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IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 201903239 B3

Royal Courts of Justice

Thursday, 3 December 2020

Before:

LORD JUSTICE STUART-SMITH

MR JUSTICE EDIS

HIS HONOUR JUDGE BURBIDGE QC RECORDER OF WORCESTER

REGINA

V

MUSTAFA KEMAL MUSTAFA

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MR J. MANNING appeared on behalf of the First Appellant.

MR R. GREEN and MR M. LEWIN appeared on behalf of the Respondent.

**J U D G M E N T**

LORD JUSTICE STUART-SMITH:

- 1 On 2 August 2019 in the Crown Court at Woolwich the appellant was convicted of an offence of failing to comply with an Enforcement Notice contrary to s.179 of the Town and Country Planning Act 1990. Upon that conviction, he was fined £5,000 and ordered to pay £10,000 towards the costs of the prosecution, together with the victim surcharge of £170. There were two co-accused, the Kulars, who we mention briefly as their involvement was severed and they have been separately tried. One was fined £3,000 and ordered to contribute £10,000 towards the costs of the prosecution and the other was fined £1,000. We need say no more about them at this stage.
- 2 The appellant now appeals against his conviction and sentence with the permission of the single judge. In his written advice and before us today, Mr Manning, who represented the appellant at trial, submits that the applicant's conviction is unsafe because the conduct of the trial judge amounted to unfair judicial treatment and undermined the fairness of the trial. For the Crown, Mr Green appears today and appeared before the court below. We are grateful to both counsel for their submissions.

**Applicable Principles**

- 3 It is convenient first to deal with the applicable principles. In *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852 the Court of Appeal said at para.108 to para.110 under the heading "The principle of fairness":

"108. It is a fundamental tenet of the administration of law that all those who appear before our courts are treated fairly and that judges act - and are seen to act - fairly and impartially throughout a trial.

109. It is perfectly proper - indeed a duty - for a judge to intervene in the course of witness evidence for the purposes described by Rose LJ in *R v Tuegel* [2002] Cr App R 361, namely 'to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear'.

110. It is wrong, however, for a judge 'to descend into the arena and give the impression of acting as advocate' (per Lord Parker CJ in *R v Hamilton* (unreported, 9 June 1969) cited by the Court of Appeal in *R v Hulusi* (1973) 58 Cr. App. R 378, 382)."

4 The decision of the Court of Appeal that there had not been a fair trial in that case was upheld by the Supreme Court [2020] UKSC 23. There is no need for further citation of the principle from the Supreme Court's decision.

5 The importance of the judge staying out of the arena was emphasised by another constitution of this court in *R v Gavin Inns and Emma Inns* [2018] EWCA Crim 1081 at para.35 to para. 38 where Singh LJ said:

"35. Thirdly, there is nothing wrong in principle with a trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in an immediate response to an answer that has just been given by a witness. Otherwise, it may often be preferable for the judge to wait until the end of the evidence given by that witness, or at least the end of the evidence-in-chief. Often things that are not clear may become clearer once the evidence-in-chief has been completed.

36. Fourthly, since ours is an adversarial system it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.

37. Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that he or she would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there is a risk that a defendant will not be able to give his or her account fully and in the manner they would wish to put before the jury.

38. Sixthly, this is not affected by the fact that the defence account may appear to be implausible or even fanciful. If it is truly incredible, the prosecution can reasonably be expected to expose its deficiencies in cross-examination and the jury will see through it. If anything, unwarranted interventions by a judge may simply prove to be counterproductive."

6 The point was succinctly but imperatively made by the Privy Council in *Michel v R* [2009] UKPC 41 at para.31:

"The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials."

