



Neutral Citation Number: [2019] EWCA 144 (Crim)

Case No: 2018/03088/B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM BRISTOL CROWN COURT**  
**HIS HONOUR JUDGE LAMBERT QC**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/02/2019

**Before :**

**LORD JUSTICE GROSS**  
**MR JUSTICE JAY**  
and  
**MR JUSTICE GOOSE**

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**Between :**

**Regina**  
**- and -**  
**SA and Others**

**Appellant**

**Respondent**

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**Stephen Mooney and Richard Posner** (instructed by The Crown Prosecution Service) for the  
**Appellant**

**Tom Little QC** (appointed by the Court as an *amicus curiae*)

**Graham Arnold** representing the **1<sup>st</sup> Respondent**

**Ray Tully** representing the **2<sup>nd</sup> Respondent**

**Nicholas Sefton** representing the **3<sup>rd</sup> Respondent**

**Peter Guest and Greg Unwin** (instructed by Cousins Tyrer Solicitors) representing the **4<sup>th</sup> Respondent**

**Peter Guest and Greg Unwin** (instructed by Cousins Tyrer Solicitors) representing the **5<sup>th</sup> Respondent**

**David Patience** (instructed by Bark & Co) representing the **6<sup>th</sup> Respondent**

**Kieran Galvin** (instructed by Cousins Tyrer, Solicitors) representing the **7<sup>th</sup> Respondent**

**Ray Tully** representing the **8<sup>th</sup> Respondent**

**David Patience** (instructed by J D Spicer Zeb Solicitors) representing the **9<sup>th</sup> Respondent**

Hearing date : 29 November 2018  
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**Approved Judgment**

## LORD JUSTICE GROSS :

### INTRODUCTION

1. These applications concern both the jurisdiction of this Court to entertain a Prosecution appeal against a Judge's ruling of no case to answer and the Prosecution's substantive challenge (insofar as there is jurisdiction) to that and other various terminating rulings made in these proceedings.
2. The matter arises out of an investigation into events that occurred between 2008 – 2015, beginning with a serious and apparently targeted burglary involving the stealing of high value paintings and jewellery, amongst other items. The story is conveniently divided into four distinct chapters:
  - i) The burglary count (count 1 – Defendants SA, ME and LJ);
  - ii) The transport and retention of the stolen property (count 2 – Defendants SA, MR, TL, DM, DP and IO);
  - iii) Defrauding the insurance company (“Hiscox”) (count 3 – Defendants DM, DP, IO and JR);
  - iv) The laundering of the proceeds of the fraud (count 4 – Defendants NB and AM).
3. On 6 June 2018, the Defendants, now the Respondents, appeared for trial at Bristol Crown Court, before HHJ Lambert.
4. On 18 July 2018, the Judge acceded to submissions of no case to answer on behalf of the Respondents, SA, ME and LJ, in respect of count 1, namely conspiracy to commit burglary contrary to *s.1(1) of the Criminal Law Act 1997* (“the 1997 Act”).
5. Pursuant to *s.58 of the Criminal Justice Act 2003* (“the CJA 2003”) and the *Criminal Procedure Rules* (“the Crim PR”), *r.38.2*, Prosecution counsel requested time until the next business day, to consider whether to appeal the terminating ruling on count 1.
6. On 19 July 2018, the Judge acceded to submissions of no case to answer on behalf of the Respondents, DM, DP, IO and JR, in respect of count 3, namely conspiracy to defraud contrary to common law. It is to be noted that, on the previous day (18 July), the Judge had refused a Prosecution application to amend the Particulars of count 3.
7. Further, on 19 July 2018, the Judge acceded to submissions of no case to answer on behalf of the Respondents, NB and AM, in respect of count 4, namely entering into or becoming concerned in a money laundering agreement contrary to *s.328(1) of the Proceeds of Crime Act 2002* (“POCA”).
8. For completeness, also on 19 July, the Judge allowed a submission of no case to answer in respect of count 2 on behalf of MR and IO but refused submissions on behalf of TL and DM, in respect of that count, namely conspiracy to handle stolen goods. No issue arises before us with regard to this ruling by the Judge but count 2 is not irrelevant to the case of SA, both before the Judge and before this Court.

9. Following the Rulings of no case to answer on counts 3 and 4 on 19 July 2018, Prosecution counsel requested an adjournment of one business day to consider whether to appeal. As the adjournment in respect of count 1 was about to expire imminently, Prosecution counsel requested that time be further extended until the next business day so that the decision whether to appeal in respect of all counts could be made and any necessary undertaking given at the same time. The Judge granted all these applications.
10. On 20 July 2018, the Prosecution announced the decision to appeal in respect of counts 1, 3 and 4. As is apparent, this was two days after the Judge's ruling on count 1. Subsequently, the jury were discharged.
11. The Prosecution application for leave to appeal each of the Judge's rulings (in respect of counts 1, 3 and 4) has been referred by the Registrar to the full Court.
12. In the ordinary course, reporting restrictions would apply to these proceedings, until the conclusion of any trial. However, the judgment has now been anonymised; accordingly, we lift the reporting restrictions, which would otherwise have been applicable.
13. To assist the Court with the issue of jurisdiction, following a request to the Attorney General, Mr Tom Little QC was appointed as advocate to the Court ("the *amicus*"). We are most grateful to Mr Little for both his written and oral submissions.

