only be fully appreciated by the police when the investigation was concluded, and it was standard practice for statements to be obtained from witnesses which included inadmissible opinion or hearsay evidence, but which would provide a relevant line for further investigation by the police. It was considered “obstructive” for staff to be encouraged to withhold copies of their notebooks, which might contain “highly probative evidence”, and would be liable to disclosure in the event of a prosecution. It would therefore seem “to make much more sense for them to be handed over to the police now”.
36. The letter concluded that the notice to staff was “distinctly hostile to the police investigation, and strikingly at odds with Group 4’s public assertions that they are doing everything they can to co-operate with the police”. The need for these matters to be approached cautiously was demonstrated by the fact that some Group 4 staff had already viewed photographs of detainees which might compromise any identifications given at trial, another process “potentially damaging to the prospects of a successful prosecution, and notwithstanding police requests ... that this very practice should be avoided”.
37. That is the background, and this exchange of correspondence is self-explanatory. The police were extremely concerned, not merely at the tone of the notice sent by the manager to his staff, but also at the potential damage to a successful prosecution if the evidence of DCO witnesses from Group 4 were contaminated, or approached as if it were.

38. It was agreed at trial that it would have been wholly improper for witnesses to discuss their notes and statements with their manager or with the company's solicitors, and further that the assertion that witnesses were entitled, as a matter of law, to be provided with their written statements was unfounded. A formal complaint was made against Norton Rose to the Law Society. We do not know, and for present purposes do not need to know the outcome.
39. Group 4 subsequently arranged witness training for its employees. Much of what actually happened is still not entirely clear, and we were invited to deal with the problem on the available material. We have not heard evidence or representations on behalf of Bond Solon or Group 4, but the inference that Group 4 was concerned to protect its intended civil proceedings is inescapable.
40. As soon as these arrangements were discovered, advice was sought from counsel for the Crown, Mr Nigel Rumfitt QC. His advice was unequivocal. In the context of a criminal trial the proposed training was wrong, and might constitute a contempt of court both by Group 4 and by Bond Solon, the company chosen for training purposes. The programme of training was to be stopped immediately. By then however sixteen potential witnesses for the prosecution had received training. Their names were provided to the defence and in due course to the jury.
41. The copy of a case study prepared by Bond Solon for training purposes was exhibited at trial. We have studied it. According to the text, witnesses were invited to read the case study and imagine they were involved in the events described in it. It continues:

“You were on duty on 12th September 2001 in your normal role. You have been called as a witness for the prosecution in the trial of some detainees charged with various offences arising from the events on 12th September 2001.

The background

Butlins detention centre for asylum seekers opened in January 2001. The centre is designed to hold up to 200 asylum seekers at a time, including women and children. There is a 15 ft high fence topped by a barbed wire around the centre, CCTV cameras, regular patrols by security officers, and detainees unable to move around by the site except under guard. The centre is run by Group 4. Detainees have alleged that the security staff are rude, racist and intimidating, and that they have been threatened with transfer to a prison if they complained. They have also complained of poor conditions and treatment.

On 12th September 2001, a disturbance started apparently triggered by a programme on TV about the events in the USA on 11th September. A fire started and the fire brigade was called. In the confusion some detainees escaped but were later

apprehended in a local Macdonald's. Several detainees are accused of violent disorder and escaping.”

42. The study was specifically directed to Group 4 employees in their capacity as witnesses for the prosecution. The defendants to the “study” prosecution were detainees for whom the witnesses were responsible. Ignoring the reference to the terrorist attack in the United States on 11th September 2001, the similarities between this “case study” and events at Yarl’s Wood on 14th/15th February 2002 is obvious. Even if the discussion and training began by focussing on the case study, the focus would inevitably move to evidence to be given by witnesses for the prosecution in what was then the shortly forthcoming trial. This case study would have been entirely inappropriate basis for any form of witness coaching or training in the present case. The trial proceeded on the basis that it had indeed been used for Bond Solon training purposes.
43. The evidence on this issue, and the consequent approach to it, may have been incomplete. On 3rd April, shortly before the trial began, Group 4 responded to the concerns about witness training, asserting that the training programme did not involve any witness coaching. The original case study sent to Group 4 by Bond Solon could indeed have become “confused” with the incident at Yarl’s Wood, and instructions were therefore given that the case study should not be used. The letter then provided a detailed account of the way in which Bond Solon had become involved in the training programme, asserting that the police liaison officer was well-aware of the proposal. The content of the course was explained. There were one day sessions, in groups of eight witnesses in a course “designed to give witness an experience very similar to going to court”. In the morning the theory, practice and procedure of giving evidence was explained. This included the roles played by various participants in the proceedings, the layout of the court, the technique of cross-examination and how to handle questions which were not understood. The afternoon session included practice cross-examination of these witnesses “on real life experiences which were not connected with the riot”. The letter repeated, “as stated above, the case study to which you refer in your letter was not used as it was deemed inappropriate”. There was a strong denial of coaching or rehearsal of evidence: the course was simply intended to familiarise witnesses with the process and procedures “so that giving evidence is not so intimidating”.
44. No record of the training programme, or the training of individual witness was available at trial, and the identity of the person responsible for the training was unknown. It was agreed at trial that Wakefield and Burns were “believed to have received Bond Solon training”. It looks as though Robinson, a DCO, who described Momodou’s presence behind the security door without attributing any specific offensive behaviour to him, also received training. There is some uncertainty about Wakefield’s position. The admission that he was “believed” to have received it was not a positive assertion that he had. In re-examination he denied that he had attended such training. On the other hand we were told that a letter from the Crown Prosecution Service had informed the defence that he had. We have not seen the letter. This is not satisfactory, but if there was any unfairness in the way in which the issue was approached at trial, Wakefield suffered the consequences, because his

evidence was approached as if he must have been lying when he denied that he had received training. Indeed, on the issue of training by Bond Solon, the entire process redounded, as the Crown feared it would, against the prosecution.

