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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 26th October 2017

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JAY

and

HER HONOUR JUDGE WILLIAMS

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

JASON JOSEPH WILLIAM TAFT
THOMAS RICHARD LESLIE

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Mr R H Christie QC appeared on behalf of the Applicant Jason Joseph William Taft

Mr N J Power QC appeared on behalf of the Applicant Thomas Richard Leslie

JUDGMENT

Thursday 26th October 2017

LORD JUSTICE HOLROYDE:

1. On 30th July 2013, following a three month trial in the Crown Court at Stoke on Trent before His Honour Judge Eades and a jury, the applicants were convicted of conspiracy to make threats to kill, contrary to section 1 of Criminal Law Act 1977 (count 1) and conspiracy to cause an explosion, contrary to section 3(1)(a) of the Explosive Substances Act 1883 (count 2).
2. On the following day, the applicant Taft was sentenced to a total of sixteen years imprisonment and the applicant Leslie to a total of fourteen years imprisonment.
3. Each applicant now applies for a long extension of time (about two years eight months in Taft's case and about three years in Leslie's case) in which to apply for leave to appeal against their convictions. Their applications were refused by the single judge for reasons which he gave in some detail. They are now renewed to the full court.
4. In summary, it is submitted on behalf of Taft that his convictions are unsafe because fresh evidence is now available which is capable of undermining the case against him and assisting his defence, and because the prosecution had failed in their disclosure duties in relation to that evidence.
5. On behalf of Leslie, it is submitted that his convictions are unsafe because the case against him depended heavily on his association with one Jason Buckley, and the issue of Buckley's guilt was wrongly withdrawn from the jury by the learned judge. The unfairness of that, it is submitted, is starkly shown by the fact that at a later trial Buckley, who had subsequently been extradited from the Republic of Ireland, was acquitted on the charge of conspiracy to cause

explosions. Leslie also relies on the alleged failure of disclosure.

6. Each applicant submits that the necessary extensions of time should be granted because they could not reasonably have advanced their grounds of appeal any sooner than they did.

7. We mean no discourtesy if we refer to the majority of the persons whom we will mention by their surnames only.

8. A number of other men stood trial jointly with the applicants. Thomas James Leslie (father of the applicant Leslie) was charged and was referred to in the evidence, but had died before the trial began.

9. It is necessary for us to outline the prosecution case. Taft and a man called Sherratt had jointly owned a scrap yard called Alget in the Cheadle area. When Taft left the business, he was owed money by Sherratt, who was paying in instalments. Taft learned of a possible £500,000 investment in the business and demanded payment of half of it but did not receive it. As a result of the ongoing dispute, Taft along with Leslie and other co-accused took physical possession of the yard on 21st June 2012. They subsequently left after Sherratt obtained an injunction.

10. Over the following weeks a number of threats were issued against Sherratt, his family and his employees. On 3rd August 2012, bombs – variously referred to as "pipe bombs" or "nail bombs" – were exploded at the homes of three of Sherratt's employees.

11. It was the prosecution case that the applicants had been responsible for a campaign of making threats to kill and bombings. The case against them was based on circumstantial

evidence, which for present purposes can be summarised as follows. On 6th July 2012, an anonymous phone call was made to Staffordshire Police by someone with an Irish accent using a Republic of Ireland mobile phone. The caller said that two viable bombs had been placed close to Sherratt's address and that Sherratt and one of his employees would be shot unless they stopped their drug dealing. No bombs were found. Cell-site evidence showed that Leslie and a co-accused, Boal, had been en route to Ireland on the day of the call. There was also telephone contact between other co-accused over the following days.

12. On 10th July 2012, shortly after telephone calls had been made from a phone box in Belfast to Buckley, a call was made to a journalist called Laura James who had previously had dealings with Taft in relation to Alget. She did not answer, but a message was left on her phone which referred to a bomb in Cheadle in connection with Sherratt. She subsequently spoke to the caller and the reference to a bomb was repeated. She advised the caller to contact the newspaper's news desk. Thereafter, a call was received by the news desk from the same mobile phone and the threat of bombs near to Sherratt's home was repeated. Telephone records showed that Buckley had telephoned Leslie shortly after the call from Miss James and that four minutes later the telephone call was made to the newspaper.

