Neutral Citation Number: [2022] EWCA Crim 942

Case No: 202103869

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
The Recorder of London
20207218

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE FRASER
and
MRS JUSTICE MAY

- -

Between :

APJ	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Tim Moloney QC and Ruth Zentler-Munro for the **Appellant**
Kate Lumsdon QC for the **Respondent**

Hearing date: 24 June 2022

- -

Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The time and date for hand-down is deemed to be 10.30am on 7 July 2022.

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Lord Justice William Davis:

The court has ordered a re-trial of the appellant in this case. In order not to prejudice those proceedings, the appellant has been anonymised. In addition the names of his victim and of the two professional witnesses have been withheld and they are referred to by initials. Pursuant to Section 4(2) of the Contempt of Court Act 1981 the court orders that the names of the appellant, his victim and the two professional witnesses shall not be published until the conclusion of the re-trial of the appellant.

Introduction

1. Between 21 October 2021 and 10 November 2021 at the Central Criminal Court, before The Recorder of London and a jury, APJ was tried on an indictment charging him with murder. At the start of the trial APJ pleaded guilty to manslaughter as an alternative to murder. That plea was not acceptable to the prosecution. At the conclusion of the trial APJ was convicted of murder. The verdict was by a majority of 10 to 2. On 6 December 2021 he was sentenced to imprisonment for life with a minimum term of 23 years less 506 days spent on remand in respect of the offence of murder. No disposal was required in relation to the offence of manslaughter, which was an alternative to the murder charge.

2. APJ now appeals with the leave of the single judge against his conviction for murder. The sole ground of appeal relates to events which occurred after the jury's retirement and after the jury had been given a majority direction. The jury sent a note asking to see an exhibit in the case. Neither prosecution nor defence counsel was told that such a note had been sent. The jury were provided with the exhibit without any discussion with counsel. It is argued on behalf of the appellant that this amounted to a significant material irregularity which renders the conviction unsafe. The respondent's submission is that no material irregularity occurred. The jury were entitled to see the exhibit. Even if there had been a discussion with counsel about the note from the jury, the outcome would have been the same.

The facts

3. The appellant was born in February 1981. As the jury heard via a series of agreed facts he had a succession of criminal convictions relating to young women with whom he had been in a relationship. In 2002 he was convicted of the rape and kidnap of an ex-partner when he had abducted the young woman concerned and raped her twice. He was sentenced to a period of 6 years' imprisonment. The notification requirements to which in consequence he was subject were for life. In 2013 the appellant was convicted of an assault on a different ex-partner. He dragged the young woman into an alleyway and attacked her before a member of the public intervened. A prison sentence of 12 months was imposed. In 2015 he damaged a mobile telephone belonging to his partner in the course of an argument. In 2016 he was convicted of an assault on yet another ex-partner.

4. In 2015 or 2016 the appellant met a young woman named K. She was then aged around 18. The appellant was in his late thirties. Notwithstanding the difference in their ages the appellant and K began a relationship. It was punctuated by incidents of violence. In 2017 the appellant was convicted of assaulting K thereby causing her

actual bodily harm. He was given an immediate sentence of 20 weeks' imprisonment. However, the relationship continued.

5. Towards the end of 2019 K moved in with the appellant at the flat he then occupied in Kingston on Thames. They lived together there until 15 May 2020. From then until 4 July 2020 they stayed in a succession of bed and breakfast addresses and hotels in various parts of South West London and Slough. On 4 July 2020 they booked into the Holiday Inn Express in Greenwich. They stayed in Room 515.

6. On the morning of 5 July 2020 K called the hotel reception from the room. She asked to extend their stay for a further night. The reception staff agreed such an extension. She called reception again at 9.30 that morning. She was upset because someone had knocked on their door. The brief conversation which followed was the last time anyone other than the appellant spoke to K. At 9.50 am two people in the next room to Room 515 were woken by the sound of breaking glass. They then heard a man saying "she is dead, I killed her, I stabbed her in the neck". The man went on to say "someone help me, I can't believe it, what have I done?" According to the people next door the man was wailing and crying.