45. It was an agreed fact between the prosecution and the defence at trial that, the training offered by Bond Solon was “wholly inappropriate and improper”. The judge took a particularly robust view of what had happened and unusually directed that he should there and then be expressly associated with that agreed fact. In the case of one defendant against whom the evidence largely consisted of witnesses who had been so trained, he withdrew the case from the jury. In relation to the present appellants, and other defendants, his directions to the jury were uncompromising. In a broad ranging, stinging, criticism, he ended this part of his directions to the jury:

“There is no place for witness training in our country, we do not do it. It is unlawful.”

46. We must now move to a third area relating to prosecution witnesses where, according to the submissions before us, there was a danger of contamination. In November 2002, 22 DCO employees of Group 4 received “cognitive therapy” from two psychologists, both called Dr McGurk. Some of them were seen in groups, others individually. The purpose was to provide information about the likely symptoms and disorders which would be associated with the aftermath of their involvement in the incident on 14th/15th February.
47. In a letter dated 22nd December 2002, headed “Yarl’s Wood de-briefing”, Dr Barry McGurk suggested that the counselling efforts which took place in the immediate aftermath (that is the ICAS treatment) was less than satisfactory. Employees were continuing to suffer from what was described as “crooked thinking”, and were in need of “a proper de-briefing” to help the therapeutic process and help them move on with their lives. The letter asserted that police instructions that people should not talk about the incident had already been disregarded. The Group 4 supervisor, David Watson, had been asked to speak about his role in the incident to the employees. The police instruction appeared to be “silly”, because the individuals would inevitably discuss their experiences with their colleagues in informal settings. As there were so many “incorrect and varying ideas” about what had actually happened, these employees would be “vulnerable to aggressive questioning” at trial. As to the argument that the arrangements for a “de-briefing” would lead to a submission that the witnesses had colluded, the alternative argument was that a de-briefing would only “provide an accurate picture of what was happening to other people” without changing any individual’s view of what had happened to him or her.
48. There was an immediate response on behalf of the prosecution, expressing “great” concern. It pointed out that discussions between witnesses before a criminal trial could give rise to a number of difficulties. These were identified. The response included a series of questions, and sought assurances that full records of “everything to do with the therapy” would be kept and made available in good time for the trial. The letter ended by repeating the writer’s extreme concern, in particular at the

arrangements for a “group de-briefing exercise which actually covers the chronological sequence of events”. An extract was also sent to Group 4 of the then recently issued booklet relating to the “provision of therapy for child witnesses prior to a criminal trial”, pointing out that for this purpose there was no difference in principle between and child and adult witnesses. The text read:

“Prior to the criminal trial group therapy where the specific recounting of abuse takes place is best avoided. The particular danger of this kind of group therapy is that the witness may adopt the experiences of others taking part in the therapy. Structured group therapy approaches which help in a neutral way to improve the child’s self-esteem are less likely to cause difficulties. As a general principle, group therapy should not be offered to the child witness prior to the trial.”

49. However Group 4 then indicated that it would postpone the original proposal for a large group de-brief, but nevertheless asserting that as a matter of company policy, for many years, Group 4 had made these de-briefings available to staff who had together been involved in any traumatic incident.
50. In the meantime, on 29th January, Group 4 wrote to the chief Crown Prosecutor notifying him that the services of Dr McGurk had been retained, and that he had already held two sessions of cognitive therapy with small groups of Group 4 staff. They were said to have “benefited significantly” from the process. The letter recorded the recommendation that this de-briefing exercise should be extended beyond the existing patients to all members of staff who were on duty at the time, who might be “repressing symptoms of psychological disorders” arising from their presence at Yarl’s Wood during the riot. In the interests of the health of its employees, Group 4 had accepted the medical advice, and proposed to allow Dr McGurk to organise a “group de-briefing”.
51. A further letter from the chief Crown Prosecutor, which appears to have crossed in the post, again emphasised the dangers and difficulties of group therapy. No records of the form of de-briefing are available, but the information about precisely who had attended when, and who had attended with him was disclosed and in due course presented to the jury. Group meetings took place, the first on 4th November 2002, the last on 21st February 2003.
52. Ram, Curtis, Burns and apparently Wakefield attended for therapy at the McGurks’, Curtis on several occasions. It is now perhaps convenient to record Curtis’ evidence that he had not spoken to anyone about the incident because, hardly surprisingly given his experience, he had suffered depression and post-traumatic disorder syndrome, and that he had received treatment. Ram attended with Curtis, on 4th November 2002, with three others who gave no evidence against the appellants. Burns attended once, with others, again, none of whom gave any significant evidence against either appellant. From the agreed facts, we cannot find any specific material that Wakefield was seen simultaneously with any other relevant witness. The form of treatment

received by the witnesses, except for Curtis, whose general evidence has been narrated, was not closely examined, not least because the relevant information emerged late in the trial.

Abuse of Process

53. None of the complaints with which we are immediately concerned were directed at investigating police officers, or those responsible for the preparation and conduct of the prosecution. They did nothing which justifies criticism. To the contrary, as the narrative demonstrates, they did their utmost to see that the process was not undermined or subverted by the actions of Group 4 or their solicitors.
54. The steady development of the abuse of process jurisdiction suggests that, notwithstanding that the prosecution or prosecuting authority may be blameless, as a matter of principle, the judge is vested with jurisdiction to order that proceedings should be stayed. The activities of third parties may constitute an abuse of process making a fair trial impossible, and if so, in an extreme case, this discretion is available to be exercised. That said, it has been pointed out time and again that difficulties, even great difficulties, created for the defence are almost always capable of being addressed by the trial process itself. This is usually achieved by evidence or agreed facts which properly inform the jury of the difficulties faced by the defendant. Then, with the benefit of the judge's directions as well as counsel's submissions before its retirement, the jury is well able to appreciate the impact of these difficulties on the proper preparation and conduct of the defence, and to take them fully into account before deciding whether the evidence demonstrates that the prosecution case has been proved. Juries have a strongly developed sense of fairness. Experience shows that they lean over backwards to see that the prosecution does not benefit from and that the defendant is not prejudiced by any unfairness, whatever its source. These considerations should properly inform the exercise by the trial judge of the salutary, but rarely exercised, power to halt a prosecution as an abuse.
55. Our first and immediate concern is whether there are any grounds for interfering with the judge's decision that the case against the appellants and their co-defendants should proceed. On the information before him when the application was made, the conduct of Group 4 in relation to DCO witnesses, and the potential difficulties created by it, was capable of full explanation before and analysis by the jury. We can find no misdirection by the judge, and none was identified to us, which would justify interfering with his decision that the case should proceed. In the result, his decision meant that all areas of complaint were fully ventilated and put into their proper evidential context before the jury. In our judgment the decision was correct.
56. We have however further examined whether the information about witness treatment or training which, with the assistance of the prosecution, became available by the end of the trial, should lead us to doubt the safety of the conviction. Again, no criticism can be directed at the way the judge summed up these issues. To the contrary he was at the greatest pains to give lengthy, unequivocal and robust support to every aspect of

