IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No 21/2013

IND 87B/11
C05425/2011

Between

HER MAJESTY THE QUEEN

Respondent

- and -

Jeffrey Barnes

Appellant

Before:

Hon Elliott Mottley, Justice of Appeal
Hon Dennis Morrison, Justice of Appeal
Hon Sir Richard Field, Justice of Appeal

Appearances: Mr Michael Wood QC and Mr Nicholas Dixey of Nelsons for the Appellant. Ms Cheryll Richards QC, Director of Public Prosecutions, and Ms Candia James for the Crown.

Heard: 21 and 22 July 2015
Judgment given: 24 July 2015
Reasons released: 20 November 2015

MORRISON JA

Introduction

1. This is an application for leave to appeal against conviction and sentence, after a trial in the Grand Court before Quin J and a jury. The appellant was convicted on all three counts of an indictment charging him with aggravated burglary and two counts of rape and, on 23 September 2013, he was sentenced to imprisonment for life. On 24 July 2015, we granted the application for leave to appeal against conviction and the

court treated the hearing of the application as the hearing of the appeal. For reasons which were later promised, the appeal was dismissed and the appellant's conviction affirmed.

2. As regards the question of sentence, the appellant's challenge to the sentences of life imprisonment is in part based on the contention that the statutory provisions under which a discretionary life sentence was imposed on him are in breach of Article 3 of the Cayman Islands Bill of Rights. When the matter came on for hearing on 21 July 2015, the learned Director alerted us to Order 77A, rule 3(a) of the Cayman Islands Grand Court Rules 1995, which requires that in these circumstances the Honourable Attorney General must be notified in order to enable him to determine whether he wishes to intervene in the proceedings. It was therefore decided, with the agreement of counsel, that in order to facilitate this process the issue of sentence should be dealt with separately and at a later date. Accordingly, we granted leave to appeal against sentence, directed that the Attorney General should be served with all papers in the matter no later than 31 July 2015 and fixed the appeal against sentence for hearing at the November session of the court.

3. These are our reasons for dismissing the appeal against conviction. The issues which arose on the appeal were (i) whether, by reason of pre-trial publicity adverse to the appellant, the trial judge should have stayed the trial as an abuse of the process of the court; or alternatively, whether the trial judge's directions to the jury were sufficient to cure any prejudice occasioned to the appellant by the publicity and to ensure that he

was afforded a fair trial; (ii) whether the trial judge gave adequate directions to the jury as to the elements of the offence of aggravated burglary; and (iii) whether the judge's directions to the jury on the effect of the appellant's failure to answer questions put to him in his police interview were appropriate.

The background to the proceedings

4. The appellant was originally charged on a single indictment dated 12 January 2012 ('the original indictment') with seven counts covering three separate incidents involving three different complainants. Counts 1-3 related to the offences allegedly committed on 20 October 2011 against the complainant in this case ('the complainant'); count 4 related to an offence of rape allegedly committed against a second complainant; and counts 5-7 related to three offences of abduction, rape and attempted rape allegedly committed against a third complainant.

5. On 3 February 2012, count 4 was severed from the original indictment and dealt with separately in a fresh indictment, in respect of which the appellant was in due course tried and acquitted on 1 August 2012. On 21 September 2012, the original indictment was further severed and counts 5-7 were also dealt with on a separate indictment, in respect of which the appellant pleaded guilty on 22 October 2012. On 31 May 2013, after an unsuccessful attempt to vacate his plea, the appellant was sentenced to 15 years' imprisonment on these counts.

6. On 21 September 2012, the remaining counts 1-3 in the original indictment were therefore included in Indictment 87B/11. On 17 February 2013, the appellant pleaded

not guilty to all three counts and it is in these circumstances that the case came on for trial before Quin J on March 25 2013.

The pre-trial publicity

7. The charges against the appellant generated considerable media attention. In his written submissions, Mr Wood QC divided the matters complained of by the appellant into three separate periods: (a) pre and post-arrest (2011); (b) after the appellant's guilty plea to the original counts 5-7 (2012); and (c) three weeks before the commencement of the appellant's trial on Indictment 87B/11 (March 2013). In addition to the separate bundle of all the allegedly prejudicial material with which we were provided, Mr Wood very helpfully set out what he was careful to emphasise were examples only in his written submissions. For present purposes, we will mention some of them.

(a) Pre and post-arrest (2011)

(i) The Cayman Compass (online source), 31 October 2011, reported that the police were requesting the public's help "in finding Jeffrey Barnes in relation to the rape of a woman in Red Bay on Saturday". The report went on to state that "Barnes is also wanted for the sexual assault of a family member and repeated attempts to lure an 11 year old girl in to his car". Further, that "Superintendent Bodden warned that Barnes has a 'violent disposition' and should be considered dangerous, adding he is known to have access to firearms". The Cayman News Service (online source) of the same date also reported Superintendent Marlon Bodden as telling the media at a press briefing

that "[w]e are aware that he has access to firearms and he is a dangerous individual with a violent disposition and it is very important we get him into custody".

(ii) Iyenews (online source), 1 November 2011, reported the following:

> "Sickening sex fiend Jeffrey Barnes was recently released from Northward prison after serving time for another rape.
>
> The 32-year-old is now wanted in connection with the abduction and sex attack of a 49-year-old woman on Saturday morning.
>
> Yesterday detectives revealed how Barnes - who has been described as 'very violent' - tried to lure an 11 year old schoolgirl into his car three times on Saturday morning.
>
> After he failed to snatch his prey he cruised the streets of Cayman looking for another victim.
>
> He eventually found a woman in West Bay and bundled her in to his red Honda Civic before taking her to nearby Admiral's Landing and raping her around 10.30am.
>
> Yesterday police took the unusual step of naming and releasing a photograph of Barnes who is also wanted on an unrelated assault charge.
>
> Detective Superintendent Marlon Bodden said yesterday: 'He is a very violent and dangerous person … We need to get him off the streets'."

(iii) The Cayman News Service (online source), 3 November 2011, reported that "[t]he senior officer said that police were now following up reports and allegations against the suspected rapist who has not been charged, but Bodden said he was confident he was the 'right guy' in connection with the incidents reported at the weekend".

(iv) Iyenews (online source), 3 November 2011, stated that:

> "Jeffrey Barnes was let out of prison after serving a minimal sentence for RAPE. His victim then was a 16 year old girl and he received prison time of just over a year! He didn't waste any time to allegedly commit the same crime again. A few weeks later, an 11 year old schoolgirl was lucky to escape this allegedly sexual predator's vile assault. There is also a report he allegedly sexually assaulted a family member.
>
> Jeffrey Barnes was already wanted for another criminal act when he raped again. This man is sick. Keep him locked away until he is cured. And the cure may be never."

A further Iyenews (online source) report that same day added that:

> "Another woman has come forward alleging sexual assault against convicted rapist Jeffrey Barnes, telling police she was attacked in the past few days, just prior to his Tuesday arrest on charges stemming from two incidents on Saturday."

Detective Superintendent Marlon Bodden was also reported as describing the series of attempts and assaults as "the most outrageous case in recent times".

(b) After the appellant's guilty plea to the original counts 5-7 (2012)

(v) Cayman 27 (online source), 22 October 2012, reported that, according to Cayman News Service —

> "… moments before the start of his trial Jeffrey Barnes changed his plea to Guilty. The Grand Court heard the 31 year old from George Town told the woman he had a gun when he forced her into his car from a bus stop on Shamrock Road in Red Bay in October last year.
>
> He then drove to deserted area in Admiral's Landing where he carried out the rape."