7 The prosecution in responding to this appeal has provided a convenient working summary of the principles to be drawn from *Serafin*, *Inns* and *Michel* as follows:

1. The tribunal of fact is the jury.
2. The role of the judge is to act as a neutral umpire ensuring a fair trial between the prosecution and the defence. The judge should not enter the arena so as to appear to be taking sides.
3. There is nothing wrong in principle with the trial judge asking questions of witnesses in order to assist the jury. That is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in an immediate response to an answer that has just been given by a witness. Interventions to clear up ambiguities, to identify the nature of the defence, if this is unclear, and to enable the judge to make certain that he is making accurate notes are justified.
4. Interventions which lead to a quashing of a conviction are:
  - (a) those which invite the jury to disbelieve the evidence for the defence, which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury.
  - (b) those which have made it really impossible for counsel for the defence to do his or her duty in properly representing the defence.
  - (c) those which have had the effect of preventing the defendant himself from doing himself justice and telling the story in his own way.
  - (d) those which compel the conclusion that the defendant has not been fairly tried by an impartial judge.
5. Not every departure from good practice renders a trial unfair. There will come a point, however, where the departure from good practice is so great or so persistent or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.
6. Ultimately, the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.
7. It is the overall fairness of a trial, taken as a whole, that is crucial."

8 We endorse that summary and adopt the principles set out in the authorities that underlie it. In particular, it is necessary to bear in mind that a trial may have to be condemned as unfair and a conviction quashed as unsafe, however strong the grounds for believing the defendant to be guilty. In every case the ultimate question is whether a conviction is unsafe because of defects in the process. In approaching that question, the court should always be astute to distinguish between questions that are merely intended to clarify ambiguities or to enable a judge to take an accurate note and those which constitute entering unfairly into the arena. There may of course be occasions where the former runs the risk of morphing into the latter. That is a risk that must be avoided at all costs if the trial is to be seen to be fair. In saying this, we recognise that the move towards greater case management and proactive involvement of the judge in the trial process may mean that some of the older statements of principle have to be seen in the light of an altered landscape. What remains unchanged is that the touchstone is fairness.

### **The Facts**

9 With these principles in mind, we turn to the facts. On 14 December 2016 Sevenoaks District Council issued an Enforcement Notice in respect of a two-storey property on land adjoining the former Convent of Mercy, Sycamore Drive, Swanley. The Notice took effect from 20 January 2017 and the time for compliance was six months expiring on 20 July 2017. The appellant was said to be in control of the land at the time and thus in breach of the Notice by allowing its use as a hostel from 21 July 2017, when that time expired, through to 11 May 2018 when a Closure Order was obtained.

10 On 23 September 2013 Cameo Real Estate, a company owned and controlled by Mr and Mrs Kular, to whom we have briefly referred, leased the property to Housing Care Association Ltd. ("HCA") as the tenant, with the appellant as a guarantor. HCA was a company limited by guarantee. The appellant was a director of HCA. He was registered as the sole director with Companies House from 27 March 2013 until he resigned his

directorship on 31 August 2017. The lease was for three years with an initial rent of £44,000 per annum. The appellant's obligations as a guarantor were to ensure that HCA performed its obligations under the lease. In a further document dated 24 September 2013 it was agreed by Mr Kular and the appellant as the director of HCA that when the three-year lease expired a further three-year lease would be granted. It was the appellant's case that despite formally remaining a director he handed over control of HCA to someone called Wayne Pinnnock and his father from about November 2016.

- 11 The Council made a number of visits to the property and noticed breaches of planning control. In December 2016 a decision to take enforcement action was taken by the chief planning officer. The Enforcement Notice with regard to use of the property as a hostel came into effect on 20 January 2017 and, as we have said, the date for compliance expired on 20 July 2017. Various site visits took place after that date with evidence being given about the occupation of the property and activities being carried on there.
- 12 On 31 August 2017 the appellant resigned from his directorship of HCA. A further visit to the property was made by a Ms Webb on 11 September 2017. She noticed that there were three or four people living in the three bedrooms on the first floor and that five rooms on the ground floor were also occupied and being used as bedrooms. Part of the ground floor had been converted into a self-contained flat. On 25 September 2017 an order was made in the Companies Court winding up HCA as insolvent. In October 2017 a claim for possession of the property was made by Mr and Ms Kular acting for the landlords against the administrator of HCA and the appellant.
- 13 On 23 February 2018 Ms Salter revisited the property with Ms Webb and noted that it was still being used as a hostel and had a sign up for "Atilkan Lettings." The appellant explained that his father had put up the sign and they should contact his father about it. On 26 April 2018 Ms Webb visited the property with a housing standards officer to offer housing advice. The appellant was present and remained present when some of the residents

were spoken to. At one stage, the appellant intervened when Ms Webb asked a man about living at the property. The appellant said no one lived there and, thereafter, the man stopped speaking.

