HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 12

on appeal from: [2004] EWCA Crim 1474

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina *v.* Smith (Appellant) (2004) (No 2) (On Appeal from the Court of Appeal (Criminal Division))
Regina *v.* Mercieca (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

ON
WEDNESDAY 16 FEBRUARY 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry and Lord Carswell, with which I am in full agreement. For the reasons they give I would allow these appeals, make the orders which they propose and answer both certified questions in the negative.

LORD STEYN

My Lords,

2. For the reasons contained in paragraph 26 of the opinion of my noble and learned friend Lord Carswell, I would also allow the appeals, quash the convictions and remit the case to the Court of Appeal to decide whether to order a new trial.

LORD RODGER OF EARLSFERRY

My Lords,

3. On the morning of 29 May 2002 counsel for Mr Smith showed him an anonymised copy of a letter detailing the alleged failures of certain members of the jury to comply with the judge's directions. As counsel explained in his affidavit in the proceedings before the Court of Criminal Appeal, his own view was that, absent tactical considerations, he should apply to discharge the jury. From the point of view of Mr Smith, there were, however, certain tactical arguments in favour of simply having the judge give the jury further directions. From what was said in the letter, it seemed likely that, if the trial went ahead, the jury would convict him of the two lesser counts, 1 and 2, but acquit him of, or be unable to reach a verdict on, the charges of kidnapping and murder in counts 3 and 4. On the other hand, if the jury were discharged and a new trial ordered, Mr Smith would again face all the charges, including those of murder and kidnapping. Counsel explained this to Mr Smith who understood the position. The affidavit records:

> "In the circumstances Mr Smith took the decision not to seek the discharge of the jury in the belief that any verdicts the jury returned would effectively clear him of murder and kidnapping. Mr Smith was, understandably, unwilling to expose himself to any continued risk of being convicted of murder or kidnapping on any retrial."

4. It is abundantly clear that Mr Smith took a tactical decision which, on advice, he thought would work to his advantage. The decision was not to seek a discharge, but to proceed with the trial after further directions to the jury. His counsel addressed the judge on that basis. Mr Smith is entitled to say that he assumed that the directions would be appropriately rigorous. In the event, for the reasons given by my noble and learned friend, Lord Carswell, they did not meet the required standard. Mr Smith can legitimately complain on that score and I accordingly agree that his appeal should be allowed.

5. I would wish to reserve my opinion, however, on whether, if the directions had been satisfactory, Mr Smith could have appealed and contended that the jury should have been discharged. The point is one of considerable general importance which was not fully argued. There

is, with respect, considerable force in the observation of Woolf LJ in *R v Lucas* [1991] Crim LR 844; transcript, p 11 that an appellant should not be able to blow hot and cold in this way. Here Mr Smith knew about the two possible remedies and their respective advantages and disadvantages, so far as his own self-interest was concerned. Armed with that knowledge, in the furtherance of his self-interest, he quite deliberately chose not to ask for the jury to be discharged because he wanted to avoid the risk of a new trial on all the charges. That decision is not hard to understand. But it is by no means obvious to me that it would be in the interests of justice for Mr Smith to be able later to contradict that deliberate decision and assert that the judge should have discharged the jury. It so happens that in this case the anticipated tactical advantage failed to materialise and Mr Smith was convicted on all four counts. But the point could also have arisen if the jury had convicted him on the first two counts only.

LORD WALKER OF GESTINGTHORPE

My Lords,

6. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry and Lord Carswell. I am in full agreement with them and for the reasons given by Lord Carswell I would allow these appeals and make the orders which he proposes.

