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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 25th October 2007

B e f o r e:

LORD JUSTICE RIX

MR JUSTICE BUTTERFIELD

MR JUSTICE NELSON

R E G I N A

v

ALAN INGLETON

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M Dutchman-Smith for the Applicant
P T Evans for the Respondent

J U D G M E N T

1. MR JUSTICE NELSON: This case raises the question of when and in what circumstances a police officer should be excluded from serving on a jury, or discharged from so serving when he knows some of the witness who are to be called to give evidence at the trial.
2. The appeal arises out of the conviction of the now appellant on 23rd January 2007 in the Crown Court at Carlisle. He was then convicted of two counts of assault occasioning actual bodily harm, one count of kidnapping and one of attempted grievous bodily harm with intent. In each case his wife was the victim.
3. The jury were unable to reach a verdict in respect of two counts, one alleging vaginal rape, the other anal rape of his wife. The judge directed the jury to acquit the applicant of a count of actual bodily harm and the jury acquitted the appellant of attempted vaginal penetration and another count of attempted oral penetration. His application for leave to appeal against conviction was referred by the Registrar and we have, as indicated, already given leave.
4. The essential facts were, on the prosecution case, that prior to the marriage the appellant had presented himself as a kind and gentle man. His demeanour towards the complainant changed when he moved to live with her. He then became abusive and violent towards her. He assaulted her by pulling her from a chair and causing her to collide with a door. Another assault occurred when, in the course of an argument, he threw the complainant, causing her to collide with a wardrobe. The kidnapping occurred when the complainant left the house following an argument and hid from the appellant in a restaurant, where he followed her, dragged her from the restaurant and forced her into his car. The allegation of attempted grievous bodily harm with intent arose from an incident when the appellant had deliberately driven his car at the complainant.
5. The Crown relied on his two previous convictions, in 1999, which were formally admitted, for anal rapes committed in 1997 and 1998 against a former partner. That was put in evidence in relation to credibility.
6. The defence case was that the first assault complained of did not take place. In relation to the second assault the appellant admitted throwing the complainant against the wardrobe and accepted, during the course of the trial, that there was no justification for what he did. He said he did not force the complainant into his car against her will and had not therefore kidnapped her. He did not drive his car at her, she was on the pavement at the time. The allegations were fabrications by a woman who was vindictive, spiteful, manipulative and unstable. The defence relied on her medical history to undermine her credibility. The complainant's medical notes outlined that she presented as a somewhat inadequate person and showed hysterical behaviour.
7. Before the trial commenced, during the process of the swearing in of the jury, a potential juror came forward to raise a matter with the judge. In what has been described as "a whispered discussion" with the judge, the potential juror gave the judge some information which the judge then relayed to the court. That information was that the potential juror had said that he was a police officer, whom knew all the officers in

this particular case, indeed all four of the officers who subsequently gave evidence in the case.

8. The defence objected to that particular police officer from sitting on the jury. He submitted that, as he was a police officer who knew his fellow police officers who were prosecution witnesses and whilst there was no challenge to the police evidence, it could not be foreseen how matters might turn out. The Crown submitted to the judge that this was really no more, as there was no material challenge to the police evidence, an objection ill-grounded on 'esprit de corps' and Parliament had already agreed that police officers could and should sit as jurors when appropriate.
9. The judge ruled that the fact that the juror was a serving police officer was not a bar to him sitting on the jury. A jury panel was to be representative of the community and could include members of those connected with the criminal justice system. In this case there was no material challenge to the evidence of the police witnesses; it was analogous to a member of the Bar sitting on a jury and knowing particular witnesses and the judge. The fact of knowledge in itself was not a bar to the individual being on the panel, and this particular juror was to remain as a matter of principle.
10. The defence did not formally object to the juror being part of the jury when he was sworn but made it known to the judge that his continued sitting on the jury was objected to.
11. The trial commenced. Evidence was given by the complainant via video link in support of her allegations and in addition a Lynn Ross, a workmate of the complainant gave evidence in relation to the attempted grievous bodily with intent by driving the car at her. In addition the four police officers also gave live evidence before the jury. One of the officers gave evidence of the arrest of the defendant on suspicion of rape in the early hours of the morning of 1st December 2005. Another officer, Police Constable Paddy had arrested the defendant in May 2005 in respect of an incident of alleged violence for which he was cautioned, and he gave evidence as to the demeanour of the complainant and her attitude to the arrest of her husband. Thirdly, the community police officer, a Police Constable Priestley gave evidence that in October 2005, initial disclosure of assaults had been made to her by the complainant. Her statement made reference initially to disclosure of only physical abuse, but when Police Constable Priestley gave her evidence, she referred to a number of meetings that followed that were not referred to in her witness statement, when disclosures of a sexual nature were made. Lastly, the officer in the case who conducted the interviews gave evidence.
12. The evidence from the police officers was not as to its content challenged vigorously, though it was part of the defence case that the police officers, in particular the community police officer, Police Constable Priestley had responded sympathetically to the complainant's allegations, thereby at least carrying with it an apparent support to her and her case. It is said, during the course of submissions and in the advice by counsel appearing on behalf of the appellant, Mr Dutchman-Smith, that the police officer gave evidence but he was in a state in which he felt he had to tread warily when she gave evidence of complaints of sexual abuse as well as physical abuse, even though that did not appear in her original statement. He felt the need to tread gingerly because of the

