



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 15

HCA/2019/260/XC, HCA/2019/264/XC, HCA/2019/246/XC,
HCA/2020/121/XC, HCA/2019/267/XC and HCA/2019/247/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION

by

(1) BRIAN FERGUSON; (2) ANDREW GALLACHER; (3) ROBERT PICKETT;
(4) ANDREW JAMES SINCLAIR; (5) JOHN TIMOTHY RILEY HARDIE; and
(6) PETER ROBERT BAIN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First appellant: Graham QC, Arrol; Faculty Services Ltd (for Ross and Fox, Glasgow)
Second appellant: Mackintosh QC, Gilbride; Collins & Co (for McCardle Solicitors, Glasgow)
Third appellant: Jackson QC, Glancy; Paterson Bell
Fourth appellant: I McSporran QC (sol adv), Findlater; John Pryde & Co SSC (for Turnbull McCarron, Glasgow)
Fifth appellant: Findlay QC, V Young; Paterson Bell
Sixth appellant: McConnachie QC, CM Mitchell QC; Paterson Bell
Respondent: P Kearney AD; the Crown Agent

5 March 2021

Introduction

[1] On 25 April 2019, at the High Court in Glasgow, the appellants were convicted of

various elements of a charge which libelled a conspiracy to murder five members of the Daniels family in the months between October 2016 and June 2017. The charge centred upon the electronic tracking of the Daniels' vehicles, acquiring a variety of weapons and other equipment, and carrying out a series of assaults on the vehicles' occupants. The assaults took the form of deliberately colliding with the vehicles, striking the occupants with machetes, hammers or other similar instruments, to their severe injury, permanent disfigurement and/or impairment and attempting to murder them. On 13 May 2019, the first, second and fifth appellants were each sentenced to 20 years imprisonment, the third and sixth appellants to 16 and 15 years respectively, and the fourth appellant to 13 years and 3 months.

[2] The appeal concerns what occurred during the course of the defence speeches, which followed several weeks of evidence. In essence, after the court had adjourned for the day, a girlfriend of one of the appellants had been passing some of the jurors at a bus stop. She maintained that she had overheard one of them saying that the jurors had already made up their minds. The appellants' contention is that the trial judge erred in the manner in which he investigated the matter. His delegation of that investigation to his clerk, who, it was alleged, had already commented adversely upon the veracity of the girlfriend's account, had resulted in a miscarriage of justice.

The report and the investigation

Preliminary Procedure

[3] The trial judge reports that speeches to the jury had commenced on the forty eighth day of the trial (Tuesday, 2 April 2019). That on behalf of the second appellant began on Wednesday, 10 April, and was continued overnight. On the following morning, prior to the

trial diet re-calling and the speech continuing, the second appellant's counsel approached the clerk of court informally. She said that, on leaving court the previous day, the second appellant's partner, namely Ashleigh Muldoon, had overheard three female jurors discussing the case. Subsequently, in a Note of Appeal, it was alleged on behalf of the second appellant that the clerk had responded to counsel by saying "well, she's a liar". It was also said in the Note that the judge had been aware of this response when the matter was reported to him; a fact which, it transpired, was unfounded.

[4] The matter was canvassed in open court, once the diet had called. A transcription of what was said in court on this and the subsequent days was obtained in light of the conflict between certain allegations contained in the Notes of Appeal and the judge's report.

Initially, the account of what had happened was a general one of the three jurors being together and a remark by one of them having been made about the jury having made their minds up. The trial judge was initially anxious that, although the matter would have to be investigated, the speeches should continue. He was persuaded, primarily at the instance of the fifth and sixth appellants, that the matter would have to be investigated before the trial continued. The submission from the sixth appellant at that stage was that the normal procedure was for either the trial judge or the clerk of court, or both, *inter alia* to interview any relevant juror. The judge stated that "the clerk of court will investigate the matter" and the first step would be for the second appellant's law agent to produce a written statement.

[5] The trial judge reports that he had regard to previous instances, in which an issue had arisen with the jury and in which it was thought appropriate for the judge to carry out the inquiry himself (*McCadden v HMA* 1985 JC 98; *Touati v HMA* 2008 JC 214). The procedure adopted was a matter for the judge; provided that it was consistent with a fair trial (*Pike v HMA* 1987 JC 9).