(vi) Cayman News Service, 22 October 2012, also reported that "Jeffrey Barnes has admitted abducting and raping a 49 year old woman". Further, that "[j]ust before his trial in the

Grand Court on Monday morning, Barnes, albeit reluctantly and only with the prompting of his attorney, admitted [having committed the offence]".

(vii) Ieyenews (online source), 23 October 2012, also carried a report of the previous day's proceedings in court:

> "He had previously pleaded 'Not Guilty' but after some prompting from his attorney he changed his plea that included admitting anal rape!!
>
> She was waiting for a bus to take her to work when Barnes approached her with what she believed was a gun …
>
> Barnes then drove the woman to a deserted spot in Admiral's Landing, parked the car and forced the woman to have sex. His victim all the time thought he had a gun.
>
> He even told her that in the lake nearby were bodies of people who had been killed! …
>
> … only a few weeks before any of the above , Barnes was let out of prison after serving a minimal prison sentence for RAPE. His victim then was a 16 year old girl and he received a time in prison of just over a year.
>
> Justice Alex Henderson adjourned sentencing Barnes to 28th November as there were other outstanding matters against him to be addressed.
>
> One of these was a criminal act he committed and was wanted by the RCIPS just before he raped again.
>
> The police described Barnes as 'a very dangerous man'."

(viii) Iyenews (online source), 13 November 2012, reported that "Barnes was due to be sentenced for this conviction but he is facing a second and separate trial for an allegation of rape".

(c) March 2013

(ix) On 6 March 2013, three weeks before the date fixed for commencement of the trial, the appellant appeared in court in connection with the charges (comprised in counts 5-7 of the original indictment) in respect of which he had previously pleaded guilty. This was the occasion on which he sought to vacate that plea and to enter a plea of not guilty in its stead. That evening, a television news item appeared on Cayman 27 Television News in which the appellant was shown arriving at court in handcuffs. The text of the report was conveyed by what Quin J described as "in-studio and out-of-studio presenters" and contained details of the matter in respect of which he had appeared in court that morning. The clip of the film and the article were broadcast again the following morning, 7 March 2013, and remained on the television company's website until 12 noon that day. It is common ground that the television report was factually inaccurate in several respects, in particular by indicating that the appellant had applied to change his not guilty plea to guilty, when in fact the opposite was true. The report also stated, falsely, that the court had that day heard "the graphic details" of the case. Further, that the appellant was awaiting a forthcoming trial for a different sexual assault case at the end of the month. In the end, the report was removed from the television company's website on 7 March 2013 after the timely – and wholly proper - intervention of the Director of Public Prosecutions.

8. In addition to the material referred to in the preceding paragraph, the appellant relied on the various comments that had been posted by online readers in the aftermath of each of the online reports. So, for instance, after the Cayman Compass

report of 31 October 2011, one reader's comment was that "[t]his despicable piece of faeces is well known to Cayman's local community and to the police, that much I guarantee". And, after the Cayman News Service report of 22 October 2012, in which the appellant's guilty plea to counts 5-7 of the original indictment was reported, another reader said, "I wish Cayman had the death penalty for these kind [sic] of people". Further, the appellant also relied on the indication after each comment of how many persons had viewed and agreed with the sentiments expressed in it.

The trial

The stay application

9. The case duly came on for trial before Quin J on 25 March 2015. At the outset, prior to the empanelling of the jury, counsel for the appellant applied to the judge for an order directed to three media houses for immediate delivery up of all media reports relating to the appellant. This was with a view to an intended application to stay the proceedings on the ground of adverse pre-trial publicity. The application for delivery up of the material was granted and, within a few hours, the judge's order was complied with by the media houses in question. In addition, the court had before it an agreed bundle of newspaper articles which the defence complained was highly prejudicial. The court was accordingly able to review the material with counsel on the afternoon of 25 March 2013 and to commence hearing submissions on the effect of the pre-trial publicity that afternoon and into the following day.

10. On behalf of the appellant, it was submitted that the result of the prejudicial pre-trial publicity was that he would be unable to have a fair trial before a jury and that the prosecution ought on that basis to be stayed. The Director for her part accepted that some of the earlier material may have "crossed the line" and posed a risk of prejudice, and that the Cayman 27 television news report was factually inaccurate. However, she submitted that, given the age of much of the material and other factors, the appellant's right to a fair trial would be adequately secured by the trial process and appropriate directions from the judge in due course.

11. On 27 March 2013, in an admirably detailed ruling in which a number of relevant authorities were considered, Quin J concluded that, notwithstanding the adverse publicity, it would still be possible for the appellant, with the court's assistance, to have a fair trial. The judge considered (at para 47) that, with the help of both the Director and defence counsel, the court could take steps to ensure that the risk of any prejudice to the jurors selected "will be reduced to a minimum". Further (at paras 48-50), that before any evidence was heard the court could direct the jury to ignore anything they may have read, seen or heard and to put out of their minds any form of speculation or prejudice and come to a verdict solely on the evidence they hear in court. And, further still (at para 51), that, in his experience, jurors do follow the directions given to them by the judge and (at para 52) that "the trial process in the Grand Court can reasonably be expected to remove any prejudice and so ensure that the [appellant] has a fair trial". It will be necessary to consider the judge's ruling in greater detail in due course (see para 42 below).

12. On this basis, the matter therefore proceeded to jury selection. But immediately before that, Quin J canvassed with counsel the terms of an appropriate preliminary direction to be given by the judge to all potential jurors before empanelment. Notwithstanding his full participation in this discussion, the appellant's counsel indicated his client's concern that, "the minute the jurors leave here, out they go and then discussions take place or the computer and Google are put into operation". After further discussion, Quin J then made the following statement to the array of jurors present:

> "… I should also make mention of the fact that there has been a considerable amount of media publicity in relation to this defendant, and no doubt this may have engendered a good deal of discussion in the community about the defendant.
>
> I want you to consider whether in the light of that discussion and in the light of that publicity you are able to bring an open and independent mind to this case. If any of you consider that you cannot bring an open and independent mind to this case as a result of any discussion or anything you've heard or for any other reason, then I would ask you to come forward, if you are called and only if you're called, and I can always discuss that aspect with you. That may mean that I will have to ask others to leave while that discussion takes place. But I have to be absolutely certain that the integrity of the jury is not tarnished in anyway.
>
> So first if you know any of the witnesses or are related to any of the witnesses or the defendant and feel that you cannot be unbiased or dispassionate, I'd ask you to raise your hand. If you've been involved in any discussion or read something that makes you feel that you cannot be independent and you cannot sit as a juror with an open or independent mind, I would also ask you to raise your hand when you're called and only if you're called."

13. The jury selection process then took place. This was followed by some further exchanges between the court and the appellant, during which the appellant continued to express a lack of confidence in his ability to secure a fair trial in the circumstances. However, he declined the judge's invitation to him to consider the option of a trial by judge alone.

14. The jury were then put in charge. Before any evidence was taken, however, the judge made some preliminary remarks to the jury. Among other things, the jury were warned against discussing the case with anyone other than among themselves and told that they should "focus entirely on the evidence … from the witness box, any exhibits or statements that are agreed between the Crown and the defence and – any admissions that are agreed [sic] between the Crown and the Defence".

