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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT SHREWSBURY
The Honourable Mr Justice Mais and HHJ Chetwynd-Talbot

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2021

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE ANDREW BAKER
and
MR JUSTICE GOOSE

- -

Between:

1. Dennis Michael WARREN	**Appellants**
2. John Malcolm CLEE	
3. William Michael PIERCE	
4. Terence RENSHAW	
5. Patrick Kevin BUTCHER	
6. Bernard WILLIAMS	
7. John McKinsie JONES	
8. Kenneth Desmond Francis O'SHEA	
9. Alfred JAMES	
10. Samuel Roy WARBURTON	
11. Graham ROBERTS	
12. John Kenneth SEABURG	
13. Eric TOMLINSON	
14. George Arthur MURRAY	
- and -	
REGINA	**Respondent**

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Mr Danny Friedman QC & Mr Benjamin Newton (instructed by **Bindmans LLP** pursuant to a representation order) for the **Appellants 1 to 12**
Mr Piers Marquis & Ms Annabel Timan (instructed by **the Public Interest Law Centre** pursuant to a representation order) for the **Appellants 13 and 14**
Mr John Price QC & Mr Hugh Forgan (instructed by **the Crown Prosecution Service**) for the **Respondents**

Hearing dates: 3rd & 4th February 2021

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Approved Judgment

Lord Justice Fulford V.P.:

Introduction

1. These appeals come before the Court of Appeal following references by the Criminal Cases Review Commission ("CCRC") dated 4 March and 22 May 2020. The appellants were all convicted or pleaded guilty in the course of three trials that were held at Shrewsbury Crown Court in 1973 and 1974 which concerned trade union-related public order allegations. Six of the fourteen appellants have regrettably died, and the court granted applications pursuant to section 44A Criminal Appeals Act 1968 to approve named individuals to take up their appeals.

2. This case has a complicated procedural history, which is unnecessary to rehearse, that includes a claim for judicial review having been lodged on behalf of four of the appellants following the decision on 31 October 2017 by the CCRC not to refer any of the convictions to the Court of Appeal pursuant to its powers under section 9 Criminal Appeal Act 1995. During the substantive hearing in the Divisional Court on 30 April 2019, the CCRC conceded the claim and agreed to reconsider the applications. The decision was made thereafter to refer the cases.

3. This judgment is not an appropriate vehicle for providing a summary of the political and industrial relations history that led to the introduction of the Industrial Relations Act 1971, which received Royal Assent in September 1971. On any view, this legislation introduced far reaching changes, some of which were significantly controversial, such as new registration requirements, provisions concerning the future conduct of trade unions and the right to collective bargaining. The Act was repealed by the incoming Labour Government in 1974.

4. It was, however, against this backcloth that the first national building workers' strike took place between 26 June and 16 September 1972. The strike action was part of a campaign to achieve an increase in the minimum wage to £30 per week for 35 hours work and to abolish the Lump Labour Scheme ("*the lump*"), the system of casual cash-paid daily labour that lacked appropriate accompanying employment rights. There were also concerns as to safety procedures within the building industry, given the high mortality rate. The 12-week stoppage affected many major sites and led to negotiations with representatives of the employers.

5. One of the tactics deployed by the strikers was the use of flying pickets, that is to say to transport ("*bus*") unionised workers, particularly from the Union of

Construction, Allied Trades and Technicians ("UCATT") and the Transport and General Workers' Union ("TGWU"), to particular building sites in order to seek support from those working on the lump. On 6 September 1972, the unions bussed some of their members from North Wales and Chester to picket building sites in Shrewsbury. The three trials concerned incidents alleged to have occurred during that day. Insofar as the materials enable us to do so, we have provided a summary of the cases relating to the individual appellants. We are grateful to all counsel for their considerable assistance in helping piece together this history from the slender extant material.

Trial 1

6. The first trial ("Trial 1"), before Mais J and a jury, took place between 3 October 1973 and 19 December 1973. There were six defendants. Dennis "Des" Warren (deceased), Eric "Ricky" Tomlinson and John McKinsie Jones were convicted of conspiracy to intimidate, unlawful assembly and affray. They were sentenced to three years', two years', and nine months' imprisonment respectively on each count, to be served concurrently. Kenneth "Ken" O'Shea (deceased), John Carpenter and John Elfyn Llywarch were acquitted of conspiracy and affray and convicted of unlawful assembly and they were each sentenced to nine months' imprisonment, suspended for two years.

7. Dennis Warren, Eric Tomlinson, John McKinsie Jones and Kenneth O'Shea are appellants in the present proceedings. John Carpenter and John Llywarch are not before this court, given they did not make an application to the CCRC.

8. Following the trial, all six men, however, appealed their convictions and sentences to the Court of Appeal (Criminal Division) ("CACD"). There was a split hearing because certain grounds of appeal for Mr Warren and Mr Tomlinson depended on transcripts being obtained of a substantial part of the evidence that had been given. Different sections of the court's judgment were, as a consequence, delivered on 4 March 1974 and 29 October 1974. In the event, the CACD dismissed the conviction appeals in relation to the counts of conspiracy to intimidate and unlawful assembly and allowed the appeals against the affray convictions. The latter convictions were quashed. Mr O'Shea, Mr Carpenter and Mr Llywarch withdrew their applications for leave to appeal against sentence. The applications for leave to appeal against sentence in the cases of Mr Warren, Mr Tomlinson and Mr Jones were refused.

Trial 2

9. The second trial ("Trial 2"), before Judge Chetwynd-Talbot and a jury, again at Shrewsbury Crown Court, took place between 14 January 1974 and 13 February 1974. There were nine defendants. Michael Pierce and George Arthur Murray were convicted of unlawful assembly and affray. They were both sentenced to

six months' and four months' imprisonment respectively, to be served concurrently. John Clee, Alfred James (deceased) and Samuel Roy Warburton (deceased) were convicted of unlawful assembly and sentenced to four months' imprisonment, suspended for two years. Derrick Hughes, Dennis Morris and Thomas Brian Williams almost undoubtedly pleaded guilty either at the beginning of the trial or at the close of the prosecution's case. John Garry Davies was acquitted.

10. Michael Pierce, Arthur Murray, John Clee, Alfred James and Samuel Warburton are appellants in the present proceedings. Derrick Hughes, Dennis Morris and Thomas Brian Williams are not before this court, given they did not make an application to the CCRC.

11. There was no earlier appeal to this court against either conviction or sentence with the exception of Arthur Murray who, limited surviving information indicates, had leave to appeal against sentence refused by the single judge.

