



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SZYPUSZ v. THE UNITED KINGDOM

(Application no. 8400/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/02/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of Szypusz v. the United Kingdom,
The European Court of Human Rights (Fourth Section), sitting as a
Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges*,
and Lawrence Early, *Section Registrar*,
Having deliberated in private on 31 August 2010,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 8400/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr Simeon Szypusz (“the applicant”), on 19 February 2007.

2. The applicant was represented by Mr R. Kovalevsky Q.C., a barrister practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Ms E. Willmott, of the Foreign and Commonwealth Office.

3. The applicant, relying on Article 6 § 1 of the Convention, alleged that he had not had a fair trial as there were insufficient guarantees to exclude legitimate doubt regarding the independence and impartiality of the tribunal which tried him on criminal charges.

4. On 26 May 2009 the President of the Chamber decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1985 and is currently detained in HMP Lowdham Grange, Nottingham.

6. On 30 May 2004, at around lunch time, an argument broke out between the applicant and D.M. in a residential street. The applicant had been trying to park a car he was driving and had collided with a parked car which belonged to D.M. Within about half an hour of the dispute, a third man, D.G., arrived at the scene equipped with a loaded shotgun and shot D.M. in the back of the head. D.M. survived but suffered permanent brain damage.

7. The Crown case was that D.G. had been summoned to the scene by the applicant and another co-accused, M.H., using a mobile telephone belonging to M.H. The applicant was charged with attempted murder and making threats to kill. The applicant denied the charges, alleging that he had left the scene at an early stage and gone to a neighbouring house. He disputed allegations that he had played any part in summoning D.G.

8. The Crown's evidence regarding the alleged phone calls came from a number of sources. They pointed to the fact that the applicant was the party involved in the original dispute and that, according to witnesses, he had made threats of violence and of death. An important part of the Crown case involved video recordings from closed circuit television (CCTV) cameras near the scene. From a combination of video recordings and mobile telephone records for M.H.'s telephone, the Crown contended that the applicant could be seen making certain calls. There was also eye witness evidence of him making at least one of the critical calls. In total, the Crown case was that six relevant calls were made from M.H.'s mobile telephone to D.G. or one of his associates.

9. The applicant's case at trial was that he had made no calls on M.H.'s mobile telephone. He accepted that eye witness evidence and CCTV recordings demonstrated that he had used a telephone at certain points. However, he said that he was a drug dealer using his own telephone and that the calls were made for his own criminal purposes and were nothing to do with the summoning of D.G. As regards one part of the CCTV footage, the applicant denied the Crown contention that it showed him making a call at a relevant time.

10. A compilation of the CCTV footage was shown a number of times during the trial. It was played on specialist digital equipment, which was more sophisticated than an ordinary video recorder, specially installed for the trial. It had a number of facilities, including a better capacity to freeze frames, to step forwards and backwards from frame to frame and to coordinate views of different cameras at any particular moment. The machine was operated by a detective constable, Officer M, who had been specially instructed how to use it. Officer M was a member of the investigating team of police officers which had conducted the inquiry into the applicant's case. He was, formally speaking, a witness in the case in the sense that he had made two single paragraph statements recording taking possession of some of the CCTV tapes and had made an uncontroversial

statement relating to the taking of a mouth swab sample for DNA analysis from one of the other accused in the applicant's case. Over the period of the trial, which lasted around a month, he had made his services available not only at the trial itself but also to the Crown and the defendants outside the court.

11. There was some early discussion about the possibility that the jury would wish to view the recordings after they retired. Leading counsel for the applicant directed the judge's attention to short notes in Archbold's *Criminal Pleading, Evidence and Practice*, an authoritative text on Crown Court practice and procedure, on the replaying of various different kinds of recording which may figure in trials. The matter was left that there was no reason why the recordings could not be taken into the jury room and played there by the jury if required.

12. At the conclusion of his summing-up, the judge told the jury that should they wish to view the recordings again, they only had to ask. The following dialogue took place:

Judge: 'Ladies and gentlemen, it may be that you will want to see the videos again. Have arrangements been made for the jury to see them in their room?'

Counsel for the prosecution: '...It is impossible, as I understand it, in fact, to take this into the jury's room. There are, therefore, either two options: either to watch a VHS video on the normal equipment in their room, or alternatively, there is the higher quality—'

Judge: 'The jury must watch what has been shown in court.'

Counsel for the prosecution: 'In that case, I am afraid the position must be that as and when the jury require it, they will have to come back and see it in court.'

Judge: 'There you are. Any time you want to see the video, you can pass a note ...''

13. The jury subsequently retired. On the second day of their deliberations, they indicated their wish to start reviewing the video evidence in the afternoon. Counsel were advised of the jury's request and the court convened with junior counsel for the applicant among those attending. The following discussion ensued:

Counsel for the prosecution: '... the only issue that arises as a result of the CCTV request is who exactly is present in court when they view the material. It is a matter that we have discussed between counsel, and of course, subject to your Lordship's view, I think the general view is that if they are able to watch it on their own, it would be much more constructive – if counsel and your Lordship were not present. In other words, if this was an extension of their jury room—'

Judge: 'And then we would have – what – just the officer working the machine?'

Counsel for the prosecution: My Lord, that is the only outstanding issue, and I am afraid I have not had an opportunity to speak to [Officer M] – who, as your Lordship knows, is the man in charge of the machinery – as to whether it would be possible for

the jury to be shown very briefly how to operate the machinery, or whether that is unrealistic.'

Judge: 'I should imagine that it is unrealistic—'

Counsel for the prosecution: 'In which case I understand—'

Judge: 'I mean, you have to go backwards and forwards, and you have to catch particular frames, and I think you will probably need [Officer M] —'

Counsel for the prosecution: 'My Lord, I am inclined to agree, in which case it would be my suggestion, on behalf of the Crown, that he remains, and at their instruction operates the machinery—'

Judge: 'And does nothing else but to operate the machinery—'

Counsel for the prosecution: 'Indeed – and, of course, makes no communication to them or to anyone else —'

Counsel for M.H.: 'Except where they will want to go backwards or forwards —'

Counsel for the prosecution: 'Except, of course, to talk to them about operating the machinery.'

Judge: 'Does anyone have any objections to the court being cleared, along with the defendants and the public gallery, and simply leaving [Officer M] there – and in that case, I do not think I need ask the jury what they want to see.'

Counsel for the prosecution: 'My Lord, no.'

Judge: 'That is probably much better.'

Counsel for the prosecution: 'Indeed. Thank you very much.'

Judge: 'Thank you. Does everybody agree?'

Counsel for the prosecution: 'My Lord, yes.'

Counsel for D.G.: 'My Lord, yes.'

Counsel for M.H.: 'My Lord, yes.'

