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2010/04307/B5 & 2010/00102/B5

**IN THE HIGH COURT OF JUSTICE**  
**COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT WOOLWICH**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/05/2011

**Before :**

**LORD JUSTICE THOMAS**  
**MR JUSTICE MACDUFF**  
and  
**MR JUSTICE SWEENEY**

**Between :**

|                                     |                          |
|-------------------------------------|--------------------------|
| <b>Regina</b>                       | <b><u>Respondent</u></b> |
| <b>- and -</b>                      |                          |
| <b>Abdulla Ahmed Ali and Others</b> | <b><u>Appellants</u></b> |

**Mr Joel Bennathan QC\* and Mr Martin Huseyin\* for the Appellant (Tanvir Hussain)**  
**Mr Malcolm Bishop QC and Ms Frida Hussain for the Appellant (Sarwar)**  
**Mr T Moloney QC\* and Mr Martin Huseyin\* for the Appellant (Ali)**  
**Mr Lawrence J McNulty for the Appellant (Islam)**  
**Mr Joel Bennathan QC and Mr Peter Wilcock for the Appellant (Arafat Khan)**  
**Mr Lawrence J McNulty\* and Mr O Osman for the Appellant (Savant)**  
**Mr James Wood QC and Mr M Summers for the Appellant (Zaman)**  
**Mr David Spens QC for the Applicant (Nabeel Hussain)**  
**Mr Peter Wright QC and Ms A Ezekiel for the Respondent**  
**\* They did not appear at the trial for the particular appellant**

Hearing dates: 16, 17, 21, 22, and 24 February 2011

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**Approved Judgment**

**Lord Justice Thomas:**

1. In August 2006 police in the UK, with the assistance of intelligence services and police forces in other states, uncovered a plot which was alleged to involve the detonation of improvised explosive devices (IEDs) on a number of transatlantic airliners by suicide bombers with the intention of causing massive loss of life on transatlantic flights.
2. Eleven people were originally indicted and sent for trial at the Crown Court at Woolwich. After trials before Calvert-Smith J, Henriques J and Holroyde J and a further trial before Calvert-Smith J, eight were convicted of conspiracy to murder and two of lesser offences. All of those convicted in the trials before Henriques J and Holroyde J sought leave to appeal against conviction; some sought leave to appeal against sentence. The Registrar referred all the applications to the Full Court.
3. After a hearing extending over four days we have granted leave to appeal against conviction on the following:
  - i) The principle that a person should not be tried twice for the same crime (*autrefois convict, autrefois acquit*);
  - ii) Abuse of process – re-trying those appellants convicted at the first trial for substantially the same offence and whether there could be a fair trial in the light of the media publicity after the first trial;
  - iii) Whether in the light of all the circumstances the proceedings should have been stayed prior to the third trial either as not being in the interests of justice or an abuse of process;
  - iv) Whether a direction should have been given when two of the jurors had to be discharged whilst the jury were considering their verdict in the third trial.

We have, however, for the reasons set out in this judgment dismissed the appeals. At paragraph 26 below we set out the issues in greater detail and the order in which they are considered in this judgment. There were other grounds on which we have refused leave and which we will deal with more briefly.

**THE COURSE OF THE TRIALS AND THE EVENTS THAT GIVE RISE TO THE APPEALS**

4. Many of the issues in the appeal have their origin in an amendment to the indictment made during the course of the first trial. It is necessary therefore to explain at the outset the course of the trials.

(i) *The original indictment*

5. The indictment on which the defendants were charged alleged that between 1 January 2006 and 11 August 2006:
  - i) Count 1: Conspiracy to murder. The persons indicted “conspired together and with others to murder persons unknown”.
  - ii) Count 2: Conspiracy to commit an act of violence likely to endanger the safety of an aircraft. The persons indicted “conspired together with others to commit an act of violence, namely an explosion on board an aircraft in flight likely to endanger the safety of the said aircraft”.

(ii) *The first trial before Calvert-Smith J: 4 April 2008 to 8 September 2008*

6. On 4 April 2008 a trial of eight (Ali, Sarwar, Tanvir Hussain, Gulzar, Savant, Arafat Khan, Zaman and Islam) began before Calvert-Smith J on that indictment. The indictment had been severed for three (Khatib, Nabeel Hussain and Uddin); their trial is described at paragraph 24 below. The Crown’s primary case as opened in relation to count 1 was that all had been engaged in a conspiracy to murder by detonating IEDs on transatlantic airliners. The alleged roles were as follows: Ali was the leader of the conspiracy, Tanvir Hussain was his right hand man and Sarwar was the expert at making the IEDs; Islam, Savant, Zaman and Arafat Khan were to carry the devices aboard and die with the passengers; they had made so called “martyrdom” videos. It is not necessary to identify the case against Gulzar as he was acquitted. Count 2 was intended to reflect an alternative case, namely a conspiracy to place bombs that might damage aircraft.
7. The case against Ali, Sarwar and Tanvir Hussain was primarily based on the following:
  - i) Ali, Hussain and Sarwar had travelled to Pakistan, particularly in 2006.
  - ii) Ali had obtained the use of a flat at 386A Forest Road, Walthamstow which was subsequently used for filming martyrdom videos and the production of detonators.
  - iii) About 40 litres of hydrogen peroxide and other items useful in the manufacture of IEDs had been obtained; this was sufficient to make 20 IEDs.
  - iv) Plastic bottles had been prepared for the surreptitious insertion of explosive material disguised as soft drinks so that they could be carried onto aircraft.

The seal of each bottle had been left intact to avoid detection at airport security.

- v) The necessary ingredients for the manufacture of HMTD (which was to be used in the manufacture of detonators) had been acquired; there was sufficient to make 20 detonators.
  - vi) At least two prototype detonators had been manufactured in order to train the bombers.
  - vii) Ali had researched flight timetables for flights to the USA and downloaded timetables.
  - viii) In the case of Ali and Hussain, suicide videos, ostensibly explaining their participation in a suicide mission, had been recorded.
  - ix) Ali and Sarwar had been in telephone, text and coded e-mail contact with unidentified people in Pakistan.
  - x) By 8 August 2006, Ali had selected the seven flights that were to be destroyed – flights to Chicago, New York, Montreal, San Francisco and Washington.
  - xi) All that remained to be done when the plot was uncovered was for the hydrogen peroxide to be reduced, flight tickets acquired and the bombs to be assembled
8. The case against Islam, Savant, Khan and Zaman was based primarily upon:
- i) “Martyrdom” videos.
  - ii) Contacts with Ali and Sarwar.
  - iii) Possession of extreme material.
9. None of the defendants provided a meaningful defence statement; the nature of their defence was only apparent from what was put in cross examination. It became clear that it was being suggested by three of the defendants (Ali, Sarwar and Hussain) that any conspiracy was a conspiracy to cause an explosion at one iconic location (such as Parliament, the City or an airport terminal) or in a café where although life would be endangered, it was not part of the plan that anyone be killed, or if any were, the numbers would be few.

(ii) *The amendment to the indictment in June/July 2008*

10. At the conclusion of the prosecution case, submissions were made on behalf of Islam and Zaman (who had made “martyrdom” videos) that there was no case to answer on count 1 as the Crown were only making a case of a conspiracy to murder by detonating IEDs on transatlantic aircraft. It was argued that, on the prosecution evidence, they may have been engaged in a conspiracy to cause explosions or even to murder (and been prepared to die in carrying out the murder), but not through detonating IEDs on transatlantic aircraft.
11. Baroness Kennedy QC who then appeared for Arafat Khan made no submission of no case to answer on his behalf. However in the course of the submissions of no case made on behalf of Islam and Zaman, she raised the question of whether the jury should be entitled to make a finding which indicated whether, in respect of each defendant, the jury accepted the Crown’s case of murder through the detonation of IEDs on aircraft or a conspiracy to murder in general (such as murdering a small number in a café). As she developed her submissions, she contended that justice required a distinction be made. Calvert-Smith J indicated that if the counts went before the jury in their current form, the defence might seek to ask him to ask the jury for a special verdict or the basis of any verdict of guilty – conspiracy to murder by detonating IEDs on aeroplanes or murder in general. His view was that this would be an issue that had to be resolved in the light of all the evidence.
12. The judge gave his decision that same day. He ruled that there was a case to answer on the basis that each was a party to a conspiracy to murder by detonating IEDs on aircraft; he would give his detailed reasons later. Immediately he had given the ruling, Mr Wood QC for Zaman asked the question as to whether there could be alternatives between the conspiracy to murder alleged and a different conspiracy to murder. The judge made clear that counsel should consider the issue and he would give it further thought.
13. On 2 June 2008, Calvert-Smith J gave his reasons for his ruling that there was a case to answer. He added that the issue raised by Baroness Kennedy would be considered further. On 9 June 2008, the Crown put forward its proposal to amend the indictment to address that issue and in July 2008 submissions were made on the issue; we refer to this in more detail at paragraph 53 and following. In the result no one objected to the Crown’s proposal to amend the indictment:
  - i) Count 1 became count 1A.
  - ii) A new count 1 was added. This alleged a conspiracy to murder. The particulars were that between 1 January 2006 and 11 August 2006 those indicted:

“conspired together to murder persons unknown by the detonation of [IEDs] on board transatlantic passenger aircraft.”

14. Calvert-Smith J discussed with counsel the directions he would give on these counts and summed up in accordance with those directions; we shall refer to these at paragraph 58.

*(iii) The verdict in the first trial and the applications to stay after the first trial*

15. On 8 September 2008, after a trial of 82 days extending over 5½ months, Ali, Sarwar, and Tanvir Hussain were convicted of count 1A. The jury could not agree on count 1 in respect of any of the defendants nor in respect of count 1A could they agree in respect of Savant, Zaman, Arafat Khan and Islam. The verdicts were broadcast worldwide as each was given; there was extensive media coverage of the background.
16. The Crown made clear that it might seek a re-trial. It subsequently informed the defendants that it would seek a re-trial of all seven on count 1 and Savant, Zaman, Arafat and Islam on count 1A.
17. Applications to stay the proceedings were made to Henriques J who was assigned to hear the re-trial of these seven. Ali, Sarwar and Tanvir Hussain based their application on the ground that it would be an abuse of process to try them on count 1, as it was substantially similar to count 1A; Henriques J rejected this in a ruling on 7 November 2008. All 7 sought to stay the proceedings in the light of the media publicity after the verdicts; this was rejected in a ruling on 18 December 2008. Both these rulings are challenged on the appeal and are considered by us at paragraphs 71-83 and 84-105 below.

*(iv) The second trial: 16 February 2009 to 7 September 2009*

18. On 16 February 2009 the trial of Ali, Sarwar and Tanvir Hussain began on count 1 and of Khan, Savant, Zaman and Islam on counts 1 and 1A before Henriques J. The twelfth defendant, Donald Stewart-Whyte, was also tried with them, having been sent for trial later.
19. Nearly seven months later, after a trial of 114 days, on 7 September 2009, Ali, Sarwar and Tanvir Hussain were convicted on count 1 and Islam was convicted on count 1A. The jury could not agree on count 1 in respect of Islam, they acquitted Savant, Khan and Zaman on count 1, but could not agree in respect of those three in respect of count 1A. Stewart-Whyte was acquitted. A decision was made by the Crown not to proceed further against Islam on count 1.

*(v) The applications in respect of the third trial*

20. The Crown immediately indicated they would consider a third trial of Savant, Khan and Zaman on count 1A. The Director of Public Prosecutions invited representations

from Savant, Khan and Zaman; after considering these, he notified them that he would seek a third trial.

21. Holroyde J was assigned to hear the third trial. Applications were made to him to stay the proceedings on the basis that a further retrial was not in the interests of justice, and that any further re-trial was an abuse of process. On 19 February 2010, Holroyde J gave his ruling that Savant, Khan and Zaman could be re-tried on count 1A rejecting each of the grounds. This ruling is challenged on the appeal; this ruling is considered by us at paragraphs 109 and following.

*(vi) The third trial: 26 April 2010 to 8 July 2010*

22. On 26 April 2010 the trial of Savant, Khan and Zaman began on count 1A. On the first day of the trial an application was made to the judge that the jury should be told to proceed on the basis that the jury could be sure that the defendants were innocent on Count 1. The judge ruled that day that the jury should be told that they were not guilty in law of that offence and that in deciding whether they were guilty of Count 1A, the earlier acquittal did not tell them anything one way or the other. An application was also made to him to exclude certain evidence given at the second trial on the basis that it was only relevant to the conspiracy under count 1 and its admission was highly prejudicial. The judge refused that application on 27 April 2010. These rulings were challenged on the appeal; we consider these at paragraphs 138 and 146.

23. After a trial of 47 days, each was convicted on 8 July 2010.

*(vii) The trial before Calvert-Smith J: 5 October 2009 to 9 December 2009*

24. Adam Khatib, Nabeel Hussain and Mohammed Shamim Uddin had been severed from the indictment. In October 2009 they were tried before Calvert-Smith J, Khatib on count 1A, Nabeel Hussain and Uddin under s.5 of the Terrorism Act 2006. Khatib and Nabeel Hussain were convicted on the counts on which they were charged and Uddin of a lesser count of possessing material useful to a person committing or preparing to commit an act of terrorism contrary to s.58 of the Terrorism Act 2000. No appeals arise out of these convictions. There is an application for leave to appeal against sentence made by Nabeel Hussain which we consider at paragraphs 200 and following.

*(viii) The sentences*

25. The sentences imposed were as follows:

- i) By Henriques J on 14 September 2009

Ali: life imprisonment with a minimum term of 40 years.

Sarwar: life imprisonment with a minimum term of 36 years.

Tanvir Hussain: life imprisonment with a minimum term of 32 years.

Islam: life imprisonment with a minimum term of 22 years.

ii) By Calvert-Smith J on 10 December 2009

Khatib: life imprisonment with a minimum term of 18 years.

Nabeel Hussain: 8 years imprisonment.

Uddin: 7 years imprisonment.

iii) By Holroyde J on 12 July 2010

Savant: life imprisonment with a minimum term of 20 years.

Khan: life imprisonment with a minimum term of 20 years.

Zaman: life imprisonment with a minimum term of 20 years.

Applications for leave to appeal against sentence were made on behalf of all of those convicted except Ali, Sarwar, Khatib and Uddin.

