

Neutral Citation Number: [2004] EWCA Crim 456

Case No: 2003-01860-C2

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
(HHJ BEAUMONT QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

4 March 2004

B e f o r e :

**LORD JUSTICE POTTER
MR JUSTICE HOOPER
and
MR JUSTICE ASTILL**

Between:

R

Crown

- and -

EL-FAISAL

Appellant

**Mr Lynch (instructed by Saunders & Co) for the appellant
Mr Perry and Mr Mably (instructed by the Crown Prosecution Service,
Headquarters) for the Crown
Hearing date : 17.02.04**

HTML VERSION OF JUDGMENT

Crown Copyright ©

Lord Justice Potter:

1. On 17 February 2004 we dismissed the appeal against conviction in this case, stating that we would give our reasons later. Those reasons are now set out below.
2. The appellant is a Jamaican national who came to this country about 10 years ago. Having studied at the university in Saudi Arabia, he became a minister of Islam known as "Sheik Faisal". In the course of his activities he created a number of audio tapes bearing various titles which were of an inflammatory nature and urged Muslims to fight and kill, among others, Jews, Christians, Americans, Hindus and other unbelievers.
3. In February 2003 he stood trial at the Central Criminal Court before HHJ Beaumont QC, the Common Sergeant of London and a jury. On 24 February he was acquitted on counts 3, 5 and 9 of the indictment and convicted on the remaining counts. On 7 March 2003 he was sentenced as follows:
4. Count 1: soliciting to murder, contrary to s.4 of the *Offences Against the Person Act 1861* (the solicitation being recorded on a tape labelled "*Jihad DAT*") – 7 years' imprisonment.
5. Count 2: soliciting to murder contrary to s.4 of the 1861 Act (the solicitation being recorded on a tape labelled "*Jihad*") – 7 years' imprisonment concurrent.
6. Count 4: soliciting to murder contrary to s.4 of the 1861 Act (the solicitation being recorded on a tape labelled "*Declaration of War*") – 7 years' imprisonment concurrent.
7. Count 6: using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred contrary to s.18(1) of the *Public Order Act 1986* (the said words and behaviour being recorded on a tape labelled "*No peace with the Jews*") – 12 months' imprisonment.
8. Count 7: using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred contrary to s.18(1) of the 1986 Act (the said words and behaviour being recorded on a tape labelled "*Jewish Traits*") – 12 months' imprisonment.

9. Count 8: distributing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred contrary to s.21(1) of the 1986 Act – 2 years' imprisonment.
10. The terms of imprisonment imposed on counts 6,7 and 8 were concurrent with each other but consecutive to the terms of 7 years' imprisonment on counts 1, 2 and 4.
11. He now appeals against conviction and sentence by leave of the single judge, limited to a single ground of the three grounds originally pursued. We shall turn to that single ground in detail shortly. It relates only to counts 1, 2 and 4, no appeal being pursued in respect of the other counts. The issue is whether the judge gave an adequate direction to the jury in relation to whether or not the killing solicited was unlawful.
12. The facts can be shortly summarised as follows.
13. From about February 1998, at a number of public meetings, the appellant addressed audiences of predominantly young Muslim males about Islam and the way in which Muslims should conduct their lives. Some of these meetings were recorded on tape and the tapes were distributed to a number of specialist bookshops. It is the content of the appellant's speeches on those tapes on which the charges of soliciting to murder were based.
14. In his speeches, the appellant encouraged his listeners to kill. He encouraged them to wage *Jihad* against the enemies of Islam as he deemed them to be. He asserted that it was compulsory for all Muslims to undertake *Jihad* and that the meaning of that word was the killing of those who did not believe in the Islamic faith (Kaffars). In particular, the appellant urged his audiences to strike against Americans, Hindus and Jews.
15. Among the speeches, the following phrases were included: "The way forward can never be the ballot. The way forward is the bullet ..."; "We spread Islam by the Sword and so what, and today we are going to spread by the Kalashnikov and there is nothing you can do about it."; "Is there any peace treaty between us and Hindus and Indians? No, so you can go to India and if you see a Hindu walking down the road you are allowed to kill him and take his money." The appellant also stated that any Muslim who was killed whilst carrying out *Jihad* would become a martyr and go to paradise. He encouraged suicide bombing and the use of chemical weapons. At a meeting which took place prior to the aircraft attacks of Al-Qaeda in America on 11 September 2001, he played a tape recording of a speech by Osama bin Laden encouraging strikes against American targets.
16. The investigation which resulted in the charges eventually preferred was initiated as follows. On 14 December 2001 police officers in Dorset stopped a motor

vehicle driven by Richard Chinyoka. During a search of the vehicle, a number of audio cassettes were found, including two containing recordings of the appellant addressing a public meeting. They had the titles "*Jihad*" and "*The Rules of Jihad*". They were marked "*By Sheikh Faisal*".