#### THE FACTS

14. Between 2007 and 2009, Mr and Mrs B, collectors of fine art and antiques, employed a firm of builders to carry out substantial renovations on their property in Somerset.
15. Some of the work was carried out by sub-contractors, including the Respondents LJ and ME, who worked at the property in 2007 and 2008. LJ's step-brother, one H, had also been part of the building team and had lived on site for almost 3 years.
16. On 15 March 2009, a house-sitter moved into the B's address to look after the property and care for the family dog whilst the owners were away.
17. On 20 March 2009, at about 22.00, the house-sitter was confronted by three men who covered her head, tied her up and demanded to know if there was jewellery or money in the house. They were in the property for 45 minutes before making off, leaving the house-sitter tied up until found by a friend the next day.
18. It appeared that the intruders knew the layout of the house and the fact that there were valuable items within.
19. Fifteen paintings were removed from the walls, a safe containing items of jewellery had been stolen, and one of the family's cars had been used to get away. The total value of the property stolen was some £2 million.
20. The stolen property was placed on a register so that if offered for sale through any reputable dealer, the police would be notified. It appears that, for this reason, the paintings could not be sold immediately and were stored for upwards of five years.

21. In the event, Hiscox (Mr and Mrs B's insurers) paid out a substantial sum for the stolen property and commenced an investigation alongside the police in the hope of recovering some of the valuables.
22. In 2015, Hiscox were approached about payment of a reward for the return of the paintings. JR had been engaged to handle the negotiations on behalf of "Undisclosed Parties", and DM, DP and IO were also involved. In circumstances to which we shall come, a Reward Agreement ("the Reward Agreement") was entered into between JR (acting as above) and Hiscox (represented by Clyde & Co, the well-known solicitors), dated 10 August 2015 and as varied on 11 August 2015. The paintings were finally handed over on 20 August 2015.

### THE PROSECUTION CASE AT TRIAL

23. *Count 1:* The Prosecution case was that LJ, ME, SA and others unknown were involved in a conspiracy to carry out the burglary. LJ and ME had worked at the address as builders and knew the layout of the property – also that valuable property was there. LJ and ME both came from Gloucester and, after the burglary, the B's stolen car was abandoned at Caldicot, on a route from Somerset to Gloucestershire, which avoided motorways and the risk of ANPR cameras. SA's DNA was recovered from the central part of the wire on one of the pictures eventually recovered, suggesting (according to the Prosecution) that he had come into contact with it during the burglary. Telephone contact between these Defendants and others, at sporadic intervals and on key dates, was indicative of their involvement in the burglary and their interest in realising the eventual proceeds of their crime.
24. *Count 3:* DM, DP, IO and JR were parties to an agreement to defraud Hiscox and took steps in furtherance of that agreement – albeit the Prosecution did not seek to prove that Hiscox had in fact been defrauded. In particular, the Defendants had threatened that unless payment was made urgently at least one of the paintings would be sold to a "Russian oligarch". We return, presently, to the true nature of the Prosecution case.
25. *Count 4:* NB and AM were part of a conspiracy to arrange for the reward monies to pass through NB's legitimate jewellery business in Birmingham ("L Jewelry"), knowing that this would facilitate the acquisition, retention, use or control of criminal property by DM, DP, JM and IO.

### THE JUDGE'S RULINGS

26. (1) *The Ruling on count 1:* Having regard to the principles set out in *R v Galbraith* (1981) 73 Cr App R 124 and other authorities, including, most recently, *R v Sardar* [2016] EWCA Crim 1616; [2017] 1 WLR 917 and reminding himself that he must be careful not to usurp the function of the jury, the Judge concluded that the Prosecution case consisted of no more than "fragments of suspicion and coincidences". As to the deposit of SA's DNA, it was much more likely to have occurred when moving a painting after its removal from a wall, rather than its removal from the wall in the course of a burglary. As to all three of the Defendants in question (LJ, ME, SA), matters needed to have gone beyond mere discussion and the provision of information and had to amount to joining a concluded agreement to burgle; however, evidence was "signally lacking" in that regard. There may well have been a "high state of suspicion" but the purely circumstantial evidence fell short of proving an inferential case. The Prosecution

case amounted to “conjectural theorising” and would require “an altogether too selective an approach” to the evidence for the case to be safely left to the jury in respect of any Defendant. Accordingly, the Judge allowed the submission of no case to answer on count 1.

27. (2) *The Ruling on the application to amend the indictment:* As already foreshadowed, the Judge refused a Prosecution application to amend count 3, namely conspiracy to defraud contrary to common law. As drafted the Particulars were in these terms:

“DM, DP, IO and JR between the 1<sup>st</sup> day of February 2015 and the 29<sup>th</sup> day of October 2015 conspired together to defraud JEB and Hiscox Insurance by causing the reward for the return of stolen paintings to be increased and by arranging for the said increased reward to be paid into a bank account in order to conceal its disposal.”

28. The Prosecution application was to amend the Particulars to read as follows:

“Conspired together to defraud Hiscox Insurance Ltd dishonestly by:

i) Failing to disclose to Hiscox Insurance Ltd that they were acting on behalf of those who had been directly involved in the theft through burglary of 15 paintings, or who had been directly involved in the dishonest retention of those paintings.

ii) Causing the reward payment for the return of the stolen paintings to be increased.

iii) Arranging for a bank account to be made available with L Jewellery into which the reward money would ultimately be paid, and;

iv) Having arranged for the reward money to be paid into the bank account of JR, diverted a payment into the account of L Jewellery in order to conceal the subsequent disposal of those funds.”

