Conduct of counsel at trial

Zoe Hillman reports on *Farooqi and Ors v R* [2013] EWCA Crim 1649

In his final judgment as lord chief justice of England and Wales, lord judge, together with Lord Justice Treacy and Mrs Justice Sharp, considered the duties and obligations of defence counsel in a criminal trial. Specifically, the English Court of Appeal considered whether a number of co-defendants had been deprived of a fair trial in circumstances where counsel for one of the co-defendants engaged in behaviour described by the court as constituting 'flagrant misconduct and alleged professional incompetence'[1].

Counsel's conduct of the trial

The Court of Appeal examined the reliability of verdicts delivered in a trial in which charges had been brought against four defendants – Muir Farooqi ('Farooqi'), Matthew Newton, Hussain Malik and Harris Farooqi. The charges arose out of allegations that each of the four defendants, who had been associated with a Da'wah stall in Manchester, engaged in conduct designed to radicalise individuals to commit violent jihad in Afghanistan and Pakistan. The prosecution's evidence had been obtained by undercover officers who, as part of a covert operation, had recorded conversations with each of the defendants between November 2008 and November 2009. There was no dispute as to what was said by the defendants in the course of those conversations.

Each of the defendants had been separately represented at trial.

The following aspects of the conduct of Farooqi's defence by Farooqi's lead counsel had attracted criticism during the course of the trial:

- two undercover officers, who were called by the prosecution as witnesses, were subjected to 14 days of cross-examination by Farooqi's counsel. The cross-examination was described in the course of the appeal as 'prolix, extensive and irrelevant, and, on occasions, offensive'[2];
- on the evening prior to the close of the Crown's case, Farooqi's counsel served the prosecution with a skeleton outline of an application to stay the proceedings on the grounds of entrapment. No such application had been foreshadowed at any time during the case management of the proceedings or during the course of the prosecution presenting its case. The application was brought in breach of the English Criminal Procedure Rules and *Criminal Procedure and Investigations Act 1996*. The application shone new light on the purpose of Farooqi's counsel's cross-examination of the undercover officers. Had it been properly notified, it would have affected the approach of the trial judge and prosecution counsel to those cross-examinations;
- a further application, again brought late and without notice to the Crown, was made that Farooqi had no case to answer as the Crown had failed to negative self defence; and
- two further late applications to alter Farooqi's defence were brought without notice, prompting the trial judge to note that the prosecution and the court had been ambushed[3].

The final provocation came in the form of Farooqi's counsel's closing submissions, in which he:

- alluded to the jury that they ought to treat the trial judge as a salesman of worthless goods;
- attacked the motives of the Crown and trial judge, depicting them as the agents of a repressive state;
- suggested that the reason counsel for the other co-defendants had not advanced the arguments he had put was because those counsel were 'sucking up' to the court;
- attempted to give evidence on behalf of Farooqi (Farooqi having elected not to give evidence in the case); and
- made significant allegations that should have been, but were not, put to the Crown's witnesses in cross-examination.

At the conclusion of Farooqi's counsel's closing submissions counsel for one of the co-defendants applied to discharge the jury on the basis that the errors in Farooqi's counsel's submissions could not be adequately corrected in summing up. The other co-defendants reserved their position. In determining whether the jury ought to be discharged, the trial judge held that, despite having been put in a very difficult position, he would attempt the task of summing up with a view to correcting the position

in a manner that would not disadvantage any defendant or the Crown. The judge went on to give a summing up that including a distinct 'Corrections' section, criticising Farooqi's counsel's conduct of the case but emphasising to the jury that they must bear in mind that there was no evidence to suggest that Farooqi himself was the author of anything said by his counsel which required correction.

Three of the four defendants (including Farooqi) were found guilty of the charges brought against them.

The Court of Appeal's consideration of counsel's conduct at trial

On appeal, Farooqi (now represented by another counsel) and two of his co-defendants argued that, although the conduct of the trial judge was impeccably fair, the defendants could not have had a fair trial as a result of the misconduct of Farooqi's counsel .

In considering the role and expectations of counsel, the Court of Appeal noted that the question of whether Farooqi's counsel had acted on his client's instructions was irrelevant, stating:

> Something of a myth about the meaning of the client's 'instructions' has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor 'instructs' him… the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with the twin responsibilities, both to the client and to the court.[4]

The Court of Appeal went on to refer to five rules governing counsels' conduct, which it considered had been infringed by Farooqi's counsel's behaviour[5]:

- The advocate cannot give evidence or, in the guise of a submission, make assertions about facts which have not been adduced in evidence – a rule described as 'particularly stark whenever the defendant elects not to give evidence in his own defence';
- Critical comments about a witness must not be advanced without the witness being given a fair opportunity to answer those criticisms in cross-examination;
- In that context, the court cautioned against the 'somewhat dated formulaic use of the word 'put' as integral to the process' of giving a witness an opportunity to answer any criticism. That is because assertion is not 'true cross-examination' and blurs the line, from a jury's perspective, between evidence from a witness and impermissible comment from an advocate;
- The advocate must abide procedural requirements, practice directions and court orders; and
- Personal attacks of the sort made by Farooqi's counsel on the judge, the prosecution and counsel for the co-defendants did not constitute 'fearless advocacy', but rather have the effect of destroying a system of administration of justice which depends on a sensible, respectful working relationship between the judge and independent-minded advocates.

Outcome

Ultimately, the Court of Appeal held that, despite the 'melancholy circumstances' of the case, on this occasion the trial judge's summing up had overcome the hurdles to a fair trial which Farooqi's counsel's conduct had created. The trial judge had managed to confine the effects of Farooqi's counsel's conduct such that Farooqi and each co-defendant had the benefit of having their case fairly put to the jury for consideration. Consequently each of the appeals failed.

A complaint made by the attorney general to the Bar Standards Board with respect to Farooqi's counsel's conduct awaits resolution. A disciplinary hearing has been set down for January 2014.

Endnotes

1. *Farooqi and Ors v R* [2013] EWCA Crim 1649 at 1.
2. Ibid at 42.
3. Ibid at 70.
4. Ibid at 108.
5. Ibid at 111 to 115.