[6] The trial judge decided that the appropriate way in which to investigate the allegation was for the clerk of court to do so under the judge's authority and direction. Parties were told by the judge in clear terms that this was what would happen during the course of the submissions on the morning of 11 April. The judge did not consider that he should conduct the interviews personally as it was clear that a number of persons would need to be spoken to, including Miss Muldoon and the jurors, and any CCTV, which covered the area of the bus stops, would require to be found and viewed, with any persons in the vicinity identified and interviewed. The judge did not consider that the police should carry out any of the interviews, given the challenges to the police evidence during the trial; although they could assist in recovering the CCTV images. Having regard to the nature of the allegation and the scope of the inquiry, which might require to be revisited as it progressed, the judge determined that he, as the decision maker, should remain apart from the investigation. The clerk would carry out the investigations, report on them and the judge could then decide how to proceed.

[7] After an adjournment, which lasted the rest of the day, the trial judge told the parties that the clerk's investigations had not been completed. He explained that the investigations had included interviewing the three jurors. The trial was adjourned again overnight.

The investigation

Part 1

[8] The investigation took from 11 to 15 April 2019 (13/14 April being the weekend). The exit of the High Court for jurors would take them out near the junctions of the Bridgegate with Mart and King Streets. There is a large open air car park extending westwards from King Street towards Stockwell Street and the St Enoch Centre. On the north side of the car

park there are bus stops located on Osborne Street westwards of the rear entrance to TJ Hughes department store.

Ashleigh Muldoon

[9] Miss Muldoon's account was that she had been walking from the High Court towards St Enoch's open air car park (see *infra*). She had crossed the road next to the bus stops. There were three female jurors whom she identified as jurors nos. 3, and 4 and 11 in the vicinity of the bus stops. On approaching to pass the jurors, Miss Muldoon overheard one of them, whom she thought was juror no. 3, say to the other two: "Well we've already made up our minds but I suppose we have to listen to them". On the following morning, she provided this information to the second appellant's law agent, who in turn relayed it to his counsel.

[10] On 11 April, in the presence of the court macer¹, the clerk of court asked Miss Muldoon a set of questions which, other than in relation to identifying the jurors concerned, were responded to, as noted by the clerk in indirect speech, as follows:

Q. At what time did you encounter the jurors and where?

A. Ashley (*sic*) was on her phone trying to locate a friend, so she remembers it being 1559/1600. She stated that this is when she hung up her phone. She encountered the jurors near the bus stops at the top of King Street car park - she believes it's called Osborne Street, and agreed with me near the back entrance of TJ Hughes.

Q. How close did you get to the three in question?

A. The jurors seemed to come to a stop as if they were parting to go their separate ways - and Ashley walked through the three of them and she stated that she started to cry when I asked if she did anything else.

Q. What was said and by who?

A. Ashley believes the woman in front row with glasses [juror no. 3] said 'Och we have already made up our minds but I suppose we have to hear what they have

¹ ie the mace-bearer, court officer or usher

to say'. Ashley said that the other two said nothing but kind of nodded as if in agreement."

[11] CCTV, which monitored areas of the street, was obtained and viewed by the clerk.

This showed three persons, presumably the jurors, walking in a particular direction and then around 40- 60 seconds later a person, presumably Miss Muldoon, walking in the same direction.

The Jurors

[12] The jurors were asked a set of questions, which appear to have been prepared by the trial judge, and responded as follows:

"Q. Did you leave with any other jurors last night when court adjourned?"

J3. I waited on another juror then I met up with [juror 4 and juror 11] - they waited on me across the road. [Juror 4] met someone from work and I laughed and said she didn't recognise you as you have been away from work for ages.

J4. Yes with [juror 3] and [juror 11] well [juror 11] and herself then [juror 3] caught up with them.

J11 Left with juror [4] and juror [3] - actually not left with [4] and [3] caught up with us.

Q. What way did you go when you left court?"

J3. I turned left then across road and turned at lights.

J4. Walked across road headed to lights and turned left - like at the back of TJ Hughes area.

J11. Out the door turned left across the road up to lights and turn left at back of TJ Hughes - [juror 4] met someone who worked with her and [juror 3] and I kind of stepped away from them a few paces to allow them to talk as we didn't know the person.

