# R V T & ORS R V

**The Lord Chief Justice of England and Wales :**

1. This is an interlocutory appeal against the ruling by Calvert-Smith J, brought with his leave, refusing the Crown's application for a trial on indictment to be conducted without a jury, in accordance with section 44 of the Criminal Justice Act 2003. The ruling was indicated during the course of a preparatory hearing on 11 March 2009. It was confirmed in a written "open judgment" handed down on 20 March. Notwithstanding the existence of a real and present danger that jury tampering would take place at a re-trial of the respondents, Calvert-Smith J was not sure that the likelihood that jury tampering would take place was so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

2. The case concerns very serious criminal activity, including possession of a firearm with intent to endanger life, possession of a firearm with intent to commit robbery, robbery and conspiracy to rob. Counts 1-5 of the 18 count indictment allege offences arising out of a carefully planned and professionally executed armed robbery which took place shortly before midnight on 6 February 2004 at warehouse premises at Heathrow Airport by robbers carrying firearms and wearing disguises. During the robbery a firearm was fired at a supervisor. The objective of the robbery was something in the region of 10 million in Sterling and mixed foreign currency. As a result of a misreading of a flight manifest, the proceeds amounted to 1.75 million, which are largely unrecovered. The remaining counts, involving one of the respondents on his own, and relating to firearms found in a lock up garage near to Heathrow Airport on 9 October 2002 are evidentially linked with the first 5 counts.

**The trial process to date**

3. In March 2005 a trial of one of the present respondents, T, and six other defendants who are not before us began. Within a few days T became unwell. The jury was discharged from returning a verdict against him. The remaining defendants were acquitted of conspiracy to rob, two of them were acquitted altogether, but the jury was unable to agree on a count of conspiracy to steal against four others. A re-trial of this count was ordered, but adjourned until the conclusion of the present proceedings.

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4. In 2007, following the arrests on different occasions of two of the present respondents, B and H, and the partial recovery from illness of T, three respondents stood their trial at the Central Criminal Court before His Honour Judge Roberts QC and a jury. This trial lasted more than six months. By the time the judge came to sum up the jury had diminished to ten. After they had been in retirement for two days a note was sent to the trial judge which indicated that the jury had reached "on all defendants on all counts, a very strong majority decision". As there was a Bank Holiday weekend ahead, the judge stated that he would not give a majority direction and take verdicts but, to assist the defence considering any submissions about the timing of such a direction, he indicated that the verdicts were likely to be adverse to them. Nine jurors returned to court after the Bank Holiday. A tenth juror said that he was under stress and refused to return to court. He was therefore discharged. With only nine jurors left, a majority verdict was no longer available and therefore the appropriate direction was not given. The jury was unable to reach unanimous verdicts. Pending a retrial the respondents were granted conditional bail.

5. By the time the re-trial was due to begin, the fourth respondent, C, had been arrested. The trial of the four respondents began on 30 June 2008. The trial judge, again, was Judge Roberts QC. The trial proceeded until December 2008. On 5th December the prosecution informed the judge of evidence that approaches were being made to two members of the jury. On 8 December 2008 the judge indicated to the parties that he was minded to discharge the jury, and on 9 December 2008 he made the necessary order. Having discharged the jury he declined to make the further order that the trial should continue without a jury because he had seen a substantial volume of inadmissible but highly prejudicial material. He decided that he could not continue with the trial on his own without a jury and that it was necessary in the interests of justice to terminate it.

6. Judge Roberts then addressed the question whether he should order that any new trial should be conducted without a jury. The prosecution submitted that the appropriate course was for the application for a preparatory hearing for this purpose to be heard by a Presiding Judge of the South Eastern Circuit. It was submitted on behalf of the respondents that he was required to decide whether to make such an order. Judge Roberts agreed, and addressed the issue. In his open court ruling he indicated that he had no difficulty in finding that a serious attempt at jury tampering had taken place at the recent trial and that there was a real and present danger that it would happen again. Having received information about possible measures for the protection of a jury,