13. On 11th July 2012, a call was made from the same Belfast telephone kiosk to Caroline Ellams (an Alget employee). The caller, who had an Irish accent, told her to tell Sherratt (to whom he referred as Sheridan) to pay the money over "or we will shoot him, his family and you". Cell-site evidence was consistent with both Leslie and Boal being in the vicinity of the Belfast phone kiosk. A scrap of paper was subsequently found at the Leslie home address on which was written Miss Ellams' phone number and the words "Caroline – scapyard".

14. Over the following days and weeks, there was extensive telephone contact between the

accused, and there were a number of meetings between Taft, the Leslies and others. Taft visited Northern Ireland during this period.

15. Pausing there in the chronology, the applicants rely heavily on CCTV footage recorded at Taft's home, Greenfields Farm ("the farm"), which showed one David Hughes on both 22nd and 25th July 2012. There was no evidence about this at trial. We will say more about it shortly.

16. We resume our summary of the evidence which was before the jury. On 2nd August 2012, Taft took the Leslies to a car dealer called "Automate", where they looked at a Nissan Almera car. This was recorded on CCTV.

17. On the evening of 2nd August, Taft and the Leslies stayed overnight at Taft's home. Again, there was extensive telephone contact between the accused. A booking was made that evening for Buckley to fly in from Dublin the following morning.

18. On 3rd August, Taft and the Leslies were together at the farm. They were seen early in the morning on CCTV. Taft was seen at approximately 8.45am with a torque wrench. However, shortly after 9.33am all of the CCTV cameras at the farm were turned off. They were not turned on again until 8.35pm, at which time Taft's wife was alone at the farm. Later that day the accused were all present together at a café owned by Taft.

19. At 10.26am that same day the CCTV cameras at Automate were switched off. When they ceased to record, the Almera was still there. Cell-site evidence showed that the movement of the mobile phones of Taft, the Leslies and Buckley was consistent with their going to the vicinity of two of the three addresses that were to be targeted that night. The prosecution contended that these were reconnaissance visits – an allegation which the defendants denied.

20. Subsequent cell-site analysis was consistent with the mobile phones of Taft, Buckley and the Leslies being in the vicinity of Automate between 3pm and 3.23pm. Shortly before this, two new mobile phones, with sequentially numbered SIM cards, were activated for the first time. The phone numbers of these phones ended in "6296" and "6544". The 6544 phone was recovered from Taft's home when he was arrested. In his evidence to the jury at trial, Taft accepted that both these phones had been activated by someone in his car, but said that this must have happened during a period of ten to fifteen minutes when the Leslies and Buckley had taken his car away and he was not in it.

21. At 6.40pm that same day, Taft and Buckley took the Leslies to the airport for a flight to Belfast. A co-accused called Drewery gave evidence that the Nissan Almera was collected from Baddeley Green. Taft and Buckley had been in that area at about 8.30pm.

22. Footage from CCTV cameras, combined with automatic number plate recognition cameras, showed the Nissan Almera travelling to and between the three addresses which were bombed. There were two occupants in the Almera. Buckley's fingerprint was subsequently recovered from the passenger side sun visor. The bombs were detonated between 9.49pm and 10.18pm – fortunately, without causing any serious injury. Ten minutes after the last bomb was detonated, the 6296 phone made its first call and was used to call the 6544 phone for seven seconds. That was the only call the 6544 phone ever received before it was recovered at Taft's home.

23. Taft's evidence was that he had spent the evening of 3rd August with his family at a restaurant with Hughes and his family.

24. On the following day, Buckley returned to Dublin on a flight which had been booked the

previous day. He used the 6296 phone to call friends and family in Ireland on 4th August. He also called Leslie, using his own mobile phone.

25. Also on 4th August a second threat was made to Caroline Ellams. The caller threatened to shoot her if she did not tell the police that Sherratt was a drug dealer.

26. Taft was arrested that day. On the following day the CCTV at Automate was switched on again. Telephone calls were made and received by various co-accused.