Trial 3

12. The third trial ("Trial 3"), again before Judge Chetwynd-Talbot and a jury at Shrewsbury Crown Court, took place between 26 February 1974 and 22 March 1974. There were nine defendants. Terence "Terry" Renshaw and Bernard Williams were convicted of unlawful assembly. They were sentenced to four months' imprisonment suspended for two years. John Seaburg (deceased) was convicted of affray and unlawful assembly. He was sentenced to concurrent terms of imprisonment of six months and four months respectively, suspended for two years. Graham Roberts (deceased) pleaded guilty to unlawful assembly in advance of the third trial. He was sentenced to four months' imprisonment, suspended for two years. Patrick Kevin Butcher pleaded guilty to threatening behaviour and was sentenced to three months' imprisonment, suspended for two years. Peter Sear, Bryn Thomas and Edward Williams pleaded guilty to unlawful assembly. The prosecution offered no evidence against William Hoosen, who was acquitted.

13. Terence Renshaw, Bernard Williams, John Seaburg, Graham Roberts and Patrick Kevin Butcher are appellants in the present proceedings.

14. There was no earlier appeal to this court against either conviction or sentence.

A Summary of the Core Issues

15. Two central points are taken on this Reference. First, it appears that handwritten witness statements made by some of the civilian eyewitnesses were destroyed during the early stages of the proceedings, for which

substitute statements were provided. This was not revealed to the accused, who, along with the judge in the first trial, were seemingly reassured that they had had access to all the statements, including those which the prosecution had no obligation to disclose under the law and practice that existed at the time (the accused and Mais J were thus told that there had been what would nowadays be voluntary disclosure of prosecution materials beyond the requirements of section 3(1)(a) Criminal Procedure and Investigations Act 1996; the latter provision contains the obligation to disclose prosecution material that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused). Second, on the same day that the prosecution closed its case in the first trial, a programme entitled "*Red under the Bed*" was broadcast on national media, which it is suggested was highly prejudicial to the appellants, thereby undermining the safety of the conviction.

The Case against the Appellants

Trial 1

Generally

16. In relation to the first trial, it is fortunate that the complete summing up of Mais J, a selection of transcripts and the split decision of this court on the first appeal have all survived. There was a single witness bundle for the three trials.

17. The prosecution case was that on 31 August 1972, the area strike committee of North Wales' building workers held its weekly gathering in the upstairs meeting room of the Bull & Stirrup public house in Chester. The committee comprised delegates from the local strike committees in the Chester and North Wales area. After hearing reports from delegates from the Oswestry area strike committee requesting support, it was agreed that picketing would take place in Shrewsbury on 6 September 1972. All of the Trial 1 defendants, bar John McKinsie Jones, attended the meeting. McKinsie Jones was the committee treasurer and had been given money from workplace collections before the meeting began. He took the money home for safekeeping instead of attending.

18. On 6 September 1972, six coach loads of pickets travelled from Denbigh, Chester, Flint, Wrexham and Oswestry. Having first stopped at Oswestry, the coaches travelled on to the Shrewsbury and Telford area and visited nine building sites, which were in a twenty mile radius of each other. They were Kingswood (where a shotgun was produced by the site foreman, a Mr Parry), Shelton roadworks, The Mount, Severn Meadows, The Weir (these four sites

were all in Shrewsbury), Brookside, Maxwell Homes and Woodside (which were all in Telford). As a consequence of what occurred, a man was hospitalised and damage quantified at £1,770 was caused (the current value is £20,255).

19. Not all of the pickets attended all of the sites. For example, John McKinsie Jones, Ricky Tomlinson and Kenneth O'Shea were not at the Shelton site. Kenneth O'Shea and John Carpenter did not go the Woodside site and The Weir respectively. The pickets were in the Shropshire area for some five hours which included a break for lunch. Unlike a factory, where there are usually one or two entrance gates next to which pickets are able to stand, building sites tend to be open and often have no fencing or obvious entrance. Consequently, the practice of the pickets, as part of a national agreement with the employers, was to visit the site office to request a meeting with the employees working on the site, either in the canteen or in the open air. Alan Abrahams (now deceased), a full-time union official from Liverpool, was to have been the leader of the pickets. However, on the day he was not able to attend, and Dennis Warren assumed the role of spokesman.

20. Police officers accompanied the pickets to many of the sites, but no arrests were made at the time. Insofar as they assist, the available extracts from the police radio communications do not suggest there were any significant concerns over public order as events unfolded. However, the West Mercia Constabulary Report of 18 December 1972 entitled "*Disorderly conduct by pickets at building sites in Shropshire on Wednesday 6th September 1972"* prepared by Chief Superintendent Hodges and Detective Chief Inspector Glover, which was sent to the Director of Public Prosecutions ("*the West Mercia Police Report*"), suggested that the police were unprepared for the "*massive disorder*" on the part of the flying pickets and as a result prolonged enquiries were necessary in order to trace and prosecute those responsible. This report first became available for the purposes of the present proceedings in March 2017, following a request under the Freedom of Information Act 2000.

21. Complaints were made by the local representative of the National Federation of Building Trades Employers ("NFBTE") as to the suggested failure by West Mercia Police to take action against those who had been involved in the pickets. On 11 September 1972, Philip Smith, the Midland Regional Director of the NFBTE wrote to the Chief Constable of West Mercia Police, referring to the pickets as "*terrorists*" and noting there did not appear to have been any arrests and expressing the concern that a mob "*was able to carry out violence on this scale with apparent impunity*". Mr Smith provided a witness statement dated 13 September 1972.

22. The national strike ended on 16 September 1972 when an agreement was reached with the NFBTE. An increase in rates of pay was agreed (£6 per week for craftsmen and £5 for labourers).

23. The NFBTE nationally compiled an "*Intimidation Dossier*" which was forwarded at the end of October 1972 to the Chief Constable and the Home Secretary, Robert Carr.

24. West Mercia and Gwynedd police interviewed many of the pickets. On 14 November 1972, 31 men were arrested and questioned in relation to the events on 6 September 1972. They were released without charge, although some remained on police bail. On 14 February 1973, 24 of the men were either rearrested and charged, or summonsed, with offences arising out of the picketing. These men have come to be known as "*The Shrewsbury 24*" and their cases were dealt with in the three trials with which this appeal is concerned.

25. Trial 1 was the only trial that contained a conspiracy count. The prosecution asserted that the defendants were the leaders of the plan to visit the sites in question and unlawfully to intimidate those who were working there. It was not disputed, however, that amongst the pickets who visited the sites at Shrewsbury and Telford some only intended to picket peacefully, saw and heard nothing before the journey to lead them to think that events were to unfold otherwise, and disapproved of, and were not associated with, any unlawful behaviour that occurred. Eighteen pickets were called to give evidence by the prosecution, and one was called by the defence. There was undisputed evidence that Terence Parry had produced a shotgun at the first Kingswood site, an event which the defence submitted acted as the trigger for the ensuing events.