29. The Judge’s Ruling was wide-ranging. Its kernel was, however, shortly stated. The proposed amendment, especially proposed amendment i), “would plead...a fundamentally different case on behalf of the Crown”. The Particulars defined (and therefore limited) the agreement which the Prosecution sought to prove; the Prosecution argument, that they did no more than serve as a guide to what the Prosecution sought to prove, was rejected. The application was made weeks into the trial and the case might have been conducted differently had the amended Particulars been pleaded from the outset. Accordingly, save for permitting the addition of the word “dishonestly” (before the word “causing” in in the original Particulars) and the deletion of Mr B’s name from those Particulars (a matter of no consequence), the application to amend was refused; it could not be allowed without giving rise to injustice.

30. (3) *The Ruling on count 3:* Next, the Judge addressed the submission of no case to answer in respect of count 3. In the light of the failed application to amend, the Prosecution were of course confined to the unamended Particulars.
31. The Prosecution accepted that if JR and DM had applied for the reward money transparently, Hiscox may have paid anyway. The essential question was whether there had been an agreement “by two or more dishonestly to injure some proprietary right”. In the Judge’s view:
- “There are two different issues. Can a Jury be sure the Defendant agreed dishonestly to cause the reward for the return of stolen paintings to be increased and/or...arranged for the said increased reward to be paid into a bank account in order to conceal its disposal? Then, would this really amount to an agreement by two or more dishonestly to injure some proprietary right, after all, the insurers got what they paid for, namely, the return of the paintings, would this, as pleaded in the indictment, really amount to the prejudice of another’s economic interest? No matter how the reward monies were disgorged after that, it does not actively affect another person’s economic interest.... ”
32. The Judge “was driven” to ask himself the question whether a reasonable jury, properly directed, could conclude that this agreement would “necessarily amount to the prejudice of another person’s economic interest”. After an exploration of the nature of the offence, which the Judge plainly viewed with some distaste, he concluded that there was a need to ensure that the offence retained “some solid form by maintaining a requirement to prove objectively identifiable economic detriment in the particular circumstances of this case”. In the event, the Judge held that, whatever other offences might have been committed, a reasonable jury, properly directed, could not have convicted the Defendants on count 3, which “falls root and branch against all Defendants”.
33. (4) *The Ruling on count 4:* The Prosecution accepted that this money laundering count, concerning the Defendants NB and AM, stood or fell with count 3; if there was no conspiracy to defraud, there could be no “criminal property” to be used in the arrangement. It followed from the Judge’s Ruling on count 3 that there could be no case to answer in respect of count 4.

#### THE JURISDICTION ISSUE

34. (1) *Introduction:* The Jurisdiction issue was raised by SA, ME and LJ in connection with count 1; they questioned whether the Prosecution had complied with the requirements of s.58(4)(a)(ii) of the CJA 2003 and r.38.2 of the Crim PR. The essence of their submission was that the extension of time allowed to the Prosecution, for deciding whether to appeal in respect of count 1, fell outside the strict timetable found in the CJA 2003 and the Crim PR. That timetable, it was contended, permitted an extension of time only to the “next business day”. The Judge’s Ruling on Count 1 was given on 18 July; the “next business day” was 19 July; the grant of an adjournment until 20 July meant that the conditions precedent to a prosecution appeal had not been satisfied and, accordingly, this Court lacked jurisdiction to entertain the appeal.

35. In the event, at the hearing, following consideration by the legal representatives of SA, LJ and ME of the submissions of the *amicus* and the authority of *R v H* [2008] EWCA Crim 483, to which the *amicus* had referred, the jurisdictional challenge was not pursued. This was realistic and, as such, commendable - albeit unfortunate that the change of heart came so late in the day. We nonetheless deal fully with the issue with a view to ensuring that the same point is not raised again and to correct one possible source of misunderstanding.
36. (2) *The framework:* Insofar as material, s.58 of the CJA 2003 provides as follows:
- “General right of appeal in respect of rulings
- ....
- (4) The prosecution may not appeal in respect of the ruling unless –
- (a) following the making of the ruling, it –
- (i) informs the court that it intends to appeal, or
- (ii) requests an adjournment to consider whether to appeal, and
- (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.
- (5) If the prosecution requests an adjournment under subsection 4(a)(ii), the judge may grant such an adjournment.
- ....
- (8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.
- (9) Those conditions are –
- (a) that leave to appeal to the Court of Appeal is not obtained, and
- (b) that the appeal is abandoned before it is determined by the Court of Appeal.”
37. Part 38 of the Crim PR, in force at all material times, is in these terms:
- “Decision to appeal

38.2 (1) An appellant must tell the Crown Court judge or any decision to appeal -

(a) immediately after the ruling against which the appellant wants to appeal; or

(b) on the expiry of the time to decide whether to appeal allowed under paragraph (2).

(2) If an appellant wants time to decide whether to appeal –

(a) the appellant must ask the Crown Court judge immediately after the ruling; and

(b) the general rule is that the judge must not require the appellant to decide there and then but instead must allow until the next business day.”

38. As is by now well settled, Part 9 of the CJA 2003 (ss. 57-74) relating to “Prosecution Appeals”, amounted to a fundamental change in criminal law. In *R v Arnold* [2008] EWCA Crim 1034; [2008] 2 Cr App R 37, at [26], Hughes LJ (as he then was) explained this change:

“The Crown is given a right of appeal in relation to trial on indictment for the first time. Moreover, it is given a right of interlocutory appeal. The new right is given on strict terms....”

As Hughes LJ had already observed, at [24]:

“The criterion for the right to seek leave to appeal is the giving of the acquittal agreement as acceptance of the price of failure.”

39. The judgment of Lord Judge CJ in *R v T(N)* [2010] EWCA Crim 711; [2010] 2 Cr App R 12, at [12], made clear that this Court has no inherent jurisdiction to hear an appeal by the prosecution against a terminating ruling. Thus (at [19]):

“...The requirement that the statutory undertaking in relation to the acquittal agreement should be given, and the latest time for giving it, are pre-conditions to this particular appeal process...”