7. At 9.58 am the appellant called 999. He asked for an ambulance. He told the operator that his girlfriend was dying and that he had stabbed her in the neck. He said that he was in Room 515 at the Holiday Inn in Greenwich. Before he concluded the call, he said that he was jumping out of the window.

8. Hotel staff went to the door of Room 515. They tried to get into the room using a master key. They were unable to do so because the chain lock was on. The appellant shouted from inside the room that he did not need any assistance. When the police and ambulance service arrived at the hotel, the appellant was throwing a suitcase and a rucksack from the window of the room, the window having been smashed. He was shouting that they should not worry about him and that he had killed her. He tried to climb out of the window and down the side of the hotel. He lost his footing and fell onto a canopy over the main entrance to the hotel from where he was arrested and taken to hospital. He suffered serious injuries in the fall.

9. The police managed to get into Room 515. They found K lying on the bed. She was already dead from a deep knife wound to her neck. The knife which had been used to inflict the wound was underneath the bed. It was part of a six-knife set which was also in the room.

10. Other items recovered from the room included two used syringes and needles and the appellant's telephone. The telephone contained material relating to anabolic steroids: order and purchase of steroids; downloaded information about how best to administer steroids; a calendar with entries indicating dates on which and the quantities in which the appellant apparently had injected steroids. The suitcase which the appellant had thrown from the window of Room 515 contained medication including 4 vials of anabolic steroids.

11. Blood samples were taken from the appellant on his arrival at hospital. Analysis of his blood showed that he had taken Trenbolone, a synthetic anabolic steroid. The scientific evidence could not specify the amount but the presence of the steroid in the

blood showed that it had been taken recently. One of the vials recovered from the suitcase thrown by the appellant from the hotel was labelled Trenbolone.

12. The appellant was interviewed on 19 July 2020. He answered no comment to all questions put to him. In the defence statement served in the course of the proceedings the appellant admitted inflicting the fatal wound. He said that he did so when his responsibility was substantially diminished.

13. The calendar on the appellant's telephone showed entries for a variety of appointments and transactions unconnected with steroids. The entries ran from 17 December 2019 to 29 June 2020. A number of entries stated a quantity of an anabolic steroid. The quantity in each case predominantly was 1 or 2 ml. The type of steroid was indicated in abbreviated form. The entries relating to steroid use were sporadic. Thus, there were 13 entries for dates between 11 May 2019 and 21 June 2019 but then no further entry concerning steroids until 25 July 2019. A few entries between that date and 23 August 2019 were followed by a gap until 20 October 2019. In the months leading up to 5 July 2020 there were regular entries (albeit by no means daily) from 30 January 2020 to 23 April 2020. There were 4 entries thereafter up to 1 June 2020. That was the last entry. There was no entry consistent with the analysis of the appellant's blood taken at the hospital on 5 July 2020.

14. The timeline created by reference to the appellant's telephone records relating to the period from the early hours of 5 July 2020 to the point at which the appellant was arrested showed that he was using his telephone throughout the night, save for a period of about 2 hours between 5.30 and 7.30 a.m. He sent messages or texts to solicitors who had represented him in the past. The following message is representative of what he was saying:

> "I know have stated the police who has been trying to arrange my murder and attempts have been made ready. I gave them the names of the persons involved. I will be killed soon if I don't go to prison, this why I'm telling you as I know I will eventually be killed, the 3rd attempt on my life was meant to be last night this early morning. But I have made it a bit more difficult for them. I need to talk to you, as I don't know what else to do. I need police protection and I have not gotten that. Police know what's going on and are ignoring it. It is 100% real, there can be no mistake in the events that have happened over the last week."

