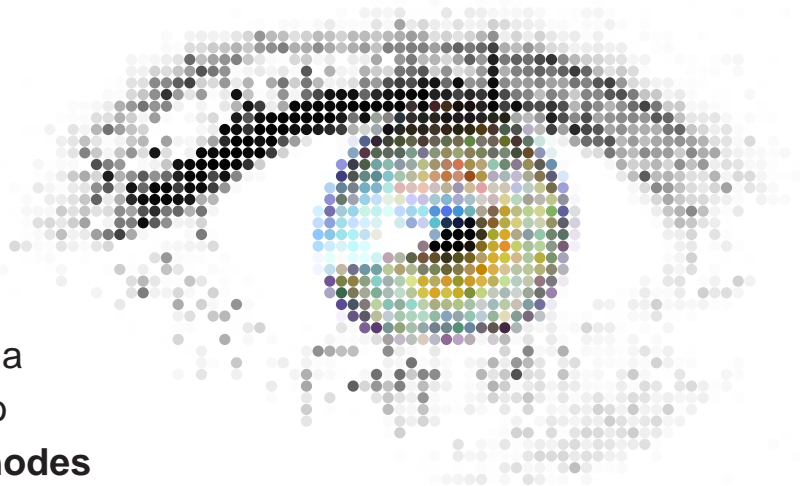


Eye of the beholder



Conducting a trial without a jury will be a flawed process if judicial bias is seen to be a realistic possibility, says **David Rhodes**

PERCEPTION IS EVERYTHING. So said the Court of Appeal in *R v KS* [2009] EWCA Crim 2377, in which it held that: "It is clear that the absence of judicial bias does not answer the separate question whether an informed objective bystander might legitimately conclude that such bias is a realistic possibility."

This case was one of the first trials to apply the controversial authority of *R v T* [2009] EWCA Crim 1035, in which the Court of Appeal permitted a judge faced with jury tampering to discharge the jury and conduct the trial alone. It is important because it shows the problems inherent in judge-only trials and the efforts of the Court of Appeal not to undermine its own recent judgment.

KS was one of a number of defendants alleged to be involved in a very substantial VAT fraud known as an MTIC or 'carousel' fraud and the arrangements to launder the proceeds of that criminal enterprise. His was the tenth trial in a series of trials arising out of different aspects of the fraud. Judge A had presided over all ten trials as well as sentencing, confiscation and pre-trial hearings.

No alternative remedy

The tenth trial had lasted several weeks and reached the point at which the jury were considering their verdict. Prosecution counsel then asked to see the judge *ex-parte* in closed court without notice to the defence in order to make a PII (public interest immunity) application. He put before the judge intelligence material which established that jury tampering had taken place. The defence were necessarily hampered because the material on which the judge based his conclusion that jury tampering had taken place could not be disclosed. The judge considered alternatives to discharging the jury but, because the trial had already reached the stage at which the jury were in retirement, there was no

alternative remedy other than to discharge the jury.

The judge then had to consider whether, applying sections 44-46 of the Criminal Justice Act 2003 and the guidance in *R v T*, the trial should continue by judge alone or whether he should order a fresh trial with a new jury. The defence submitted that with all the knowledge accumulated by a judge who had presided over the previous nine trials it would be impossible to reach an independent fair judgment, and that, in any event, the perception would inevitably be that the process had been unfair.

In his ruling, the judge cited *R v T* that "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". This, as he observed, "makes the judge's task doubly onerous but that is something Parliament has deemed we should not shirk from". He reminded himself that a judge should be assumed to be capable of putting out of his mind, and not allow himself to be prejudiced by, any material which had not been placed before the jury. He decided that the trial should proceed without a jury.

Giving the judgment of the Court of Appeal, the Lord Chief Justice (who had also presided over the interlocutory appeal in *R v T*) was at pains to assert that: "We see no reason for resiling and we do not resile from the observations in *R v T*." He held that in almost every respect the trial judge had dealt with the issues correctly.

In respect of the judge's decision to carry on alone without the jury, the Court of Appeal observed that the judge had been privy to a large amount of information which had not been before the jury. He had heard the nine other trials in which the Crown had alleged that KS was crucial to the criminal enterprise. Indeed, he had sentenced others whose involvement with KS the judge had expressly commented upon in the absence of the appellant. Judge A had also been made aware of

KS's previous convictions for fraud and of (unsubstantiated) allegations that KS had been responsible for jury tampering in the first trial.

Nonetheless, the Court of Appeal said: "In general terms, we should normally be prepared to accept the judge's own assessment whether he would be able to reach a true verdict in accordance with the actual evidence called before the jury."

Fundamental flaw

However, the decisive factor in this case – in contrast with the position in *R v T* – was the question of *perceived* rather than actual bias. It was for that reason alone that the Court of Appeal allowed the appeal. Lord Judge said: "We repeat that in circumstances like these the trial should proceed to a conclusion, however, in that case [*R v T*], it was unnecessary to address the perception issue which was troubling Judge A. And the court did not do so because the principles are elementary. In this jurisdiction, as this case itself demonstrates, we cannot countenance, let alone permit, the verdicts in a criminal trial to be returned by a jury which is actually or apparently biased. An identical principle must apply whenever the verdict is to be returned by a judge sitting on his own."

But doesn't that expose the fundamental flaw in all judge-alone trials? For once the trial judge has seen PII evidence upon which the defence cannot make submissions, and then concluded that the defendant is responsible for tampering with the jury, he has made a finding of fact adverse to the defendant. Even if he is able to put that fact out of the judicial mind, wouldn't the informed objective observer perceive that there may be a realistic possibility of bias if the judge went on to determine the ultimate question of the defendant's guilt or innocence?

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