Neutral Citation Number: [2019] EWCA Crim 1527

Case No: 201803667C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Central Criminal Court (Recorder of London)
HHJ N Hilliard
T20177181

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2019

Before :

LORD JUSTICE GROSS
MRS JUSTICE MCGOWAN
and
MR JUSTICE BUTCHER

- -

Between :

Regina	**Appellant**
- and -	
Khalid Mohamed Omar Ali	**Respondent**

- -
- -

Alison Morgan (instructed by **Counter Terrorism Division**) for the **Appellant**
Andrew Trollope QC and David Gottlieb (instructed by **Waterford LLP**) for the **Respondent**

Hearing date : 31 July 2019

- -

Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. On 26 June 2018, in the Central Criminal Court, before the Recorder of London, the Applicant, now aged 29, was convicted after trial of two counts (counts 1 and 2) of possession of an explosive substance with intent, contrary to s.3(1)(b) of the *Explosive Substances Act 1883* ("the 1883 Act") and one count (count 3) of preparation for terrorist acts, contrary to s.5(1)(a) of the *Terrorism Act 2006* ("the TA 2006").

2. On 20 July 2018, the Applicant was sentenced by the Recorder of London on counts 1 and 2 to imprisonment for life, the period of 40 years, less 436 days on remand, was specified as the minimum term under s.82A *Powers of Criminal Courts (Sentencing) Act 2000*, concurrent on each. In respect of count 3, the Applicant was sentenced to imprisonment for life, with a specified minimum term of 25 years, concurrent to the sentence passed on counts 1 and 2.

3. The Applicant renews his application for leave to appeal conviction and sentence after refusal by the Single Judge (Sir John Royce).

4. In respect of the application for leave to appeal conviction we grant leave.

5. The conviction appeal arises in this way. In the course of the Applicant's trial, the prosecution ("the Respondent") twice saw the Judge on an *ex parte* basis. Neither of these hearings was concerned with Public Interest Immunity ("PII") matters. Their purpose instead concerned "notification" *ex parte* of otherwise non-disclosable sensitive information to prevent the inadvertent mismanagement of the trial. The basis upon which the Respondent relied for holding these *ex parte* hearings was the *CPS Disclosure Manual* ("the CPS Manual").

6. The essence of the Applicant's case on the appeal against conviction was that there was no proper basis in law for the Respondent seeing the Judge *ex parte* for case management purposes outside a PII application; the CPS Manual did not make good the absence of any proper legal basis; accordingly, the *ex parte* hearings amounted to a material irregularity and the Applicant's convictions were unsafe. The Respondent defends the procedure followed; denies that there was any irregularity and contends that, even if there was an irregularity, the Applicant's convictions were safe.

7. The indictment was in these terms. Count 1 charged the Applicant with being in possession of an explosive substance with intent, contrary to s.3(1)(b) of the 1883 Act. The Particulars alleged that the Applicant:

> "…on or before 28th day of January 2012 unlawfully and maliciously made or had in his possession or under his control an explosive substance with intent by means thereof to endanger life or cause serious injury to property outside the United Kingdom, or to enable any other person to do so."

Count 2 was in the same terms, save that the dates in question were "…on or before the 6th day of July 2012".

8. Count 3 charged the Applicant with preparation of terrorist acts, contrary to s.5(1)(a) of the TA 2006. The Particulars alleged that the Applicant:

> "….on or before the 27th day of April 2017, with the intention of committing acts of terrorism, engaged in conduct in preparation for giving effect to that intention, namely purchasing knives and travelling to London."

THE FACTS

9. The Applicant was arrested on 27 April 2017, in possession of three knives near Downing Street (count 3). He had been to Parliament Square the week before and had spoken to police officers on duty at a "Stand up to Racism" march. The officers later remembered him.

10. The Applicant was born in Saudi Arabia and moved to the United Kingdom ("UK") with his family in 1992, when he was 3 years old. He was given British citizenship on 15 April 2003. He left home in 2011, saying he was not going to return. In 2016, the Applicant attended the British Consulate in Istanbul to apply for a temporary travel document to enable him to return to the UK.