Q Did you discuss anything about the case or anything that happened yesterday?"

J3. No - I didn't discuss the case I was moaning about one of the other jurors- who was just annoying me yesterday.

J4. No nothing discussed about the case - did meet a girl from my work who asked what I was doing here - said I was on jury duty but nothing else mentioned.

J11. No I don't discuss the case out with the jury room.

Q. Did you or any other of the others say, 'Och we have already made up our minds but I suppose we have to hear what they have to say'?

J3. No not one of us said that.

J4. No not at all - I haven't made up my mind...

J11. That was not said – we didn't discuss the case and I have an open mind.

Q. Did you notice a female who may have walked through your group?

J3. Nobody walked through us.

J4. No one walked through us.

J11. Didn't see anyone walking through the group

Q. If so was the female doing anything of notice?

J3. It didn't happen and would have noticed if it did.

J4. No again didn't happen but would have noticed if that had.

J11. Didn't see anyone walking through or upset or anything..."

The clerk recorded that juror no 11 wanted to speak to him after the interviews to say that she forgot to say that juror no 3 had been moaning about another juror and that she had been annoying her the day before.

[13] The clerk reported the results of his interviews and his viewing of the CCTV to the trial judge. The clerk expressed the following "conclusion":

"Having interviewed Ms Muldoon and the three jurors and considered the CCTV which is available, and given what the jurors have individually stated and further when all three statements are considered collectively, I conclude that there is no independent support for Ms Muldoon's evidence."

Further Submissions

[14] On 12 April, when the court reconvened, the parties had been provided with the clerk's report, which included the various responses to his questions. The first appellant complained that the investigation had been carried out by the wrong person. It was said, for the first time (cf the submissions of the sixth appellant on the previous day), that the trial judge should have interviewed the jurors himself as qualitative assessments of what the

jurors had said had to be carried out. Once interviewed, the jurors had been allowed to return to the jury room. In addition, the investigation had been incomplete because there might be CCTV images from the First Bus buses at the stops. The fourth person should be located and interviewed. The fifth appellant adopted the same line in relation to the judge carrying out the investigation. The judge ought to have interviewed the jurors with the clerk as a witness. The sixth appellant adopted a similar approach.

[15] The trial judge instructed inquiries to be made of First Bus and to locate the fourth person. He informed the parties of his intentions and adjourned the trial over the weekend, pending the results of these investigations.

Part 2

[16] Further CCTV was obtained thereafter from a First Bus which had been parked on Osborne Street. This showed the three jurors meeting the fourth person and stopping to talk to her. After about 30 seconds, Miss Muldoon passed all four women. She did not stop, break stride and/or look down. The fourth person then left and, about 40 seconds later, the three women continued walking.

[17] On the afternoon of 12 April, the fourth person was questioned by the clerk as follows:

“Q. Did you meet anyone on Wednesday who you knew and close to this court building?”

A. ...Yes I met someone I knew, [juror 4], she is a work colleague.... I met her near to the large car park and where the buses go up and down and stop.

Q. What did you talk about what was said?

A. [Juror 4] said Hi and how are you. I replied good and how are you and said I haven't seen you for a long time at work. [Juror 4] said yes I'm on a jury. She asked is it interesting. [Juror 4's] reply was yes it is. Nothing else was said. [Juror 4] was with two other ladies I didn't know them. I must have spoken with [juror 4] for about 30 seconds to 1 minute.

Q. Have you had any contact with [juror 4] since you met her on Wednesday?

A. I have not had any contact from [juror 4] as we are not friends just work colleagues and I don't have any contact details for her."

The clerk proffered an additional conclusion in his report to the judge:

"Having interviewed [the fourth person] and considered further CCTV from a bus, we now have an independent witness who confirms a conversation took place and what the details of that conversation were and this supports what the 3 jurors have advised me individually."