17. Having heard the content of the tapes, the police began an investigation into the activities of the appellant. On 14 February 2002 an undercover police officer went to an Islamic bookshop at 61 Brick Lane, in London and bought a number of tapes, including an audio cassette with the title "*Traits of Jews*" and marked by "*Sheikh Faisal*".

18. On 18 February 2002, police officers acting under a search warrant issued pursuant to s.8 of the *Police and Criminal Evidence Act 1984* (PACE) entered premises called Zam Zam Bookshop at 388 Green Street, East Ham and seized a large number of tapes containing recordings of the appellant's speeches, including audio cassettes with titles "*No Peace With The Jews*", "*Declaration of War*" and "*Them v Us*".

19. On the same day police officers acting under a search warrant entered the appellant's home at 104 Albert Square, Stratford and seized a large number of tapes containing recordings of the appellant's speeches, including an audio cassette with the title "*Jihad DAT*". Immediately prior to the search, the appellant was arrested for inciting murder and distributing racially inflammatory material. After being cautioned he stated:

"I do not incite murder, it's not my policy to incite murder, I only preach Islam and secondly I'm not a racist, I do not hate anyone, I only hate crimes against humanity."

20. Taken to Paddington Green Police Station and interviewed, the appellant stated that he had been born in Jamaica and been in the United Kingdom for some 10 years. Having been to university in Riyadh, Saudi Arabia, he was sent to the United Kingdom to preach by Sheikh Rajhi. He used to give lectures in Brixton Town Hall and travelled around preaching, visiting Manchester, Worthing, Bournemouth, Cardiff, Swansea and Birmingham. His talks were sometimes attended by a 100 people and sometimes by 500. Many people had told him to take the tapes out of his house. He said "*Jihad*" and "*The Rules of Jihad*" were recordings of his speeches and should be listened to together. On having various passages played to him, he said Muslims were not allowed to start hostilities and references to killing non-believers were being misconstrued. He was talking about killing in self-defence. He was not a racist. He had a problem with Zionist Jews, but did not encourage anybody to attack or kill Jewish people. He had met Richard Chinyoka. He had supplied the tapes to about 15 bookshops. It was impossible to separate him from the Quran and, if he were put on trial, the Quran would be on trial.

21. We have already set out the names of the tapes in respect of which the counts in the indictment were framed. Because the grounds of the appeal relate only to counts 1, 2 and 4, it is necessary only to refer to extracts from the three tapes upon which the prosecution principally relied which are relevant to those counts. (References in the left-hand column are to the pages of the transcript at trial and the timing upon the tapes.)

22. Jihad (DAT) (Count 1)

Page	Reference
2 (1:28)	Before continuing let us define the word Jihad... whenever Allah used the word Jihad in the Koran it means to kill the Kaffars...That's the legitimate meaning of Jihad.
3 (4:11)	So the 1st condition for you to call your war Jihad is that is, it has to be against Kaffars.
8 (12:12)	The Jihad of a woman is to bring up her male children with a Jihad mentality. Is that clear? So when you buy toys for your boys you buy tanks and guns... [laughter]. Helicopter gun ships and so forth. This is the Jihad of a woman, to bring up her sons with a Jihad mentality not to be wimps but to be Mojahedeen. And whenever you are a Muslim boy and you are 15 you are a soldier automatically...So all of you, sitting down in front of me are soldiers. Is it sensible for you to be a soldier and you don't know how to shoot a Kalashnikov. A soldier who doesn't know how to shoot therefore Jihad training is compulsory on all of you...
10	Hypocrites would have said maybe Allah meant the Jihad of the pen or the Jihad of the tongue so Allah said ...fighting is prescribed for you and you can't say that Allah meant you can fight with a pen on the battlefield [laughter from audience].
11 (16:45)	...anytime you love the world-earthly life and fear death the Kaffars will not fear you anymore. Therefore for you to be a formidable foe...you need to conquer your fear for death...and you need to look to die in the path of Allah...