11. The Applicant was provided with the necessary documentation but was registered as a suspicious traveller. On entry into the UK, on 2 November 2016, he was examined under Schedule 7 to the *Terrorism Act 2000* ("the TA 2000") and his fingerprints were taken. Those fingerprints were thereafter shared with the US Federal Bureau of Investigation ("FBI"). In turn, the FBI matched the prints to those found on two caches of components of improvised explosive devices ("IEDs") recovered in Afghanistan in 2012 (counts 1 and 2).

12. The Respondent's case on counts 1 and 2 was that whilst abroad, in about 2012, the Applicant became involved in the manufacture of IEDs, intending that they be used against Coalition and local forces in Afghanistan.

13. The Respondent relied upon, *inter alia*: the fingerprint evidence; evidence as to the military and forensic significance of the items seized in the caches, going to the intended use of the items and, hence, the Applicant's intent; evidence as to the conflict in Afghanistan and the use of IEDs; evidence that the items comprising the caches had been used to trigger IEDs in Afghanistan; lies told by the Applicant when detained and interviewed under the TA 2000, upon his return to the UK in 2016; lies told to the police when they attended his home in November 2016 to speak with the Applicant about the missing person's report filed by his family when he left home in 2011; finally, evidence found on the Applicant's laptop in 2011 (after he left home and his family reported him missing to the police) of three speeches encouraging individuals to engage in *Jihad*.

14. The Respondent's case on count 3 was that, on re-entry into the UK, the Applicant planned a fatal terrorist attack on persons at Westminster, which included a reconnaissance the week before and which he was about to carry out when arrested in April 2017.

15. In this regard, the Respondent relied upon, *inter alia*, the Applicant's presence in Central London (already referred to) the week before his arrest; evidence downloaded from his phone following his arrest, showing images of police officers and street views of the Secret Intelligence Service ("SIS" or "MI6") building; the Applicant's purchase of five knives and a sharpener five days before his arrest; surveillance of the Applicant in the days leading up to his arrest; the Applicant's movements, including the purchase of three further knives, on the day of his arrest.

16. The Defence case on counts 1 and 2 was that the Applicant was acting under duress. He gave evidence that he had been kidnapped when travelling in Pakistan in 2012 and forced, under threat of death, to make parts for IEDs. He was released on condition that he communicated a threefold message when he returned to the UK: that the UK leave Muslim lands; return Palestine to Muslims; and free Muslim prisoners of war.

17. The Defence case on count 3 was that the Applicant had no intention of carrying out any attack. The Applicant's evidence was that he had not been carrying out reconnaissance in the preceding week; he had in fact been going to a different march in relation to the Syrian regime of President Assad. He attended Westminster on the day of his arrest to attempt to speak to those in authority about the message he had to deliver. He had the knives for self-protection because he thought that there were people who would harm him for not delivering the message. He did not have the knives for the purpose of committing a terrorist attack.

18. On counts 1 and 2, there was no dispute that the Applicant had been in possession of an explosive substance. The issue for the jury was whether he was in possession of the items with the intent that he use them to endanger life or to cause serious damage to property or to enable someone else to do either of those things and that he was not acting under duress.

19. On count 3, there was likewise no dispute that the Applicant was in possession of three knives when he was arrested. The issues for the jury were, firstly, whether the Applicant intended to commit acts of terrorism and, secondly, if so, that he engaged in conduct in preparation for giving effect to that intention.

20. In the event, the jury convicted the Applicant on all three counts.

THE *Ex PARTE* HEARINGS

21. As already foreshadowed – and comprising the essence of the conviction appeal – the Respondent notified the Defence on two occasions that they had seen the Judge *ex parte*. The Defence were told that the hearings were not PII applications and were for trial management purposes. The parties exchanged emails in this regard.

22. On 15 June 2018, 09.23, counsel for the Respondent (Ms Morgan QC, as she now is) notified (leading and junior) counsel for the Applicant that the Respondent had asked to see the Judge for a short *ex parte* hearing at 10.00.