the conduct of Group 4 which was rightly criticised before the jury by the prosecution and the defendants. We have no reason to doubt that the jury would have been fully alert to those directions and the judicial concern which led to their expression.

Witness Care

ICAS

57. The ICAS arrangements were not improperly motivated. As employers, Group 4 provided this facility for members of their staff who wished to have it, or thought they needed it. Two potential dangers were identified. First, discussions between those who had been grouped together during specific parts of the incident might influence individual recollections, and second, there would be no means of checking whether this had happened.
58. We understand the submission, but we are unimpressed with it as a matter of complaint. It was not unreasonable for employers to do everything they could to alleviate the pressures and stresses endured by those members of their staff who were involved in or witnessed this incident. In its immediate aftermath, we can well understand why little, if any, thought was given to the position of potential witnesses who might become involved in any subsequent prosecutions of any detainees. At that time there was no process to be abused. Litigation, civil or criminal, would have been far from the mind of any of these potential witnesses. Many of them had endured a ghastly experience. Provided that no attempt was made to conceal what had happened from the jury (and none was), it was not abused. Each relevant witness for the prosecution was cross-examined about his or her involvement in the ICAS arrangements, and the jury was properly informed of the relevant facts.

McGurk

59. The later cognitive therapy is more troublesome because, by then, the employees who needed such treatment included witnesses in the forthcoming prosecution. The potential conflict between necessary pre-trial treatment for a witness or victim of crime and the possible contamination of that evidence by constant out-of-court reiteration or aspects of treatment which consciously or unconsciously involved the prodding of memory is well-recognised. Without treatment, some victims and witnesses may suffer serious continuing psychological ill-health. On the other hand, treatment which involves discussion and analysis of the incident which is the subject of the prosecution may affect the clarity and accuracy of the witnesses' memory. The dilemma is most frequently observed in cases where the victim has endured serious, sometimes prolonged, sexual crimes. Early treatment would help the victim to come to terms with what she (as it usually is) has suffered. The treatment process however does sometimes lead to a reduced possibility of conviction. In some cases therefore the conundrum resolves itself into a decision about priorities. The correspondence encapsulates this dilemma. Where, as here, the court was not involved in the decision about priorities, the critical requirement is that the court should be properly informed

of any witness who has received pre-trial treatment of any kind. That enables its possible impact on the evidence to be investigated at trial, as appropriate. The trial then proceeds on the basis of the known facts, which can be properly assessed.

60. In the present case, by the time the jury retired, it was fully informed of precisely which prosecution witnesses had attended for the McGurk cognitive therapy, and when it happened, and the identity of others who received treatment at the same time. With the judge's directions, and in the context of very modest levels of therapy which actually took place, and the very limited possibility of cross-contamination of evidence which related to the participation of either appellant in the violent disorder, a proper evaluation of their evidence could be made.

Witness training (coaching)

Bond Solon

61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.
63. In the context of an anticipated criminal trial, if arrangements are made for witness familiarisation by outside agencies, not, for example, that routinely performed by or through the Witness Service, the following broad guidance should be followed. In relation to prosecution witnesses, the Crown Prosecution Service should be informed in advance of any proposal for familiarisation. If appropriate after obtaining police input, the Crown Prosecution Service should be invited to comment in advance on the proposals. If relevant information comes to the police, the police should inform the Crown Prosecution Service. The proposals for the intended familiarisation programme should be reduced into writing, rather than left to informal conversations. If, having examined them, the Crown Prosecution Service suggests that the programme may be breaching the permitted limits, it should be amended. If the defence engages in the process, it would in our judgment be extremely wise for counsel's advice to be sought, again in advance, and again with written information about the nature and extent of the training. In any event, it is in our judgment a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies, and it will follow that the Crown Prosecution Service will be made aware of what has happened.
64. This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarisation sessions. None of the material should bear any similarity whatever to the issues in the criminal

proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events. As already indicated, the document quoted in paragraph 41, if used, would have been utterly flawed. If discussion of the instant criminal proceedings begins, as it almost inevitably will, it must be stopped. And advice given about precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. Note should be made if and when any such warning is given.

65. All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed.
66. On the facts apparently established, alternatively on the factual assumptions made at trial, so far as these appellants were concerned this guidance was not complied with in relation to two witnesses, Wakefield and Burns. As already indicated, their names were among those provided to the defence as having attended for training.
67. We have closely examined the relevant material. We have already noted the facts agreed by the Crown at trial and the judge's directions. The fact of and the arrangements for the training programme organised by Group 4 with Bond Solon reflected adversely not on the defence but on the Crown. Legitimate and powerful forensic criticism of the facts was made by the defence: the Crown conceded its justification: the judge unequivocally endorsed it. In Wakefield's case, his contemporaneous notes of the incident were made on the following day. If his evidence drifted away from those notes, there was ample scope for cross-examination. In Burns' case, her evidence was not wholly critical of Limani. In any event, the way in which the "training" issue was left to the jury meant that it was damaging to the creditworthiness of every witnesses who received it. In the result, looking at the evidence overall, the arrangements for training for Burns and Wakefield do not undermine the safety of the conviction.