26. We deal with the issues as follows:

- (I) *Autrefois convict* (paragraphs 27-70)
- (II) Abuse of process in re-trying the appellants Ali, Sarwar and Tanvir Hussain on Count 1 before Henriques J (paragraphs 71-83)
- (III) Abuse of process – whether there could be a fair trial in the light of media publicity after the first trial (paragraphs 84-105)



- (IV) *Autrefois acquit*, staying the third trial as not being in the interests of justice or an abuse of process (paragraphs 106-161)
- (V) The direction to the jury after retirement in the third trial when two jurors were discharged (paragraphs 162-167)
- (VI) Other grounds (paragraph 168-174)
- (VII) Sentence (paragraphs 176-204)

## **I: AUTREFOIS CONVICT**

27. The first argument advanced on the appeal by Ali, Sarwar and Tanvir Hussain was that the second trial on count 1 was not permissible in view of the plea of *autrefois convict*. This was an argument that was only barely mentioned before Henriques J in the hearing which led to his ruling of 7 November 2008. As it is a pure point of law and, if correct, would make the verdict in the second trial one that was not open, it was an argument that we consider these appellants were entitled to advance. In contradistinction to the next issue, stay for abuse of process, the court has no discretion; the application of the principle is mandatory; for example in *R v G* [2001] 2 Cr App R 615 the fact that counsel had agreed in terms not to raise *autrefois acquit* was irrelevant.

### *(i) The general principles*

28. The plea of *autrefois convict* has a long and ancient history embodying in the common law the principle, now universally accepted in charters of human rights as a basic right, that no man should be tried twice for the same crime. Blackstone in his *Commentaries* in 1759 (Book iv page 329) said that the pleas of *autrefois convict* and *autrefois acquit* are “grounded on this universal maxim of the common law of England that no man is to be brought into jeopardy of his life, more than once, for the same offence.” Despite the broad principle on which the plea of *autrefois convict* is grounded, the plea remains expressed in narrow and technical terms.

29. The modern authority is *Connelly v DDP* [1964] AC 1254 (as explained in *R v Beedie* [1998] QB 356 at 360-1). The House of Lords decided (at a time when this court had no power to order a re-trial after quashing a conviction) that a person whose conviction for murder in the course of an armed robbery had been quashed could be re-tried for the offence of robbery. The speeches in the House trace the history of the plea and discuss its relationship to abuse of process. It was made clear that its precise ambit and limited scope had been developed in the cases and should not be reformulated in more general terms, as the citation from the speech of Lord Devlin (set out below) makes clear. The basic principle is expressed in the speech of Lord Morris of Borth-y-Gest at 1305:

“In my view both principle and authority establish:

- (1) that a man cannot be tried in respect of which he has previously been convicted or acquitted;
- (2) that a man cannot be tried in respect of which he could on some previous indictment have been acquitted or convicted.”

Lord Devlin added in his speech at 1339-40:

“For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law ... I would add one further comment. My noble and learned friend [a reference to Lord Morris of Borth-y-Gest] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based see *Rex v. Kendrick and Smith*. I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise.”

30. These speeches refer to “conviction”, but some of the statements of the scope of the plea contained the requirement that the defendant had not only been convicted, but also sentenced. In *Hale’s Pleas of the Crown* (1778) Vol 2 c.32 p.251, it was said:

“If A be indicted and convicted of felony, that hath neither judgment of death nor hath his prayed his clergy, this is no bar of a new indictment for the same offence, if the first were insufficient .... and it seems although it were sufficient, yet it is no bar without clergy or judgment.”

31. However, this court in two decisions in the 1930s, *R v Sheridan* [1937] 1 KB 223 and *R v Grant* [1936] 2 All ER 116 decided that the plea of *autrefois convict* could be

relied on even if a defendant had not been sentenced. However in *Richards v The Queen* [1993] AC 217, the Privy Council said that these two cases had been wrongly decided.

(ii) *The issues*

32. The issues before us on whether the appellants could rely on the principle of *autrefois convict* were two:

- i) Was the offence under Count 1 on which they were tried and convicted before Henriques J in their second trial the same as the offence under count 1A on which they had already been convicted before Calvert-Smith J in their first trial?
- ii) If so, could the appellants rely on the plea of *autrefois convict*, even though they had not been sentenced at the time of the second trial?

**Issue 1: Were the offences charged under counts 1A and 1 the same?**

33. It is apparent from what we have set out at paragraphs 10-13, that the amendment to the indictment made in the first trial of these appellants, so it included count 1 and count 1A, was intended by those at the trial, including the judge, prosecuting counsel and counsel for the defendants, to enable the jury, as distinct from the judge, to decide on the role of particular defendants as to whether they were persons who had planned murder in general or murder by detonating IEDs on transatlantic aircraft.

(i) *The use of different counts to distinguish different offences and different factual bases*

34. It is necessary first to consider the extent to which a court is entitled to use different counts in an indictment to enable a jury to decide the different factual bases in which a defendant had committed an offence and where it is the function of the judge to make that decision.

35. In many common types of offending, legislation defines those aspects of conduct or intention that places the criminal behaviour of a defendant into different offences that can be separately indicted so that the jury can decide on the level of conduct or intention. For example, in relation to assaults, there can be a common assault, an assault occasioning actual bodily harm, an assault on a police officer in the execution of his duty, racially aggravated assault, a malicious wounding or a wounding with intent. These offences carry different penalties and, where there is a dispute as to the level of conduct or the intent, the Crown can, by charging different offences, enable the jury to determine, as triers of fact, the essential basis of fact upon which the judge will sentence. It is of course for the Crown, subject to the view of the court, to

consider the offences with which it is appropriate to charge a person, as an indictment with many alternative counts seldom makes the trial one that is easy to conduct or in the interests of justice.

36. However, what cannot be done is to put two different counts into the indictment to enable the jury to determine a factual issue where the difference in the facts does not make the offence in each count a different offence. There can only be different counts where there are different offences. This appears clear from a series of cases:

- i) In *Stosiek* (1982) 4 Cr App R (S) 205 the defendant had assaulted a person who was, in fact, a police constable acting in the execution of his duty. He was tried and convicted on an indictment containing a single count of assault occasioning actual bodily harm. At trial he had given evidence that he did not know the victim was a police officer; he had reacted in self defence when someone had put his arm over him. The case had been left to the jury on the basis that they could convict him if they were sure that his actions in striking out were unlawful because he knew the victim was a police officer or, if he did not know that, he had over-reacted. The defendant contended he should have been sentenced on the basis that he did not know the victim was a police officer. In this court Tasker Watkins LJ made clear that the court wanted to do nothing to encourage judges to depart from usual and proper practice (followed in that case) of refraining from inviting juries to explain their verdicts. The prosecution could have avoided the problem if they had indicted the defendant for assaulting a police officer in the execution of his duty.
- ii) The well known case of *Newton* (1983) 77 Cr App R 13 made clear the process by which a judge could resolve the factual dispute on a plea by hearing the evidence himself.
- iii) In *Young* (1990) 12 Cr App R (S) (decided at a time when anal intercourse with a female was the offence of buggery whether or not the female consented), the defendant's case was that the female had consented. The indictment which contained a count of buggery was amended to include a count of buggery without consent. Neill LJ giving the judgment of the court said:

“It seems to this court that the course that was followed at the trial, though understandable, was not justified in law. It meant that the judge was leaving to the jury an issue which was not for them to determine. Furthermore he allowed to be included in the indictment a statement and particulars of an offence which included immaterial averments, namely the absence of consent of the victim ... In circumstances such as this it is for the judge himself to decide a question of consent that is in issue.”

- iv) In *Dowdall and Smith* (1992) 13 Cr App R (S) 441 the appellant was charged with theft; it was the prosecution's case that he had stolen a pension book from a woman's handbag. He was prepared to plead guilty on the basis that he had found the pension book, not that he had stolen it from her handbag. The Crown persuaded the judge to permit the indictment to be amended so as to charge as alternative counts a count of stealing the pension book from the handbag and a second count of stealing by finding it. He was convicted on the first count of stealing from the handbag. The appellant had wanted to plead guilty and, as it was relevant to sentencing, had wanted the judge to hold a *Newton* hearing to determine the circumstances in which the pension book had been stolen. This court quashed the conviction. It applied the statement of principle in *Young* and reminded judges of what Lawton LJ had said in an earlier case about an indictment, "The golden rule should be 'keep it short and simple'".
- v) In *Efionayi* (1995) 16 Cr App R (S) 380 one of the appellants was charged in the indictment with wilful neglect of a child between 1 and 14 September. She was prepared to plead guilty to wilful neglect on two days; the medical evidence was not inconsistent with that plea. The Crown would not agree to accept the plea nor to add an alternative count to the indictment alleging wilful neglect on the two days. The jury were directed that they could convict on the count that was in the indictment as long as they were sure and satisfied as to any wilful neglect at any time within the period specified. She was convicted. The judge took the view that it was for him to make a ruling as to the appropriate factual basis for sentencing, relying upon the evidence that he had heard. This court observed, not having heard argument from the Crown, that, "An amendment to the indictment could easily have been made so as to secure a finding of the jury on the point". We agree with the submissions of counsel before us that that course would only have been permissible if the indictment could have been framed so as to give rise to two separate offences.
37. In the light of those authorities and the argument before us, it became common ground that it would be unlawful to charge the same offence in different counts in the indictment even though the factual basis differed. It is not permissible to put into an indictment an alternative factual basis which makes no difference to the offence committed whether it is for the purpose of enabling a jury to decide an issue of fact or for any other purpose. The judge must resolve the factual issues which are material to sentencing if the offences are the same; in limited circumstances, the judge may ask the jury a specific question. In *Solomon and Triumph* (1984) 6 Cr App R (S) 105, [1984] Crim. L.R. 433 this court set out its view as to the common circumstances in which the jury could be asked such a question:

"The only instance we have been able to find in which it might be said to be common practice to go behind the general verdict and to enquire from the jury the basis upon which it was reached is in the case of a verdict of manslaughter, when the jury may have reached their decision on alternative grounds which have been left to them by the judge. In the case of *Matheson* (1958) 42 Cr. App. R. 145, this Court said that in

such circumstances the judge may, and generally should, seek guidance from the jury concerning the basis of their verdict. In the case of *Warner (1967) 51 Cr. App. R. 437*, this Court described that practice as common, but also pointed out that in other cases there was no obligation upon a judge to ask, nor upon a jury to answer, questions after they have returned their verdict. Even if the jury do express their opinion, the judge having heard the evidence is still entitled, where the evidence supports it, to reach his own view of the facts.”

(ii) *The function of the judge in deciding the role of conspirators*

38. The judge’s function in resolving the factual issues is plainly evident after verdicts in trials of conspiracies. The general practice of the Crown is to formulate a conspiracy in broad terms; a jury is simply concerned to decide whether the person was a party to a conspiracy formulated in broad terms. It is for the judge, who hears the trial, to determine when he comes to sentence what role each played in furthering it. To take the common example of a conspiracy to import drugs into the United Kingdom; the Crown would ordinarily charge those indicted as parties to a conspiracy to import drugs; those indicted might include a courier who has participated in one journey, more senior persons within the hierarchy and the one or two persons who were at its centre. It is sufficient for the Crown to obtain a conviction to prove each was a party to the conspiracy to import; it is for the judge, at the end of the trial, to determine whether a particular defendant is a courier or at the apex of the conspiracy and therefore whether he may receive a sentence of five years or one of 25 years. This practice was approved at least as long ago as 1973 when this court made clear in *Greenfield* (to which we refer in more detail at paragraphs 43 and 47) that the judge had to assess for the purpose of sentence what part each had played and the importance of that part.
39. The Crown could, as it made clear, have alleged one general conspiracy without specifying the specific course of conduct agreed on in relation to IEDs. It did not do so initially; it alleged in opening a specific agreement in relation to the specific course of conduct of detonating IEDs on transatlantic aircraft. However, in the light of the issue raised at the end of the prosecution case, as we have explained at paragraphs 10 and following, it also put forward what it contended before us was a different conspiracy with an agreement on a more general course of conduct to meet the possibility that the jury might not find the specific agreement proved.

(iii) *The nature of issue to be resolved: the principles applicable to conspiracies*

40. It is clear from *Collison (1980) 71 Cr App R 249; [1980] Crim LR 591*, that where a defendant has been charged with an offence (in that case wounding with intent contrary to s.18 of the Offences against the Person Act 1861) where there is a less serious alternative (malicious wounding contrary to s.20), an acquittal of the more serious offence does not prevent a conviction on the less serious. It seems to us

therefore that if there is a different, but less serious conspiracy, an acquittal on the count charging the more serious does not prevent a conviction on the count charging the less serious or vice versa. However, for reasons we shall explain, it is essential that the conspiracies in the counts are different.

41. On the basis of the authorities it was common ground before us that if counts 1 and 1A charged the same conspiracy, with the difference being only a factual difference made to enable the jury to distinguish certain facts irrelevant to guilt or innocence of the conspiracy charged, not only would that have been impermissible, but the first issue in relation to *autrefois convict* would have to be resolved in favour of the appellants.
42. The submissions made by the parties were made in skeleton arguments prior to the hearing, at the hearing and in written submission after the hearing. It was the contention of the appellants, advanced primarily through Mr Bennathan QC (who appeared on this part of the appeal for Tanvir Hussain) that both counts charged the same conspiracy, the only difference being the knowledge of certain of the conspirators. It was the Crown's contention, advanced by Mr Peter Wright QC, that two distinct conspiracies were charged, an overarching conspiracy and a sub-conspiracy.
43. Mr Wright relied principally on *Coughlan & Young* (1976) 63 Cr App R 33 and *Greenfield* (1973) 57 Cr App R 849. The effect of those decisions is elegantly summarised in *Smith & Hogan Criminal Law* 12 Ed. (2008) at page 405:

“If D1 and D2 set up an organisation to plant bombs, that is a conspiracy indictable as such, though the overt acts offered to prove it consist in further conspiracies to plant particular bombs. These further agreements are indictable as separate conspiracies, notwithstanding the existence of a general conspiracy and acquittal or conviction of one such alleged conspiracy is no bar to trial for another.”
44. In *Coughlan & Young* the appellant Coughlan was convicted in the Crown Court at Manchester of conspiracy to cause explosions in the UK between 1 April 1973 and 30 April 1974. Subsequently he was indicted in the Crown Court at Birmingham with conspiring to cause explosions in the United Kingdom between 1 August 1973 and 3 August 1974; he pleaded *autrefois convict*. The jury rejected that plea. He was tried and found guilty. The overt acts proved by the prosecution at the trial in Manchester were explosions in Manchester and no other part of the United Kingdom. The overt acts to be proved in the trial in Birmingham were explosions in Birmingham and its environs and not in Manchester or any other part of the United Kingdom. Before the jury and on appeal it was Coughlan's case that the prosecution were alleging on each occasion the same conspiracy, namely to cause explosions in the United Kingdom, including Manchester and Birmingham and that he had already been convicted of this conspiracy in his trial at Manchester. The answer of the Crown was that although the indictment in each case alleged a conspiracy to cause explosions in the United

Kingdom, in deciding whether there was one conspiracy or two it was permissible to have regard to the nature of the overt acts relied upon by the Crown. The trial judge directed the jury that the conspiracy to plant bombs in Manchester and the conspiracy to plant bombs in Birmingham were two distinct conspiracies. This court considered that this was too robust a direction, as it was for the jury to decide whether there was one conspiracy or two. However the jury could have come to no other conclusion. It stated the principle as follows:

“There is no difficulty in law about alleging a separate conspiracy to cause explosions in Manchester and another to cause explosions in Birmingham, even though some, or it may be all of the conspirators, may have been parties to a wider agreement to cause explosions throughout the United Kingdom, including Birmingham and Manchester. The wider agreement or conspiracy would not preclude the existence of sub-agreements or sub-conspiracies to cause explosions in particular places, and as a matter of law these sub-conspiracies or agreements could properly be charged as separate offences. Acquittal or conviction on a charge of one such offence would be no bar to the trial of the same accused on another.”