LORD CARSWELL

My Lords,

7. The institution of jury trial, with all its imperfections, is still trusted by the public as a method of determining the guilt of persons charged with criminal offences. Two important factors in retaining that trust are concerned in this appeal. The first is the maintenance of the sanctity of the jury's deliberations, so that its members will continue to feel confident that they can discuss the issues in the case before them with complete candour. Their individual views or arguments will not be revealed to the court, which will be informed simply of the jury's

laconic verdict. This encourages the collective and cohesive deliberation and reconciliation of differing views which Lord Hobhouse described in *R v Mirza* [2004] 1 AC 1118 at paragraph 143 as an important feature of the jury's work. It also protects individual jurors from exposure to pressure to explain the reasons which had actuated them individually to arrive at their verdicts: *Ellis v Deheer* [1922] 2 KB 113 at 121, per Atkin LJ. The second factor is that in those fortunately rare cases where the court is informed that there has been some misconduct on the part of jurors or irregularity in the way in which their deliberations have been carried out, it should have as effective means as the circumstances will permit of ascertaining what has gone wrong and taking steps to rectify it. The present appeal concerns the second of these factors and the way in which such investigation can be carried out while preserving the first factor intact.

8. The appellants were convicted on 30 May 2002 at the Central Criminal Court after a trial before His Honour Judge Stokes QC and a jury on four counts:

Count 1: conspiracy to cause grievous bodily harm;
Count 2: false imprisonment;
Count 3: kidnapping;
Count 4: murder.

They were each sentenced to imprisonment for life on count 4 and to seven years' imprisonment on each of the first three counts, to run concurrently.

9. The Crown case against the appellants was that the victim Mark Levy was on 27 January 2000 lured by one David Checkley to a house where he was held for a time, before being taken by the appellants in the boot of a car to a wood at Denham, Buckinghamshire, where he was murdered by them. The case depended very largely upon the testimony of an accomplice, Arpit Kumar Patel, who gave evidence for the Crown. The admissibility of his evidence was strongly challenged by counsel for each defendant, and that issue formed the substance of much of the argument before the Court of Appeal, which on 19 December 2003 dismissed the appellants' appeals on all grounds. The issue was not the subject of the appeal before the House, which turned solely on the question of the action taken by the judge on receipt of a complaint from a juror.

10. The trial which ended on 30 May 2002 was a retrial. The appellants and three other defendants had been tried in a trial which lasted for six months in 2001, but ended with the discharge of the jury on account of an irregularity (unconnected with the defendants) before they reached their final verdicts. The appellants were the only two defendants in the retrial, which occupied some three months in 2002. The events after the judge completed his summing up were somewhat protracted. The jury were sent out to consider their verdict on Wednesday 15 May 2002. One juror then took ill and the house of another was burgled, with the result that they did not resume their deliberations until Tuesday 21 May. On that morning the judge assured them that there was no pressure of time and at their request gave them a reminder of the definition of conspiracy. He gave them more directions on the morning of 22 May and they continued their deliberations for that day and the next. On the afternoon of Friday 24 May the judge gave them a majority direction. The jury continued to deliberate on Monday 27 May. The judge had to be elsewhere on 28 May, so there was no sitting that day.

11. On 29 May at 9.30 am a letter was handed to the judge by a member of the court staff. It had been written the previous day by a juror, who gave her name and address in the letter. The text of the letter was as follows :

> "My Lord this is my first experience of Jury Service and based on your directions in your Summing Up I feel that it is important that you are made aware of the conducts of certain Jurors during the deliberation process.
>
> In my understanding of your instructions of how to come to a decision, which should be based on the evidence presented in court, I feel that your directions have not been taken into account. I say this because of the behaviour of several jury members during these proceedings, which has greatly concerned me.
>
> I feel that during the deliberating process Jurors are being badgered, coerced and intimidated into changing their verdict to that which a certain group of Jurors deem to be the right verdict regardless of what the evidence shows.
>
> For example, certain jurors would sneer and pour scorn on another juror's verdict by making comments such as:
>
> "The CPS would not have brought the case if they did not think that the defendants were guilty";
>
> "Do you want a re-trial at the tax payers expense";

Accusing jurors of:-

"Not having any common sense";

"Not looking at the evidence";

"Being afraid of finding the defendants guilty"

I can clearly remember you instructing us not to play detectives and not to speculate. However I feel that almost the entire deliberation process by this group of jurors has been based on speculation and jurors playing detectives, particularly when badgering another juror attempting to get them to change their verdict.