23. On 19 June 2018, 15.11, Ms Morgan emailed the Applicant's counsel, saying:

> "Further to the *ex parte* notification hearing that took place on 15 June, we have just been *ex parte* in front of the Judge again.

> This was to address a query that the Judge had raised at the earlier hearing."

24. This email prompted a response from the Applicant's leading counsel on the same day, at 20.02, in which Mr Trollope QC said:

> "I do not understand these ex p applications. Brian [i.e., Mr Altman QC, then leading counsel for the Respondent] says they are not pii. If not what sort of applications can be made ex p whether with or without notice as to the reason? Chapter and verse please. We will have to decide whether we raise it with …[the Judge]."

25. At 20.46, Ms Morgan replied, saying that there "will be no chapter and verse I'm afraid." It was up to the Applicant's counsel to raise the matter as they saw fit "but there is nothing further for us to say I'm afraid".

26. On the next morning, 20 June, 09.20, Ms Morgan sent a further email to the Applicant's counsel, indicating that the *ex parte* hearings had been conducted in accordance with the guidance provided by (Chapter 13 of) the CPS Manual:

> "The two *ex parte* hearings on 15 and 19 June 2018 were conducted in accordance with the guidance provided in the CPS Disclosure Manual as follows:
>
> **Ex parte notifications to a judge**
>
> In *R v H and C* [2004] UKHL 3, the House of Lords set out that neutral material or material damaging to the defendant should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands (see paragraph 35).
>
> However, it is recognised that other **exceptional circumstances** may arise in which the judge should be notified *ex parte* of otherwise non-disclosable sensitive material, such as where not to reveal non-disclosable sensitive information to the judge would create a risk that the judge's fair management of the trial or a wider public interest would be prejudiced. The judge must be told that the purpose of the hearing is to prevent the inadvertent mismanagement of the trial and that therefore he or she is not being asked for any ruling on disclosure.
>
> In such circumstances, the prosecution advocate should only put before the judge such information as is necessary to enable him or her to properly manage the trial process or protect the wider public interest and should be used to do no more than flag areas of potential concern or sensitivity. Only such revelation as is strictly necessary should be made to the judge and only in very rare circumstances should the revelation go beyond the category of material and headline information. The

judge should determine how much of the material, if any, needs to be viewed before he or she is in a position to best ensure the fair management of the trial."

27. Interposing, it may be noted that the CPS Manual continued as follows:

> "The following are examples of circumstances in which an *ex parte* notification could be conducted, so long as the criterion set out above is applied:
>
> - where there is a CHIS whose name or identity appears on the face of the papers;
> - where the defendant is a CHIS, particularly a participating CHIS; and
> - where there are details of observation posts or the product from them that has been edited.
>
> Notice of the intention to notify the judge *ex parte* should be given to the defence in all but exceptional circumstances. The process should reflect that applicable to the different types of PII hearings.
>
> A suitable form of notice to the defence is suggested as follows:
>
> '*The prosecution are in possession of material [categorise where appropriate] which does not satisfy the disclosure test and which at present cannot be disclosed in the public interest. It is the prosecution's intention to alert the judge to the existence of material in this category so as to ensure that he/she is able to manage the trial in a way which is fair to all parties.'*
>
> Except in **Type Three** cases the prosecution advocate should invite the judge to consider making it clear in open court that:
>
> - the *ex parte* 'hearing' was not one where he or she was requested to rule on PII or decide a truly borderline issues of disclosability, but was necessary for the fair management of the trial;
> - (further) submissions from the defence were not required; and
> - he or she is aware of the basis on which material would be disclosable under the CPIA and when PII would justify withholding it; and

- nothing done was contrary to principles in *Edwards and Lewis v UK* and *R v H and C*."

28. Returning to the contemporaneous events, on 16 July 2018, the Judge gave an *ex parte* judgment on the matters he had heard in the (June) *ex parte* hearings. As is apparent from further emails exchanged between counsel, no part of that ruling was open; it confirmed what had happened before and was recorded.

