
A unique insight into defending in the age of Lockdown

Dominic Thomas of 25 Bedford Row, acting alone, has just secured the acquittal of his teenage client for murder & manslaughter at Bristol Crown Court in the first new jury trial of the Lockdown age. He therefore holds a unique insight into defending in the new regime that he shares with Simon Pentol QC also of 25 Bedford Row who asks the questions.

SPQC: First things first Dom, many congratulations on a terrific result...

DI: *Thanks Simon. It's a relief twice over. The result was very pleasing, but I'm also happy to report that no one in Court seems to have got ill in the course of the trial.*

SPQC: Before we get into the detail, how did you feel about the prospect of defending in such a serious case in these circumstances?

DI: *Quite apprehensive. When even epidemiologists admit they haven't got the answer, when the classrooms and most of the rest of the country was in Lockdown, it seemed a bold experiment to conduct a trial. Lots of strangers, the lawyers, jurors and witnesses, sharing a room for hours at a time sounded like a recipe for trouble. The client was a youngster who'd been in custody for months, however, and it was easier to concentrate on that.*

SPQC: What notice did you receive prior to the first day of trial of the changes to be implemented in the courtroom and by what means did you voice your concerns or counter proposals?

DI: *Counsel in the case were written to by the Resident Judge in Bristol tipping us off about a fortnight before the case came on that we should be ready. Both of us wrote to him to discuss the arrangements and to express our views. I must say he was very attentive and receptive.*

SPQC: In a nutshell, how was the courtroom reconfigured?

DI: *In the first place, there were three courtrooms given over to the trial. The first contained the main players. The second was for overspill (press, police, solicitors and public). The third was converted into the jury deliberation room, large enough to accommodate social distancing. Each juror was assigned a number and came in and out of court in sequence, one by one. They were spaced throughout the Court, four in the jury seats, three sat behind Counsel's row, five in the seats usually reserved for the public. To see everyone, we gave our speeches from the witness box. As much information as possible was put up on Clickshare, the Court system for sharing materials on screen.*

Any paperwork was distributed at the start of every session. "Milling about" in Court was strictly forbidden.

SPOC: Were you allowed any input into it or was it presented as a fait accompli?

DI: Well, as you know Simon, it's difficult to stop a barrister sticking his oar in and this was no exception. Although the arrangements and adaptations were quite impressive, prosecution counsel and I were concerned about the adequacy of ventilation in Court. Indeed, I remain concerned about this issue. The trial judge assured us that Public Health England had given the courtroom the okay and that ventilation had been considered but at our request every hour we rose for fifteen minutes to give the Court an airing.

SPOC: Your lay client is very young. Did he express any concerns to you about the trial process and how did you go about allaying any fears he or you might have had, to him?

DI: I think he felt safer in Court than he did in custody so far as the pandemic is concerned. The trial Judge, a High Court Judge, dispensed with wigs, as happens quite often in the trial of a youth defendant (a kind touch so far as the defendant was concerned but it must have been painfully obvious I hadn't had a haircut for over two months). The defendant was permitted at my request to be accompanied throughout the trial by a youth worker with whom he had a very good relationship. That helped a lot.

SPOC: Did you have any concerns that the fairness of the trial might be compromised by the changes to be implemented and if so, what were they and how did the judge respond?

DI: My main concern was that the jurors would be distracted by concerns for their health. That anxiety evaporated more or less immediately. As most murders cases are, the trial was inherently gripping. Otherwise, we heard some witnesses remotely and I recommend that practitioners get to grips with schedule 23 of the Coronavirus Act 2020 so as to ensure that witnesses are heard only when the Court has ensured that the legislative safeguards are in place.

SPOC: To what extent, if any, did the configuration of the courtroom affect your conduct or presentation of the case?

DI: The adaptations employed in Court put a premium on two things: the use of Clickshare and general preparedness. Getting the jurors in and out was such a performance and took so long that they would not have appreciated counsel causing avoidable delay. So far as Clickshare was concerned, I prepared a file of all the materials I might conceivably refer to that day, in a state of readiness to be put on screen instantly. This latter approach is one that I will stick to in all my

trials from now on. It created I think, the valuable impression that the defence was on top of the case.

SPOC: What did you consider were the biggest challenges and how did you go about meeting them?

DI: The biggest challenge was finding the time behind the scenes to negotiate and compromise issues with prosecution counsel. I was fortunate to have a thoroughly charming opposite number in Adam Vaitalingam QC and we met regularly (at a distance of course). A difficult opponent would have been a terrible spanner in the works but Adam was always open to discussion.

