Neutral Citation Number: [2024] EWCA Crim 1041

Case No: 202303823 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LUTON
MR RECORDER CLAXTON
INDICTMENT NO: 41B21118723

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2024

Before :

LADY JUSTICE WHIPPLE
MR JUSTICE GOOSE
and
HHJ MICHAEL CHAMBERS KC RECORDER OF WOLVERHAMPTON

- -

Between :

THE KING	**Respondent**
- and -	
LEON SHORTT	**Appellant**

- -
- -

Justin Yang (**assigned by the Registrar of Criminal Appeals**) for the **Appellant**
Kellina Gannon (instructed by **CPS Appeals Review Unit**) for the **Respondent**

Hearing date: 30 July 2024

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Approved Judgment

This judgment was handed down remotely at 10:30 a.m. on 13 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lady Justice Whipple :

INTRODUCTION

1. This is an appeal against conviction with leave granted by the single judge.

2. On 4th October 2023, the appellant was convicted of various drugs offences following a trial at St Albans Crown Court before Mr Recorder Claxton (the "Judge"). The appellant's case is that the trial was unfair as a result of interventions, comments and inappropriate behaviour by the Judge, such that these convictions should be quashed. In the event that the appeal succeeds, the Crown seeks a retrial.

3. The Judge sentenced the appellant on 20 March 2024 to a total of 4 years imprisonment to include sentence for an additional matter committed to the Crown Court for sentence. No issue arises in relation to sentence.

4. The appellant's submissions focussed on the transcript of the trial, with certain passages identified and amplified by reference to counsels' recollections of what occurred at trial. No audio recordings had been requested or made available prior to the appeal hearing. They seemed to the Court to be important in the context of the submissions advanced on appeal. At the end of the appeal hearing, which took place on Tuesday 30 July 2024, the Court indicated that it would reserve judgment with the intention of listening to the audio recordings before coming to its judgment. In the event, it has taken some time for all members of the Court to listen to the audio recordings and the consequent delay is regrettable. However, the audio recordings have proved to be extremely valuable, enabling the Court to assess the tone of the various exchanges complained of, alongside the content which was already evident from the transcripts.

FACTS

5. The facts of the offending can be shortly stated. The case concerned a police operation involving the supply of controlled drugs in the Borehamwood area of Hertfordshire. As part of the investigation, information was received in July 2022 that the appellant was using a phone (1250) to send bulk messages relating to the supply of both Class A and B drugs. In October 2022, further information was received that the appellant was using another phone (3935) to send bulk messages concerning the supply of Class A and B drugs.

6. On 27 April 2023 police attended the appellant's home address. The appellant attempted to escape but was caught and arrested. A third phone (1193) was recovered. A Hugo "man bag" was 12 grams of cannabis and £1,138.15 in cash was also recovered.

7. The three phones were analysed. There were bulk messages in 1250 and 3935 advertising the sale of drugs. In almost all the messages, the drugs for sale were

conceded by both parties to be cannabis or hash, which are Class B drugs. However, there were two specific bulk messages in 3935 which listed various quantities and prices under the headings "W" and "B" respectively. It was the prosecution's case that "W" and "B" were references to crack cocaine ("white") and heroin ("brown") respectively. These are both Class A drugs. The prosecution's expert, DC Terry, gave evidence to support the prosecution case in this respect.

8. The indictment covered two time periods: between 1 October 2022 and 2 February 2023, during which 1250 and 3935 were active (giving rise to counts 1 and 2, charges of being concerned in the supply of Class A drugs, namely crack cocaine and heroin); and on 27th April 2023, when the appellant was found in possession of cannabis and cash (giving rise to count 3, possession with intent to supply Class B drugs, and count 4, possession of criminal property, namely the cash found in the Hugo bag).

9. The appellant was arrested on 27 April 2023. On 28 April 2023 he gave a "no comment" interview.

TRIAL

10. It was the prosecution's case that the appellant was in control of all three phones, 1250, 3935, and 1193, which he used for the purposes of supplying controlled drugs of Classes A and B, namely crack cocaine, heroin, and cannabis. Further, the money recovered on his arrest represented the proceeds of his criminality. To prove its case, the prosecution relied on a number of strands of evidence including evidence from DC Terry (the prosecution's expert), agreed facts and the appellant's "no comment" interview.

11. The appellant's case, outlined in his defence case statement, was that he was involved in the supply of class B drugs only and that the references to W and B in the messages found on 3935 were to "weed" and edible hash "brownies" respectively. The drugs found in his possession on 27 April 2023 were for his own use and not for onward supply. Any dealing was to fund his own drugs habit. The cash seized on 27 April 2023 was from the sale of a car which was itself funded by the sale of Pocket Bully puppies (a miniature American breed which was in high demand). The appellant gave evidence at trial.

12. The trial started on Monday 2 October 2023 and concluded on Wednesday 4 October 2023, within its time estimate. Mr Yang was instructed to represent the appellant a day or two before the trial. He immediately sought to reduce much of the cell site evidence, which had been in dispute, to agreed facts. There were concerns raised during the course of the trial that train strikes might cause a day of trial to be lost, but in the event those fears did not materialise. There was therfore no particular pressure of time or other procedural difficulty to deal with in the course of the trial.