THE APPEAL AGAINST CONVICTION

29. *(1) The rival cases:* For the *Applicant*, Mr Trollope QC submitted that there was no lawful authority for the two *ex parte* hearings which contravened the cardinal principle of open, public justice involving the maximum participation by the parties – a principle long-established at common law and enshrined in Art. 6(1) of the *European Convention on Human Rights* ("ECHR"). The practice upon which the Respondent purported to rely had sprung from nowhere. Thus:

    i) Such case authority as there was did not contemplate *ex parte* hearings outside the ambit of PII. In this regard, the Applicant placed much reliance on the decision of the House of Lords in *R v H* [2004] UKHL 3; [2004] 2 AC 134.

    ii) The CPS Manual could not confer authority, otherwise lacking, for these hearings; nor did the examples there given justify hearings of this nature.

    iii) While the inherent jurisdiction of the Court permitted, *exceptionally*, departures from public justice, such *in camera* hearings remained *inter partes;* they were not *ex parte*, with the defendant excluded.

    iv) Neither the *Criminal Procedure Rules* ("the Crim PR") nor Art. 6(1) of the *ECHR* lent any support to this practice; to the contrary, they pointed in the opposite direction.

    v) Either statute or a decision of high judicial authority was required before such a practice could properly be introduced. In the absence of either, the grounds for holding such hearings and their parameters had not been carefully and closely identified.

30. It followed that the *ex parte* hearings during the trial were insupportable and constituted a material irregularity rendering the Applicant's convictions unsafe.

31. For the *Respondent*, Ms Morgan QC submitted that the facility, exceptionally, to hold such *ex parte* "notification" hearings went to the "overriding objective" under the Crim PR and served to protect a defendant's rights under Art. 6(1), ECHR. Ms Morgan relied in particular on r.1(1) of the Crim PR, providing the "overriding objective" that "criminal cases be dealt with justly", together with r.3.2(1) which placed a duty on the Court to "further the overriding objective by actively managing the case". Notification hearings were consistent with the guidance furnished in the CPS Manual. It was incumbent on the prosecution to take steps to prevent the inadvertent mis-management of a trial (to the disadvantage of the defendant) – as the CPS Manual made clear, the prosecution could not simply "sit on their hands"; there

was no "straitjacket" precluding the steps taken in the present case. Ms Morgan indicated that she had experience of this procedure in a number of cases.

32. In response to the Court's inquiry as to the origins of the provisions contained in Chapter 13 of the current CPS Manual (set out above), Ms Morgan reiterated that these were intended to guard against the "inadvertent mismanagement" of the trial. The Disclosure Manual was first introduced in 2005, following the judgment of the House of Lords in *R v H*. A version of the CPS Manual, dated November 2005 ("the 2005 CPS Manual"), contained a section headed "*Ex parte notifications to the Judge*". In substance, paras. 39 and following very closely resemble Chapter 13 of the current CPS Manual. As it seems to us, the nub of the matter appears from paras. 41 – 42 of the 2005 CPS Manual:

> "41. The judge must be told that the purpose of the hearing is to prevent the inadvertent mismanagement of the trial and that therefore he or she is not being asked for any ruling on disclosure.
>
> 42. In notifying the judge *ex parte* of sensitive material, the prosecution advocate should only put before the judge such information as is necessary to enable him or her to properly manage the trial process or protect the wider public interest. In order not to create unwarranted unfairness to the accused, the notification hearing should be used to do no more than flag areas of potential concern or sensitivity….."

33. In Ms Morgan's submission, there were circumstances falling outside the disclosure regime (dealt with in *R v H*) "…where issues arise in the course of a trial which have the potential to result in 'inadvertent mismanagement' by the court." Where such circumstances arose "…the Prosecution will seek to ensure that the court does not proceed e.g., on a false basis that results in unfairness to a defendant or on a basis that damages a national security interest." Accordingly, "notification hearings" were justified on the basis that "…they ensure the integrity of the proceedings" and were therefore in accordance with the overriding objective in the Crim PR.