45. Professor Sir John Smith commented in the Criminal Law Review [1976] Crim LR 631:

“Parties to a general conspiracy may enter into subsidiary conspiracies in pursuance of the general conspiracy. The general conspiracy and each of the subsidiary conspiracies are separate offences. If the general conspiracy is charged in a single count, it is not bad for duplicity because the evidence offered to prove it includes proof of the subsidiary conspiracies entered into in carrying out the general conspiracy: *Greenfield*. If A and B set up or join an organisation with the purpose of planting bombs they are parties to a conspiracy. If they then agree to plant a bomb in the Manchester area, and, subsequently, in the Birmingham area, there are three separate offences of conspiracy, and conviction or acquittal on one charge will not bar proceedings on another.”

46. In the High Court of Australia in *Gerakiteys v The Queen* [1984] HCA 8, 153 CLR 317, Brennan J expressed the same principle:

“The identity of a conspiracy is to be found in what the conspirators commonly agree to or accept: a conspiracy is proved by evidence of the actual terms of the agreement made or accepted or by evidence from which an agreement to effect common objects or purposes is inferred. If two conspirators agree to effect several unlawful objects and a third person agrees with them to effect some only of those objects, there are two conspiracies not one: the original conspirators are parties to



both conspiracies, the third person is a party only to the conspiracy with the more limited objects.”

47. It is clear from *Greenfield* that we have to decide that issue by examining the counts in the indictment. In that case, the Crown charged one conspiracy between a number of people alleged to have caused explosions in the UK as the Angry Brigade. On appeal, it was contended that the count was bad for duplicity as it charged more than one conspiracy; the basis of that contention was that, as the trial progressed, the evidence showed the existence of more than one conspiracy. This court held:

“In our judgment, that did not make the count bad in law. A conspiracy count is bad in law if it *charges* the accused with having been members of two or more conspiracies. This is elementary law. We have had to consider whether count 1 did charge more than one conspiracy.

In our judgment, the distinction which exists between form and proof is the clue to the problem provided by this case. The prosecution was alleging that these appellants and the other accused had had a common purpose to cause explosions. All the accused in their different ways challenged this basic allegation of a common purpose; and they did so by submitting that the evidence revealed the possibility that those charged may have had in relation to some of the incidents purposes which were not common at all. What they were doing was challenging the existence of the conspiracy as charged, which is but a way of saying that they were denying that the prosecution had proved their case. A charge which is not bad for duplicity when the trial starts does not become bad in law because evidence is led which is consistent with one or more of the accused being a member of a conspiracy other than the one charged. Such evidence may make it impossible for the prosecution to establish the existence of the conspiracy charged. *Griffiths* was such a case. At the end of the prosecution’s case the evidence may be as consistent with the accused, or some of them, having been members of a conspiracy which was not the one charged as with the one charged. In such a situation the trial judge should rule that there is no case to answer. But if at the end of the prosecution’s case there is evidence on which, if uncontradicted, a reasonably minded jury could convict the accused, or two or more of them, of the conspiracy charged despite evidence of the existence of another conspiracy, then the trial judge should let the case go to the jury. ”

48. It seemed clear from the transcripts of the trial before Calvert-Smith J that when the amendment to the indictment was made, there was no discussion of the principles to which we have referred. It is in our view clear that what motivated the amendment was the view that, in this quite exceptional case which attracted worldwide attention as being a conspiracy with the aim of achieving murder on a par with the destruction

of the World Trade Centre on September 11 2001, a jury, rather than a judge, should decide whether each was responsible for such a crime. As was accepted by Mr Wright QC this was the purpose of the amendment. It appears that no one specifically considered at the time whether there were separate conspiracies.

(iv) *Was there a single conspiracy or more than one conspiracy?*

49. Although therefore the issue we have to decide was not debated before Calvert-Smith J, we proceed to examine the issue first by reference to the counts in the indictment and then by reference to the facts and the way the matter was put before the jury.

50. Although the offence of conspiracy has a long history, the statutory definition of the offence is contained in s.1 of the Criminal Law Act 1977 which provides:

“(1) Subject to the following provision of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.”

51. We therefore have to see whether there was in each of count 1 and 1A a different agreement to pursue a course of conduct. It is necessary to focus on the agreement made as in the offence of conspiracy what matters is the agreement. Numerous cases make that clear – for example *Griffiths* [1966] 1QB 589 at 597, *Churchill* [1967] 2 AC 224 at 232 and *Bolton* (1991) 94 Cr App R 74 at 80.

52. It seems clear to us from an examination of count 1 and count 1A that each charges a different agreement; they did so with the necessary precision: see the judgment of Murphy J in the High Court of Australia in *Gerakiteys v The Queen* [1984] HCA 8, 153 CLR 317. Count 1A charges an agreement to commit murder. On the basis of that count, the original count in the indictment, all it would have been necessary for the Crown to prove was an agreement to pursue a course of conduct which would necessarily have involved the commission of murder. It mattered not for the purpose of that count how the murder was committed. Count 1, on the contrary, charged an agreement to commit murder by the detonation of IEDs on board transatlantic passenger aircraft. It seems clear to us that on a simple reading of the indictment, these were different agreements. There was a conspiracy to murder and a distinct

conspiracy to murder in a particular way. As was apparent from the way in which some of the appellants had argued their submission of no case to answer before Calvert-Smith J, they may have been parties to an agreement to cause an explosion but they were not parties to an agreement to detonate IEDs on board transatlantic passenger aircraft. There is in our view a distinct difference between the two agreements; although each may have involved the commission of the offence of murder, they were distinctly different agreements as to the method and scale of the murder to be carried out. They were therefore different in fact and in law for the purpose of *autrefois convict*. We therefore consider, applying *Greenfield*, that that should be sufficient to decide the question. However, we have gone on to consider what happened at the trials particularly in the light of the submission made by the appellants that we should focus on the way the case was advanced and put before the jury.

(v) *The manner in which the issue was dealt with by Calvert-Smith J*

53. As we have mentioned at paragraph 13 above, the Crown put forward its proposal on 9 June 2008 in a note in which it was stated:

“It is the prosecution case that there existed a single conspiracy to murder, and that the method by which that conspiracy was to be achieved was by the detonation of improvised explosive devices on board transatlantic passenger aircraft. At the conclusion of the evidence in order to cater for the possibility raised in submissions that any particular defendant may have been party to that conspiracy to murder but may not have been aware of the precise method by which the conspiracy was to be achieved the prosecution will seek leave for count 1A to be added to the indictment.”

54. As Mr Wright QC accepted, the amendment was not characterised as a plot/sub-plot; he submitted it was unnecessary to do so. Indeed in the argument that followed on 9 July 2008, the Crown’s position was that count 1A was a lesser alternative to count 1.

55. In his ruling granting the application to amend, Calvert-Smith J said:

“In my judgement there is the possibility in the case of one or more or indeed of all the defendants that the jury would find that that defendant or those defendants were indeed guilty of a conspiracy to murder but that the conspiracy did not involve the detonation of explosives on board passenger aircraft in flight, but something similar perhaps to what we all remember from the 7 or 21 July 2005 attacks in London. In that case, the jury would either have to acquit altogether on the way the case had been put by the Crown or to convict if the count was left on both bases. In that latter event, neither the sentencer nor the public at large nor of course the individual defendant would be

aware of the basis upon which the verdict had been returned. Albeit both possible findings involve the commission of an offence of the utmost seriousness, it is clear that the first is even more serious than the second.”

56. On 14 July 2008 Calvert-Smith J explained the purpose of the amendment to the jury. He said:

“Both sides ... agreed that the count that you have been considering, count 1, should be divided into two .... A new count 1A ... is in the indictment now in case you were to come to the conclusion that you are sure that any given defendant had agreed to murder, but had not agreed to do so by actually putting bombs on planes and detonating them. The old count 1 would have been sufficient legally to cover both possibilities ... but if you did convict any defendant whether it had been on the basis that you were sure he had taken part in an agreement to take explosives on board planes and detonate them or whether he was simply party to an agreement not yet formulated to that extent to kill.”

57. When counsel for the Crown made his final speech to the jury, he made clear it was the prosecution’s case that there existed a single conspiracy to murder and the method by which the conspiracy was to be achieved was the detonation of IEDs on board transatlantic aircraft. He suggested there were four questions. The third and fourth were as follows:

- “3. Had the plot progressed such as to have identified the detonation of IEDs upon passenger aircraft as its ultimate goal?
4. Was the defendant whose case you are considering aware of that goal and an active participant in the plot to seek to achieve it?

If you are sure of the defendant’s participation in the plot to the full extent of having identified the specific target of transatlantic aircraft, then the defendant whose case you are considering is guilty of count 1 of the indictment. If you are not sure of this but you are sure of the defendant’s participation in the plot to commit murder as part of unspecified terrorist outrage, then the defendant whose case you are considering is guilty of count 1A.”

58. When Calvert-Smith J summed the case up -

“The questions therefore for you to decide –

1. First are we sure that between 1 January and 9 August 2006 the defendant whose case we are considering agreed, knowing that the plan was to commit murder, with one or more of his co-defendants to play a part in furthering such a plan to murder persons? If so, go to question 2. If you are not sure then that defendant is not guilty of either charge.
2. Are we sure that the defendant knew that the plan involved taking explosives on board aircraft and detonating while the aircraft were in flight? If so, he is guilty of count 1. If you are not sure, then he is not guilty of count 1 but guilty of count 1A. You can see ... the difference between count 1 which includes the allegation of detonating IEDs on board transatlantic passenger aircraft and count 1A which does not. There are thus three possible combinations of verdict:
  - i) The defendant is guilty of count 1;
  - ii) That he is not guilty of count 1 but guilty of count 1A;
  - iii) Not guilty of both counts 1 and 1A.

...If a defendant on any day between 1 January and 9 August 2006 agreed with others to commit murder, in either the way specifically set out in Count 1 or generally as set out in Count 1A , he is guilty of the offence...”

*(vi) The trial before Henriques J*

59. As we set out at paragraphs 71-78 below, the distinction between the two conspiracies was in our judgement maintained in the application and trials before Henriques J.

*(vii) Overall conclusion*

60. Although looking at the matter with the benefit of hindsight and in the realisation that no-one had at the time in mind the precise distinctions which have been drawn on this appeal, it is clear overall, in our judgement, that the jury were being directed to look at two conspiracies. First the Crown’s case that there was a single conspiracy to murder by detonating IEDs on transatlantic passenger aircraft and second, a conspiracy to murder in general.
61. Furthermore it seems to us that looking at the evidence in the case, it is clear that there was the possibility of two distinct agreements on the evidence advanced by the prosecution: an agreement by all to murder and an agreement by some (or all on the prosecution’s case) to murder not simply by detonating a device before an iconic object but by detonating IEDs on transatlantic aircraft. Although the object was to commit the same underlying offence of murder, they are distinct and different agreements as the latter involved an infinitely more serious and sophisticated agreement to do so by detonating IEDs on aircraft.

62. It would, in our judgement, be possible in law to have charged one single conspiracy to murder, even though there was a distinct conspiracy to murder by detonating IEDs on transatlantic aircraft. It would have been open to the Crown to prove a conspiracy to murder; that would have been sufficient for the jury to convict and for the judge to have taken upon himself, as he would do in the ordinary case, the burden of deciding the role each played in the furtherance of the conspiracy and the importance of that role. In the usual case, experience has shown that this is the better course where the agreement is to commit the same substantive offence. The position in the case of agreements to commit different substantive offences was considered in *Roberts and Taylor* [1998] 1 Cr App 441 at 449-50; it is for the Crown to determine whether to charge one conspiracy or more than one (cf *R v Wells* [2010] EWCA Crim 1564 where the court expressed the view it was fairer to charge more than one conspiracy where different substantive offences (robbery and theft) were involved).
63. However, in the exceptional nature of this case, it was permissible for the Crown to charge two conspiracies though each involved an agreement to commit the same substantive offence so that the jury could determine whether a conspiracy to detonate IEDs on transatlantic aircraft had been established in contradistinction to a conspiracy to murder in another way and, if so, which of the defendants were parties to the distinct conspiracies.
64. We have carefully considered whether there was room for confusion in the way in which the case was placed before the jury in trials before Calvert-Smith J and Henriques J. In our view, for the reasons we have given, there was no room for confusion. The Crown had a primary case that there was a conspiracy to which all were parties to murder by detonating IEDs on aircraft; their secondary case was that if some were not parties to that agreement there was a conspiracy to murder without any specific means being specified. Those two cases quite apart from being differentiated in count 1 and count 1A were, in our judgement, made clear in the two trials before Calvert-Smith J and Henriques J. We consider the position in the trial before Holroyde J at paragraphs 106 and following.

**Issue 2: Can the plea of *autrefois convict* succeed even if sentence has not been passed?**

65. As we have set out in paragraph 31 above, there is a conflict between the decisions of this court in *Sheridan* and *Grant* and the decision of the Privy Council in *Richards* on an appeal from Jamaica. In the light of our conclusion on the first issue, it is not necessary for us to decide this second issue. However, in deference to the extensive research done by the parties, particularly after the hearing, and the arguments presented, we consider we should record the arguments made.
66. It was the foundation of Mr Bennathan QC's argument that the principle of the common law that no person should be put in peril of his life twice was reflected in the principle that no person should be tried for an offence twice. He relied on Article 14(7) of the International Covenant on Civil and Political Rights, Article 4 of Protocol 7 to the European Convention, the principle of *ne bis in idem* expressed in the

Schengen Agreements, s.26(2) of the New Zealand Bill of Rights, s.11(h) of the Canadian Charter of Rights and decisions of courts in other countries including *R v Pearce* [1998] HCA 57 (High Court of Australia), and *Green v The United States* (1957) 355 US 184. He submitted that in the light of Lord Bingham's observation in *A v Secretary of State (No.2)* [2006] 2 AC 221 at paragraph 27 that to the extent development of the common law is called for, development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them. He submitted, therefore, that we ought to follow the previous decisions of this court and not the decision of the Privy Council in *Richards*. He relied on the fact that in *S (An infant) v The Recorder of Manchester* [1971] AC 481, the majority of the House had declined the invitation to overrule *Sheridan* though Lord Upjohn did state that *Sheridan* was wrongly decided.