40. The scheme of the legislation and the Crim PR highlights that there is “no room whatsoever for temporising” and the “plain need for urgency”: *R v Mian* [2012] EWCA Crim 792; [2012] 2 Cr App R 9, at [28], *per* Rix LJ. “Immediately” under the Crim PR here means “there and then and in any event before anything important has happened” (*ibid*). As expressed by Sir Brian Leveson P, in *R v C, D* [2017] EWCA Crim 2257, at [24] – [25], what is “critical” is the sequencing of events:

“24. ....and in particular that before the judge embarks on any consideration of the merits of an application for leave to appeal, the undertaking has been given so as to provide him with jurisdiction to consider whether to grant leave to appeal and this court jurisdiction to grant leave to appeal if he declines to do so.



25. It does not have to be in the same speech but it does have to be at the same time. In other words, the undertaking must be given at the time when the court is being asked to embark upon the exercise of this jurisdiction... ”

41. There was no issue before us as to these strict terms and conditions precedent which needed to be followed and fulfilled so that there was jurisdiction for the Prosecution appeal on count 1 to be entertained. The only issue (prior to its abandonment at the hearing) was whether the *duration of the adjournment* constituted a condition precedent. Narrowed still further and as already foreshadowed, the issue was whether in some manner there was a jurisdictional requirement that the Judge was precluded from granting an adjournment extending beyond the next business day.
42. (3) *The CJA 2003*: It is plain that nothing in the wording of the statute lends any support whatever to the erstwhile jurisdictional challenge. S.58 of the CJA 2003 says nothing at all about the length of adjournment which may be granted.
43. (4) *The Crim PR – literal interpretation*: Having regard to the version of the Crim PR in force at all material times, no proper basis appears for the contention of a limitation to the permissible duration of an adjournment which may be granted, let alone a jurisdictional limitation. R.38.2(2)(b) speaks of “the general rule” being an adjournment “until the next business day”. Putting all questions of context to one side, a “general rule” does not mean an invariable rule. The language is clearcut; elaboration is unnecessary.
44. (5) *The Crim PR – purposive interpretation*: A purposive interpretation of the Crim PR leads to the same conclusion: the duration of the adjournment granted by a Judge does not constitute a jurisdictional condition precedent for entertaining prosecution appeals. In this regard, we are indebted to the *amicus* for his researches into the history and evolution of the Crim PR.
45. The Crim PR first came into force on the same day as s.58 of the CJA 2003, namely 4 April 2005. The relevant rules were originally contained in Part 66 of the *Crim PR 2005*. In the case of a ruling of no case to answer, rr. 66.2(1) and (2) provided that an application by the prosecution for an adjournment “must be made...immediately following” the making of such a ruling. R.66.2(3) provided that the request for an adjournment was to be granted unless it was in the interests of justice for the prosecutor to indicate immediately whether or not he intended to seek leave to appeal. Importantly for present purposes, r.66.2(4) was in these terms:

“The adjournment shall be until the next business day after the day on which the ruling was given, unless the interests of justice require a longer adjournment.”
46. Plainly, therefore, under this version of the Crim PR, the Court had jurisdiction to grant an adjournment extending beyond the “next business day”. As the *amicus* contended, the original intention in the Crim PR was that the Court had power to grant an adjournment of a length consistent with the interests of justice.
47. Part 67 of the *Criminal Procedure (Amendment No.2) Rules 2007*, substituted a new set of rules for Part 66 of the 2005 Crim PR. R.38.2(2)(b) of the current rules (set out

above) is in identical terms to r.67.2(2)(b) of the 2007 rules, which no longer contained the “interests of justice” wording. It is, however, clear that the change of wording was not intended to undermine the “interests of justice” test as to the length of adjournment to be granted.

48. The 2007 amendments were the result of a request from the then Registrar for Criminal Appeals to the Criminal Procedure Rule Committee, to undertake a revision and simplification of the rules about appeals to the Court of Appeal Criminal Division. The Criminal Procedure Rule Committee invited comments from interested parties and its Secretariat produced a Note (dated 3 April 2007) on the draft new rules. With regard to Part 67, the Note was unequivocal:

“16. Explicit references in the existing rules to a requirement to observe ‘the interests of justice’ have been rendered superfluous by rule 1.3 (the application by the court of the overriding objective) and thus are omitted.”

49. The submission of the *amicus* was expressed in these terms:

“it follows that the removal of an ‘interests of justice’ test did not represent a significant change. Its retention was unnecessary because the rules themselves required the Court to apply the overriding objective when considering an application to adjourn. In addition, it should be noted that there is no suggestion in the Note that the ability to grant a longer adjournment than one business day would no longer be available.”

We accept this submission.