Dennis Michael Warren

26. The prosecution case was that Mr Warren was a leader at the Kingswood Site, as suggested by Arthur Hartshorn who was pulled from a vehicle. Anthony Alvis had identified Mr Warren as having been present, but he did not see him do anything in particular. Arthur Bateman claimed Mr Warren shouted, "*It's a revolution*". There were loud voices and noise at the Shelton site, but he did not see any damage. He did not know how a van came to be overturned. Police officers spoke to Mr Warren after the pickets had been to Kingswood and Shelton to warn him and other perceived leaders about any violence. Others said to be present when this occurred were Mr Tomlinson, Mr McKinsie Jones, Mr Llywarch and Mr Carpenter. There was evidence from various pickets who

got back on the coach that Mr Warren and Mr Tomlinson had told some of those present to cool off.

27. Dennis Warren had been involved in the Chester and North Wales Strike Action Committee. He denied that intimidation or serious disorder had occurred, and he suggested that the damage had been slight. He rejected the suggestion that there was any intimidation at Kingswood, or that a man was pulled from a roller. Mr Warren explained that some men in small and isolated sites feared to come out on strike. His case was that there was no intention to terrify the workers, who were already intimidated by their employers. He suggested that allegations of violence in the press meant that some were fearful before the pickets even arrived.

28. He testified that the pickets were told to spread out and to inform those working at the site that there was a meeting, whilst he went to see the management. He denied making threats of violence or using violence.

29. At The Mount, Mr Warren said he went into the office and asked Terence Callaghan to sign the company agreement, before going to the canteen to address the workers. He did not see anyone flee in terror. Mr Callaghan initially told the police that it was Mr Llywarch who had said that a revolution was occurring but later he ascribed this statement to Mr Warren.

30. At Severn Meadows, Mr Warren testified that he spoke to Herbert Starbuck who was not prepared to sign any agreement. He then went to The Weir where he hastened to the site of a commotion on the other side of the river, but on his arrival the men were already walking away from whatever had occurred. He denied attacking the canteen.

31. Mr Warren maintained that he saw no damage at Brookside, nor stones thrown. He denied any involvement by himself or Mr Tomlinson in an attack on Clifford Growcott (who was admitted to hospital with a head injury where he was detained for a week, suffering from suspected concussion) and he suggested Mr Growcott had made false allegations. Henry James – a picket whose evidence had been the subject of considerable controversy, resulting in a specific warning by the judge to the jury – alleged that Mr Warren had said to Mr Tomlinson that throwing a missile was a "*good job done*".

32. Woodside was suggested to have been the scene of a peaceful picket with no threats, damage or intimidation. Mr Warren indicated he did not go onto the site except to attend the meeting. There were contradictory accounts as to what occurred, in that Alan Goodwin claimed he saw Mr Warren throwing stones at the site whereas Peter Morgan thought Mr Warren's speech was "*partly good*" and he made no mention of seeing any violence.

John McKinsie Jones

33. John McKinsie Jones was a painter and decorator, a shop steward, a member of the North Wales and Chester Strike Action Committee and treasurer of the Flint Pickets. He testified there was shouting and noise at the Shelton site but he saw no damage being caused, and he did not know how a van came to be overturned. He was part of a group of men that was spoken to by police officers about the nature of the picketing after the visits to the first two sites. The judge noted that although there was not extensive evidence of Mr Jones doing any damage, he was "*there or thereabouts all through the day*".

34. The judge summarised the case advanced by Mr Jones particularly by reference to his account of what happened at the first site. In a nutshell, he denied witnessing any intimidation or serious disorder. If such events had occurred, he did not participate in or see them.

35. At The Mount, he went into the site office but took no part in the discussion with Mr Callaghan. There were allegations of abusive language directed at Mr Smith and later Mr Starbuck (at Severn Meadows) which he denied. He also denied going to the canteen that had been damaged or harassing the workmen at Severn Meadows. As regards the suggested identification evidence that he had been involved in some of the relevant events, he said there must have been somebody else carrying an attaché case that day.

36. He went 50 yards onto the Brookside site before returning to the coach to get his case. He denied that he threw a stone or broke a window, or that he said to others "*if you come back you will be beaten up so you will never work again*" or "*we're closing the site*". He disputed the evidence that he had been with Mr Warren or Mr Tomlinson, or that he shouted at a machine driver and threw hard core and a brick.

Ken O'Shea

37. Ken O'Shea was a shop steward and Chairman of the Denbigh Strike Action Committee as well as a representative of the Chester and North Wales Strike Action Committee. He was not alleged to have personally caused any specific

damage; instead, he was said to have been a leader and to have given encouragement to others who committed offences.

38. He was the only defendant who did not give evidence, although he did make a statement to the police. He suggested that although disorder and damage had occurred which had shocked him, he was not a participant.

39. In the course of his interview, he suggested he had visited all the sites but he was not entirely certain. The judge summarised his account as being that he went to all sites except Shelton and that "*he did not go across the river at the Weir, and Maxwell Houses did not get out of the coach there, and at Woodside there is no evidence that he took part in any meeting or went on to the site*".

40. He denied being a "*front runner*" when they first went on site, or that his presence at the front was encouraging to others due to his position as Chairman. He similarly denied being in the front at The Mount, where he said he walked straight through to a location by the river; he did not go to the canteen and did not see the compressor turned over into the water.

41. He described what he saw at Brookside as terrible, but he denied any personal responsibility for what occurred.

42. At The Oaks he went forward with the others to see the police, not – he maintained – as a leader but instead to hear what they had to say. He was in a photograph purportedly showing those in charge at the meeting at Brookside.

Eric Tomlinson

43. Eric Tomlinson was recruited to a trade union by Mr Llywarch in the summer of 1972 while he was working on the Wrexham bypass. He became a shop steward, and then the Chairman of the Wrexham Strike Action Committee.

44. The judge summarised the essence of the case advanced by Mr Tomlinson particularly by reference to his account of what happened at the first site, in that he denied that either intimidation or serious disorder had occurred. He suggested that any damage was slight.

45. He denied that he had made an initial speech at Oswestry and, as with Dennis Warren, the burden of his evidence was that the allegations of damage and violence had been exaggerated. In interview he told the police that the damage

was slight and was unplanned. At Kingswood, he shouted to one of the men who had thrown a brick at a JCB.

46. He challenged the assertion by Mr Parry (who, as set out above, produced a gun at the Kingswood site to frighten away the pickets) that he was part of the crowd that was causing damage.

47. He described the meeting at the Mount as being ideal, and he refuted the claim that he had referred to people being "*carried out in a box*", as alleged by Alan Hordley. At The Weir he saw a compressor on its side and men running away who he thought had turned it over. However, he denied having crossed the river at The Weir and denied the allegation made by Arthur Newton that he had attacked a hut door with a shovel.