14 As we have said, on 11 May 2018 Sevenoaks District Council obtained a Closure Order from Sevenoaks Magistrates' Court prohibiting anyone having access to the property for three months. On 29 May 2018 solicitors acting for the appellant issued an Appeal Notice against the Closure Order. The notice stated:

"I was not given an adjournment as requested in order to have funding for Legal Aid and to obtain evidence through my father that I was not involved with the premises in question. My father is the leaseholder."

15 On 18 June 2018 Cameo applied to amend their civil proceedings so that they were no longer brought against HCA, which had ceased to exist, but were brought against the appellant and others unknown. Within their particulars of claim they alleged that the appellant had gone into occupation of the land without permission, there were unknown persons present in the property and that the appellant had continued to occupy and use the premises as a scrapyards to dismantle cars. The appellant had ultimately abandoned his appeal.

16 On 10 August the Council applied for a three-month extension of the Closure Order. The appellant emailed Ms Webb in response and said within his email:

"I want my building back how it was, Kelly."

17 On 15 August 2018 Ms Webb returned to the site to allow one of the residents, Vilmos Vargas, to collect his belongings. Mr Vargas told her that he paid his rent to the appellant via Wendy Aldred and he signed the inventory form and produced a bank statement showing payment of rent with a reference "Resset Mustafa" (the appellant's father's name).

## **The Trial**

- 18 We turn to the conduct of the trial. We should start by saying that it is clear from the transcripts that both the appellant and the prosecuting authority were represented by counsel who were fully competent to act in a trial of this nature. Specifically, their presentation of the case and the conduct of examination-in-chief and cross-examination was appropriate and competent when given a clear run. We make no criticism of either counsels' conduct of either examination-in-chief, cross-examination or re-examination.
- 19 There were two live issues at the trial. The first was whether the appellant was a person who had control of the property between 21 July 2017, when the Enforcement Notice became effective, and 11 May 2018, when the Council closed down the property. The second was whether during that period the appellant as a person having control of the property caused or permitted its use as a hostel.
- 20 The appellant started his evidence-in-chief on the afternoon of 31 July 2019. The case was adjourned overnight. In the morning of 1 August 2019 his evidence continued. His examination-in-chief continued from 11.09 to 12.33. Cross-examination then lasted into the afternoon, followed by brief re-examination. Some indication of the duration of his evidence is provided by the length of the transcripts which covered 16 pages on 31 July and 91 pages on 1 August 2019. Early in his evidence the appellant said that he had been diagnosed as having ADHD and a Personality Disorder in October 2016. He explained his symptoms as being disorganised in his thoughts and lacking in concentration and that it was difficult for him to concentrate. His case was that these conditions though undiagnosed were of long-standing, but in the second part of 2016 things had become too much for him for a number of reasons and that he stepped back from running HCA's business at about the time of this diagnosis or shortly thereafter. This last proposition was contentious and was central to the issues to be determined by the jury, but there was never any doubt that the defendant suffered from the mental illnesses with which he had been diagnosed.



21 Having read the transcripts with the benefit of hindsight and without professing any particular medical knowledge, it seems to us that there are distinct signs in the appellant's evidence of his becoming disorganised and flustered when put under legitimate pressure by counsel for the prosecution and when being subjected to questioning by the judge. In saying this, we do not suggest that prosecution counsel acted inappropriately in his cross-examination of the appellant. He did not. His cross-examination was well-structured and his questions almost always entirely clear. It should also be noted that the appellant was softly spoken and had to be asked to speak up at fairly regular intervals. This was done appropriately on each occasion. It is clear that his command of English, though good, is not always perfect, which may have contributed to the difficulties that are always inherent in conducting both examination-in-chief and cross-examination before a jury. We make full allowance for any difficulties that these features may have caused. It is also right that we should record that, with one or two possible exceptions where the transcript suggests that the judge was somewhat sharp with counsel, the judge was always courteous. While we are conscious that reading a transcript does not enable us to hear the tone or speed of delivery of what was recorded, the transcript does not demonstrate overt hectoring or bullying of a witness at any point, though the judge's questioning was sustained and very extensive. Counsel for the appellant has not suggested otherwise.