50. While there is a plain and undiminished need for urgency in and concerning the launching of a prosecution appeal under Part 9 of the CJA 2003, as a practical matter there can be no doubting the wisdom of permitting a Judge to grant an adjournment extending beyond the “next business day”, when the interests of justice so require. Some such extension may well be necessary in cases where, for example, it is appropriate or necessary to consult the Attorney General or DPP in connection with any prosecution appeal, or in cases where Public Interest Immunity is involved. It must be unlikely that Parliament or the Rules Committee intended to prohibit such flexibility. By the same token, Judges faced with a prosecution application to adjourn and having regard to the context are most unlikely to permit drift or temporising; but that is a matter going to the exercise rather than the existence of the jurisdiction. In the present case, it may be noted, the Respondents have (if we may say so, realistically) not pressed any challenge to the Judge’s exercise of his power to extend time for all the Prosecution decisions as to pursuing an appeal to be considered together.
51. Before leaving the Crim PR, we add this. The *amicus* questioned the *vires* of any rules, had they introduced a jurisdictional time limit, not contained in the statute. Given the view we take of the Crim PR, it is unnecessary to take time over this further consideration, other than to record that the point was raised.
52. (6) *Authority*: For the reasons already given, the answer to the Jurisdiction issue seems clear. Were there any residual doubts (which we do not entertain), they are dispelled

by *R v H (supra)*. Giving the judgment of this Court, Davis J (as he then was) dealt with the very issue which the Respondents sought to raise here. He said this:

“10. The argument of Mr McGuire, on behalf of the respondent, is quite simply that under the new rule, and by reason of the words ‘but instead must allow until the next business day’ the court has no power to grant any greater extension of time. The court is required, it is submitted, if the court decides not to require the appellant to decide there and then, to allow the prosecution only until the next business day to make its decision. Accordingly...the purported adjournment of seven days to enable that decision to be made was invalid and the subsequent appeal was a nullity.

11. We are in no doubt that that argument is incorrect. First, the primary legislation (section 58 of the 2003 Act) imposes no set time limits. Second, so far as the subordinate legislation is concerned (...Rule 67.2) it is, in our view, incorrect to read rule 67.2(2)(b) as only and mandatorily permitting the would-be appellant until the next business day to decide. On the contrary, that sub-rule is prefaced, and significantly so...by the words ‘the general rule is...’. General rules connote by their very nature exceptions. That is what the drafting here clearly contemplates. It is further to be noted that the words ‘the general rule’ embrace the entirety of the subsequent words set out in 67.2(b). Third, and for good measure, it is very difficult to see why the rules should mandate so rigid and inflexible approach as advanced by Mr McGuire and there is good practical reason why it should not. It remains the case that the general approach is to ask whether it is the purpose of the legislation than an act done in breach of the relevant provision should be invalid (see *R v Soneji* [2006] 1 AC 340, *R v Clark & Day* [2008] UKHL 8). One can readily and easily think of very good reasons why that should not be intended here. Indeed, that it was not so intended is borne out by the very wording of the sub-rule. Such an interpretation manifestly accords with the overriding objective, as set out in Rule 1.1 of the Criminal Procedure Rules, and the principles of interpretation by reference to the overriding objectives set out in Rule 1.3 of the Criminal Procedure Rules.

12. Mr McGuire objected that that would mean that a judge would be left with an unfettered discretion as to how long an adjournment was granted and that...would subvert the scheme of Rule 67.2. But the practical reality is that judges well appreciate, both from the wording of the rule itself and from the general context of prosecution appeals, that there has to be a real justification for an extension of time at all and that expedition is always requisite....Accordingly, neither on a literal nor on a purposive interpretation of Rule 67.2 is the objection to jurisdiction well founded....”

53. *R v H* is most probably binding on us. In any event, we agree entirely with the reasoning of Davis J and, as already shown, would have approached the matter in the same way ourselves, had it been free from authority.
54. (7) *For completeness*: Two matters need to be mentioned under this heading. First, *Blackstone's Criminal Practice 2019*, continues to include the following passage at D16.77 (and found in earlier editions):
- “The court must grant an adjournment (s58(5)), which will be until the next business day (r.38.2(2)). The provision for a longer adjournment where the interests of justice so required no longer applies.”
55. It follows, with respect, from all we have said that this passage is erroneous. It is apt to mislead and may have done so here. We trust that this concern will be addressed in future editions.
56. Secondly, s. 58(4) and (5) refers to “an adjournment”. In the event it might be said that this wording tells against more than one adjournment and that there was more than one adjournment here (admittedly not a point raised by the Respondents), we address this question shortly. To begin with, we are minded to view the adjournment from 18 to 19 July and its extension to 20 July as comprising a single adjournment. If need be, however, we would have recourse to s.6(c) of the *Interpretation Act 1978* (“the Interpretation Act”), which provides, *inter alia*, that “unless the contrary appears....words in the singular include the plural”. In agreement with the *amicus* we readily conclude that far clearer wording would have been required for “the contrary” to appear. Accordingly, *if* there was more than one adjournment here, then s.6(c) of the Interpretation Act applies so that the singular includes the plural and the matter nonetheless came within s.58(4) and (5) of the CJA 2003.
57. (8) *Overall conclusion on the Jurisdiction issue*: For the reasons given, we dismiss the Jurisdiction appeal hitherto advanced in respect of count 1 on behalf of SA, ME and LJ. We turn to the substance of the Prosecution appeals.

#### THE PROSECUTION APPLICATION ON COUNT 1

58. (1) *The rival cases*: In brief outline, Mr Posner (who argued this aspect of the appeal for the Prosecution) submitted that the Judge properly identified the correct test but had then mis-applied it. As to SA, the Prosecution relied on the DNA evidence already mentioned. Furthermore, he had been in *limited* telephone contact with LJ and ME around the time of the key dates in 2015, when the question of a reward arose – thus realising the proceeds of the burglary (as the Prosecution put it). The very fact that the telephone contact was limited, demonstrated its suspicious nature. The same limited telephone contact was relied upon against ME, who also had TL – one of the alleged co-conspirators on count 2 – amongst his telephone contacts. As to LJ, his telephone had travelled to the area of the country where SA lived in June 2015. The three Respondents on count 1 may or may not have been the actual burglars; it was not the Prosecution case that only these three were responsible for the burglary.
59. The Prosecution application was opposed by each of the Respondents to count 1. Insofar as necessary, we extend time for all the Respondents' Notices.