[18] Meantime, at about 10.00am on 12 April, a precognition had been taken from Miss Muldoon by the second appellant's agents. This stated that Miss Muldoon had been walking along Osborne Street with the intention of meeting a friend. She noticed a juror (juror 3) walking in front of her. Miss Muldoon "put her head down, to walk by". She then heard the juror saying "Och well, we've already made up our minds but I guess we need to hear what they have to say." Miss Muldoon said that this made her look up. She was about a foot away when she realised there were two other jury members there. Juror no 3 was on her left (in) side and the two others (jurors no 4 and 11) were on her right (road) side as she walked by. Miss Muldoon reported the matter to the second appellant's solicitor on the following morning.

The Trial Judge's Decision

[19] All the relevant material was made available to the parties on 15 April, when the trial judge heard motions by the appellants to discharge either juror no 3 or all three jurors and, in effect, to desert the diet *pro loco et tempore* (one juror having been discharged already). The Crown opposed the motions. The judge refused the motions. He reasoned, *inter alia*, that Miss Muldoon had made no mention of the fourth person being present or of a conversation between one of the jurors and the fourth person when she was in a position to

do so. The CCTV images had confirmed that a fourth person had been present and such a conversation had taken place. Miss Muldoon said that she walked through the three jurors. All three jurors confirmed that this did not happen. The CCTV images recorded that she did not walk through the three jurors; she walked past them. Miss Muldoon said that, after walking through the jurors, she started to cry. There was nothing in the CCTV images which confirmed that and the jurors and the fourth person did not make reference to such a potentially memorable event. Miss Muldoon said that she put her head down upon recognising a juror. The CCTV images did not record her putting her head down nor did any of the three jurors or the fourth person refer to this.

[20] The trial judge explained that all three jurors had, independently of each other, mentioned one juror meeting and speaking to a work colleague. They were all correct and their accounts were verified by an independent witness, namely the fourth person work colleague. All three jurors said that no one walked through them. Their accounts were verified by the CCTV images. The three jurors stated that nothing was discussed about the case and that no conversation took place as alleged by Miss Muldoon. They all said, independently of each other, that no such conversation took place. Their interviews took place in advance of the interview of the fourth person. That person confirmed the accounts of the three jurors. The judge accordingly preferred the accounts of the jurors to that of Miss Muldoon.

[21] In due course the trial judge directed the jury that an open mind should be kept until all the speeches and directions had been completed and the jury had been invited to retire to consider their verdicts. He told the jury repeatedly that they should only begin the process of assessing the evidence and reaching verdicts once they were invited to retire to consider

their verdicts. The jury considered their verdicts from 10.16 hours on 18 April until 12.13 hours on 25 April 2019 (around three and a half days of court deliberations).

[22] On 2 July 2019, Miss Muldoon wrote to the Scottish Courts and Tribunals Service complaining that the investigation had been “prejudiced” and she had been “unfairly branded a liar” by the clerk. Miss Muldoon had been told of the remark which counsel for the second appellant had attributed to the clerk when the matter was first reported to her. Miss Muldoon states that she had not said that she had only seen three people when the remark, which she had overheard, was made. She had said that she had seen a group of people which included at least three members of the jury. She had wanted to avoid eye contact. She did not say that she walked through the middle of the group, but passed them on her left hand side. The friend whom she had met had not been contacted yet she would have confirmed that she had been upset at what had happened. Miss Muldoon asserted that the jurors had “substantial time to discuss what their responses would be” because they had not been separated from each other. She complained that her complaint was not taken seriously and had been investigated by a person who was “under-qualified”.

[23] An affidavit was obtained from the second appellant’s counsel to the effect that, when she told the clerk of what the second appellant’s partner had reported, he had said “well, she’s a liar”. She had told the second appellant’s agent what had happened. She had not mentioned the matter when the court convened. She assumed that the clerk would have repeated his view to the trial judge in private. She expressed the view that the trial judge had found the matter to be an “irritating delay to the trial” and that whatever investigation was undertaken “was only paying lip service to the issue”. The trial judge had delegated the matter to the clerk in the knowledge of what the clerk’s view of Miss Muldoon had been.

[24] An affidavit from the clerk records that he recalled counsel's approach to him in the well of the court about comments made by jurors on the previous evening. He "definitely did not say in response to what she told me 'She's a liar'".