22 The criticism that is made of the judge can be supported by a broad analysis of the scale of the judge's interventions during the appellant's evidence. Mr Manning's analysis, which we take as indicative, is that during the continuation of his examination-in-chief on 1 August 2019 approximately 257 questions were asked of the appellant, of which approximately 116 were asked by the judge. During his cross-examination approximately 327 questions were asked of the appellant, of which 110 were put by the judge. These figures are themselves startling. However, they tell only part of the story.

23 On the afternoon of 31 July 2019 the judge's interventions were, in our judgment, within reasonable bounds. He asked for clarification of the appellant's diagnosis and later for clarification of the appellant's evidence that he had been preparing to start a new business involving Smart Cars. Shortly before the end of the day's hearing, he obtained clarification of the rent that the appellant said he had been paying his father for the use of all rooms in the building, which he said he used in connection with the proposed Smart Car business. We would not criticise any of the interventions on 31 July 2019.

24 On 1 August 2019 the position changed. Almost from the outset, the judge's interventions in Mr Manning's examination of his client in-chief became numerous and disruptive of the reasonable approach being adopted by counsel. Counsel gave a polite indication to the judge by pointing out at a very early stage that the question just asked by the judge would have been the next question that he, counsel, would have asked. Quite soon, in our judgment, worrying signs of the judge entering the arena emerged. An early example was when counsel asked the appellant when HCA's lease had ended. Without waiting for the witness to answer, the judge intervened by saying:

"Well, this lease ended in September 2016. We know that from his terms."

Counsel again responded appropriately that he had been asking the appellant whether he, the appellant, knew when it ended.

25 Taken in isolation, this might seem trivial. However, it cannot be seen in isolation. On the next page of the transcript as counsel was asking the appellant an important question about whether a document indicated that the appellant had control of the building, the judge intervened again with a series of questions that were on an unrelated topic, namely the renewal of HCA's lease. This continued for approximately two pages of transcript and had the effect, no doubt unintended, of deflecting counsel from the important point he had been asking about. After that intervention, counsel tried a different topic, namely when

HCA stopped paying rent. Once again, the judge intervened, this time to ask about what had happened in September 2016. This intervention lasted about two pages and can properly be described as entering the arena and taking control of the examination-in-chief.

26 The next significant intervention happened about two pages later when counsel asked his client by an appropriate non-leading question if he knew why HCA had been wound up.

The judge intervened by saying:

"Well, if you look at p.370, which we have already looked at, you know why."

27 Counsel respond entirely fairly:

"Yes, I know we do know why. I am just asking this witness if he knows why, because he is giving evidence."

28 Once again, had this been an isolated intervention, no serious complaint could be made, but it was not isolated as is illustrated by the fact that by this time the transcript of the morning's proceedings had covered ten pages, of which well over four had been taken up by the judicial interventions that we have outlined above. We do not suggest that every intervention was either unhelpful or inappropriate. For example, on p.15 of the transcript the judge asked an appropriate and helpful clarificatory question about whether the appellant was aware of a notice that had been served by the local authority. However, on the following two pages, the judge appears to have entered the arena again in terms more appropriate to cross-examination than judicial intervention in a passage that in our judgment was unnecessary, given the competence of counsel who was still trying to take his client through his evidence-in-chief. In our judgment, an impartial observer could by now have formed the clear view that the judge was entering the arena to take over conduct of the evidence and that the form of his questions had gone well beyond the merely clarificatory.

29 After a period that was substantially free from further intervention, counsel for the appellant concluded his examination-in-chief on p.24 of the day's transcripts of evidence. There then followed a passage which covers eight pages of transcript in which the judge took over the questioning completely, asking about the number of occupants in the property at various times and the number of visits made by the appellant to the property. He prefaced his intervention by saying:

"Before we have cross-examination, I would like to understand, rather than dotting around through the documents, what happened. So let me ask you a few questions to try and elicit what happened."

