'A Judge summing up in a criminal trial should only give directions of law and a route to verdict; it is not necessary or desirable to sum up the evidence' – *Discuss.*

> THE PRISONER:— You can go on for ever; you cannot make me into a murderer; I have done no murder.[1]

On a blazingly hot Wednesday morning in June 1915, the twelve gentlemen of the jury clutching straw hats to cool themselves,[2] filed into a court room at the Old Bailey to hear Mr Justice Scrutton sum up the case against George Joseph Smith. Smith stood accused of murdering his wife, Bessie Williams, by drowning her in the bath. In an extraordinary judicial summing up the judge, punctuated by outbursts from the dock, invited the jury to consider the following theory not advanced by either advocate:

> Wife to husband: "I am going to have a bath"; husband to wife, "All right, I will go and turn on the water for you"; husband goes to bathroom and turns on the water and waits; the wife comes in in her dressing-gown or night gown… The newly married husband stays in the room, strips her, or she strips herself; "I'll put you in the bath my dear"; picks her up… lowers her into the bath but holds the knees up…"[3]

Having considered their verdict for just 20 minutes, the jury returned to find Smith guilty of murder. He would later be hanged in Maidstone Prison. Writing after the trial, Scrutton J revealed how closely his personal views of the case matched those he delivered to the jury in his summing up:

> […] I have of course formed views on the cases… I subscribe to your own theory of some kind of newly-wedded dalliance[4]

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[1] *The Trial of George Joseph Smith*, ed. Eric Watson, William Hodge & Company, (Edinburgh,1922), p. 290.
[2] Sally Smith, *Marshall Hall: A Law unto Himself*, Wildly, Simmonds & Hill, (London, 2016), p. 159.
[3] David Foxton, *The Life of Thomas E Scrutton*, Cambridge University Press, (Cambridge, 2013), p. 197.
[4] Letter of 5 July 1916, Scrutton Papers, cited in *The Life of Thomas E Scrutton*.

This case, notwithstanding its age, demonstrates the danger of the judicial comment which may arise during a summary of the evidence. However, this essay will argue that despite such dangers, it is still desirable for the judge to provide a summary of the evidence to the jury which stands apart from the theories advanced by the advocates during their closing submissions. Such a summary must be free from comment and bias to enable the tribunal of fact to reach its own findings and in the context of the modern rules of procedure, should be reached in consultation with the advocates.

Modern duty to sum up the evidence

Over time, something close to a judicial duty to provide a summary of the evidence heard in the course of a trial, has been held to exist. Early practice was 'simply to read trial notes to the jury with minimal direction'.[5] However, it soon came to be realised that a balanced marshalling of the facts was an important part of the judge's role to the extent that it came to be expected, 'particularly in complicated cases'.[6]

More recently, that expectation has become further entrenched. While in *Brower* [1995] Crim LR 746 the court 'would not go so far as to say that there could never be a case where the judge would need to sum up on the facts', the decision five years later in *Amado-Taylor* [2000] 2 Cr App R 189 made it clear that save for very short and simple cases, it would be a procedural irregularity for a judge not to provide a summary of the facts.

In *Amado-Taylor*, the Court of Appeal gave the following guidance:

> [C]ounsel's closing speeches are no substitute for a judicial and impartial review of the facts from the trial judge who is responsible for ensuring that the defendant has a fair trial. And the first step to such a trial is for the judge to focus the jury's attention on the issues he identifies. That responsibility should not be delegated (or more accurately here, abandoned) to counsel, doubly so

[5] Renée Lerner, 'How the creation of appellate courts in England and the United States Limited Judicial Comment on Evidence to the Jury', 40 J. Legal Prof. 215 (2015), 232.
[6] *Attfield* (1961) 45 Cr App R 309

> when they do not know, when making their speeches, what the judge is expecting of them.
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> Second, the fact that members of the jury were taking notes does not relieve the judge of this responsibility. Evidence is not given sequentially—it comes out witness by witness and needs to be marshalled and arranged issue by issue. This is the judge's responsibility—it involves work out of court, which he cannot simply pass on to the jurors.