Submissions

Appellants

[25] The principal submission was made by the sixth appellant, supplemented by the second appellant, and variously adopted by the remaining appellants. It was averred in the Note of Appeal and the sixth appellant's Case and Argument that, during the discussion on 11 April, "the appellants had not been advised what procedure was proposed and had not been invited to make representations". The appellants had not, according to the Case, been given an opportunity to make submissions on what the procedure should be until the procedure had been embarked upon. It was contended in the Note and in submissions that it had been imperative that the persons involved, including the jurors, should have been interviewed by the trial judge in the presence of the clerk of court (*Touati v HM Advocate (supra)* at para [21]; *McCadden v HM Advocate (supra)* at 101; *Nicolson v HM Advocate* 2001 SCCR 13 at 16). Although there was no rigid rule in relation to whether a juror should be interviewed, *Pike v HM Advocate ((supra)* at 12) was not authority for delegating the process to the clerk of court.

[26] It was inappropriate to delegate this to the clerk as he was not a decision maker. It was inappropriate to invite the clerk to reach conclusions on where the truth lay and to make decisions based upon these conclusions. Only by conducting the interviews himself would the judge have been aware of how they had been carried out and what the demeanour of those interviewed had been. Juries were regularly told of how demeanour

could assist in determining credibility and reliability. It could be a crucial factor, yet the judge had removed that tool from his decision making function. A judge had training in the assessment of matters of fact and experience in doing so in civil cases, evidential hearings, examinations of facts, contempt of court proceedings and proofs in mitigation. No-one was aware of what a clerk's knowledge and experience was. If the judge had been uncomfortable with conducting the interviews, the questioning could have been done in open court by the parties. Full statements from the persons involved should have been taken, rather than answers to a few questions.

[27] Miss Muldoon would not have been aware of what CCTV might show, but it supported her position that there had been three jurors, walking in the same direction, stopping at the bus stops and being passed by her when she would have been in a position to hear what they had said. There had been mention of jury service to the fourth person. Miss Muldoon had had nothing to gain from reporting the matter, whereas the jurors had a reason to deny doing something which they had been warned about by the trial judge.

[28] The second appellant emphasised that a clerk of court did not require to be legally qualified. They did not take the judicial oath. They were appointed by the Scottish Courts and Tribunals Service (Administration of Justice (Scotland) Act 1933, s 23) and their duties approved by the Lord Justice General (*ibid* s 24). There was no statutory power enabling a clerk to investigate and report. Were this court to remit a matter to "any fit person" (Criminal Procedure (Scotland) Act 1995, s 104(1)(d)), it would be to a person who was qualified. Interviewing people, notably the asking of questions, required skill. A person who was legally qualified would know how to avoid the pitfalls, such as by separating the three jurors from the others. Miss Muldoon's subsequent complaint had said that the clerk

had noted what she had said wrongly. The nature of a clerk was as a “civil servant” and not a judicial office holder.

[29] It was acknowledged that the Note of Appeal was in error where it had said that the remark, which counsel had attributed to the clerk on first reporting the matter, had been relayed to the trial judge. It was accepted that counsel had not brought the matter to the judge’s attention. Nevertheless, the remark meant that there was a real possibility that the clerk had been biased and this ought to be the subject of inquiry by a judge. The fifth appellant disavowed any criticism of the clerk of court. He was neutral on that matter.

Crown

[30] The Advocate depute submitted that, where a trial judge was informed of potential improper conduct by a juror, it was a matter for the discretion of that judge to decide:

(a) whether to make further inquiries; and (b) the nature and extent of those inquiries. The latter would depend upon the facts and circumstances of the particular case (*Pike v HM Advocate (supra)*; *Nicholson v HM Advocate (supra)* at 17). The inquiries had been appropriate. The investigation was extensive. It interrupted the trial for two days. It armed the judge with sufficient information upon which to take a decision on the facts.

[31] Miss Muldoon’s allegation could be compared with the statements of the three jurors and the fourth person, who had been traced after extensive attempts by the police. The detail of Miss Muldoon’s account, in particular that she “walked through the three of them”, could be tested against the CCTV images. Although Miss Muldoon claimed in her letter of complaint that she had not told the clerk that she had walked through the group, her precognition of 12 April 2019 was to a contrary effect.