presence on the jury of the police officer who was someone who knew Police Constable Priestley.

13. The appellant gave evidence in his defence denying, save in relation to the wardrobe incident, that the assaults or the kidnapping had taken place. He said that he had not violently abused the complainant; she was a manipulative and untruthful woman.
14. As a consequence it can be seen that the evidential issue rested essentially between the complainant and the defendant and, in so far as attempted grievous bodily harm with intent was concerned also the evidence of Miss Ross. As we have already indicated, it is submitted on behalf of the appellant that the police evidence also had potential relevance.
15. At a later stage in the trial a note was received from a juror, another juror on this occasion, to say that he thought he may have worked in the same factory as the appellant and had recognised him but had only just realised at a later stage in the trial that this was so. Mr Dutchman-Smith submitted that this further revelation, together with the continued presence of the police officer meant that the whole jury should now be discharged. The judge ruled that whilst the discharge of a jury should never occur lightly, this was a retrial involving a vulnerable witness. He had considered the question of bias and decided it had not been made out, and rejected the application. During the course of this ruling the judge made it clear that, when in his first ruling in relation to the police officer he had described the police officer's knowledge, that only included professional knowledge of the four fellow police officers, not any more than that. That was the state of play at the end of the case as far as the trial in the Crown Court was concerned, which resulted in the convictions, failure to agree and acquittals that we have already mentioned.
16. It is submitted that the convictions are unsafe because the judge should have excluded the serving police officer, who knew all the police witnesses from the jury. That he had not ascertained the facts fully before making his ruling and that the judge erred again in failing to discharge the whole jury when in addition to the continued presence of the serving police officer, another juror had made it known that he was employed by the same firm as the applicant.
17. Before us today Mr Dutchman-Smith has submitted that, as a matter of general background, it is right that a police officer is charged with investigation of crime, the apprehension of criminals, the duty to bring them to justice and the giving of evidence in court when necessary. It is inevitable that there is a loyalty in esprit de corps which involves a frustration at acquittals which are regarded as incorrect. He accepted that, that in view of Parliament's legislation, could not be capable of leading to a conclusion of bias in itself. But what caused concern here, he submitted, was that this officer was not merely a member of the same force as the police officer witnesses but they came from the same division; they worked at the same police station and they were personally known to each other. That, he submitted, was a nexus which was uncomfortably close. When he dealt with it, the judge dealt with the issue in what should be described as a "cursory fashion". The appropriate legal test of determining whether there is apparent bias, is that of a fair-minded observer who might well have

concluded that the challenged juror would be unlikely to acquit when faced with personal colleagues giving evidence. That submission was somewhat detracted from by the fact of the acquittals, but Mr Dutchman-Smith said that, on the facts of this particular case, it was a valid submission.