The Jury

68. The trial began on 23rd April. After the judge rejected abuse of process submissions, the jury was duly sworn. At the outset of the trial the judge was at pains to emphasise to them that they must concentrate exclusively on the evidence in court, and that they should leave any personal opinions about asylum issues "outside this courtroom". It was a clear and unequivocal direction. It was then repeated by counsel for the Crown.
69. The jury itself was self-evidently drawn from a wide variety of ethnic backgrounds. Before the summing up concluded on 6th August, when the jury (by now down to 11 members) retired to consider its verdicts on these appellants and the remaining co-accused who were subsequently acquitted, no concern was expressed by or about the jury, or the attitude or approach of any of the members to their responsibilities.

70. In the course of their closing submissions, counsel on behalf of all the defendants addressed the issue of prejudice and discrimination. The judge opened his summing up by reminding the jury of the caution he had given them against prejudice. He pointed out that the press reports on the incident which occurred on 14th February had been not only “fallacious but ... highly emotive and downright offensive”. He pointed out that hardly anyone in the court was not descended directly or indirectly from an immigrant family and that some of those immigrants had arrived illegally many years earlier. Most of them had made what he described as “an enormous contribution to the well-being of the nation”. He was confident that the jury would put aside any prejudices or suspicions and that they would try the case “dispassionately and fairly”. He repeated the need for the jury to be fair in its decision, and to examine the evidence dispassionately, setting aside any of their personal prejudices. These directions were robust, uncompromising and unequivocal.
71. At the end of the first day of the jury’s retirement, 6th August, just before the judge gave them directions prior to their dispersal overnight, in the presence of the other members of the jury, the judge was given a hand-written note in the following terms:

“To your Honour,

Following a private and personal issue between myself and a few other jurors, would it be possible to have a private word at your leisure.

Many thanks.”

Given the apparent absence of any sign of difficulty throughout a period in excess of three months, this note was wholly unexpected.

72. The judge rightly decided, and there and then informed the jury that he was unable to speak privately with any individual juror. He did however warn the jury that it was important for them to work together in a civilised and sensible way, listening to the views of others, and sharing their opinions without exerting inappropriate pressure on any other juror, “remembering that we strive, not always perfectly, but we do strive, and genuinely strive, to do justice”. He invited the juror who had expressed a problem in the hand-written note to think about the position and attempt to resolve it with her colleagues.
73. On the following morning, amongst his other mail, the judge found an envelope marked “Your Honour”, which contained a type-written letter from an identified address by the same juror. It read:

“7th August 2003

Dear Your Honour

Further to my note to you on Wednesday 6th August 2003, I write to clarify further the contents of that note.

Two jurors [both identified by name] are being discriminatory and prejudiced against the defendants and are not judging the case based upon the evidence presented. What they are actually saying is these defendants “come to this country to take our tax money, buy their foods and clothes and take our jobs and should be deported back to their own country.”

I am seriously concerned that they are influencing the other jurors to make decisions which are not based upon the facts of the case.

Please advise.

Yours sincerely”.

It is clear from the papers that the two jurors identified in this letter were themselves members of ethnic minority communities.

74. The letter was, of course, no longer concerned with what was described in the previous note as a “private and personal issue” with “a few other jurors”. This was now a serious allegation of improper behaviour by two jurors which was said to be “influencing” the other jurors. In short, it was now being alleged that the jury, or rather that two of its members, were not fulfilling their duty to return a true verdict according to the evidence, and, in addition, that they were influencing their colleagues not to do so.
75. Naturally, the judge was greatly concerned. He discussed the contents of the letter with counsel, first in his chambers, then in open court. Reference was made to the decisions in the European Court of Justice in Gregory v UK 25 EHRR 577 and Sander v UK 31 EHRR 344, he rejected applications on behalf of all five defendants that the jury should be discharged.
76. The judge was in an unenviable position. He had received an unsupported allegation of serious misconduct by one juror against at least two of her colleagues. This came out of the blue after the evidence was concluded at the end of a long and complex trial, apparently without any previous suggestion or hint of difficulty or suggestion of improper bias and prejudice. The judge could not ignore the allegation. However it would have been unreasonable for him to discharge the jury simply because such an allegation had been made. So he investigated it, as best he could given the confidentiality of jury deliberations, with the only people who could know whether any jurors were indeed expressing themselves in discreditable language or approaching their responsibilities in dereliction of their duty.
77. The jury were invited into court. The judge expressed his grave concerns about the communication he had received from one of them. They were provided with an appropriately edited copy of the letter, and asked to retire to consider it and decide whether they felt able to continue deliberating together impartially. The jury were directed that the purpose of this retirement was to give them an opportunity to

consider whether their collective ability to give an impartial verdict had been compromised. They were told that the judge could only accept a response in general terms and could not be told how the deliberations in relation to any individual defendant were proceeding.

78. The jury retired. After deliberating privately for about an hour, they responded in writing.

“Your Honour

The jury regard these allegations seriously and the remaining ten jurors all agree that nothing was said during our deliberations that represent prejudiced or biased views against the defendants or any party involved in this case. We take our oaths seriously and know that we can try this case fairly and impartially.

However the person who has made the allegation wishes to resign from the case if possible.”

79. It is submitted that the approach adopted by the judge was wrong. After receiving the typed letter he should have made a much closer inquiry of the juror who had made the allegations, perhaps in chambers, in the absence of the other jurors. In our view even if that course was necessary, any such inquiry had to be conducted in open court in the presence of the defendants. It was submitted further that the inquiry should have extended to all the matters causing concern, with detailed particulars of what was being said and done, and by whom, and where. Thereafter the judge should have explored the same issues with each other member of the jury, individually, so as to form a view whether there was any truth in the allegations. In the result, the judge was unable to form any well-founded view that the complaint was wrong.
80. On this basis a further application to discharge the jury was made on behalf of all the defendants. The Crown asked that the single juror should be discharged. The judge rejected both applications. In a brief judgment in the absence of the jury he reminded himself that ten members of the jury had responded to the allegation made by one of them, in which they emphatically stated that nothing prejudiced or discriminatory or biased had been expressed against the defendants or any other party. He considered the authorities. He did not believe that there could realistically be any perception that any conviction recorded by the jury would arise from “prejudice rather than from proper consideration of the evidence impartially”. He continued that the only reasonable conclusion of anyone who had observed the proceedings so far was that the single juror had misrepresented the situation, and that was not sufficient reason to discharge the jury as a whole. As to her position, he accepted that she would be uncomfortable, and would continue to be so, but of itself that did not justify her discharge. It was not suggested to us that the judge’s decision that the complaining juror should remain was wrong.
81. The judge invited the jury back into court. He welcomed their response. He wished them to continue deliberating in a fair and impartial way according to the directions