[32] It was not necessary for the trial judge to carry out the interviews. The veracity of an account could be assessed without seeing or hearing that account being given. Everyday examples included the admission of statements under sections 259 and 271N of the 1995 Act. Empirical studies, which had been considered by the Scottish Court Service Steering Group on Evidence and Procedure chaired by the then Lord Justice Clerk (Carloway) (at para 3.8), had shown the shortcomings of demeanour as a means of assessing credibility and reliability. A person's demeanour was only one factor that could be used in that assessment. Others included the content and substance of the statement, its inherent likelihood and its comparison with other evidence. How it compared with other evidence in the case was often the most important gauge (*CJM (No 2) v HM Advocate* 2013 SCCR 215 at para 41).

[33] The veracity of the allegation could be tested against the statements of three jurors, who had no personal connection with each other or to the accused, and that of the fourth person, who had no connection to the case at all. The particular circumstances, and the extent of the inquiry, extending as it did beyond the interview of the jurors, distinguished it from *Touati v HM Advocate (supra)* and *Nicholson v HM Advocate (supra)*. The judge's reasoning for rejecting Miss Muldoon's allegations was cogent and compelling.

[34] In relation to the remark attributed to the clerk, even if it had been made, it did not give rise to a miscarriage of justice. The right of an accused at common law and in terms of Article 6 of the European Convention was to have the charge against him determined by an independent and impartial tribunal (*O'Neil v HM Advocate* 2013 SC (UKSC) 266, at para [47]). Any issue concerning alleged partiality of the clerk did not relate to the determination of the charge. In any event, the clerk did not make the final determination. The judge was responsible for the direction of the investigation, the assessment of the material and the determination of fact.

[35] The test was whether the fair minded and informed observer would conclude that there was a real possibility that the tribunal was biased (*O'Neil v HM Advocate (supra)* at para [47], applying *Porter v Magill* [2002] 2 AC 357). The fair minded observer would have regard to: the transparent manner in which the investigation was progressed; the opportunities afforded to the parties to address the court upon further lines of inquiry; the fact that the clerk was carrying out the investigation in his official capacity, on instruction from the trial judge; the clerk being an officer of the court of many years standing; and the interviewing being witnessed by another experienced court official. The making of the remark would be seen in its context as an initial spontaneous reaction. It would not be inconsistent with the subsequent proper exercise of the clerk's duties. The fair minded observer would have regard to the absence of any complaint about the remark to the trial court (*O'Neil v HM Advocate (supra)* at paras [55]-[56]). Had there been a real basis for concern, it was unlikely that appellants' representatives would have refrained from raising the point. The observer would be aware of the directions given to the jurors (*Carberry v HM Advocate* 2014 JC 56, at para [43]). Any alleged bias on the part of the clerk would have had no bearing upon the judge's determination; far less the jury's verdicts. Even if the allegation were true, the terms of the comment, its timing, the safeguard of the judge's charge, the discriminating verdicts and the length of time taken to reach them, all showed that no miscarriage of justice had occurred.

Decision

[36] The comment, which Miss Muldoon maintains that she overheard juror no 3 make, bears a resemblance to that which was said to have been made to, rather than by, a juror in *Pike v HM Advocate* 1987 JC 9 ("So you have already made up your mind then") and

overheard by one of the junior counsel. The trial judge in *Pike* adjourned the trial pending the maker of the alleged statement being jointly interviewed by the parties' legal representatives. Ultimately, that person said that, although he was not 100 per cent sure, he did not think that he had made the remark and, if he had, it was not in connection with the trial. The judge did not take matters further. It was argued on appeal that, following *dicta* in *McCadden v HM Advocate* 1985 JC 98 (LJC (Wheatley) at 101-102), the judge ought to have interviewed the juror concerned rather than relying on a direction, which he gave at the time. The direction addressed the specific remark, as if it had been made, by reminding the jury that they required to keep an open mind until they had heard all the evidence, speeches and directions. The appeal was refused. In delivering the opinion of the court, the Lord Justice General (Emslie) said (at 12) in relation to the particular facts that:

“it was a matter for the judge to decide what course he ought to follow. The appellant's contention is that he should have interviewed the juror. We do not doubt that if a judge is faced with evidence which shows *prima facie* that improper conduct has occurred he may be obliged to take the matter further if he feels that it may be too serious to leave to be corrected by directions to the jury as a whole. In particular, in such a situation the proper course may be to interview the juror allegedly concerned. We are not satisfied, however, that the passage in *McCadden* is to be understood as laying down a rigid drill which requires to be followed by a judge in every situation where a suggestion is made that a juror may have engaged in some improper conduct or other outwith the courtroom. Whether a judge requires to interview a juror must always depend on the circumstances which confront him and in this case, since it was far from clear that any improper conduct on the part of the juror had occurred at all, and the indications were that nothing improper had probably happened, the judge was well entitled to make no further investigations and to deal with the matter after hearing counsel by giving the jury... directions.”