67. He also submitted that the Privy Council had been wrong in one of the reasons that underpinned its decision. The Privy Council had said at page 226:

“If, in any case following trial and conviction by the jury, the judge were to die before passing sentence, there would be no court seized of the case by which sentence could be passed. The defendant, it seems to their Lordships, would in those circumstances have to be re-arraigned before another court and if he again pleaded not guilty would have to be re-tried. But it would be absurd that he should be able to plead the jury's verdict in the first trial as a bar to the second.”

68. In showing that the Privy Council had been wrong, Mr Bennathan QC relied on:

- i) S.79 of the Senior Courts Act 1981 (a provision derived in this consolidating statute from s.6(4) of the Courts Act 1971) which made clear that the practice of taking pleas, the trial by jury and the pronouncement might be by or before different judges. The practice in Quarter Sessions (a court whose jurisdiction was subsumed into the Crown Court) permitted another judge to pass sentence when the trial judge had died: see *R v Pepper and Platt* (1922) 16 Cr App R 13 at 20; from the citation of authority in that case and the summary of the position in 1969 as set out in the 37<sup>th</sup> edition of *Archbold*, this was part of the general practice at Quarter Sessions that enabled one chairman or Recorder to take over functions from another in the same case. At Assizes, it had been permissible since 1547 (s.5 of 1 Edw V1 c.7) for a judge to pass sentence of death which had been postponed by another judge: the practice is set out in the 25<sup>th</sup> edition of *Archbold* (1918).
- ii) In more modern times, the practice had been the same. In *R v Crown Court at Southwark ex p Commissioners of Customs & Excise* (1997) Cr App R 226 Tasker Watkins LJ had accepted the possibility of a change in judge and in *R v Abdul El Ghaidouni* [2006] EWCA Crim 845 this court had accepted that after a trial in which the judge became unwell, it was proper for another judge to take over and supervise the jury's retirement. He also relied on the

observations of James LJ in *R v Robinson* (1974) 60 Cr App R 108 in which that very experienced judge had observed that a conviction or acquittal arose at the proper conclusion of the verdict.

- iii) The Privy Council had not been referred to the practice of courts of Quarter Session or Assize or to the observations of James LJ. One of the reasons for the judgment was therefore founded on an error.
  - iv) The position in Jamaica was similar, as under s.7(3) of the Jamaican Judicature (Supreme Court) Act 1880 as amended, another judge could transact the remaining business of a trial if a judge had fallen ill or died. Again this had not been brought to the attention of the Privy Council.
69. Mr Wright QC relied on the long line of authority that had been considered by the Privy Council in *Richards* and the very firm view of the Privy Council that *Sheridan* was wrongly decided.
70. A decision on this issue would have been far from easy. Although technically this court should follow its own previous decision and is not bound by decision of the Privy Council, the views of the Privy Council in *Richards* would entitle us to follow the decision of the Privy Council, even though the decision was in part based, as the researches of Mr Bennathan QC have shown, on a misunderstanding of practice. Moreover, it is clear from the decision in *Connelly*, that because of the ramifications of a decision of *autrefois convict*, it is a principle that should not be expanded beyond its clear bounds. As the court has the power to apply the principle of double jeopardy or *ne bis in idem* by resort to staying proceedings, it would be difficult to see why it was necessary to develop the law in a manner different from that which was expressed by the Privy Council in *Richards*. Moreover the Law Commission in its report *Double Jeopardy and Prosecution Appeals* (Law Com no 267, 2001) appears to have accepted that *Richards* represented the law in England and Wales (see paragraphs 6.24- 6.27). However it is not necessary for us to express a concluded view on this question.

## **II: ABUSE OF PROCESS IN RE-TRYING THE APPELLANTS ALI, SARWAR & TANVIR HUSSAIN ON COUNT 1 BEFORE HENRIQUES J**

### *(i) Retrying the same or substantially the same offence*

71. As we have mentioned at paragraph 27, a submission founded on *autrefois convict* was barely mentioned before Henriques J in the hearing prior to his ruling on 7 November 2008 which led him to decide there was no impediment to a second trial on count 1. That was because the view was then taken that the decision in *Richards* precluded reliance on the plea of *autrefois convict*. The argument before Henriques J was therefore based on the more general principle set out in *Connelly* that it would be an abuse of process to hold a second trial because count 1 was the same, or



substantially the same, as count 1A; on this application the technical rules relevant to *autrefois convict* would not apply. However, in contradistinction to the plea of *autrefois convict*, the court applying the principles of a stay would have a much broader discretion.

72. In the argument before Henriques J the prosecution relied on the argument subsequently advanced before us that the amendments provided for the possibility of the existence of a general conspiracy to murder (count 1A) and a sub-conspiracy that involved the detonation of IEDs. It was contended by the Crown that it had sought the amendment to avoid a potentially ambiguous verdict.

73. In a clear and careful ruling, Henriques J accepted that in its unamended form the trial judge would not have known whether that defendant had been found by the jury to have been a party to a conspiracy to detonate explosives on an aircraft; that the amendment was well-intentioned and had the concurrence of all parties; and that there were potential advantages in the amendment to each and every defendant as it provided the possibility of a guilty verdict which did not implicate a defendant in aircraft destruction. He concluded that there would be no prospect of a plea of *autrefois convict* succeeding

“Count 1 alleged a different conspiracy from the general conspiracy in count 1A; the defendants had not been convicted of a conspiracy to blow up airliners.”

74. It would therefore only be possible to stay the proceedings if it would be unfair to proceed or if the defendants could not have a fair trial. He then considered whether there would be any unfairness. He concluded there was none; it had not been unfair of the Crown to fail to object to the jury returning their verdicts on count 1A.

75. We were referred in the submissions made after the hearing to an exchange between counsel and the judge during closing speeches on 1 July 2009 about the scope of the conspiracy charged on count 1. Although that exchange can be thought to give rise to an ambiguity, the position was made very clear in the summing up.

76. In his summing up, Henriques J maintained the distinction between Counts 1 and 1A which he had made in his ruling. He said:

“The prosecution allege that these eight defendants joined in a single conspiracy to murder and that the method by which the plan was to be achieved was by the detonation of [IEDs] on board transatlantic passenger aircraft. The prosecution made that allegation in count 1 of the indictment. In the cases of Ali, Sarwar and Tanvir Hussain, you are concerned only with count 1. In the cases of the remaining five defendants, count 1A has been included in order to provide for the possibility that one or more of these defendants was recruited to the conspiracy, but

you cannot be sure that he was aware the conspiracy involved the detonation of IEDs on board transatlantic aircraft.”

He then posed four questions:

- “(i) Was there a plot in existence to murder persons unknown?”
- (ii) If so was the defendant a participant in the plot, knowing that he did so, that it was a plot to murder?
- (iii) Did the plot involve the detonation of IEDs upon passenger aircraft?
- (iv) If so, was the defendant a participant in the plot, knowing, when he did so, that it involved the detonation of IEDs upon passenger aircraft?”

He then went on to direct the jury that if the answer to all four questions was yes they were guilty on count 1 but if they answered questions 1 and 2 yes but were not sure or answered no in respect of questions 3 and 4 then the verdict would be guilty on count 1A.

77. In a subsequent passage he said:

“The prosecution allege in count 1 that a decision had been made to blow up airlines and, thus, before convicting on count 1 you must be sure that the plot was to blow up airliners. The actual aircraft need not have been identified, but an agreement must have been reached about aircraft. In order for you to find a conspiracy to murder exists or existed, you must be satisfied by the evidence called in this present trial that a conspiracy to murder existed ...”

78. In the appeal before us, this part of the case was advanced on behalf of the appellants by Mr Malcolm Bishop QC. His principal argument was based on the argument we have already considered under the heading of *autrefois convict*, namely whether there was one conspiracy or two. We have considered the point made by Mr Bishop QC on this aspect when considering our decision on *autrefois convict*. For the reasons we have there given, we were satisfied that the conspiracies charged were different conspiracies.

(ii) *The taking of the verdicts in the first trial*

79. In the result, therefore, the only substantial additional point that could be argued on this aspect of the appeal was that the Crown should have urged the judge not to take the verdicts on count 1A and Calvert-Smith J should not have taken those verdicts.
80. It is clear from the transcript of the proceedings that the judge was made aware prior to the jury announcing their verdict in open court that the jury could not agree on count 1 in respect of any defendant. It is also clear from the way in which the judge spoke to counsel, that they were made aware of that fact. Counsel for the Crown did not seek to prevent the verdicts being given.
81. In our judgement, counsel for the Crown took the right course and Calvert-Smith J was right to take the verdicts. If the jury had reached a verdict on count 1A in respect of some of the defendants, it was the duty of the judge to take that verdict. We can see no basis whatsoever for suggesting that a verdict which a jury had decided on should not be taken. We turn at paragraphs 86 and following below to consider the adverse publicity that followed from that, but issues of publicity and prejudice arising are irrelevant to the taking of the verdict.
82. We therefore do not consider that the taking of the verdict on count 1A made it in any way unfair to hold a second trial.

*(iii) Other factors*

83. We have considered all the other factors as to whether there was any unfairness in holding a second trial. We can think of none, particularly bearing in mind that all had assented to the division of the indictment in the way we have described into counts 1 and 1A. We therefore see no basis for disturbing the ruling that was made by Henriques J; he acted on a correct application of principles and his decision was one plainly within the area of discretion left to a trial judge. However, far from leaving our decision on the basis that it was a matter of his discretion, we agree completely with the way in which he exercised it.

**III: ABUSE OF PROCESS – WHETHER THERE COULD BE A FAIR TRIAL IN THE LIGHT OF MEDIA PUBLICITY AFTER THE FIRST TRIAL**

*(i) The publicity after the taking of the verdict*

84. As the trial before Calvert-Smith J had attracted worldwide publicity, there was a separate room for the media into which the proceedings were transmitted by closed circuit television. When the verdicts were expected the media set up broadcasting equipment outside the court which enabled them to transmit instantly onto the airwaves news from the trial as it occurred; using these facilities, the media transmitted each verdict immediately after it was given. It is also clear that the

newspapers placed the verdicts onto their websites as soon as they received the information.

85. It was, in the circumstances, impossible to have imposed reporting restrictions on the verdicts, as no one had applied to the trial judge that this should be done before the verdicts were taken. If such an application had been made, given the worldwide interest in the trial, it is difficult to see how Calvert-Smith J could in effect have prevented the publication of the verdict on news channels not subject to the jurisdiction of the court.
86. That day and over the following days there followed what was described as an “avalanche of publicity”. It is not necessary for us to set it out because it is common ground that the ruling of Henriques J on this issue made on 18 December 2008 perfectly captures the gravamen of that publicity:

“The offending material can be categorised in the following ways: (i) the defendants have strong links with several prominent Al Qaeda terrorists, including Rashid Rauf, 7/7 bombers and 21/7 bombers, of which the jury were not informed; (ii) but for the premature arrest in Pakistan of Rashid Rauf, for which the Americans are to blame, more evidence would have become available to the prosecution; (iii) the activities of the defendants were being monitored by phone taps and other forms of interception and a dummy run was anticipated which might be used to carry out a real attack; (iv) the investigation had prevented unspeakable carnage and loss of countless lives; (v) the jury were incompetent, the evidence was very strong and the jury’s verdict was astonishing; (vi) the trial judge mishandled the trial and in particular permitted a two-week break during the jury retirement, the jury returning for only five days at the commencement of their deliberations before then going on holiday.”

(ii) *The applicable principles*

87. Although it was also common ground that Henriques J had applied the correct principles in the application made to him, it is convenient to refer to them and to the argument on principle raised on the issue of publicity which arose before Holroyde J.
88. A defendant is entitled to an impartial tribunal. The fundamental importance of this requirement is set out in *Locabail (UK) v Bayfield Properties Limited* [2000] QB 451 at paragraphs 2 and 3 and the test of the informed observer a modest adjustment to *R v Gough* [1993] AC 646 proposed by Lord Phillips MR in *Re Medicaments in Related Classes of Goods* [2001] 1 WLR 700 at paragraph 85:

“The court must first entertain all the circumstances which have a bearing on the suggestion the judge was biased. It must then

ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”

That was approved by the House of Lords in *Porter v Magill* [2002] 2 AC 357 at paragraphs 85 and 103.

89. In considering whether a jury can, in circumstances of great publicity about defendants, act as a fair and impartial tribunal, the court has to have regard to the trial process and its ability to deal with the publicity that had arisen. In *Abu Hamza* [2007] QB 659, Lord Phillips, the then Lord Chief Justice, had referred to and endorsed the views of Sir Igor Judge (as he then was) in *In re Barot* [2006] EWCA Crim 2602 which were as follows:

“31. There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts in the light of any trial post the sentencing hearing, after hearing submissions from counsel for the defendants. We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair.”

At paragraph 92 of *Abu Hamza* Lord Phillips said:

“The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties.”

90. On behalf of the appellants in the appeal from the decision of Holroyde J it was said that it was no longer possible to rely on juries to follow the directions of the judge and to focus exclusively on the evidence, ignoring anything that they may have heard or read out of court. In the circumstances of this case the trial process, whatever assistance was given by the judge, could not produce a fair trial. In support of that submission reliance was placed on the report of Professor Cheryl Thomas for the Ministry of Justice made in February 2010 under the title *Are Juries Fair?*
91. She had concluded from her research that more jurors said they saw information on the internet than admitted looking for it on the internet. In high profile cases, in her sample, 26% had said they saw information on the internet compared to 12% who said they looked. In the study, jurors were admitting to doing something they should have been told by the judge not to do. In her view this might have explained why more jurors said they saw reports on the internet. It was argued that as, without doubt, the material to which we have referred was available on the internet, and it could be inferred from this research that juries did not follow the directions given by the judge, an informed observer could not take the view that the jury, in a case such as this, could act as a fair and impartial tribunal.
92. To the extent that there remains the risk that, despite what jurors are told by a judge, an individual juror might look up matters on the internet, any attempt by an individual juror to use what was found to influence the views of the other jurors is, in our judgement, bound to fail. For what was found on the internet to have any influence on the verdict of a jury, it would require other members of the jury to disobey their oath. In our judgement, the observations in *Barot* and in *Abu Hamza* hold good and the trial process in this trial was capable of coping with the adverse publicity. There was, it must be emphasised, no evidence at all to suggest that any juror had sought information on the internet.