The evidence

15. On that note, the trial commenced. In the light of the nature of the appellant's challenge to his conviction in this appeal, it is unnecessary to give more than an outline of the case against him. For this purpose, we have gratefully adapted the summary provided by the Director in her submissions. The Crown's case was that the appellant entered the complainant's apartment in the early morning of 20 October 2011. The complainant testified that at about 3:00 a.m., while sleeping on her back, she felt as if she could not breathe properly and awoke to find a male person on top of her. The person had one hand on her throat and a knife against her neck. There was no light in her apartment at the time. When she began to fight, the intruder threatened her and used the knife which

he had to cut off her clothes. The intruder had vaginal and anal sexual intercourse with her, at times placing the knife against her neck. He remained in the room until close to 6:00 a.m. and, when the complainant explained that she needed to leave for work, he told her to go, to act normally and not to tell anyone. He also said that he would be waiting for her when she returned. During the course of preparing for work the light was on in the apartment and she was able to see the intruder. She noted that he had a tattoo marked "Gangsta" on his chest and also noted his general description. She had seen him on occasion outside her complex. She also saw the knife which he had (which was not hers) and was able to describe it as a red Swiss army knife.

16. The complainant did not return home after work that day and stayed overnight at her boss's home, before leaving the island the following day. Two days after the incident, the complainant's boss and her husband went to her apartment and entered using the key which she had left with them. The screen to the window had been pulled half way back and the place was in disarray. There were red stains on the sheet and a torn empty condom wrapper was seen next to the bin on the floor. The matter was in due course reported to the police, who entered the complainant's apartment and retrieved a number of items, including the condom wrapper, three pillow cases from the bed, the complainant's brassiere, her T shirt and an undershirt. Semen was detected on one of the pillow cases and subsequent DNA analysis, based on a buccal sample taken from the appellant, produced a match probability or random occurrence ratio of 1 in every 88 quintillion individuals. The appellant's DNA was also found on the condom wrapper, producing a match probability or random occurrence ratio of 1 in every 4.7 million

individuals; and on the exterior of the complainant's brassiere, to a match probability or random occurrence ratio of 1 in every 55,000 individuals.

17. The appellant's case was that he had been elsewhere and was not the person who entered the complainant's apartment on the night in question. It is obvious from their verdict that the jury must have rejected his defence and accepted the case put forward by the Crown.

The grounds of appeal

18. The grounds of appeal against conviction, which we have already foreshadowed, were as follows:

> "1. The proceedings should have been stayed as an abuse of process. The effect of the publicity, including wholly in appropriate comments from a senior police officer, was such that a fair trial was impossible and nothing in the Court process could cure the damage caused. Alternatively, the directions to the jury were inadequate to cure the prejudice occasioned by the publicity so as to afford a fair trial to the Appellant.
>
> 2. In his summing up, the Judge failed to give the jury any directions as to the elements of the offence of Aggravated Burglary.
>
> 3. In his summing up, when dealing with the Applicant's failure to answer questions in his police interview, the judge directed the jury: 'Now you might think an innocent man would give his response as soon as possible'. This was not only inconsistent with the appropriate direction, it also amounted to wholly inappropriate and prejudicial judicial comment. Furthermore, the direction to the jury that they 'consider whether the case being put to [The Applicant] was sufficiently strong to demand a response from him' was wholly prejudicial in the absence of reminding the jury that

> at the material time the case against the Applicant was weak in that the police had not yet obtained any identification or DNA evidence against him."

Ground 1 – the impact of pre-trial publicity

The submissions

19. In written and oral submissions on behalf of the appellant, Mr Wood made a number of points. First, the appellant was entitled to a fair trial by a jury and this entitlement was not diminished by the fact that he had an option, pursuant to section 129 of the Criminal Procedure Code to waive his right to trial by jury in favour of trial by a judge sitting alone. Second, as Lord Bingham of Cornhill said in **Randall v The Queen** [2002] UKPC 19 (page 28), "the right of a criminal defendant to a fair trial is absolute". Third, although the jurisdiction of the Grand Court, in the absence of specific legislation, to order the postponement of publications or reports "must be doubted", in this case the court and/or the prosecution should have ensured that no reporting of any of the matters against the appellant until after the conclusion of all proceedings against him. (During the course of the argument, we were told by Mr Wood that Cayman News had confirmed, in response to the appellant's specific enquiry, that it had never been asked to remove anything from the internet.) Fourth, in seeking to apply the principles which he derived from the authorities referred to in his ruling on the application for a stay, Quin J failed to address the "uniquely prejudicial features" of this case, such as (a) the unusually small jury pool existing in the Cayman Islands and the correspondingly greater impact of "the virulent adverse pre-trial publicity"; (b) the fact that much of the pre-trial publicity complained of was from website sources and as such easily accessible

by way of an internet search, therefore qualifying the weight attributed by the judge to the lapse of time since the original publications; and (c) the fact that the widely reported inappropriate comments made about the appellant by Detective Superintendent Bodden would have commanded the respect of the public. Fifth, the judge's warnings to the jury after they were put in charge (before the trial commenced) were wholly inadequate, in that he failed to warn them against carrying out any research on their own, particularly on the internet, despite having been alerted to the dangers by the appellant's counsel. In this regard, Mr Wood referred us in particular to Practice Direction No 3 of 2014, issued by the Honourable Chief Justice, which speaks specifically to the dangers of resort by jurors to internet sources during the course of trials; and to the standard direction on the point contained in the Crown Court Bench Book.

20. The Director submitted that Quin J's ruling that no stay should be granted was correct and that his directions to the jury, although omitting reference to searches on the internet, were adequate in all the circumstances. It was submitted that, given the nature of the pre-trial publicity, the issue was whether it was so overwhelming or so fresh as to prevent a carefully selected jury from being impartial; or whether any residual bias could and was adequately be addressed by the judge. The Director referred us to the judge's caution to potential jurors to disregard anything heard by them outside of court before the jury was empanelled and to his subsequent warnings to the jury after it had been empanelled and before the evidence begun. We were also referred to the judge's summing up and the directions there given to disregard such

material, all to make the point that the jury could have been under no misapprehension that they should disregard anything extraneous to the evidence adduced during the actual trial. In these circumstances, the Director submitted, the judge's failure to advert specifically to the internet was not material, given the cumulative effect of the careful jury selection process and the warnings to the jury given by the judge during the trial. As regards the appellant's reliance on **Randall v The Queen**, the Director accepted that there is a "fair trial threshold", but contended that this was only reached when the departure from proper practice in a particular case was extreme, as it was in that case. Finally, the Director submitted that the strength of the case against the appellant was such that (i) an impartial observer would not conclude that the jury was biased; and (ii) no reasonable jury could have come to any other conclusion.

The authorities

21. Both Mr Wood and the Director very helpfully took us to a number of authorities, many overlapping, in which the proper approach to, and the impact of, pre-trial publicity was discussed. In our consideration of the authorities (which we will take in more or less chronological order), we will bear in mind, as we must, Mr Wood's preliminary caveat that some of the older cases pre-dated the internet age and may as such be of limited value in this case.

22. One such, in Mr Wood's submission, was **R v Emil Savundranayagan and Walker** [1968] 3 All ER 439. In that case, the appellant Savundra's trial did not begin until some 11 months after the television interview of which he complained. Despite the

fact that the Court of Appeal considered (at page 441) that the television interview with Savundra, at a time when it must have been known that criminal proceedings against him were imminent, was "deplorable", the court declined to quash the conviction on that ground. Delivering the judgment of the court, Salmon LJ said this (at pages 441-442):

> "On the facts of this case, however, it seems to the court that, regrettable though this interview undoubtedly was, it affords no ground for quashing the appellant Savundra's conviction. In the first place, the appellant Savundra voluntarily went to the television interview when he must have strongly suspected that he was about to be arrested and eventually tried. He should have had a fair idea of what was in store for him at the interview, but, in his self-confidence or conceit, he thought that he could get the better of the interviewer. It hardly lies in his month to complain. Secondly, in the event, the trial did not take place until eleven months after the interview. The evidence lasted for close on forty days and the judge gave a strong warning, both at the beginning of the trial and in his summing-up, that the jury must pay attention only to the evidence and not take any notice of anything they may have heard or read or seen out of court. This court is quite satisfied that, in the particular circumstances of this case, there was no real risk that the jury was influenced by the pre-trial publicity. Also, and perhaps most importantly, the case for the Crown was so overwhelming that no jury could conceivably have returned any different verdicts against the appellant Savundra."