27. On 15th August 2012, a hard drive on which was recorded footage from a number of CCTV cameras was recovered by the police from the farm. This became exhibit JT/3, and we will refer to it as such in this judgment.

28. On 17th August threats were made in telephone calls to Sherratt's employees, Lesley Burrows and Laura Sherratt. The prosecution alleged that these calls were made by Boal.

29. During the search of Taft's home, a piece of piping was recovered from the pocket of a jacket. Evidence was adduced that Taft had made telephone calls on 22nd July enquiring about obtaining a piece of pipe for use at a café he owned. Taft denied that either the jacket or anything in its pockets was his.

30. Other evidence at trial included expert evidence as to mobile phone cell siting, automatic number plate recognition and the pipe bombs. The prosecution also adduced evidence in respect of surveillance of Taft whilst he was on remand. It was contended that the surveillance tapes included references by him to attempts to frame Sherratt.

31. The prosecution further relied on a number of failures on the part of some of the accused. Leslie did not answer questions in interview and did not give evidence. Taft had failed to mention in his defence statement a number of matters on which he relied at trial.

32. Taft's evidence was that he was not a party to any conspiracy and that the likely perpetrator was a man called John Ferguson. Later in his evidence he said that the man to whom he was referring was Andrew Ferguson. He said that the various telephone contacts and meetings were all innocent, and he gave his explanations as to those.

33. Leslie, as we have said, did not give evidence.

34. Thus, this was a circumstantial case. The issues for the jury were: knowledge, participation and alibi.

35. Mr Power QC, on behalf of Leslie, makes some criticism of the learned judge's conventional direction in his summing-up to the effect that it was for the jury to decide what matters were important, and that they should not be influenced in any way by the fact that the judge mentioned some things, and did not mention other things, in his summing-up as to the facts. Mr Power submits that that conventional direction would have been better if it had been conventionally placed near the beginning of the summing-up and not, as was in fact the case, after the judge had been speaking for some time about matters of fact.

36. With that exception, no criticism is made by either Mr Power or by Mr Christie QC, on behalf of Taft, as to the learned judge's direction of law. We therefore turn to outline the matters relied on by the applicants. We preface our remarks by paying tribute to the care and clarity with which both counsel have addressed us. We are extremely grateful for their written and oral

submissions.

37. We are invited to receive as fresh evidence a detailed statement by Mr Robert Tolhurst, who was counsel for Taft at trial. Mr Tolhurst sets out a history of delays on the part of the prosecution in serving evidence and in complying with the court's pre-trial directions. With specific reference to JT/3 (the hard drive of footage from the farm), he states that the first reference to the police being in possession of any images from that CCTV was in material served on 26th November 2012. A schedule of material, including JT/3, was served on 17th December 2012. In early 2013, the prosecution served evidence which included still images showing events at the farm on 3rd August 2012. On 6th March 2013, counsel advised that an expert be instructed on behalf of the defence to examine JT/3 with a view to trying to rebut the prosecution's allegation that the CCTV at the farm had been turned off for part of 3rd August.

38. On 14th March 2013, counsel attended police headquarters by arrangement to view a number of items, including JT/3. He was not, however, able to do so because the hard drive was unstable and could become degraded if repeatedly viewed. It was proposed that there should be a joint inspection of the hard drive by expert witnesses.

39. On 28th March 2013, Taft's defence statement was served. In it he sought, amongst other things, disclosure of any evidence which pointed away from Taft being involved in making the bombs, including any evidence which suggested that someone else may have been involved.

40. A cloned copy of the hard drive was eventually provided for Taft's expert witness on 1st May 2013, after the trial had begun on 29th April. The defence expert found that there was a very large quantity of recorded footage. It was not until 26th May that Mr Tolhurst was provided with a copy DVD which he and other counsel could view. His statement indicates that he spent

many hours doing so. He, understandably, concentrated on the footage for dates which the prosecution alleged were significant against Taft, namely 24th July and 2nd, 3rd and 4th August 2012. The prosecution evidence relating to CCTV footage from the farm was concluded in the course of the trial on 6th June 2013. After that date Mr Tolhurst, understandably, concentrated on other aspects of the evidence.