60. For SA, Mr Arnold submitted that the Judge had been right to characterise the 2015 evidence as no more than fragmentary. The Prosecution point as to so-called key dates in 2015 involved “theorising”. With regard to the DNA evidence (such as it was), it was at least equally consistent with SA’s involvement in count 2 (handling) as contrasted with count 1 (burglary).
61. For ME, Mr Tully maintained that there was no evidence of contact between him and TL; it was a fact – but no more than that – that TL was amongst the contacts on ME’s phone. It was not surprising that some of the Respondents knew one another. In any event, the significance of this strand of evidence depended on the Prosecution making good its case against TL. The contact between SA and ME related to dealing in cars; not all the contacts between the two fitted with the Prosecution hypothesis. The Prosecution’s emphasis on “limited” telephone contact involved “making a virtue of lack of evidence”. It needed to be set against the other evidence including, as helpfully summarised by Mr Tully: lack of forensic links to the scene; lack of forensic links to the stolen vehicle; lack of forensic links to the recovered art work; absence of inside information as at March 2009; the existence of others with inside information at that time; existence of an alternative reason (above) for communication with SA.
62. For LJ, Mr Sefton highlighted the “gap” between 2009-2015. The evidence was simply not there to link LJ to the actual burglary. As to knowledge of the B’s property, he had been working outside not inside. However the Prosecution now sought to put their case, at trial they had argued that “ME and LJ had descended upon the property”. As to the 2015 communications, these related to business in cars.
63. (2) *The test*: The test in *Galbraith* is too well-known to require citation here. Most recently, this Court, in *Sardar*, reviewed its application to cases involving circumstantial evidence together with the relevant authorities in this regard. The “traditional question” (Elias LJ in *R v Darnley* [2012] EWCA Crim 1148, at [21], cited in *Sardar*, at [18]) was “whether there was evidence on which a jury, properly directed, could infer guilt”. The focus was on what a reasonable jury could do. If the judge was satisfied “that even on the view of the facts most favourable to the prosecution no reasonable jury could convict, then the case should be dropped” (*ibid*).
64. For the purposes of this Court on applications such as the present, there is an additional consideration. S.67 of the CJA 2003 provides as follows:
- “The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied –
- (a) that the ruling was wrong in law,
- (b) that the ruling involved an error of law or principle, or
- (c) that the ruling was a ruling that it was not reasonable for the judge to have made.”

In short, merely because this Court might have formed a different view from that taken by the Judge, would not suffice for such an appeal to be allowed. This Court must be satisfied that the Judge’s ruling comes within one or more of sub-sections (a) – (c).

65. (3) *Discussion:* We can state our conclusions on this Prosecution application almost summarily. So far as concerns SA, the Prosecution reliance on the DNA evidence goes nowhere; it is wholly equivocal and, if anything, significantly more consistent with count 2 (handling) - where, on the material before us the Prosecution has a far stronger case against SA – than providing a proper foundation for the Prosecution case on count 1, conspiracy to burgle. So far as the telephone and other 2015 evidence was concerned, it was in our judgment too fragmentary and speculative to be left to the jury. Overall, the Prosecution against all three Respondents on count 1 is unacceptably tenuous; we agree with the Judge’s Ruling, allowing the submissions of no case to answer on this count. In any event, the Prosecution case came nowhere near satisfying the requirements of s.67 CJA 2003. For all these reasons, we refuse the Prosecution leave to appeal in respect of the Judge’s Ruling on count 1.

#### THE PROSECUTION APPLICATION ON COUNTS 3 AND 4

66. (1) *The rival cases:* For the Prosecution, Mr Mooney struggled with the constraints necessarily flowing from the Judge’s refusal of the Prosecution application to amend the indictment – and which confined the Prosecution case on count 3 to a conspiracy dishonestly to cause the *increase* of the reward by threatening that one of the paintings would be sold were the money not promptly paid and for the money to be paid into the account of L Jewelry so as to conceal its disposal. Nonetheless, Mr Mooney submitted that this case was sufficient to be left to the jury and the Judge had been in error in withdrawing it from them. Detriment to Hiscox was irrelevant. The Ruling was not easy to follow because it was difficult to distinguish between the Judge’s distaste for the offence of conspiracy to defraud and his reasoning on the facts.
67. For the Respondents, DM, DP, IO and JR, the submissions of counsel, Mr Guest, Mr Patience and Mr Galvin proceeded broadly as follows. The need for “detriment” had been conceded in terms by the Crown below. There was nothing unusual about the negotiation process, culminating in the agreed reward of £175,000 – as reflected in the Reward Agreement - and the return of the works of art in question. In this regard, Hiscox had obtained reassurance from the police. There was, in any event, no or insufficient evidence on which any reasonable jury, properly directed, could conclude that the “threat” as to the sale of one of the paintings if the reward was not paid promptly amounted to anything more than a mere “puff”; accordingly, the alleged conspiracy did not involve an agreement to injure any proprietary right. It was to be underlined that the Prosecution had not charged fraud by false representation and leave to amend to do so had been refused. Furthermore, there was nothing in the point as to the designation of the L Jewellery account as the destination of the reward moneys – which was itself the subject of the variation to the Reward Agreement. Finally, as to IO, there was no evidence that IO was involved in any agreement to cause the reward moneys to be increased. As to all the Respondents in question, there was no basis for this Court to intervene pursuant to s.67 of the CJA 2003 (set out above).
68. (2) *Conspiracy to defraud:* For present purposes, it suffices to highlight a very few salient features of this offence.
69. First, *the nature of the offence.* As set out in *Blackstone* (2019), at para. A5.64, the “conspiracy must incorporate some unlawfulness, either in its object or means. An agreement to achieve a lawful object by lawful means cannot amount to a conspiracy to defraud, however dishonourable or unscrupulous the object or means might be”. A

conspiracy to defraud, to achieve an unlawful object, was defined by Viscount Dilhorne in *Scott v Metropolitan Police Commissioner* [1975] AC 819, at p.840, in these terms:

“...it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.”

