

R v Lucy Letby

Summary of Day 3 – Friday, 7 October 2022

Rulings on reporting directions and special measures, amendment of the indictment, jury panel, and defence application on expert evidence

Date	Friday, 7 October 2022
Judge	Mr Justice Goss
Prosecution	Mr Johnson KC and a junior prosecution barrister (who dealt with the special measures submissions for the Crown)
Defence	Mr Myers KC, with Ms Fiona Clancy
Nature of day	Procedural. The jury had not yet been sworn and no evidence was heard. The day produced two rulings, an amended indictment of 22 counts, a panel of 30 potential jurors, and argument on the order in which expert witnesses should be called.

Overview

Following the psychiatric assessment of Ms Letby the previous afternoon, the defence reported that she was fit to proceed, and the court was able to move forward on several fronts. The judge handed down his written ruling granting the eight reporting-direction applications heard the day before, then gave leave to amend the indictment, granted 16 applications for screens for prosecution witnesses, and addressed a panel of 30 potential jurors. In the afternoon the court heard the defence application that its experts be called "back to back" with the prosecution experts. The judge reserved his decision on that until Monday, and set out a more limited daily sitting timetable. The transcript notes that some speaker labels and sub-headings in the original were erroneous and have been corrected, and that some speech attributed to Mr Myers appears to have been spoken by a junior prosecution barrister.

1. Update on Ms Letby and the psychiatric assessment

Mr Myers reported that Ms Letby was seen by Dr Melanie Higgins on the previous afternoon. A written report was expected by Monday, though it arrived during the day. His verbal, second-hand summary of the doctor's conclusions was:

- Ms Letby is fit to carry on, though this will need monitoring and could change;
- no underlying mental illness was identified;
- her brain had "slowed" and the doctor described a short-term trauma. Her memory is intact, she follows what happens in court and understands the timetable, and her mood is flatter than normal;
- the doctor would follow up with the Cat A team about accommodation, as she shares the concern that the travel alone may have an impact.

The defence asked that matters proceed that day as planned (identifying the jury panel and amending the indictment) but that nothing go further until the written report had been seen. The written report arrived later in the morning. After reading it, the judge thanked Dr Higgins, and Mr Johnson confirmed that the report made it plain Ms Letby was able to proceed and wished to do so as quickly as she could.

2. Selecting the jury panel

- The judge proposed narrowing the panel to **30** rather than 25 as a precaution against drop-outs. Both sides agreed. The Jury Officer would randomly select 30 by ballot from those who had confirmed availability for six months.
- After a short adjournment the judge reported that a panel of 30 had been selected from **61** people, some of whom had given reasons why they could not serve.
- He explained the usual procedure: on Monday, 14 jurors (12 plus two reserves) would be selected by ballot from the 30, with the number falling to 12 at the end of the opening. This is done in long cases in case a juror cannot continue.
- He addressed the panel when it was brought in. He thanked them for completing the questionnaire, checked that their answers still held, and said they were all understood to be available for up to six months. One member had not yet asked their employer and was asked to do so that day. The remaining 16 would not be required, but all 30 were to return at 10.30 am on Monday.
- He directed them not to discuss the case with anyone, including each other and family, and not to research it or anyone involved in it, stressing the integrity of the jury system and that the case must be tried only on the evidence in court. Any newly arising difficulty should be reported to the Jury Officer on Monday morning.
- While introducing the defendant to the panel the judge misnamed her and immediately corrected himself and apologised.

3. Ruling: reporting directions for the eight witnesses

The judge handed down a written ruling on the applications argued on 6 October. **He granted each of the applications.** The text of the ruling is not in the transcript, so its reasoning cannot be summarised here. He said he would circulate a draft order to the prosecution, defence and media representatives for suggested amendments before finalising it. Later in the day he sent back a draft with changes, and Mr Myers said Mr Bunting had come back with points the parties would try to resolve between them before returning to the judge. The judge wanted an order in place by Monday morning.

4. Amendment of the indictment

Mr Johnson formally applied to amend the indictment in the terms circulated and uploaded to the digital case system. The amended indictment contains **22 counts**. The number increased because of a recent Court of Appeal decision on attempted murder: instead of a single "rolled-up" count of attempted murder for an individual child, the Crown has separated distinct attempts on the same child into separate counts, avoiding complicated directions to the jury and making the Crown's case clear from the outset. Where there was something akin to persistent poisoning over a period, a single count remains. The defence had no observations. The judge granted leave to amend.