[37] *Pike* was followed in *Nicolson v HM Advocate* 2001 SCCR 13 (Lord Cameron of Lochbroom, delivering the opinion of the court, at 17) in which the trial judge had, contrary to the submissions of the accused, interviewed a juror in private, albeit in the presence of the clerk, having had a report from the clerk that the juror was unhappy because she had

recognised certain associates of the accused in court. The judge told the parties what he had been told by the juror and invited submissions upon it. He then discharged the juror but, on the basis that the juror had said that she had not discussed the matter with the other jurors, did not make any inquiries of the other jurors. He considered that his directions on deciding the case on the evidence would suffice. He also commented that to have interviewed each juror would have been both upsetting to the jury and given undue prominence to the discharge of the juror. The appeal against the judge's decision was refused.

[38] In *Touati v HM Advocate* 2008 JC 214, an allegation was made during a trial that, according to the first accused, a juror had been scowling at all four of the accused and, some days previously, had mouthed to him "you four are going down". The judge had, at the invitation of the first accused, interviewed the juror in private. In the subsequent appeal, the complaints of another accused to this mode of proceeding, on the basis that it deprived him of the opportunity to question the juror, was given (at para [21]) short shrift in so far as it suggested an appearance of jury bias.

[39] These cases illustrate that, where an allegation of juror misconduct is made, the nature of any inquiry will depend on the particular facts and circumstances. If there is information which *prima facie* supports the allegation, some inquiry will almost certainly be needed. It is important to note, first, that any such inquiry has to be made in the context of a continuing jury trial, which should not, for a variety of reasons, be unduly delayed or interrupted and in which the jurors' attention should not be unnecessarily distracted from the central questions in issue. Secondly, it is equally important that any inquiry should be as transparent as is reasonably practicable. Although a judge interviewing a juror in private has been one mode of proceeding which has been endorsed at an appellate level, it carries

with it certain dangers if the nature and extent of the interview is not conveyed to the parties at the time. Any such interview should, in the modern era, normally be recorded.

[40] In this case, the decisions of the trial judge had due regard to the particular circumstances. He first ensured that everyone had a clear written statement of what had been reported to the second appellant's law agent. Secondly, he told parties of his intention to instruct the clerk of court to investigate the alleged transgression. That had been one course of action which had been specifically mentioned by the sixth appellant. If any party had considered that to be inappropriate, for whatever reason, they could have objected to such a course then, before the clerk's investigation had commenced. Any allegation of bias, if it was to be made, which was based on a remark which the clerk had made informally to counsel, ought to have been made then. The absence of any such objection would be an important factor for the informed observer to take into account (see *infra*).

[41] The court rejects the contention that the clerk of court was in some way unqualified to carry out what was to be a relatively limited inquiry involving asking a very few, prescribed questions, noting down the answers and identifying any relevant CCTV images brought to his attention by the police. A Depute Clerk of Justiciary may, or may not, have an academic legal qualification. In all instances, he or she will have undergone substantial training in the procedures and practices of the High Court and, in particular, how to deal with and, on occasions, advise upon any practical matters which arise during the course of a trial. The appointment of a Depute Clerk requires a warrant of the Lord Justice General. This particular Depute Clerk was a clerk of many years' experience. There is no reason to doubt his competence to carry out the delegated task. The trial judge would have been well aware of his clerk's skills and experience. He was content that the clerk could and would do what the judge instructed.