23. **R v Malik** (1968) 52 Cr App R 140 was a case in which the appellant was convicted of the statutory offence of using certain words with intent to stir up hatred against a section of people distinguished by colour. One of the arguments advanced on appeal on his behalf was that, having regard to prejudicial pre-trial publicity, there was a real danger that he had not had a fair trial before the jury. However, it was held, as

there was no issue at the trial of the appellant's credibility being weighed against that of witnesses for the prosecution and as the jury could not have come to any conclusion other than that the appellant had used the words with the required intent, there was no danger of prejudice to the jury having been caused by the publicity.

24. In **R v Kray and others** (1969) 53 Cr App R 412, the issue was whether the fact that a previous trial involving the defendant, which had ended in a verdict adverse to him, had been reported at length in the press would give rise to a case of probable bias or prejudice in jurors called upon to serve in a later trial of the defendant. Holding that it would not, Lawton J said the following (at page 414):

> "I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up just as they have got other public institutions sized up, and they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper. So, the mere fact that an earlier trial had been reported at length in the Press would not, in my judgment, amount to establishing a prima facie case of the probability of bias or prejudice in anyone summoned to attend as a juror at a later trial …
>
> It is … a matter of human experience, and certainly a matter of the experience of those who practice in the criminal courts, first, that the public's recollection is short, and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before."

25. Next we should mention **Attorney General v MGN Ltd** [1997] 1 All ER 456. The issue in this case was whether the publication of certain articles had created a "substantial risk that the course of justice [would] be seriously impeded or prejudiced", within the meaning of section 2(2) of the Contempt of Court Act 1981. Delivering the

judgment of the court, Schiemann LJ, sitting in the Queen's Bench Division, pointed out (at page 461) that "[i]n making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters: (a) the length of time between publication and the likely date of trial, (b) the focusing effect of listening over a prolonged period to evidence in a case, and (c) the likely effect of the judge's directions to a jury". As regards the last-mentioned consideration, Schiemann LJ also observed that "what has been stressed is that the whole system of trial by jury is predicated upon the ability and willingness of juries to abide by the directions given to them by the judge and not to accept as true the content of a publication just because it has been published".

26. Counsel on both sides referred us to the well-known decision of the Privy Council in **Montgomery v HM Advocate and another** [2003] 1 AC 641, to which Quin J had also referred in his ruling on the issue of pre-trial publicity. The issue before the Board in that case (on appeal from the High Court of Justiciary) was whether the considerable pre-trial publicity which had attended the laying of a charge of murder against the defendants was such that it would be impossible for them to receive a fair trial, as required by article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] ('the Convention'). In agreement with the courts below, the Privy Council rejected the contention that the defendants would not be able to have a fair trial.

[1] "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

27. The leading judgment was delivered by Lord Hope of Craighead, who was prepared to assume (at page 656) that "the coverage which has been given to this case was observed and absorbed at one time or another by most of the adult population in Scotland during the relevant period". Lord Hope stated (at page 667) that "[t]he common law test, which is applied where pre-trial publicity is relied upon in support of a plea of oppression, is whether the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it". (In the context of a case of pre-trial publicity, this test, "*The 'Stuurman' test*", derived from the judgment of the Lord Justice General (Emslie) in **Stuurman v HM Advocate** 1980 JC 111, 122.)

28. In stating his conclusion that the judges in the courts below had not fallen into error in their assessment of the effect of the widespread publicity which the case had received, Lord Hope observed (at pages 673-674) that:

> "I am not persuaded that the judges in the court below were in error in their assessment of the effect of the publicity that has been given to this case and of the question whether, despite that publicity, the jury can be expected to act impartially. Recent research conducted for the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: *Young, Cameron & Tinsley, Juries in Criminal Trials: Part Two*, vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999). The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. Nevertheless the risk that the widespread, prolonged and prejudicial publicity that occurred in this case will have a residual effect on the minds of at least some members of the jury cannot be regarded as negligible. The principal safeguards of the objective

> impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict.
>
> The judges in the court below relied on their own experience, both as counsel and as judges, of the way in which juries behave and of the way in which criminal trials are conducted. Mr O'Grady submitted that there was no basis upon which one could assess the likely effect of any directions by the trial judge. He said that this was something that was incapable of being proved. But the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."

29. Both counsel also referred us to the decision of the Court of Appeal in **Regina v Abu Hamza** [2007] QB 659. The issue of pre-trial publicity arose in that case in the context of a complaint about excessive delay in the commencement of the prosecution. Among other things, the defence submitted that where the authorities have failed to bring about a timely prosecution and the delay has led to a risk of prejudice to the defendant by reason of subsequent events and publicity, it is unfair and oppressive for the trial to go ahead. This submission was rejected by the court and it was held that the circumstances of the case were not such as to require the judge to stay the prosecution on the ground that there could not be a fair trial.

30. En route to this conclusion, the court considered several of the relevant authorities, including **Montgomery v HM Advocate**. Lord Phillips of Worth Matravers CJ pointed out (at para 89) that –

> "In general ... the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity."

31. Lord Phillips went on to refer to Lord Taylor CJ's summary of the position in **R v West** [1996] 2 Cr App R 374, at 385-386:

> "… providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In *Kray* (1969) 53 Cr App R 412, 414, 415, Lawton J said: 'The drama ... of a trial almost always has the effect of excluding from recollection that which went before.' That was reiterated in *Young and Coughlan* (1976) 63 Cr App R 33, 37. In *Ex p The Telegraph plc* [1993] 1 WLR 980 at 987, I said: 'a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'"

32. Lord Phillips also referred (at para 89) to, and endorsed, the statement by Sir Igor Judge P in **R v B** [2006] EWCA Crim 2692, para [31]:

> "There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and

> judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts in the light of any trial post the sentencing hearing, after hearing submissions from counsel for the defendants. We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair."

33. Then, after referring to Lord Hope's concluding words in **Montgomery v HM Advocate** (to which we have already referred at para 26 above), Lord Phillips stated his own conclusion as follows (at para 92):

> "Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial. The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties."

34. The last in the series of cases to which we were referred on the effect of pre-trial publicity is the recent decision of the European Court of Human Rights ('ECHR') in

Abdulla Ali v The United Kingdom (Application no 30971, judgment delivered 30 June 2015). Mr Wood considered this case to be particularly helpful and, in order to understand why, it is necessary to consider it in somewhat greater detail. The applicant was initially indicted, along with seven others, on two counts: conspiracy to murder, in respect of which the prosecution's case was that the means by which it was to be effected was by way detonation of improvised explosive devices on board aircraft in mid-flight (count 1); and murder (count 2). During the trial, the indictment was amended to add a further count (count 1A), alleging a conspiracy to murder without specifying the means by which the murder would be carried out. The applicant was convicted on count 1A, but the jury was unable to reach a verdict on count 1. The jury was also unable to reach verdicts on all or some or all counts in relation to six of the other defendants and the eighth was acquitted.