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Judge Roberts indicated that he was prepared to assume (without deciding) that the risk of jury tampering would be reduced below the level appropriate for an order for trial without jury by a series of steps which could be taken by the police to protect the jury. In the end, however, as the issues involved important matters of public policy he decided that these would be best considered by one of the Presiding Judges of the Circuit. He therefore declined to make the order sought by the prosecution and invited the Presiding Judge to take over the application and reconsider the matter afresh. However the way in which he dealt with these issues in his judgment was referred to by Calvert-Smith J later, and so we should recite the relevant passages:

> "Of the two packages . one is more intensive and therefore demanding of resources than the other. The more intensive option would involve a cost of about 6 million if the trial lasts, as expected, for six months. It will also require not less than 82 Metropolitan Police Officers to be detached from their normal duties for six months to participate in the exercise. The less intensive option would involve a cost of about 1.5 million if the trial lasts for six months. It would require not less than 32 Metropolitan Police Officers to be detached from their normal duties for six months to participate in the exercise."

He went on to identify some of the ingredients of the less intensive package which he said would "include allowing the jurors to be referred to by numbers only, the court sitting in a courtroom where people in the public gallery cannot see the jurors, and withdrawing the defendants' bail for the duration of the trial".

7. At a preparatory hearing on 11 March 2009 Calvert-Smith J considered material placed before him by the Crown ex parte on notice in chambers, and then received submissions from both sides in open court. In his written open court ruling Calvert-Smith J reached the following conclusions. The material placed before him ex parte by the Crown, in the public interest, be and should remain withheld from the respondents, notwithstanding that this inhibited their opportunity to make representations in relation to the Crown's application under section 44 of the 2003 Act. He was satisfied that there was evidence of a real and present danger that jury tampering would take place at the trial of the respondents, and that the risk would remain throughout the trial. That said, he concluded that a "package" of measures to provide jury protection would be

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sufficient to reduce the risk of jury tampering to an acceptable level. In other words, with the package of measures in place, the likelihood of jury tampering would not be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

8. In his judgment Calvert-Smith J considered the reasonableness of the expense and man hours which would be needed in relation to a trial which he was informed might last nine months. He continued that he was "provided with figures similar but not identical to those recited" by Judge Roberts and concluded that the "less expensive package of measures would be sufficient to reduce the risk of tampering". He referred to the detailed reasons for his conclusion which would be found in the closed ruling. It includes this passage, which can safely be included in this judgment " as to the nature and cost of any such measures as would be put in place to safeguard a jury, there is obviously a clear public interest in not revealing the ambit of such measures, because it would simply increase the risk that anybody wishing to tamper with the jury would find a way round such measure. Beyond saying that of course the court has had well in mind on the authorities, in particular that of Mackle, such things as the reasonableness of the expenditure in a long trial of this kind and the effect on manpower of the police service responsible and so on, without revealing the exact details either of the measures or of the cost of them". (As to Mackle see para 18 below)

9. We have examined not only the open court, but also the carefully prepared closed judgments by Judge Roberts and Calvert-Smith J as well the entire evidential basis for the Crown's application and reliance on PII procedures. As we indicated to counsel in open court we have heard the oral testimony of an Assistant Commissioner and Detective Superintendent of the Metropolitan Police. In view of the nature of the defence of at least one respondent, which is that he is the victim of a police conspiracy to pervert the course of justice, we should record that like Judge Roberts and Calvert-Smith J, we have not read any material or considered any evidence or information from any officer involved in the investigation of the offences alleged in the indictment or from any witness called by the prosecution in any of these trials.

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## The Legislative Structure

10. In this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a right, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation. The constitutional responsibilities of

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the jury are, however, flouted if "the integrity of an individual juror, and thus of the jury as a whole, is compromised. Such a compromise occurs when any juror, whether because of intimidation, bribery or any other reasons, dishonours or becomes liable to dishonour his or her oath as a juror by allowing anything to undermine or qualify the juror's duty to give a true verdict according to the evidence". (per Lord Bingham CJ in **R v Comerford** [1998] 1 Cr App R 235 (/judgement/uk/5a938b3e60d03e5f6b82bb4e), BAILII: [1997] EWCA Crim 2697 (/judgement/uk/5a938b3e60d03e5f6b82bb4e) ).