GROUNDS OF APPEAL

13. By perfected grounds of appeal dated 23 January 2024, My Yang, counsel for the appellant at trial and on appeal, advances three grounds of appeal:

> [1] the Judge undermined the appellant's account and credibility in his summing up, which drew laughter from the jury;
>
> [2] the Judge undermined the defence by persistently requiring defence counsel to call the appellant in front of the jury, and requesting answers as to

why a conference was required, even though express permission had been given; and

[3] the Judge was highly antagonistic and unprofessional towards defence counsel throughout the entire trial, which unfairly undermined defence counsel's ability and focus to represent the appellant in a fair and unobstructive way. That conduct led to the court no longer being a neutral and objective venue for a fair trial.

14. By a Respondent's Notice dated 15 February 2024, Ms Gannon for the Crown resists this appeal. She does not accept that the Judge undermined the appellant's defence in summing up (ground 1), submits that there was good reason for the Judge to question Mr Yang's request for 25 minutes to confer with the appellant (ground 2), and asserts that, although at times the Judge "descended into the arena" in his questioning of witnesses, this did not tip over into unfairness (ground 3).

15. We are grateful to both counsel for their balanced presentation and focussed submissions. This is an unusual appeal, which has required a great deal of hard work and reflection by all involved.

LAW ON UNFAIR TRIALS

16. The Court was referred to a number of authorities on unfairness in the context of trial management and allegations of judicial misbehaviour. In chronological order, they were: *R v Tuegel (Peter Johannes)* [2000] 2 Cr App R 361; *R v Michel* [2010] UKPC 41, [2010] 1 WLR 879; *R v Myers* [2018] EWCA Crim 2191, [2019] Crim LR 181; and *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455. There are many other cases which have examined similar issues. We are satisfied that we can draw the key principles, which are not in dispute, from the authorities we have been referred to, so far as is relevant to this appeal. We would summarise those principles as follows:
    a. There is a wider principle at play in cases where unfairness is alleged than the safety, in terms of the correctness, of the conviction. There comes a point when, however obviously guilty an accused person may appear to be, the appeal court reviewing the conviction cannot escape the conclusion that he has not been fairly tried. If the departure from good practice has been so gross, persistent, prejudicial or irremediable that an appellate court condemns a trial as unfair, the conviction will be quashed as unsafe, however strong the grounds for believing the defendant to be guilty (*Michel* per Lord Brown at [27]; *Myers* per Hamblen LJ at [49]).
    b. By no means all departures from good practice render a trial unfair. 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 (*Michel* per Lord Brown at [28]).
    c. Allegations of unfairness are to be assessed objectively by the appeal court (*Serafin* per Lord Wilson at [38]); that requires punctilious analysis of the evidence, given that the trial judge's view has not been heard in answer to those allegations (ibid at [45]).
    d. A judge's role is to hold the ring fairly between prosecution and defence and this cannot be done properly if a judge enters into the arena by appearing to

take one side or the other during questioning of witnesses (*Tuegel* per Rose LJ V-P at p 381C; *Michel* per Lord Brown of Eaton-under-Heywood JSC at [17], [31] and [32]; *Myers* per Hamblen LJ at [22]).

e. That said, it is not only permissible for a judge, it is their duty to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if that is unclear (*Tuegel* at p 381C; *Michel* at [17]).

17. We add to the above list of factors the following points, drawn from the judgment of the Court of Appeal in *In Re AZ* [2022] EWCA Civ 911, [2022] 4 WLR 78 at [122]-[127]. That was a family case but the points we draw from it are universal in their application:
    a. Where it occurs, judicial bullying is wholly unacceptable. It brings the litigation process into disrepute and affects public confidence in the administration of justice.
    b. Trials are a very intense environment. Judges and counsel may in the pressure of the moment express themselves in ways which they did not really intend or say things which they would not have said if they had time for reflection.
    c. Where a judge concludes that counsel's conduct requires explicit correction or admonishment, that rebuke should be proportionate and delivered by the judge in measured terms, without showing personal resentment or anger.

18. Finally, although this appeal centres on allegations of unfairness, at times Mr Yang used the language of apparent bias. Allegations of apparent bias are also to be assessed objectively, applying the test of whether the fair-minded and informed observer would find there was a real possibility of bias (see *Porter v Magill* [2002] AC 357 at [102]).

19. It is convenient at this point to mention the Statement of Expected Behaviour which was issued on 19 January 2023 and incorporated into the Guide to Judicial Conduct in July 2023. It sets out the standards of behaviour expected of judicial office holders in and outside the hearing room. It recognises the responsibility on judges, amongst other things, to treat others fairly and respectfully, not to abuse their authority, to remain patient and tolerant when encountering difficult situations, to avoid shouting or snapping, and to ensure that no one in a hearing room is exposed to any display of bias or prejudice. It provides a helpful reference point for complaints of inappropriate judicial behaviour.

THE INDIVIDUAL INCIDENTS

20. We turn to the particular allegations. In relation to each, we have noted the paragraph number from the Advice and Grounds of Appeal where the allegation is made and have set out the relevant parts of the transcript. However, we repeat that we have also listened to the audio recordings of each incident and have based our judgment on that in combination with the transcribed words. We consider the allegations in chronological sequence as they occurred during the course of the trial.

21. Paragraph 10. Before the jury was empanelled on the first day of trial, the Crown asked the Judge to allow their expert, DC Terry, to appear remotely by CVP. This was a St Alban's case which had been transferred at the last minute to Luton Crown

Court for trial, and the expert was physically at St Alban's Crown Court covering this and another case at that Court. In the course of that discussion, the Judge asked Mr Yang what he wanted to ask the expert. The Judge made some comments about what "W" and "B" meant in his experience. Mr Yang was resistant to the case being reduced to that issue alone. This exchange is typical:

> *"MR YANG: Your Honour, there's more than that.*
>
> *JUDGE: Well, when I say ---*
>
> *MR YANG: There's more questions than that.*
>
> *JUDGE: --- when I say more than that, of course you might be asking a lot of questions, but essentially it boils down to interpretation of W and B."*

22. Mr Yang submits that the Recorder inappropriately pressed for an overly simplistic explanation of the defence questions for the expert, tried to impose his own streamlined view of the issues and would not let counsel answer his questions (a pattern which he submits was repeated throughout the trial).