Again here are some examples:-

Asking jurors to explain,

"What has happened to ML's body";

"Why has DC not been charged with murder";

Making statements such as:-

"I do not believe we have been given the whole story about the money";

"I believe its more than the money. There must be other things we don't know about";

"Even if they are not guilty do you really want these people to go free";

"They can always appeal";

My grave concerns arise because I have seen how this group has used what they believe to be their knowledge of the law to influence and intimidate other jurors by making statements such as:

"In my opinion the defendants should prove their innocence, I don't believe that the prosecution should have to prove that they are guilty";

"These defendants have not made any attempts to prove their innocence";

"The Law is wrong";

"I don't need firm evidence I can give a guilty verdict on circumstantial evidence alone";

"If they are guilty and we find them innocent they would have got away with it, but if they are innocent and we find them guilty they can always appeal";

"Their appeal will be heard by three experienced judges";

One juror commented that on asking a friend who is a barrister about the points of law that the judge might apply to the indictments, it was stated that the judge might

> decide to throw out the whole case if a majority was not reached on all counts.
>
> "if the case is thrown out the past three months would have been for nothing";
>
> I find the whole idea of bargaining with jurors to influence their votes totally unacceptable because this is not what I understood the judicial system to be about.
>
> The incident I am referring to occurred when two members persuaded other jurors to change their verdict to give a majority on the 1st and 2nd indictment on the promise that they will in turn change theirs on the 3rd and 4th indictment. Stating that indictment 1 and 2 are less serious than 3 and 4 therefore the defendants would not serve any further time. Also stating by doing this we can quickly finish the case, as a certain juror needed to get back to work.
>
> Jury members who have been subjected to these tactics have actually indicated to me that they have had enough and are prepared to change their verdict.
>
> On more than one occasion particular jurors have felt so pressurised by the group that they have asked me to help and support them in defending their decision on the verdict, but I felt helpless to assist.
>
> I have agonised and thought long and hard about what I should do about this appalling and dreadful situation. I feel very strongly about what has been happening during the deliberation and believe that some of the jurors have behaved disgracefully in trying to secure the verdict they are convinced is the proper one.
>
> Because of what has taken place, in my opinion, any resulting verdict would not be a true representation of what all the jurors truly believe.
>
> I do not know what action can be taken at this stage but I felt that I needed to document my concerns and draw this matter to your attention."

12. The judge furnished copies of the juror's letter to counsel and saw them in his chambers, in the absence of the defendants. He invited submissions from counsel and Mr Black QC for the Crown suggested that he should give them a "powerful direction" to act on his instructions on the law and remind them of their duty to follow their own beliefs in the light of the oath they had taken. The judge indicated that that was the view which he had himself provisionally formed. Mr Blunt QC on behalf of Smith referred to the risk of a corrupt verdict, that verdicts of

guilty on counts 1 and 2 could be returned in exchange for not guilty verdicts on counts 3 and 4. He and Mercieca's counsel asked for and were given an opportunity to take their clients' instructions. It appears from the material before the Court of Appeal that if it were not for tactical considerations Mr Blunt would have sought the discharge of the jury, on the ground that a direction from the judge would not succeed in putting right the jury's approach to the case. The tactical consideration which prevailed with him was that if the jury, as counsel expected, convicted on counts 1 and 2 but either acquitted or disagreed on counts 3 and 4, his client could escape conviction on the more serious counts. He so advised Smith, who agreed to the course which the judge had proposed and which counsel for this reason recommended. Mercieca also consulted with his counsel, but there was no evidence as to why he agreed to the course proposed.