11. In summary any attempt at interference with the jury constitutes an abuse or misuse of the process. Comerford suggested that one possible response would be to dispense with a jury altogether in a case where an attempt to nobble the jury was apprehended. In such a case, the outcome would be a judge sitting alone. However, as Lord Bingham explained at the time when Comerford was decided, that solution had not then been adopted. Now it has.

12. The Criminal Justice Act 2003 (the 2003 Act) has imposed fresh restrictions on the right to trial by jury, by identifying two particular situations in which such a trial on indictment may be conducted not by a judge and jury, but by a judge sitting alone. Where it arises the judge assimilates all the functions of the jury with his own unchanged judicial responsibilities. This function, although new in the context of trial on indictment, is well known in the ordinary operation of the criminal justice system and is exercised, for example, by District Judges (Magistrates Court) in less serious, summary cases.

13. In this appeal we are not concerned with section 43 of the 2003 Act, which applies to specific fraud cases. We are concerned with section 44, which provides:

> "(1) This section applies where one or more defendants are to be tried on indictment for one or more offences

> (2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

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(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place

(a) a case where the trial is a re-trial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial."

14. The procedure for an application under section 44 is governed by section 45. Among the various provisions section 45(3) provides:

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"The parties to a preparatory hearing at which an application to which this section applies is to be determined must be given an opportunity to make representations with respect to the application."

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In addition, the statutory arrangements contained in section 29(1) of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) apply to preparatory hearings in the Crown Court, are made to apply to this application by section 45(4).

15. Section 46 addresses the discharge of a jury because of jury tampering. It provides:

> "(1) This section applies where
>
> (a) a judge is minded during a trial on indictment to discharge the jury, and
>
> (b) he is so minded because jury tampering appears to have taken place.
>
> (2) Before taking any steps to discharge the jury, the judge must
>
> (a) inform the parties that he is minded to discharge the jury,
>
> (b) inform the parties of the grounds on which he is so minded, and
>
> (c) allow the parties an opportunity to make representations
>
> (3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied
>
> (a) that jury tampering has taken place, and
>
> (b) that to continue the trial without a jury would be fair to the defendant of defendants;

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> but this is subject to subsection (4)

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(4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.

(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.

(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.

(7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial."

16. This legislation is unequivocal and unambiguous. Its meaning is not clarified by reference to the pre-enactment Parliamentary debate. The judge is required to make the order if the conditions in section 44(4) and 44(5) are fulfilled. There was some discussion in argument before us about the standard of proof. It was agreed by both sides that as these were criminal proceedings the criminal standard should apply and that the application made by the prosecution should not be granted unless the judge is sure that both statutory conditions are fulfilled. It is unnecessary to involve ourselves in this debate. We take the same view. The right to trial by jury is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard.

17. Both conditions in section 44(4) and 44(5) are predictive. The first condition addresses the risk that jury tampering may take place at any stage of the trial before the jury has returned their verdict. The real and present danger to be addressed therefore relates to the entire trial process. Where the court is sure that there is a real and present danger that the right to jury trial will be abused, or misused by jury tampering, the first condition is established.

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18. Unusually the legislative structure identifies three situations which exemplify circumstances in which this condition may be fulfilled. The list is neither exhaustive nor exclusive, and equally, just because one or other of the examples is demonstrated, none of them conclusively establishes the first condition, nor in the language of Sir Brian Kerr LCJ in **R v Mackle and others [2008] NI 183** does it create "a presumption" in favour of trial without a jury. The examples do however indicate that the evidence which may demonstrate the statutory danger is not confined to evidence which would be admissible at a defendant's trial. Perhaps however it is important to emphasise that although the right to trial by jury is entrenched in the way we have indicated, the process of dispensing with a jury in a case where it is established that a jury trial is likely to be abused or subverted, the end result is not an unfair trial, but a trial by judge alone, where the necessary procedural safeguards available in a trial by jury are and remain available to the defendant. It therefore does not follow from the hallowed principle of trial by jury that trial by judge alone, when ordered, would be unfair or improperly prejudicial to the defendant. The trial would take place before an independent tribunal, and as it seems to us, for the purposes of article 6 of the European Convention of Human Rights, it is irrelevant whether the tribunal is judge and jury or judge alone.