he had already given. As for the individual juror's application to "resign", he directed the jury that if such an application was simply being made because of unhappiness as a result of a potential disagreement with other jurors, that provided no reason for discharging the juror. He indicated that unless there was a medical or similar problem then no good reasons had been shown why any individual juror should be discharged. He pointed out that "If the application to leave the case is simply because of discomfort as a result of finding yourself apparently in disagreement ... or feeling like being in a minority of one, I'm afraid you have to brace yourself and get on with your colleagues as best you can". There had to be argument and discussion and where there was a difference of opinion which might, as he put it, "have led to all this," then they should "try to accommodate the individual view, take it on board, listen to the views that are expressed, whether it comes from one or a greater number. Everyone had an equal say and a perfectly good point of view to express." He then suggested to the jury that some of them may have had some personal experience of prejudice and difficulties in the past and that people could become "irrational ... in sorting out everyday problems if they allow prejudice to overtake them. They just can't see, they become blind." Effectively that was the end of the day.

82. The next day on which the court sat was 11th August. The judge gave the jury a further direction to cast aside any prejudice, underlining that it was "quite clear" that they understood their obligations and oath and their duty to judge the evidence and to do their duty "fairly and honestly". Immediately after lunch, the juror who had made the earlier complaints sent a note to the judge indicating that she was unwell. The jury was sent home, and the juror who was unwell was invited to see her doctor as quickly as possible. In the absence of the jury, the judge recorded that the juror concerned had been complaining to the jury bailiff for some time of ill health but that she had not been prevented from concentrating on the issues.
83. On 12th August, the judge received a medical certificate dated 11th August, which advised the juror that she should refrain from work for one week. The judge did not identify the diagnosis in public, and when invited by counsel to do so, observed that this was a confidential medical note. The judge indicated to counsel that he proposed to discharge this particular juror. An application was made for the case to be adjourned so that the juror could be returned to her duties at the end of the week. The judge rejected the application, commenting that the juror had already indicated that she had a holiday booked for 20th August. It would in our judgment have been unrealistic to invite the jury to postpone further consideration of the verdict for a week, and even if the juror had then been fit, equally unrealistic to expect her to resume participation in jury deliberations when she was supposed to be on holiday.
84. There was then a further application for the jury as a whole to be discharged. The judge rejected the application. He was satisfied from the reaction of the jury during the previous week (7th August) that there was no reason to think that they would be unable to continue as a jury of ten, and honour their oaths and act responsibly. Accordingly, the one juror was discharged. The judge then invited the remaining jurors into court. He referred to their earlier difficulties. He reminded them that any prejudices should be set aside during the course of their deliberations and when reaching their verdicts. "You will", he said, "of course, honour your oath to try this

case according to the evidence and give true verdicts accordingly. Nothing else will do. Again, I have to say it, put all prejudice aside when you deliberate and form your final views.”

85. The jury retired again. On 13th August Momodou was convicted of violent disorder, and acquitted of arson.
86. On 14th August the judge received a duplicate of a letter sent to the jury bailiff by the juror who had been discharged. The text of the letter reads:

“Your Honour,

Further to my letter of 7th August I am writing again to inform you that I have been threatened by the two jurors named in that letter.

The woman threatened me with legal action and the man said “Now that I know where you live, I saw your address on the letter, I will come to your house and deal with you.”

I am frightened for my life and that of my family and feel I was forced to withdraw from the jury through stress from these threats.

Please advise.

Yours sincerely

....”

The judge did not immediately show the letter to counsel. The remaining members of the jury continued their deliberations. After sending what is sometimes described as a “numbers” note to the judge, they returned to court and delivered their verdict in respect of Limani. He was guilty of violent disorder.

87. Thereafter the judge asked counsel into his chambers. He then read the further letter dated 13th August to them. He said that he proposed to pass the letter to the Metropolitan Police for an expedited inquiry into the allegations. The jury was sent home for the day. The judge rejected yet another application by counsel on behalf of the remaining accused that the jury should be discharged. Limani’s counsel submitted that if he had been alerted to the contents of the letter before the verdict had been entered, he would have invited the jury to stop their deliberations until he had a further opportunity to address the court. He invited the judge to set the verdict aside. The judge rejected the application. Before us, it is contended that he should have informed all counsel of the contents of this further letter earlier than he did, and in particular, before Limani was convicted. It is of course well-understood that a judge should normally inform counsel when he has received any correspondence of this kind. That however does not preclude him from reflecting on the contents of such communications before doing so. In any event the contents of this letter did not

require that the jury should have been discharged from giving a verdict on Limani, or indeed, later, on the other defendants.

88. In due course the jury returned verdicts on the three remaining defendants whose cases were still outstanding, and acquitted them all.
89. We must, by way of narrative, describe events after the trial. On 18th August the Court Manager at Harrow Crown Court wrote to the Registrar of Criminal Appeals informing him that the judge had met with two officers of the Special Inquiry Unit of the Police on 15th August. On 19th August the Registrar informed the Court Manager that the Vice-President of the Court of Appeal Criminal Division (Rose LJ) had directed that the jurors should not be interviewed at that stage, but that the matter should be reviewed if either of the convicted defendants sought leave to appeal. After applications for leave were lodged, the Registrar wrote to the Court Manager on 10th September, advising him that further directions would now be sought. On 14th October, the Court Manager was informed that the juror should not be interviewed pending the decision of the House of Lords in R v Mirza: R v Connor and Rollock [2004] 1 AC 1118. After the decision in Mirza had been delivered, the Vice-President directed that the juror should not be interviewed. Counsel for both appellants were notified accordingly.
90. We have the advantage, which Judge Sanders did not, of the reasoning in the House of Lords in Mirza. In Mirza, six days after conviction, one juror wrote that other jurors were racially prejudiced against the defendant. In Connor and Rollock, an appeal heard at the same time as Mirza, a different complaint of jury impropriety also emerged after verdict. It was alleged that other jurors had failed to follow the judge's direction to consider the case against each defendant separately, and that they were driven by a desire to save time. Therefore, unlike the present case, the House of Lords was not directly concerned with allegations made before the jury returned its verdict. Nevertheless, close attention was given by their Lordships to the problems which might arise if they were.
91. Our attention was drawn to the decision of this Court in R v Smith and Mercieca, unreported, 19th December 2003 (that is before the decision of the House of Lords in Mirza was available) and to the hearing of the House of Lords scheduled for 10th and 11th January 2005 of the following certified question:

“When a member of the jury sends to the trial judge in the course of a trial a letter criticising the conduct of other members of the jury in terms that suggest, or might arguably suggest bias on their part, and it is accepted that the letter has been written in good faith, is the judge obliged as a matter of law (whether by the application of the opinions of their Lordships in R v Mirza [2004] 2 WLR 201, or otherwise) to question the members of the jury about the criticisms before deciding that the delivery of unlawful and unbiased verdicts by the jury can be achieved by the giving of a further direction rather than by discharging the jury?”

Plainly, anything we say in this judgment will be subject to reconsideration in the light of the decision of the House of Lords in Smith and Mercieca.

92. We shall summarise the principles applicable to these appeals which we derive from Mirza. Jurors are permitted to ventilate any issues of impropriety among their colleagues with the trial judge. Indeed, at an early stage in the trial the judge should normally direct the jury to draw his attention to anything which leads them to suspect that the jury as a whole, or any individual juror, is behaving partially or unfairly. The object is to enable the judge to decide what should be done, and to ensure that it is done immediately. By enquiring into such allegations, the court is neither in contempt nor acting in contravention of s 8 of the Contempt of Court Act 1981. (See, in particular, Lord Slynn at paras 50, 51, 54 and 57: Lord Hope at paras 93, 116, 118, 119 and 125 and 126: Lord Hobhouse at para 148(a) and (b): and Lord Rodger of Earlsferry at paras 156 and 165. See also Lord Steyn, dissenting in part, at para 25).
93. Our attention was drawn to the now well-known, and not easily reconciled decisions of the European Court of Human Rights in Gregory v United Kingdom [1997] 25 EHRR 577 and Sander v United Kingdom [2000] 31 EHRR 103, both of which involved allegations of jury impropriety made before verdict. We also considered Remli v France [1996] 22 EHRR 253. The account which we should take of these decisions is of course now subject to the authoritative views expressed by the House of Lords in Mirza. Perhaps the best we can do with the decisions in Gregory and Sander is to recognise that although the trial judge in each case sought to address the issue raised by information about possible jury impropriety, the court in Gregory held that he had dealt with it sufficiently, and successfully, whereas in Sander he had not. In Sander it was positively established that one juror at least had indeed made racist remarks, or what were described as jokes, and was then a signatory to the letter from the jury as a whole utterly refuting the allegation, and expressing deep offence that it was made. Given this slightly bizarre and apparently contradictory material, the European Court (by a bare majority) was not prepared to conclude that the judge's subsequent directions to the jury adequately met the demands of the problem.
94. The analysis of these decisions in the House of Lords, and the judgments in Mirza itself, lead us to conclude that the exercise of the trial judge's discretion to discharge an individual juror or the entire jury for impropriety, requires him to address the question whether impropriety has in fact occurred, and if it has, whether it can be cured, and if so how, or whether it is irremediable. This is a case specific decision. The jury is not to be discharged to enable the judge to proclaim that decisions based on racial or other prejudices are abhorrent to the administration of justice. They always are. And in passing, we suggest that it would not be fair automatically to condemn a juror or other members of the jury as racist, or partial, on the basis that a single individual (even if himself or herself a juror) asserts that he is or that they are. Such condemnation would be inconsistent with the approach in Mirza.
95. If the jury, or at the very least some of its members, cannot be trusted to recognise blatant discriminatory and prejudicial remarks or attitudes when they are together, and, first, to reject them, and second, honestly to address the issue with the judge and

respond accurately and truthfully to his concerns about the possibility of discrimination and prejudice among their number, it is difficult to see why we should ever entrust juries with their heavy responsibilities. One of the strengths of the jury system is that the jury will provide a fair trial for a defendant who may have been oppressed or treated unfairly by those responsible for or involved in the prosecution. We expect juries to give a defendant a fair trial. Indeed we expect them to deliver a true and impartial verdict, in accordance with their consciences, and to do so even when under pressure, direct or indirect, from any source, whether from one of their own number, or indeed the judge himself.

96. In the present case, the judge, who had seen the jury at work for something like three months or so, directed himself to discover, as best he could, whether the allegations made by the individual juror were indeed accurate. The response showed that they appreciated the seriousness of the issue, and were taking a responsible view of their obligation to reach an impartial verdict. That was asserted not only by the two jurors identified with discreditable conduct, but was adopted by the remaining eight members of the jury. The judge therefore decided that the case should proceed. In this case, it was not necessary for him to interview each juror.
97. In our judgment, even without the benefit of Mirza, the judge cannot be criticised for the way in which he handled this difficult issue. In any event, we know as a matter of certainty that this jury was not corrupted by discrimination and prejudice against asylum seekers. In short, the complaints made about the jury on behalf of the appellants are made against a jury which acquitted Momodou of the most serious charge against him, and acquitted altogether a number of other defendants, who were all asylum seekers, and whose position, as such, would have been no less exposed to the risks of discrimination and prejudice. That sufficiently demonstrates that this was an impartial jury, conscientiously doing its duty to return true verdicts, according to the evidence.