<p>11-12 (17:08)</p>	<p>So at this particular moment in time your Islamic scholars are dumped in prison like Sheikh Omar Abdul Rahman and Moulana Masood Azhar until they hijacked a plane and freed him and this person wrote a book and advised Osama Bin Laden who wrote the book Sheikh Bin Baz advising Osama Bin Laden about terrorism, hijacking and suicide bombing...Sheikh Bin Baz is a Kaffar so who is he to advise Osama Bin Laden. You understand. Would you take advice from a Kaffar?</p>
<p>19 (29:32)</p>	<p>The greatest Jihad is for your feet to blister and for your blood to run...</p>
<p>20 (31:14)</p>	<p>So many of you, you don't want to do a Jihad but I have news for you...Even if you don't want to do Jihad the Kaffars are going to bring the Jihad to your doorstep...</p>
<p>22 (33.23)</p>	<p>So the Jews brought Jihad to you, one billion Muslims and the Russians bring it to you and the French bring it to you. So even if you don't have it on your agenda the Kaffars are forcing you to include Jihad on your agenda because they are coming to get your natural resources and they are coming to kill your scholars and rape your women. They are coming to get you. So you have absolutely no choice.</p>
<p>23 (36.07)</p>	<p>So the way forward can never be the ballot. The [way] forward is the bullet.</p>
<p>24 (37.41)</p>	<p>We spread Islam by the sword and so what, and today we are going to spread by the Kalashnikov and there is nothing you can do about it</p>
<p>29 (44.31)</p>	<p>I'm sure that after September 11th everybody knows about Islam and Muslims [laughter in audience]</p>
<p>38 (10:23)- 39 (11:02)</p>	<p>Mullah Omar has passed a Fatwa that Jihad is an individual duty for the protection of Afghanistan...against America the Great Satan. However it was brought to my attention that some people tried to enter and they sent them back...This was on the Kaffar news media. So we shouldn't believe it...The Kaffars are saying this because they don't want you to do Jihad. Go for Jihad on the path of Allah.</p>

39 (11:06)	The fifth aim and objective of Jihad is to lessen the population of the Kaffars...Even today in modern times you should cut the throat of the Kaffars with machete.
40 (12:22)- 41 (12:53)	Allah used the word to terrorise...So we terrorise the Kaffars. However you are only allowed to strike at military targets. You are not allowed to strike at civilian targets. This is debatable. Is that clear? What I've just said to you is debatable because I've read to you a Fatwa from Saudi Arabia last week and the Sheikh said there is no such thing as an innocent Kaffar because before they attack Muslims they will vote for war...They take a poll and 90% of Kaffars said kill them...so whenever a Kaffar vote for war they are like Kaffar soldiers.
43 (16:22)- 44 (17:17)	...one of the aims and objectives of Jihad is to lessen the population of the Kaffars and in order to inspire us to kill Kaffars the messenger of Allah said any time a Muslim kill a Kaffar that Kaffar will take his place in hellfire...If you kill a Kaffar on the battlefield that Kaffar will take your place in hellfire.
44 (16.58)	By you killing you will crawl on his back and go to paradise while you are pushing him down to hellfire [laughter in audience]. This is how wonderful it is to kill a Kaffar...the Muslim didn't really kill the Kaffar. The Kaffar was already dead. All the Muslim did was to finish him off
45 (18.52)	The sixth aim and objective of Jihad is to terrorise the Kaffars...Allah said you should terrorise them
64A	[Question from the audience: when there is a legitimate target, you go for the legitimate target...if there are children there you can't stop the...] The Sheikh expanded on that, if you have a legitimate target and you strike at it and women and children die, they become collateral damage, the Sheikh actually expanded on that last week – next?
64A	[Question from the audience: how can we help the Taliban apart from praying for them?] You should send wealth to them if you have the means to do so