41. As we have indicated, Taft now relies on footage on JT/3 relating to two days in July 2012. On the evening of 22nd July (the date when Taft was making enquiries about buying pipe), the footage shows Hughes arriving at the farm, putting on rubber gloves and moving around the yard carrying what appears to be a piece of pipe. The relevant footage covers a period of about half an hour, towards the end of which Hughes can be seen briefly speaking to Taft whilst holding the pipe.

42. On the morning of 25th July, the relevant footage is a short clip in which Hughes can be seen in the yard carrying a spanner or wrench and making adjustments to a tractor. He is again shown speaking to Taft.

43. The respondent accepts that those sections of footage had not been viewed by the police either before or during the trial.

44. It will be recalled that at trial Taft gave evidence suggesting that the man responsible for or involved in the making of the bombs was either John Ferguson or Andrew Ferguson. In the later trial of Jason Buckley, however, a different person was suggested as the maker or organiser of the bombs. Buckley was not tried jointly with the applicants and other defendants, as would obviously have been desirable, because he was not then in the jurisdiction. He was subsequently extradited and stood trial in June 2016, when he was found not guilty. He was represented at

that trial by Mr Power, who before us appears on behalf of Leslie. The defence of Buckley involved reference to the CCTV footage showing Hughes and Taft at the farm on 22nd July 2012. This material was used to suggest that it was not Buckley, but that it was Hughes who had the ability and expertise to make bombs. The defence also adduced evidence to the effect that Hughes had a grievance against Sherratt, having sued Sherratt for a large debt and having been attacked by masked men who told him to "drop the case".

45. We had initially inferred that it was in the light of the evidence deployed in defence of Buckley that those now representing Taft came to focus on the CCTV footage to which we have referred. We were told, however, that that is not so. As we now understand it, after some endeavours, Taft obtained a copy of the CCTV footage which he was permitted to view whilst in prison serving his sentence. He spent many hours doing so. There came a point when he noticed the footage which is referred to before us and he brought it to the attention of his legal advisers. That footage was later passed to the lawyers representing Buckley.

46. The grounds of appeal on behalf of Taft are as follows:

"a. That fresh evidence (CCTV footage JT/3) existed which was capable of undermining the prosecution case against the applicant and assisting his defence to such an extent that it rendered his conviction unsafe. This footage showed a man called David Hughes in possession of an item consistent with it being a component of a pipe bomb ten days before the bombing. Hughes lived within the grounds of Taft's home.

b. That it is in the interest of justice to admit the fresh evidence.

c. That the failure of the prosecution to disclose the extent to which the material in their possession was capable of undermining the prosecution case against the applicant and/or assisting the defence was such as to render the conviction unsafe."

47. Leslie's grounds of appeal are that his convictions are unsafe because:

"a. The prosecution case against Leslie depended heavily on his association with Buckley and was, in relation to the bombing, that he had recruited Buckley to be the bomber.

b. Buckley's guilt was expressly challenged on behalf of Leslie, but the judge effectively withdrew the issue of Buckley's guilt from the jury.

c. The judge said that Buckley's guilty had a "... profound effect, potentially, upon the rest of the evidence and your assessment of who was involved". It is contended that, in those circumstances, Buckley's acquittal would be relevant and admissible at any trial but was obviously not available at the applicant's trial.

d. The failure to view and/or disclose the CCTV evidence relating to David Hughes on 22nd July 2012 denied him the opportunity to allege the role of someone other than Jason Buckley as the bomber."

48. Before coming to the submissions, it is convenient to consider the basis on which Hughes is suggested by both applicants to be a person who may have been involved in making the bombs or in organising the manufacture and placing of them.

49. Hughes worked for and with Taft. He lived within the grounds of the farm. We have already referred to the footage showing him in the yard, apparently carrying a piece of pipe, on 22nd July 2012. In addition, in the light of the evidence both at the trial of the applicants and the trial of Buckley, the following points are made to support the contention that Hughes had a strong motive to harm Sherratt, as well as an opportunity to do so. First, on 21st May 2012, Hughes submitted a winding-up petition against Algmt, alleging that the company was indebted to him for about £90,000, plus interest, in respect of loans which he had made. In an affidavit in response, Sherratt asserted that no debt was owed and that in fact the company had overpaid Hughes by more than £9,000. The outcome of this was that on 3rd September 2012 the

winding-up petition was dismissed and Hughes was ordered to pay Alget's costs.