Arraignment. The defence asked for arraignment to take place first thing on Monday, once the written report had been seen and when the families would be present. Mr Myers explained that at an earlier hearing Ms Letby had been arraigned unexpectedly, which had caused difficulty for families who had been told nothing significant would happen. Mr Johnson agreed, and said Ms Letby was ready to be arraigned as soon as the court wished. The judge agreed to Monday.

5. Special measures: screens or live link

Defence position (Mr Myers). The defence did not object to special measures but said that, if granted, they should be by live link rather than screens:

- the witnesses' main concern is the anxiety of coming into court and being seen there, which screens do not remove because they still enter a public courtroom and are seen by the jury, lawyers and judge;
- Ms Letby would be at a significant disadvantage if she could not see how people she knows give evidence, and could not convey this to her lawyers, particularly as many witnesses are linked to each other;
- the defence accepted there is no objective basis for fear of intimidation and described the pressure as intimidation of circumstance, noting that only her parents and a couple of friends were expected to attend; and
- a live link is practical and avoids repeatedly rearranging the courtroom for screens. The defence cited section 24 of the Youth Justice and Criminal Evidence Act 1999.

Prosecution position. The Crown had applied only for screens. Officers had been checked with that morning, and in every case it was the witness's choice to ask for screens and to decline a live link. The Crown said screens maximise the quality of the evidence and allow the jury to see the witness first-hand in cross-examination, whereas a live link is an unnecessary obstacle. Screens are not unusual, and section 23 of the Act requires that the judge, jury and lawyers can see the witness. There were **16 applications** in total, two other witnesses having been agreed and no longer needing measures.

Ruling. The judge noted it was not disputed that the criteria for special measures were met for each of the 16 witnesses; the only issue was the form. He said the wishes of the witness are a statutory consideration and a significant factor, though not determinative, and no live link application was before the court. He accepted it is true that the defendant would be better able to see witnesses on a live link, but said that this did not carry such significance, provided the trial remained fair, that the applications should be refused. **All 16 were granted.** He said court staff could assemble screens quickly and it would soon become routine, and that the jury would be directed to ignore the presence of screens.

6. Defence application on the order of expert evidence

The issue. Whether the defence experts should be called "back to back" with the corresponding prosecution experts, as far as practicable, as the case proceeds child by child, or together at the end of the defence case. The written submissions were in the agenda bundle (defence at page 35, prosecution responses at pages 40 and 42).

The experts. Mr Myers identified the controversial experts as:

- **Prosecution:** Dr Dewi Evans (consultant paediatrician) and Dr Sandie Bohin (consultant neonatologist and paediatrician), both involved in every count; Dr Andreas Marnerides (forensic pathologist and histopathologist), who covers seven counts; and Dr Owen Arthurs (paediatric radiologist).
- **Defence:** Dr Michael Hall (consultant neonatologist) and Dr Mohammed Rahman (consultant paediatrician), both involved in every count; and Dr Katharine Halliday (paediatric radiologist).
- The expert material amounts to hundreds, if not thousands, of pages and over 200 statements or reports. The case involves 17 babies and 22 offences.

Defence submissions (Mr Myers).

- The medical evidence is the central terrain of the case and is heavily inter-related between the two sides, particularly after the joint expert meeting and report. Experts now respond directly to each other's opinions in further statements.

- The prosecution evidence is being presented in stages, each taking about a week per child, with witnesses, exhibits and electronic presentation. Defence experts should address the same material while it is fresh to the jury and to the experts themselves, rather than months later.
- It would be imbalanced for prosecution experts to give evidence repeatedly over months without the jury hearing the competing opinions, and the jury would hear defence opinions only through cross-examination before hearing them directly. If opinions develop, this can happen in real time if the experts are heard together.
- He illustrated the inter-relation with extracts from reports by Dr Hall (including a structured analysis of chronology, possible causes and the prosecution experts' views), a further statement by Dr Evans responding to Dr Hall on air embolism research, and a statement by Dr Bohin on chest drain positioning in relation to Baby H.
- The defendant's position is different from the experts': a defendant gives evidence last so as to answer the case against her, whereas expert evidence is independent opinion that should be presented in whatever way best assists the jury.
- He rebutted the Crown's criticism that Dr Hall had "obfuscated" the facts regarding Babies K and M. Dr Hall's views on timing of sedation (Baby K) and of blood in the oral cavity before intubation (Baby M) came from his analysis of the medical records and did not refer to what the defendant said. If there are questions of weight, they are for cross-examination.
- Dr Hall is expected to attend court for most of the trial. Other experts' availability will have to be accommodated, even if that means one expert addresses more than one child at a time.