Lord Diplock, at p.841, expressed it this way:

“Where the intended victim of a ‘conspiracy to defraud’ is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.”

The emphasis, it may be seen, is on an agreement on the part of the conspirators dishonestly to deprive the victim of some proprietary right. Such an agreement need not involve fraudulent misrepresentation; it follows that if fraudulent misrepresentation is to be relied upon, it would need to be specifically pleaded.

70. As will be apparent, the offence is of considerable width or “exceptionally broad”. However, as observed by Hickinbottom J (as he then was) in *R v Evans (Eric) and others* [2014] 1 WLR 2817, at [35]:

“...that is not the same thing as an offence without boundaries. It is not literally a ‘catch-all’. Indeed, the common law has imposed firm limits on the conceptually wide offence; and...the courts have repeatedly stressed that the criminalisation of conduct which has not in the past been found by the common law to be criminal is a matter for Parliament and not them.”

71. Secondly, *the agreement*. As with any conspiracy, its essence is agreement – so that “...repentance, lack of opportunity and failure are all immaterial”: *Archbold* (2019), at para. 33-5. In short, a conspiracy to defraud remains such even if the intended victim is not in fact defrauded and no detriment is suffered.

72. Thirdly, *the indictment and particularity*: An indictment for conspiracy to defraud “should not lack particularity and should enable the defence and the judge to know precisely the nature of the prosecution’s case”: *Blackstone*, at para. A5.66. This “...prevents the prosecution from shifting their ground during the trial, unless they obtain leave of the judge and amend the indictment itself”: *ibid*. In *R v K* [2004] EWCA Crim 2685; [2005] 1 Cr App R 25, at [36], Thomas LJ (as he then was) said this:

“...the indictment should identify the agreement alleged with the specificity necessary in the circumstances of each case; if the

agreement alleged is complex, then details of that may be needed and those details will as in *Bennett* form part of what must be proved. If this course is followed, it should then be clear what the prosecution must prove and the matters on which the jury must be unanimous...Further particulars should be given where it is necessary for the defendants to have further general information as to the nature of the charge.....Such further particulars form no part of the ingredients of the offence and on these the jury do not have to be unanimous.”

In *Bennett* (Thursday 6<sup>th</sup> May 1999), Henry LJ had observed, “...the indictment must define the conspiracy....”.

73. (3) *Discussion: (A) The Ruling on the application to amend the indictment:* As already observed, the Judge ruled that the Particulars defined the agreement upon which the count of conspiracy to defraud rested; accordingly, the Prosecution could not shift their ground during the trial without the leave of the Judge – which he refused.
74. The Prosecution could have sought to appeal the Judge’s Ruling, refusing leave to amend the indictment. S.58(7) of the CJA 2003 provides as follows:
- “Where –
- (a) the ruling is a ruling that there is no case to answer, and
- (b) the prosecution, as the same time that it informs the court in accordance with subsection (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal, that other ruling, or those other rulings, are also to be treated as the subject of the appeal.”
75. The Prosecution, however, took no steps in accordance with s.58(7)(b) to “nominate” this Ruling as the subject of their appeal. Necessarily, therefore, the Judge’s Ruling, refusing leave to amend, stands and limits the case open to the Prosecution on their application to this Court. His decision that the unamended Particulars defined the conspiracy is now unappealable. It follows that the Prosecution are not entitled to advance any case of fraudulent misrepresentation, including the allegation (whether of misrepresentation or non-disclosure) contained in para. i) of the proposed amended Particulars (set out above). It follows further from the very limited nature of the conspiracy alleged in the unamended Particulars, that no case could be advanced before this Court to the effect that no reward at all would have been payable but for the misrepresentation or non-disclosure complained of in para. i) of the proposed amended Particulars. As pleaded, the alleged conspiracy is confined to causing the reward to be *increased* and concealing the disposal of the reward thus increased.
76. (B) *An element of confusion:* We pause here, to clear the decks. With respect to the Judge, there was some force in Mr Mooney’s complaint that the Judge’s emphasis on his distaste for the offence of conspiracy to defraud, rendered his Ruling on count 3 considerably more difficult to follow than it might have been. Moreover, as it seems to



us, the Judge – at times in this Ruling – appeared to be distracted by the need to prove “detriment”. As already underlined, this being a charge of *conspiracy*, it was not necessary to prove that “objectively identifiable economic detriment” had actually occurred. To reiterate, the essence of the matter was the agreement between the Respondents not the factual outcome of that agreement. To such extent, Mr Mooney’s submissions before us made headway; but that headway was of a most limited nature. Overall, we have no real doubt that the Judge appreciated the need to focus on the *agreement*, albeit his reasoning (with respect) resulted in unnecessary complication.