23. We are not persuaded that these exchanges show anything other than the Judge trying to identify the central issues in the case in order to decide whether to allow DC Terry to attend via CVP. It was appropriate for the Judge to probe the sort of questions DC Terry was going to be asked and to question how extensive her evidence was likely to be. What is more, Mr Yang had himself identified the central issue in the case to be the meaning of W and B in the text messages, and he had himself indicated that was the essence of what he wanted to put to the expert (see p 3G and 4F of the transcript as examples, before the exchange above took place) and it is unsurprising to find the Judge focussing in on this as the central issue in the case.

24. Paragraph 12. Mr Yang takes issue with this exchange about DC Terry:

> *"JUDGE: And in front of the jury, if you could refer to the expert as the expert, the prosecution expert, because as you know experts are here to help the court. Yes. OK. You smile, Mr Yang, have I got that wrong?*
>
> *MR YANG: You haven't, your Honour, but it's a police officer.*
>
> *JUDGE: It's what?*
>
> *MR YANG: The police - she's a police officer, yes.*
>
> *JUDGE: Well, no, she's - I think she's a drugs expert, Mr Yang. I've been in about four trials with this lady as an expert and I happen to know that she may well be a police officer but as you well know in these cases they are trained experts, and if you want to look about - look at all of her qualifications. She doesn't go out and knock on people's doors and take people's fingerprints, do you follow me? She's a ---*

MR YANG: Yes, your Honour.

JUDGE: --- drug expert. Yes? All right. OK. I'll help you more if you want in the future.

MR YANG: Yes."

25. Mr Yang could not remember if he smiled or why he might have done so, but the Judge plainly detected a smile on Mr Yang's face. In our judgment, this exchange, and the point being made by the Judge, was well within the Judge's trial management discretion. There was nothing objectionable about the Judge making the point, at this juncture, that DC Terry was instructed as an expert, was qualified to give expert evidence and would have understood her duty to the Court as an expert. We are not persuaded that there was anything amiss in the Judge's intervention here.

26. We do not understand what the Judge meant when he said "I'll help you more if you want in the future". Mr Yang did not understand what he meant either. It was an odd thing to say. Whatever the Judge meant, the comment was not undermining of the defence and did not denote any bias against the defendant.

27. The prosecution then opened the case and called its witnesses. The first was the Officer in the Case. No particular issue arises in relation to her evidence.

28. Paragraphs 13 and 14. The second of the prosecution's witnesses was DC Terry, the prosecution's expert. Two complaints are made at this stage. First, Mr Yang argues that the Judge interfered excessively and took over or shaped the cross-examination of DC Terry. Secondly, he complains that the Judge undermined him in front of the jury by pausing questioning and inviting Mr Yang to read the expert's conclusion in her report to himself.

29. The following passage is highlighted by Mr Yang as an example of excessive judicial intervention during his cross-examination of DC Terry:

"MR YANG: Yes, so, when you translated each mobile phone, of course there was some relationship between the numbers given in this to you. That's how they must have been given to you.

JUDGE: Mr Yang, the expert has to analyse the information she is given, yes?

MR YANG: Of course.

JUDGE: Right. So, we have done the first report and 1250, correct?

MR YANG: Yes.

JUDGE: What's the next report that you want to ask her about analysing the phones?

MR YANG: There is a ---

> *JUDGE: When you want to ask about certain matters that seems to be more in the officer in the Case questions. Please do that but let's go now to what the expert's comfortable to deal with about what you were sent and what you analysed and what your conclusions were analysed.*
>
> *MR YANG: Your Honour, there is a point that the expert has to answer and can answer. It's not the OIC.*
>
> *JUDGE: All right. Yes, but you're asking about investigations from the - of asking her when did the officer realise matters of that nature.*
>
> *MR YANG: But ---*
>
> *JUDGE: The officer analyses what she's sent."*

30. Mr Yang moved on at that point without further protest. The point he wanted to put related to the fact that DC Terry had examined several other phones – which contained messages about Class A drugs but which were not related to the appellant's case - together with the appellant's phone and there was a risk that she had been influenced in her comments about the appellant by what she had found on the other phones. Mr Yang put that question to DC Terry a bit later, in this way:

> *"MR YANG:. So, it's not right that you're - I'm not getting into semantics of word play here, but what I am getting - what I am trying to put to you, officer, is that the first report you prepared was on the basis that Mr Shortt was involved with others who include - who may have been selling crack cocaine, cocaine, and what have you. But when we sever that apart and we just have Mr Shortt selling skunk cannabis, it's not right for you in your second report to say that you maintain your previous findings because your previous findings are not relevant. It's not accurate."*

31. At that point, the Judge intervened. He asked Mr Yang to go back to the conclusions of the first expert report prepared by DC Terry. He invited Mr Yang to read that conclusion to himself:

> *"JUDGE: Right. And if you just read the paragraph quickly - just - no, you just read it to yourself, for concerning the supply of ---*
>
> *MR YANG: I am aware of what it says, your Honour.*
>
> *JUDGE: Yes."*

32. There was further debate between the Judge and Mr Yang about the conclusion in the first report and where it could be found on the DCS. Then there was this exchange:

> *"JUDGE: Now, ask the officer for clarification now. Yes, ask the officer to explain what she is maintaining.*
>
> *MR YANG: Yes, please explain, DC Terry.*

> *A. I'm maintaining my findings of all the material and comment that I've made in that first report. So, that first report, I made reference to various mobile phones and I made opinion on the material within each of those phones. So, I'm saying in my second report I maintain the findings of my first report. And yes, in my first report when I commented on T1250, my opinion is that the user is concerned in skunk cannabis, but there were a lot of other material that I was looking at in that report.*
>
> *MR YANG: Yes, and a lot of the other materials that you've looked at in the first report that suggested anything other than skunk cannabis are not related to Mr Shortt. But that's a point that the OIC can answer.*"

33. There are a number of points to make here. First, at the start of these exchanges, the Judge was plainly concerned that Mr Yang was putting to the expert questions which should properly be put to the Officer in the Case. The Judge was entitled to interrupt the questioning to check that the questions were properly for the expert and not the OIC. Secondly, the question posed by Mr Yang for the expert, when he finally got to it, was not particularly well-expressed. We are not surprised that the Judge intervened at that point to clarify what Mr Yang was seeking to put to the witness. Thirdly, there was some confusion about what DC Terry had said in her first report. Given that confusion, it was reasonable for the Judge to suggest to Mr Yang that he read the conclusion of that report to himself before putting his next question. We are not sure what point the Judge was getting at here; indeed, we are not even convinced that the Judge was on the right track, given that the settled position by the time of trial was that the first report only dealt with 1250 and that so far as the appellant was concerned, only class B drugs could be connected with that number. But what was in the Judge's mind, precisely, is by the by. The Judge was seeking to clarify the point, and in context it was reasonable for the Judge to invite Mr Yang to read the conclusion in the first report to himself before putting any more questions to the expert. We are not persuaded that that request, considered objectively, was unfair or undermining; but in any event, it was a moment which passed quickly and which would not have undermined Mr Yang in the eyes of the jury in the way he suggests. All that said, however, and fourthly, we do accept that the Judge was pretty interventionist at this point in Mr Yang's cross-examination. The effect of his various interventions was to slow the pace of the cross-examination and, specifically, to allow the expert plenty of time to think about her answer to Mr Yang's long question, which answer she eventually gave in compelling terms which were unhelpful to the appellant's case: she rejected the suggestion that she had got confused. The Judge was unwise to intervene in that way, even if those interventions did not in our judgment cross the line into unfairness or apparent bias.

34. Paragraph 15. Mr Yang's next complaint involves a further intervention in the course of DC Terry's cross examination. The defence case was that W meant weed and B meant brownies. DC Terry was asked about the bulk messages which includes references to W and B. She did not think that W and B stood for weed and brownies, or that weed or brownies would have been advertised for sale in that way. The Judge sought to summarise DC Terry's evidence by means of an analogy which Mr Wang

complains was factually inaccurate and wholly inappropriate. This is the relevant part of the transcript:

> *"A: Well, I would dispute that because edibles are quite a distinct specialised sort of commodity. So, those that are selling edibles would want to be very clear in what they are selling. So, their customers would want to know are they buying edible sweets? Are they buying edible cakes? So, they would describe the edible within any advertising message clearly.*
>
> *MR YANG: But if he was selling to a client base that knew it's not always the case that he would have to spell it out every single time. Would you agree with that?*
>
> *JUDGE: Are you saying that if edibles are going out on sale and be broadcast on sale it would say it's edibles, it will be clear to somebody purchasing the edibles?*
>
> *A. Yes, your Honour.*
>
> *JUDGE: Yes. Same way as if digestive biscuits are being sold and bread is being sold it would be made clear that although they both come from flour ---*
>
> *A. Yes.*
> *JUDGE: --- which is which?*
>
> *A. Yes, your Honour.*
> *MR YANG: Thank you. I have no further questions."*

35. The Judge was, it appears, trying to clarify the expert's point, by drawing out the expert's view that the two products, if they were on sale, would have been differently described. However, the effect of this intervention was to undermine the appellant's defence which was that particularisation is not necessary for an audience accustomed to being offered such products. This was an unwise intervention which in our view does cross the line and is a "descent into the ring".

36. Paragraph 16. We come now to the first of Mr Yang's complaints that the Judge belittled or patronised Mr Yang by suggesting he was not concentrating on the trial. After the jury had been released at the end of the first day, the Judge heard the prosecution's bad character application. During that discussion, the appellant signalled from the dock that he wanted to speak to his barrister and the Judge invited Mr Yang to go and take instructions. Ms Gannon continued addressing the Court about previous charges of drug dealing which were, in the event, dropped by the Crown. A few moments later the Judge said this to Mr Yang, who had by that point finished taking instructions from his client:

> *"JUDGE: The short point is from the discussion I've had while you were distracted is that there is no conviction for drug dealing because whatever happens, even if he was charged, the Crown did not pursue the matter."*

37. Mr Yang complains about the reference to him being "distracted". He says it was meant in an insulting and patronising manner as a suggestion that Mr Yang was not paying attention and it was said in a tone that was highly offensive. We have listened to the audio recording of this exchange and can find no substance in Mr Yang's criticisms. The Judge, to our ear, is simply repeating what Ms Gannon has said while Mr Yang's back was turned – ie, while he was distracted with his client. We are not with Mr Yang here; we found no cause for concern.

38. The Judge went on to consider the prosecution's bad character application and dismissed it. The trial proceeded without that bad character evidence being admitted.