30 We do not think it is unduly sensitive to suggest that this can be seen as implying criticism of defence counsel's conduct of the appellant's evidence-in-chief, criticism which in our judgment would not have been and was not merited. We accept that both of the topics pursued by the judge could have been viewed as relevant. We are, however, unable to accept that this passage represented simple clarification of the evidence that had been given up to that point. In particular, the numbers of people at the property, which was relevant to whether the building was being used as a hostel, was an area that appears to have been of interest to the judge at this point, rather than being something raised but left untidy and requiring clarification at the end of examination-in-chief. We do not know whether prosecuting counsel would have considered it necessary or desirable to pursue the points if the judge had not pursued them as he did. We are, however, clear in our view that the appropriate course, not least because of the scope of the judge's interventions up to that point, would have been to leave it to competent prosecuting counsel to develop the case as he thought fit. If there had been any residual lack of clarity at the end of cross-examination or re-examination, it could then have been appropriate for the judge to ask questions, but we have no reason to assume that counsel's cross-examination would not have covered the main points sufficiently in due courses.

31 In the light of this intervention, the appellant's counsel reasonably asked some supplementary questions to deal with the points that had been raised. During those questions, the judge intervened again, challenging counsel about whether counsel was looking at the right floor of the building in asking his questions. As a matter of fact, he was and Mr Manning includes this intervention as one which he considers to have been objectionable. We take a different view since the question demonstrated a difficulty on the part of the judge in following counsel's questions, which it was reasonable to try to resolve. However, it contributes to the overall picture of the sheer weight of numbers of interventions.

32 The high, and we would say inappropriate, level of intervention during examination-in-chief stands in contrast to the restraint shown during the early stages of cross-examination, lasting for about 19 pages of the 90-page transcript of the appellant's evidence on 1 August 2019. However, from then until the conclusion of counsel's cross-examination, the interventions increased in number and significance.

33 We shall not lengthen this judgment yet further by exhaustive citations, but the interventions may reasonably be characterised as entering the arena and taking over the cross-examination. One particular example arose where the judge again pursued the question of how many bedrooms were in the building and who was there, which would have been proper cross-examination material for the prosecution, but did not warrant further intervention by the judge at that point. We give one further example, which occurred towards the end of the appellant's evidence:

JUDGE: Can we just go back? What do you say about, 'My father is the leaseholder;' was he the leaseholder or not?

WITNESS: There was an agreement between – I wasn't there – concerning the Kullars, Wayne. What exactly it was concerning the building works that was going on, I don't know. I don't have – I don't know what the agreement

was. I can only tell you what I know. They were doing four flats, that's what they were doing.

JUDGE: 'I don't know what the agreement was,' **well, if you do not know what the agreement was, how come your solicitors were saying on your behalf, 'I was not involved with the premises in question. My father is the leaseholder.'** [Emphasis added]

34 Once again, if this could be seen in isolation, it might not be cause for substantial concern, but by this point we are satisfied that the judge's interventions had long crossed the line of what would be acceptable. Read in that light, this example takes on a different hue.

35 At the very end of the appellant's evidence, prosecuting counsel was cross-examining on the terms of HCA's lease. In the course of an intervention which we would not otherwise criticise or mention, the judge said:

"The terms [of the lease] may be important ... but **we were asking, you were being asked about ...** " [Emphasis added]

To our minds, this slip of the tongue provides a reasonable, if concise, encapsulation of the problem that was endemic throughout the appellant's evidence.

36 After the appellant's evidence, a witness was called on his behalf called Mr Vargas. He is from Romania and his English is poor. He was asked questions in chief about how he came to live at the building and to whom he paid rent. The prosecution chose not to cross-examine. The judge then opened a new line of questions for the witnesses, effectively taking the role of cross-examiner. He asked him about how many people had lived in the premises from time to time and whether the building had been subject to conversion at any time. The witness' poor English makes it difficult to decipher what he was actually saying, though he does not appear to have supported any suggestion that the building was subject to extensive conversion from multi-occupancy to self-contained flats or that there was no one living in the property at the time of the Closure Notice. When the appellant's counsel

attempted to re-examine by reference to a plan, the language difficulties became insuperable.