77. *(C) Increasing the amount of the reward:* In our judgment, *given the case to which the Prosecution were confined*, the evidence here was one-way and overwhelmingly favoured the Respondents. Assuming in the Prosecution’s favour that the reward was indeed *increased* from some lower figure which might have been paid, the increase was achieved by a process of negotiation which was unremarkable – let alone disclosing a conspiracy to defraud, as defined above. The evidence quite simply does not disclose an agreement capable of coming within the definition of the offence. In the negotiations with JR (acting on behalf of “Undisclosed Parties”), Hiscox were represented (and protected) by Mr E, an art recovery investigator retained on their behalf – a former Detective Sergeant in the Metropolitan Police Art & Antiquities Unit – and Mr P, a Fine Arts claims underwriter and Hiscox Employee. Another art recovery expert, Mr H, played an advisory role in the reward process and was in contact with both sides. For his part, Mr H had previously worked together with Mr E in the same unit of the Metropolitan Police, where he held the rank of Detective Chief Inspector. Subject to the one concern to which we next come, the evidence of Mr E was clear: the negotiation process followed a “well-defined road” with “nothing untoward”.
78. The sole concern – and the alleged deception on which the Prosecution case came to rest - related to a “threat” relayed via Mr H to Mr E on 11 July 2015 that unless agreement on the reward was reached in the next couple of days, one of the works of art in question, a painting, *AB*, would be sold to a “Russian oligarch”. This was undoubtedly sensitive territory, in particular given what can be a very thin line between a *ransom* and a *reward*. The upshot was the convening of a meeting on 17 July 2015, attended by Mr E, Mr P, senior officers from Avon and Somerset Police and representatives from the National Crime Agency. The conclusion of the meeting was that no offences had been committed and that the “threat” concerning *AB* had not converted the process into a ransom demand. Thus satisfied that it was safe and not illegal to do so, Mr E was content to continue the negotiations.
79. In his evidence, when cross-examined by Mr Galvin, Mr H dealt trenchantly with the reality of the “threat” as to *AB*:

“ Mr Galvin: ...what did you make of the fact that the...collection of the paintings might have been...broken up for individual sales?

Mr H: ....at the time, I thought....it was a load of bollocks, however, it could be true and if it were true, were to be true, then we had to do something.

His Honour Judge Lambert: I’d rather you used the expression, fundamentally improbable....

Mr H: OK, so I thought it was fundamentally improbable that I was being told the truth about the painting, AB.

Mr Galvin: And for what reason?

Mr H: Experience, reason from experience.

Mr Galvin: i.e., that people don't break up these collections?

Mr H: Well and they spin you a tale, you know, there's a Russian oligarch wants to buy one of them because it reminds him of his daughter, you know all that."

80. Against this background, no reasonable jury, properly directed, would have been entitled to convict the Respondents on the charge of conspiracy to defraud arising from an increase in the reward, on the Prosecution case taken at its highest. Overall, a well-recognised negotiation process had been followed, culminating in a written agreement (the Reward Agreement) where Hiscox had been represented by vastly experienced commercial solicitors. The single "blip" but crucial to the Prosecution case, related to AB. However, that blip led to the meeting with the police and the reassurance as to lawfulness then conveyed; it resulted in no more than a short delay to the negotiations. The true nature of that "threat" emerges with conspicuous clarity from the evidence of Mr H (set out above). Properly described, it was no more than a "mere puff" in the negotiations. Conscious as the Judge and we must be not to usurp the role of the jury, there was, realistically, nothing to cast doubt on this view of the evidence.
81. In the light of our conclusion, it is unnecessary to express any view on the question of whether IO had a distinct and unanswerable defence to this count - and we do not do so.
82. *(D) The account into which the reward moneys were paid:* All that remains is the variation to the Reward Agreement providing that the reward moneys were to be paid into the L Jewellery account rather than the JR bank account. With respect to the Prosecution, there is nothing in this point and on no view does it provide a foundation upon which a reasonable jury, properly directed, could have convicted the Respondents on count 3. Adapting the Judge's words, this aspect of the matter concerned the "disgorging" of the money after payment pursuant to the Reward Agreement. We are quite unable to see how this could properly be said to support, still less, found the Prosecution case on count 3; in any event, the account had been identified and was specifically designated in the written variation to the Reward Agreement. Had Hiscox entertained concerns about the account, they need not have agreed the variation. For completeness in this particular regard, it may be noted that no money laundering charges were brought against the Respondents to count 3.
83. *(E) Conclusion on count 3:* We remind ourselves of the terms of s.67 CJA 2003, set out above. For the reasons given, we conclude in respect of count 3 as well, that the Prosecution came nowhere near satisfying the requirements of that section. It will be appreciated that s.67 is concerned with the *ruling* of the Judge, not his precise *reasons*. We accordingly refuse the Prosecution leave to appeal in respect of the Judge's Ruling on count 3.

84. We add only this. As to count 3, we have reached our decision with a tinge of regret. No case of fraudulent misrepresentation or non-disclosure, along the lines of para. i) of the proposed amended Particulars, was timeously pleaded and, in the event, could not be pursued. We cannot say what the fate of the Prosecution case might have been had it rested on an allegation of that nature, coupled with a particular focus on Recital (E) and cll. 3.1 (a) and (b) of the Reward Agreement. As it is, nothing in this judgment contains any expression of view as to contractual questions, if any, arising under or out of the Reward Agreement.
85. *(F) Count 4:* We record that, as was common ground, count 4 stood or fell with count 3. In the light of our conclusion on count 3, it follows that there was no case to answer under count 4. Leave to appeal must therefore be refused in respect of the Judge's Ruling on count 4.

#### OVERALL CONCLUSION AND CONSEQUENTIAL MATTERS

86. Pulling the threads together and for the reasons given:
- i) We are satisfied that this Court has jurisdiction to entertain a Prosecution appeal on count 1;
  - ii) On the merits, we refuse the Prosecution applications for leave to appeal in respect of the Judge's Rulings on counts 1, 3 and 4.
87. Pursuant to s.61(3), CJA 2003, we order that the Respondents in relation to counts 1, 3 and 4 be acquitted of the offences in question.