48. At Brookside he saw some damage as he went through the site, but nothing that looked deliberate, and he denied using any violence in relation to Mr Growcott. He saw a man smash a window and told him to stop. He disputed going further onto the site than the site of the school. He said there were was no intimidation and he denied the various specific allegations advanced against him, which included the description by Roger Castle of threats having been made by a bearded man with a Welsh accent dressed in a white shirt and jeans, who seemed to know about the man who had been injured by a brick. Mr Castle identified this individual as Mr Tomlinson from photographs shown to him by the police. This was the subject of dispute at trial, and Mr Tomlinson emphasised his strong Liverpudlian accent and the fact that he had been wearing a flowered shirt, together with a light cardigan and light trousers.

49. Mr Tomlinson denied going on to the site at Woodside, and he maintained he simply spoke to two men outside the site. He disputed that threats were made at the canteen. He challenged the suggestion that stones had been thrown or windows had been broken, or that he had said "*we will be back tomorrow or someone will*".

John Carpenter and John Elfyn Llywarch

50. As set out above, neither Mr Carpenter nor Mr Llywarch have approached the CCRC.

Trials 2 and 3

51. Due to the absence of the original Crown Court papers and in light of the absence of a judgment following a contemporaneous appeal to this court, we have not attempted to summarise the individual cases against the relevant appellants. The Crown's opening speech for Trial 2, however, has been preserved and it is clear that the case focussed on the allegations of affray and unlawful assembly at the Brookside site (*i.e.* the first of the sites visited in the Telford area).

52. Although the allegations were focussed on this site at Brookside, the Crown also relied on a continuing course of conduct over the course of the day which included the five earlier sites at Kingswood, Shelton, The Mount, Severn Meadows and The Weir.

53. The Crown's case in Trial 2, and it is assumed Trial 3, was based at least in part on the defendants' alleged association with the leaders.

54. At the outset of his opening speech in Trial 2, Mr Maurice Drake Q.C., leading counsel for the Crown, acknowledged that the jury would inevitably be aware of the earlier trial, given the publicity that attended it. He indicated that the charges in Trials 1 and 2 were not precisely the same, and he encouraged the jury to put the earlier proceedings out of mind, save to the extent that the trial and its circumstances was referred to in the present case. However, he acknowledged that many of the prosecution witnesses were the same in both cases, and some of those convicted in the first trial had been identified as the leaders of the events in which the accused in the second trial were said to have been involved. For instance, Mr Drake observed "*You may think it is not insignificant – it is a matter for you to say – the position of some of these men in the dock right up amongst the leaders addressing the crown, uttering their threats plus promises at that stage"*. In that sense, the convictions in Trial 1 – the findings of guilt as regards the "*leaders*" – would have had an impact on Trial 2. As Mr Drake made clear at the conclusion of the opening, "*These men, as I have indicated to you, are not put forward as the organizing ring leaders of what happened that day. Those organising ring leaders have been dealt with in a separate proceeding*." Throughout the opening Mr Drake referred, therefore, to some of those who had been convicted in the first trial as the ring leaders.

55. The Crown called witnesses in Trial 2 who attributed particular instances of violence to the various defendants. By way of example, it was suggested that the appellants Derrick Hughes and Michael Pierce had been identified as having been in the site office with some of the leaders and that they behaved violently; Samuel Warburton was alleged to have climbed onto some

scaffolding, thereafter causing damage to brickwork; Arthur Murray was seen carrying a short iron stake; Brian Williams was identified as throwing a brick which hit a man who was standing on scaffolding; Alfred James was seen carrying a pole and was alleged to have pushed over some brickwork; and John Clee was said to have uttered threats to a crane driver.

56. Very little is known of the prosecution and defence cases in Trial 3, albeit it is highly likely to have involved many similarities to Trial 2 in terms of the approach of the prosecution and the nature of the evidence.

57. The lack of materials in relation to Trials 2 and 3 is rendered of lesser significance than otherwise would have been the case by the concession by Mr Price Q.C. and Mr Forgan on behalf of the respondent that if the convictions relating to Trial 1 are to be quashed, it would be appropriate to quash the convictions relating to Trials 2 and 3 given the generic nature of the grounds of appeal. It follows that this judgment tends to focus on the circumstances of the first trial.

The Grounds of Appeal

Ground 1: The "Destroyed" Statements

Submissions

58. The West Mercia Police Report (see [20] above) sets out many of the problems that faced the investigating police officers, which had led to prolonged enquiries with a view to tracing and prosecuting those responsible for the violence. The report rehearses in significant detail the areas covered in the various witness statements that had been taken, highlighting the parallel investigations by different teams and the cooperation between them. A schedule was prepared, which included, *inter alia*, a description of the events at the various sites, a list of the witnesses in each instance, together with a summary of their individual accounts together with any identifications that had been made. The police relied substantially on press photographs, including of the marches that had been held to promote publicity concerning the strike, instances of peaceful picketing and the events on 6 September 1972 at Telford. These photographs were shown to all the witnesses "*with a view to identifying persons involved in disorderly picketing – both in Shropshire and North Wales*". In a section of the report, entitled **The Statements**, the following is set out:

> "104.The statements taken from witnesses fall into four main categories (*viz.* non-striking workmen, miscellaneous witnesses, pickets and police

officers). All these statements, whilst in Criminal Justice Act form and signed, include matter which may be held to be irrelevant and also some hearsay. By the very nature of the investigation, this form of statement was considered essential in the initial stages and is left on file for the information of counsel.

(a) Non-striking workmen

105. All workers on the seven affected building sites were interviewed and statements recorded, embodying evidence of the disorder and damage and, where applicable, the identification from the photographs of those responsible. These constitute the majority of witnesses.

106. One point must be made here: due to the circumstances, confusion, and fear generated by the pickets, it would be unrealistic to think that all these could have been identified. Indeed, in the circumstances we have been singularly fortunate in the number that have been identified.

[…]

(c) Pickets

[…]

110. […] it was decided to interview all the identified "passive" pickets.

[…]

111. Several […] made statements […]

112. One point to be made about these statements is that these men visited so many sites and […] finer details is short on accuracy. Basically, however, the story they tell is corroborated by other witnesses.

(d) Police Officers

116.These are largely non-evidential as to specific offences but do fill in the background of the sites and […] details of the interview with the accused persons."

59. The report goes on to suggest that some of what occurred was spontaneous and had not been planned in advance, for instance the events at Kingswood, Shelton roadworks, The Mount and Severn Meadows. Similarly, the visit to Telford was said to have been spontaneous. The authors then added:

"126.The evidence against several […] organisers and leaders […] is not so strong. It mainly consists of the very act of organising their party's

> attendance, in circumstances where disorder on a large scale must have been foreseen, and the fact that they were present on the sites with the pickets without trying to restore order (or paying lip-service in that respect). […]"

60. Mais J ordered that before entering the court to give evidence the witnesses should see their witness statements and the photographs that they had earlier viewed for identification purposes.