15. The schedule created by reference to the appellant's telephone records for the period from 6 May 2020 to 4 July 2020 showed that the appellant regularly messaged a variety of people to say that he was hearing voices, that he was contemplating suicide and that he needed help with his mental health. The schedule also set out police records over the same period. On at least five occasions police officers had dealt with the appellant when he had behaved erratically or he had been agitated and visibly distressed. The appellant regularly claimed that people "were out to get" him.

The trial

16. The sole issue for the jury was whether the appellant's responsibility for his actions was substantially diminished by an abnormality of mental functioning. The appellant's plea proved that he had unlawfully killed K. It was never suggested that he did not have the intent required for murder.

17. The appellant did not give evidence. On his behalf Dr F, a consultant psychiatrist, gave evidence. The respondent called a consultant psychiatrist named Dr B to rebut the appellant's case. Dr F and Dr B agreed that the appellant had an underlying medical condition, namely a moderate to severe personality disorder. By 5 July 2020 this condition had deteriorated into a state of psychosis. The psychiatrists further agreed that the appellant's ability to form a rational judgment was impaired by reason of his psychosis. They disagreed about the cause of the appellant's deterioration. Dr B's opinion was that steroid consumption was the cause and that the acute psychosis which affected the appellant on 5 July 2020 was similarly due to steroid misuse. Dr F accepted that steroid use was one factor in the appellant's deterioration. However, he considered that there were other factors which played a significant role such as the impact of the pandemic and the loss of the appellant's accommodation. These factors interacted with the appellant's personality disorder to lead to a psychotic episode.

18. Dr F set out the appellant's account of his steroid use in the period up to 5 July 2020. The appellant told him that he had been using steroids occasionally for two months prior to the day of the killing. At around 7.00 p.m. on 4 July 2020 he had used 1 ml TT300. The appellant said that that use of steroids did not affect him mentally. He said that he had never had any side effects from steroids.

19. Dr B noted that, in his many dealings with psychiatric services in 2019 and 2020, the appellant had never revealed his misuse of steroids. He described the appellant as "deceiAPJul" in his account of drug misuse. When speaking to Dr B the appellant accepted that he had used steroids in 2016 and 2020. He did not refer to the use indicated on the calendar recovered from his mobile telephone.

20. The judge provided written directions and directed the jury that, when they considered the question of whether the appellant had satisfied them on the balance of probabilities that his abnormality of mental functioning arose from a recognised medical condition, they first had to consider whether the appellant was voluntarily intoxicated i.e. from the effect of steroids. It was for the prosecution to prove that the appellant was so intoxicated. The question which the jury were required to answer was: Has the prosecution satisfied you so that you are sure that the defendant was voluntarily intoxicated and aware that steroids could adversely affect his mental state? If the prosecution failed to prove voluntary intoxication as so defined, the jury were directed to move on to consider the question of substantial impairment since, in the absence of voluntary intoxication as defined by the judge, the appellant on the agreed psychiatric evidence would have proved that his abnormality of mind arose from a recognised medical condition. Even if the prosecution did prove voluntary intoxication, the jury were required to consider whether the abnormality of mental functioning was due to a combination of factors including the ingestion of steroids. If the appellant proved on balance that it was, the jury were required to move on to the other elements of the defence of diminished responsibility. Only if voluntary intoxication with steroids as defined by the judge was the only significant cause of the abnormality of mental functioning would the defence fail.

21. In the course of the hearing of the appeal we asked whether this direction had been the subject of discussion between counsel and the judge and, if so, on what basis the judge had concluded that the prosecution had to prove that the appellant was aware of the potential effect of steroids on his mental state. We were told that the direction was the subject of discussion. On behalf of the appellant it had been argued that such

an awareness was a required element to establish voluntary intoxication for the purposes of the partial defence. The prosecution had argued the issue should be put simply on the basis of whether the appellant voluntarily had taken steroids in the knowledge that he had some abnormality of mental functioning. Counsel were unable to direct the judge to any authority on this particular topic. We have been unable to identify any authority directly on point from our own researches.