37 The judge summed up the case to the jury on 2 August 2019 with a split summing-up enveloping counsels' speeches. There is no criticism to be made of the judge's legal directions or of his summary of the evidence. On any view, there was ample evidence to sustain a conviction.

### **The Appeal**

38 We turn to the appeal against conviction. Although advancing one ground of appeal, Mr Manning summarises his submissions under three sub-headings. We can deal with the first two together. They are that, one, the judge acted as a third advocate, clearly and repeatedly descending into the arena and, two, examinations were "taken over" by the judge at multiple instances, demonstrating that he had developed an animus towards the appellant.

39 We accept the criticism that the judge clearly and repeatedly descended into the arena and refer to our summary of the course of the trial as set out above. For most of the appellant's evidence-in-chief on 1 August 2019 the natural flow of counsel's efforts to adduce his client's evidence were subject to disruptive and frequently unnecessary interruptions. As we have identified, on at least one occasion it is clear that counsel was diverted from a proper line of examination and did not return to it after interruption. We do not criticise counsel for failing to return to the point he had reached: being deflected is a vice that is to be expected from such interruptions. A number of interventions can, in our view, reasonably be described as taking over the examination-in-chief. The most pronounced examples of those we have described as happening at the end of the appellant's evidence-in-chief and when the prosecution had decided not to cross-examine Mr Vargas. Each can equally be characterised as usurping the proper function of the prosecution, whose job it is to challenge, where it sees fit, in order to prove the case that has been brought against

a defendant: see para. 36 of *Inns* which we have cited above. Similarly, the progressively increasing level of intervention during cross-examination gives the impression on occasion of a level of involvement that is inimical to the adversarial system and the role of the judge as neutral arbiter.

40 We should make one thing clear, we do not detect any conscious animus on the part of the judge against the appellant; nor is this a case where the judge can be said to have set out or determined to crack the thin ice on which he thought the appellant was skating: see *Gunning* [1994] Crim App R 303 at 306 per Cumming-Bruce LJ. That said, the judge's questions typically probed and tended to undermine the appellant's evidence in a manner that contributes to our finding that he entered into the arena and, ultimately, that he did so unfairly.

41 In our judgment, the interventions prevented the appellant's counsel from doing his duty properly in presenting his client's evidence and, thereby, prevented the appellant from doing himself justice. Our judgment is influenced by the fact that in this case the judge was dealing with a defendant who was at a disadvantage, because of his diagnosed mental illnesses, which were known to the judge. Some of the interventions which we consider to have been inappropriate, if viewed individually, might have been acceptable had the defendant not been subject to those disadvantages. However, given the known characteristics of the defendant, we are clear in our view that they crossed the line. Put in slightly different terms, we conclude that the core principle identified in *Michel*, namely that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, was materially infringed to the point of unfairness.

42 We have said that the summing-up cannot be criticised and that there was evidence on the basis of which a conviction properly obtained could be sustained. We have considered anxiously whether the summing-up can be said to have remedied the problems that flowed from the earlier conduct of the trial. However, our judgment is that the sheer scale and



content of the interventions were inimical to the adversarial system and lead to the conclusion that the appellant was not fairly tried, as he should have been. We therefore quash the appellant's conviction on the basis of Mr Manning's first two submissions.

43 Mr Manning's third submission is that the judge trespassed on previous rulings on admissibility. In the light of the findings we have just made, we can deal with this very shortly. The question related to hearsay evidence about the recipient of Mr Vargas' rent. It is submitted that the judge made an inapposite remark to the jury when asking them to retire while a question of law was raised. In our judgment, the remark adds nothing material and certainly would not be a reason for allowing an appeal if treated as a freestanding complaint. Otherwise, the dispute about the hearsay that could be admitted appears to us to be narrow to the point of vanishing. We do not accept the substance of the third submission and would not allow an appeal on the basis of it.

44 In the result, this appeal must be allowed. We therefore do not address the separate question of the appeal against sentence. We would only say that if there were to be a retrial and a conviction, it would be for the judge in those proceedings to decide on an appropriate sentence, including any order for costs. We should not be taken as having expressed approval, or indeed any view, on the sentence passed below in the present case.

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