23. Jihad (Count 2)

Page	Reference
65 (0:29)	There is a lot of difference of opinion among the four groups of Imams in regards to the Islamic Jurisprudence of Jihad. I will be mentioning the difference to the text but at the same time I will be telling you which of them is most accurate...
66 (1:56)	Jihad is to wage war against the unbelievers
72 (18:41)	You need to wage Jihad to repel the aggression of NATO...the UN...the USA [and]...the UK, only with Jihad we can repel the aggression so don't entertain the idea of voting... our methodology is the bullet not the ballot.
73 (21:24) – 74	Is there any peace treaty between us and Hindus and Indian? No, so you can go to India and if you see a Hindu walking down the road you are allowed to kill him and take his money, is that clear, because there is no peace treaty between us and him his wealth isn't sacred nor his life because there is no peace treaty between us and him...
77 (30:57)	...assassination is Hallal Lawful, so if you know that the person is plotting, you are allowed to send somebody to kill him.
79 (35:43)	Allah is not going to use what he used to wipe [unbelievers] out in the time of Noah...he will use you to wipe them out.
80 (36:47)	Those who want to go to Jenna paradise it's easy just kill a Kaffar unbeliever...by killing that Kaffar unbeliever you have purchased your ticket to paradise.
80 (37:43) – 81	The sixth aim and objective of Jihad is to spread terrorism. To terrorise the unbelievers...if terror didn't work Allah wouldn't have commanded you to terrorise the unbelievers and the best way to terrorise them is to exterminate them with Jihad.

83 (0:12)	Allah prescribed for you fighting, and you can't say well Allah meant you fight with a pen, you can't go to the battlefield with a pen...and there is only one explanation for fighting and that is to kill the unbelievers.
85 (4:56)	Every Muslim hates the unbelievers and you want to see their extermination...Allah said kill them and did Allah tell you what to use. That means you can use anything, even chemical weapons...to exterminate unbelievers.
90 (19:53)	When you travel together...think about travelling to the battlefield to kill unbelievers and spread the deed.
93 (27:43)	Osama Bin Laden, he is hiding from America in the mountains of Afghanistan if America should capture him, say the Taliban hand him over to America, have you got the power to defeat America and take back Osama Bin Laden
93 (28:34)	The apostate leaders and the scholars of the apostate leaders, you have to kill them because they preach the wrong Islam...you have to abduct them and kill them and you kill the unbelievers and you kill the hypocrites and...the apostates...these are the 5 people you kill when you do Jihad

24. Declaration of War (Count 4)

Page	Reference
129 (00:08)	By Allah's permission we will be taking a look at a speech that was delivered by Osama Bin Laden...he has given a speech in regards to the importance of liberating the Holy Land and...I will be translating his speech word for word, because in my opinion everything he said is of extreme importance – every word is like [a] gem...
132 (13:16)	[El-Faisal translating]: The high blow, maybe many times, the high blows, maybe are many. But the short and swift blow which causes the enemy to bleed is the best of blows.

<p>135 (25:15)</p>	<p>[tape of Osama Bin Laden]: One of the most imperative duties, which is the most obligatory after declaration of faith, is to seek jihad to fight the Americans and the Jews to drive them out of the holy places of Islam.</p>
<p>136 (27:39)</p>	<p>[El-Faisal translating]: Hence the first duty, the first compulsive act upon you, after your declaration of faith...is for you to fight and kill the Americans and the Jews and drive them out of the Arabian peninsular.</p>
<p>137 (33:30)</p>	<p>[tape of Osama Bin Laden]: Some may ask the question, what's compulsory on them at this time and how can they get to fight the Americans and Jews?</p>
<p>137 (35:22) – 138</p>	<p>[El-Faisal translating]: Some may ask the question, what's compulsory on me and how can I fight and kill the Americans and the Jews and the Christians and their allies?</p>
<p>140 (42:03)</p>	<p>Afghanistan is the only country in the world today that has the Sharia, therefore it is compulsory on all the Muslims all over the world to help Afghanistan, and to make migration to this land, because it is from this land we will dispatch our armies to smash the disbelievers all over the world.</p>
<p>141 (48:07)</p>	<p>Whenever the holy months expire, kill the pagans wherever you find them.</p>
<p>142 (00:50)</p>	<p>These are the words of Allah...commanding us to fight and kill the disbeliever even when they are in their own countries...so if you were commanded to fight them, even when they are in their own countries, how can you have them in the holiest land of Islam...It is incumbent upon us Muslims to remind the believers of the importance of killing these disbelievers, finding them and killing them...Brothers and sisters let me remind you that all of you will die except the martyr, you will all die except the martyr.</p>
<p>142 (2:47)</p>	<p>This was the speech of Osama Bin Laden to the nation. He spoke from the heart...</p>

146

(18:02)

[Inaudible question from the audience] From the speech of Osama Bin Laden, I have gathered that he did not want us to come there, but attack from wherever in the world we are, that way we will be more effective

25. The law relevant to the charges in the counts under appeal is as follows.

26. The offence of soliciting to murder is contained in s.4 of the 1861 Act which states:

"Whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for life."