61. As set out above, during the first trial, and this was likely to have been the general position in Trials 2 and 3, the appellants accepted their presence at the various picketing sites but challenged the identification evidence to the extent that it was suggested they had been involved in criminality. As Mais J summed up the defence contention:

> "The accused, on the other hand, say that they took no part in any violence; they threatened no one; they acted peacefully; they did no damage. They say that if there was any violence, any threats, any intimidation, any damage, they were not parties to it, they did not lend their support and were not responsible in any way."

62. To a significant extent during Trial 1, and again in all probability repeated in Trials 2 and 3, the witnesses were cross-examined on the basis of their statements, and any contradictions and omissions were highlighted. Additionally, Mr Platts-Mills (appearing for Mr Warren) during his closing speech made significant criticisms as to what he suggested was the selective and partial approach of the police. The judge dealt with this issue during the summing up as follows:

> "Mr Platts-Mills on behalf of Warren said this: there was a partial and selective weeding of witnesses. Admittedly the prosecution only called 200 witnesses. The police had interviewed and obtained statements from some 700. The Defence have been provided with the names of all such, so it is said. It is the duty of the Prosecution to adduce relevant evidence before you. That is the duty of the Prosecution. **The Defence, providing they are given the facilities, know what other people have said.** It is up to them, if need be, but the Prosecution's duty is to produce the relevant evidence before you." (our emphasis)

63. Before the three trials, the police revisited some witnesses in order to obtain, *inter alia*, identification evidence from them. Unlike the modern practice of taking a further or additional statement, the police – potentially, we observe, in many instances – elected instead to amend the earlier statement. A witness

called Roger Castle provides an example of this. The first version of his statement that has been produced is dated 29 September 1972. In it he described the actions of some of the pickets, including what was allegedly said by their "*spokesman*". He gave no description of this individual. The statement was then amended on 13 March 1973 (as indicated in the body of the statement) when PC Jones visited Mr Castle and showed him a number of photographs. This section of the statement, as it is to be inferred, commences with the words "*I have now been shown some photographs marked A – N*". As set out in what is apparently, therefore, an amendment to the statement, he suggested that one of the individuals was the spokesman, who had been dressed in a white shirt and (he thought) in jeans, and who had a Welsh accent (see [48] above).

64. We interpolate to observe that this was a significant alteration, not only because it involved his identification of Mr Tomlinson as the spokesman, but he also described what he said was his clothing and accent.

65. The same course was apparently taken with a witness called Henry James (one of those picketing: see above at [31]). His statement was purportedly taken on 2 November 1972, although the date does not appear on the version of the document provided to defence counsel. There is no indication in the body of the statement that it was altered, but in evidence Mr James said that a section had been added to the end of the statement without his consent. There was no subscription, as with Mr Castle's statement, to indicate it had been altered. It is perhaps notable that the section that Mr James suggested had been added begins with the words "*I have now been shown a set of photographs lettered A – N*".

66. Again, the importance of this development is that there had been a significant change in the witness's account during the process of seemingly adding to the original written/typed account, in that in the addendum Mr James asserted that Mr Pierce was one of the front runners at Telford and had charged up the site waving a stick. Mr James said that he had not seen this alleged occurrence and that it had been added to his statement without his permission.

67. It is unsurprising, therefore, that during the first trial, the appellants were forensically interested in the existence of any additional accounts from the witnesses. In support of this appeal, they rely on four instances when the issue arose as to the availability of earlier statements or reports from particular witnesses, which resulted in a response from the judge or prosecution counsel that would have had a tendency to deter them from pursuing this line of enquiry. In essence, two things occurred. Either the prosecution strongly implied that the appellants were in possession of all the potentially relevant materials, or the judge indicated that if the issue was pursued the witness's statement would be made an exhibit and provided to the jury (in accordance

with the practice at the time), or alternatively he chastised defence counsel for pursuing the issue.

68. By way of detail, during the cross examination of PC Jones, Mr Drake stated in front of the jury that all the statements, including those the defence were not entitled to see, had been made available. When Mr Turner-Samuels Q.C. on behalf of Mr Carpenter was asking Mr James about the addition, without his consent, to his witness statement as set out above (at [65]), the judge observed that this had involved "*a most outrageous suggestion*" by counsel, notwithstanding the fact that it was the witness who had volunteered this information. During the cross-examination of Alan Hordley, Mr Platts-Mills attempted to test the reliability of the witness by reference to changes in the account that he had provided to the police. The copy of the witness's statement served on the defence in advance of the trial was dated 20 March 1973. However, on the last page there was a subscription: "*Statement amended from statements taken on 7th and 13th September, 1972*". Mr Platts-Mills was concerned to highlight how the witness's account had changed during this process, and particularly that in the statement of 7 September 1972 he had not mentioned the "*the big man*" (Mr Warren) "*taking a poke at him*". This statement had not been provided to Mr Platts-Mills until Mr Hordley was in the witness box and was being questioned by him during the trial. Mr Drake made it clear that if it was to be suggested that the witness's account had changed, the relevant statements should be provided to the jury. When Detective Inspector Gradwell gave evidence, he indicated that he had dictated a statement on 7 September 1972. However, the statement he was shown during the trial, dated 30 March 1973, was not his original statement. The statement of 7 September 1972 does not appear to have been available. We note that he looked at photographs to make identifications within a few days of 6 September 1972.

69. It is on the basis of these clear foundations for the interest on the part of defence counsel in any changes in the accounts of the witnesses as to what had occurred, along with the apparent assertion by the prosecution that the accused had been shown all the statements – including those they were not entitled to see – that we turn to the lynchpin of this ground of appeal. This is to be found in paragraph 16 of a note of a consultation on 17 September 1973 at which Mr Drake and officers from West Mercia Police were present (held at Mr Drake's home). This document was found in the National Archives in late October 2013. The note was prepared by an assistant chief constable (administration), Alex Rennie, who was present at the meeting. The note was sent with a covering letter dated 20 September 1973 to Mr Desmond Fennell, Mr Drake's junior, who had not attended the consultation, as well as to the office of the Director of Public Prosecutions. Paragraph 16 sets out:

> "So that Counsel would be aware it was mentioned that not all original hand written statements were still in existence, some having been destroyed after a fresh statement had been obtained. In most cases the first statement was taken before photographs were available for witnesses and before the Officers taking the statements knew what we were trying to prove."