19. The second condition requires that, after making due allowance for any reasonable steps which might address and minimise the danger of jury tampering, the judge should be sure that there would be a sufficiently high likelihood of jury tampering to make a judge alone trial necessary. In Mackle the Court of Appeal in Northern Ireland drew attention to "the feasibility of measures, the cost of providing them, the logistical difficulties that they may give rise to and the anticipated duration of any necessary precautions" which all constituted relevant matters for consideration. The court was also satisfied that it was relevant to take account of the question whether the level of protection appropriate to protect the integrity of the jury might "affect unfavourably the way in which the jury approached its task. If a misguided perception is created in the minds of the jury by the provision of high level protection this would plainly sound on the reasonableness of such a step". We respectfully agree with this approach, and in the course of reaching our own conclusion, we examined some of the possible measures to ensure jury protection by asking whether such measures would be liable to "lead to an incurable compromise of the jury's objectivity". We further examined their likely impact on the ordinary lives of the jurors, performing their public responsibilities, and considered whether, in some cases at any rate,

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even the most intensive protective measures for individual jurors would be sufficient to prevent the improper exercise of pressure on them through members of their families who would not fall within the ambit of the protective measures.

20. The provisions in section 46 relating to the discharge of a jury where tampering appears to have taken place require attention, not least because although the second rather than the first of the legislative provisions dealing with the possible consequences of jury tampering, in this case and no doubt in others, the first event chronologically was and will be the decision to discharge the jury mid trial. The judge is then faced with two alternatives, either to continue the trial or to terminate it. As we have narrated, in this case Judge Roberts brought the trial to an end. We understand his reasons, and what follows is not intended to be seen as a criticism of the decision. However, given that one of the purposes of this legislation is to discourage jury tampering, and given also the huge inconvenience and expense for everyone involved in a re-trial, and simultaneously to reduce any possible advantage accruing to those who are responsible for jury tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial. The fact that he has been invited to consider material covered by PII principles, whether during the trial, or in the course of considering the application, should not normally lead to self-disqualification.

21. Our attention was understandably focussed on section 46 (2)(c) by Mr John Aspinall QC, in submissions which were effectively adopted on behalf of the remaining respondents. Section 46 (2)(c) requires the judge to permit representations to be made by the defendants before the trial jury is discharged. This is linked with section 45(3) which makes similar provision when an application for trial by judge alone is being made, and which is the provision immediately relevant to the present application. These provisions require no analysis. They speak for themselves. The problem which arises in the present case is one which will undoubtedly recur, and we must therefore address it.

22. The defendants, as they were at trial, and the respondents to this appeal, have not been shown the evidence considered first, by Judge Roberts when making his decision, then by Calvert-Smith J when making his, and indeed by this court making our own decision that the

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first condition real and present danger was established. If this appeal were to be allowed it is also pointed out that there has been precious little disclosure of the evidence which demonstrates that the likelihood of jury tampering cannot be satisfactorily minimised. It appears to have been common ground before Calvert-Smith J that, in relation to possible protective steps, it has long been understood that these would not normally be discussed or disclosed to the defence. What however is known is that he believed that appropriate and sufficient protective steps could reasonably be taken.

23. Mr Aspinall submitted that absent an opportunity to see at least some of the evidence on which these conclusions but, in particular, the conclusion in relation to the first condition - were or would be based, the respondents were deprived of the opportunity to make meaningful representations. That would contravene the statute and in any event this process undermined his client's article 6 rights, which Mr Aspinall pointed out, extended to procedural matters.