[42] The delegation of the inquiry to the clerk had certain clear advantages. First, as the trial judge noted, it kept the judge separate from the initial process, which was to involve the questioning of the girlfriend of one of the accused and jurors and the possible viewing of CCTV images. Once all the information was ingathered, it could, secondly, be provided to the parties. The parties would transparently have all the material which the judge himself had. The judge could then, thirdly, hear submissions upon the material before assessing it and making an informed and reasoned decision upon it. This is what occurred. At each stage of the inquiry, parties were provided with the material recovered and were able to make submissions upon it. They were, on 12 July 2019, able to persuade the judge to make further inquiries (which did not include interviewing Miss Muldoon's friend). They were able to submit belatedly that the judge should carry out the interviews himself. The judge reports that he considered and rejected that option for the reasons which he gave (*supra*). Fourthly, having the clerk carry out the questioning, kept the inquiry at the appropriate level of scrutiny and thus lessened the risk of the jurors becoming distracted by this issue assuming a disproportionate importance were it to be found to be lacking substance. The stress which would be caused to the jurors by the judge undertaking this task, especially but not only if it were done in open court, should not be underestimated. No doubt, if at the end of the process, the judge considered that he himself ought to re-interview the jurors, that could have been done but there were no indicators that pointed to any need to do that.

[43] The clerk did not express any views in relation to the demeanour of the persons whom he interviewed. Given the limited nature of the inquiry, it is difficult to see how demeanour could have entered the equation in any meaningful sense. The clerk's "conclusions" did not amount to findings in fact. He simply reported the answers which he had been given and said, correctly, first, that there was "no independent support for

Ms Muldoon's evidence" regarding the remark and, secondly, after the fourth person had been questioned, that there was now an independent witness who spoke to what was said and that "this supports what the 3 jurors have advised me individually". It was then for the judge to consider the whole content of the reports and, by comparing and contrasting them and the CCTV images, to decide whether what had been alleged had such substance as merited the significant step of desertion of the diet *pro loco et tempore*.

[44] The trial judge did not simply adopt findings made by the clerk. He analysed what each person had said and how it fitted into the known facts as shown, for example, in the CCTV images. He did not consider that Miss Muldoon's account of her physical movements fitted with what was shown on CCTV. This included her account of walking through the jurors. Although Miss Muldoon protested in her letter to the SCTS that she was misquoted by the clerk in this regard, the clerk's record is the same as is contained in Miss Muldoon's precognition, as taken by the second appellant's agent. The judge was persuaded by the consistency of what was said by the three jurors *inter se* and with the account of the fourth person, as confirmed in part by the CCTV. In this regard, there is no basis for an allegation that the jurors could in some way have colluded with each other because they had not been separated. The judge was entitled to reach the view that Miss Muldoon's allegation was not well founded and that the trial should continue. In so finding, neither the clerk nor the judge said that Miss Muldoon had been lying, although no doubt that was one possibility. They simply did not accept the accuracy of her account. As *Pike v HM Advocate (supra)* demonstrates, even an account reported by responsible junior counsel can turn out to be mistaken upon inquiry.

[45] The latter comment in relation to error may also be applicable to the remark attributed to the clerk of court. Even if it were accepted that such a remark had been made,

it was at best an ill-informed and perhaps flippant remark made prior to the calling of the trial diet. As such it provides no stable foundation for a plea that the trial thereby became unfair. Applying the test of “whether the fair minded informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” (*O’Neill v HM Advocate* 2013 SC (UKSC) 266, Lord Hope at para 47 quoting from his judgment in *Porter v Magill* [2002] 2 AC 357 at para 103), it is important to note that the tribunal in this case was ultimately the jury. The fictitious hypothetical observer would see the clerk’s remark, if it was made at all, in its context as some form of throwaway line. He or she would then observe the serious manner in which the allegation made by Miss Muldoon was investigated by the clerk and reported to the judge. This involved delaying the trial for two days while extensive and impressive efforts were made to locate relevant CCTV images and to find and interview the fourth person. The observer would be aware of the reasoning ultimately provided by the judge for rejecting Miss Muldoon’s account. He or she would have in mind the clear directions given by the judge to the jury that they must decide the case solely upon the basis of the evidence which they had heard. Finally, he or she would see that the jury deliberated for some three days before returning discerning verdicts in relation to each appellant. At the end of this process, the fair minded informed observer would not consider that there was any real possibility of bias.

[46] The appeals are refused.