27. The scope of the behaviour sufficient to constitute the offence was classically identified as follows in *R v Most* (1881) 7 QBD 244 per Huddleston B. at 258:

"The largest words possible have been used – "solicit" – that is defined to be, to importune, to entreat, to implore, to ask, to attempt to try to obtain; "encourage", which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; "persuade" which is to bring any particular opinion, to influence by argument or expostulation, to inculcate by argument; "endeavour" and then, as if there might be some class of cases that would not come within those words, the remarkable words are used, "or shall propose to", that is say, make merely a bare proposition, an offer for consideration."

28. The crime of murder for this purpose may be defined as the unlawful killing by one person of another by an act aimed at the victim with the intention of causing him death or serious bodily injury. "Unlawful" means "without lawful justification or excuse".

29. The archetypal example of a killing for which there is lawful justification or excuse is one where the fatal blow is struck or other fatal act committed in the course of the exercise of reasonable force in defence of the actor or of some other person in the face of unlawful attack. Thus the law recognises that a person may use such force as is reasonable in the circumstances (as he honestly believes those circumstances to be) in the defence of himself or another. In the context of solicitation to murder, a distinction is to be drawn between the person who solicits murder and any person who may act upon the solicitation. It is the state of mind of the former which is in issue. In other words, it is necessary to consider

whether he solicited the killing of another person or persons which would only take place in circumstances where such killing would be justifiable as being necessary and reasonable force in the face of threatened attack, or whether the defendant was encouraging and persuading persons to kill others (in this case non-believers) regardless of whether such persons were under attack or threat of attack themselves.

30. It was the prosecution case that, in his speeches, the appellant solicited the killing of individuals based on their beliefs, nationality or race and not on the basis that such individuals were themselves physically attacking or threatening to attack the person solicited. The general nature of the solicitation was reflected in the drafting of the indictment. The classes of people who it was alleged the appellant solicited to be murdered were particularised as:

i) Count 1: "a person or persons who did not believe in the Islamic faith;

ii) Count 2: "a person or persons who did not believe in the Islamic faith, in particular Indian Hindus";

iii) Count 4: "a person or persons who did not believe in the Islamic faith, Americans and Jewish people".

31. The prosecution asserted that such a general solicitation to kill could not properly be said to invoke considerations of self-defence, being neither expressly nor implicitly limited to circumstances in which the person solicited was being physically attacked or under immediate threat of attack. On the contrary, the appellant was urging his audience to attack rather than simply to defend themselves by lawful means. The plain and ordinary meaning to be given to the appellant's words was that they were a general encouragement to his listeners to carry out acts of terrorism, the violent overthrow of democracy and the extermination of non-Muslims and other classes of people.

32. The defence case, advanced by the appellant in evidence over a period of five days, was a development of his assertion in interview that all he was doing was elaborating and interpreting the teachings in the Quran, and that, when he spoke of killing, he was speaking only of killing in self-defence, his references to the killing of non-believers having been misconstrued by the prosecution. In elaboration of this, he highlighted the various passages in his speeches where he had referred to killing in or on the "battlefield". He asserted that, however the individual tapes of his sermons might be interpreted by the prosecution, it was the case that none of them meant or was intended to mean that the killing should be indiscriminate. Any killing was to be done on the battlefield and was aimed at those who oppressed, persecuted and murdered Muslims.

33. By way of example, he stated in relation to one passage he was expounding the definition or extent of *Jihad*:

"I deal with where the Jihad is to take place at pages 69 and 70 by making it clear that it's on the battlefield. I deliberately use that word, "battlefield" so that audience would understand that acts against, for example, embassy buildings as in the Sudan or on a bus or on a train are not. I meant by battlefield where the conflict is taking place, not where civilians would be found but on the battlefield alone."

34. Again, when in relation to a tape extract where he had referred to the training of boys in *Jihad* for the purpose of defending the Islamic faith, he was asked "to defend the faith where?", he answered:

"... that's a decision for them to make for themselves. I as a cleric merely lay out the principle. I cannot specify where for each of them ... it's not applicable however, this definition of *Jihad*, to fighting in this country because in this country there is no oppression of Muslims. Its not applicable to going to America to carry out fighting there because America is not the battlefield. *Jihad* belongs to a battlefield, and the battlefield is what is happening in Kashmir ... that is an example of a battlefield ... and I make it clear to my audience that if they want to go there to fight, even if that involves killing the enemy, that would be an act within their faith provided of course that they also do the other things within the meaning of *Jihad*. That's to say not killing women or killing labourers just killing the military who are killing the people there."

