**3. Retirement of jury** – *R. v Dunster* [2021] EWCA Crim 1555, unreported, 13 October 2021, CA.

(1) The default position remains firmly that evidence should be placed before the jury during the parties’ cases and not at any other stage. It is likely that it will only be found to be in the interests of justice to permit new information after the retirement of the jury on very rare occasions and where in particular (a) the information answers a question asked by the jury, (b) is neutral or at least incontrovertible, and (c) it is clear that a defendant is not in any way disadvantaged by the stage at which it is admitted. A judge considering whether to permit the jury to be given some new information in any form after their retirement must consider the matter not on the basis of some absolute rule, but on what the interests of justice require. When balancing the interests of justice, it will be important to assess the importance of the new material and to give particular, probably decisive, weight to any real possibility that the absence of an opportunity to deal with it evidentially or in closing submissions has harmed the interests of the defendant to any extent. It will not be possible at that stage to reopen the evidence generally or to permit further speeches to be made. If admission of evidence at that stage might disadvantage the defendant because further evidence or submissions are in fairness required, then the choice will be between refusing the request for new information and carrying on, or discharging the jury so that the new material can properly be addressed in the course of a retrial. The situations where this problem may arise will be many and varied and there is no absolute rule to guide the trial judge.

(2) On appeal, the Court of Appeal will be concerned only with the safety of the conviction, which includes deciding whether or not the trial was fair to the defendant. An enquiry into the safety of the conviction need not always come to an end if it is shown the defendant consented to what happened. The defendant’s consent and in particular the perception that the new material might assist his case is plainly highly relevant. However, there may be circumstances in which that consent may have been entirely misconceived, given after inadequate time for reflection or based on inadequate advice.

(3) It is particularly unwise for a trial judge to go beyond the agreed facts in a case where the parties have carefully prepared them to reflect the agreed scientific evidence so that it is clear and intelligible. If the court considers on reading the agreed facts that they are not clear and intelligible, that is the time to intervene and to suggest the parties should revise them so that they are clear, intelligible and comprehensive. That process having been completed, and the material having been placed before the jury in the prosecution case, explained by the defendant in his evidence and then subjected to analysis in the closing submissions of the parties, it is too late to start introducing new material once the jury is out. If the parties have produced satisfactory agreed facts, most relevant questions from the jury can be answered by reference to them.

**Key cases cited**: Not followed – *R. v Owen* [1952] 2 Q.B. 362, CCA; *R. v Wilson* (1957) 41 Cr.App.R. 226, CCA; *R. v Corless* (1972) 56 Cr.App.R. 341, CA; *R. v Khan* [2008] EWCA Crim 1112, unreported, 23 May 2008, CA. Considered – *R. v Karakaya*, CLW/05/09/5, [2005] EWCA Crim 346, [2005] 2 Cr.App.R. 5, CA; *R. v Hallam* [2007] EWCA Crim 1495, unreported, 14 June 2007, CA.

COMMENT:

The material placed before the jury after they had retired related to DNA evidence that was before them by way of admissions. In response to a jury note, and with the consent of both advocates, the judge provided “extra technical information” and effectively gave expert evidence about the possibility of “secondary transfer” of DNA, which had not even been addressed by the experts in their reports. Unsurprisingly, the Court of Appeal concluded that the judge had fallen into error but dismissed the appeals as the remaining evidence was “truly overwhelming” (at [43]).

The appellant had been convicted *inter alia* on two counts of theft from cash machines. A glove was recovered from the scene of the first theft and a cigarette lighter from the second. DNA analysis of a sample recovered from the inside surface of a finger of the glove indicated the presence of DNA from at least three contributors, but “[t]he clear complete major DNA profile” matched the appellant (at [17]). The probability of obtaining this match if the major portion of the DNA originated from someone unrelated to the appellant was less than one in one billion (this being the level at which smaller match probabilities are capped in the UK).

Analysis of swabs taken from the lighter also indicated the presence of DNA from at least three people, but “[a]ll of the components in the reference DNA profile of [the appellant] were represented, such that … [he] could be a substantial contributor to it” (at [17]). It was one billion times more likely that the DNA had originated from the appellant and two unknown individuals, than that the DNA had originated from three unknown individuals.

The expert evidence was agreed and was put before the jury by way of a series of admissions. After retiring, the jury sent a note that included two questions. First (at [12]): “With regard to the other sets of DNA [on the glove and lighter], we understand we don’t know who the contributors were but how strong were their profiles? Were they also a billion to one from one person?” Secondly (at [13]): “Can you transfer your DNA into your own glove from shaking hands with another person?”

The first question appears to reveal a fundamental misunderstanding of match probabilities, which the judge did not address. Instead, with the agreement of the parties, the judge augmented the original admissions in two separate places. To the agreed evidence about the statistical evaluation of the DNA profile recovered from the glove, he added (at [17]-72):

“Mixture, clear complete major profile determined, majority of DNA appears to be of male origin, suitable for comparison, major portion only, minor portion not suitable for routine statistical analysis, major portion only [and then] match obtained.”

Quite how anyone thought this “unexplained technical language” (at [38]) might assist the jury, let alone a jury that was already in retirement, is a mystery.

The judge appended some further “technical" information to the admissions relating to swabs from the lighter (at [17]-85), namely that it was “not possible to determine a clear contributor of DNA to this result” and the finding was “not suitable for routine statistical evaluation and consequently the Forensic Scientist undertook a statistical evaluation using probabilistic genotyping software”. As the Court of Appeal commented (at [85]) this did nothing whatsoever to help the jury resolve the question of whether the appellant had directly contributed his DNA to the lighter.

 The judge then attempted to answer to the jury’s question about whether the appellant’s DNA could be inside the glove as a result of the appellant shaking hands with the wearer. He told the jury (at [18]) that “particles of DNA can be transferred by secondary transfer” and that one explanation for the presence of DNA from three persons may be that “one has shaken hands with the others and so deposited a DNA mixture of all three in the glove that way”. He added, “there are obviously other things you can imagine which might result, because DNA can be transferred, giving rise to that mix being deposited in that glove”, but advised that the jury “should not speculate beyond the sort of facts you had”. The possibility of tertiary transfer (person A - to object 1 - to person B - to object 2) was not acknowledged.

The Court of Appeal held that the judge ought not to have attempted to explain secondary transfer to the jury. The admissions already made clear (at [18]) that “the forensic scientists could not say how or when the DNA profile came to be deposited”. However, the so-called “CSI effect” means that at least some jurors may speculate about DNA findings. As the issue of secondary (or tertiary) transfer has caused difficulties in a number of cases (e.g. R. v Killick CLW/20/41/2 [2020] EWCA Crim 785; R. v Tsekiri, CLW/17/09/2, [2017] EWCA Crim 40, [2017] 1 W.L.R. 2879; R. v Jones (William Francis), CLW/20/33/2, [2020] EWCA Crim 1021, [2020] 2 Cr.App.R. 26), it may be preferable to specifically address this issue where a defendant denies having had direct contact with a moveable object found at a crime scene from which his DNA was recovered. As Royal Society’s judicial primer on forensic DNA analysis explains, there are three possibilities in such cases: “(1) the suspect deposited the sample, (2) the suspect did not provide the sample but has the profile by chance, and (3) the suspect did not provide the sample and the matching result is a false positive due to a sample switch or some other kind of error **or transfer**” (emphasis added). The primer goes on to set out (at para. 3.4) a number of general principles about the deposit and transfer of DNA, which are designed to enable judges to ensure that evidence is presented in a way the jury will understand and to advance the understanding of the issues in any given case.