18. The evidence that was given during the case by the police officers, although there was no direct challenge to it was of significance. It is right, it was submitted, that because of the change in her evidence by Police Constable Priestley from in her statement mentioning any physical abuse whereas in oral evidence, referring to sexual abuse complaints as well, that the defence felt inhibited about fully cross-examining her as to that difference and felt unable to make, as Mr Dutchman-Smith said, capital out of it. The defendant was accordingly put at a disadvantage.
19. The whole case begs, in his submission, the unanswerable question of: given the presence of the policeman on the jury what would have been the outcome if he had not been on the case? There was an obligation on the judge to review the matter and keep the matter under review. He had failed to perform that task adequately when given the opportunity when the question of the other juror had arisen. As a consequence the juror should have been excluded at the outset, and if not then he should have been excluded in the sense of the whole jury being discharged at a later stage. This was a case where apparent bias was established.
20. The respondent, the prosecution, does not accept that submission. Every case depends on its own facts and has to be determined by the degree of knowledge of the witnesses. It is not the case that the simple fact of knowledge of a witness must always lead to a juror with such knowledge being taken from a jury or excluded.
21. The facts show, Mr Evans on behalf of the respondents submits, that there was no actual bias here because of the fact of the acquittals. It was pointed out to him that the fact of the convictions presented a different problem but he maintained his submission that the acquittal demonstrated that there was no actual bias. The test, of course, is not one of actual bias but apparent bias.
22. The respondents submitted that there was no meaningful dispute here between the police and the defendant, and where there is no such dispute, there is no reason for the exclusion of a juror even if he does know witnesses who are to be called. If the evidence of the witnesses cannot be, as it could not here, be challenged, then that is simply evidence that goes before the jury. If it is unchallenged, the question of unconscious bias simply cannot operate, he said. Even though there may be cases where there is no direct dispute between the side of the prosecution's account the defence's account, even in such circumstances, if there is no actual conflict, then the question of unconscious bias simply does not arise.
23. In his submissions in reply Mr Dutchman-Smith said that whilst he was not able to challenge the evidence of the police officers, it was clearly his obligation to test police evidence, even though his client was not there when the police were recording what they saw and observed and that it was that which he was unable to perform with the

same degree of rigour that he might have been able to do had the police officer not been sitting on the jury.

24. Where a potential juror, as is his obligation should it be so, informs the court that he personally knows anyone involved in the case, the judge must establish the facts relating to that knowledge and then decide whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is the appropriate test in circumstances such as these, as set out in a number of cases and in particular that of R v Pintori [2007] EWCA Crim 1700 and R v Abdroikof in the House of Lords [2007] UKHL 37. The judge must ask himself whether there was a real possibility of bias in the jury if that jury were to include the police officer who knew all four police officers who were to give evidence in the case.
25. The Court of Appeal in the case of Pintori suggest that personal knowledge of witnesses will normally demonstrate a real possibility of bias. At paragraph 23 of that case the Court of Appeal, in the judgment of Dyson LJ, said as follows:

"But more fundamentally, the fair-minded observer would have concluded that there was a real possibility that the juror was disposed to find the appellant guilty simply because she knew the officers, had worked with them and therefore wished (consciously or subconsciously) to support them in this prosecution."

In paragraph 24 of the decision, the Court said as follows:

"It seems to us that the fact that the juror knew the officers in the case reasonably well and had worked with them is enough to satisfy the bias test as regards the individual juror. There was a real possibility that she would be influenced by these factors in reaching her verdict."

26. The House of Lords does not deal with the matter as directly as that on the facts of the case there arising but the majority made it clear that the decision in any given case as to whether apparent bias exists must depend on the facts of the case but that knowledge or a close relationship was relevant, even if not always decisive. Lord Bingham said that at paragraph 25 of Abdroikof, and before citing the passage, we refer briefly to the facts of the cases as follows. There were three appeals. The first appeal involved a serving police officer on the jury who, during the trial, sent a note to the judge revealing for the first time that he was a serving police officer and asking a question about what duties he should attend. The appellant had been charged with theft and attempted murder. In the second case, of the appellant, Green, there was also a police officer on the jury. On this occasion the police officer's presence on the jury had not been made known to the parties until after the trial had been concluded and in that case there was a dispute in the evidence between the appellant and the police sergeant concerning the manner in which he had been searched and what he and the sergeant respectively said. In the case of the third appellant, Williamson, he was tried by a jury which included amongst its members someone who worked for the Crown Prosecution Service and had done so since its inception.

27. When dealing with the matters in his conclusions, Lord Bingham said as follows, in paragraph 25:

"In the case of the first appellant, it was unfortunate that the identity of the officer became known at such a late stage in the trial, and on very short notice to the judge and defence counsel. But had the matter been ventilated at the outset of the trial, it is difficult to see what argument defence counsel could have urged other than the general undesirability of police officers serving on juries, a difficult argument to advance in face of the parliamentary enactment. It was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant, and it makes no difference that the officer was the foreman of the jury. In the event, confronted with this question at very short notice, defence counsel raised no objection. I conclude, not without unease, that having regard to the parliamentary enactment the Court of Appeal reached the right conclusion in this case, and I would dismiss the appeal."