13. A short time later the hearing resumed, in open court in the absence of the jury. Counsel informed the judge that they were in agreement with his proposed course of giving the jury a further direction and discussed the matters which might be included. The judge then recalled the jury and addressed them in the following terms:

> "I am very sorry to have kept you waiting so long this morning, members of the jury. It is perhaps appropriate for me to say a few words to you at this stage of the trial. Each of you has taken an oath to return true verdicts according to the evidence. Nobody must be false to that oath, but you do have a duty not only as individuals but also collectively. That is the strength of the jury system and each of you takes into the jury box with you your individual experience and wisdom. As I said to you before, your task is to pool that experience and wisdom and you do that by giving your views and listening to the views of others. There must necessarily be discussion, argument, and give and take, within the scope of your oath and that is the way in which agreement is reached.
>
> If, unhappily, ten of you cannot reach agreement you must say so. Do not allow yourself, please, to be bullied or cajoled into giving a verdict that you do not agree with. That is most important. Do not worry about it in the sense that this trial has taken a long time: it has taken three months and if we do not reach verdicts three months will have been wasted. These things happen. You must not think like that; nor as to what might happen, whether there

> would be a retrial. All those are irrelevant matters so put them, please, out of your minds completely.
>
> It is perhaps fair and appropriate I should remind you that the prosecution bring the case against these accused. They must prove the case. It is not for the defendant to prove his innocence and I remind you that the prosecution must make you satisfied beyond all reasonable doubt of a defendant's guilt. Suspicion, strong suspicion, will not do; you must be sure.
>
> Finally, resist the temptation to speculate and keep your eye on the ball. Resist the many opportunities and temptations that exist in this case to be distracted. It is your views, and your views alone, that count.
>
> So with that further direction, which it seems to me right that I should give you, bearing in mind it is a long time since I addressed you, will you please retire once again and consider your verdicts in this case. Thank you."

The jury then retired again at 11.35 am on 29 May and continued their deliberations. At 2.55 pm they returned to court, having sent a note to the effect that they had reached a majority verdict on two of the counts but not on the other two and required further instructions. The judge asked them to continue considering their verdicts for a period. They separated overnight and resumed on the morning of 30 May. At 12.30 pm they sent a note reaffirming that they had agreed on two counts but could not reach verdicts on the remaining two. The court commenced to assemble, assuming from the terms of the note that a verdict would be taken on two counts and the jury would then be discharged. Before the jury came in, however, they sent a further note stating that verdicts had been reached on all counts. They came into court at 12.44 pm and returned majority verdicts of guilty against both defendants on each count.

14. The Court of Appeal (Buxton LJ, Goldring and Mackay JJ) held, following the views expressed in *R v Young* [1995] QB 324, 330, that the judge was precluded by the terms of section 8(1) of the Contempt of Court Act 1981 from carrying out an investigation into irregularities alleged to have occurred in the jury room. He was faced with the alternative of discharging the jury or giving a further direction and could not be criticised for choosing the latter course, the more so since counsel had expressly agreed that that was preferable.

15. On 22 January 2004 this House gave judgment in *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118, in which it was held, disapproving the observations in *R v Young*, that section 8(1) of the Contempt of Court Act 1981 did not have the effect of preventing the judge from conducting an investigation into the events which took place in the jury room. Buxton LJ sent a note to counsel dated 2 February 2004, stating that in the light of *R v Mirza* the court's reasoning in paragraphs 82 to 84 of its judgment based on section 8(1) was incorrect, but the court still was of the opinion that the judge's action was correct. He summarised its view as follows:

> 1. It was in practical as well as legal terms impossible to conduct an enquiry [judgment, §86]
> 2. It was for the trial judge to decide what course to take, and whether the remedy that he adopted would achieve the delivery by the jury of verdicts reached on a proper basis [judgment, §§ 88 and 93]
> 3. The court found that the judge's course in the present case, assessed on that basis, was not wrong [judgment, §93]
>
> There is nothing in *Mirza* that casts doubt on that approach. Although the House held that enquiry of the jury by the trial judge was permissible, it did not hold or suggest that such enquiry was required in every case; and Lords Hobhouse (at § 148(a) and Rodger (at §§ 156 and 157) made specific reference to the continuing discretion and judgement of the trial judge."