14. No assent was recorded from junior counsel for the applicant but no objections were raised to the course of action proposed.

15. The judge instructed the jury to return and directed them as follows:

“Ladies and gentlemen, having discussed this matter with counsel, what we are going to do is this: we are going to leave [Officer M] in this court with you, and he will play any part of the video that you have seen, and he will play it as you think fit. Remember that there is more than one camera that operates – that sometimes you are viewing camera no. 1, and I think at other times camera no. 2. [Officer M] cannot do anything other than operate the video machine, and there is to be no other communication with him – or any communication from him – than simply asking him

to play you what you want to see – and I think it is probably better, because he was in court – and apart from discussing among yourselves, perhaps, what you want to see, any other discussion is in your jury room ...”

16. The jury was left alone in the court room with Officer M at 2.05 p.m. to begin reviewing the video evidence.

17. As soon as leading counsel for the applicant, who had been engaged elsewhere during the earlier discussions with counsel regarding the viewing of the video recordings as the applicant's trial had overrun, was informed of the course of action adopted, a request was made to reconvene the court at 3.30 p.m. The judge agreed to reconvene at 4 p.m. as he did not wish to interrupt the jury's viewing of the video evidence. The jury spent almost two hours viewing the video recordings in the presence of Officer M.

18. When the court reconvened, leading counsel for the applicant directed the judge's attention to various authorities, including Archbold's *Criminal Pleading, Evidence and Practice*, and the following discussion took place:

“Counsel for the applicant: 'The court has, for all purposes, during this afternoon, whilst the jury have been reviewing the material, really been an extension of the jury room –'

...

Counsel for the applicant: 'And what has happened, in reality, is that an individual – he happens to be a police officer – an individual has, in fact, been within that jury room –'

Judge: 'There was instructions –'

Counsel for the applicant: 'I know that, but the difficulty with that is that the person who would normally be supervising “the sanctity”, if I can put it that way, of the jury – because, of course, normally there is no problem; they are in their jury retiring room, and there is no individual who can come near them –'

Judge: 'No –'

Counsel for the applicant: 'Because the jury bailiff acts in accordance with their oath, as one expects, to prevent that – by my understanding is that this afternoon there has been no such person present.'

Judge: 'But are you saying that if one of the jury bailiffs had been present, that would be all right? That would have caused other problems.'

Counsel for the applicant: 'My Lord, I am trying to see a way through it. This is a very unusual circumstance.'

Judge: 'The unusual circumstance is this we cannot put the equipment in the jury room'.

Counsel for the applicant: 'Yes, I understand that'.

Judge: 'And that is the first problem ... The second problem is that the jury could not work the equipment.'

...

Counsel for the applicant: '...we understand that [Officer M] was able, in fact, to instruct another officer how to use this machine in pretty short order.'

Judge: 'Perhaps, but that is how it was presented to me –'

...

Counsel for the applicant: 'I am merely looking at the peculiar situation that arises here, and the simple fact of the matter, if we boil it down to first principles, is quite simply this: throughout this afternoon, there has, in fact, been an outsider in the jury retiring room. Your Lordship, of course, has given directions, and so be it. In fact, we cannot inquire – certainly from the jury – as to whether that was followed, because we have no right –'

Judge: 'No, I agree –'

Counsel for the applicant: 'And the problem is this: that those who sit behind the dock are essentially put on trust in relation to the police officer's lack of communication, and as soon as one recognises that, that, essentially, cannot be right, because there is no reason why they should, as it were, feel that they can trust the police officer to that extent ...'

19. Counsel for the applicant then suggested that the police officer could continue to operate the equipment but that the presence of a jury bailiff in the jury room would ensure that there was no communication between the parties in light of the oath sworn by the jury bailiff to prevent any communication with the jury. The following exchange took place:

“Counsel for the applicant: 'If the jury bailiff's oath is that they are to stop any approach by any outsider to the jury, then any communication as to which section of tape the jury wish to see should, in fact, go through that conduit, and that can be in the same room, but the jury bailiff can ensure that there is no communication directly between the parties.'

Judge: '... You are suggesting that the police officer could operate the machinery – that is obviously the most convenient way to do it, even if there could possibly be other ways ... – but the jury bailiff has to be present?'

Counsel for the applicant: 'Yes, because the jury bailiff, consistent with his or her oath, is duty bound to stop all communication, and essentially, that communication can only be complained of if it came from the officer. I am not saying for one instant – for one instant – that I have reason to believe that that has happened.'

Judge: 'No.'

Counsel for the applicant: 'I am merely looking at it from a point of principle ... The system ... has a safeguard within it, and normally that is the jury bailiff, who essentially guards the sanctity of the jury once they have retired.'

20. The judge observed that there was a need to protect the privacy of the jury while preserving the integrity of the situation. However, he pointed out that "the die had been cast" and that:

"... either the procedure in the circumstances of this particular case is acceptable, or it is not. I am not sure I would want to change it now. I mean, counsel can consider all of this overnight –"

21. He later continued:

"... I think I ought to state for the record – and I will – precisely what has happened, so that there can be no doubt about it. I will give counsel a chance to consider this matter ... it may be that it is just not sensible to do anything different, and if something has gone wrong, it has gone wrong – but I will give counsel a chance to consider the matter overnight, and if they want to suggest to me anything – alternative procedures – not very different than what we are doing – but any modified procedures, tomorrow I will listen to them."

22. It was then suggested by counsel for M.H. that either the jury themselves be instructed how to use the equipment or that the video be played in open court in the presence of the judge. The following morning, a solution was agreed which would allow the jury to operate the equipment themselves, with information provided to assist them in locating the part of the recordings that they wished to view. The judge subsequently advised the jury as follows:

"We have reconsidered the procedure for your viewing [the CCTV] footage, and in order to give you complete freedom for discussion amongst yourselves as you view that footage, we propose to give you the opportunity to do so in the absence of any other person.

What we propose is this: that you should be shown in a moment or two in open court, with everybody present, how that equipment works, and you will then be left to it, and you will decide exactly who is to operate it, and what you wish to see.

Can I remind you that the tape is a composite tape containing footage from three cameras. You will be given a sheet of paper – this one – containing an index of counter times, which show where footage from each camera begins, and what each camera is focused on ... If you have any problems in working the equipment, let me know, and I will reconsider the position ..."

23. The jury subsequently viewed the video recordings alone for about an hour. They continued their deliberations for the rest of the day and into the following morning.

24. On 25 February 2005, the jury found the applicant guilty of attempted murder and making threats to kill. He was sentenced to 25 years in prison for attempted murder and three years, to be served concurrently, for making threats to kill. His co-accused, M.H., was found not guilty.

25. The applicant appealed, arguing that the approach taken to the viewing of the video recordings amounted to a fundamental infringement of the integrity of the jury's deliberations.