In paragraph 26 of his judgment, Lord Bingham refers, in relation to the second appellant Green's case as being different. There there was a crucial dispute on the evidence between the appellant and the sergeant and:

In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial."

When dealing with third appellant, at paragraph 27, Lord Bingham came to the conclusion that justice could not be seen to be done if one of the jurors discharging the very important neutral role of a juror was a full-time, salaried long term serving employee of the prosecutor.

28. In another speech in the House, that of Baroness Hale, who was also one of the three of the majority of the decision, stated as follows at paragraph 49:

"We are here concerned, not only with justice being done, but with justice being "manifestly and undoubtedly seen to be done". There must be circumstances in which an individual should not serve even though he or she has no personal acquaintance with the case or the people involved."

That passage does not deal directly with the situation where there is knowledge alone and what would be the inevitable consequences of that, though it carries with it the implication that is a very important factor to be taken into account. It will be noted that

both of the judgments referred to, deal with whether there was an issue on the evidence between the police and the defence evidence which the known witnesses would be testifying to. This will be a relevant and, in some cases, decisive point, although in many cases, in the judgment of this Court, knowledge of a witness alone will raise a real possibility of bias.

29. In all cases the test is one of apparent bias. This will depend on the facts. If, for example, a potential juror knows a witness personally, it is common for such a juror to stand down. Where, however, the witness he knows is not contentious and not to be called, but is taken simply as read as an agreed statement, there may well be no possibility of bias. It is therefore necessary for the judge to make all appropriate factual enquiries. Usually, this is by posing questions, either in court or in writing to the potential juror. The manner in which the questions are asked will depend on the circumstances. Sometimes a few questions in open court will suffice. In other cases, where the information might be sensitive, or more detail is required, the matter may have to be dealt with in writing.
30. The results of the factual inquiry should be made known to counsel, who will then be in a position to make submissions to the court. Here, it would have been helpful to have known how well the juror knew the police officers. Had he ever worked with them on any particular matter or in a particular project? How often did he see them in the course of his work? How and in what circumstances did he meet him? All such inquiries can be dealt with by very brief questions, briefly stated and briefly answered. They are not complicated. Although the evidence of the police officers would, we suspect, as a matter of tactics, not have been vigorously challenged, even if the policeman had not been on the jury, we nevertheless think that the evidence from Police Constable Priestley and perhaps also from Police Constable Paddy as well was a relevant part of the background to the case. If the police account that the complainant was frightened and vulnerable and distressed was accepted, it might be more difficult for the defendant to satisfy the jury that, at heart, she was deliberately manipulative and untruthful.
31. The evidence of Police Constable Priestley was certainly relevant. She had listened to the complainant make her disclosures of physical assault and, she added in evidence, sexual assault. That evidence could not be directly challenged, but we do not accept the prosecution submission that in those circumstances no apparent bias could occur. It is simply not known how important Police Constable Priestley's arguably sympathetic ear was to the jury's deliberations and in what light they considered her evidence or what views the police officer juror expressed, if any, on his colleague's evidence.
32. Whilst this evidence was not in any sense the main area of dispute which was clearly between the defendant and the complainant, it gave rise to an evidential issue nevertheless as to whether the complainant was an abused woman or a manipulated and untruthful one. We accept Mr Dutchman-Smith's submission that the presence of the policeman on the jury may have affected the manner in which his cross-examination was carried out, even though, as we have already said, it is unlikely that there ever would have been a wholeheartedly vigorous challenge. When Police Constable Priestley changed her account to add details of sexual abuse as well as physical abuse,

counsel may well have felt the need to tread somewhat gingerly in asking her questions in view of the fact that sitting on the jury was one of her colleagues who knew her.