(iii) *The role of the Crown, the Attorney General and others*

93. Before turning to consider the application of these principles to the position in the trial before Henriques J, it is necessary to refer to the relevant circumstances as they then pertained. Before Henriques J it was argued that the publicity and the disclosure of certain facts had been deliberate. The judge rejected that and it is not pursued. However there are three circumstances that we have to consider – the terms of the media briefings, the action of the Crown and the actions of the Attorney General.
94. It has become commonplace in major trials for the media to be briefed by the police and/or the Crown Prosecution Service on terms that nothing in the briefing is to be disclosed until the verdict. No challenge was made before us as to the propriety of the press briefings and so we do not comment on this development in our criminal justice system. What was raised both before the judge and before us were the terms upon which restrictions had been made as to when the briefings could be used. In 2010, the Association of Chief Police Officers issued revised guidance; paragraph 5.27 provides that embargo agreements must make clear that any additional material provided to the

media can only be used when all criminal proceedings are concluded. However the CPS protocol has not been revised; the current edition is dated October 2005. It would plainly be desirable that it should be examined to ensure that it is clearer about the time at which use may be made and to deal with press briefings.

95. The second circumstance related to the actions of the Crown. As we have already set out, there was no way in which the Crown could have prevented the publication of the verdicts. Nor, in our view, was there any way in which immediate press comment could have been prevented. Some criticism was made of the Crown for failing to prevent a BBC Panorama programme broadcast on the night the verdict had been given. We were told the Crown tried to prevent the broadcast once it had learnt what was contained in the broadcast, but it failed to achieve a result.
96. At the hearing the criticism was directed at the failure to prevent the publication of articles over the days following the verdict. In the light of that criticism, we asked if the Attorney General could assist us. We are grateful to his office for the very considerable assistance provided.
97. The Attorney General's office was informed of the issues that had arisen on the day following the verdicts. The approach of the office was in general to follow the stance taken by Lord Goldsmith QC, the then Attorney General, in a speech given by him at the Reform Club on 24 May 2007 and in particular the following passage from that speech:

“But so far as the law on contempt is concerned, at the end of the day it is the responsibility of the media to comply with the law. The media often look to me for guidance but nothing I say can either add to or take away from their existing legal obligations. Sometimes, frankly, I am in a no-win situation. If I do not issue guidance or some form of public statement, I am accused of inertia, or am seen to be giving the media a green light to publish whatever they want. But if I give guidance reminding the media of their obligations I am often accused of “gagging” them. For the future, I want to make it clear that I will not routinely issue “advisory notices” where these would simply advise the media of their obligations to comply with the law. So the absence of an advisory notice should not be taken as a green light to publish whatever the media want. I will continue to monitor press reporting of criminal cases closely. If something is the wrong side of the line I will not hesitate to act. But in the end it will be for the media to ensure that they stay the right side of the line. I will generally issue guidance only if a case gives rise to some specific issue or risk about which the media need to be warned and which would not otherwise be self-evident.”

98. Thus when letters were sent in September 2008 on behalf of the appellants to the Attorney General about the Panorama programme (of which his office had been unaware until after its transmission) and the torrent of other reporting, the response of his office was to inform the appellants that the office was keeping potential contempt of court proceedings under review. The Attorney General, Baroness Scotland QC, wrote to *The Times* on 18 September 2008 to answer criticism made in letters that the law on contempt was not being enforced effectively:

“The law on contempt involves a delicate balance between two vital public interests – on the one hand freedom of expression, and on the other hand the right of an accused person to a fair trial. Not every public comment about a particular case, however outspoken, will seriously interfere with the rights of the accused. That may be so for example, where there is likely to be a long gap between the publication and any future trial, that it is unlikely to weigh heavily in the minds of the jury when they come to hear the case (“the fade factor”). It may also be so where what is published in the media amounts to no more than the evidence that will be put before the jury in any event.

Compliance with the law is, in the first instance, the responsibility of the individual editors and journalists. The fact that I do not routinely advise the media on their responsibilities under the law is not a sign of leniency or any lack of concern. I and my office will carefully review media comment about active proceedings to ensure it does not fall on the wrong side of the line. In those cases where I consider that contempt proceedings are justified I will not hesitate to bring them. This year, contempt proceedings have been successfully concluded against the editor and publisher of the Sunday World and against ITV Central. The Sunday World action results in record fines against the editor. It would be wrong to assume that no further proceedings are in prospect. But I emphasise that decisions to bring proceedings are made case by case, after careful consideration, and applying the tests which have been articulated by the Courts.

As part of my wider contempt responsibilities my office provides guidance and assistance to prosecutors where prosecutions are brought against editors and publishers for breach of statutory reporting restrictions relating to proceedings. We have also provided assistance to courts and members of the judiciary in resolution of contempt issues. Journalists and commentators should be in no doubt that I will continue to enforce the law on contempt fairly and robustly.”

99. In fact it appears that, although there was close contact between the CPS and the office of the Attorney General, the only specific action taken in the aftermath of the



first trial was to add to the end of the press release announcing the intention to seek a re-trial which was issued on 10 September 2008 a note which stated:

“The CPS would like to remind media organisations of the need to take great care in reporting the events surrounding this alleged plot. These remain allegations only and, if retrials take place, the defendants have the right to a fair trial. It is extremely important that there should be responsible media reporting which does not prejudice the due process of law.”

100. The Attorney General considered whether proceedings should be brought, but in view of all the circumstances including the ruling of *Henriques J* in December 2008 she determined that a prosecution would be unlikely to succeed. However, in the light of the experience of what had happened after the first trial, five Advisory Notices were issued during the course of the second trial, including one issued whilst the jury were in retirement to warn editors of their responsibilities.
  101. It was submitted to us that the court should make clear to the media the serious consequences of the publicity by ruling that it was not possible for the appellants to have had a fair trial. We have set out at paragraph 92 the reasons why we consider that it did not have this effect. However, as has recently been emphasised in *HM Attorney General v Associated Newspapers* [2011] EWHC 418 (Admin), the question to be resolved on an application for contempt is not the question that faces the trial judge or this court on an appeal as set out in *Abu Hamza*, but whether the publication created a substantial risk that the course of justice would be substantially impeded or prejudiced. The preponderance of view and in our judgement the right view is that a publication will have created that risk if there was before the trial judge a seriously arguable issue as to whether the defendant could have a fair trial and the jury reach a just verdict in the light of the publication.
  102. Despite the criticism made before us, it would not be appropriate for us now to comment on whether that test had been met, for we consider that the office of the Attorney General followed the guidance given by the Attorney General. We do emphasise that the test is one substantially different and much easier to meet than the test to be applied by the judge or this court in determining whether the trial should be stayed. Once it was known that there would be a re-trial, there should not have been the publication of the material of which complaint was rightly made.
- (iv) *The ruling of Henriques J*
103. We have considered in detail the judge’s ruling and are entirely satisfied that he not only applied the correct principles but came to a conclusion that was open to him, namely that a fair-minded observer would consider that a jury, properly directed, could fairly try the appellants who had been convicted on count 1A.

104. Not only do we consider that conclusion open to him but we also consider that that conclusion was correct. We accept the argument of Mr Moloney QC that trying the case elsewhere was not an option; asking potential jurors about their knowledge of the case again was not an option. However, we do consider that, given the trial process and the months that had elapsed before the second trial, the informed observer would be satisfied that a jury would consider fairly and impartially the evidence and would have no regard to the publicity to which we have referred.
105. We have also taken into account the fact that, unlike the decisions in *Abu Hamza* and *Montgomery v HM & Another* [2003] 1 AC 641, this was not a case concerned with pre-trial publicity but with publicity following a conviction. The fact that it was a trial following a conviction on one count in our view is an important factor that may be viewed as more significant than pre-trial publicity. However, looking at the matter overall, we consider that the trial process could ensure a fair trial and a fair-minded observer would think that as well.

#### **IV: AUTREFOIS ACQUIT, STAYING THE THIRD TRIAL AS NOT BEING IN THE INTERESTS OF JUSTICE OR AN ABUSE OF PROCESS**

106. As we have set out at paragraphs 21 and 22, the appellants who were tried in the third trial, Savant, Arafat Khan and Zaman advanced a number of grounds as to why there should have been no third trial. The arguments fell under the following headings:
- i) It followed from the acquittal on count 1 that that they could not be re-tried on count 1A on the basis of *autrefois acquit*.
  - ii) A third trial was not in the interests of justice applying the principles set out in *Bell* that a second re-trial was not in the interests of justice.
  - iii) The proceedings should have been stayed as an abuse of process

We will consider the issues raised by those arguments in turn.

##### **Issue 1: *Autrefois acquit***

107. We have set out above the principles of *autrefois convict*. The principles relating to *autrefois acquit* are the same, with of course the exception that the issue in *Richards* does not arise. The issue was whether on the third trial, matters proceeded on the basis that count 1A was the same offence as count 1.
108. As we have set out at paragraphs 49 to 64 above, we are satisfied that count 1A and count 1 were different offences. It seems to us, for the reasons we have already given, that they were so treated by Calvert-Smith J and Henriques J. However, it was

submitted to us that, as regards the third trial, that was not the position taken by the trial judge, Holroyde J.

(i) *The way in which Holroyde J approached the issue*

109. In the argument advanced to us, very substantial reliance was placed by the appellants on the approach Holroyde J had taken to this issue. In his ruling of 19 February 2010 Holroyde J set out the note of 9 June 2008 (to which we referred at paragraph 53), Mr Wright QC's oral argument on 9 July 2008 (which we mentioned at paragraph 54) and Calvert-Smith J's ruling (to which we referred at paragraph 55). Holroyde J then continued:

“It is important to emphasise that for the reason mentioned ..... above, the amendment was not opposed by any of the defendants. On the contrary, it was positively welcomed by at least some of them. Given that the Crown's case remained that there was a single conspiracy to murder, an amendment relating only to the particulars of that allegation might well have been open to objection on familiar principles if any defendant had wished to resist it. But no defendant did. For entirely understandable reasons, the defendants positively wanted count 1A to be before the jury, or at the very least did not seek to argue against it. This is to my mind a significant factor in the decision I have to make.”

It was submitted on the appeal that Holroyde J had plainly taken the view that the amendment which had resulted in count 1 and count 1A did not disclose different conspiracies.

110. In support of that contention, counsel for the appellants then relied on what Holroyde J had said at paragraph 63, 67 and 69 of that ruling of 19 February 2010 where he said:

“63. The prosecution by their application to amend the indictment acknowledged the possibility of a jury being sure that a defendant conspired to murder, but unsure that he knew and agreed to the means by which the conspiracy was to be carried into effect. The prosecution did not by that amendment allege a completely different conspiracy, and the amendment did not to any significant extent require the defence to meet a different case...

....

67. ... The fact is that both count 1 and count 1A related to the same conspiracy: what differed was the allegation as to the level of knowledge and intention of an individual defendant who was proved to have been a party to the conspiracy. For

that reason, the inextricable intertwining stems from the addition of count 1A, to which no objection was raised.

...

69. Further or alternatively, it is submitted to me that in any second retrial reference to the ultimate target of the conspiracy would give rise to severe and insuperable prejudice. It seems to me that the concern is exaggerated. Again, it arises because of the amendment of the indictment to include two differently-particularised forms of what the Crown has always alleged was a single conspiracy to murder.”

111. For the purposes of the trial, the convictions of Ali, Sarwar and Tanvir Hussain on count 1 (the conspiracy to murder by detonating IEDs on aircraft) were admitted, not the conspiracy under count 1A. The convictions of Islam and Khatib under count 1A were also admitted. On the basis of those formal admissions the judge directed the jury:

“So for your purposes ... I direct you that the convictions of Ali, Sarwar, Tanvir, Umar Islam and Khatib establish that during the relevant period in 2006 there was in existence a conspiracy to murder and that those five men were all involved in that conspiracy.

In the case of three of them, Ali, Sarwar and Tanvir, their convictions established they agreed to play their respective parts in the conspiracy intending that members of the public would be murdered and knowing and intending, in addition, that the precise means by which members of the public would be murdered would be by the exploding of improvised explosive devices on board transatlantic passenger aircraft.

In the cases of Umar Islam and Khatib, their convictions established that they agreed to play their respective parts in the conspiracy, intending that members of the public would be murdered but without sharing the specific intention as to the precise means by which those murders would be committed. You will understand, in view of what I have just said, members of the jury, why I said a moment ago that the first ingredient of a conspiracy to murder, namely being sure there is a plan to commit that crime, would very quickly be decided because these convictions of the other five prove that there was such a plan. So the real issue for you to decide is whether the prosecution have made you sure that an individual defendant was a party to that conspiracy in the sense I have explained.”

112. It was submitted on behalf of the appellants that the judge summed the case up to the jury in that trial on the basis there was a single conspiracy and that Ali, Sarwar and

Tanvir Hussain were parties to the same conspiracy as Islam and Khatib, although the knowledge of Ali, Sarwar and Tanvir was different.

113. It was therefore submitted that from the beginning of the case to the end, the judge had proceeded on the assumption there was a single conspiracy. Whatever view therefore might be taken of the indictment, the third trial had proceeded on that basis, namely that there was a single conspiracy. As that was so, the third trial was being conducted on the basis that they were guilty of participation in the same conspiracy of which they had been acquitted in the second trial. They were therefore in effect being tried for the same offence twice. Whatever might be the position in relation to the trial before Henriques J, the trial before Holroyde J had been conducted by him on the basis there was but one conspiracy.

(ii) *The limited way in which the issue of autrefois acquit was raised before Holroyde J*

114. However, as was pointed out by the Crown, the issue of *autrefois acquit* was not raised until 26 April 2010. When it was raised the gravamen of that submission was as to the way in which the acquittals on count 1 should be treated during the third trial. In the argument advanced, detailed reference was made to the speeches in *R v Z* [2000] UKHL 68, [2000] AC 2 AC 483. The submission noted that *R v Z* had not been referred to in the submissions that led to the ruling of 19 February 2010 and accepted that it would have been better if it had been. Although it was submitted the prosecution had come perilously close to breaching the principles of *autrefois acquit*, the primary submission was that the court must avoid any suggestion that the jury could conclude that the defendants were guilty of that of which they had been acquitted; the jury should therefore be directed that the appellants were innocent on Count 1. We return to that issue and the ruling made in relation to it at paragraph 138 below.

115. In that part of his ruling on 26 April 2010 where he considered the plea of *autrefois acquit*, Holroyde J made clear that a plea of *autrefois acquit* was not available to any of the appellants. They were not being tried for an offence of which they had been acquitted, as they were being prosecuted for an offence which was in the nature of a lesser alternative to the offence of which they had been acquitted. He summarised his analysis as follows:

“(a) There was a plan to commit murder. By virtue of section 74 of the Police and Criminal Evidence Act 1984 those convicted of Counts 1 and 1A are taken to have committed those offences unless the contrary is proved.

(b) Everyone who was party to that plan intended that it should be carried out and that members of the public would be killed.