35. It was the prosecution case that those explanations which the appellant gave in evidence as to the meaning of his words constituted a gloss which was plainly inconsistent with the breadth of the words actually used, in particular in the passages which we have already quoted at paragraphs 23-25 above. The words of the appellant were so general, and the nature of the passages quoted such, that the field of conflict in which the appellant urged Muslims to kill plainly extended beyond any battlefield in the ordinary sense and included acts of terrorism against Kaffars generally and in any place where, in a loose sense, there was a struggle, as the appellant saw it, between the forces of Islam and various identified non-believers such as Americans, Jews and Hindus, in the course of which the killing of non-combatants, including women and children, was acceptable as collateral damage.

36. Prior to his summing-up, we have been informed by counsel (though no transcript has been obtained), that the judge raised with counsel the nature of the summing-up appropriate to be given to the jury upon the issue of self-defence in the circumstances of the case. He indicated that he proposed to deal with it in conventional terms along the lines which he in fact employed (see further below). Counsel had the opportunity to make any comments or suggestions they wished. However, no additional suggestions were made and, in particular, counsel for the defence made no suggestion that the judge should include a passage specifically

directed to the question whether and how far the "battlefield" explanation/interpretation advanced by the appellant could come within the standard definition of self-defence.

37. In relation to the relevant counts, the judge dealt with the matter in this way. He said:

"What is murder? Murder is the unlawful killing of another person done with the intent to kill, or at the very least to cause really serious injury. It incorporates within it 'unlawful'. 'Unlawful', means without lawful justification or excuse for the killing. If it happens by accident, it would not be unlawful. If it is done in necessary and reasonable defence of yourself or another, then ... it would be lawful, and it would not be unlawful. Usually, consideration of lawful defence of oneself or another gives rise to considerations applicable to the act of killing – proof by the parties seeking to prove that it was an unlawful act that took the life of another, disproving a defence raised that it was done in necessary and reasonable self-defence or defence of another.

Ordinarily, the considerations of that would be looking to see if that act was, in the first instance, necessary; to see whether the risk that caused the taking of the life of another, said to be in self-defence, could have been avoided at all; looking to see whether that act was, in reality, not defending oneself or defending someone else, but an act done, in truth, in retaliation, or in punishment, or by way of revenge, or paying off old scores. If you, considering that individual act, were sure that it was one of those as the reason for it being done, then of course it would not be or could not be said to be a necessary act that caused that life to be taken ... lawfully.

Even if there was the necessity to defend oneself or somebody else, the second question that has to be asked is whether the act done that took a life in self-defence or the defence of someone else was reasonable; that the act of self-defence was proportionate to the threat posed. Those are the considerations that ordinarily go to the jury's consideration of whether the taking of life in necessary and lawful self-defence excused or justified the taking of that life.

You will have to consider whether, in relation to proof, what the defendant was urging is the unlawful killing of another; whether a general solicitation or encouragement to kill – to kill as the Crown allege here unbelievers, or Jews, or Americans, or Hindus – in the terms that the Crown assert that the defendant was so soliciting and encouraging others ... whether general solicitation or general encouragement of this sort ... [there then follows a passage in the transcript which is difficult to follow]."

38. The judge then went on:

"The soliciting or encouraging the unlawful killing of who? Well – anyone, whether here, in this country, or anywhere else in the world ... The prosecution do not have to prove that anyone was solicited or encouraged to murder as a result of what the defendant said, but the prosecution must prove that that was his intention when he uttered those words, knowing, as it is alleged he would from the fact that those words were recorded, that the tape recordings would afterwards be offered to the public for sale.

Therefore, the prosecution have to prove in respect of each of the first 5 counts which accuse the defendant of soliciting to murder, first of all, that the defendant said the words that the prosecution allege ... There is no problem there. There is no issue raised before you but that those were the defendant's words.