70. It is important to understand the extent to which the terms of this note reveal what must have occurred. The incident was on 6 September 1972. The relevant photographs (from the press) were in the possession of the West Mercia Police by 13 September 1972. However, it is by no means clear by which date the officers understood what it was that the prosecution were trying to prove. Therefore, if the destroyed "*original handwritten*" statements in the first sentence, which represented "*some*" of the total, are the same as the "*first statement(s)*" in the second sentence (which seems to us to be the likely position), "*most*" of them would have been written at a time before the police had the press photographs (within 7 days of the incident) **and** before the police knew what those responsible for the prosecution were trying to prove. In our judgment it would be erroneous, therefore, to conclude that this subset of destroyed handwritten statements had necessarily been provided before 13 September 1972. The most that can be said with confidence is that there were handwritten statements from eyewitnesses which had been destroyed once i) the police were able to show the press photographs to the witnesses **and** ii) the officers knew what those responsible for these prosecutions were seeking to prove in the forthcoming trial.

71. One of the investigating forces, Gwynedd police, adopted the straightforward approach, which mirrors that of today, in which they took initial statements to which were added later additional statements. The statements taken by West Mercia Police, by way of contrast, were in various forms. Some were taken on a particular date and they provide no indication as to whether later amendments or additions were made. Others are dated March or April 1973 but are recorded as having been taken in September or October 1972. Some were clearly marked as being further statements. In other instances, it is evident that composite statements had been prepared, which combined the contents of various statements that had been prepared on more than one occasion (for this latter category, see [63], [65] and [68] above). A number of statements had details added to them (for instance under the heading "*further states*"). In other instances, the handwritten original statements are still in existence, a number of which were exhibited at trial.

72. Critically, however, none of the surviving statements indicates it is a replacement document, in the sense described in paragraph 16 of the note of 17

September 1973, namely that an earlier statement, or a version of it, had been destroyed leading to a replacement statement. We note that the committal proceedings were delayed because the statements "*were still being amended and signed following Counsel's advice*".

73. The CCRC considered whether it is possible to establish the approximate number of statements to which the note refers but concluded this would be a futile exercise.

74. There is an absence, therefore, of any reference in any of the documents in this case, save for paragraph 16 of the note of 17 September 1973, to this procedure of destroying an unknown number of the original hand-written statements. As we have already set out above, the report of the West Mercia Police to the Director of Public Prosecutions ("DPP") dated 18 December 1972 summarises the difficulties faced by those responsible for the investigation and the reliance on photographs shown to witnesses when taking the statements. It records that "*the task would been virtually impossible without Press photographs: of various marches held to promote publicity in the strike, of actual peaceful picketing, and one set taken on a Telford site on "Black Wednesday" by the local news photographer* […]" (see paragraph 102). It is of note that the Chief Constable of West Mercia Constabulary made no mention of the destruction of some statements in his letter of 18 December 1972 to the DPP which attached the report. Instead, he set out not, we observe, entirely accurately:

> "*The West Mercia Investigating Officers were fortunate in having press photographs of the pickets and they started by identifying persons on the photographs and then taking statements when identifications had been made. The officers considered that all statements taken should be included to present a full picture and also to enable counsel to discard those not required."*

75. The Chief Constable added, "*The officers are in no doubt that there may be some difficulties in identification after this lapse of time".*

76. The prosecution, with considerable industry for which we are grateful, have sought to demonstrate that there was a clear and consistent pattern to the way in which the civilian eyewitness statements were taken. There were over a hundred and forty individuals in this category. Mr Price Q.C., leading counsel for the Crown, has set out a number of key factors which include:

    i) There was clear utility in indicating in the margins of the witness statements the identity of the individuals identified in the photographs;

ii) Only the last witness statement from the witness was placed in the trial bundle (this is described by Mr Price as an annotated account of a witness, recorded in a single document);

iii) Statements sometimes incorporated the contents of earlier statements or referred to other statements (*e.g.* George Evans's statement is dated 21 March 1973 but at the conclusion it is set out "*Statement taken at* […] *at 8.35 on Thursday, 7th September, 1972; and amended* […] *at 5.00 p.m. Wednesday 13th September, 1972*; Trevor Clarke's statement is dated 3 March 1973 and at the conclusion it is recorded "*Statement taken at 11.55 a.m. on Thursday 28th September, 1972* […]";William Allen's statement is dated 21 March 1973 but at the conclusion it is recorded "*Statement taken from statements taken on the 9th and 20th September 1972*"; Robert Briscoe's statement is dated 20 March 1973 and it concludes "*The details contained in this statement were originally reported to Police on 7th September 1972, and added to on 3rd October 1972*"; George Stubbs's statement is dated 21 March 1973 but at the conclusion it is recorded "*Statement amended from statements taken on the 8th and 14th September 1972*").

77. It is contended that it is reasonable to infer that the destruction of an original handwritten statement only occurred after the replacement had been taken and only when the latter contained the information set out in the original. It is suggested that:

> "Even if a statement taken prior to 13.09.72 had not already been typed and or photocopied by the time it was destroyed, its content was otherwise preserved in its replacement. That it should by then not have been copied or typed, is in any event submitted to be highly unlikely, not least because it would have been expedient when going to see a witness for a second time, so soon after the first with a photograph album, that the officer should also take with him a copy of the first statement, with which to begin the process of supplementing the narrative with additional information obtained from a review of the photographs".

Analysis

78. The case against all the appellants was essentially based on the testimony of eyewitnesses who were asked to look at photographs of potential suspects some days at least (but in some cases it might have been weeks or months) after the incidents had occurred. These events substantially predated our era of ubiquitous CCTV cameras and mobile telephones, which frequently provide a contemporaneous and continuous record of public events. Cross-examination in the circumstances of the present case, particularly in the absence of modern

methods of verification, can be critical. One of the vital means of demonstrating that an eyewitness is unreliable is by careful examination of the opportunities the individual had for observation; their powers of perception and memory; mistakes they have made in recalling and recording what occurred; inconsistencies in their evidence; and omissions or inconsistencies revealed in, or by, previous statements. Proof of previous inconsistent statements is governed by sections 4 and 5 Criminal Procedure Act 1865. Although criminal cases are infinitely various, based always on their particular facts, comparing and contrasting the various accounts of eyewitnesses can have a substantial – indeed, potentially determinative – impact on their credibility.

79. We are unpersuaded by Mr Price's analysis of the witness statements and the conclusions that he suggests should be drawn. We can see no basis for concluding that the content of a destroyed witness statement would necessarily have been preserved in its replacement. Indeed, we would suggest that the opposite may – indeed, was likely – to have been the case, given the destroyed statements in all probability had a different focus than their later iterations, since they were taken before photographs were available and before the officers taking the statements knew what the Crown were seeking to prove. Furthermore, Mr Price's contentions have been substantively undermined by the transcript of the cross-examination of Alan Hordley by Mr Platts-Mills. As set out above, Mr Platts-Mills sought to test the reliability of the witness by reference to changes in his account. The witness statement dated 20 March 1973 was an amendment from statements taken on 7 and 13 September 1972. Mr Platts-Mills was provided with the statement of 7 September 1972 during his cross-examination of the witness, and it was clear that the witness had not mentioned in this earlier version key assertions that featured in the later statements, for example that the "*the big man*" (Mr Warren) had taken "*a poke at him*".