SPOC: As defence counsel, its common place to take our cues from the jury's reaction to the demeanour or responses of witnesses or even the trial judge. How was this diminished, if it all, by the configuration of the courtroom and how did you overcome these issues?

DI: We've all been taught as young barristers not to mug at the jury and not to look over at them. Inevitably though, as you say, we are all aware of our audience, if only at a subconscious level. At any one time I could only see about four or five jurors during the trial. I just had to get on with it.

SPOC: When addressing the jury its also common place for defence counsel to make eye contact with (various of) them, if for no other than reason than to take our cues and ensure they're following what we are saying. How did you overcome these difficulties?

DI: By using the most basic techniques possible. I would ask them out loud to indicate whether they could see, hear and follow what I was doing or asking. No one saw fit to stop me!

SPOC: What steps were taken to ensure the safety and social distancing of the defendant in his journeys to and from court and during those parts of the day when the court was in recess?

DI: The defendant had a cell and a van to himself. I am bound to say that in the cells I saw him on occasion at a less than ideal distance from security staff but, in fairness, it is difficult to know how the arrangements could have been otherwise. He was never cuffed to staff.

SPOC: What steps were put in place to ensure your safety and social distancing when convening with your lay client?

DI: I spoke with him through glass in a partitioned room we had to ourselves. We had perfect privacy. This would have been a demand of mine had it not been provided from the start.

SPOC: How did this affect your ability to communicate with him and how in turn, did you adapt?

DI: *The main thing to remember was to tell the client in advance what materials to bring in with him and to copy any such materials for him in advance so as not to waste time. Again, preparedness was the key to avoiding delay.*

SPQC: *What steps were taken to ensure the safety and social distancing of the jury, especially when travelling to and from court, when gathering in the court building outside of the court sitting and in retirement?*

DI: *Other than a separate jury deliberation room and staggered entry and exit from the courtroom, I really don't know. I am bound to say that the one real safeguard of safety would have been testing. I had asked about this before the trial started. There was no provision for testing. No masks either. I had taken the view that wearing a mask myself would have been off-putting (but I can well understand anyone taking the opposite view). I confess I had expected jurors to be masked. Our jury were very trusting it seems, perhaps more so than could reasonably have been expected. There were bottles of hand sanitiser aplenty.*

SPQC: *How were any safety fears of the jury members conveyed and how did the judge deal with them?*

DI: *The jury had only one complaint when someone unconnected with the case had stepped into a lift with a juror. The rule for the lifts was one at a time. It appears that the issue never came up again.*

SPQC: *Did any of this affect jury selection?*

DI: *No one in a vulnerable category was in the jury pool for selection. I understood that this had been accomplished by means of a screening process to which neither myself, the solicitor nor the defendant objected.*

SPQC: *What steps were taken to ensure the safety and social distancing of all other court users, including counsel?*

DI: *I'm not sure I have much to add to the above except to say that the trial judge kindly gave me a letter to present at my hotel confirming my status as an essential worker which I may very well frame one day.*

SPQC: *Very kind(!) Overall, how did you rate the whole experience?*

DI: *The adaptations so far as they went were significant but ultimately a little amateur. Without testing of the participants, their safety cannot come close to being guaranteed it seems to me. If one person in Court had been carrying the virus, I daresay there might have been transmission to others. Of course, this is precisely the issue with which the whole country is grappling. I was telling myself throughout that we were not being asked to do any more than the staff at Tesco had been doing for weeks. On the other hand, we've heard recently from some high-profile proponents of trial by judge or the reduction of jury*

numbers. I'm passionately opposed to both these proposals and while it seems to me the adaptations for my recent trial are not replicable for multi-handed case or to cope with the huge backlog of trials, I'm glad to have had a small role in the re-start of jury trials if only to demonstrate our commitment to the right of a defendant to be tried in this manner, by his peers.

SPQC: What lessons can be learned?

DI: If we want to scale up the hearing of criminal trials, we need to get a grip on testing. That seems to me so, so obvious. You can't make a dent in the backlog of cases one trial at a time, occupying three courtrooms and the whole Court building.

SPQC: And what, if anything, would you do differently next time?

DI: I'd get a haircut.

SPQC: That's good to know! Many thanks Dom and on behalf of us all yet to "Cross the Rubicon" of defending a criminal trial in the (post) Lockdown age, might I extend our appreciation for your time, effort and invaluable insight . . .

DI: It's been a pleasure Simon. Stay alert!