26. On 20 June 2006, the Court of Appeal dismissed the applicant's appeal. The court summarised the matter before it as follows:

“[Counsel for the applicant] contends now, as foreshadowed in his submissions to the judge on his return to court, that the course taken amounted, however unwittingly, to a fundamental infringement of the integrity of the jury's deliberations. He takes his stand on the point of principle. He contends that when somebody has retired, in effect, with the jury for a substantial period the conviction is, for that reason alone, unsafe. He adds, of course, that in this particular case it was a policeman who was in that position.”

27. Discussing the role of Officer M, the court noted that:

“The officer in question was a serving police officer. He was a member of the investigating team of police officers which had conducted the enquiry into this case. That was a team which had assembled the evidence, taken the statements, and no doubt planned the investigation. He was, formally speaking, a witness in the case, in the sense that he had made two single paragraph statements recording taking possession of some of the close circuit television tapes and he had also made an entirely uncontroversial statement relating to the taking of a mouth swab sample for DNA analysis from one of the other accused ... There was no hint of question about the formal statements that he had made. He had not been called as a witness. His credibility was not in any sense in issue. He was a member of the investigating team, but this was not a case in which there was any challenge to the credibility or propriety of any of the police officers. This was not that kind of a case. There was no challenge whatever to the manner of investigation. The issue at the trial was what the evidence, which the police were accepted properly to have gathered, did or did not prove.”

28. During the proceedings, the Court of Appeal had been invited to receive a witness statement from Officer M which had not been seen by the applicant or his lawyers. However, it concluded on this matter (at paragraph 28) that:

“...we do not think that we should be invited to receive partial evidence of what occurred. We are certainly satisfied that no further enquiry, for example of jurors, would in a case of this kind be proper”.

29. The court examined the trial transcript and, despite the absence of any recorded assent from the applicant's junior counsel to the jury's viewing of the CCTV footage in the presence of Officer M, stated that it had absolutely no doubt that assent to the presence of Officer M while the jury viewed the CCTV footage was given by all counsel concerned, referring to the various, non-verbal manners of expressing assent in such situations.

30. The court agreed that a fair trial required that a jury should not be improperly influenced during its deliberations. The Court observed that this was not a case where any bias, or apparent bias, was in question. The question was whether the conviction was safe, and in particular whether the unusual course taken meant that there was an unacceptable risk that the jury

may have come under improper extraneous influence after the close of evidence in the case. The court accepted that this would include an inquiry into whether there was such appearance of that possibility that a fair minded, independent observer would conclude that there was a real danger or a real possibility of the jury's decision being compromised by external influence.

31. The court found (at paragraphs 44-45):

“In the modern era our system proceeds upon the basis that jurors can be trusted to heed the very careful injunctions which are given to them throughout the trial process, to try the case upon the evidence heard in court alone and to be scrupulous in not discussing the case with anybody outside their number. Such directions are conventionally given by judges at the outset of the trial. They will have been foreshadowed before that by the instruction given to jurors on attending court. They are always repeated at later stages of the trial and they are invariably endorsed at time of separation, if that necessity arises. Quite apart from that, some jurors need transport for various reasons; sometimes, but not always, of security. Drivers who are not operating under a bailiff's oath, hotel staff where appropriate, and many others have dealings with jurors who are in retirement. Once again, the system proceeds on the basis that the jurors treat their task conscientiously and can be trusted to obey the oath that they have taken and not to allow any possibility of extraneous influence to compromise the integrity of their discussions as a group of 12. The experience of trial judges up and down the country demonstrates that in all but a tiny handful of cases that trust is well placed. Jurors approach what is a difficult and often anxious task with a remarkable sense of duty.

Now to accept the risk which thus arises of influence from someone unknown and unconnected with the case is not, of course, the same as positively to permit a 13th person to be present with the jury after it has retired and whilst it is reviewing part of the evidence in the case. If, therefore, there were in this case an unacceptable risk of compromise to the integrity of the jury's discussions, the modern practice as to the separation of juries during retirement would not necessarily save it. What the modern practice does, however, is to demonstrate the recognition of the fact that the safeguard of the integrity of the jury system lies in the respect that jurors have for the serious oath that they have taken, reinforced by the directions and warnings that they are given by trial judges, rather than in requiring formal rules attempting to insulate them from contact with the outside world.”

32. The court noted that the approach adopted in the present case occurred with the authority of the judge and with the consent of all parties, although it emphasised that no question arose as to the applicant's right to a fair trial being waived. Such a right could only be waived after a full investigation of the facts, in particular as to whether the applicant was fully apprised of the options available. However, the court considered that the agreement of the judge and counsel to the approach adopted was relevant when assessing whether a fair minded observer would have been of the view that there was, as a result of the decision, an unacceptable risk of the jury's discussions being compromised.

33. The court further referred to the “careful direction” given to the jury that there was to be no communication between them and the officer

operating the equipment except for the purposes of finding the correct place on the video. The court noted (at paragraph 50):

“He directed them, as we have recorded, that they were to preserve their own discussions of what they had seen until they were in private. That direction came on top of, we are quite sure, conventional directions to the jury of the kind which we have already mentioned that is to say as to the necessity to try the case on the evidence, and, on many occasions, to be scrupulous to avoid discussing the case with anybody outside their number. For the reasons which we have explained, the modern practice is to trust jurors to obey injunctions of this kind.”

34. The court noted that the suggestion mooted before the trial judge of having a jury bailiff present demonstrated that there could be no absolute prohibition on contact with the jury. It further observed that there was no indication that the jury had been in any way inhibited by the presence of the police officer: they spent considerable time viewing the recordings. In any event, they continued to view the recordings alone the following morning and clearly gave further consideration to them.

35. Finally, the court considered it significant that the jury had convicted the applicant of attempted murder but acquitted of attempted murder his co-accused, M.H., who was also directly affected by the CCTV evidence. The significance was that:

“... the jury arrived, after prolonged deliberation, at discriminating verdicts.”

36. The court concluded (at paragraph 55):

“We are satisfied that on the facts of this case, whether or not what occurred should have happened – and we will come to that in a moment – the hypothetical informed and fair minded observer would be aware of all the factors to which we have called attention and he would, we are satisfied, on the facts of this case not believe that there was a real danger, or a real possibility, that the jury's deliberations had been improperly influenced by an external individual.”