50. Secondly, on 2nd August 2012, Hughes reported to the police that he had been attacked on the previous evening by men who shouted "drop the case".

51. Thirdly, CCTV footage at the farm showed Hughes putting baseball bats into his car at a time after that alleged attack.

52. On behalf of Taft, Mr Christie criticises the respondent for not having viewed the footage on which reliance is now placed and for not having alerted the defence to that footage. He argues that the CCTV footage for 22nd and 25th July would plainly have been admissible at trial, but was not used because the cloned copy of JT/3 was provided so late that the defence had no realistic opportunity to view all of it, and were not alerted by the prosecution to any reason to view the specific sections of it relating to the actions of Hughes. He argues that the footage, taken together with other information about Hughes, would have caused the jury to have real doubt about the prosecution case that Taft instigated the bombings because of his grievance against Sherratt. He argues that Hughes had, if anything, a stronger grievance against Sherratt. Moreover, Hughes worked at the farm and would therefore have been able to put into the jacket the piece of pipe on which the prosecution relied against Taft.

53. Mr Christie further submits that, in addition to revealing the possible involvement of Hughes, the footage undermines the case presented against Taft, which was put on the basis that Taft, the Leslies and others had come together to create the bombs on or around 3rd August. The footage was capable of suggesting what Mr Christie contends is the more realistic scenario that the bombs were made some days earlier, thus gravely weakening the prosecution's circumstantial case.

54. One of the points which the single judge made in refusing leave was that Hughes had been put forward as the person with whom Taft had spent the evening of 3rd August. Mr Christie acknowledges that it was part of Taft's defence at trial that he had an alibi in that he was with Hughes and members of their respective families at the time of the bombings. But, he submits, Taft could not fairly be criticised for failing to appreciate the significance of – and to remember at the time of his trial – his short meeting with Hughes at the farm on 22nd July.

55. Mr Christie also relies on the later acquittal of Buckley, which he submits undermines important parts of the prosecution case against Taft.

56. On behalf of Leslie, Mr Power points to passages in the summing-up which he submits had the effect of improperly withdrawing from the jury the issue of whether Buckley was the bomber. At pages 10F to 11A, having invited the jury to consider the issues of whether Buckley was the bomber and whether he had used the Almera to deliver the bombs, the judge referred to the finding of Buckley's fingerprint in the Almera and said:

"You have also heard the submissions from the defence; really, again, it is only Mr Enoch [then leading counsel for Leslie] who submitted to you that it is not proved that Buckley was the bomber. But taking an overview, members of the jury, it is a matter for you; you may well conclude that he was the bomber and he used the Almera.

If you find those facts to be the truth so that you are sure, then that has a profound effect, potentially, upon the rest of the evidence and your assessment of who was involved. In particular, you have to ask yourselves the question: What impact does that have on Jason Taft's submission/argument to you that the person responsible was John Ferguson?"

A little later in the summing-up (at page 13D), the learned judge said:

"Moving on, members of the jury, you need to ask yourself questions such as: Who drove the Almera? It is quite clear, from the evidence that you have seen and heard, that there were two people in the Almera; one was clearly Buckley, and his fingerprint is on the passenger-side sun visor, and the implication, therefore, is that somebody else was driving him – driving him around."

57. Mr Power submits that the case against Leslie at trial was put on the basis that his role was as recruiter and facilitator of those from Ireland who were to be involved in making bombs, and that he gave instructions to Buckley, who was the bomber. But Mr Power points out that the only eyewitness description of the bomber (in a statement which was read to the jury by agreement) did not match Buckley, who had distinctive hair which was very different from that described by the eyewitness. Mr Power submits that the later acquittal of Buckley shows how important it was for the summing-up in this case to leave open, rather than to close off, the possibility that someone other than Buckley was the bomber. If Buckley may not have been the bomber, then the whole case against Leslie was undermined. Mr Power submits that if Buckley had been acquitted before the trial of the applicants, then either the prosecution case would have been presented in a different way or the acquittal would have been adduced before the jury. He emphasises, however, that the fact of Buckley's acquittal is not the foundation of his grounds of appeal. The acquittal, he submits, merely highlights what was, in any event, the unfair treatment by the trial judge of the issue of Buckley's possible involvement.