The second issue: the prosecution must prove that in respect of each of those first 5 Counts the words that the defendant used were a solicitation of or an encouragement to persons to murder those specified; in Count 1, a person or persons who did not believe in the Islamic faith, the solicitation being recorded in 'Jihad DAT'; in Count 2, persons who did not believe in the Islamic faith, in particular Indian Hindus, the solicitation being recorded in 'Jihad'; ... in Count 4, a person or persons who did not believe in the Islamic faith – Americans and Jewish people – that solicitation, the Crown assert, recorded in the tape labelled 'Declaration of War'.

Thirdly: that the killing being solicited or encouraged was unlawful. That is to say not accidental, or being done in necessary and reasonable self-defence or defence of another – in other words not justified or excused in law.

Fourthly and finally: that the defendant intended the words he used by way of solicitation or encouragement – in other words, those to whom he spoke either in person or on the tape recordings – to murder the person specified in each of those 5 Counts. In other words, you have to give consideration to his state of mind at the time he uttered those words ... What was going on in his head at the time he uttered those words; in other words what his intention was."

39. At this stage we pause to observe that the judge had already instructed the jury, shortly before the long passage we have quoted, that:

"The defendant's claim to be to be able to justify any utterance of his with reference to the Koran or the Hadith or a scholarly interpretation of either during the 1400 years since the prophet Mohammed, as the defendant believes but

many others do not – that belief that he gave the word of God – may well have a bearing on why he said what he did. It may well have a relevance to your consideration of his intention in saying what he did, but it does not of itself afford him a defence in law to any charge, if having considered what he said and his explanation to the police and his explanation to you as to why he said it, that the use of those words in the circumstances he spoke them are proved to be contrary to the law of this country and thus an offence – no more or less than a similar citation from anyone else's holy book including the Bible would be."

40. Having completed his summary of the ingredients of the various counts as to which the jury would have to be satisfied to return a verdict of guilty in respect of each, the judge proceeded to deal at length with the various passages upon which the Crown relied, before turning later to the explanations of the defendant in relation to each of those passages. However, before starting to review Count 1, he said this:

"The Crown's case about this recording is that in the plain ordinary meanings of the words used by the defendant to the study circle who heard the words at a public meeting, to anyone who cared to attend that public meeting at which the words were uttered, to anyone hearing the words on a tape thereafter, this was the defendant, as the Crown put it to you, preaching murder. That is to say ... soliciting or encouraging those he addressed to kill the 'Kuffar' – that is to say the persons who do not believe in the Islamic faith. The prosecution case is that this is, as are the other four tapes, the subject of the soliciting to murder Counts, the defendant making it clear that military Jihad is a compulsory duty which includes the lessening of the Kuffar here or abroad and his attempts to you to suggest that the killing should be confined, that is to say to take place only on the battlefield where Muslims are being oppressed does not stand up to scrutiny because principally he does not make that clear and if he does not make it clear, how is that to be apparent to his audience, either the audience in the study circle to whom he was actually uttering the words or the audience who would in the future listen to the tape."

41. In reviewing at great length the evidence of the appellant on each Count, the judge gave emphasis to those parts of the appellant's evidence where he had justified or explained what he said on the grounds that his remarks and exhortations were limited to the battlefield. Thus, in relation to Count 2 at page 80 (36:47) concerning the killing of Kaffar unbelievers the judge recited in full the explanation of the appellant that:

"whenever you give a speech or a talk on Jihad or mention a Kuffar, you mean those Kuffars who have engaged Muslims on the battlefield. That was my meaning by the use of those words, to which he adds, 'My audience wouldn't

have misunderstood that'. Those citations are derived from the well-known Hadith, and he refers to page 25 in the defence bundle, chapter 858 and the footnote to them. He says,

'That is my understanding and that of a billion Muslims and I was not in those passages telling them – my audience – anything that they didn't know already and it doesn't apply and wasn't intended to apply to the killing of unbelievers not on the battlefield. Were that to take place, that would be buying a ticket to hellfire, because what you did would not be lawful and it would be considered murder'."

42. Again, in relation to page 85, (4:56), the reference to use of chemical weapons to exterminate unbelievers, the judge pointed out that the appellant had said:

"Yes. I meant what I said, but in this sense, that here I am speaking about the unbelievers who wage war on Muslims in Serbia, East Timor and Palestine, wherever oppression and violent oppression of Muslims is taking place. I do not respect anyone with blood on his hands especially the blood of women, children and innocent persons, and this is the context that I was speaking in."