37. As to the approach adopted to the viewing of the video evidence as a matter of principle, the court stated (at paragraphs 56-57) that:

“We add this. Although in this case we are satisfied that no harm was done, we firmly suggest that this is a course which is not followed in future with or without the consent of the parties. We are alive to two considerations which troubled those who were concerned in this case and we understand how it came about that they resulted in the judge doing what he did with the consent of all the parties. We do not, however, think that anybody needed to be concerned that a jury would betray its thinking by identifying a piece of recording that it wanted to see again. Jurors commonly ask questions on all manner of topics. Some of them call for the jury to be reminded of a particular area of evidence. We do not believe that anybody who has any experience of jury trials supposes that anything can be read into the questions which a jury asks. Such a question may come from all jurors or from one. It may come because the evidence is regarded by someone as of great importance or it may come because the jury collectively thinks it is irrelevant but wants to be sure.

The second concern, however, namely that the jury ought to be able to view real evidence of this kind, and discuss it as it views it, is of much greater significance.

The breadth of close circuit television coverage in places public and private is nowadays so extensive that juries are more and more presented with evidence of this kind. They also have recorded evidence very often in cases of recorded surveillance. There are other examples, of course, as well. It seems to us that it should be regarded as the plain duty of any party, Crown or defence, which is proposing to rely on such recorded evidence to ensure that there is provided equipment not only to play the recording in court, but also such as the jury can use in its retiring room during its retirement. They must, we are quite satisfied, as jurors be entitled to review precisely the same material as has been put in evidence in court. The judge in this case, we are satisfied, was absolutely right not to permit them to be given a substitute poorer quality VHS recording. If the necessary equipment can be provided in any particular court by agreement as to compatibility of machinery between parties and the court, then so much the better. The ultimate responsibility, however, for the presentation of evidence lies not with the court, but with the parties seeking to adduce it. It is not desirable that equipment should be provided which can only be used in open court, because although it may turn out to be possible to proceed as was done here on the second day of viewing, that will often not be possible, and in many courts the courtroom will by then be in use in the next trial. If in the last resort it really is the case that the recorded material simply is incapable of being played on any machinery which the jury can take into the retiring room -- and we take leave to doubt that that will ever be so with a little forethought -- then we think that the normal course should be followed and in that exceptional case any replaying for the jury during retirement ought to take place in open court."

38. On 22 August 2008, the applicant was denied leave to appeal to the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Impartiality

39. In a judgment of the House of Lords in *Magill v Porter* [2001] UKHL 67, Lord Hope of Craighead endorsed a judgment of the Court of Appeal, which took into consideration the jurisprudence of this Court, on the question of apparent bias and concluded that:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

40. In *Helow v Secretary of State for the Home Department and Another (Scotland)* [2008] UKHL 62, the House of Lords gave further guidance as to the attributes of the "fair-minded and informed observer". Lord Hope of Craighead explained (at paragraphs 2-3) that:

"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious ... Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the

complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

B. The presence of an unauthorised person in the jury room

41. In *Goby v Wetherill* [1915] 2 KB 674, a civil case, the town sergeant, acting as an usher in the county court, had, through what was described as an excess of zeal, retired into the retiring room with the jury and remained there for about 20 minutes whilst they were considering their verdict. The High Court held that the action vitiated the verdict, which could not stand.

42. In *R v McNeil* [1967] Crim LR 540, a criminal case, two uniformed police officers acting as jury bailiffs had retired with the jury and remained there throughout the time when the verdict was being arrived at, apparently in ignorance of the fact that it was something that they ought not to do. The Court of Appeal allowed an appeal against conviction, holding that the retirement of strangers with the jury during their deliberations was an irregularity which was difficult to cure, even if, as in that case, an assurance had been received from the foreman that the bailiffs had taken no part in the deliberations and had not influenced the members of the jury in their decision.

C. Communication with the jury when retired

43. In *R v Furlong* (1950) Cr App R 79, the Court of Appeal upheld a conviction where the clerk of court had been instructed to go to the jury room and ask them to put a question in writing. The court concluded that it was satisfied that the clerk had not, himself, entered the jury room but:

"Even if he had, we do not think that that would have been in itself an irregularity, because the court always has power to allow somebody to make a communication to the jury, if it is a communication proper to be made, and if it is made by the direction of the court. Everybody knows that the oath that is given to a jury bailiff is that he 'shall suffer no person to speak to them nor speak to them [himself] unless it be to ask whether they are agreed upon a verdict, without leave of the court'."

44. In the subsequent case of *R v Dempster* (1980) 71 Cr App R 302, an important part of the evidence was in the form of audio recordings. With the authority of the judge and by consent of counsel, a scheme was devised to enable the jury to hear the tapes in their jury room. The jury were supplied with a loudspeaker in their room which was connected to the recording and transmitting equipment in the courtroom. Anyone from the defence or prosecution could sit in the courtroom and observe the proceedings. The technician in the courtroom who was in charge of the equipment had been sworn as a jury bailiff and when the jury required some part of the tapes to be played, the foreman of the jury would instruct the technician by two-way radio. The court, dismissing the appeal against conviction, concluded that:

“... in the special circumstances of this case what was done was done by order of the court and with the consent of the parties. As matters exist at the moment we do not see what other method could easily, properly and practically have been adopted to overcome the difficulties which obviously existed.”

D. Instructions and directions to the jury

45. Upon responding to a summons, jury members are sent a leaflet called “Your Guide to Jury Service”. The leaflet explains that jurors’ discussions are private and that jurors should not discuss any aspects of the trial with anyone other than fellow jurors. It sets out that the verdict must be that of the jurors alone and reminds jurors that their role is to reach a verdict on the evidence presented in the court room at trial. The leaflet also notes that it is an offence for anyone outside the jury to try and influence them.

46. Once selected for jury duty, jurors must swear an oath or affirmation that they will:

“faithfully try the defendant and give a true verdict according to the evidence.”

47. At the outset of the trial, the jury are conventionally given a direction to the effect that they must try the case on the evidence alone, which is what they hear in court. They are instructed that they must not discuss the case with family, friends or anyone else or conduct their own research into the case.

48. Section 13 of the Juries Act 1974 provides that a trial judge may allow a jury to separate at any time during a trial. Upon allowing the jury to separate the judge will normally re-emphasise that they must not talk about the case to anyone who is not one of their number.

49. Practice Direction (Crown Court: Guidance to Jurors) was issued on 23 February 2004. The practice direction contained the following extract:

“IV.42.6 Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.

IV.42.7 Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right."

E. Secrecy of jury deliberations

50. Section 8(1) of the Contempt of Court Act 1981 states that it is a contempt of court to obtain, disclose or solicit any particulars of any statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

51. In *R v. Mirza, R v. Connor and Rollock* [2004] UKHL 2, the House of Lords considered the implications of Article 6 § 1 of the Convention on the common law rule that the court will not investigate the content of jury deliberations. Subsequently, Lord Carswell summarised the current position in *R v. Smith, R v. Mercieca* [2005] UKHL 12 (at paragraph 16):

"The principles of the common law relating to inquiry into the verdicts of juries and matters which may affect the propriety of the manner in which they reach their verdicts have been rehearsed in *R v Mirza*, particularly in paragraphs 94 to 107 of the opinion of Lord Hope of Craighead, and it is unnecessary for me to repeat what their Lordships have said there. It may nevertheless be helpful if I set out in a series of brief propositions how the law stands, prior to considering how a judge should approach a situation such as that encountered in the present case:

(1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room: *Ellis v Deheer* [1922] 2 KB 113, 117-118...; *R v Miah* [1997] 2 Cr App R 12 at 18...; *R v Mirza*, paragraph 95...