The Court of Appeal was not at that time minded to certify questions for an appeal to your Lordships' House, but after receipt of further written submissions it did on 5 April 2004 certify the following points of law:

> "(a) When a member of the jury sends to the trial judge in the course [of a trial a letter criticising the conduct] of other members of the jury in terms that suggest, or might arguably suggest, bias on their part, and it is accepted that the letter has been written in good faith, is the judge obliged as a matter of law (whether by the application of the opinions of their Lordships in *R v Mirza* [2004] 2 WLR 201 or otherwise) to question the members of the jury about the criticisms before deciding that

the delivery of lawful and unbiased verdicts by the jury can be achieved by the giving of a further direction rather than by discharging the jury?

(b) Is the position different if counsel representing the accused, on being consulted by the judge on the receipt of the letter, agree with the judge that the problem can properly be resolved by the giving of a further direction without further enquiry of the jury and accordingly that the jury should not be discharged."

Leave to appeal was refused, but on 11 October 2004 the Appeal Committee gave leave to appeal to the House of Lords.

16. The principles of the common law relating to inquiry into the verdicts of juries and matters which may affect the propriety of the manner in which they reach their verdicts have been rehearsed in *R v Mirza*, particularly in paragraphs 94 to 107 of the opinion of Lord Hope of Craighead, and it is unnecessary for me to repeat what their Lordships have said there. It may nevertheless be helpful if I set out in a series of brief propositions how the law stands, prior to considering how a judge should approach a situation such as that encountered in the present case:

(1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room: *Ellis v Deheer* [1922] 2 KB 113, 117-118, per Bankes LJ; *R v Miah* [1997] 2 Cr App R 12 at 18, per Kennedy LJ; *R v Mirza*, paragraph 95, per Lord Hope of Craighead.

(2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all: *R v Mirza*, paragraph 123, per Lord Hope of Craighead.

(3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible. The House so held in *R v Mirza*, affirming a line of cases going back to *Ellis v Deheer*

[1922] 2 KB 113 and *R v Thompson* (1961) 46 Cr App R 72.

(4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences, eg contact with other persons who may have passed on information which should not have been before the jury: see such cases as *R v Blackwell* [1995] 2 Cr App R 625 and *R v Oke* [1997] Crim LR 898.

(5) When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasion given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence: *R v Orgles* [1994] 1 WLR 108.

(6) Section 8(1) of the Contempt of Court Act 1981 is not a bar to the court itself carrying out necessary investigations of such matters as bias or irregularity in the jury's consideration of the case. The members of the House who were in the majority in *R v Mirza* all expressed the view that if matters of that nature were raised by credible evidence the judge can investigate them and deal with the allegations as the situation may require: see the opinions of Lord Slynn at paragraphs 50-51; Lord Hope of Craighead at paragraphs 92, 112 and 126; Lord Hobhouse of Woodborough at paragraphs 141 and 148; and Lord Rodger of Earlsferry at paragraph 156.

17. None of their Lordships specified the steps which it is open to the trial judge to take in the last-mentioned type of case, and the issue now before the House is the nature of the inquiry which can properly be made and the extent to which, if at all, it is permissible to question jurors about matters which took place during their deliberations. Counsel for the appellants submitted that the judge in the present case was obliged to question the members of the jury about the criticisms made in the juror's letter. In the absence of such inquiry he had to assume the truth of the contents, in which case further direction would not have been sufficient and discharge of the jury was the only option open to him. Alternatively, it was submitted that if it could have been a sufficient course to give a further direction, that which was in fact given was insufficient in the circumstances.

18. Counsel for Smith in the Court of Appeal summarised his complaints about the juror's letter in his skeleton argument in the following terms, which were substantially adopted in the argument for the appellants before your Lordships:

> "The letter showed that the key elements of the judge's summing-up had been wilfully ignored and his directions of law flagrantly disobeyed in that:
>
> - Legal directions had not been taken into account;
> - The burden and standard of proof had been reversed by jurors;
> - Irrelevant matters had been taken into consideration;
> - Jurors were speculating rather than considering the evidence;
> - Improper pressure had been placed on jurors to return verdicts on all counts because of an erroneous belief that there would have to be a retrial unless verdicts were returned on all counts;
> - The verdicts were not true verdicts according to the evidence."