22. We were invited to express a view on whether the direction as given did accurately reflect the law. Though we understand why the parties were keen for us to do so, we decline the invitation. The question was not the subject of argument before us. The appellant did not raise the point since the direction was favourable to him. In consequence, the respondent had not dealt with the matter in the respondent's notice. The point is not straighAPJorward. For instance, it requires consideration of whether the rationale adopted in *Hardie* [1985] 1 WLR 64 could apply in the context of the partial defence of diminished responsibility. The issue will have to wait for another case where it arises on the facts of that case. We proceed on the basis that the jury had to reach findings in accordance with the direction.

23. When they retired to consider their verdict, the jury had several bundles of documents and other materials. They included the calendar and the timeline to which we have already referred, screenshots from the appellant's telephone relating to anabolic steroids and photographs of the items recovered from Room 515 and from the suitcase thrown from the window by the appellant. The photographs included images of the four vials of anabolic steroids found in the suitcase. In the course of the trial the vials had been formally produced by a police officer who had held them up in the witness box. The officer held up the sealed clear plastic exhibits bag into which the vials had been placed after they had been photographed. They were not passed around the jury box. However, prosecution counsel had said that the jury would be able to examine them in due course should they so wish. They were an exhibit in the case. They were Exhibit 7 on the list of exhibits kept by the court.

24. The jury began their deliberations at 11.30 a.m. on the morning of 8 November 2021. Shortly before 4.00 p.m. the jury sent a note indicating that they could not reach a unanimous verdict. The judge did not show the note to counsel. We assume that it disclosed the arithmetical division of views within the jury and, as such, properly was not shown to counsel. It was agreed that (a) the jury should be given the majority direction and (b) the direction should not be given that afternoon. The jury were sent away. Because of other commitments on the part of the judge and members of the jury, the trial did not resume until the morning of 10 November.

25. Just before 10.30 a.m. on 10 November 2021 the judge gave the jury the majority direction in conventional terms. Thereafter the jury sent out a note. It is timed at 11.52 a.m. This is an entry made by a member of the court staff because it is appears on a page headed "Court use only". The sensible inference is that the jury sent out the note very shortly before that time. It read as follows:

> "Can we see the vials/know the size/volume of the vials to see how much is left. Prosecution argues hiding use.
> Can use (sic) state ml size of vial"

The phrase "argues hiding use" must have been, inter alia, a reference to the observations of Dr B to which we have referred.

26. There is nothing on the transcript or on the exhibit log which refers to the note. There is no doubt that nothing was said about the note to counsel whether in open court or otherwise. Given the lacuna in the material available to us and the potential importance of the issue, we took an exceptional course. We asked the Registrar to inquire of the trial judge whether he recalled receiving the note and, if so, what steps he took in respect of it. He responded as follows:

> "I did see the note and, as the items were an exhibit, they were sent through to the jury".

This is consistent with the recollection of Mr Moloney QC who appeared for the appellant in the court below and before us. He heard a tannoy announcement for the officer in the case to go to court. The exhibit list to which we have already referred indicated that the vials were in the possession of that officer. The officer's attendance at court was necessary so that the vials could be provided to the jury. The precise time at which the jury were in possession of the vials is not known. The jury returned their verdict at 12.53 p.m. It was only after the verdict had been returned that counsel became aware of the note timed at 11.52 a.m. and the contents of the note.

The submissions on the appeal

27. Mr Moloney submitted that there were two interlinked grounds of appeal which, taken together, established that the verdict was unsafe. First, the judge erred in providing the exhibit without allowing counsel an opportunity to see and comment on the note. Second, the judge erred in allowing the jury to see the exhibit for a purpose which enabled the jury to receive evidence during deliberations and carry out their own investigations.

28. As to the first ground Mr Moloney argued that the guidance in *Gorman* [1987] 1 WLR 545 still holds good. Thus, a judge in receipt of a note from the jury in almost every case should set out its contents in open court and, as appropriate, seek the assistance of counsel. For a judge not to do so represents a material irregularity. In the circumstances of this case, the consequences of the irregularity were significant. The content of the note went directly to the central issue in the case.