(2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all: *R v Mirza*, paragraph 123...

(3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible. The House so held in *R v Mirza*, affirming a line of cases going back to *Ellis v Deheer* [1922] 2 KB 113 and *R v Thompson* (1961) 46 Cr App R 72.

(4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences, e.g. contact with other persons who may have passed on information which should not have been before the jury: see such cases as *R v Blackwell* [1995] 2 Cr App R 625 and *R v Oke* [1997] Crim LR 898.

(5) When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasion given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence: *R v Orgles* [1994] 1 WLR 108.

(6) Section 8(1) of the Contempt of Court Act 1981 is not a bar to the court itself carrying out necessary investigations of such matters as bias or irregularity in the jury's consideration of the case. The members of the House who were in the majority in *R v Mirza* all expressed the view that if matters of that nature were raised by credible evidence the judge can investigate them and deal with the allegations as the situation may require: see the opinions of Lord Slynn at paragraphs 50-51; Lord Hope of Craighead at paragraphs 92, 112 and 126; Lord Hobhouse of Woodborough at paragraphs 141 and 148; and Lord Rodger of Earlsferry at paragraph 156."

F. Discharge of a juror or a jury

52. A trial judge has a discretionary power to discharge a jury, before the jury has given its verdict, if he considers it necessary to do so in order to ensure a fair trial (*R v. Azam and Others* [2006] EWCA Crim 161, at paragraphs 48 and 50).

53. A trial judge also has discretion under section 16 of the Juries Act 1974 to discharge an individual juror for any reason, provided that the discharge of the juror does not result in the total number of jurors falling below nine.

G. Code of Conduct for the Bar of England and Wales

54. Rule 708 of the Code of Conduct for the Bar of England and Wales provides, in so far as relevant, that:

"A barrister when conducting proceedings in Court:

...

j) must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to the lay client's case and appear to him to be supported by reasonable grounds."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

55. The applicant complained that there were insufficient guarantees to exclude legitimate doubt regarding the independence and impartiality of the tribunal which tried him on criminal charges in light of the fact that a police officer responsible for operating video equipment was permitted to remain alone with the jury for almost two hours while they viewed important video evidence in his case. As a result, he alleged that he had been denied a fair trial, as provided in Article 6 § 1 of the Convention, which reads as follows:

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

56. The Government contested that argument.

A. Admissibility

57. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

58. The applicant argued that it was necessary to consider the reality of the situation regarding Officer M. He was a member of the Trident team, which was a permanent team primarily investigating offences of murder within the black community. As a dedicated investigating team, its members developed close links with fellow team members. The status and role of the team was well-known to the public and had been the subject of several national television programmes.

59. In the present case, the victim, D.M., was unable to attend court. However his family attended and sat in the court room, rather than the public gallery. Thus the family were seated in an area to which the jury, counsel, witnesses and police officers had access. Accordingly, the investigating officers associated with family members outside the court room and as the jury were brought from their refreshment area in the

building they would be unable to avoid noticing the association. The true position was that the jury were well aware that Officer M was a member of a dedicated investigation team which was tasked with investigating the offence which formed the subject of the charge against the applicant. The applicant argued that it was a matter of chance which officer actually presented evidence to the jury, all members of the team being actively involved in the detection work and the presentation of the case for the prosecution. The applicant therefore disputed that Officer M's significance to the prosecution was minimal. He insisted that the officer was an integral part of the prosecution team, noting the findings of the Court of Appeal as to the fact that he was a member of the team which had assembled the evidence against the applicant, taken the statements and no doubt planned the investigation (see paragraph 27 above).

60. The applicant also refuted the Government's argument that the defence did not formally withdraw consent to the unmonitored presence of Officer M. He referred to the judgment of the Court of Appeal (see paragraph 26 above) and to his grounds of appeal, which he said made it clear that the submission to the trial judge was that the presence of Officer M with the jury amounted to a fundamental infringement of the integrity of the jury deliberations.

61. As to the failure of counsel to seek the discharge of the jury, the applicant referred to the observations of the Court of Appeal that a defendant's Article 6 rights are not extinguished by the actions of counsel (see paragraph 32 above). Indeed, when it was pointed out by senior counsel for the applicant that there were concerns as to the course of action followed, the applicant argued that the judge had taken the view that if it had gone wrong, it had gone wrong (see paragraph 21 above). In the applicant's contention, this was a clear statement of the judge's view that he was not going to alter the course of the trial as he was of the view that the procedure he had conceived was appropriate. That this was the case could also be seen from the judge's refusal to reconvene the court immediately when senior counsel raised his concerns regarding the viewing of the CCTV footage (see paragraph 17 above).

62. The applicant also referred to Rule 708 of the Code of Conduct for the Bar of England and Wales (see paragraph 54 above). He considered it clear that there could be no inquiry as to what had transpired in the jury retiring room, with reference to the judgment of the Court of Appeal (see paragraph 28 above). Accordingly, the applicant's counsel was unable to make any criticism of, or comment on, what had transpired.

63. The applicant emphasised that the trial court's rules of evidence and procedure were designed to ensure that cases were presented in the presence of the parties and the public and the judge was entrusted with ensuring that the trial was fair by supervising the proceedings and the application of all relevant laws and rules. The law concerning the prohibition on contact with

a jury in retirement had developed in order to ensure that deliberations were not extraneously influenced and to provide safeguards and promote an environment where jurors were able to speak freely in the absence of any person outside their number. The applicant argued that the introduction of a member of the prosecution team as a thirteenth person in the jury's retiring room, without supervision, could not be viewed as fair. The guarantees relied upon by the Government (see paragraphs 69-75 below) were, in the applicant's view, wholly inadequate.

64. The applicant also referred to a warning issued by the Bar Council in its general standards for the conduct of professional work, where it was stated that a barrister should be alert to the fact that, even in the absence of any wish or intention to do so, authority figures do subconsciously influence lay witnesses. He submitted that the same principle applied in respect of a police officer's presence with the lay members of a jury after retirement.