34. Ms Morgan further referred to the similar form of wording recognising the existence and scope of "notification hearings" found in the *Judicial College Training Note* dated November 2016, apparently drafted and delivered by the then head of Counter Terrorism within the CPS and Saunders J ("the Training Note"). It is unnecessary to set out the wording here.

35. *(2) Discussion:* The centrality of public, open, justice to the common law requires no emphasis. It forms the starting point of this discussion and informs it throughout. A corollary is that a defendant in criminal proceedings is and must be entitled to be present and participate fully in his trial.

36. A clear statement of the principle of public open justice is to be found in *Attorney-General v Leveller Magazine* [1979] AC 440, a decision of the highest authority, which also made it plain that exceptions were jealously guarded. At pp. 449-450, Lord Diplock said this:

> "As a general rule the English system of administering justice does require that it be in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

37. Likewise, the openness of judicial hearings is a fundamental principle enshrined in Art. 6(1) of the ECHR: *Stefanelli v San Marino* (2001) 33 EHRR 16. As there observed by the European Court of Human Rights, at [19], this fundamental principle:

> "…protects the applicants from justice administered behind closed doors beyond all public control, and therefore constitutes one of the means of preserving confidence in the courts. In making the administration of justice more transparent, it helps to achieve the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of all democratic societies."

38. It is, however, also clear from *Leveller* that as the purpose of the general rule is to serve the ends of justice, it may, exceptionally, be necessary to depart from it, where the application of the general rule would otherwise frustrate or render impracticable the administration of justice. The basis of the departure from the general rule, statutory exceptions apart, is the Court's inherent power to control the conduct of proceedings before it. Lord Diplock put the matter this way (at p.450):

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the 'trial within a trial' as to the admissibility of a confession in a criminal prosecution. The due

> administration of justice requires that the jury should be unaware of what was the evidence adduced at the 'trial within a trial' until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the trial within a trial is held in open court in the presence of the press and public but in the absence of the jury…"

Much the same point was illustrated by Lord Scarman (at p.471); considerations of prejudice to national security alone would not justify the Court sitting in private; if, however, the factor of national security appeared to endanger the due administration of justice (for example, by deterring the Crown from prosecuting in cases where it should do so), then the Court may sit in private.

39. The basis for a principled but exceptional departure from the general rule of open justice may thus be found in the Court's inherent power to control its own proceedings. That said, the observations in *Leveller* cannot simply be transposed to the facts of the present case. The examples in *Leveller* went to evidence being withheld from the jury or to the Court sitting in private or *in camera*; in both examples, the proceedings remained *inter partes* – the defendant would not be excluded, as the Applicant here was excluded from the *ex parte* hearings. We return to this consideration later.

40. *R v H*, much relied on by the Applicant was plainly, with respect, a most important decision but, in our judgment, of significantly more limited scope than the submissions of either the Applicant or the Respondent would suggest. Our reasons for this view follow.

41. First, as explained by Lord Bingham of Cornhill (at [14]), fairness ordinarily required that "…any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence." Lord Bingham continued (*ibid*):

> "Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure."

42. In the event, that "bitter experience" had resulted, as it seems to us, in decisions such as *R v Ward (Judith)* [1993] 1 WLR 619 (referred to by Lord Bingham at [16]), opening the taps on disclosure, laying down a general test that *all* relevant material should be disclosed, whether it strengthened or weakened the prosecution case or assisted the defence case. This more generous approach to disclosure, however, turned out to be an over-correction and came to be seen as giving a blank cheque to the defence: see, *Review of Disclosure in Criminal Proceedings*, The Rt Hon. Lord Justice Gross, September 2011, at paras. 16 and following.

43. The upshot was the *Criminal Procedure and Investigations Act 1996* ("the CPIA"), as amended, restricting (by s.3 and elsewhere) disclosure to previously undisclosed material "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".