(c) Some of them intended that it should be carried out and that members of the public would be killed in a specific way, namely by exploding improvised explosive devices on board aircraft in flight.

(d) These defendants have been acquitted of sharing in that specific intention. That charge has been determined in their favour. They cannot be and are not being tried on it again.

(e) However, it can still be, and is, alleged against them that they conspired to murder, intending that the plan to murder should be carried out and that members of the public would be killed.

(f) Unless it would be unfairly prejudicial, evidence which is relevant to Count 1A remains admissible even if it may also point to the defendants in fact having been guilty of Count 1.”

116. It is apparent, it seems to us, from the analysis of Holroyde J that the importance in the appeal before us of seeing whether the conspiracies alleged in counts 1 and 1A were different for the purposes of the plea of *autrefois acquit* was not a matter that had been argued before him, as the plea of *autrefois acquit* had been advanced for a different purpose. Thus in distinguishing in this particular ruling between “intention” and in earlier rulings “knowledge” has to be seen in the context that he was not addressing the argument made to us.
117. We have made clear at paragraphs 41-52 that in our judgement count 1 and count 1A were different conspiracies to be analysed in the way suggested by Professor Sir John Smith and by *Coughlan* and *Greenfield*. However, in a case where drawing the distinction between counts 1 and 1A did not matter or otherwise make a difference, can the fact that the judge in his rulings and in his summing up did not draw that distinction have the consequence that the plea of *autrefois acquit* must succeed?
118. The plea is one that is good or bad as a matter of law and analysis. It cannot, in our judgement, make any difference if, in the analysis that was carried out by Holroyde J, he did not make the distinction which it is necessary to make for these purposes when the issue was not raised before him.
119. However, that is not to say that his analysis and the way in which the trial was conducted does not become important when we consider the second and third issues; we therefore return to this at paragraph 155.

## **Issue 2: Was a second retrial trial in the interests of justice?**

### *(i) The general principles*

120. It is well established that a defendant should not be subject to a second retrial unless the interests of justice (which require a fair trial in circumstances which are neither oppressive or unjust) justify a second re-trial: see *Bell* [2010] EWCA Crim 3, [2010] 1 Cr App R 7 at paragraph 25. Although the Crown must decide first whether it is in

the interests of justice to seek a re-trial, it is for the court to decide whether there should be a re-trial. In doing so, it must undertake a dispassionate and informed assessment of how the interests of justice are best served, taking full account of the defendant's interests and the public interest of convicting the guilty and maintaining public confidence in the efficacy of the criminal justice system: see the judgment of Lord Bingham in *Bowe v R* [2001] UKPC 19 at paragraph 37 and the illuminating judgments of the Supreme Court of Ireland in *DS v The Judges of the Cork Circuit Court and the DPP* [2008] IESC37, particularly that of Denham J at paragraph 17.

121. In *Bell*, Lord Judge, Lord Chief Justice, provided some observations as to the circumstances in which a second re-trial should be ordered at paragraph 46.

“We doubt the value of offering further guidance on the circumstances in which a second re-trial may be appropriate. We shall confine ourselves to reminding the Crown that the jurisdiction which permits a second re-trial after two jury disagreements in circumstances like the present must be exercised with extreme caution. The broad public interest in the administration of criminal justice leads us to the clear view that a second re-trial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred (as here) and in which the evidence that the defendant committed the crime (again, as here), on any fair minded objective judgment remains very powerful.”

122. Submissions were made to Holroyde J prior to the decision in *Bell*; the argument was then adjourned to await the decision in *Bell* and further argument then took place. In his ruling permitting a third trial made on 19 February 2010, Holroyde J considered that the circumstances in which a second re-trial should be ordered were not confined to those identified at paragraph 46 of *Bell*. A judge must consider whether the public interest required a second re-trial.

(ii) *A two stage approach?*

123. It was first submitted to us that there was a two stage test. We should first consider if the conditions set out at paragraph 46 of *Bell* had been satisfied and only if they were satisfied should we proceed to examine the wider interests of justice.

124. We do not consider this is the correct approach. It is clear from the authorities, as Holroyde J rightly held, that what the court is concerned with are the interests of justice. The observations made by Lord Judge CJ will, in the ordinary case, no doubt apply, but these trials were not the ordinary case.

125. In any event, even if there was to be a two stage test, that test would have been satisfied. Our reasons for this can be shortly explained. First it was submitted to us

that the present case was one which did not involve “a crime of extreme gravity which has undoubtedly occurred”; it was submitted that the conspiracy with which the appellants were charged was an inchoate crime; no criminal act had occurred. In our judgement it is clear from the convictions in the first trial and the conviction of Islam in the second trial that there had been a conspiracy to commit murder; such a conspiracy was plainly a crime of extreme gravity. Second, subject to the considerations we address below in relation to overlapping evidence, there was a powerful case against these appellants.

*(iii) The general considerations*

126. However, as we have said, the authorities make clear that the duty of the court is to consider the overall interests of justice. The weight of the submissions made by Mr Bennathan QC (who appeared on this part of the appeal for Arafat Khan) and Mr Wood QC for Zaman were rightly addressed to this issue. In looking at the interests of justice it was submitted we should take into account:

- i) The fact the trials had already lasted a total of 196 days and had begun two years before and the conditions of detention of the appellants were harsh prior to and during the trial.
- ii) There was no fresh evidence.
- iii) There had been an acquittal on count 1.
- iv) The Crown had changed their case. In the first trial they had said they only wanted a conviction if the jury were satisfied the conspiracy involved detonating IEDs on aircraft, whereas in the second re-trial they were seeking a conviction on the basis that that was not part of the conspiracy.
- v) The publicity had been so extensive that no jury could safely try the case.
- vi) The jurors were likely to use the internet; if they did so they would find material, the prejudicial effect of which could not be countered.
- vii) If the evidence at the second re-trial was adduced again, no direction could be given by the judge which would enable a jury properly to take account of the effect of the acquittal on the same evidence on count 1.

We will consider these factors in turn

*(iv) The length of the first and second trials and conditions of detention*



127. We accept that in assessing the interests of justice account had to be taken of the fact that the trials to which these appellants had been parties had occupied 196 days and that the first trial had commenced two years before the start of the third. There can be little doubt but that trials of the length of the two earlier trials had subjected the appellants to considerable stress.

128. That stress must have been exacerbated by the intrusive and strict security procedures and other conditions of remand to which they had been subject during that period in the High Security Unit (often described as prison within a prison) at Belmarsh which was not designed for long term detention. Those conditions are described in considerable detail by Lord David Ramsbotham, HM Chief Inspector of Prisons 1995-2001, in a report to the court dated 16 November 2009. These matters were also plainly factors that had to be taken into account.

*(v) Absence of fresh evidence, the jury disagreement and the acquittal on count 1*

129. The facts that there was no fresh evidence, the jury had disagreed twice in relation to count 1A and there had been acquittal on count 1 had all to be brought into account.

*(vi) A change in the Crown's case*

130. The Crown had made clear in the initial stages of the first trial that the Crown did not wish to seek a conviction, unless the jury were satisfied that the defendants were parties to a conspiracy to detonate IEDs on aircraft. However, as we have set out at paragraph 9 above, the nature of the defences advanced by the defendants was not clear as none had served a meaningful defence statement. As we have explained, it certainly was the position that, by the end of the Crown's case, the Crown, by seeking the amendment to the indictment, had accepted the possibility that there could be a conviction on the basis that some of the defendants had engaged in a conspiracy to murder and not in a conspiracy to murder through the detonation of IEDs on transatlantic aircraft. From that time on the position of the Crown was clear. We reject the submission that the Crown was being opportunistic. We therefore cannot see that the way in which the Crown had opened its case initially is a factor that is relevant to an assessment as to whether a second re-trial was in the interests of justice.

*(vii) Publicity and the internet*

131. We have referred at paragraph 86 above to the very substantial publicity after the first trial. After the verdict on the second trial there was again very considerable publicity. This included, not unsurprisingly, the reporting of materials that had not been before either of the two prior juries and would not have been admissible in any re-trial. We were provided by the appellants with a selection of that publicity which, for example, alleged that the plot was part of Al Qaeda's campaign; that Al Misri, an Egyptian bomb maker in the mountains of Pakistan, had been someone with whom Ali had been put in touch; that a British man, Rashid Rauf, thought to be from Birmingham and a British citizen, had been referred to in the e-mails as "Paps" and that he was behind this and other terrorist plots; that Ali had been in regular contact with one of the gang who tried to bomb London on 21 July 2005; that the e-mails used in the

second trial had not been available in the first trial because of the ban on using intercept material; that the appellants' cars were bugged. In relation to Zaman, in particular, there was significant publicity in relation to the Queen's Road Mosque in Walthamstow where it was said that Ali and his associates had met. This mosque was said to be controlled by Tablighi Jamaat and had been used as a recruiting ground for extremists and the preaching of Jihad; that mosque featured heavily in Zaman's life and evidence.

132. We have set out at paragraphs 87 and following the applicable principles. It was submitted to us that the prejudice was incurable. A change of venue would not be possible; nor would selecting a jury panel from a different area or questioning a jury panel have been available options. As we have said in relation to the position of the first trial we accept that these were not available options.
133. The real issue, therefore, was whether the trial process itself and suitable directions by the trial judge, together with the time lapse, would together mean that the informed observer would be satisfied that the jury would consider fairly and impartially the evidence notwithstanding the publicity we have outlined.
134. This submission in relation to Professor Cheryl Thomas's report had been made to Holroyde J. In rejecting it, he said there was little scope for an individual juror improperly to influence a verdict by the product of personal research by disobedience to his oath or affirmation and to the specific instruction in relation to the internet which had been given
135. In our judgement, the approach of Holroyde J was correct for the reasons we have given at paragraph 92 above.
136. In making our assessment, we have also taken into account the risk of further publicity during the trial. In fact, as was pointed out to us, during the course of the trial on 12 June 2010, the *Daily Telegraph* gave publicity to what it claimed was a briefing paper by MI5 about young British Muslims being groomed to carry out terrorist attacks by Al Qaeda. It seems to us inevitable that during the course of any trial at the present time of a person alleged to be a terrorist, there are bound to be press reports in relation to Al Qaeda or other organisations; we have no doubt that the jurors are capable of ignoring such reports.
137. Thus, although in our judgement the publicity did not make a fair trial impossible, the publicity was a factor that had to be taken into account in assessing whether a second re-trial was in the interests of justice.

*(viii) Giving effect to the acquittal on count 1*

138. The next factor to be considered was whether there was a way in which the acquittal in count 1 could be accommodated within the re-trial on count 1A. The submission made to us was that effect had to be given in the third trial to their acquittal on count 1; as it was not possible to do this in the circumstances, it was an overwhelming reason to conclude that a second re-trial was not in the interests of justice.
139. As we have mentioned at paragraph 114, the limited basis on which the issue of *autrefois acquit* had been raised prior to the third trial was to found an argument that the jury should be directed to proceed on the basis that they could be certain that the appellants were innocent of count 1. Holroyde J rejected that argument in the further part of his ruling given on 26 April 2010, after consideration of *R v Z, R v Terry* [2005] 2 Cr App R 7; he held:

“A defendant who has previously been acquitted of an offence is entitled in subsequent proceedings, not amounting to a breach of the rule against double jeopardy, to the benefit of the presumption of innocence, but is not entitled to rely on his acquittal as being conclusive for all purposes that he was innocent of the earlier offence. Moreover, he is not entitled to treat the earlier acquittal as affirmative proof of any fact which was or may have been in issue at his earlier trial.”

He then set out the analysis which we have set out at paragraph 115 above, concluding that “... unless it would be unfairly prejudicial, evidence which is relevant to count 1A remained admissible even if it might also point to the defendants in fact having been guilty of count 1”. The jury would be told that they were acquitted on count 1 and they were not guilty in law of that offence. The jury would have to be directed that they had to decide whether the Crown had made them sure of guilt on count 1A and in making that decision, the earlier acquittal did not tell them anything one way or another about count 1A.

140. The direction given to the jury was in accordance with that ruling:

a. The convictions of Ali, Sarwar, Tanvir, Umar Islam and Khatib establish that there was during the relevant period a conspiracy to murder and that they were parties to it. It has been proved against each of those five men that he intended that the agreement would be carried out and that members of the public would be killed. It has further been proved against Ali, Tanvir and Sarwar that each of them also intended that the agreement would be carried out, and that members of the public would be killed, in a specific way, namely by exploding IEDs on board aircraft in flight.

b. These three defendants have been acquitted of sharing in that specific intention. That charge has been determined in their favour, and they are not guilty in law of it. They cannot be, and are not being, tried on it again. The allegation on which they

are being tried is that each of them conspired to murder, intending that the plan to murder would be carried out and that members of the public would be killed.

c. The convictions of others do not in themselves tell you anything about whether these defendants are or are not guilty of this offence.

d. The acquittals of these defendants do not in themselves tell you anything about whether they are or are not guilty of this offence.”