65. The applicant further considered that the acquittal of M.H. had no relevance to the jury's approach in the case.

66. Finally, the applicant criticised the prosecution for failing to anticipate the problems which would arise with the viewing of the CCTV footage by the jury in retirement. As the prosecution had introduced and sought to rely on the evidence, it was incumbent on them to ensure the availability of the necessary equipment. He further criticised the failure of the judge and the prosecution to explore more fully at the outset whether the jury members could have operated the machinery themselves.

b. The Government

67. The Government accepted that the requirement of independence and impartiality in Article 6 § 1 of the Convention applied to a jury determining a criminal charge, as in the present case. In their view, the complaint in the present case concerned the impartiality, rather than the independence, of the jury. Further, there was no basis to find an absence of subjective impartiality in the case.

68. The Government considered, with reference to the Court's case-law, that the applicant's fears as to the impartiality of the jury in his case were neither reasonable nor legitimate. It therefore followed that they were not objectively justified. In the Government's contention, there were ample guarantees to ensure that the jury which tried the applicant's case was impartial. The Government relied in particular on the following safeguards.

69. First, they argued that the trial judge had given the jury a clear and forceful direction to the effect that they were not to communicate with Officer M, other than to ask him to play whatever section of the CCTV recordings they wished to see (see paragraph 15 above). He had further instructed the jury that they should not continue their discussions in front of the officer but should reserve them until they returned to the confines of the jury room (see paragraph 15 above). In the absence of any evidence to the

contrary, the Government also contended that it could be assumed that the trial judge had additionally directed the jury both at the outset of the trial and subsequently that they should not discuss the case with any third party (see paragraphs 31, 33 and 47 above).

70. Second, the Government emphasised that each of the members of the jury was committed by oath or affirmation to “faithfully try” the applicant and to “give a true verdict according to the evidence”, a matter which was considered relevant by the Court in *Gregory v. the United Kingdom*, 25 February 1997, § 44, *Reports of Judgments and Decisions* 1997-I).

71. Third, it was, according to the Government, striking that the course of action in the present case took place with the authorisation of the trial judge and with the consent of experienced trial counsel, including junior counsel for the applicant (see paragraphs 13-14 and 29 above). Even when the applicant's leading counsel subsequently objected, he did not unequivocally withdraw the consent already given. In the Government's view, this strongly indicated that any doubts the applicant may have developed as to the effect of Officer M's presence on the impartiality of the jury were neither legitimate nor objectively justified.

72. Fourth, the Government contended that it was significant that counsel for the applicant had not sought the discharge of the jury, even after leading counsel had raised his concerns with the trial judge.

73. Fifth, as already mentioned, the trial judge would have directed the jury that they should bring to his attention any behaviour affecting the jury which caused them concern. It was significant in these circumstances that no juror raised any concern with the trial judge in relation to the viewing of the CCTV footage.

74. Sixth, as to the applicant's contention that Officer M may have inadvertently revealed his reaction to the jury's requests, thus influencing them, the Government considered this to be both imprecise and wholly implausible. It was also, in their view, inconsistent with the position taken on behalf of the applicant at trial, where it was not suggested that the jury's deliberations might have been compromised. In particular, leading counsel for the applicant had indicated that he would be content for the police officer to be present to operate the equipment provided that this occurred either in open court or under the supervision of a jury bailiff (see paragraphs 19 and 34 above).

75. Seventh, the Government considered that it was relevant that the judge had instructed the jury to inform Officer M of the footage that they wished to review; that the jury had continued to view the CCTV evidence without the presence of Officer M for over one hour the following day; and that the jury had acquitted the applicant's co-accused, M.H., despite the case against both the applicant and M.H. being very similar (see paragraphs 15, 23-24 and 35 above). Thus it was clear that any objection that Officer M

may have created an imbalanced picture by omitting to play some of the footage was not justified.

76. Finally, the Government indicated that they did not consider it to be significant that there was an alternative to the course of action initially pursued, arguing that the question for the Court was not one of proportionality; rather, the Court was required to assess whether, in all the circumstances, any concerns as to impartiality were objectively justified. The Government further considered the fact that the person present in the room was a police officer to be insignificant as the officer's role in the case was minimal and uncontentious (see paragraphs 10 and 27 above).

77. As to the effect of the inability of the applicant or the judge to make inquiries into whether any inappropriate communication had in fact occurred, the Court pointed out that the secrecy of jury deliberations had previously been accepted by the Court as an important safeguard of the jury's independence and impartiality (citing *Gregory*, cited above, § 44). The Government further noted that the applicant's counsel did not suggest that the trial judge ought to have undertaken any particular inquiry of the officer in question or of the jury. In this regard, the Government observed that the Court of Appeal was offered the opportunity to investigate what had occurred when Officer M was with the jury, by means of a witness statement made by the officer. Having regard to all the circumstances of the case, the court did not consider any such inquiry to be necessary.

78. The Government further considered that the fact that the Court of Appeal had given guidance to avoid any repeat of the situation was irrelevant to the consideration of whether there had been a breach of Article 6 § 1.

2. The Court's assessment

a. General principles

79. The Court recalls that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused. To that end it has constantly stressed that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view (see *Hauschildt v. Denmark*, 24 May 1989, § 46, Series A no. 154; *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Pullar v. the United Kingdom*, 10 June 1996, § 30, *Reports* 1996-III; and *Gregory*, cited above, § 43).

80. The Court recalls that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53; and *Kyprianou*, cited above, § 119). The same holds true in respect of jurors (see *Sander v. the United Kingdom*, no. 34129/96, § 25, ECHR 2000-V). In the present case, it was not disputed

that there was no evidence of actual or subjective bias on the part of one or more jurors. The Court further observes that the Court of Appeal found that in the circumstances of the present case, any further inquiry of the jurors as to what had happened while they viewed the CCTV footage in the presence of Officer M would not be proper (see paragraph 28 above). The Court has previously acknowledged that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard (see *Gregory*, cited above, § 44; and *Miah v. the United Kingdom*, no. 37401/97, Commission decision of 1 July 1998, unreported).

81. While the need to ensure a fair trial may, in certain circumstances, require a judge to discharge a jury it must also be acknowledged that this may not always be the only means to achieve this aim. In other circumstances, the presence of additional safeguards will be sufficient (see *Gregory*, cited above, § 48). It follows therefore that the Court must examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury bearing in mind that the misgivings of the accused, although important, cannot be decisive for its determination (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 194, ECHR 2003-VI; *Gregory*, cited above, § 45; and *Sander*, cited above, § 27).

b. Application of the general principles to the facts of the present case

82. The applicant's concern in the present case related to the possible influence on the jury of the presence of Officer M for almost two hours, after the jury had retired. Regardless of the extent of Officer M's actual role in the prosecution of the case, the Court considers that his position as a police officer and his resultant association with the prosecution could give rise to understandable misgivings on the part of the accused as to the impartiality of the jury. In light of this finding, it is not necessary for the Court to consider the question of post-retirement contact with a non-jury member who was not associated with the prosecution. The Court would, however, express doubts as to whether understandable misgivings would automatically arise in such a case, given that jury members are no longer isolated throughout the duration of the trial and have contact with a large number of people on a daily basis (see paragraph 31 above).