39. Paragraph 17. Before leaving the first day, we note this exchange at the end of the day. Mr Yang asked for time to see his client after the prosecution closed its case:

> *"MR YANG: Very well. I wonder whether I could be afforded about 25 minutes with the defendant to go over his evidence before he ---*
>
> *JUDGE: Oh yes, tomorrow morning if you want - after the agreed facts have been read - to have a conversation with your client, yes, of course.*
>
> *MR YANG: Thank you very much.*
>
> *JUDGE: Yes. All right. No need to wait. You might want to go and see him before you go and then you won't have to see him as long in the morning which is one of the easons I am stopping now so you can go and have a conference.*
>
> *MR YANG: I'm very grateful.*
>
> *RECORDER CLAXTON: Yes. Thank you.*
>
> *MR YANG: Thank you."*

40. On the second day of trial, the Court assembled at 10.11 with both counsel present. There was a delay because the agreed facts had to be printed out. Mr Yang explained to the Judge that delay was his fault because he had needed to clarify a point when he was in the cells (which we infer to be a reference to seeing his client in the cells that morning) and that he had only got clarification just before the Judge came in that morning. Both counsel and the Judge stayed in Court while the agreed facts were printed out. The jury came in at 10.29. The Judge apologised for the delay. The prosecution read the agreed facts and then closed their case. The Judge then called on Mr Yang. This exchange then took place before the jury:

> *"JUDGE: Thank you. Mr Yang?*
>
> *MR YANG: Your Honour, it is the intention to call Mr Shortt to give evidence but, as your Honour knows, it may be more convenient for the jury to return in about 25 minutes.*
>
> *JUDGE: You'd like an opportunity to speak to your client?*
>
> *MR YANG: Yes.*

JUDGE: Yes. All right. OK. As long as 25 minutes because you had some time this morning, did you not?

MR YANG: Yes.

JUDGE: Yes, because we started a bit late. Yes. So, do you think you want that much time or are you just ---

MR YANG: It may be shorter than that.

JUDGE: I think you ought to be a lot shorter than that because you have had time this morning that we talked about yesterday.

MR YANG: Very well.

JUDGE: I think it's time that you called your client, don't you?

MR YANG: I would still request some time with my client though, your Honour.

JUDGE: Yes, all right.

MR YANG: I will make it as fast as I can.

JUDGE: All right. OK. Right. I am going to call this case back on at five to 11. All right?

MR YANG: Yes.

JUDGE: OK. Thank you. Yes, members of the jury, we are going to have a break till five to 11. There is nothing more I can say. Thank you very much. If you could come back then?"

41. By ground 2, Mr Yang complains that it was inappropriate to have this discussion in front of the jury. Mr Yang says he did not wish to tell the jury the reason why he had not been able to see his client, which was that his client was being detained on remand at Wormwood Scrubs, some distance from Luton Crown Court, and that the prison van had arrived late in the mornings and left early in the afternoons. Further, Mr Yang thought that the Judge had already agreed to grant him 25 minutes with his client and it was unfair of the Judge to remove that indulgence at this point and in this way.

42. As to the last point, the Judge had indicated he would allow 25 minutes the preceding evening, but had immediately followed that up with an invitation to Mr Yang to use the time remaining that (previous) day to speak to his client. Court then assembled a bit late that morning, meaning that there had been some time available for use for a conference earlier that day – which time it appears Mr Yang had used to see his client in the cells. So, by the time of this exchange, things had moved on. We would not criticise the Judge for questioning why Mr Yang still needed 25 minutes. Further, we do not consider this exchange, in front of the jury, to have undermined Mr Yang or his client in any material way. We recall that by this point, the jury had been delayed in coming into Court and then had only been in Court for about 10 minutes before being asked to step out again. The Judge was justified in giving the jury an explanation, which was that Mr Yang wished to have some time with his client. It was reasonable to suggest, in front of the jury, that the conference should be as short as possible. The

tone of this exchange was not hostile or critical and we see nothing to be concerned about in it.

43. Paragraph 18. However, we are troubled by the following exchange, immediately after the jury had left:

> *"JUDGE: Mr Yang, I am surprised that you just made that application with the delay that we have because you had last night and then you had this morning while we were waiting to come in.*
>
> *MR YANG: I didn't have that much time, your Honour.*
>
> *JUDGE: Well, you had the time this morning and the issues are - what's the issues with the case? Help me? On count 1, what's the issue?*
>
> *MR YANG: I ---*
>
> *JUDGE: No, I want - what's the issue on count 1 on the indictment as far as the defence is concerned? You can help the court with that.*
>
> *MR YANG: It's the defence ---*
>
> *JUDGE: Is it what - is it what drug?*
>
> *MR YANG: --- and the - yes.*
>
> *JUDGE: It's what drug in count 1. And count 3, what's the issue?*
>
> *MR YANG: Your Honour, I'm aware - I'm conscious of the time that's taken ---*
>
> *JUDGE: No, no, don't worry about the time. The Judge is asking you questions.*
>
> *MR YANG: Very well.*
>
> *JUDGE: You focus on what I'm asking you.*
>
> *MR YANG: OK.*
>
> *JUDGE: Right. Counts 1 and 2 is what drug, correct?*
>
> *MR YANG: Yes.*
>
> *JUDGE: Count 3 is no, no intent to supply?*
>
> *MR YANG: No intent to supply.*
>
> *JUDGE: And then count 4, what is being said about the money?*
>
> *MR YANG: Yes.*
>
> *JUDGE: What is being said about it? What's ---*
>
> *MR YANG: Not of the proceeds of crime.*
>
> *JUDGE: It's not the proceeds of crime?*
>
> *MR YANG: Yes.*