Incompetent Representation

98. This ground of appeal affects Momodou only. Mr Bennathan submitted that a number of different matters, taken cumulatively, demonstrate that the appellant's representation at trial fell far short of any reasonably acceptable standard. Accordingly, the trial was unfair, and the conviction is unsafe.
99. We shall summarise what are said to have been the main identifiable errors or irregularities in the trial for which the appellant's legal representatives were responsible. Some of them arise from detailed aspects of the evidence, others are more broadly presented. Taking them in a reasonably chronological sequence the criticisms begin with the repeated failure of the trial solicitors to engage with the Bedfordshire police to identify potential witnesses for the defence among the detainees. Next it is argued that trial counsel failed to submit a skeleton argument until the second or third day of the abuse of process hearing. Thereafter he conducted the case, contrary to his instructions, on the basis that the appellant was asserting that

he was never behind the locked door, and that witnesses who suggested that he was, were either mistaken or untruthful. It is next argued that counsel failed to seek an adjournment to renew the abuse of process application or otherwise deal with late disclosure of several important and material documents which prevented the appellant from properly preparing and presenting his case. Counsel failed to cross-examine DCO Wakefield about Bond Solon witness training, notwithstanding that he was the central witness against the appellant, and that the judge himself was extremely concerned about and disapproved of this witness training. He failed to advance a proper argument which would have excluded the photograph of the appellant with a mask over his face. Throughout the hearing he failed to engage in careful and focussed legal submissions, a criticism which was exemplified by a wasted costs order and an exchange with the judge during the course of the summing up. He called a witness for the defence who did not recall seeing the appellant behind the door, and failed to call a witness who had seen him. Finally, there were ill-conceived grounds of appeal that the judge should have allowed a submission of no case at half time, which again illustrated a complete lack of appropriate grasp of the essential issues in the case.

100. We have examined each of the criticisms individually.

(a) Failure of trial solicitors to identify potential defence witnesses among detainees.

101. The essential weakness of this criticism is that most of the detainees had been deported before the appellant's arrest. As we have explained, two potential witnesses were deported before his first arrest in April 2002, and the third shortly afterwards, and before the appellant's second arrest in July 2002. The chronology of contact between the police and the appellant's solicitors, which we find in divider 4 of the Momodou appeal bundle, shows that on occasions it was the appellant himself who was the cause of delay in viewing the photographs of the detainees. In any event however, nothing the solicitors might have done would have changed the essential fact that the three named witnesses were deported before they were fully instructed. At trial the jury was made aware of the missing witnesses, and the issue was explained in admissions agreed between the prosecution and the defence. Subsequently attempts were made by solicitors to track down potential witnesses and discover evidence from abroad, with a measure of success. According to trial counsel, the two witnesses who could not be found would have given evidence in relation to the charge of arson, on which the appellant was in any event acquitted.

(b) Late Submission of Skeleton Argument

102. The late submission of the skeleton argument is established. Trial counsel admits it. He points out however that he was not the only counsel who submitted a late skeleton argument on the topic, but more important, the court already had skeleton arguments from other counsel, and that the arguments for all the defendants were essentially the same. In his ruling on this issue the trial judge referred to copious and erudite submissions from the two counsel who took the lead on the abuse argument, with the support of their colleagues. We have not discovered any argument of significance which should have been advanced on behalf of the appellant. The appellant did not suffer any prejudice from the fact that the skeleton argument was submitted late.

(c) Putting the appellant's case at trial forward on a basis other than his instructions

103. A significant problem for the defence was that when first interviewed the appellant denied that he had ever been behind the door, and asserted that he had been in chapel at the relevant time, and then had gone directly to his room. At trial his instructions were that his account in interview was a lie, and he had indeed been one of those behind the security door. His case was that he was there at some stage after the window had been broken, and only for a short time, innocently, not participating in any disorder. The contention is that his case was conducted on the basis that he was not there at all, and this meant that everyone who said that he was present at any stage of the incident must have been lying or mistaken.
104. The context in which the contention has to be examined is that even on the basis of his instructions, the appellant still faced a twofold problem. First, witnesses who said that they saw or heard the appellant do or say anything which contributed to the violent disorder were giving evidence which was still wholly inconsistent with his instructions. They had to be challenged directly. Second, on the basis of those instructions, and until he gave evidence (and in the end, apparently against counsel's advice, he decided not to do so,) no "innocent" explanation for the lie was apparent.
105. Our overall impression from the judge's summary of the appellant's case, as advanced through cross-examination, was that any actions or language attributed to him which suggested that he was involved in the disorder was challenged. That indeed was his defence. Much could be made, and was, of the confusing nature of the incident. The recollection and note of counsel for the Crown are that in cross-examination on the appellant's behalf it was suggested that he was behind the door at some stage during the disturbance after the glass was shattered. On the basis of the summing up and the note of counsel for the Crown, the cross-examination of witnesses for the Crown was not advanced on a basis inconsistent with the instructions given by the appellant to his trial counsel. There was a lack of clarity about the appellant's precise case, which we suspect was a deliberate tactical decision, to enable counsel to slide over the difficulties created by the appellant's stark lie about his movements when he was interviewed, and his concession that he was present for part of the time, but not participating in the way described by some of the witnesses. Whether this absence of clarity was incompetent, the conduct of the appellant's case in cross-examination, a case which was not in the end supported by the appellant in evidence, does not serve to undermine the safety of this conviction.

(d) Failure to seek an adjournment to renew the abuse of process application, or otherwise deal with late disclosure of several important and material documents

106. From time to time as the trial progressed, additional material came to the attention of counsel for all the defendants. The judge had given his ruling, and no doubt would have been alive to the possibility that he might have to review it. He had however rejected the original application on the basis that the trial process would properly reveal the relevant facts. By the end of the trial that included the fact of late disclosure. However an adjournment to consider the fresh material as it arrived was unnecessary. We can identify no consequent prejudice to the appellant. A renewed abuse of process application would rightly have been rejected.