58. Mr Power also relies on the failure of the prosecution to review the CCTV footage relating to Hughes. On any view, he argues, no one could criticise Leslie for having no knowledge of Hughes' actions at the farm on 22nd July 2012. Even if Taft might be thought to have been aware of those actions, no one suggested that Leslie was.

59. We have not heard oral submissions from the prosecution on this renewed application for leave, but we have from them a detailed Respondent's Notice resisting the application. The prosecution submit that there was no reasonable explanation for the failure of Taft to adduce in evidence at trial the CCTV footage on which he now relies, and that in any event that footage provides no grounds for allowing an appeal. The prosecution had no reason to draw to the attention of the defence that which Taft already knew, namely that Hughes had been at the farm, carrying items and speaking to Taft, as shown in the footage. The footage had not in fact been viewed by the police; but even if it had, it would not have been regarded as undermining the prosecution case or as assisting the defence case based upon the defence statement served and the fact that Hughes was an employee of the applicant and worked on the farm. The prosecution point out that there was no forensic evidence to prove that the bombs had been made at the farm and that Hughes did not have telephone contact with other co-accused and was not linked to anyone either in Ireland or at Automate. Moreover, the prosecution submit that it is clear from Mr Tolhurst's statement that, even if the relevant footage had been seen by him, Mr Tolhurst would have had no reason to use it, as his instructions from the applicant were clear. Mr Hughes was not relevant to the case being put forward. Accordingly, the prosecution submit that the footage, even if admitted, would not assist the applicant; it would not in any way explain the remainder of the evidence against him and does not raise any doubt as to the safety of his conviction.

60. The prosecution further point to the fact that although Hughes was not called as an alibi witness, at trial Taft relied on his having been in Hughes' company as an alibi for the night of 3rd August. The prosecution invite the inference that Hughes was not called because it would have damaged Taft's case to do so. At trial, Taft had first sought to blame John Ferguson, and then sought to blame Andrew Ferguson. His account had been rejected by the jury and he was now seeking to blame someone, who was in effect his alibi witness, on the basis that that man had

held certain items whilst working on the applicant's farm and in his presence.

61. As to Leslie, the prosecution dispute the submission that the issue of Buckley's guilt was withdrawn from the jury. In any event, Leslie's guilt did not depend on Buckley's guilt. It was not admitted that the acquittal of Buckley would be admissible in any trial of Leslie. The fact that the prosecution had not drawn attention to the footage of 22nd and 25th July did not mean that Leslie was prevented from suggesting that someone other than Buckley was the bomber. The evidence suggested that there were two people in the bombing car. The identity of those individuals was to be inferred from a number of pieces of evidence which were not undermined by the recordings of Hughes. There was an absence of evidence connecting Hughes to the selection of the Almera, to the reconnaissance, or to the picking up of the Almera on the day of the bombing.

62. We have briefly summarised these competing submissions, but we have taken into account all the detail of the written and oral arguments.

63. We consider first the issues relating to disclosure of the CCTV footage showing Hughes. We bear in mind two important points. First, it is not the case that the existence of JT/3 was unknown at the time of trial. The hard drive had been exhibited. It was first mentioned in material disclosed or served upon the defence some five months before the trial began. The failure alleged by the applicants is, therefore, not a failure to make disclosure at all. Rather, it is a failure to review the whole of the footage on the hard drive and to alert the defence to the fact that it included clips showing Hughes at the farm on two dates.

64. Secondly, we take it that the criticism made on behalf of the applicants relates to secondary disclosure, after the service of defence statements. In fact, we have only heard submissions

based on Taft's defence statement. It has not been suggested that Leslie served a defence statement containing anything which materially affected the disclosure duties of the police or the prosecution, and indeed it appears that Leslie probably did not serve a defence statement at all.