Prosecution submissions (Mr Johnson).

- The norm is set by rule 25.9 of the Criminal Procedure Rules: the defendant gives evidence first and then calls any other defence evidence. A departure needs strong justification, and the claimed benefit of clarity would in fact be the opposite here. Back-to-back expert evidence is not the norm, and most cases involve only one to three incidents.
- The Crown counted 22 charged incidents but, if the murder counts are broken into separate incidents (for example four separate alleged assaults on Baby I), the number is considerably higher.
- **Dr Marnerides.** Because he is exceptionally busy, the Crown will call him at the end of the prosecution case. His report covers the seven murder cases: in one he is unable to offer an opinion, and in the other six he supports the allegation that the children were unlawfully killed with varying degrees of certainty. The defence has served no pathology evidence. If the defence experts give evidence before him, they cannot be tested against his opinions, which would be inconsistent with the overriding objective.
- **Availability.** The Crown can guarantee Dr Bohin and Dr Evans, and the defence can do the same with Dr Hall, but Dr Rahman is in busy practice, making the proposal impractical. He might be called part-way through the Crown case on a different child.
- By the time defence experts give evidence in the normal order, the facts and points of dispute will have been clarified, including what the defendant says if she gives evidence. Experts should not descend into factual disputes. As an example, Dr Hall distinguishes descriptions of a fleeting rash, while the defendant says what she saw in one case was the same as in another.

Defence reply. Mr Myers said he had learned of the Marnerides arrangements only that day and did not criticise them. Calling a pathologist at the end of the evidence is not unusual, and it is a decision of necessity, not choice. Dr Marnerides' evidence is far shorter than the paediatricians', and Drs Hall and Rahman are not pathologists, so nothing is gained for balance by calling them last. The same availability problem applies to prosecution witness Dr Arthurs and defence witness Dr Halliday. Dr

Rahman is available on Monday mornings, Thursday afternoons and Fridays, and any imperfect synchronisation is far less problematic than calling him months after the evidence he deals with.

Judge's approach. The judge, in exchanges with counsel, noted the ideal might not always be achievable, and that the usual order has a rationale but with discretion to adjust it. He **reserved his decision until Monday**, said it was a case management issue, and that he would probably give brief written reasons rather than a long judgment.

7. Welfare, transport and sitting hours

- Mr Myers thanked the court, prosecution and the liaison officer for helping obtain the psychiatric report and for communication with the prison. He said they would watch how Ms Letby manages the transport arrangements and might raise further issues. The judge said that, although he does not control the prison estate, he is responsible for the fairness of the trial and does not want a defendant who is, through circumstances beyond her control, not in an appropriate state.
- **Timetable.** The judge proposed to sit about 10.30 am to 1.00 pm, then from shortly after 2.00 pm to as late as 4.30 pm, with flexibility. He preferred roughly two-and-a-half-hour sessions without short mid-morning breaks (which tend to overrun), and a willingness to finish earlier if Ms Letby is tiring or counsel need to take instructions. This took account of the psychologist's recommendations.
- He thanked the escorts, asked that thanks be passed to the unit at HMP New Hall, and said the court would try to address the room being too hot (a point raised by Mr Johnson).

Key outcomes

- Defence reported Ms Letby fit to proceed on Dr Higgins' oral conclusions, with monitoring; the written report later arrived and was read.
- Written ruling granting all eight reporting-direction applications; draft order to be settled with the media by Monday.
- Leave granted to amend the indictment to 22 counts.
- 16 special measures applications granted in the form of screens, rejecting the defence request for live links.
- Panel of 30 potential jurors selected from 61 and told to return at 10.30 am on Monday, when 14 would be selected.
- Arraignment set for first thing on Monday.
- Decision on the order of expert evidence reserved until Monday.
- Sitting hours set at roughly 10.30 am to 1.00 pm and 2.00 pm to 4.30 pm, with flexibility.

This summary is based on the transcript of the 7 October 2022 hearing. The written rulings are not reproduced in the transcript. Statements about the defendant, witnesses and experts are the submissions of counsel and are not findings by the court. Babies are referred to by the letters used in the transcript.