> *JUDGE: Right. Thank you. Please come back up for five to. Spot on five to. And as you can see, I've crystalised the issues with you, so - to make sure that we know where we are focussed. OK?"*

44. The trigger for this exchange was (so it appears) the Judge's view that Mr Yang had already had sufficient opportunity to see his client. Mr Yang's explanation to the Judge that "I didn't have that much time" was given short shrift by the Judge who moved immediately to a discussion about the issues in the case, which issues the Judge plainly considered to be straightforward; we infer that the Judge did not think Mr Yang was justified in asking for as much as 25 minutes with his client at that point. When Mr Yang remonstrated that he was losing precious time with his client - which was a reasonable point for Mr Yang to make - the Judge's voice became raised, almost to the point of shouting, as he told Mr Yang not to worry about the time because the Judge was asking him questions. The exchange culminated in the Judge telling Mr Yang should be in Court at "spot on five to" and that the issues were now "crystallised", words that were delivered sharply and intemperately. Overall, this was a clear rebuke to counsel, delivered in anger.

45. It is regrettable that Mr Yang did not manage to explain to the Judge what he has explained to us, namely that the prison van had left early and arrived late and quite simply he had not been able to see his client for as long as he wanted to. Another more experienced barrister might have pushed back and insisted on giving the Judge a fuller explanation. But Mr Yang told us that he felt that he was not given any opportunity to explain and that his priority was not to make things worse with the Judge. That was, we think, a reasonable election for Mr Yang to make.

46. We are critical of the Judge in this exchange. The Judge should not have lost his temper, he should not have rebuked Mr Yang while he was angry, and he should have given Mr Yang an opportunity to explain why he had not been able to see his client already. Further, while we think it was just about within the limits of trial management, we consider the Judge was unwise to limit Mr Yang's time with his client to around 10 minutes (which is all that Mr Yang got by the time this exchange was concluded) at this stage of the trial, when the appellant was just about to put his case before the jury by giving evidence.

47. The jury returned at 10.56 and the appellant was sworn. Mr Yang complains that the Judge interrupted him several times while he took the appellant through his evidence in chief (paragraph 19). However, we consider those interventions were permissible. They were aimed at clarifying the question or the evidence, and in context they have not caused us concern.

48. Paragraph 20. At one point, Mr Yang handed the jury an index of text messages found on the third phone, and the Judge intervened to verify that it was an agreed document before saying *"Normally, someone lets the Judge know what's going on*". Mr Yang complains that this was another comment which was critical of him. But this comment was a justified criticism, in our view, of both counsel for not letting the judge see the agreed document before it was put before the jury. It was an off the cuff remark and we do not think it bears any particular significance.

49. Paragraph 21. The jury left court at 11.52 and the Judge embarked on the first of three discussions about legal directions with Mr Yang and Miss Gannon. There was an exchange part way through that discussion which Mr Yang criticised. The Judge had just explained his understanding of the word "supply" and invited Mr Yang's views:

> *"JUDGE: ... Mr Yang?*
>
> *MR YANG: Apologies, your Honour, I didn't catch that.*
>
> *JUDGE: Well, that's because you're doing something else at a very important part of the discussions, because I'm just dealing with matters that your client said in evidence. And so, as far as intention is concerned, I need your assistance with the drafting of matters. So, do you mind if I go over that again ---"*

50. Mr Yang said he was just looking at his computer screen when this happened; he was at all times fully engaged in the trial; he was not 'doing something else'. The Judge was, however, plainly of the view that Mr Yang's mind was elsewhere and we cannot know what caused him to say what he did. The Judge went on to explain that he needed Mr Yang's help with the drafting of the legal directions and that was main point the Judge made: the Judge wanted Mr Yang's help (as he was entitled to expect). It would have been better if the Judge had not resorted to sarcasm, but this comment was delivered politely and very much as a prelude to the request for help which came next. It was not hostile or disrespectful; it was a passing comment and it was insignificant.

51. Paragraph 22. Mr Yang criticises the Judge for making comments about his apparent lack of submission at various points in the debate about legal directions, in the following exchanges. The Judge asked Mr Yang for his view about whether a direction permitting the jury to draw an adverse inference from the appellant's silence in interview should be given:

> *"JUDGE: So, what do you say about that?*
>
> *MR YANG: Well, Mr Shortt was represented, yes, and ---*
>
> *JUDGE: Yes, but as counsel said just now, and I am sure you agree, even though he's represented, it's his choice whether he stays silent or not. And if the choice is such that he stays silent having had the caution explained to him and broken down, it ordinarily attracts a section 34 direction. Now, if you agree it might be just - we can cut to the chase that you agree that a section 34 is necessary rather than to tell me he was represented because I've kind of got that from the evidence.*
>
> *MR YANG: Well, your Honour has submissions. Very well.*
>
> *JUDGE: So, you will ---*
>
> *MR YANG: Yes.*

JUDGE: --- you have no, you have no - nothing to say about that as far as the section 34 is concerned?

MR YANG: No."

52. The Judge then asked Mr Yang about how the jury should be directed about a part of the appellant's evidence in chief where he had said he had been charged and pleaded guilty to a matter:

"JUDGE: ... So, what's your submission about what should be the directions about that?

MR YANG: Well, they should be told that he was charged by the police and he pleaded guilty to it.

JUDGE: We've already had that in evidence.

MR YANG: Yes.