29. In relation to the second ground, Mr Moloney's written argument was to the effect that the provision of the vials to the jury amounted to the provision of further evidence. Had he known of the content of the note and of the intention to provide the vials to the jury, he would have invited the judge to conclude that the jury would be given new evidence were the jury's request to be met. Further, the jury were put in the position of being able to conduct their own investigations. That was an impermissible approach.

30. Ms Kate Lumsdon QC responded to the appeal. Like Mr Moloney she appeared at the court below. She submitted that the jury were entitled to see the vials. They were an exhibit in the case. Her submission was that general practice where a jury asks to see an exhibit produced during a trial is for the jury to be provided with it, without the court being assembled or counsel being asked for their views on the matter. That

practice was reflected in the response we received from the trial judge. She submitted that suggestions to the contrary in the current edition of *Archbold* at 4-497 do not represent the correct position.

31. Ms Lumsdon further argued that providing the vials to the jury did not constitute the provision of new evidence. They were simply given items which were an exhibit in the case. There were no investigations that the jury could undertake. The vials and their contents were as shown in the photographs which the jury had had throughout their retirement. There was nothing for the jury to investigate. In any event, when directing the jury in relation to the expert evidence (which included the evidence of scientists in relation to steroids), the jury were directed not to "carry out experiments, tests or comparisons of your own…" Insofar as any direction was needed at the point at which the jury were given the vials, it was dealt by this direction which formed part of the written directions with which the jury had been provided on 5 November 2021. Even if the note had been disclosed to counsel, the outcome would have been the same.

32. In the course of oral submissions Ms Lumsdon acknowledged that the note raised questions which went beyond the mere provision of an exhibit. She accepted that no evidence had been adduced during the trial of the size or volume of the vials, and she also accepted that there was a risk of the jury having engaged in irrelevant speculation in the course of reaching their verdict.

Discussion

33. The guidance in *Gorman* to which Mr Moloney referred is as follows:

> *….it seems to us that certain propositions can now be set out as to what should be done by a judge who receives a communication from a jury which has retired to consider its verdict.*
> *First of all, if the communication raises something unconnected with the trial, for example a request that some message be sent to a relative of one of the Jurors, it can simply be dealt with without any reference to counsel and without bringing the jury back to court. We have been helpfully referred to a decision of this court, Reg. v. Connor, The Times, 26 June 1985 where that very situation seems to have arisen.*
> *Secondly, in almost every other case a judge should state in open court the nature and content of the communication which he has received from the jury and, if he considers it helpful so to do, seek the assistance of counsel. This assistance will normally be sought before the jury is asked to return to court, and then, when the jury returns, the judge will deal with their communication.*
> *Exceptionally if, as in the present case, the communication from the jury contains information which the jury need not, and indeed should not, have imparted, such as details of voting figures, as we have called them, then, so far as possible the communication should be dealt with in the normal way, save that the judge should not disclose the detailed information which the jury ought not to have revealed.*
> *We may add, before parting with the case, that the object of these procedures, which should never be lost sight of, is this: first of all, to ensure that there is no suspicion of any private or secret communication between the court and jury, and secondly, to enable the judge to give proper and accurate assistance to the jury*

> *upon any matter of law or fact which is troubling them. If those principles are borne in mind, the judge will, one imagines, be able to avoid the danger of committing any material irregularity.*

We consider that this guidance remains valid to this day. Since 1987 the Criminal Procedure Rules have been introduced. CPR 25.14 deals with the procedure in relation to questions from the jury after their retirement. As clarified in *R v Ball* [2018] EWCA Crim 2896 at [19] the position has not changed:

> *The procedure to be followed when the jury ask a question is now the subject of Rule 25.14 of the Criminal Procedure Rules. So far as is material for present purposes the rule states:*
>
> > *"After following the sequence in rule 25.9 (Procedure on plea of not guilty), the court must—*
> > *(c) direct the jury to retire to consider its verdict;*
> > *(d) if necessary, recall the jury—*
> > *(i) to answer jurors' questions, or*
> > *(ii) to give directions, or further directions, about considering and delivering its verdict or verdicts, including, if appropriate, directions about reaching a verdict by a majority…"*
>
> *In our view, the use in that rule of the phrase "if necessary" in sub-paragraph (d) is not intended to depart from the principles stated in Gorman. In our view, save in the limited situation of an uncontroversial communication raising something unconnected with the trial, it will in almost every case be necessary for the judge to recall the jury if they have asked a question and to answer their question in open court.*

34. Applying those principles to the facts of this case, we have no doubt that the note sent by the jury at 11.52 a.m. on 10 November 2021 should have been disclosed to counsel who should have been given the opportunity to make submissions in relation to it. Whatever the outcome of those submissions, the jury then should have been required to return to court so that the judge could read out the note and tell the jury of the outcome of their request. We consider that this generally should be the position even if the jury's request is simply to be provided with an exhibit. There will be cases in which the possibility of the jury wishing to see a particular exhibit has been anticipated prior to their retirement, but it has not been thought necessary or appropriate that they be provided with it from the outset. In those cases the judge, after agreeing the position with counsel, will say to the jury that, should they wish to see the relevant exhibit, they should ask for it. If the jury then send a note asking for the exhibit, it will not be necessary for the jury to return to court. However, even in those cases, all counsel must be made aware of the jury's note before the exhibit is provided, so that counsel have the opportunity to ensure that the correct item is sent in to the jury.

35. Ms Lumsdon referred in her written submissions to the Criminal Practice Direction Part VI 26L which reads:

> *26L.1 At the end of the summing up it is also important that the judge informs the jury that any exhibits they wish to have will be made available to them.*
> *26L.2 Judges should invite submissions from the advocates as to what*

> *material the jury should retire with and what material before them should be removed, such as the transcript of an ABE interview (which should usually be removed from the jury as soon as the recording has been played.)*
> *26L.3 Judges will also need to inform the jury of the opportunity to view certain audio, DVD or CCTV evidence that has been played (excluding, for example ABE interviews). If possible, it may be appropriate for the jury to be able to view any such material in the jury room alone, such as on a sterile laptop, so that they can discuss it freely; this will be a matter for the judge's discretion, following discussion with counsel.*

In this case the judge told the jury that they would have access in their room to footage that had been played during the trial. He did not otherwise refer to exhibits. Nothing in the Criminal Practice Direction is contrary to or in conflict with the guidance we have set out at [34] above.

36. It follows that, on any view, the jury's note should have been shown to counsel before any action was taken in response to it. Not only was the note not shown to counsel, they were unaware that such a note had even been sent by the jury. The failure to show the note to counsel, so that the matter could be discussed, was a material irregularity. That would have been the case if the jury simply had asked for an exhibit. However, had the note simply asked for an exhibit of no particular consequence, the failure to inform counsel probably would not have rendered the irregularity of sufficient materiality as to affect the safety of the verdict. In those circumstances, we almost inevitably would have concluded that the irregularity made no difference and the conviction was safe. The judge would have done just the same whatever counsel may have said. An example of this court taking that approach is *R v Chapman* [2015] 1 QB 883 at [70] to [75].