141. It was made clear by counsel on the appeal that they did not contend that this was a misdirection. There was nothing that the judge could have said that would have given effect to their previous acquittal; the remedy was not to embark on a re-trial.
142. This point was exemplified by Mr Bennathan QC in his submissions on behalf of Arafat Khan and by Mr McNulty in his submissions on behalf of Savant.
143. The case against Arafat Khan was based primarily on (i) evidence of regular contact with Ali and Tanvir Hussain, (ii) surveillance evidence in the period 5 July to 9 August 2006 when he was seen in the company of Ali, Tanvir Hussain and Savant, (iii) the presence of Arafat Khan's palm print on a single page of manuscript notes written by Ali on various aspects of Jihad, (iv) CCTV of a visit by Arafat Khan to John Bell & Croyden, Chemists in Wigmore Street to buy cylinders and beakers, one of which was found amongst material hidden by Sarwar in High Wycombe, (v) an application for a loan in 2006 and (vi) a martyrdom video. It was his case that he was preparing to get married, that he knew Tanvir Hussain and Ali well, that he had visited John Bell & Croyden at Ali's request to do him a favour and he had made the martyrdom video as he had been told by Ali that he wanted to make a test video for a form of publicity stunt for a campaign against the Iraq war.
144. Mr Bennathan QC submitted that as that evidence had been led against him in the second trial and his defence had been the same, it was impossible to see how a jury could re-try him, without in effect re-trying him for that of which he had been acquitted in the second trial. No direction by the judge could have prevented them doing this and convicting him on the same evidence on which he had been acquitted.
145. The Crown's case against Savant relied principally on evidence of (i) his relationship with his co-defendants, (ii) his school friendship with Ali, (iii) telephone calls between himself, Ali, Hussain, Islam and his co-defendants, (iii) meetings with Ali on 27 July 2006, (iv) a journey with Ali to 386a Forest Road, Walthamstow, (v) possession of extremist material, (vi) a martyrdom video made on the occasion of a visit to 386a Forest Road and (vii) handwritten jottings taken from the Koran. In addition and relevant to the issue raised on the appeal, there was:

- i) Evidence of a number of changes that could be seen in passport applications made by him. It was the Crown's case that these showed him changing his appearance. In previous passports he was shown as having a long beard; in the 2006 passport he was shown with a short trimmed beard and short hair. The Crown also relied on the applications to show he was the person referred to in e-mails as "half Guggie";
  - ii) Six e-mails dated between 5 and 26 July 2006 and exchanged between unknown persons in Pakistan and Ali or Sarwar which referred to "half Guggie being well up for it and having sorted his looks out". These were said unmistakably to refer to Savant as he was of mixed Indian and English parentage.
146. After the ruling on 26 April 2010 in relation to the direction on the effect of the acquittal on count 1, an application was made by Patrick Upward QC to Holroyde J on 27 April 2010 to exclude the evidence relating to his passport application and the e-mails under s.78 of the Police and Criminal Evidence Act 1984 on the grounds its prejudicial effect far outweighed its probative value. It was submitted that the Crown had relied on the evidence to prove the conspiracy alleged in count 1 and the Crown should not be allowed to rely upon the evidence in respect of the conspiracy under count 1A.
147. The judge concluded that the e-mails remained relevant and admissible on count 1A. The e-mails were acts and declarations in the course of and in furtherance of the conspiracy to murder, the existence of which had been established by other evidence; it did not matter that in the earlier trials the Crown had relied on the e-mails as showing not only participation in the conspiracy to murder, but also the specific intention charged in count 1 to carry out that conspiracy by detonating IEDs on aircraft. The Crown was entitled to point to the e-mails as evidence of the scale and preparation of the conspiracy, as these were relevant to the Crown's attempt to rebut the explanation for the recording of what were known as the martyrdom videos. He considered that the evidence in relation to the passport applications was evidence of willing participation in the conspiracy to commit murder without necessarily importing any element of a willingness to participate specifically in detonating IEDs on aircraft as well as evidence of rebuttal of the explanation of the martyrdom video.
148. It was submitted to us by Mr McNulty that the reason why such evidence should not have been admitted was that it was not possible to give the jury a direction which would enable them to distinguish its relevance to count 1 on which Savant had been acquitted and count 1A on which he stood trial.
149. Significant reliance was placed on *R v Byrne* [2002] EWCA Crim 632, [2002] 2 Cr App R 21. The defendant in that case had been acquitted of murder but convicted of manslaughter at the first trial; at that trial the victim's wife had given evidence that she had seen him stab the victim. His appeal against conviction on the first trial was allowed and a re-trial was ordered on the charge of manslaughter. The jury did not

agree. At the second re-trial the Crown's case was that the appellant was present during the attack on the victim; his participation in the manslaughter was on the basis that he knew one of his co-defendants had a knife. In the course of the trial the victim's wife gave evidence that she had seen the appellant use the knife with murderous intent on the victim. On his conviction for manslaughter this court held that the conviction should be set aside because her evidence was irrelevant to the Crown's case save to the extent that she saw the appellant at the scene of the attack. The evidence was extremely prejudicial and no direction by the judge, however strongly worded, could have undone the effect of that evidence. It was pointed out to us in the course of submissions that at the second re-trial the judge had directed the jury that the defendant had been acquitted of the murder and that the acquittal was conclusive evidence on a charge of murder.

150. In our judgement, Holroyde J was right to conclude that a direction could be given that would give effect to the previous acquittal. The appellants had been acquitted of conspiracy to murder on the basis that they had agreed to murder by detonating IEDs on transatlantic aircraft. It was inevitable that much of the evidence would have been the same, but the effect of the acquittal was that the Crown could not allege and could not call evidence to show that these appellants had been party to an agreement to detonate IEDs on transatlantic aircraft. Provided that that was done, and it is not suggested it was not done, then there was no reason why it was not possible to call the evidence relevant to the conspiracy charged in count 1A and give the jury a direction as to how to treat the acquittal on count 1.

(ix) *Arafat Khan: prejudice from the failure to disclose at the first trial e-mails relating to his intention to marry*

151. There is a separate point that applies to Arafat Khan alone. At the second trial the Crown disclosed a number of e-mails. Five of those were relied upon by Arafat Khan as supporting his case that he had not intended to be a suicide bomber and was interested in getting married. For example, an e-mail on 5 July 2006 stated:

“aro aint up for it he has not shown the wnthusism I had expected. i advise not to give him the job. i aint told him nothing by t he way I just said to him there may be a chance for him to get a promotion you ready for the responsibility. he said he is not sure cos he is o nhis way to getting merried. i said its no prob have a think about it and let me know. i did not put any pressure on him, cos there must b a desire from teh person himself to work other wise it will not work out i have learnt this from experience. half guggie is well up for it i told him he must to x y z and he has done it striaight away so he is well up for it. ask paps where exactly i should send my nigga for the rehearsal, which studio.” (Text as original)

152. At the first trial it was Arafat Khan's case that he intended to get married. He called his prospective bride, her parents and her sister to give evidence to that effect and also

called evidence from a graphic designer that wedding invitations were being printed. However, these e-mails had not been made available at the first trial.

153. A submission was made to us by Mr Bennathan QC that, although the e-mails might not have been available in a form in which they could have been served prior to February 2009, the prosecution must have been aware of them prior to that time. If they had been aware of them at the time of the first trial, then reliance was placed on paragraph 1 of the Code of Practice which states:

“If prosecutors are satisfied that a fair trial cannot take place when material which satisfies the disclosure test cannot be disclosed, and that this cannot or will not be remedied by, for example, making formal admissions, amending the charges or presenting the case in a different way so as to ensure fairness or in other ways, they must not continue with the case.”

154. We held a PII hearing in order to review the PII hearings held before Henriques J and Holroyde J and in order for us to be able to ask various questions. We are satisfied, after consideration of all the material facts, that the Crown could not have given disclosure of the e-mails, or a gist of their contents, earlier than it did. In reaching that conclusion, we have carefully evaluated the position during the trial before Calvert-Smith J. Although there was no PII hearing before him in relation to the e-mails, we have considered in detail the position as it was before him and are entirely satisfied that no obligation arose to disclose either the e-mails or a gist of their contents. In our judgement, the prosecution before Calvert-Smith J was conducted on behalf of the Crown in a manner which meant the trial was entirely fair.

(x) *Conclusion on whether a second retrial was in the interests of justice.*

155. Before turning to set out our conclusion on whether the second re-trial was in the interests of justice, we must return, as we indicated at paragraph 119, to the effect of the analysis made by Holroyde J as to the distinction between counts 1 and 1A set out at paragraphs 108 to 119 above. We do so in the light of our conclusion expressed at paragraph 52 that the offence charged in count 1 and that charged in count 1A were different offences
156. Two forceful arguments were made to us. First, in the way in which the trial proceeded before Holroyde J, the distinction between count 1 and count 1A was made on a basis which did not in fact distinguish those counts as a matter of law. Second, if the judge had taken the view (as it has been forcibly submitted he did) that the difference between the counts rested on a difference in intention which would not in law have made them different offences, the judge did not distinguish carefully enough between the two counts for him to give a correct direction in relation to the effect of the acquittal of count 1.

157. We have set out our reasons for rejecting the submission that no judge could have given a satisfactory direction at paragraphs 138-150. However, we accept that it follows from our analysis of the distinction between counts 1 and 1A that the distinction drawn by Holroyde J between counts 1 and 1A was not correct.
158. However we cannot accept that the way in which the judge put the case before the jury had the consequence that the directions that he gave did not sufficiently enable the jury to understand the effect of the acquittal on count 1. We accept that it may have been better if the judge had not used the technical phrase in respect of the effect of the acquittal “they are not guilty in law of it”, but as in *Byrne* had simply said they were innocent of that charge. However that can make no difference; it was technically correct. What matters is whether the jury understood the effect of the acquittal. In our judgement that was made very clear – they had not participated in the plan to detonate IEDs on transatlantic aircraft. Their acquittal on count 1 was explained on the basis that they did not share the specific **intention** to carry out the agreement to murder in the specific way of detonating IEDs on aircraft. In our judgement, although for the reasons we have given we do not consider that analysis correct, nonetheless the jury were told of the essential distinction. Their non participation in the plan to detonate IEDs on transatlantic aircraft was put as a matter of intention rather than agreement, but we cannot think that that distinction, important though it is in law, can have made any material difference to the factual issue before the jury and the way in which they were to treat the acquittal on count 1. The jury had to determine whether the appellants were party to a conspiracy to murder; in making that determination, the jury were told that by reason of the acquittal, they were not guilty of seeking to do so by detonating IEDs on aircraft. As long as those two matters were clear, and we believe they were, we do not consider that the way in which Holroyde J said he would direct the jury or directed the jury in any way affected the question of whether it was in the interests of justice to hold a second re-trial or the fairness of that trial.
159. In our view, Holroyde J exercised the discretion in relation to whether there could be a fair trial in accordance with the correct principles. He carefully weighed up the considerations and came to a view that was plainly open to him. We have had the advantage not open to the trial judge of standing back and looking at the arguments and the considerations together as opposed to having to consider the arguments as they were developed and ruled on at different occasions. We are satisfied that the judge not only reached a decision that was open to him, but one that was plainly correct. It is, in our view, also relevant to the interests of justice that it was at the instigation of the appellants in this case, particularly Zaman and Arafat Khan (as we have set out at paragraph 11) that the jury were asked to decide whether the appellants had agreed to being involved in detonating IEDs on transatlantic aircraft. Weighing up all the factors, despite the long period of time that the two previous trials had taken and the harsh conditions of pre-trial detention and the publicity surrounding the two verdicts, we have concluded that the interests of justice required a second re-trial.



### Issue 3: Abuse of Process

160. As we have indicated at paragraph 106 above an argument was advanced that it was an abuse of process for the third trial to have taken place. We were referred to the well known statements of principle in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42, *R v Latif* [1996] 1 WLR 104, *R v Mercer* [2001] EWCA Crim 68 and *R v Horsham Justices ex parte Reeves* (1982) 75 Cr App R 236.
161. It seems to us that although it is necessary to consider whether a third trial would, in all the circumstances, have been an abuse of process, the considerations which we have enumerated and discussed in answering the question whether it was in the interests of justice for there to be a third trial are identical. As was agreed before us, it would make no sense to conclude it was in the interests of justice to hold a third trial, but it would be an abuse of process to do so or vice versa.

### V: THE DIRECTION TO THE JURY AFTER RETIREMENT IN THE THIRD TRIAL WHEN TWO WERE DISCHARGED

162. After the jury had retired to consider their verdict in the trial before Holroyde J, two members of the jury had to be discharged. It was submitted by Mr Wood QC that a direction should have been given to the jury that they should disregard the opinions of those who had left. Mr Wood QC suggested a direction should have been given to the following effect:

“If you have already agreed with [the views of jurors who have been discharged], whether openly or not, and adopted them as your own views then they are your own and you are entitled to act upon them, subject of course to further discussion in the course of your deliberations. If, however, the views or comments of the departed jurors are ones with which you have not already agreed, then you must not give weight or consideration to them. Of course those issues may be the subject of further discussion between you 10, but the opinions of the departed jurors should not feature in any such discussions.”

163. Holroyde J declined to give such a direction. He simply told the jury that they should not discuss the case with those who had been discharged.
164. The judge's decision was entirely in accordance with *R v Carter* [2010] EWCA Crim 201, [2010] 1 WLR 1557 where Lord Judge said at paragraph 19:

“As a matter of first principle the verdict of the jury is the verdict which the members returning it conscientiously believe to be right. Before reaching their decision, they will have reflected on the arguments they have heard advanced by both,

and in a multi-handed case by all the parties at trial, and then, in the privacy of their retiring room, the opinions and views expressed by each member of the jury. This is, as counsel for the Crown, Mr Brooke, put it in his written submission, a "dynamic" process. Of course the jurors who have been discharged cannot be, and are not responsible for the eventual verdict. But until their discharge they are entitled to express their views, favourable or adverse to the prosecution or to some parts of the prosecution case, or favourable or adverse to the defendant or some part of the defence case. As the discussions proceed, the views expressed at an earlier stage may well develop and change. It is a continuing process. But while jurors are properly empanelled, the views of each and every one of them are entitled to the same careful analysis and respect as those expressed by any juror, including jurors who are later discharged. On discharge they cease to have any responsibility for the verdict, but there is no reason to imagine that the views expressed at a time when they believed that they would be responsible for the verdict were expressed any less conscientiously and responsibly than those of any other juror. Those views become part of the fabric of opinions under consideration, impossible to isolate and compartmentalise. It would therefore be wholly unrealistic for a direction to be given to the remaining members of the jury to ignore the views expressed on any subject by the departed jurors. What matters is that the discussion between the remaining jurors will continue to ebb and flow and, on reflection, the views expressed by the departing juror (or jurors) would have been examined and either accepted wholly or in part, or rejected wholly or in part, or treated as irrelevant by the remaining jurors in the course of reaching the decisions to which their conscience impels them. The eventual verdict, however, is no more than that of the jurors who have been party to it as a result of the process of discussion in the privacy of the jury room. The views expressed by the departed jurors will only be relevant to the extent that the remaining jurors will have adopted or assimilated those views as their own."

No application to certify a point of law of general public importance was made in that case.

165. Mr Wood QC submitted that *Carter* was wrongly decided. Although we were bound by it, he submitted the point was one of general public importance and we should certify the following question for the Supreme Court:

“Whether when one or more jurors are discharged after retirement but before verdict it is necessary to give the remaining jurors any direction as to how they should approach

the views expressed, during retirement, by the discharged jurors.”

166. Although we are bound, of course, to follow *Carter*, we would have come independently to our own view that the kind of direction suggested by Mr Wood QC was wholly unnecessary. If two jurors were discharged, the way in which the jury should have conducted themselves was one that was obvious and one on which the jurors needed no direction. If the views of those departed had appealed to them, the remaining jurors would have taken them into account; on the other hand if they had not, they would not. That is what happens at a meeting where decisions have to be made after a participant has left; we see no reason why jurors would not proceed in the same way.
167. We do not consider any point of law of general public importance arises which ought to be considered by the Supreme Court.