I would accept without hesitation that the allegations, if true, contained evidence of misconduct which required the judge to take action. I am less convinced that they amounted to a charge of bias on the part of some jurors, as Miss Montgomery QC contended. Some jurors, according to the letter, had made up their minds about the defendants' guilt and were trying to overbear other members of the jury. It does not follow that they entertained any hostility against the defendants sufficient to amount to bias against them, rather than a strong opinion which they were pressing upon the others in a manner which might be criticised. There is no doubt, however, that the letter contained allegations which did amount to charges that some jurors were disregarding the judge's directions on the law, were indulging in speculation contrary to his instructions and were engaging quite improperly in horse-trading over verdicts on the several counts. In view of the conclusion which I have reached in respect of these allegations I do not find it necessary to pursue further the question of possible bias.

19. The letter contained the juror's name and address and from that fact and from internal evidence bore the indications of authenticity as a genuine letter from a juror concerned about the conduct of other members of the jury. Unlike the situation in *R v Robinson* [2002] EWCA Crim 2489, where the judge prepared questionnaires designed to ascertain whether any of the jurors had written an anonymous letter sent to him by post, I think that the judge in the present case was correct in assuming the authenticity of the letter and proceeding on that basis.

20. I am unable, however, to accept that it would have been appropriate for him to question the jurors about the contents of the letter, let alone that he was obliged in law to do so. If he had gone into the allegations, he would inevitably have had to question them about the subject of their deliberations, whether the appellants were guilty of any of the offences charged. In my opinion the common law prohibition against inquiring into events in the jury room certainly extends to matters connected with the subject matter of the jury's deliberations, and I do not find anything in the opinions in *R v Mirza* to cast doubt upon that basic proposition. I do not think that it is necessary or desirable to attempt to draw up a precise definition of the situations in which it would be legitimate for the judge to question jurors. There may be some matters into which the judge can and should inquire in this way, for example, an allegation that a juror has used a mobile telephone to make a call from the jury room, but I should prefer to leave for future decision the limits of any such inquiry.

21. My second reason for holding that it would not have been appropriate for the judge to question jurors in this case is concerned with the probable usefulness of such a course and the effect which such questioning was likely to have upon the jury's further consideration of the case. Where, as here, the juror's communication alleged wilful misconduct on the part of certain jurors and deliberate disregard of the judge's directions on the law, the prospects of obtaining satisfactory answers to questioning would have been rather limited. If the jury were questioned as a body, it is not very likely that the members against whom misconduct was alleged would be willing to admit it, and there could be a conflict of evidence which would be very difficult to resolve. An attempt to question separately the juror who wrote the letter, as suggested by Mr Sweeney QC for Mercieca, would lead to her identification as the complainant and possible recriminations in the jury room. Even if she were not separated or identified, there could well have been suspicions, perhaps a witch-hunt and a confrontation, and at worst intimidation and coercion, when the jury resumed its deliberations. None of that would conduce to the jury's reaching a calm

and harmonious decision by genuine agreement. I accordingly consider that questioning the jurors, even if it were within legitimate bounds, would have been likely to make the situation worse rather than better. I do not consider that issuing a questionnaire of the type used in *R v Robinson* [2002] EWCA Crim 2489 would have been an appropriate expedient in this case.

22. The judge was accordingly left with the choice of two courses of action, to discharge the jury or to give them further instruction, on the lines of the familiar direction set out in *R v Watson* [1988] QB 690, re-emphasising their duty to carry out their discussion with proper give and take. The judge took the latter course and I consider that it was justified in the circumstances. There is no suggestion in the recorded discussion that he was over-influenced by the waste of time and resources that would result from discharging the jury and he was at pains to remind the jury on various occasions that they need not feel under any time pressure. It does not appear from the terms of the letter that the jurors who were being pressed to change their verdicts as part of a bargain had committed themselves irretrievably, and it was justifiable to hope that if lectured sufficiently sternly the jury would confine their deliberations within the proper bounds of discussion.