43. Finally, the judge completed his summing-up in this way:

"What is asked of you now is this: a calm, critical but unemotional appraisal of the evidence that you have been asked to consider over the days that we have sat together as judge and jury. You are not concerned with questions such as, is this prosecution fair? You are only asked to say by your verdict, is it proved that the defendant committed all or any of the criminal offences with which he is charged? To that end, the questions that you have to ask yourselves, and answer are these: in relation to Counts 1 – 5, the allegations of soliciting to murder, considering each of them separately – are we sure that the words that the defendant used solicited or encouraged others to murder, that is to say, to kill unlawfully ... those persons being those who did not believe in the Islamic faith; Count 1, 'Jihad DAT' those who do not believe in the Islamic faith, and in particular Indian Hindus; Count 2 in 'Jihad' those who do not believe in the Islamic faith; Count 3 in the 'Rules of Jihad', those who do not believe in the Islamic faith; [Count 4]: Americans and Jewish people in 'Declaration of War' ... If you are sure that he did in each instance, then the next question is, "Are we sure that that is what he intended when he used those words". It is his intention in the use of those words that you are concerned with, not the intention in the minds of the people who listened to him either in the audience or in playing the tapes. If the answer to both of those questions is, 'yes, we are sure of the offence in that particular Count ... is proved', it will be your duty in those circumstances to find

him guilty ... If the answer is, 'no, we are not sure', to either of those questions, then you should find him not guilty of that Count."

44. Mr Lynch's argument is that, while he does not criticise the summing-up on the question of self-defence in general terms, the judge limited himself to what the court is 'ordinarily' concerned with when there is an issue of self-defence and did not give a more specific direction tailored to the particular facts of the case. He submits that the trial judge (i) should have invited the jury to consider whether the killing solicited was of an indiscriminate nature or whether the killing solicited was limited to that taking place in a theatre of war such as Kashmir or Palestine; (ii) should further have directed that, if the latter was the case, then the intention of the defendant would not be a solicitation of murder, but a legitimate exhortation to the audience to fight in circumstances in which their participation could be regarded as self-defence against the physical attacks of an enemy.
45. In reply, Mr Perry for the prosecution submits that this complaint is one raised in retrospect for the purposes of appeal, no such suggestion having been made at the time when the judge raised the question of the form which his summing-up should take; nor was any further objection or comment made at the end of the summing-up. Indeed, Mr Perry submits that the point was not taken in the form in which it was argued in the original grounds of appeal. Rather was it raised by the single judge upon his consideration of the application for leave. Mr Perry points out (as Mr Lynch accepts) that it was the prosecution case throughout that the appellant was simply advocating indiscriminate killing of non-believers, in response to general oppression, without any limitation or suggestion that killing should only take place in the face of physical attack. Mr Perry submits that the best which can (or could) be said for the appellant's defence was that he was advancing a 'humpty dumpty' gloss upon his general exhortation, in an effort to bring it within the confines of the well understood limitations of English criminal law embodied in the doctrine of self-defence or defence of another. Since the defence raised the argument that what was incited was justifiable as a response to persecution and/or violence against Muslims in certain theatres of war, the judge made clear what the limitations of the defence were in English law, leaving it to the jury to decide whether the appellant's evidence was sufficient to raise a doubt in the jury's mind as to his intentions.
46. Having studied the summing-up in detail, we consider that this analysis is a fair one and that the jury must have been well aware in the light of its content what the appellant's defence was, namely that he intended, and his audience would have understood, his remarks to be limited to the battlefield. We shall assume for the purposes of this appeal that this would constitute a good defence. We accept that there is no specific direction that if the jury were satisfied that the remarks of the defendant were limited and intended to be limited to specific areas of conflict where the actions of Muslims could be regarded as taken in self-defence in the face of attack, that would be a defence to the charge. We also think that it would have been better had such an additional direction been given. The fact remains,

however, that neither counsel found it necessary to request such a direction and the direction given was in no respect erroneous or unfair.

47. We are quite satisfied that the jury were well aware of the basis upon which the Crown asked for a conviction, namely that the appellant's exhortations and, in particular, the passages we have highlighted, were of a general kind which solicited killing on an indiscriminate basis in areas other than the battlefield and that they roundly rejected the evidence of the appellant as to his limited intent. Even without the direction now argued for by Mr Lynch, we are quite satisfied that the issues were properly before the jury and that the conviction is safe.

48. The appeal against conviction is therefore dismissed.