35. The announcement of the verdicts attracted considerable media coverage, some of the reports including material which had never been put before the jury at the trial. The prosecution decided to seek a retrial of the applicant and the other defendants and this too was widely reported. So the applicant applied for stay of the proceedings on various grounds, including that a fair trial was no longer possible because of the allegedly prejudicial publicity which had followed the conclusion of the first trial. The judge noted that the publicity which had attended the matter had been "worldwide, often repeated and reported in every branch of the media, including the Internet and associated blogs" (para 32). Although the reporting had, in the main, run for a period of just under a week (8-4 September), much of it remained available on the internet.

36. In a ruling given on 18 December 2008, the trial judge, after a review of the authorities, including **Montgomery v HM Advocate**, refused the request for a stay. The judge considered that a fair trial for all defendants was possible. In reaching this conclusion, he indicated, he brought to bear his many years of experience in the criminal courts, as well as his confidence that juries pay attention to and do indeed have regard for the directions given by judges. He stated his intention to give careful directions at the outset of the trial, which he would repeat from time to time as necessary. He considered that by the time the trial commenced, more than five months would have elapsed since the publicity, sufficient time would have passed and the facts, as well as any possible prejudice, "will have receded and faded" (see para 33 of the judgment of the ECHR).

37. Accordingly, the retrial proceeded and the applicant was convicted on count 1. On appeal to the Court of Appeal (**R v Ali** [2011] 3 All ER 1071), one of the submissions made on behalf of the applicant was that it was no longer possible to rely on juries to follow the directions of judges and to focus exclusively on the evidence, ignoring anything which they may have heard or read out of court. This submission was based on academic research which suggested that jurors sometimes ignored the trial judge's directions not to conduct internet research. Rejecting this submission, Thomas LJ observed (at para [91]) that:

> "To the extent that there remains the risk that, despite what jurors are told by a judge, an individual juror might look up matters on the internet, any attempt by an individual juror to use what was found to influence the views of the other

> jurors is, in our judgment, bound to fail. For what was found on the internet to have any influence on the verdict of a jury, it would require other members of the jury to disobey their oath."

38. In the result, the applicant's appeal to the Court of Appeal was dismissed, the court considered that the trial judge's ruling on the stay application was correct. Further, that "given the trial process and the months that had elapsed before the second trial, the informed observer would be satisfied that a jury would consider fairly and impartially the evidence and would have no regard to the publicity …" (per Thomas LJ, at para [104]). The applicant's subsequent application to the ECHR was based on the contention that the adverse publicity prior to his retrial was capable of influencing that jury to the point of prejudicing the outcome of the proceedings and therefore rendered his trial unfair and in breach of Article 6.1 of the Convention. This contention was rejected by the ECHR, which indicated (at para 98) that it was "satisfied that the reasons given by the judge in the retrial for refusing the application for a stay [of] proceedings and by the Court of Appeal for dismissing the appeal were both relevant and sufficient".

39. But Mr Wood was principally concerned to show us the summary given in the ECHR judgment (at paras 37-41) of the way in which the trial judge dealt with the issue of adverse publicity at the retrial. Thus, potential jurors were specifically asked (i) whether, as a result of the publicity given to the case and the allegations against the defendants, any of them had "any pre-conceived views of guilt or innocence incompatible with an unbiased discharge of your duties as a juror"; (ii) whether any of

them, or any immediate family member or close friend of any of them, had been employed by any media agency involved in the investigation or reporting of the case; (iii) whether any of them had watched two television broadcasts two weeks before in which the case had been discussed; and (iv) whether any of them, as a result of seeing that publicity, had carried out "any internet research in the last two weeks into the alleged airline plot". And then, the jury having been selected, the trial judge directed them in explicit terms not to do carry out research of any kind, including internet research (para 39):

> "Can I please give you some additional instructions? There may now be a temptation, knowing that you are going to serve upon this case, to try to find out a little bit more about it and if any of you are addicts of the internet or the web, there may be a temptation to go on to it and read about it and see about it. Please do not do that. There was an element of inaccurate and unsatisfactory reporting at the time this matter first came to light. The allegations were not accurately reported in every instance and it is critically important that you decide the case upon the evidence that you hear in court and nowhere else. We tell jurors in all criminal cases not to carry out any research of their own. In a typical pub fight case we tell jurors not to go and have a look at the pub, not to turn themselves into sleuths because what is critical is you decide the case only upon what you hear in court. The defendants are entitled to know the basis and the exact basis upon which they are being tried. So, accordingly, please do not, either before the case starts tomorrow or indeed at any stage, carry out any internet research or indeed any research of any kind. I will also give you further instructions not to read any newspapers or listen to any television reports. The reason for that is sometimes they are inaccurate, sometimes they are speculative and they are always partial reporting. The only way you can hear and receive all the evidence is by being here in court, listening to it. That is where you receive the information."

40. Thereafter, the judge reminded the jury intermittently throughout the trial not to discuss the case with family or friends or carry out internet research and Mr Wood submitted that this is the kind of detail in which Quin J ought to have directed the jury in this case.

Conclusions on pre-trial publicity

41. In considering the effect of these authorities, we take as our starting point, as indeed we must, the entitlement of the defendant in any criminal trial to a fair trial. As it was put by Lord Bingham of Cornhill in **Randall v R [2002] UKPC 19**, (at para 28), a decision of the Privy Council on appeal from this court on which Mr Wood placed particular emphasis -

> "… the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

42. In this jurisdiction, this is as much a matter of common law as it is of constitutional right, given section 7(1) of the Cayman Islands Constitution Order 2009, which provides that "[e]veryone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time".

43. The authorities which we have considered make it clear that, on an application for a stay of proceedings on the ground that the effect of adverse and prejudicial pre-trial publicity has been such as to jeopardise the defendant's right to a fair trial, it is for the trial judge to determine whether a fair trial will be possible in all the circumstances. The test to be applied is whether the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it. Among the matters to be taken into account in making this assessment are the time which has elapsed between the date of publication of the allegedly prejudicial material and the date of trial; the focusing effect which the trial process, that is, the discipline of listening to the evidence in the case over a prolonged period, is likely to have on the jury; and the likely effect of any directions to be given by the judge. On this last point, the judge will be entitled to have regard to his or her own experience of the manner in which jurors normally perform their duties, in particular the consideration that jurors generally pay attention to and follow directions given by judges.

44. It is not in controversy – and the Director has at no stage contended otherwise – that much of the material of which the appellant complained in this case was potentially prejudicial. We have already given a fair sampling of the material (see para 7 above) and it suffices to say that it betrays a complete absence of editorial control on matters that plainly called for greater sensitivity and restraint on the part of the persons responsible for the publications involved. So the question for Quin J was whether, by virtue of this fact, the appellant's right to a fair trial was at risk. In order to assess this,

we cannot avoid setting out in full the operative part of his ruling on the point (paras 43-53):

> "43. In the case now before the Court it is accepted by the DPP that there was prejudicial material which was published by two media houses in October and November 2011. There was less and more restrained coverage for a few days in October 2012 and then there is the offending Cayman 27 television news report on the 6th and 7th March 2013.
>
> 44. It is my view that the effect of the 2011 news reports, and more restrained news reports in 2012 will have been greatly diluted by the passage of time, so that there will be little, if any, residual prejudicial impact on the jury selected to hear this case.
>
> 45. The Court understands that the Cayman 27 news report was aired on the evening of the 6th March 2013 and on the morning of the 7th March 2013 and further, that the same report stayed on the media house's website until the 7th March 2013. Accordingly there has been a lapse of time of about 3 weeks since it was last broadcast.
>
> 46. I have decided to follow the English Court of Appeal decision in ***R v. Abu Hamza*** and find that the fact that this broadcast on the other case was aired almost three weeks before this trial is no reason for not proceeding with this trial. I conclude that with the Court's assistance it is still possible for the Defendant to have a fair trial.
>
> 47. With considerable guidance from the Privy Council and the English Court of Appeal in the case law cited above, and, with the help of both the DPP and Defence counsel the Court can take steps to ensure that the risk of any prejudice to the jurors selected will be reduced to a minimum.
>
> 48. The Court can discuss with the DPP and Defence counsel the appropriate directions to be given before any evidence is heard and in the Judge's Summing Up to the Jury. For example, before any evidence is heard the Court can direct the jury to ignore anything they may have read, seen or heard and come to a verdict solely on the evidence which they have heard in Court.