23. The judge was entitled to be fortified in taking this course by the explicit assent and encouragement of the appellants' counsel. It is clear, however, that the ultimate responsibility was his to determine what course to take. Not only was he not bound to take the action which counsel agreed, but if he thought that another course was the correct one he was obliged to follow that, regardless of the urgings of counsel. It might perhaps be regarded as surprising that the law should permit a party to assent to one course, and indeed encourage the judge to take it, then to complain on appeal that he was incorrect to do so. As Woolf LJ said of a comparable volte-face in *R v Lucas* [1991] Crim LR 844:

> "The appellant had himself been made aware of the contents of the note. He, having been made aware of the contents of the note through his counsel, did not dissent from the course proposed by the judge, namely to take a verdict. As was pointed out in argument, for him now to seek to challenge that verdict means that he waited to see whether the verdict was favourable or not, and only sought to challenge the right of the jury to bring in a verdict when he has ascertained, in relation to one count, that the verdict is unfavourable to him. It cannot be satisfactory that in a

> situation of this sort an appellant should blow hot and cold, albeit through counsel."

The appellants' counsel met this by arguing before the House that the doctrine of waiver could not operate and that it was permissible for them now to contend that the judge had taken the wrong course. Mr Perry for the Crown, in my opinion quite rightly, did not attempt to argue that there had been any waiver. He confined his submission to the proposition, which I consider correct, that the assent of counsel was at most a relevant factor to be taken into account on appeal in considering the justification for the judge's choice of his course of action.

24. Once he had decided to give the jury further directions, it was incumbent upon the judge to ensure that they were apposite, clear and as emphatic as the situation required. Those which the judge gave were modelled closely upon the standard *Watson* direction about the necessity for discussion and give and take in argument. He added an exhortation to the jurors not to be bullied or cajoled into giving a verdict with which they did not agree, referred to the burden of proof and adjured them to decide the case on the evidence without speculating. All that was a necessary part of any direction, but there was no reference to the need to reach verdicts on their own conscientious judgment without bargaining over them. Nor did the judge remind the jury that they must follow his directions on matters of law, which in my view required very clear and strong emphasis if it was accepted that there was any truth in the juror's letter.

25. Miss Montgomery submitted that the judge should have discussed with counsel the precise terms of the direction before he gave it, referring to such cases as *R v Wright* [2000] Crim LR 510, *R v McKechnie* (1992) 94 Cr App R 51, *R v Aitken* [1992] 1 WLR 1006 and *R v N* [1998] Crim LR 886, in which the desirability of such discussion in various circumstances was underlined. There are many instances in which it is of prime importance to give counsel notice of a proposed direction and furnish them an opportunity to make representations about the content. It is right to say that these instances centre largely round the formulation of directions on the law and points of evidence before the closing speeches and summing-up, so that they may be framed as accurately as possible and counsel may fashion their speeches with the proposed directions in mind. It is, however, very much a matter for the discretion of the trial judge, and there is no absolute rule. In the present case the content of the direction was not propositions of law or evidence and it is not likely that counsel could have added more than a limited

amount to framing it, particularly since they had had an opportunity to make submissions about its content before the judge prepared it. I would not myself fault the judge for proceeding without showing counsel the text of his proposed direction, although to do so might have been a safeguard against inadvertent error or omission.

26. I do consider, however, that the direction was insufficiently comprehensive or emphatic. If the jury had been behaving as alleged by the juror in her letter, they required a strong, even stern, warning that they must follow the judge's directions on the law, adhere to the evidence without speculation and decide on the verdicts without pressure or bargaining. I am unable to regard the directions given as having covered these areas with sufficient particularity and emphasis, and I consider that the jury required stronger and more detailed guidance and instruction. Without that it is difficult to be satisfied that the discussion in the jury room was conducted thenceforth in the proper manner.

27. For this reason I must conclude that the verdicts were unsafe. I would answer both parts of the certified question in the negative, allow the appeals, quash the convictions and remit the case to the Court of Appeal to decide whether to order a new trial.