37. However, the note in this case went further than simply asking to see an exhibit of no particular consequence. The exhibit related to steroid use. Moreover, the note asked questions i.e. the size and volume of the vials "to see how much is left". These were questions that the jury associated with a critical issue in the case, namely whether the appellant had been dishonest in relation to his use of steroids. As Ms Lumsdon acknowledged in her written submissions, it was part of the prosecution case that the appellant's use of steroids in the period leading up to 5 July 2020 was in excess of anything set out in his telephone calendar and/or greater than he admitted to the psychiatrists who gave evidence before the jury. Ms Lumsdon went on to say this:

> *It is submitted that neither the exact size of the vial nor the precise volume of steroid left in each vial will have had any bearing on the decision of the jury. There was no evidence as to how many vials he had at any stage over the past few months nor when he acquired the vials exhibited. The toxicological evidence was that he had steroids in his system on the day of the killing and the forensic search evidence was that there were two empty syringes in his room, he having packed the partly-used vials to take with him when he made his escape.*

She also could have said that there was no evidence as to the size or volume of the vials which were the issues on which the jury were seeking assistance. The fact that the exhibit could not assist the jury on the issue of whether the appellant had been

dishonest is precisely the point. From their note it appeared that the jury considered that the vials were relevant. They required a proper direction about the extent of the evidence relating to the vials and about the conclusions that could be drawn from them. Since the note was not referred to in open court and because it was not shown to counsel, there was never an opportunity for any discussion on the matter.

38. We do not accept Mr Moloney's argument that the vials consisted of new or further evidence such that the jury were not entitled to see them. He cited *R v Kaul* [1998] Crim LR 135 in support of his submission. We do not intend to rehearse the facts of *Kaul*. They were far removed from this case. In particular, in *Kaul* the jury were provided with material which had not been part of the evidence in the trial and had never been referred to even in passing. The fact that the jury had not looked at the exhibit prior to their retirement did not mean that, when given the physical exhibit, they were being provided with new evidence. The vials had been produced in evidence and had been exhibited during the trial.

39. Mr Moloney submitted that, had he realised that the jury would be given the vials as a physical exhibit, he would have instituted inquiries such as finding out whether the vials could be aged by reference to batch numbers, discovering whether liquid steroids had a tendency to evaporate from vials and identifying the number of doses in an individual vial. We do not follow this submission. The vials were an exhibit in the case from the outset. The inquiries to which Mr Moloney referred were open to the appellant's legal team at any time. We can understand that information about the vials could have been relevant to the issues in the case. For example, how much they contained when full, approximately how much was left in the vials when they were recovered and when they were produced or supplied (by reference to any batch number). That information did not become of potential relevance because of the jury's request.

40. We also reject the argument that *R v Stewart* (1989) 89 Cr App R 273 is of any assistance in the resolution of this appeal. In *Stewart* the appellants were charged with importing cannabis in holdalls being carried by them as they came off a flight from Jamaica. Their case was that they were unaware of the drugs in their bags. The prosecution relied on the fact that each appellant was carrying nearly 2 kilos of cannabis so that they would have realised that their bags were much heavier than they should have been. After retirement the jury asked for scales to allow them to see how much difference the weight of cannabis would have made. This was an exercise which had not been conducted at any stage in the course of the trial. The convictions of the appellants were quashed because the jury were "provided with something which had not been part of the evidence in the trial". That is not what occurred in this case. The jury were simply provided with the exhibit in the form in which it had been produced during the trial.

41. Although we reject the proposition that the vials did not amount to new evidence, we acknowledge the clear possibility that the jury considered that an inspection of the vials would reveal something of relevance to the issues in the case. It is that on which the appropriate direction should have been focused. The jury should have been directed along the following lines:

- You have asked to see the vials recovered from the suitcase thrown by APJ from the window of the hotel.

- They are exhibits in the case and you are entitled to see them although you do have photographs of them and they were held up in the course of the trial when a police officer was giving evidence.
- There is no evidence of the size/volume of the vials other than what is apparent from looking at them.
- There is no evidence about the amount of the drug contained in the vials when first acquired by APJ
- The only evidence of the amount left in the vials is what you can see from looking at them.
- There is no evidence about the length of time APJ had been in possession of the vials.
- Other than looking at the vials and at anything shown on the labels, you must not engage in any comparison or test of your own. Please remember what I said in the written direction in relation to expert evidence.