## **VI: OTHER GROUNDS**

168. Having heard argument, we do not consider that we should grant leave to appeal on the following further grounds. We therefore deal with the matters briefly.
- (1) *Islam: The e-mail evidence relied on by the Crown*
169. Part of the evidence relied on by the Crown against Islam was a series of e-mails sent between 6 June 2006 and 9 August 2006. These e-mails passed between Ali and an unknown person in Pakistan. They were written in an ordinary conversational style with references such as, “My mate is ready”, “My black mate said he is cool with a rehearsal trial run”, “Ask Paps where exactly I should send my nigga for the rehearsal, which studio”, “About the gig for ur nigga rapper mate il let u know when i call”.
170. It was the Crown’s case that in the context of the e-mail traffic, the references were references to preparations for a dummy run for the conspiracy to detonate IEDs on aircraft.
171. It was contended on the appeal that the judge should not have permitted this evidence to be used as evidence against Islam unless an expert had been called to assist the jury in interpreting the e-mails. We reject that contention as unarguable. These e-mails were not written in a code, let alone a sophisticated code such as the Enigma Code, which would have required expert interpretation. It was well within the experience of the jury, looking at these e-mails in context, to decide if the Crown had satisfied them so they were sure of the meaning advanced by the Crown.

(2) *Islam: Direction in respect of the e-mails*

172. It was submitted to Henriques J on behalf of Islam that the jury should be directed to accept the evidence given by Ali in relation to the e-mails or to reject it, but that they should not embark on their own interpretation of the e-mails. The judge rejected the submission and directed the jury that it was for them to decide on the meaning of the e-mails, but they had to be sure of that meaning before they could act on that meaning. In our view that direction was entirely correct for the reasons we have given in relation to the submission on the need of an expert.

(3) *Islam: Mala fides in relation to media publicity*

173. A submission was made to Henriques J that witness summonses should be issued to journalists so that they could be questioned about the press briefings they had received which it was suspected was designed to vilify the defendants. The judge was right to reject the submission for the reasons he gave; first there was no evidence of *mala fides* and secondly it is clear that the journalists would have refused to answer such questions.

(4) *Savant : Admission of e-mail and passport evidence*

174. It was contended that it was unfair to admit the e-mail and passport evidence; we have considered this evidence at paragraphs 145 to 150. To the extent that an additional ground of appeal was raised, we refuse leave for the reasons given.

**CONCLUSION: THE OVERALL SAFETY OF THE CONVICTIONS**

175. We have very carefully reviewed the issues, the course of the trials before Henriques J and Holroyde J and the evidence. We are satisfied that the way the trials were conducted before both judges and the issues left to the jury resulted in no unfairness and that the convictions are safe.

**VII: SENTENCE**

176. Ali and Sarwar who were convicted on count 1 do not seek leave to appeal against sentence. They were right not to do so. There could be no possible criticism of the imposition of life sentences or of the length of the minimum terms given the gravity of the offence, the culpability of the offenders and the mass murder which would have taken place if the security services and the police had not uncovered the plot. The plot to detonate IEDs on aircraft was rightly described by Henriques J as “the most grave and wicked conspiracy ever proven within this jurisdiction. The intention was to perpetrate a terrorist outrage which would stand alongside the events of September 11, 2001 in world history.”

(i) *Tanvir Hussain: convicted on count 1*

177. It was submitted by Mr Martin Huseyin on behalf of Tanvir Hussain that the minimum term of 32 years imposed on Tanvir Hussain was far too long in the light of the decision of the court in *Barot* [2007] EWCA Crim 1119, a case where Butterfield J had imposed a sentence of life imprisonment with a minimum term of 40 years. Barot was a terrorist who had pleaded guilty on a written basis of plea to the preparation of proposals for the purpose of being submitted to Al Qaeda for mass murder in both the United States and the United Kingdom. The most detailed proposal was for what was known as the “gas limos project” - a proposal for packing limousines with gas cylinders and explosives and detonating them in an underground car park. Although the plan, if executed, would have resulted in a very large number of deaths, the plan was a long way from being put into effect at the time Barot was arrested. Before this court there was evidence that the “gas limos project” was amateurish and would never have given rise to a mass cumulative explosion. It would therefore not have had the consequence which Barot had hoped for. The court in the light of that and after a review of the principles reduced the sentence to a minimum term of 30 years.
178. Mr Huseyin put forward to us a number of detailed submissions as to why the actions of Tanvir Hussain were not as serious as those of Barot; that the minimum term of 40 years should have been considered, save in quite exceptional circumstances, the maximum sentence for a terrorist who sets out to achieve mass murder but was not successful.
179. In our view Henriques J was correct in the minimum term he imposed. The judge carefully described Tanvir Hussain’s role as Ali’s right hand man, the research he had done, the way he had helped with communications and had participated in the making of martyrdom videos. The judge concluded he was not a foot soldier but belonged to the inner circle. The judge correctly reflected the relative roles of Sarwar and Tanvir Hussain in the distinction he drew between them. This was a case where the IEDs could well have exploded on transatlantic aircraft causing massive loss of life. There can in our view be no complaint about the minimum term imposed. We refuse leave to appeal.

(ii) *Islam: convicted on count 1A.*

180. It was contended that the minimum term of 22 years imposed on Islam by Henriques J on 14 September 2009 was too long. His role was no different to that of Khatib who subsequently received a minimum term of 18 years when sentenced by Calvert-Smith J on 10 December 2009 after his conviction under count 1A.
181. Henriques J accepted that Islam was a foot soldier and had taken part in a conspiracy to murder, but not a conspiracy to murder by detonating IEDs on transatlantic aircraft. He had made a martyrdom video and must have known that life would be taken.
182. In his sentencing remarks in relation to Khatib, Calvert-Smith J in December 2009 concluded that Khatib was an early recruit, much earlier than Islam who had come on

the scene much later in late July 2006 and who only made his martyrdom video on the day of his arrest on 9 August 2006. Islam's only role, as a convert who had been converted to the concept of murder as a religious act, was to carry out the destruction of a flight by carrying on board an IED, though he did not know the exact nature of his participation; he played no part in the preparation of the plot otherwise. In contrast, Khatib had spent 5 months with Ali in Pakistan in 2005; the only reason the judge could deduce for that was for him to become, as he did, Ali's lieutenant. On his return, he had set up e-mail accounts, did research into detonators and bombs for the purpose of embarking with Ali on the making of bombs; because of his arrest for a driving offence and for possession of cannabis, he was considered too much of a risk to participate actively between May and July 2006. He was then involved actively from July when he visited 386A Forest Road in Walthamstow and helped Ali and Tanvir Hussain. The judge concluded that all the mitigating and aggravating factors of his participation compared with that of Islam cancelled each other out, save for Khatib's youth; Khatib had only been 19 when he became involved whereas Islam had been 28.

183. It was submitted on Islam's behalf that there was disparity between the minimum term imposed on Khatib and that on Islam. We do not agree. We consider that Henriques J came to the correct conclusion on the minimum term to be imposed; the culpability of Islam and the harm that would have been caused were of a high order. He properly reflected Islam's participation in a different conspiracy to that in which Ali, Hussain and Sarwar had been engaged in the significantly lower minimum term imposed. There was moreover no disparity with the sentence subsequently passed by Calvert-Smith J on Khatib which properly reflected the distinction correctly expressed by Calvert-Smith J. We refuse leave to appeal

*(iii) Savant: convicted on count 1A*

184. After his conviction on count 1A Savant was sentenced, as were his co-defendants at that trial, Arafat Khan and Zaman, to life imprisonment with a minimum term of 20 years
185. Holroyde J accepted, as he did in the case of Arafat Khan and Zaman, that none of the three had played any organisational role or occupied any position of responsibility in the conspiracy to murder nor had they been involved in any communications with those in Pakistan; none had been showed to have played a part in the assembly of IEDs or to have had any specialist knowledge or experience in IEDs or to have been present inside 386A Forest Road, Walthamstow when detonators were being assembled. None had been shown to have been involved in the conspiracy any earlier than July 2006. He accepted that each was recruited by Ali whom he accepted to be a very powerful personality. He accepted the description of each as a foot soldier who those higher chose, for reasons of security, not to inform about the specific target against which each would be deployed.
186. Nonetheless he sentenced each on the basis that this was a dreadful conspiracy in which each would blow himself up and kill and maim an uncertain but potentially

large number of innocent men, women and children. It was also apparent from their suicide videos that each would not be alone, as from the language of each of those videos, it was clear that each was part of a mission involving others and which was intended to cause many deaths. This was evident from phrases such as:

“We hope to achieve a blow to your society that you will not be able to survive.” (Savant)

“I swear by Allah we will rain upon you such a terror and destruction that you will never feel peace and security. There will be floods of martyrdom operations and bombs falling through your lands.” (Khan)

“There is only one way in which to solve this crisis, the problem will not be solved by means of campaigning, big conferences or peaceful negotiations with the disbelievers. The only solution to this current situation of the Muslims is by fighting Jihad for the sake of Allah until the enemy is fully subdued and expelled from our lands.” (Zaman)

“Death and destruction will pass upon you like a tornado and you will not feel any security or peace in your lands until you stop interfering with the affairs of the Muslims completely.” (Zaman)

187. The judge was also satisfied in the case of each that the conspiracy was continuing at the dates of the arrests. The fact that there was limited activity in August 2006 was not an indication of reduced or falling enthusiasm. Each was awaiting instructions to carry out the planned mass murder.
188. Holroyde J accepted in the case of each that he was to be treated as a person of previous good character, that each had a better side and his family had suffered. What had begun as a genuine faith had been corrupted.
189. As regards Savant, Holroyde J found he was referred to as “half guggie” and that he had joined the conspiracy on about 5 July 2006, then being 25 years old. He had gone to considerable lengths to obtain a passport bearing a photograph which would be unlikely to attract close attention, having that passport available should the need arise for any reason to use it in the course of the conspiracy. He had in his possession DVDs and CDs containing recordings of a vile nature. He was an intelligent man who had commenced a university course.
190. Although it was accepted that no criticism could be made of the judge’s decision to impose a sentence of life imprisonment, it was contended that the minimum term was too long, particularly when his sentence was compared with that of Khatib; there was disparity. We do not agree. Holroyde J carefully took into account all the circumstances relating to Savant and was correct in imposing a longer minimum term than that imposed on Khatib, having regard in particular to the age differences.

Furthermore we consider that the judge was correct in his analysis of his role and the more limited nature of his involvement than that of Islam.

191. At paragraph 128 we referred to the harsh prison conditions in which Savant, Arafat Khan and Zaman had been detained pending their ultimate conviction. This was a factor the judge was entitled to take into account above and beyond the normal credit given for time on remand. Holroyde J did so, but treated it as permitting only a slight reduction. Although in our judgement greater allowance could have been made, we do not consider that the limited allowance made by the judge was such that it could be appropriate for us to interfere with the sentence.

192. For these reasons we refuse leave to appeal.

*(iv) Arafat Khan*

193. Holroyde J accepted that Arafat Khan was initially unwilling to join the conspiracy, perhaps because he was looking forward to marriage, but by 25 July 2006 the e-mails showed that he had overcome that reluctance and joined the conspiracy. The martyrdom video made it plain that once he had made up his mind he embraced the cause of mass murder wholeheartedly. He was 25 years old at the time and when he purchased the equipment to which we have referred at paragraph 143; the judge was satisfied he must have known it was intended for use for the purposes of the conspiracy; he had gone on to make two visits to the flat at 386A Forest Road, Walthamstow.

194. It was submitted on his behalf that there was a disparity in the sentence he received in comparison to that passed on Islam and that passed on Khatib. We do not agree. Holroyde J's analysis of the roles played by each cannot be faulted; the same considerations which we have set out in relation to Savant on parity apply. We refuse leave to appeal

*(v) Zaman*

195. Holroyde J accepted that the e-mail traffic showed that Zaman had joined the conspiracy by 18 July 2006, then being aged 22. His willingness to join the conspiracy was more striking because he held a position of responsibility in the university's Islamic society and had previously used that position to spread the peaceful message of Islam.

196. Although he was a foot soldier, it had been an advantage to the conspiracy as a whole to be able to record a martyrdom video in which he had expressed so forcibly the position that moderate Muslims would achieve nothing by peaceful negotiation. Although he did not have direct communication by telephone with Ali, Holroyde J was satisfied that he used Savant as an intermediary for the purpose of



communication. Although he was in his second year at university, Holroyde J rejected the submission that he was naïve or immature or more open to persuasion than others older than himself; he had said in his video that he was old enough to make his own decisions; that was right.

197. He considered that Zaman, although he had showed affirmative good character in the past, was the most intelligent of the three tried before him and that in terms of maturity of judgement there was no distinction to be drawn between any of the three.
198. It was submitted that Holroyde J had not given sufficient weight to his youth and had not appreciated his limited involvement, particularly his lack of direct contact with Ali, Sarwar or Tanvir Hussain and his lack of involvement in obtaining materials or research or planning. It was submitted that the judge was wrong, when judging Zaman's maturity at the time of the conspiracy, to have had regard to his demeanour and his answers in evidence as by that time Zaman was the same age as Savant and Arafat Khan had been at the time of the conspiracy.
199. Although we appreciate the force of the points made on his behalf by Mr Wood QC, we are not in the end persuaded that the minimum term passed was manifestly excessive. The judge was in the best position to judge his maturity, as it is commonplace that maturity is more significant than chronological age. Although we grant leave to appeal on sentence, we dismiss the appeal.

(vi) *Nabeel Hussain: convicted under s.5 of the Terrorism Act 2006*

200. As we have set out at paragraphs 24 and 25, Nabeel Hussain was convicted of engaging in conduct in preparation of terrorist acts; he was sentenced by Calvert-Smith J to 8 years, less the period of about 20 months he had spent on remand.
201. Calvert-Smith J found that he was the financier to the project, being a supporter of the commission of terrorist acts committed to influence governments and to frighten citizens; money was needed for the plot to succeed – the purchase of materials, fresh passports, airplane tickets and the re-settlement of the families of those who died after the IEDs had destroyed aircraft or to enable those such as Sarwar to hide. He set up false addresses from which monies could be obtained. His preparedness to help was prompted by a religious and/or political belief that acts of terrorism were a permissible way of influencing governments and that he knew the acts contemplated must involve the risk of death and at least the risk of the use of explosives; he knew Ali was engaged in an English plot.
202. Calvert-Smith J accepted that he was an immature young man (then aged 22), of hitherto good character and had been subject to onerous bail conditions between December 2006 and June 2008 when he was remanded into custody for breach of his bail conditions.

203. It was submitted that the sentence was manifestly excessive in the renewed application for leave to appeal. It was said that the judge should have sentenced him on the basis that he had offered support to Ali and was not a party to the full extent of Ali's plans. We were referred to the sentences passed by Henriques J on Parveez Khan, Zahar Iqbal, Mohammed Irfan and Hamid Elasmr in February 2008 for purchasing and exporting goods and sending money to insurgents in Northern Pakistan.
204. We cannot accept these submissions. The sentences passed on Parveez Khan and others (to which Calvert-Smith J and the single judge referred) were not relevant. This was a far graver case. Calvert-Smith J properly assessed Nabeel Hussain's role. The sentence of 8 years was in our judgement entirely appropriate. There is no arguable ground of appeal and we refuse this renewed application.