Accordingly, as Lord Bingham remarked (at [17]), the CPIA test did not require disclosure of material which was either neutral or weakened the defence.

44. Secondly, it was against this background that the House of Lords came to consider the procedure for *ex parte* hearings in which the Crown sought to withhold material on the ground of PII. The particular focus was on material which might reasonably undermine the prosecution case or assist that of the defendant and thus otherwise disclosable, subject to any question of PII. Moreover, the House of Lords was concerned (at [20]) that an excess of caution on the part of prosecutors, following *R v Ward* had tended to impose "an undue and inappropriate burden on judges"; implicit in this concern was that the prosecutor's duty in respect of disclosure should not be transferred to the Judge. This is the context in which Lord Bingham's observations (at [35]) fall to be understood:

> "If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands…..If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been privately shown material damning to the defendant will…be very exceptional indeed."

45. Thirdly, *R v H* was primarily concerned to fashion a procedure covering *ex parte* applications to withhold material on PII grounds while ensuring the proper protection of the defendant's interests and the fairness of the trial. Compliance with the CPIA test for disclosure, as contrasted with a more lax approach, underpinned the reasoning of the House of Lords. The sentence (at [35]) "Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court" is to be understood in this light. It was not, in our judgment intended to impose a blanket prohibition on *ex parte* hearings outside the ambit of PII; no such issue was before the House of Lords. That said, there are obvious dangers, of which this Court is very mindful, in any private showing of unused material damaging to a defendant (*ex hypothesi*, not disclosable), to the Judge. So too, nothing in *R v H* itself affords a foundation for *ex parte* notification hearings.

46. The problem to which notification hearings seek to provide an answer is necessarily rare. It concerns material which does *not* meet the disclosure test (undermining the prosecution case or assisting that of the defendant) – but is nonetheless of a public interest sensitivity so as to preclude disclosure by way of a pragmatic relaxation of the CPIA test. Crucially, if the Judge is not kept informed, there is a risk that the material in question will inadvertently impact on the fair management of the trial and thus run

counter to the ends of justice. Though Mr Trollope disputed this, the two CHIS examples in the CPS Manual strike us as apposite – and, at least one member of this Court, can recollect a case (far-removed from the present) where such problems did arise. The CHIS examples are, of course, no more than examples and, to repeat, far-removed from this case; as criminal proceedings produce the widest variety of factual circumstances, there will be other, though very different, instances where the same conundrum arises. (For completeness and in fairness to Mr Trollope, we are more troubled by the "observation posts" example in the CPS Manual; that strikes us as much closer to a "borderline" disclosure issue.)

47. What then is to be done in such circumstances? Ms Morgan submitted that it was incumbent on the prosecution to act so as to guard against the risk of the inadvertent mis-management of the trial to the defendant's disadvantage; hence the provision for notification hearings in the CPS Manual. It would appear that both Saunders J (now Sir John Saunders) and Sir John Royce - Judges of vast relevant experience - agree. In the case of Saunders J, we were told, without contradiction, that he drafted (or approved) the Training Note of November 2016, recognising the existence and scope of notification hearings. Sir John Royce, as the Single Judge in this case, refused leave to appeal conviction, saying:

> "There may be circumstances where the prosecution have to see the Judge *ex parte* to ensure the trial does not proceed in a way which is unfair to a defendant.
>
> This is an exceptional course. A record is kept and a transcript can be considered in the event of an application for leave to appeal. That is the case here."

48. In principle, we are minded to agree. Procedure must always be the servant, not the master, of justice. If, exceptionally, it is necessary for the prosecution to see the Judge *ex parte* to avoid the risk of the inadvertent mis-management of the trial occasioning unfairness to the defendant, then it would indeed be regrettable if a blanket procedural prohibition stood in the way of doing practical justice. For our part, we find the source of the Court's power to hold such an *ex parte* hearing in the Court's inherent jurisdiction to control its own proceedings – bearing in mind that the circumstances must indeed be exceptional to warrant a departure from open justice going so far as to justify a hearing *ex parte*, by definition, in the absence of the defendant. We think that the decision in *Leveller* furnishes the principle upon which a departure from open justice may be justified, namely where the ends of justice themselves require such a departure. While we are not persuaded that *Leveller* confines such departures to *in camera* hearings *inter partes*, we have very much in mind that *Leveller* stands as a reminder of the gravity of any departure from public, open justice in the presence of the defendant.