33. In these circumstances, we have no doubt that there was here a real possibility of bias arising from the presence on the jury of a police officer who knew the police witnesses. The possibility that he might be likely to accept the words of his colleagues, irrespective of the dispute between the parties is one which can only be described as real. We know no more than that and there is no suggestion the police officer was actually biased. None at all. Justice must not only be done but must be seen to be done. We fear that on the facts of this case that did not occur.
34. At what stage should the judge have taken the course which this Court thinks he should have taken? The judge could not have known when he first had the matter raised before him by the potential juror, how the police officer's evidence might emerge; what its importance might be, and how it might affect the defence. We consider that caution should have caused him to exclude as a juror the officer who knew all four of the police witnesses who were going to give evidence, particularly in view of the fact that he could not be certain as to the precise scope, when all the evidence was given, of their evidence and how it might emerge, and not forgetting that this was the third attempt, it appears, to bring this matter to trial.
35. The problem that arose with the second juror realising that he had worked at the same employer as the defendant but did not know him would not have justified the discharge of the juror. But the raising of this problem gave the judge a renewed opportunity to consider the whole issue of the policeman juror. By that time the possible significance in the police evidence was or should have been apparent. It is the view of this court that he should then, out of a sense of caution and fairness, have discharged the jury as a whole. But the police officer juror should, in our judgment, have been asked to stand down at the outset, as should normally occur where a policeman or indeed any other potential juror knows witnesses who are to be called to give oral evidence, unless it can be said with certainty that the evidence of the witnesses who are known will play no contested part in the determination of the matter.
36. We venture to suggest, if it cannot be so determined with certainty, the potential juror who knows witnesses personally should be asked to stand down, whether he be a policeman or not a policeman. In other words, in many cases, if not most, where a potential juror knows witnesses who are likely to be called. It is the case that an enquiry always has to take place, albeit a brief one. When that enquiry has taken place, then the judge will act upon it, but we reiterate, unless it can be said with certainty that the known witnesses to be called will play no contested as opposed to an agreed part in the determination of the issues, a juror who personally knows a witness or witnesses should normally be asked to stand down. Once the juror was not excluded, we accept Mr Dutchman-Smith's submission that the judge had a continuing obligation to keep that decision under review. When facts emerge which might change the situation, having decided not to exclude the juror, the judge is under an obligation to consider such facts and here, it is in the view of this Court when it became apparent there was potential significance of the police evidence, that the jury should have been discharged, as it simply could not know how the juror would deal with the witnesses as against the

defendant's case that this was not a genuine vulnerable woman but a woman acting as one who was manipulative and untruthful.

37. This is the most unfortunate outcome as the matter has had two failed attempts at trial. We appreciate that these are sometimes, as this was, difficult decisions for a judge to make. Nevertheless, we are clear in our conclusion of apparent bias and we emphasise "apparent" because there is nothing to suggest that the juror in question did anything at any stage that was wrong. As a consequence of this decision, the appeal must be allowed.
38. LORD JUSTICE RIX: The appeal is allowed. What do you submit, Mr Evans, should happen now?
39. MR EVANS: My Lord, I do submit that this is a proper case for a retrial, certainly so far as the allegation of attempted section 18, if I can use the short forms, is concerned. That is a grave allegation, the potential sentence from which would go beyond the period in custody that the defendant is presently serving awaiting sentence.
40. If I may just factually deal with that for the purposes of the record, I do not know if my Lords are aware of this. The appellant has been in custody since his arrest. One of the reasons for that is that part of the evidence in the case was the sending of a series of letters from prison with a view, as the Crown put it, to try in effect pervert the course of justice and persuade her not to pursue the case in court and no doubt--
41. MR JUSTICE NELSON: New letters or the ones that were referred to?
42. MR EVANS: The ones that featured in the trial. No doubt that played part in the decision that this was a proper case for a remand in custody rather than a remand on bail. So my Lords, in relation to that perhaps an additional difficulty as opposed to simply the question whether there should be a retrial in any event. That is the status of the defendant pending that retrial. May I mention the fact that my Lords may be aware of in any event. This matter is due to come back before His Honour Judge Batty presently, whether he remains the trial judge and that is a matter no doubt in due course for him, but it is due to come back in front of him on 13th November. Certainly, if my Lord were of the view this is a proper case for a retrial, the Crown could have an indictment ready for that mentioned date.
43. MR JUSTICE NELSON: One certainly notes there was no criticism of the summing-up in any respect.
44. MR EVANS: None at all. And also if in the interim Mr Dutchman-Smith wishes to raise the question of bail given the period in custody that the appellant has spent, then perhaps that could also be considered in Carlisle.
45. MR JUSTICE BUTTERFIELD: When was the arrest date?
46. MR EVANS: 23rd May 2005, from memory. May I just check?
47. MR JUSTICE NELSON: How long has he been in custody?