65. The legal basis of Taft's submissions is, therefore, unusual. This is not a case of non-disclosure. Nor, so far as the CCTV footage is concerned, is it a case of fresh evidence, because the material was there all the time. Rather, the argument is put on the basis that by a combination of delay and non-compliance with the court's directions, plus the sheer volume of material contained on JT/3, plus the fact that in his defence statement Taft had sought any material pointing to any other person, the prosecution had come under a duty to review the whole of JT/3 and actively to alert the defence to the footage for 22nd and 25th July 2012.

66. In the course of their very helpful submissions, counsel addressed us as to the problems which may arise when, as is increasingly common in a digital age, a digital copy is served of a mass of material, only a fraction of which is relied upon by the prosecution and parts of which may not even have been reviewed by the prosecution. This, however, is not an occasion to consider wider issues, especially in the absence of any representation of the prosecution. For present purposes only, we proceed on the basis of counsel's submission that the prosecution should either have reviewed the whole of JT/3 and treated any footage which did not form part of their case before the jury as unused material subject to the disclosure duty; or, at the very least, should have served the cloned copy of JT/3 very much earlier than they did.

67. Even if that be the correct approach, it does not, in our judgment, assist the applicants. Any continuing duty of disclosure would only be a duty to disclose material which had not previously been disclosed and which was reasonably capable of undermining the case for the prosecution or assisting the case for the accused. In our judgment, there is no basis on which it could be argued

that the prosecution were in breach of that duty by failing to flag up and identify to the defence the footage showing Hughes on two dates. Hughes lived at and worked at the farm. On 22nd July he was carrying what looked like a piece of pipe, but was doing so when he spoke briefly to Taft. On 25th July he was carrying and using a tool, and again spoke to Taft. Although Taft had denied any involvement in the conspiracies and had sought disclosure of anything which might suggest involvement by other persons, there was no basis on which the recordings of Hughes on those occasions could reasonably have been considered to undermine or to assist. Plainly it could not undermine the prosecution case to point to material which the defence now suggest would implicate the man relied upon as, in effect, an alibi witness.

68. As to assisting the defence case, Taft himself was surely in as good a position as anyone to know whether there was any reason to think that Hughes - who had been attacked only the previous day - might have been involved in the bombings which took place days after this footage was recorded, and in relation to which Taft himself was quickly arrested. Taft made no such suggestion at the time, or during his trial. Indeed, he made no such suggestion for a long time afterwards, and then only, it would seem, after many hours looking at the contents of JT/3.

69. We bear in mind also that at the stage when the disclosure duty is said to have arisen, the Defence Case Statement of Taft was to the effect that Hughes was his alibi witness and that there appears not to have been any Case Statement from Leslie.

70. We see no grounds on which it can be argued that the prosecution should have looked for and flagged up to the defence footage which showed Taft speaking to his employee. We accept, of course, that the evidence of Mr Tolhurst, which we have considered *de bene esse*, is a truthful and accurate account of the circumstances surrounding the disclosure of the footage. We also accept that there had been late or incomplete compliance with court directions, and that in the

events which happened there was not sufficient time for the defence to have reviewed the whole of the contents of the hard drive before the prosecution evidence about it was given. We are, however, satisfied that there is nothing in the footage which provides any ground for allowing an appeal. Quite simply, it was no part of the defence case at that time to suggest that Hughes had any relevant involvement. We cannot accept that if the footage had been viewed it would have started a line of enquiry which would or might have developed into a part of the defence case. We note in this regard that Mr Tolhurst's review of the CCTV footage came to an end after evidence given on 6th June 2013. That is entirely understandable and we certainly make no criticism of him. But the trial continued for another seven weeks. That provided an ample opportunity for Taft, if he had any reason to be suspicious of Hughes or to become suspicious of Hughes as the evidence emerged, to give appropriate instructions.

71. It is submitted on Taft's behalf that much has now come to light which would cause Taft to view Hughes in a very different light. That may be so. But it is not something which in itself can provide a ground of appeal.

72. Despite Mr Christie's submissions, we are wholly unpersuaded that the case now being presented can be reconciled with Taft's case at trial, in particular his accusations against the Fergusons and his claim to have been with Hughes at the time of the bombings. As to the latter, we are unimpressed by the submission that Taft would now say that Hughes had left his company for a period during the evening of 3rd August, or by the submission that the significance of that absence did not strike Taft until very recently.