49. We are not minded to agree with Ms Morgan that the source of the Court's power to hold notification hearings lies in the Crim PR. The matter strikes us as altogether more fundamental. Instead, as indicated, the principled basis for the Court holding *ex parte* notification hearings is to be found in the Court's inherent jurisdiction to control its own proceedings to ensure fairness and conduct criminal trials justly. The Crim PR may, however, be said to furnish the framework within which notification hearings may proceed - and both rr. 1(1) and 3.2(1) of the Crim PR may properly be viewed as

providing the mechanism for the exercise of the Court's inherent jurisdiction in this regard. A properly justified notification hearing furthers the overriding objective and is achieved through the exercise of the Court's case management powers and duty.

50. Pulling the threads together, we are persuaded that *ex parte* notification hearings *may* be justified, where the following conditions are met:

    i) The need must be exceptional; such a hearing can never be routine or simply held by way of a course of least resistance.

    ii) There must be no practicable *inter partes* alternative, so that even an *in camera* hearing cannot practicably be held.

    iii) The *ex parte* notification hearing must be *necessary* in the interests of justice to avoid the risk of inadvertent mismanagement of the trial occasioning unfairness to the defendant.

    iv) The material shown to the Judge and the discussion at the notification hearing must be kept to a minimum and confined to what is *necessary* to achieve the purpose of the notification hearing. It is only by such restraint on the part of counsel, subject to tight case management by the Judge, that the acute dangers inherent in any private exchange of material between prosecutor and Judge can be avoided or minimised.

51. In the present case, we have read the transcript of the notification hearings, together with the Judge's *ex parte* Ruling. As we indicated in open Court, there is nothing which causes us concern arising from those notification hearings in connection with either conviction or sentence. We acknowledge in this regard, and with respect, the care taken by counsel and the professionalism of the Judge. For the reasons given, we are satisfied that, in principle, the holding of a notification hearing is permissible within the parameters we have outlined. We are further satisfied, in the particular circumstances of this case, that the notification hearings came properly within those parameters and do not disclose any material irregularity. It follows that we would dismiss the appeal against conviction.

52. We do not, however, leave the matter there. First, and especially as Ms Morgan told us that she has experience of notification hearings in other cases, we are deeply concerned that any practice has arisen, to date solely based on the CPS Manual. That cannot possibly be right. Valuable document though it is, it is of no legal authority. We think it essential if such hearings are to continue – and for the reasons given they may, exceptionally, be necessary to do justice – that the practice be placed on a sounder and more appropriate footing. We therefore draw this judgment to the attention of the Head of Criminal Justice and the Criminal Procedure Rules Committee. Having regard to the parameters we have outlined above, we would invite that Committee to consider and, if necessary, refine the procedure to govern notification hearings, including the circumstances in which such hearings can take place and the limits to be placed upon them.

53. Secondly, even assuming that we are wrong and that the holding of the notification hearings did constitute a material irregularity, we are sure that there was no unfairness

to the Applicant - and we entertain no doubt whatever as to the safety of his convictions. For this reason too, we dismiss the appeal against conviction.

THE RENEWED APPLICATION FOR LEAVE TO APPEAL SENTENCE

54. *(1) The Judge's sentencing observations:* Passing sentence, the Recorder of London said that, on counts 1 and 2, he could not be sure that the Applicant personally detonated devices before 2012. However, the Applicant was involved in the manufacture of devices that he intended would be detonated by others against international forces. Viable devices were deployed and detonated. The activity clearly went beyond preparatory steps. Multiple deaths were risked and likely caused.