80. Similarly, again as set out above, Mr James testified that there had been a significant change to his statement when additional detail was added to the original iteration. It was suggested that Mr James had claimed that Mr Pierce (a Trial 2 appellant, William Michael Pierce) was one of the front runners at Telford and had charged up the site waving a stick. Mr James said that he had not seen this alleged occurrence and that it had been added to the end of his statement without his permission. The layout of the statement potentially supported Mr James's contentions in this regard, demonstrating that additional allegations may have been added, once the photographs were available and the officers understood what the prosecuting authorities were seeking to prove.

81. In our view, these two examples exemplify the lack of a proper basis for the Crown to assert that we should infer that nothing of consequence was lost in

the process of destroying this unknown number of original handwritten statements. The respondent's detailed analysis set out above, albeit presented skilfully and helpfully by Mr Price, does not therefore support the conclusion that the contents of the destroyed statements would necessarily have been preserved in the later statements. Considered realistically, recollections on an unquantifiable number of occasions will have changed and additional details will have been provided as the statement-taking process unfolded, in a case which involved a large number of eyewitnesses.

82. As Mr Friedman Q.C. and Mr Newton, along with Mr Marquis and Ms Timan, have correctly submitted, in historic cases of this kind the court should apply the relevant statutory provisions as in force at the time of the original events, but the common law is to be applied as understood at the time of the present review. Lord Bingham C.J. put the matter succinctly in *R v Bentley* [2001] 1 Cr. App. R. 21:

> "5. Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the Court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. […]"

83. The respondent does not dispute that this represents the correct approach.

84. This court has on a number of occasions considered the consequences when evidence of relevance has become unavailable. Relatively recently, in *PR* [2019] EWCA Crim 1225, [2019] 2 Cr App R 22 (227), the issue under consideration was whether the trial judge was right to allow the case to proceed when evidence gathered by the police in 2002, relevant to the accused's defence, had been destroyed by water damage and was unavailable for the trial in 2018. It was observed at [65]) that:

> "[...] there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of inquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused whose

> trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested."

85. The court noted at [66]:

> "[...] the question of whether the defendant can receive a fair trial when relevant material has been accidentally destroyed will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to the defendant. A careful judicial direction, in many instances, will operate to ensure the integrity of the proceedings."
>
> And at 71:
>
> "It is clear that imposing a stay in situations of missing records is not a step that will be taken lightly; it will only occur when the trial process, including the judge's directions, is unable adequately to deal with the prejudice caused to the defence by the absence of the materials that have been lost. The court should not engage in speculation as to what evidence might have become unavailable but instead it should focus on any "missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. […]".

86. The directions to the jury will frequently be of significance in this regard, as the court highlighted at [73]:

> "The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. […]"

87. If the destruction of the handwritten statements had been revealed to the appellants at the time of the trial, this issue could have been comprehensively investigated with the witnesses when they gave evidence, and the judge would have been able to give appropriate directions. We have no doubt that if that had happened, the trial process would have ensured fairness to the accused. Self-evidently, that is not what occurred. Instead, we are confronted with a situation in which an unknown number of the first written accounts by eyewitnesses have been destroyed in a case in which the allegations essentially

turned on the accuracy and credibility of their testimony. As we have already described, we consider it correct to infer that the descriptions by the witnesses would in many instances have changed and developed as they were shown the photographs and as the police gained greater understanding of what those responsible for the investigation sought to prove. Those changes and developments could have been critical for the assessment by the jury of whether they were sure that the individual appellants were guilty of the charges they faced. The jury either needed to have this evidence rehearsed in front of them to the extent necessary, if the statements were still in existence, or they needed to be given clear and precise directions as to how to approach the destruction of the statements if that had occurred. Neither of those things happened, and in consequence we consider the verdicts in all three trials are unsafe. The common law has developed significantly in this area over the last half century, particularly as regards the obligation on the prosecution to retain a record of any variations in the statements of relevant witnesses (see the Code under the Criminal Procedure and Investigations Act 1996 ("CPIA"), paragraphs 4 and 5) and to disclose them if that material might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused. It is to be stressed that under paragraph 5 CPIA Code, the duty is to retain the final versions of witness statements and draft versions where the content differs, along with, *inter alia*, any material casting doubt on the reliability of a witness. As in *Bentley*, this court in arriving at this conclusion on the first ground of appeal has applied "*legal rules and procedural criteria which were not* […] *applied at the time*". By the standards of today, what occurred was unfair to the extent that the verdicts cannot be upheld.

Ground 2: The Red under the Bed

Submissions

88. On 13 November 1973, the same day that the prosecution closed its case in the first trial, an undoubtedly political documentary entitled "*The Red under the Bed*", compiled and narrated by the well-known former Labour MP and controversialist Woodrow Wyatt, was broadcast nationwide by Granada Television. The local daily press had indicated that the programme was to be shown, *inter alia*, under the heading "*Reds in Industry*". A significant part of the thesis of the programme was that there was a new and alarming phenomenon: "*violent picketing and intimidation*". A panel discussion followed the presentation by Mr Wyatt who had suggested, as part of his analysis, that the Communist Party was determined to take over the Labour Party by fair means or foul. The presentation included controversial comments by a journalist, Simon Regan, to the effect that the union leadership was prepared to turn a blind eye to unlawful tactics, such as making threats to kill. A Conservative MP, Geoffrey Stewart-Smith, suggested at the end of the panel discussion that the Building Workers strike was an example of "*blatant communist influence*",

and he expressed the view that "*the violence in the building strike was caused by a group, the Building Workers Charter, operating in defiance of their union leadership, indulging in violence and flying pickets and this is an example of these people operating, opposing free trades unions, opposing the Labour Party*".

89. Although not "*in shot*" for more than a short period, Mr O'Shea, Mr Tomlinson, Mr Warren and Mr Carpenter can be seen marching in Shrewsbury Town Centre on 15 March 1973 (which coincided with their first appearance in the Magistrates' Court in connection with the present proceedings) towards the start of the documentary. The Magistrates' Court is located in the same building as the Crown Court in the Shirehall where the three trials were held.