48. MR DUTCHMAN-SMITH: I think it was December 2005.
49. MR JUSTICE BUTTERFIELD: December 2005. So he has served close to the equivalent of 4 years?
50. MR JUSTICE NELSON: We do not know the sentence, it may not be relevant. What is he serving at the moment?
51. MR EVANS: Awaits sentence.
52. MR JUSTICE NELSON: That has been postponed further?
53. MR EVANS: It has been postponed further because it was known for some time that Abdroikof was making its way through the courts. We rather hoped it would make its way quicker.
54. MR JUSTICE BUTTERFIELD: But he is now serving that period as a convicted prisoner?
55. MR EVANS: A convicted but unsentenced.
56. MR JUSTICE BUTTERFIELD: It does make a significant difference.
57. MR EVANS: Yes. So, my Lord, my submission would be that this is a proper case for a retrial, a retrial in any event of those counts, the serious counts which the jury could--
58. LORD JUSTICE RIX: You have mentioned count 9, which is the attempted grievous bodily harm count, the others are actual bodily harm, counts 3 and 4 and kidnapping, count 6.
59. MR EVANS: The kidnapping in the context is -- I believe I put it in my documents to you -- in effect an assault occasioning actual bodily harm, with a bit of putting her in the car, enough to amount to a kidnap but really of the same sort of species of offence as the abhs, if I can use the short form. But the grave offence is the deliberate driving.
60. LORD JUSTICE RIX: What you are saying to us that it is only the grievous bodily harm count you want to retry or do you want to retry them all because?
61. MR EVANS: Retry them all.
62. LORD JUSTICE RIX: Because it might be a matter of context?
63. MR EVANS: Retry them all.
64. MR JUSTICE BUTTERFIELD: The evidence on the other counts is admissible, it seems to me, on the counts.
65. MR EVANS: Yes.

66. MR JUSTICE BUTTERFIELD: It would be pointless to try to disentangle it seems to me.
67. MR EVANS: That was the way in reality it was put in the summing-up, it was the picture of the marriage, supportive so.
68. My Lord, they are my two applications, No 1 that this being considered a proper case for a retrial, so far as the counts on which there were convictions concerned and this Court not consider the question of bail today because of the somewhat complicated and usual background, with the attempts to suborn, the Crown say, the complainant. If I may say so, in that regard, reference of course has been made in my Lord's judgment and in the evidence to the previous convictions which bore, if I may say so, unhappily resemblance in a number of ways, including the sending of letters of a similar nature to that previous complainant and so the Crown would say that there is a potentially here a history of attempting to persuade the complaints in very serious matters not to give evidence against him which is a matter really ought to be considered in a detailed bail application, which I am not sure Mr Dutchman-Smith is in a position to make today or I am in a position to respond to today.
69. LORD JUSTICE RIX: Although the matter is coming back before Judge Batty on 13th November, that is not the retrial of the rape counts.
70. MR EVANS: No. It is simply to appraise Judge Batty as to what has happened today and to take stock because we then enter the minefield of how we go forward in relation to the trial, that it is inevitably the case where a difficult pre-trial review would be necessary because it is the Crown's application in the retrial in any event, whatever it concerns, to put in the detail of the previous Leicestershire offence. There are questions as to what goes in from the trial my Lords have ruled upon, whether Mr Dutchman-Smith is entitled to rely upon the acquittals for example.
71. LORD JUSTICE RIX: You are not within a sight of a date for what you already had before this appeal, the retrial of the rape counts?
72. MR EVANS: We are not within sight of any retrial, my Lord, yes.
73. MR JUSTICE NELSON: One small question, is it relevant to the issue you are now asking the Court to determine or not, that the evidence given was in effect, as I think Judge Batty almost said, virtually an admission to count 4, if not an admission to count 4?
74. MR EVANS: Well, in fact as my Lord gleans probably from the documents that my Lord has seen from me, it went somewhat further than that because it was almost a submission by my learned friend.
75. MR JUSTICE NELSON: In the speech?
76. MR EVANS: Yes, to convict the assault--
77. MR JUSTICE NELSON: But not the sex offences.