55. Those counts were category 1A cases within the *Sentencing Council: Terrorism Offences: Definitive Guideline* ("the Guideline"). The starting point ("SP") was life imprisonment and a minimum term of 35 years custody, with a category range for the minimum term of 30 - 40 years. The case was aggravated by the fact of two counts but mitigated by the fact that Applicant was likely working under the direction of others.

56. On count 3, the preparations for the attack were complete and death was very likely to be caused by such an attack.

57. This was a category 2A case within the Guideline. The SP was life imprisonment and a minimum term of 25 years, with a category range for the minimum term of 20 – 30 years.

58. The Judge held that the Applicant clearly met the dangerousness criteria; accordingly, the sentence must be one of life imprisonment on each count.

59. As to mitigation, the Applicant's age and previous good character were of limited weight in a case of such gravity.

60. The sentence on counts 1 and 2 included an uplift to take account of the offending in count 3. The Judge bore in mind totality and passed the sentence already recorded.

61. *(2) The Applicant's case:* Mr Trollope submitted, first, that despite assurances from the Judge that nothing in the *ex parte* hearings would affect sentence, he may have been negatively influenced by matters disclosed to him, resulting in an unfair approach to sentence. Secondly, as to counts 1 and 2, the Judge erred in placing them in category 1A of the Guideline; the Applicant was never in possession of a viable explosive device; the evidence went no further than linking the Applicant to one component of such a device. Thirdly, as to count 3, the Judge again erred as to the categorisation of this offence. The Applicant had no intention to harm the British public or of carrying out any attack; had he intended to do so, he had every opportunity to do so overnight or *en route* to the vicinity of Downing Street. The knives were carried as protection from those watching him. There was no evidence that multiple deaths were risked or that any death was risked and very likely to be caused.

62. *(3) The observations of the Single Judge:* The Recorder of London had had the advantage of trying the case. He was justified in concluding that counts 1 and 2 came

within category 1A of the Guideline. He was likewise justified in concluding in relation to count 3 that the offence went well beyond merely threatening violence:

> "…You would have killed any policeman you could. Timely intervention prevented this…"

Refusing leave to appeal sentence, the Single Judge observed that the uplift to 40 years for the minimum term was "well merited". He added that the *ex parte* applications had not affected the sentencing process.

63. *(4) Discussion:* We agree entirely with the Single Judge and did not call upon Ms Morgan. With respect to Mr Trollope, the application for leave to appeal sentence lacked substance.

64. We add only a very few observations. We at once repeat that we have no concerns as to the *ex parte* notification hearings having had any, unintended, influence on the sentence passed by the Judge.

65. As to the categorisation of counts 1 and 2, the Recorder of London correctly focused on the fact that "a viable device was actually developed and deployed" in combat. In our judgment, this feature served to distinguish a category 1A case from a category 1B case. Moreover, the submissions advanced on the Applicant's behalf failed to take into account that category 1A included *development* of a viable explosive device.

66. With regard to the categorisation of count 3, having referred to the "three part message" that the Applicant was intent on delivering, the Judge said this:

> "You decided to deliver that message by an act of extreme violence in circumstances which would attract maximum publicity and instil terror. I am sure your plan was to attack and kill someone in central London. I am absolutely sure it went way beyond merely threatening violence…."

Those were conclusions the Judge was amply entitled to reach; they comprise a complete answer to the submissions advanced on behalf of the Applicant.

67. The Recorder of London went on to add the following observations:

> "You were obviously being followed on the 27th of April and it will be of great reassurance to the public that that was the case. The timing of the intervention by armed officers on the 27th of April was, in fact, before anybody was attacked by you and at a stage which had enabled the greatest amount of evidence to be gathered. That can never be an easy balance to strike, but in this case, events show that it was struck at the right stage…
>
> The fact is, you were detained in a successful operation and an investigation which followed, all of which deserve commendation as do the brave police officers who arrested you in the street."

With those observations, we specifically agree. That balance is never easy to strike. Thankfully, it was correctly and commendably struck in this case.

68. The renewed application for leave to appeal against sentence is refused.