> 49. The discipline of listening to, and thinking about, the evidence during the trial, in my view, will have a greater impact on the jurors' minds that any possible residual recollection as might exist about reports about the other case in the media.
>
> 50. In my charge to the jury I can include the standard directions which will include ordering the jurors to put out of their minds any form of speculation, and to concentrate exclusively on the evidence presented in the courtroom. Furthermore, there will be the most important standard direction to remove any feelings of sympathy for the Complainant or prejudice against the Defendant.
>
> 51. It is my experience that Grand Court jurors follow the directions of the judges of this Court, particularly when those directions coincide with the submissions of both counsel for the prosecution and the defence.
>
> 52. It is my view that the trial process in the Grand Court can reasonably be expected to remove any prejudice and so ensure that the Defendant has a fair trial.
>
> 53. For all the aforesaid reasons I do not find that the risk of prejudice is so grave that the trial process, along with the directions and instructions from the trial judge, would not be able to remove any risk of prejudice and allow for a fair trial for the Defendant."

45. In our view, it is patently clear that, in arriving at his decision to refuse the stay application on the ground that in all the circumstances it was nevertheless possible for the appellant to be afforded a fair trial, Quin J was fully alive to all of the relevant considerations arising from the authorities. The 2011 pre-trial material predated the trial by over a year, while even the last of the 2012 material, which was obviously more factually oriented, was published several months before the trial commenced. And while the March 2013 material was much closer in time to the trial, it too, though factually inaccurate, was much milder in tone than anything which had gone before.

46. We accept that, as Mr Wood urged, the jury pool existing in the Cayman Islands is unusually small (smaller at any rate than that existing in larger societies). By this, we understood him to mean that the reach and effect of the pre-trial material would have been correspondingly greater. But, as it seems to us, particularly having regard to a case like **Montgomery v HM Advocate**, in which Lord Hope was prepared to assume that the coverage given to the case "was observed and absorbed at one time or another by most of the adult population in Scotland during the relevant period", this does not by itself disenable the trial judge from seeking to neutralise the negative effects of pre-trial publicity by way of appropriate directions from the jury. Similarly, in our view, factors such as the source of much of the pre-trial publicity complained of (website sources) and the (as we accept) inappropriate comments made about the appellant by Detective Superintendent Bodden, were matters to be dealt with by the judge in his directions to the jury.

47. For these reasons, we accordingly concluded that the contention in ground 1 that the judge erred in not staying the proceedings had not been made good. This brings us then to the appellant's alternative complaint on this ground, which was that the judge's directions to the jury were inadequate to cure the prejudice occasioned by the publicity. As we have indicated, Mr Wood's principal complaint on this point was that Quin J omitted to warn the jurors specifically against carrying out internet research of their own. This, it was submitted, was particularly significant because of the absence any 'fade' factor in respect of internet material, thus distinguishing it from ordinary printed material.

48. We have already referred to **Abdulla Ali v The United Kingdom**, in which, as Mr Wood demonstrated, the trial judge gave repeated and specific warnings to the jury on the issue. Mr Wood also referred us to the Judicial Studies Board's Crown Court Bench Book 2010 ('the Bench Book'), in which it is recommended (at page 9) that jurors should be told not to "seek further information about, or relevant to, the case from any source outside the court, including the internet (e.g. Google)". Further, as Mr Wood also pointed out, in Practice Direction No. 3 of 2014 (albeit issued after the trial in this case), the Chief Justice has recommended to trial judges a direction to jurors that they "must not search the internet or any other source for information that may affect [their] consideration of the case".

49. As the Director readily accepted, Quin J made no specific reference to the internet in his directions to the jury, either at the outset of or during the trial, nor did he do so in the summing up. In our view, he ought to have done so, particularly in the light of the indication from the appellant's counsel of his client's concern that, "the minute the jurors leave here, out they go and then discussions take place or the computer and Google are put into operation". Although the 2014 Practice Direction was not yet available at the time of the trial, it nevertheless seems to us that, especially in a case in which the pre-trial material of which the appellant complained was, on the face of it, from online sources, a specific caution might have been given to the jury in this regard.

50. In order to assess the overall impact of this omission on the fairness of the trial and the safety of the conviction, it is necessary to consider whether, as the Director went on to submit, the judge's actual directions to the jury were adequate to convey to them that they should have regard only to the evidence presented to them in court and to nothing else. We have already referred (at para 12 above) to the fact that, having discussed with counsel the terms of an appropriate preliminary direction to be given by the judge to all potential jurors before empanelment, Quin J addressed the array of jurors present, mentioning what he described as "a considerable amount of media publicity in relation to this defendant", and the "good deal of discussion in the community" which this may have engendered about the defendant. Jurors who considered themselves unable to "bring an open and independent mind" to the case as a result were invited to come forward, if called, to discuss the matter with the judge. The purpose of this exercise, the potential jurors were told, was so that the judge could be "absolutely certain that the integrity of the jury is not tarnished in anyway". Then, after the jury were empanelled and put in charge, the judge warned them that they should "focus entirely on the evidence … from the witness box" (see para 14 above).

51. In summing up the case to the jury, Quin J dealt with the question of extraneous material at several points. First, close to the outset of the summing up, he said this:

> "… further, it goes without saying that I must remind you that you must decide this case only on the evidence which has been placed before you during this trial. That evidence includes the testimony from the witness box, the agreed statement, the formal admissions, and the exhibits which were presented in the evidence."

Shortly afterwards, the judge added this:

> "Do not pay any attention to what you've read in the newspapers or what you may have heard on the radio or the television. Just put out of your mind anything you may have heard, seen or read, and just focus solely on the oral evidence, the admissions, indeed your view of the scene — that's part of the Crown's case, that's part of the case — and the exhibits given by the Crown and the defence evidence."

The judge then repeated his warning to the jury to focus only on the evidence in the case:

> "Finally in relation to these general instructions and directions which I'm giving to you, it is only consistent with your oath as jurors to return a true verdict according to the evidence. So you must cast aside any feelings of sympathy or prejudice for the defendant or the complainant. You must remove all prejudice and be impartial and objective.
>
> I have reminded you of your oath to return a true verdict according to the evidence. I must add that you must bring forward in your consideration of this case only the evidence that has been presented to you by the Crown and by the defence. That is your sworn duty. The facts and evidence presented to you in this courtroom are the sole items for your consideration."

And finally, after a full and careful review of the evidence in the case, the judge invited the jury "to review all the evidence of the Crown, all the evidence of the defence". His enquiry of counsel whether there was anything which either of them wished him to add drew a negative response.

52. In our view, the combined effect of Quin J's warnings to the jurors, before and after the commencement of the trial, and during the course of the summing up, must have been such as to leave the jury in no doubt that they were required to exclude all extraneous material from their consideration and to focus on the evidence given at the

trial in determining whether the prosecution had satisfied them of the appellant's guilt. It seems to us that there is absolutely no basis for thinking that the jury failed or neglected in any way to follow the judge's repeated directions, and none was put forward in this appeal. We therefore consider that, despite Quin J's omission to give a specific caution to the jury against conducting internet searches, the directions which he did give were sufficient to dispel any risk of prejudice to the appellant created by the adverse pretrial publicity.