(e) Failure to cross-examine Wakefield about Bond Solon witness training

107. The stage at which it became known that Wakefield had undergone Bond Solon training is unclear. We have already noted Admission 75 states that he was one of the witnesses who was “believed to have received” this training. When summing up the evidence, the judge indicated that the fact of Wakefield receiving Bond Solon training was not something of which people were aware at the time when he gave evidence. And his summary of cross-examination (which was very detailed and comprehensive) showed that no counsel cross-examined on this issue.
108. The jury was reminded in the summing up that Wakefield was one of those who had undergone training, although he had in re-examination indicated the contrary. The jury had admissions that any such training was improper, and that the case history prepared by Bond Solon for the instant case (set out in detail at paragraph 41) was before the jury. We have already commented on the summing up. It is however argued that given that Wakefield “lied” when he said in re-examination that he had not undergone any such training, the issue should have been re-opened by trial counsel. In fact not one of the defence counsel sought to re-open this issue, no doubt preferring to rely on admission 75, and making such comment as they thought appropriate, and in this way gaining the advantage of what was treated throughout as if it were indeed a lie by Wakefield.
109. Wakefield’s police statement and contemporaneous notes of the incident were made on the following morning. Those notes were put to him during his cross-examination by counsel for another or other defendants. These notes were damaging to the appellant’s case. Further cross-examination about witness training/coaching would have underlined and enabled re-examination about the contemporaneous nature of the damaging evidence. Wakefield was an important witness against the appellant. Trial counsel was entitled to approach this problem in the same way as his colleagues, and avoid confirming the importance of Wakefield’s evidence against his client, while leaving himself open to comment on the agreed facts.

(f) Failure to advance properly an argument to exclude a photograph of the appellant

110. Counsel objected to the admission of this evidence. The judge made clear, very quickly, that he would reject the submission. Prolonged additional submissions would not have changed his view. In any event, we notice that there is no ground of appeal which suggests that the decision to admit the photograph was wrong. Even if there had been, we see no criticism of trial counsel for accepting that the judge had formed a clear view.

(g) Failure to engage in legal submissions in a careful focussed manner

111. Our attention was directed to two short extracts from the transcript, where trial counsel made short submissions which did not find favour with the judge. It is suggested that a wasted costs order was made against him. Trial counsel denies it. We have no evidence which refutes his assertion.

112. In any event, the exchanges took place in the absence of the jury. The appellant was not prejudiced by them. No grounds of appeal suggest that the judge's decisions were erroneous.

(h) Calling an unhelpful witness for the appellant, rather than a witness who would have assisted him

113. We have not seen the witness's proof of evidence. In his evidence the witness who was called did not recall seeing the appellant behind the door. The second witness attended court, but after the first witness had given evidence, it was decided, with the agreement of the appellant, that it would be too risky to call the second witness. This was a realistic tactical decision.

(i) Ill-conceived grounds of appeal

114. Particular criticism is directed at the ground of appeal which asserted that the judge should have upheld a submission of no case to answer. We agree that the point would have been unarguable. Unhappily, this ground is hopelessly advanced with depressing frequency by numerous counsel, who have conducted the trial itself with skill and competence.

(j) Miscellaneous

115. In addition to these specific matters, complaint was made before us about the inadequate and dilatory response of trial solicitors to the criticism made of them, and the need for the solicitors now acting for the appellant to be provided with the case papers. The criticism may well be justified, but it has no bearing on the question whether the representation of the appellant at trial was incompetent.
116. Finally, it was suggested that the first question asked by trial counsel when cross-examining the witness Lawal demonstrated counsel's incompetence. Lawal was a critical witness to the issue of arson. He claimed to have seen the appellant setting fire to the building. If true, it was devastating evidence. The first question asked in cross-examination on behalf of the appellant was whether he was in love with him. From the context, the sarcasm in tone is almost audible. We are not asked to commend this style of cross-examination, and we do not do so. The reality, however, is that the combined efforts of all the defence counsel successfully undermined Lawal's evidence, and, notwithstanding his unequivocal evidence, the appellant was acquitted of arson.
117. We have endeavoured to deal with each of the express criticisms made by Mr Bennathan. In our judgment, it has not been demonstrated that there was flagrant or persistent incompetence by trial counsel, and we have not been able to identify errors of substance by him or irregularities in the trial itself, which rendered the process unfair, or the conviction unsafe.

Rippingale

118. Leave was sought on behalf of Limani to argue a discreet point affecting his case. In short, it was submitted at trial on Limani's behalf to the judge that the evidence of witness, Rippingale, should not be admitted. The judge rejected the submission. After he had heard the witness cross-examined on behalf of a number of the defendants, he decided to direct the jury to ignore her evidence. He did so, there and then, when her evidence was completed. It is therefore suggested that his decision to allow the evidence to be given in the first place was wrong.
119. We disagree. In the context of a trial involving a number of defendants, the judge's decision not to exclude the evidence in advance, was not invalidated by his conclusion, after hearing all the evidence, to direct the jury to ignore it. That decision was a consequence of the evidence which the witness had given, not a reflection of how it stood, on paper, in advance. In any event, there is no reason to conclude that the jury would have ignored the direction given by the judge immediately at the conclusion of this particular witness.
120. Accordingly, leave is refused.

Sentence

121. We were asked to consider a number of matters of personal mitigation in the context of a conviction for an offence for which the statutory maximum sentence was five years imprisonment.
122. The essential argument on sentence is a disparity one. It arises from the 18 month sentence imposed on Aliane, immediately after he pleaded guilty to violent disorder.
123. The Crown's case was that Aliane played a major part in the violent disorder. There was, therefore, so it is argued, a significant disparity in the sentence imposed on these appellants, whose role in the violent disorder was no greater than that attributed to Aliane.
124. By the time he came to sentence these two appellants, the judge had presided over a very long trial, and would have formed his own view, probably much more vivid than the picture which could be conveyed by the opening words of counsel for the prosecution, outlining the facts against Aliane, of the true extent of the violent disorder in which these appellants had participated, and to which they had contributed. In one sense, Aliane may have been fortunate, but his good fortune stemmed from the fact that he was prepared to admit his guilt.
125. This was a truly dreadful incident of violent disorder. These appellants played a significant part in it. They did not have the benefit of the mitigation which a guilty

plea would have provided. In these circumstances we do not consider that these sentences were manifestly excessive or wrong in principle, nor that we should interfere with them on the disparity ground.

126. These appeals against conviction and sentence are accordingly dismissed.