83. Given the applicant's understandable misgivings in the present case, the Court must examine whether, in the light of the applicable safeguards, his concerns were objectively justified (see *Hauschildt*, cited above, § 49; and *Simsek v. the United Kingdom* (dec.), no. 43471/98, 9 July 2002). The Court notes that it has, in previous cases, sought cogent evidence that concerns as to the impartiality of jurors were objectively justified before

finding any breach of Article 6 § 1. Thus in *Pullar*, cited above, §§ 37-41, there was no breach where a member of the jury was employed by the firm in which a prosecution witness was a partner. In *Hardiman v. the United Kingdom* (no. 25935/94, Commission decision of 28 February 1996, unreported) the Commission declared inadmissible an application involving a jury trial where a juror had passed a note to counsel asking him to meet her for a drink, on the basis that the safeguards in place in domestic criminal procedure were sufficient to allay reasonable doubts as to impartiality. Similarly, no breach was found in *Gregory*, cited above, §§ 9 and 50, where a juror passed a note to the judge stating: "Jury showing racial overtones. One member to be excused".

84. In the present case, the Court observes, first, that upon being selected to serve on the jury, each juror was required to swear an oath or affirmation to the effect that he would faithfully try the applicant and give a true verdict according to the evidence presented in court (see paragraph 46 above; *Pullar*, cited above, § 40; and *Gregory*, cited above, § 44). Further, in accordance with the conventional directions given to juries at the beginning of, and where appropriate during, the trial, it would have been made clear to the jury that they were not to discuss the case with any person outside their number (see paragraphs 33, 45 and 47-48 above). In the Court's view, this provided an important safeguard to dispel any reasonable doubt as to the impartiality of the jury, a point also highlighted by the Court of Appeal (see paragraph 31 above).

85. Second, having decided that the jury should view the CCTV footage in the court room with the assistance of Officer M, the trial judge gave the jurors a clear direction in which he emphasised that Officer M was to do nothing other than operate the video machine and that there was to be no communication with him other than simply asking him to play the parts of the footage that the jury wished to see (see paragraph 15 above; *Pullar*, cited above, § 40; and *Gregory*, cited above, §§ 47-48; and compare and contrast *Sander*, cited above, § 30). The judge further instructed the jury that other than discussing among themselves what they wished to see, any discussion of the case was to take place in the jury room (see paragraph 15 above). The Court considers that the effect of the direction was to leave the jury in no doubt as to the purely technical role of Officer M and the impropriety of engaging in any discussion with him, other than to indicate what parts of the footage to play. There was nothing in the circumstances of the case to suggest that the jury could not be relied upon to follow the judge's instructions and the trial judge was therefore entitled to assume that the jury would follow the directions he had given.

86. Third, the Court notes that the jury would have been advised at the commencement of the trial that they should bring any concerns regarding fellow jurors to the attention of the trial judge as soon as such concerns emerged (see paragraph 54 above). It is therefore significant that, in the

present case, no juror sent a note to the trial judge to express any concerns following the viewing of the CCTV footage (see *Miah*, cited above, and compare and contrast *Gregory* and *Sander*, both cited above, where the judge was alerted to concerns regarding the impartiality of the jury as a result of notes from jury members). While no inquiries could be made into whether inappropriate communication had occurred, it is clear from Lord Carswell's opinion in *R v. Smith*, *R v. Mercieca*, and is implicit from the judgment of the Court of Appeal, that there is in general some scope to make inquiries where this is shown to be necessary and appropriate (see paragraphs 28 and 51 above).

87. Fourth, it was clear that Officer M was to show extracts of footage on the instructions of the jury (see paragraph 15 above). He was not instructed himself to select relevant parts of footage for the jury to review. In the circumstances the Court considers the suggestion that Officer M may have inadvertently contributed to an imbalanced perception of the evidence by selecting particular extracts to show to be without reasonable foundation.

88. Fifth, the Court would further observe that the trial judge sought the views of the counsel in the case on the proposed course of action. The defence counsel of two of the defendants expressly agreed and no objection was voiced by the junior counsel of the applicant (see paragraph 14 above). As the Court of Appeal found, there was absolutely no doubt that assent to the presence of Officer M while the jury viewed the CCTV footage was given by all counsel concerned. The Court considers this agreement to be of particular importance when considering whether the applicant's fears as to the impartiality of the jury were legitimate and objectively justified.

89. Finally, as to the firm suggestion of the Court of Appeal that the approach originally adopted in the applicant's case was not to be followed in future cases, regardless of whether consent had been given, the Court emphasises that it is natural for a court to strive to ensure that future criminal proceedings are conducted in a manner which is beyond reproach (see, *mutatis mutandis*, *Pullar*, cited above, § 36). As such, from time to time, appellate courts may provide guidance to first-instance courts in order to avoid procedural flaws which, while not undermining the overall fairness of the trial, are nonetheless undesirable. As not every procedural flaw will give rise to a violation of Article 6 § 1, the fact that criticism was made of the procedure initially adopted in the applicant's case does not in itself support the conclusion that his rights under Article 6 § 1 have been violated.

90. Taking into consideration all of the above, the Court finds that there were sufficient safeguards to exclude any objectively justified or legitimate doubts as to the impartiality of the jury. There has accordingly been no violation of Article 6 § 1 in the applicant's case.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;
2. *Holds* by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge David Thór Björgvinsson joined by Judge Garlicki is annexed to this judgment.

L.G.
T.L.E.

DISSENTING OPINION OF
JUDGE DAVID THÓR BJÖRGVINSSON
JOINED BY JUDGE GARLICKI

I.

1. I disagree with the majority in finding no violation of Article 6 § 1 of the Convention in this case.

2. It is clear from the decision of 20 June 2006 that the Court of Appeal recognised that a fundamental problem had arisen in this case: “Although in this case we are satisfied that no harm was done, we firmly suggest that this is a course which is not followed in the future with or without the consent of the parties ...” (paragraph 56 of the Court of Appeal's judgment – see § 37 above).

3. The finding of the Court of Appeal that no harm was done does not sit comfortably with the same court's view that this course of action ought not to be followed in the future even where the parties consent. It is self-evident, in my view, that no trial should ever be tainted with a scenario whereby a member of the police investigation team who was a witness for the prosecution spends two hours alone with a jury, if the minimum requirements of Article 6 (1) of the Convention are to be observed.

4. In my view, the reasons for the domestic court's warning that this course of action should never recur, with or without the consent of the parties, ought to have been sufficient to lead the Court of Appeal to find that the applicant's trial was unfair and thus in violation of Article 6 § 1.