53. In coming to this conclusion, we have not lost sight of Mr Wood's submission that the peculiar nature of internet material (the absence of the 'fade' factor) is such as to call for different considerations to those which would apply to ordinary printed material. But, in the absence of any suggestion that the jury failed to follow the judge's directions to set aside all extraneous material in this case, there is in our view no reason to suppose, even in respect of internet material, "that they would do otherwise" than to follow those directions (see Lord Taylor CJ in **R v West**, quoted at para 31 above).

54. Lastly, in assessing the impact of pre-trial publicity on the minds of the jurors in this case, we think that, as the Director submitted that we should, we are bound to consider the strength of the prosecution's case against the appellant (as was done on appeal in both **R v Savundra** and **R v Malik** – see paras 22 and 23 above). The complainant's evidence implicating the appellant plainly derived support from the DNA evidence and, in these circumstances, it cannot be said, in our view, that the jury's

verdict of guilty was influenced by any consideration of bias on their part brought about by the pre-trial publicity. In this case, as in **R v Savundra**, it appears to us that the case for the prosecution was "so overwhelming that no jury could conceivably have returned any different [verdict] against the appellant".

55. For these reasons, we came to the conclusion that the appellant's alternative complaint in ground 1 also failed.

Ground 2 – the judge's directions on aggravated burglary

56. The appellant was charged (on count 1 of the indictment) the offence of aggravated burglary with intent to rape, contrary to section 244 of the Penal Code (2010 Revision). The stated particulars were that, on the date and at the location in question, he entered the complainant's dwelling house as a trespasser, with intent to rape her, and that he at the same time had with him an offensive weapon, namely a knife.

57. The offence of aggravated burglary is defined by section 244(1) of the Penal Code (2010 Revision) ('the Code') as follows:

> "A person who commits any burglary and at the same time has with him any firearm or imitation firearm, any offensive weapon or any explosive is guilty of aggravated burglary …"

58. And, by virtue of section 78 of the Code, "offensive weapon" is defined as "any object made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him".

59. Quin J directed the jury as to the charge of aggravated burglary in the following terms:

> "The Crown's case on aggravated burglary is that on the 20th October 2011 the defendant entered the apartment as a trespasser with intent to rape the said occupier of that apartment, [the complainant], and at the time of the said entry had with him an offensive weapon, namely a knife, so, members of the jury, the Crown submit that the defendant entered into the complainant's apartment, he cut the screen of the single window into [the apartment] in order to gain entry through the window, thus committing the burglary for the purpose of raping the complainant."

60. Mr Wood submitted that this direction was "wholly inadequate" and that the jury ought to have been directed that, before they could convict, they would have to be sure that (i) the appellant entered the building as a trespasser; (ii) at the time of entry he had the knife with him; (iii) the knife was an offensive weapon, because he had it with him intending that it be for the purpose of causing injury to a person; (iv) at the time of entry with the knife, his intention was to rape; and (v) if he formed the intention to rape only after having entered the building he would, on the indictment as pleaded, be not guilty.

61. To support these submissions, Mr Wood referred us to some authorities, of which it is only necessary to mention two. First, there is **R v O'Leary** (1986) 82 Cr App R 341, in which the appellant was charged with aggravated burglary under the provisions of section 10(1) of the Theft Act 1968 (which is in terms similar, if not identical, to section 244 of the Code). The prosecution's case was that, in the early hours one morning, the appellant forced entry into a private house while unarmed. He

searched the house, picked up a knife from the kitchen and went upstairs, where he was confronted by the two occupants of the house. A struggle ensued, during which all three persons were injured and the appellant, still armed with the knife, demanded and was given cash and an item of jewellery. At his trial, it was contended on his behalf that he could be guilty of aggravated burglary because he was not armed when he entered the house. Upon the trial judge's rejection of this submission, the appellant changed his plea to one of guilty and was sentenced to seven years' imprisonment.

63. The appellant appealed on the ground that the trial judge was wrong to have rejected the submission. Dismissing the appeal, the Court of Appeal held that, on a charge of aggravated burglary, the time at which the defendant must be proved to have had with him an offensive weapon was the time at which he actually stole. Accordingly, the relevant time in this case was at the point when the appellant, armed with the knife, confronted the occupants and demanded their cash and jewellery.

64. Next there is **R v Edmonds and Others** [1963] 2 QB 142, in which the appellants were together in a car belonging to one of them in a London street. They went from one betting shop to another. At each shop one or two of them would go towards the shop and then return to the car, which was left with its engine running. One appellant then drove the car away and the car was stopped at traffic lights by police officers. One appellant had in his pocket an unloaded starting pistol, another had in his trouser pocket a piece of lead piping, of a length suitable for use as a cosh, and the third had in his trouser pocket a hammer shaft. In the car there was a single-barrelled sporting gun and a number of live cartridges. The appellants were indicted on

three counts, the first of which charged them with conspiracy to rob, the second with loitering with intent to commit a felony and the third with having offensive weapons in a public place without lawful authority or excuse, contrary to section 1 of the Prevention of Crime Act, 1953. By section 1(4) of the Act, an offensive weapon was defined as "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him". The jury were directed not to convict on the second count; they acquitted the appellants on the first count and convicted them on the third count.

65. On the appeal against this conviction, it was held that the convictions should be quashed because the jury had not been adequately directed on the vital issue, *viz*, whether the prosecution had made them sure that each was party to a common purpose with the other or others, of using one or more of the articles for inflicting injury on someone. In judgment delivered by Winn J, the court considered (at page 149) that requisite direction in the circumstances should have been as follows:

> "Consider the nature of each article and the case of each man individually and separately, and have regard to the circumstances as a whole and the time of day. Are you sure that each man intended to use the article that he carried to injure someone? Alternatively, are you satisfied that he was party to a common purpose, with one or more of the others, of using one or more of the articles for inflicting injury upon someone? And when you consider this alternative, you must first be sure that he knew that one or both of the others had the article which each of them was shown to be carrying."

66. In response to Mr Wood's submissions, the Director accepted that Quin J's directions could have been more detailed. However, she submitted that in this case,

unlike in the cases cited by Mr Wood, no issues arose as to whether the offence of aggravated burglary had been made out, as in **R v O'Leary**, or as to the state of mind of each of three defendants, as in **R v Edmonds**. The only issue in this case, it was submitted, was whether the appellant was the person who entered the complainant's apartment on the night in question and the complainant's evidence of what took place there was therefore effectively unchallenged. It is in this context that the judge's directions therefore had to be considered.

67. We agree that Quin J's directions might have been more expansive, particularly as regards the ingredients of the offence of aggravated burglary and the definition of an offensive weapon. But it seems to us that, in the light of the complainant's unchallenged evidence, on the basis of which the offence of aggravated burglary was plainly made out, the jury would inevitably have arrived at the same conclusion, once they rejected the appellant's alibi and accepted, as they must have done, that she was a witness of truth. It is on this basis that we accordingly came to the view that the absence of a fuller direction did not make the appellant's conviction unsafe in the circumstances of this case.

Ground 3 – the judge's directions on the effect of the appellant's failure to answer questions put in his police interview

68. When interviewed by the police, the appellant did not answer any of the questions which were put to him. Instead, he made a short prepared statement in

which he denied the offences. In evidence at the trial, he told the court that, in adopting this stance, he had acted on the advice of his attorney-at-law.