90. Complaints are made concerning the cooperation by a Foreign Office agency called the Information Research Department in making the programme (it seems they a "*a discreet but considerable hand in the programme*", per T.G. Barker the Head of the Department). It is highlighted that Simon Regan's reporting had been discredited in relation to events in Birmingham on 23 August 1972 and in Corby on 30 August 1972. The relevant police forces had dismissed his reports of a particular incident on 23 August 1972 as being "*mistaken*", alternately "*a figment of imagination*", and that he had either not been present or had "*completely fabricated*" the alleged events on the 30 August 1972. The Prime Minister of the day, Edward Heath, praised the programme with a note in his own hand, "*We want as much as possible of this*".

91. The programme was brought to the attention of the judge and he viewed a copy of it in Chambers. The context of his viewing was that the representatives of Mr Carpenter applied for the makers of the film, Anglia TV and another regional television company, Granada TV, to be proceeded against for contempt. The judge was told that Shrewsbury Crown Court, defendants and the demonstrations in Shrewsbury had been shown. The version seen by Mais J did not include the panel discussion, which he was told was "*uneventful*". The judge was directed to Mr Regan's claim that he had infiltrated pickets and what he described as violence during strike action in southern England. The judge was unaware of the adverse comments by the police concerning Simon Regan and the involvement of Information Research Department, as set out above.

92. The judge directed the jury as follows:

> "*You will not be dissuaded or allow your judgment to be influenced by outside considerations.*"

93. The appellants submit the judge did not take sufficient steps to ensure that the adverse publicity did not undermine the fairness of the proceedings. It is

argued that he should have enquired as to whether any of the jurors had viewed the programme and, if this was the case, they should either have been discharged or given robust directions to ensure that they did not allow any prejudice created by the programme to affect their verdicts. It is argued that the judge's reaction to the programme was, in part, vitiated by the lack of information set out above as to Mr Stewart-Smith's comment, the criticisms by two police forces of Mr Regan and the role played by the Information Research Department. In summary, it is submitted the programme undermined the fairness of the proceedings and that by contemporary standards the prejudice it created was not addressed in an appropriate manner by directions to the jury.

Discussion

94. There is no doubt, in our judgment, that in 2021 the court and the parties would take steps to seek a postponement of the broadcast of a programme such as *Red under the Bed* until after the trial, given it involved consideration, in an uncompromising format, of some of the political issues underpinning the national building workers' strike that was clearly relevant to the ongoing trial. Alternatively, as with contemporary internet material, the jury would be directed not to view it and they would be given a robust direction not to undertake any research and to disregard any potentially prejudicial material that they might encounter that touched on the issues in the case.

95. However, the question for this court is whether the risk that the programme may have been seen by one or more jurors renders the verdicts in the three trials unsafe. We have no doubt this is not the case. It is not suggested that there was an attempt by the executive to prejudice the proceedings, albeit at one stage it appeared that this contention was being advanced. It follows that the criticisms, for instance, of the involvement of the Information Research Department and the apparent attitude of the then Prime Minister are irrelevant to this Ground of Appeal. The issue is the impact of the broadcast on the safety of the conviction – whether the content would have affected the jury's fair appreciation of the evidence – rather than an assessment of the motives of those who participated in its creation. In oral submissions before us, the argument was not advanced under the heading of abuse of process, on the basis that the proceedings constituted an abuse of executive power. It is not suggested, in this sense, that the circumstances of the trial offended "*the court's sense of justice and propriety*" (per Lord Lowry in *Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, at p. 74G) or undermined "*public confidence in the criminal justice system*" thereby bringing it into disrepute (per Lord Steyn in *R v Latif* 1996 2 Cr App R 92 at p. 100). Factors such as the involvement of the Information Research Department and the views of Mr Heath are, therefore, no doubt of historical and political significance, but they fall outside the bounds of this court's consideration.

96. This trial occurred in a charged political atmosphere of which the jury would undoubtedly have been aware, which included the notably polarised industrial relations of which the allegations against these appellants were said to have been an example. There was, on a general level, no apparent dispute by the appellants that violence and criminality had occurred on 6 September 1972 within this significantly unsettled context (although it was not accepted this necessarily happened at each of the six sites and there were differing levels of acceptance within the appellants' accounts as to how serious it had been). The issue was whether the appellants had been correctly identified as being involved in the offences. The trials would have been focussed on a careful analysis of whether each accused had been a participant in, or as having instigated or encouraged, the violence. The summing up by Mais J in the first trial amply bears out this conclusion.

97. The main part of the programme was an avowedly anti-communist exercise in journalism – it was inescapably recognisable as such – with a strong message that the labour movement and the Labour Party were at risk of being infiltrated or taken over. The panel discussion that followed included a wide range of views across the political spectrum. It is notable that no defence counsel, whose number included barristers of considerable eminence, applied for the jury to be discharged and the matter was not raised during the first appeal, during which a wide range of complaints were ventilated. Although the judge's direction to the jury on disregarding extraneous considerations was limited to a single sentence, as set out above, this was not raised as having been insufficient, either with the judge at the time or with this court on appeal. To the extent that some appellants were fleetingly shown within the film footage, they had chosen to attend a march in Shrewsbury as part of an exercise of bringing the dispute, and the politicised trial (as they regarded it) to the attention of a wider audience. Although they had not sought to be involved in a documentary of this kind, they had aimed at gaining publicity.

98. Given the political climate of the early 1970s and the clear issues in the case, we are confident that any juror who saw this programme would not have been prejudiced against the appellants as a consequence. They would have understood that it was essentially and avowedly polemical, and that it was unrelated to the decision that had to be made as regards each accused: were they sure the defendant they were considering had been involved in the criminality reflected in one or more of the counts on the indictment.

Conclusion

99. It follows that under Ground 1, the convictions of all the appellants in Trials 1, 2 and 3 are unsafe. Their appeals are allowed and all the verdicts in relation to them are quashed.

100. For obvious reasons there is no sensible prospect of a retrial, nor would it be in the public interest to retry these appellants after such a significant gap of time in the particular circumstances of these cases.

Postscript: The Extant Materials

101. This trial took place nearly 50 years ago, in the pre-digital era, when the court records (self-evidently in paper form only) were retained for a set period following the convictions and any subsequent appeals, and thereafter destroyed. Serendipity governed what, if anything, survived beyond that date, perhaps in the chambers of counsel, the offices of solicitors, with the relevant investigating police force, at the National Archive, with the accused or with others with an interest in the proceedings. This case provides the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal *etc*.), particularly if they resulted in a conviction. At the point when the record is extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there is no way of predicting whether something may later emerge that casts material doubt over the result of the case.

102. Given most, if not all, of the materials in criminal cases are now presented in digital format, with the ability to store them in a compressed format, we suggest that there should be consideration as to whether the present regimen for retaining and deleting digital files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe.

103. If it is decided to undertake this piece of work, it will self-evidently involve reconsideration of the HMCTS Record Retention and Disposition Schedule dated 19 August 2020.