73. We turn to the issues relating to Buckley. Notwithstanding Mr Power's very able submissions, we do not accept that the judge withdrew from the jury the possibility that someone other than Buckley was the bomber. We accept Mr Power's submission that the

inclusion of a phrase such as "It is a matter for you, members of the jury" will not always sanitise a judicial observation which is in some way unfair or objectionable. We also accept that it might have been better if the learned judge had expressed himself somewhat differently and had given the conventional direction nearer to the start of the summing-up than he did. But it is important to remember that of the five defendants who stood trial, only one cast doubt on the prosecution submission that the evidence showed Buckley to be involved in the bombing. It must also be remembered that leading counsel for Leslie, who did dispute that submission and whose argument about it was placed before the jury in the summing-up, did not at the time invite the judge to say anything further to the jury on this point and, we infer, did not subsequently advise that the terms of the summing-up gave rise to any ground of appeal. It seems to us that, in those circumstances, the judge in the criticised passages was doing no more than expressing what seemed to him to be a fair summary of the overall approach taken by the parties, over a three-month trial, to the issue of Buckley's involvement. In that regard, we consider the criticised passages to be similar to the observations of the learned judge in the immediately preceding section of the summing-up, in which also he had referred in general terms to an issue about which there had been broad agreement, but about which Mr Enoch, on behalf of Leslie, had contested the point.

74. That being our view on the essential question of whether Buckley's involvement was withdrawn from the jury, the subsequent observations about which complaint is made were questions which the jury were logically bound to ask themselves if they were sure of Buckley's involvement. They were not, however, the sole basis of the prosecution case against Leslie. There were many strands to the circumstantial case against Leslie, and Leslie himself did not give evidence to explain or answer any of them. In those circumstances, we can see no arguable basis on which it could be said that the summing-up unfairly took away from the jury an issue on which the case against Leslie rested.

75. As to whether Buckley's acquittal would now be admissible in a trial of the applicants, the general rule is that an earlier acquittal is irrelevant and inadmissible because it is no more than evidence of the opinion of the jury at the earlier trial: see *Hui Chai-Hing v R* [1992] 1 AC 34. There is an exception to that general rule, where the credibility of a prosecution witness is in issue and the circumstances of the earlier acquittal give rise to a clear inference that the jury at the previous trial must have disbelieved the evidence of that witness: see, for example, *R v Hay* (1983) 77 Cr App R 70. In considering whether that exception applies, it is necessary to keep in mind that the previous acquittal is not conclusive evidence of the accused's innocence of the offence to which it relates. Nor does it mean that all relevant issues have been resolved in favour of the accused: see *R v Colman and Terry* [2005] QB 996 at [43].

76. The present case cannot be said to come within that established exception. We therefore doubt that Buckley's acquittal could be admissible in a trial of these applicants. We do not, however, think that we need to reach any concluded decision on that point because we accept the prosecution's submission that, in any event, Leslie's guilt does not depend on Buckley being convicted.

77. We accept the submission made in the Respondent's Notice to the effect that none of the matters now advanced by the applicants provide any answer to the force of the circumstantial cases against them. Whatever may be said about the possible involvement of Hughes or non-involvement of Buckley, the jury had to focus on the evidence against and for each of the applicants. The prosecution evidence against each was compelling. Leslie did not give evidence. Taft did give evidence, but the jury disbelieved him. He gave his evidence in terms which he now, effectively, wishes to change.

78. The closing submissions on behalf of the applicants were to the effect that, however precisely one approaches the issues in this case, something went seriously wrong with the process of disclosure in relation to the CCTV footage, and that the subsequent acquittal of Buckley highlights deficiencies in the trial process.

79. We have considered those submissions carefully, but we are not persuaded by them. For those reasons we decline to admit the fresh evidence of Mr Tolhurst. We see no ground on which it could be argued that the convictions of either applicant are unsafe. Nor can we see any basis for granting the very long extensions of time which are sought.

80. These renewed applications therefore fail and are refused.