24. Mr Aspinall is right that the evidence was examined under PII conditions in accordance with PII principles. We addressed, as no doubt Judge Roberts and Calvert-Smith J addressed, the question whether there was any material favourable to the respondents and adverse to the prosecution in the context of issues under examination that should be disclosed. There was none. This material has been examined on three separate occasions by three separate tribunals. Each was satisfied that the evidence could not be disclosed and each satisfied that the first condition was established. It is inconceivable that Judge Roberts would have discharged the jury when he did unless the evidence of jury tampering was compelling. Calvert Smith J's finding to similar effect was made in the context of a decision which in the end was adverse to the prosecution. Although in truth, as Mr Aspinall reminded us, this is an appeal not a re-hearing, in this court we re-examined all the material for ourselves and formed our own view independently of Judge Roberts and Calvert-Smith J. We are content to adopt the analysis of the relevant evidence in relation to the first condition made by Judge Roberts and Calvert-Smith J in their closed rulings.

25. The problem with Mr Aspinall's submission is that the legislative structure is directed at jury tampering in whatever form it may take. Experience suggests that the seriousness of jury tampering problems is usually proportionate to the seriousness of the alleged criminality. There will be cases where the evidence to demonstrate the risk of jury tampering will be so sensitive that it

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can only be addressed under PII principles. Mr Aspinall would argue that important though these considerations may be, he has nevertheless been unable to address the evidence of the alleged danger. The application should therefore fail.

26. The immediate attraction of the argument is plain. If correct however it would produce a remarkable outcome. It would mean that the court's ability to discharge a jury because of jury tampering and order trial by judge alone could never be exercised if the evidence of the real and present danger were so sensitive that it could not be disclosed to the defendant. In short, the process could not apply where the actual or potential interference with the jury was of the most serious or sophisticated kind, and where, for example, disclosure of the evidence might imperil life or health or involve the disclosure of police operational evidence or methodology which, if disclosed, would be of considerable interest to the criminal world and damaging to the public interest. In such cases, faced with an order for disclosure, the Crown would be left with no alternative but to discontinue the prosecution. If so, the objective of the jury tampering would have succeeded. In short, therefore, we reject the submission that the evidence relied on by the Crown, or the bulk of it, must always be disclosed. This would indeed represent what Lord Bingham CJ in Comerford described as "the ideal". It is, as he observed, "an ideal which cannot always be achieved in practice". We agree that the evidence should be disclosed to the fullest extent possible, but it would be contrary to the legislative purpose to make an order for disclosure which would, in effect, bring the prosecution to an end, and enable those who had been involved in jury tampering to derail the trial and avoid the consequences prescribed by statute, trial by judge alone.

27. We have considered the use of special counsel. We do not rule out the possibility, in an appropriate case, that the court might seek assistance from counsel. However, this is not a situation in which evidence relating to the defence to the charges is under consideration, nor indeed the fairness of any future trial. What is in issue is the method of trial. We think it unlikely that special counsel will be able to provide any more assistance than counsel for the prosecution, in accordance with his responsibilities, can be expected to provide. Having considered whether special counsel would be of assistance to us or to the respondent, we came to the conclusion that we could not derive any assistance from special counsel. Accordingly none was appointed.

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28. It was further argued that, whatever the outcome of the submission based on the inadequacy of the opportunity for the respondents to address the issues, this court should not interfere with Calvert-Smith J's conclusion in relation to the second condition unless it was unreasonable in the Wednesbury sense. We must of course pay close attention to Calvert-Smith J's decision and the reasons for it. The ruling was made in the course of a preparatory hearing. Our jurisdiction is to confirm, reverse or vary the decision. The decision itself does not represent the exercise of a discretion, rather it requires the judge to decide whether the statutory conditions have been established. If his assessment was wrong, the appeal should succeed and an order for trial by judge alone would follow.

29. This part of the argument led naturally to consideration of the extent of the requirement, if any, that the judge making the order for trial by judge alone under section 44 (rather than section 46) should himself be that judge. In view of the provisions in section 45 this application is decided as part of a preparatory hearing under section 29 of the 1996 Act. We have taken due note of the well known decision in **R v Crown Court at Southwark, ex parte Commissioners of Custom and Excise [1993] 97 CAR 266** where Lord Justice Watkins observed that the "judge presiding at the preparatory hearing must be the judge who, save in exceptional circumstances, is to conduct the trial". He ruled out administrative convenience as a sufficient reason for changing the judge between the preparatory hearing and the jury trial. The contention on behalf of the respondents was that unless the judge who ordered trial by judge alone was himself the trial judge, there was a real danger that a second judge who did not agree with the order would be nevertheless obliged to conduct a juryless trial.