JUDGE: What's your submissions about directions?

MR YANG: I have no submissions.

JUDGE: Right. Yours?

MISS GANNON: No, thank you, your Honour."

53. The Judge formulated a direction in outline and asked counsel if they agreed with it. Miss Gannon indicated her agreement. Next comes this, addressed to Mr Yang, which is the source of this complaint:

JUDGE: Do you agree with that?

MR YANG: Yes.

JUDGE: So, you have got a submission. ..."

54. Mr Yang submits that the Judge was here suggesting that Mr Yang had been wrong previously to say he had no submissions; he says the comment was unwarranted and unnecessary.

55. This last comment must be considered in context. At two earlier points in the discussion, the Judge had invited Mr Yang's submissions on the legal directions; in response to two proposed directions (in relation to silence in interview and evidence about guilty plea) Mr Yang had said he had "no submission". We gather that the Judge found this rather frustrating. The Judge wanted counsel's help in drafting the legal directions (as he had earlier said). The Judge wanted to know whether Mr Yang agreed or disagreed with what the Judge proposed. When Mr Yang said he did agree with the direction as the Judge formulated it, ie, took a positive stance, the Judge made this last comment. It would have been better if the Judge had avoided sarcasm but we can understand what drove that comment. Whatever the cause, the moment

passed very quickly and the comment was not, in context, disrespectful or overbearing.

56. Paragraph 23. The jury returned at 12.22 and both counsel delivered their closing speeches. The jury left court at 12.43 and the Recorder embarked on a second discussion of legal directions with counsel. He started the discussion in this way:

> *"JUDGE: I've listened carefully to what you both said but I've come to the conclusion that there's no need for a lies direction. Mr Shortt was asked questions and he said - and given an answer that he effectively - and he's given a reason. Now, to start giving a lies direction - Mr Yang, are you joining in this discussion?*
>
> *MR YANG: Yes."*

57. Mr Yang complains that this comment by the Judge was deliberately antagonistic towards him. Mr Yang was not aware of anything that might have prompted this comment; he was paying attention at all times. We cannot know why the Judge thought Mr Yang was not paying attention, but that was plainly the Judge's impression. On the audio recordings, we detect not malice or intention to antagonise. We cannot know why the Judge thought that Mr Yang was not concentrating. But, whether the comment was in fact justified or not, we do not consider the comment bears the weight put on it by Mr Yang.

58. Paragraphs 24 and 25. Court adjourned over lunch and resumed (without the jury) at 14.09. The appellant was sent back to the cells by the Judge while counsel discussed the legal directions further (this was the third discussion). Draft legal directions had been circulated by email. The Judge invited counsel's comments on them. An issue arose, at the instigation of Miss Gannon, about where the money which formed the subject of count 4 came from. Specifically, the question was whether the appellant's evidence had been that it came from the sale of the car or puppies or both. This striking exchange then took place:

> *"MR YANG: No, he said he got £1500 from the sale of the car. I'm happy for the record to come out in the transcripts but ---*
>
> *JUDGE: No, Mr Yang, that's not how you approach things in court. We discuss things without you saying what you've just said. It's over - you've been doing a lot. Don't do it in front of me.*
>
> *MR YANG: It's the time ---*
>
> *JUDGE: Just - let's deal with things in the way. Now, if I've got that wrong I will amend it to what you want because when the defendant was giving evidence I got the impression that the defendant was saying at the time he made money in two ways and - but I will change it to simply Mr Yang wants the car honoured, is that right?*
>
> *MR YANG: Yes.*

> *JUDGE: Yes, OK. I don't need to look at the transcript or are you happy to hear from the tape record because I was not saying other than getting the directions correct.*
>
> *MR YANG: Very well.*
>
> *JUDGE: Yes. I'm glad you said that's OK. You have a tendency to be saying things 'OK then' and et cetera, like that, it's not quite the right way and I've just put up with it with a lot of patience but it stops now. …"*

59. Mr Yang told us that his reference to transcripts, which seems to have been the trigger for the Judge's outburst, was nothing more than a suggestion that the record should be checked in order to be clear about what the appellant had said in evidence. We think it is likely that the Judge thought Mr Yang was threatening him with an appeal and was referring to the transcripts for that purpose. It is irritating for a judge when counsel are appearing to "stack the transcript", ie store up points for an appeal rather than try to address those points at trial. But even if that was what the Judge thought, that did not justify his loss of temper at this point. Further, if that was what the Judge initially thought, the Judge worked out quite quickly that was not what Mr Yang meant because within a couple of sentences the Judge had agreed to remind the jury of the appellant's evidence (that the money came from the sale of the car) in his summing up – and that was the only point that Mr Yang was trying to make. The Judge did not apologise for misunderstanding Mr Yang, nor did he admit to or apologise for his loss of temper. Instead, he embarked on an unwarranted personal attack of Mr Yang, criticising Mr Yang's use of language, telling him to stop that "right now", and indicating that his patience had been much strained by Mr Yang. We consider this to have been wholly inappropriate.

60. We put on record that we saw nothing during this appeal which caused us to doubt Mr Yang's professionalism. He is an articulate advocate who used appropriate and suitably formal courtroom language at all times during this appeal. Our impression from reading the transcripts and listening to the audio recordings tallies with what we saw during the appeal hearing: Mr Yang's language was at all times appropriate and respectful, even during counsel-only discussions with the Judge, which were conducted with greater informality, as might be expected. We are not at all clear about why the Judge considered it necessary to reprimand Mr Yang as he did.