5. The importance in a democratic society of the criminal courts inspiring confidence in the public at large and, in particular, in the accused, cannot be overstated. A fundamental prerequisite for such confidence is that a tribunal must be independent and impartial. (*Hauschildt*, cited above, § 46; *Kyprianou*, cited above § 118; *Pullar*, cited above § 30 and *Gregory*, cited above § 43). It is clear from this Court's case-law that the requirement of independence and impartiality of tribunals applies equally to juries (see *Holm v Sweden* 14191/88, 25 November 1993, § 30). Thus, when assessing whether this requirement has been fulfilled the same criteria apply to judges, lay judges and jurors alike.

6. It is well-established that impartiality for the purposes of Article 6 § 1 of the Convention must be determined on the basis of both a subjective and an objective test. In the case of juries the subjective test relates to the personal conviction of the individual jurors. Under the objective test it must be ascertained whether there are sufficient guarantees to exclude any legitimate doubt as to a juror's impartiality (see *mutatis mutandis* *Pétur Thór Sigurðsson v. Iceland*, no. 39731/98, § 37, ECHR 2003-IV; and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

II.

7. As regards the subjective test, the majority finds that there was in this case no evidence of actual or subjective bias on the part of one or more of the jurors (§ 80). Nor, however, is there any evidence to the contrary. Why? Because the Court of Appeal found that any further inquiry of the jurors as to what happened while they were viewing the CCTV footage in the presence of officer M would be improper. Thus, we do not have any evidence either way. We are left only with the stark reality that a witness for the prosecution spent two hours alone with the jury in the absence of any representation for the accused.

8. Thus, the question is whether this fact alone, viewed objectively, can be considered to give rise to a justified fear that the jury might have been influenced by officer M's presence in a way that was detrimental to the accused.

III.

9. Applying the objective test, it must be determined whether there are ascertainable facts which may give rise to justifiable doubts as to the impartiality of the jury and therefore the tribunal (see for example *Pétur Thór Sigurðsson v. Iceland*, judgment, § 37, ECHR 2003-IV). The question is whether, in the circumstances of this case, the applicant's fear of lack of impartiality of the jury because of the presence of officer M in the jury room is objectively justified. I find that it is.

10. The majority accepts that, regardless of the extent of officer M's actual role in the prosecution, his status as a police officer and his resultant association with the prosecution could give rise to “understandable misgivings” on the part of the accused as to the impartiality of the jury. However, by reference to the jurors' respect for their oath and to the directions and warnings given by the trial judge, the majority finds that there were sufficient safeguards in place to exclude any objectively justified or legitimate doubts as to the jury's impartiality. I disagree.

11. None of the safeguards relied upon by the majority, taken individually or collectively, was sufficient to counterbalance the procedural irregularity that occurred in a case where the trial judge allowed the said improper course of action to be followed. I make the following observations.

12. *Firstly*, the Court of Appeal itself indicated that this is a course of action which ought never to be followed in the future, with or without the consent of the parties.

13. *Secondly*, it is apparent, that as soon as the lead counsel for the applicant was apprised of the procedure adopted, he objected to it.

Subsequently, it was discontinued and, thereafter, the jurors viewed the video recordings alone (see §§ 18-23). By then it was, of course, too late since the jury had spent almost two hours alone in the company of M who was in control of the technical evidence which the jury wanted to review.

14. *Thirdly*, I am unimpressed by the majority's (§ 82) and the Court of Appeal's (paragraphs 44-45 of its judgment, cited at § 31 above) reliance on the fact that jurors are no longer as isolated as they used to be and can potentially be in contact with a large number of people. The same consideration applies to judges and lay judges alike. The relevance of this is therefore questionable since, regardless of whether a judge or a juror is concerned, direct contact with a witness for the prosecution behind locked doors in the absence of the defence must always be considered irregular and improper.

15. *Fourthly*, I emphasise that when assessing whether the applicant's fear of possible bias on the part of the jurors is justified, the nature of the role of the jury as the triers of facts must be borne in mind. In other words the jurors are “judges” of the facts of the case. The jury, as with a judge, is obliged to reach an independent judgment on the evidence. The essential idea is that the jury is impartial and arrives at its verdict on the basis of an independent consideration of the evidence which has been given in court. It would certainly give rise to justified fears of impartiality if a judge in a criminal case, after the evidence was heard, relied on the technical assistance of a member of the police investigation team as well as a witness for the prosecution to help him to review the main evidence in the case in the absence of the defence team.

16. *Fifthly*, it is not contested that officer M was a member of the investigation team which had dealt with the applicant's case. He was also a witness for the prosecution. While his role may have been primarily technical and his statements uncontroversial, the fact remains that he was a part of the prosecution and actively participated in the investigation and presentation of the case. For this reason alone a fair minded and objective observer would be justified in fearing that there was a real risk that the jury lacked impartiality.

17. *Sixthly*, the relevance of the role played by officer M should not be underestimated. He was, in the absence of the trial judge and counsel for the defence, entrusted with the task of assisting the jurors in reviewing one of the most important pieces of evidence. Furthermore, the relevance of the communication that took place is not insignificant. In that context it should be pointed out that the mere identification of the parts of the video footage in which the jurors were interested is in itself a form of communication which potentially was capable of revealing the jurors' thoughts on the evidence and their deliberations as they identified those parts of the evidence in which they were particularly interested. Furthermore, it cannot be excluded that the very presence of officer M in the “jury room” may

unwittingly have inhibited or influenced the jurors. Thus, I find that M's role was not as insignificant as implied by the majority and that this situation certainly gives rise, from an objective point of view, to justified fears that the jury may have come under an improper and extraneous influence.

18. *Finally*, the majority relied on the fact that the barristers for two of the defendants expressly agreed to the procedure adopted and that initially no objection was voiced by the junior counsel of the applicant (see § 14 of the judgment). The Court of Appeal found that there was no doubt that all concerned consented to the presence of officer M. Nevertheless, the Court of Appeal clearly stated that the proposed course of action ought not to be followed in the future “with or without the consent of the parties”. This is not surprising since nobody can waive his right to a fair trial. It is this Court's function to ensure that the domestic courts comply with the State's Convention obligations under Article 6 which establishes the unqualified fundamental right of every person to a fair trial by an independent and impartial tribunal.

19. For the reasons advanced above, I believe that the applicant's fears as to the impartiality of the jury because of the presence and role of officer M were both legitimate and objectively justified. I therefore conclude that there has been a breach of Article 6 § 1 of the Convention.

20. I regret that the majority has accepted a “slippage” of the sort found in the case to form a part of this Court's case law. We are now in the unsatisfactory position that this Court finds tolerable a course of action which the domestic court said ought never to recur.