Here, the court clearly emphasises that the management and presentation of the facts is the responsibility not just of the advocates, who are entitled to comment on the evidence but also of the trial judge who is responsible for collating and deploying relevant evidence to assist the jury in making their determinations. It is made clear that the judge has an obligation to assist the jury in their deliberations by providing an overview of the evidence, which stands distinct from those offered in closing speeches.

Distortion by Counsel

Arguably the most important reason for retaining judicial summary of the evidence is to mitigate the possibility of distortion by the advocates. As David Wolchover notes, a summary of the facts was 'more or less unknown before 1722'[7] due to the long-held view that judges preside at trials 'for the sole purpose of explaining the law to the jury and not to sum up the evidence'.[8] However, as trials became more elaborate and complex, particularly following the right for defence counsel to address the jury in felony trials,[9] judges began to exercise their right of review and comment 'in order to safeguard against possible distortions uttered by counsel in their enthusiasm to secure acquittal'.[10]

Joseph Chitty, commenting in 1839, was concerned about the influence advocates could exercise over the jury:

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[7] David Wolchover, 'Should judges sum up on the facts?', [1989] CrimLR 781, 782.
[8] Ibid.
[9] Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114, s. 1.
[10] 'Should judges sum up on the facts?', 783.

> Without this assistance from the learned judge, few juries would, in a contested case, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders[11]

The overriding concern of these commentators is that the judge should exist as an impartial observer – able to correct any false impressions created by counsel as would appear necessary in the circumstances – and be able to act as an independent source of relevant facts upon which the jury would be able to rely. As Lord Justice Cumming-Bruce noted in *Gunning*,[12] '[the judge] is much more like the umpire at a cricket match. He is certainly not the bowler, whose business it is to get the batsman out.'

These historic roots of the judge as umpire have continued into the present day, being particularly well demonstrated in the case of *Farooqi and Others* [2014] 1 Cr App R 8. In that case, the defence advocate made a speech which contained allegations of judicial bias, suggested the judge and prosecution were agents of a repressive state, and saw the advocate himself give evidence on a number of occasions. The trial judge expressed concerns that the speech contained 'so many falsehoods that could not adequately be corrected in a summing-up, or if fully corrected, the summing up would appear unbalanced'.[13] Ultimately, however, the judge dealt with the misrepresentations made by counsel through a distinct section of his summing-up, which lasted one hour and 10 minutes, stating 'I have a number of tasks […] and that includes that you are not misled as to the law or the facts by anyone'.[14]

The facts and circumstances of *Farooqi* clearly show that it remains necessary for a judge to be able to make comments upon the facts of a case as and when required. Further, it demonstrates that the concerns of Joseph Chitty remain justifiably true even in the modern regime.

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[11] Joseph Chitty, *The Practice of Law in All Its Departments* (1839), 913 cited in 'How the creation of appellate courts in England and the United States Limited Judicial Comment on Evidence to the Jury'.
[12] [1994] 98 Cr App R 303, 306.
[13] [2014] 1 Cr App R 8, [82].
[14] Ibid, [91].

Judicial Partiality

The principal competing argument, is that judges may be 'biased, lazy, corrupt, or incompetent'.[15] In particular, there is the long-standing concern that judges may be biased against defendants and anxious to secure an conviction – for example, Alexander Sullivan, the last 'sergeant-at-law' is said to have suggested to a judge that the jury foreman should be asked whether the jury found for his Lordship or against him.[16]

The judge remains entitled to make robust comments on the evidence, provided that it is emphasised that the jury are entitled to ignore the judge's views in preference for their own. In the frequently cited case of *O'Donnell* (1917) 12 Cr App R 219, the trial judge is said to have described the defendant's story as a 'remarkable one', however, the Court of Criminal Appeal declined to criticise the judge for the comment. Instead, the court held that:

> [a] judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all.