69. The appellant's complaint on this ground is that Quin J directions to the jury on the effect of the appellant's silence in the face of questions from the police were wrong in principle and misleading. This is the passage to which we were referred:

> "Now you might think an innocent man would give his response as soon as possible. You need to consider whether the case being put to the defendant was sufficiently strong to demand a response from him. You take in to account the allegations against him. They were serious allegations of entering a young lady's apartment and raping her. But you also need to consider the defendant's reason for remaining silent. He told you that his attorney advised him that he should make no comment. The fact that the defendant has been advised to say nothing is an important consideration, but it is not necessarily an answer to the prosecution's argument. The choice as to whether to put forward an explanation as to his movements on the 19th and 20th October at the time of interview was his to make. If the defendant had a good defence, but chose, on his attorney's advice, to say nothing, that is one thing. But if the real reason for his silence was that he had no defence to put forward and that he just used his attorney's advice as a convenient excuse for evading the truth that is another."

70. Mr Wood submitted that these directions were wrong in two fundamental respects. First, the direction that "You might think an innocent man would give his response as soon as possible", ran wholly contrary to the principle that a suspect has a right to silence and is presumed innocent unless and until proven guilty, and that inferences are only to be drawn from silence in certain circumstances. And second, the bare direction that "you need to consider whether the case being put to him was

sufficiently strong to demand a response from him" required analysis from the judge, since at that stage the police was in possession of neither DNA nor identification evidence against the appellant. The case against him at that time was therefore not strong, but, rather, was weak.

71. In response to these submissions, the Director submitted that the part of the judge's summing up of which complaint was made had been taken out of context. It therefore fell to be balanced both by what the judge said before and after it. In any event, it was submitted, the jury would have been fully aware of the stage at which the police investigation had reached when the appellant was interviewed. Finally, it was submitted that the judge's directions were in line with the guideline directions set out in the Bench Book.

72. In order to assess the merits of these submissions, it is therefore necessary to establish the context in which the directions complained of were made. In the course of his review of the evidence for the benefit of the jury, Quin J came to describe the circumstances of the appellant's interview by the police on 11 November 2011. The appellant was accompanied by his attorney-at-law and, as we have indicated, made a brief prepared statement denying any knowledge of the allegations against him. He was then questioned, but not before being cautioned to the effect that he was not obliged to say anything, but that it might harm his defence should he fail to mention any fact subsequently relied on by him in court. (This caution accurately reflected the provisions of section 148 of the Police Law.) The judge then recounted to the jury the series of

questions to which the appellant gave "no comment" answers, followed by a summary of the appellant's evidence at trial in which he set up his alibi.

73. Against this background, the judge continued as follows:

> "Now, the prosecution submits that if there was any truth in the defence now put forward by the defendant, he should have mentioned it as soon as he was questioned. In other words, he should have mentioned it when questioned by the police. The prosecution submits that the only reason the defendant has for not mentioning his defence must have been that he did not have any answer to give at the time and that he waited until the trial to give evidence that he was somewhere else rather than at [the complainant's address].
>
> Now, the Legislative Assembly has provided that in the circumstances prevailing at the time, the defendant … could reasonably have been expected to mention, when questioned, facts on which he later relies at trial, but he chose to remain silent. You the jury may draw any inference or reach any conclusion from that silence which you think is fair or proper. The inference you are invited by the prosecution to draw is that the defence now put forward by the defendant is false.
>
> Now, the first question for you to consider is whether in the circumstances the defendant could reasonably have been expected to tell the police officers that he was not at [the complainant's apartment] when the rape occurred, but that he was in Windsor Park with [other persons].
>
> Now, in examining this, you have to say what were the circumstances prevailing at the time.
>
> First, there was the caution. He was told before the interview began that – he was told that he need not say anything, but anything that he did say maybe given in evidence.

> And you should remember that it was indeed his legal right to remain silent, as he'd been advised. The defendant is perfectly entitled to decline to answer questions put to him by the police and not to reveal what may be his defence until any subsequent trial. So the defendant was told that it might harm his defence if he failed to mention, when questioned, something which he later relied upon in court. The point of the caution was to inform the defendant fully of his rights."

74. It is at this point in the summing up that Quin J made the remarks of which complaint is now made. The context was the prosecution's contention that, if the defendant's evidence that he was elsewhere at the time of the offence was true, he ought to have mentioned when he was questioned. But, having told the jury this, the judge quite properly balanced it by inviting them to consider the prevailing circumstances at the time of the police interview, including the fact that the appellant was under caution and had the right to remain silent. Indeed, the comment of which the appellant complains was qualified almost immediately by the judge's reminder to the jury of the need to consider the appellant's reason for remaining silent, which was that he had been advised by his attorney-at-law to make no comment.

75. In leaving this aspect of the matter to the jury, the judge went on to say this to the jury:

> "I have said that these conclusions are open to you, but this is a decision for you to make. You should only reach such conclusions if you are sure that they are fit and proper. Furthermore, you should not convict just because, or even mainly because, the defendant chose to make no comment during his interview with the police on the 11th of November."

76. In our view, looked at in its broader context, the judge's remarks were wholly unexceptionable. It accordingly seems to us that the judge's rhetorical observation that "you might think an innocent man would give his response as soon as possible" was simply an aspect of an even-handed reflection for the jury's benefit on what were the competing arguments on both sides. As far as the appellant's further complaint relating to the stage which the investigation had reached at the time of the interview is concerned, we accept that no positive identification of the appellant as the intruder who entered the complainant's apartment on the night in question had yet been made at that time. Even if the case against the appellant was not then fortified by the DNA evidence, it appears to us that the question whether any inference could be drawn from his failure to make mention of the alibi which he would later rely on when questioned about his whereabouts on the night in question remained one for the jury to consider.

77. Finally on this ground, we would refer to the specimen direction set out in the Bench Book (at page 393) under the rubric "Defendant's failure to Mention Facts When Questioned or Charged":

> "1. Before his interview(s) the defendant was cautioned. He was first told that he need not say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court; and that anything he did say might be given in evidence.
>
> 2. As part of his defence, the defendant has relied upon … But [the prosecution say] [he admits] that he failed to mention those facts when interviewed about the offence(s). [If you are sure that this is so, this/This] failure may count

> against him. This is because you may draw the conclusion from his failure that … If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it; but you may take it into account as some additional support for the prosecution's case and when deciding whether his [evidence/case] about these facts are true.
>
> 3. However, you may draw such conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about three things: first, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; third, that apart from his failure to mention those facts, the prosecution's case against him was so strong that it clearly calls for an answer by him."

78. Although somewhat differently organised, it is clear that Quin J's summing up on this point was generally in keeping with the model directions set out in the foregoing paragraph. For this and the other reasons which we have stated in this judgment, we saw no reason to disturb the appellant's convictions on account of it.

Conclusion

79. These are our reasons for the dismissing the appeal. As regards ground 1, we considered that, because he applied the correct principles in relation to the impact of pre-trial publicity, there was no basis upon which to disturb Quin J's refusal of the stay application; further, that despite the judge's omission to give a specific warning to the jury against conducting internet searches, the directions which he did give on the matter of pre-trial publicity were sufficient to make it clear to the jury that they should not consult any extraneous material and should decide the case purely on the basis of the evidence which they heard. On ground two, we considered that, despite the fact

that the judge failed to give a full direction to the jury on aggravated burglary, the evidence against the appellant was sufficiently strong to ensure that there was no miscarriage of justice and that there was no need to disturb the appellant's conviction on that account. And on ground three, we considered that, taken in context, the parts of the judge's summing up of which complaint was made were, in the circumstances, unexceptionable.

Mottley, JA

Morrison, JA

Field, JA