61. Even if the Judge did have reason to reprimand Mr Yang, it was inappropriate for the Judge to do that in anger, and to do it during the course of the trial. The reprimand should have been delivered after a period of reflection, when the Judge was calm and could speak without anger. Further, this reprimand, if it was needed at all, should have been delivered after the trial, when Mr Yang was no longer engaged in representing his client and was able to engage in discussion about his performance. There was nothing urgent about it. We are concerned about the way the Judge conducted this exchange.

62. Paragraphs 26-27. The jury came in at 14.41 and the Judge gave his legal directions and then summed up the case. In the course of his summing up of the facts, the Judge reminded the jury of the appellant's evidence. The transcript records him saying this:

> *"He told you how he made brownies and he said that he grounded up the weed and then he told you how he did it, baked them, and put them in an oven. I did not take a note of the temperature but it is really high. ..."*

63. This is ground 1, by which Mr Yang complains that this passage was delivered in a way that made light of the appellant's case and that at this point the jury laughed. Miss Gannon does not recall this occurring and says that this was an ordinary part of the summing up which raised no concerns. We have listened to the audio recordings and are unable to identify any problem with this part of the trial. There is no audible laughter, and we detect nothing in the tone of delivery by the Judge which might invite ridicule or amusement. We are not persuaded that there is any problem here.

CONCLUSION

64. We have considered each of the individual incidents of which this appellant complains. There were about 16 individual complaints. We have found the majority of those to lack substance. However, we do have concerns about three or four of the complaints raised. We accept that the Judge was unwise to interrupt Mr Yang's cross examination of DC Terry in the way that he did; and on one occasion we think he improperly descended into the ring in doing so. We have identified two occasions where the Judge lost his temper with Mr Yang for reasons and in a way which cannot be justified; we are troubled by both of those incidents (especially the second).

65. We stand back and ask ourselves whether our conclusions on the three or four incidents which we do find concerning cast a different light on the remainder. But we are not persuaded to change our minds on those other incidents. We do not think the remainder represent a pattern of undermining behaviour, on a fair reading of the transcripts, aided by the audio recordings of this trial. We hold to the views expressed already about each of them.

66. It follows that we reject grounds 1 and 2 for reasons we have already given. The focus of our attention is on ground 3 and whether the Judge's conduct, considered overall, led to the trial being unfair.

67. We have no real concern that the jury might have been unduly influenced in its deliberations, or that the Judge might have demonstrated (or might have been perceived to demonstrate) bias against the appellant. The jury was exposed to the Judge's many interventions during DC Terry's evidence, but for the most part we consider those were on the right side of the line; the jury did witness the Judge's descent into the ring on one occasion during DC Terry's evidence. The jury would have understood that it was their judgment on the case that counted, not any view that the Judge may at one point have appeared, possibly, to express or intimate.

68. We have also considered the appeal from the appellant's perspective. The appellant was in Court when the Judge descended into the ring that one time. He was also present when the Judge lost his temper with Mr Yang counsel on the morning of the second day of trial. The latter has potential potency because it was shortly before the

appellant was due to give evidence. However, the cause of that outburst was easy enough to understand: the Judge thought that Mr Yang had already had time to speak to his client, and wanted to emphasise that this was a simple case. In discussing the issues in the case, the Judge was not identifying anything which was not already part of the appellant's defence case statement. The appellant then gave evidence in a coherent manner; he set out his case in much the way that it had been foreshadowed in his defence case statement. These two incidents are regrettable, but set in the wider context of the trial as a whole, they are insufficient to demonstrate unfairness or bias, judged objectively from the perspective of the appellant.

69. The main thrust of ground 3 is the effect on Mr Yang of these incidents. It was certainly frustrating for Mr Yang to have the Judge excessively intervening during his cross-examination of DC Terry, but for the most part those interventions were not improper. The most concerning aspect is the Judge's loss of temper on two occasions, both times directed at Mr Yang. That was unacceptable and Mr Yang should not have had to put up with either incident. The first incident occurred at the start of the second day and followed Mr Yang's request for time to speak to his client. In fact, Mr Yang did get time to speak to his client, his client then gave evidence, and from all that we have seen and heard, Mr Yang remained effective as the appellant's counsel for the remainder of the trial. The second loss of temper occurred after Mr Yang's work was essentially concluded and when all that remained was the Judge's legal directions and summing up before the jury were sent out to deliberate. In our judgment, and very much to Mr Yang's credit, neither incident had any significant impact on the course of the trial.

70. The question for us is whether the cumulative effect of the Judge's behaviour, to the extent we have found that behaviour to be inappropriate, rendered this trial unfair. Fairness is not an absolute concept; there are many things in life and in the law which could be done better but which do not make the process intrinsically *un*fair. Standing back, we have concluded that our concerns about the way this trial was managed do not come close to the point where the trial as a whole might be considered unfair. The incidents which have troubled us are few; they came and went quickly, in the context of a short trial where there was no time or space for resentments to build up; they were dealt with effectively by counsel who did not appear to be knocked off course; the most concerning incident occurred at a late point in the trial which made no difference to the way the defence was conducted; and there were much longer and larger parts of the trial which do not give rise to any legitimate grounds for complaint.

71. We emphasise that ground 3 was predicated on Mr Yang's submission that the Judge's behaviour was antagonistic and unprofessional *throughout the entire trial*. We have not accepted that predicate. We have found only a few incidents which are concerning. We have rejected many more. We have not accepted, in any event, that Mr Yang was knocked off course in his representation of the appellant by the Judge's behaviour.

72. We reject ground 3.

DISPOSAL

73. We dismiss this appeal.