More recently the courts have indicated that the 'degree of adverse comment allowed today is substantially less than it was 50 years ago',[17] and the Court of Appeal has made it clear that comments on the evidence must be made with 'clarity, impartiality and without exaggeration'.[18] Where judges have gone too far, the court has criticised the use of 'sarcastic or extravagant language'.[19] Judicial guidance also makes it clear that in directing the jury, the judge must not

[15] 'How the creation of appellate courts in England and the United States Limited Judicial Comment on Evidence to the Jury', 221.
[16] Cited in 'Should judges sum up on the facts?'.
[17] *Wood* [1996] 1 Cr App R 207, 216.
[18] *Berrada* [1990] 91 Cr App R 131.
[19] Ibid.

usurp the their function as the tribunal of fact. For example, in the recently published *Crown Court Compendium*, judges are given the following model direction:

> [if], when I review the evidence, I do not mention something please do not think you should ignore it. And if I do mention something please do not think it must be an important point. Also, if you think that I am expressing any view about any piece of evidence, or about the case, you are free to agree or to disagree because it is your view, and yours alone, which counts.[20]

The effect of the model direction is seemingly to encourage judges not to exercise their right to comment on the evidence, or if they do, to neutralise its effect upon the jury. However, such a direction is akin to closing the stable door after the horse has bolted. As Glanville Williams noted in *The Proof of Guilt: A Study of the English Criminal Trial*, 'the way in which [the judge] marshals the facts and gets rid of irrelevancies may present a strongly persuasive argument for one side or the other-and it must be remembered that it is the judge who has the real 'last word' with the jury.'[21] The judge is, therefore, in a unique position to influence a jury not only the remarks he may make on a piece of evidence, but also through the way he selects the evidence and places it before them for their attention.

There are also limits on how overtly prejudicial comments may be regulated. While the Court of Appeal is in a position to regulate the conduct of judges' factual summing of a case through careful examination of the transcript of proceedings it is unable to assess the judge's body language, tone of voice, demeanour and non-verbal communications to the jury which may also be capable of conveying a judge's attitude towards the evidence. Further, considering the additional effort and expense involved in an appeal in a system increasingly concerned with cost, it is questionable whether resolving these issues in rarefied atmosphere of the Royal Courts of Justice is the most sensible solution.

[20] Judicial College, *Crown Court Compendium: Part 1,* May 2016, [4-3].
[21] Cited in Lerner, p. 233.

Alternative

It is clear that in recent years there has been a wholesale change in how juries are directed. The introduction of the 'route to verdict', the ability of judges to give directions as to the law 'at any time' in order to assist jurors,[22] and the power of a judge to give the jury 'written directions, questions, or other assistance in writing'[23] all point towards an increasingly regulated system of judicial direction. Further reforms have been contemplated, such as the suggestion in the *Auld Review* that:

> at the start of the trial the judge should give the jury a summary of the case and the questions they will have to decide, supported by a written aide memoire. After the evidence, the judge would no longer direct the jury on the law but would provide the jury with written factual questions, the answers to which would lead to a verdict of guilty or not guilty[24]

Given the nature and form of the judicial comment as part of the process of directing the jury, it would stand to reason that its use should be more closely regulated in the trial process. Such regulation would be through consultation with the advocates in the absence of the jury, in the same way in which directions are presently discussed. Such an approach would not oust the jurisdiction of the judge to correct distortions made by counsel, but would enable all parties to consider their position before any comment goes before the jury. Furthermore, it would enable appellate judges to understand why any comment was made and to understand what challenges to that comment were contemplated at first instance.

Conclusion

Since Mr Justice Scrutton advanced his pet theories and opinions in his summing up, which may in part have led George Smith to the noose, the ability of judges to comment on the evidence has been restricted. Notwithstanding those changes, it remains desirable that a judge in concluding a criminal trial should review the evidence as part of his summing up so as to

[22] r. 25.14(2) CrimPR 2016.
[23] r. 25.14(4) CrimPR 2016.
[24] As outlined in Cheryl Thomas' Ministry of Justice Research Paper *Are Juries Fair?*, 2010. https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf

assist the jury. What is not desirable, however, is for a trial judge to comment on the evidence, or to manipulate the evidence so as to achieve a particular outcome. In the context of a system moving towards closer regulation of summing up and judicial directions, it would appear only appropriate that judges' observations on the evidence are subject to scrutiny by counsel before they are made. In a system where the judge is to be perceived as the independent umpire, such modest reform ought to prevent any defendant from feeling what George Smith shouted across the courtroom at the Old Bailey: 'You may as well hang me at once, the way you are going on.'[25]

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[25] Edward Marjoribanks, *Famous Trials of Marshall Hall*, Penguin, (London, 1989), p. 294