30. We have examined the reasoning in **R v Crown Court at Southwark**. Its basis is readily understood. A preparatory hearing is part of the trial. Where a judge is assigned to take the trial who has not conducted the preparatory hearing "it will be necessary for the second judge during the hearing before the jury to consider whether decisions of the first judge at the preparatory hearings relating to questions such as the admissibility of evidence should be reconsidered by him". The purpose of a preparatory hearing is to address and decide as many questions as possible relevant to the conduct of the trial. That, however, is not the purpose of section 44. In truth, crucial as the judicial decision may be, it is concerned with what for the purposes of **R v Crown Court at Southwark** would be described as an administrative question. Either there will be trial

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by judge and jury or there will be trial by judge alone. The evidence on this issue will be self-contained and it will very rarely have any bearing on the ultimate verdict. In short, the reasoning behind the decision in **R v Crown Court at Southwark** does not apply to the present situation. We need not address the question whether modern case management requirements may compel fresh consideration of the broad understanding that the same judge must conduct both the preparatory hearing and the trial.

31. In relation to the contention on behalf of the respondents, the submission is not, in our judgment, sustained, if for no other reason than that the issue trial by judge alone - has been conclusively decided. Any attempt under section 31(11) of the 1996 Act to vary or discharge the order would founder on the basis that the interests of justice in relation to the form of trial have already been addressed and, if necessary, appealed. In other words it is difficult to envisage any proper basis for re-examining the decision or inquiring into it. This would be satellite litigation about an issue already resolved, with no relevance to the ultimate verdict. As we have already indicated, we anticipate that in most cases where these issues arise and the jury is discharged the judge should continue the trial. Where he does not, the circumstances in which a trial judge could begin to countenance argument criticising or undermining the decision of trial by judge alone would be extreme. In any event, in the present situation, the case was adjourned to be heard before the Presiding Judge of the Circuit just because it raised issues of principle. The practical reality is that it is inconceivable nowadays for a presiding judge to be able to take a case of the length envisaged here without making it utterly impossible for him to carry out his responsibilities for his circuit. These in themselves fall within the ambit of the exceptional circumstances referred to in R vCrown Court at Southwark.

32. Confining ourselves to what we anticipate will be the rare case which arises for decision under section 44 (because the trial judge considering an application under section 46 will have continued the trial) and to ensure consistency of approach and acknowledge the importance of any interference with the principle of jury trial, for the time being, arrangements should be made for the case to be referred to one of the Presiding Judges of the Circuit for a listing decision. The application will normally be heard and decided by the Presiding Judge. If the application is granted then, subject to any appeal, the Presiding Judge should identify a senior and experienced judge to conduct the trial.

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**Conclusion**

33. As the judgment has already made plain, the first pre-condition to the order sought by the prosecution is emphatically established. By that we mean that the danger of jury tampering and the subversion of the process of trial by jury is very significant. The nature of the risk bears on the protective measures necessary to obviate it. At a lower level of risk than the risk which obtains here, it might be possible to agree with Calvert-Smith J that the lesser level of protective measures might suffice, although the cost estimated at 1.5 million and the loss of 32 police officers from their other duties for six months or longer is far from trivial. But in our judgment these protective measures do not sufficiently address the extent of the risk. Moreover having considered the evidence, and the oral testimony before us, the more burdensome of the two protective "packages" does not sufficiently address the potential problem of interference with jurors through their families. Even if it did deal with the dangers posed to the integrity of trial by jury, it would be unreasonable to impose that package with its drain on financial resources and police manpower on the police, and, no less important, it would be totally unfair to impose the additional burdens consequent on the deployment of this package on individual jurors. The burdens of a lengthy trial are heavy enough for them: quite apart from the risk of prejudice to the defendant identified in Mackle the effect of the second "package" on their ordinary lives would be quite unacceptable.

34. Accordingly, this appeal will be allowed. This trial will take place without a jury. We shall invite Calvert-Smith J, as Presiding Judge, to identify the judge who will conduct the trial.

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