78. MR EVANS: It is another difficult matter to put into equation of this difficult case.
79. LORD JUSTICE RIX: We shall hear from Mr Dutchman-Smith.
80. MR DUTCHMAN-SMITH: I am conscious of the fact there is a retrial in any event. The issue is simply what matters should be retried in addition to the most serious allegation faced by the appellant, namely the anal and vaginal rape, prior to the (inaudible).
81. I think the other only useful points I can make, my Lords, are these. That those grave matters stand to be retried in any event. So far as the other matters are concerned, the reality is that the only one of particular gravity is the attempted section 18, and the reality is he has already served a sentence approaching 4 years in relation to that matter. Whether in the circumstances therefore the better course may be simply to concentrate upon the two very grave matters that are going to be retried. More than that I do not think I can realistically say.
82. LORD JUSTICE RIX: We will rise for a moment to consider that matter.

(Short Adjournment)

83. LORD JUSTICE RIX: We think that it is in the interests of justice that the appellant should be retried on the counts on which we are now quashing his convictions. So the position is that we allow the appeal; we quash the convictions on counts 3, 4 and 9; we order a retrial on those counts; we direct that a fresh indictment be preferred; we direct, in the circumstances, that the appellant be arraigned on that indictment by 13th November 2007; we adjourn the question of bail to the Crown Court and we direct that the question of who should try the retrial be referred to the presiding judge on the circuit. I have omitted to mention count 6 as well, which is both quashed and to be retried. I mentioned counts 3, 4 and 9. I am grateful to my Lord for clearing that omission.
84. MR DUTCHMAN-SMITH: Can I assume your Lordships are ordering a retrial of the alternative allegation of dangerous driving upon which no verdict was taken from the jury?
85. MR EVANS: That would in any event be included in the retrial indictment in the same way that it was in the original trial. I am happy for my Lords to order for it to go in, but as prosecuting counsel I would say it will go in in any event with or without my Lord's order.
86. LORD JUSTICE RIX: So be it. I think that covers everything that we need to cover. (Pause)
87. Reporting restrictions question in the light of the retrial. Are there any observations?
88. MR EVANS: I wonder if as a matter of safety, if this were a standard trial so to speak, there would be a limitation on reporting the name of the victim of the sexual allegation in any event. I do not anticipate that the reporting of my Lord's decisions would be

hampered if there was reporting using an initial or the like. I am not sure how many people would read the law reports in Carlisle.

89. MR JUSTICE BUTTERFIELD: Yes. It is not so much the concern of the good people of Carlisle, but this particular aspect of jurisprudence is a rapidly developing field and will no doubt be of interest to others to know how this Court has determined this appeal.
90. LORD JUSTICE RIX: Mr Dutchman-Smith?
91. MR DUTCHMAN-SMITH: My Lord, there has already been an element of publicity in the local press regarding the fact that this appeal is being pursued. In those circumstances, the fact that the appeal succeeded might be appropriate, at least, in limited terms.
92. LORD JUSTICE RIX: We will say of course there be no disclosure of the name of the complainant, but subject to that there are no reporting restrictions.(Pause) Perhaps it should be reported under an initial given the relations between the complainant and the appellants.
93. REPRESENTATIVE OF THE PRESS: My Lord, I hesitate to rise. It might give rise to jigsaw identification. The way the Press usually reports it is to take the relationship out, but name, because it has already been reported before, there is a danger that the facts in the case might be similar, and by taking out the name, the legal relationship in, people could identify the victim that way.
94. MR JUSTICE NELSON: Need to take the relationship out too?
95. LORD JUSTICE RIX: We so direct. I am obliged. Representation order for trial. Do we need to say anything about that?
96. MR DUTCHMAN-SMITH: I do, my Lord.
97. LORD JUSTICE RIX: You require one. We grant you one. With solicitor as well. Is there anything else?
98. MR EVANS: I do not know whether out of a super abundance of caution, my Lords, whether given one has now to ask for a representation certificate to a particular point, whether my Lords would order a representation certificate throughout the evidence. Very often now such certificates are granted, for example, for the first day and then have to be renewed.
99. LORD JUSTICE RIX: That makes sense.
100. MR JUSTICE BUTTERFIELD: Of course, it does. It is a great pity you have to ask for it but there it is.

101. MR EVANS: We do. Sometimes it is forgotten about, I hesitate to say it Mr Dutchman-Smith, one needs to battle and his battle is always gentle of course, but it does create problems.
102. MR DUTCHMAN-SMITH: My learned friend on this occasion has made an unnecessary application: the allegation being rape the certificate, I think, lasts throughout.
103. LORD JUSTICE RIX: We are pleased to hear it. If we have covered all the necessary grounds, it only remains us to thank you for your submissions.