42. In the course of oral argument Mr Moloney submitted that the jury also should have been directed in terms that the size, contents and appearance of the vials were irrelevant to the issue of the appellant's dishonesty. Whether that would have been necessary is not a matter we need to decide. We merely observe that the jury required directions (a) on the evidence they did not have and (b) the need to avoid any speculative exercise. In the absence of directions of this kind, there was a risk that the jury would draw conclusions from the contents and size of the vials which were not justified by the evidence which the vials represented. That would not need to involve any experimentation by them. But the provision to the jury of the vials without more amounted to a significant material irregularity.

43. As we have set out above Ms Lumsdon relied on the written direction the judge had given in relation to expert evidence. In our judgment this did not cure the material irregularity involved in the way in which the note was dealt with since it did not prevent the jury speculating or attempting to draw conclusions themselves upon the exhibit being given to them in response to their note. The content of the note suggested that making some comparison was (or may have been) the purpose for which they wished to see the exhibit. Providing the exhibit without any further direction may have been taken by them as tacit approval of the use of the exhibit for that purpose.

44. There were clearly points to be made in relation to the vials. There were four of them. Whatever the actual measurement of the steroid liquid left in the vials, it was apparent that the amount of liquid was very much less than would be found in a vial when first supplied. That much was clear from the picture the jury had of full vials which was contained on a download from the appellant's mobile telephone. In Room 515 the police found at least two used syringes. They also recovered a large number of unused syringes. The prosecution were able to rely on all of those matters in support of the proposition that the appellant's use of steroids was much greater than he was willing to admit.

45. We also have had to take into account that the vials were supplied to the jury in a sealed clear plastic exhibits bag and that the bag was still sealed after the verdict. The jury did not remove the vials. Whatever inspection they carried out was through the plastic bag. There can have been no experimentation in the real sense.

46. In the light of those matters we have had to consider whether the significant material irregularity which occurred in this case in the event did not affect the safety of the conviction. We are satisfied that this is not a conclusion properly open to us. Although the vials could have been provided to the jury once they had requested to have sight of them, such provision required a proper direction to the jury as to the extent to which they could use their examination of them. Without such direction there was a real risk that the jury would come to conclusions about the significance of the vials adverse to the appellant which were not justified on the evidence.

Conclusion

47. For the reasons we have given we conclude that the verdict returned by the jury is not safe. The issue of the appellant's abuse of steroids and his alleged willingness to lie about that was of critical importance. The jury were provided with the vials without any assistance from the judge as to their possible relevance to that issue given the state of the evidence in the case. We cannot be satisfied that the absence of such assistance made no difference to the outcome. It follows that we quash the appellant's conviction on the count of murder.

48. At the hearing we canvassed the question of a retrial on that count. Mr Moloney very properly accepted that, in the event of the appeal succeeding, a retrial would be inevitable. That is the order we make. We direct that a fresh indictment be preferred on which the appellant must be arraigned within 2 months of our order. The retrial will be at the Central Criminal Court to be heard by a judge nominated by a Presiding Judge of the South Eastern Circuit.

49. This case serves to emphasise the particular status of the jury in retirement. This is reflected in the oaths taken by the jury bailiffs. Once a jury are sent into retirement, they are kept in seclusion and permitted to separate only after being brought back into court and given the relevant directions by the trial judge. Any note concerning the case sent by a jury in retirement must be taken to the trial judge who, subject to the exceptions identified in *Gorman*, must then ensure that counsel in the case are aware of the note. If a note simply asks for an exhibit produced in the course of the trial, it will be a matter for counsel whether they wish to raise any issue with the judge. Even if they do not, it will be for counsel to ensure that the correct items are sent in to the jury.

50. Where the note (as in this case) asks specific questions, it must be discussed in the jury's absence, but in open court, with counsel for all parties. The judge will consider any submissions from counsel before answering the questions. When the questions are answered, this will be in the presence of the jury in open court. This process is required in order to preserve the integrity of the trial process.