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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 15 November 2018

B e f o r e:

LORD JUSTICE HOLROYDE
MR JUSTICE DINGEMANS
HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the CACD)
R E G I N A
v
LINDA SHEILA BALL

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Mr David Baird appeared on behalf of the **Appellant**
Miss Samantha Wright appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 1 March 2018, in the Crown Court at Chelmsford, this appellant was convicted of an offence of theft of three sunbeds. At a later date she was sentenced to a fine and was ordered to pay compensation and costs. She now appeals against her conviction by limited leave of the single judge.

2. Initially two grounds of appeal were advanced. One challenged the decision of the trial judge permitting the prosecution to adduce as bad character evidence previous convictions of the appellant for offences of dishonesty many years ago. The single judge refused leave to appeal on that first ground and sensibly the appellant has not sought to renew it to the full court.

3. The other ground of appeal, and the sole ground argued before this court today, relates to an irregularity which occurred during the jury's retirement.

4. In those circumstances, it is sufficient to summarise the facts of the case very briefly. The sunbeds which were the subject of the charge were part of the equipment which had been installed in premises used as a beauty salon. The owners of the building decided to sell it and appointed the appellant to act as their agent. Months later, when the premises remained unsold, the owners found that the contents including the sunbeds had been removed. It was admitted by the appellant that she had sold the sunbeds and had kept the proceeds of sale. The prosecution case was that she had acted dishonestly, knowing that she had no right to dispose of the sunbeds. The defence case was that the owners of the property had permitted her to sell the sunbeds, which were of modest value, and to keep whatever she was paid for them. The issue which the jury had to decide was encapsulated by the learned judge at an early stage of her summing-up in the following words:

> "The central area of the dispute in this case, members of the jury, will be, I know, entirely clear to you. Miss Ball asserts she had permission from the owners of those sunbeds to sell them or dispose of them, whilst they assert that she did not. Where the truth lies in that dispute is of central import to this case. The question for you is then whether Miss Ball acted dishonestly in disposing of those sunbeds and keeping the proceeds. If you're sure she did act dishonestly, then she's guilty and, if you're not sure, then she's not guilty."

5. The trial began on 22 February 2018. On the fourth day of the trial, heavy snow fell and more was forecast. The jury sent a note to the judge indicating that they were concerned about their journeys home. As a result, the court rose early on that day, finishing proceedings in mid-afternoon.

6. On the following day, day five of the trial, the court could not sit at all. Counsel attended court but both the judge and the jury were unable to do so.

7. On the sixth day, Thursday 1 March 2018, 10 jurors attended but the remaining two were unable to do so. The judge determined, without objection from counsel, that the absent jurors should be discharged from further service and that the trial, which had

reached the stage of speeches and summing-up, should proceed. No point arises from that decision.

8. The trial therefore continued, but the adverse weather conditions were still a matter for concern. The judge rightly had regard to that concern. Towards the end of her summing-up, she told the jury that there was no "correct time" for their deliberations to take. She went on at page 14G of the transcript to say this:

> "So what I'm saying is there's no minimum time, there's no maximum time for your deliberations. But, if you get to the stage where you think 'I'm worrying about getting home', don't reach a verdict just because you want to go home. Let me know and I will send you home if you were worried. I'd much rather do that but, on the other hand, if you reach a verdict in a shorter time, then don't feel worried about that either. It's entirely a matter for you. The point is you take as long as you need and don't rush it because of the weather, because you can always come back another day."

The judge then directed the jury in conventional terms as to the need for a unanimous verdict. The jury retired to consider their verdict at 1.23 pm.

9. Immediately after the jury had retired, prosecuting counsel Miss Wright raised with the judge the fact that the jury in retirement would not have any means of establishing whether or not their travel home would be viable. That was a sensible point to consider, because at that stage of the trial the jury, in accordance with usual practice, would have surrendered their mobile phones. Having considered the point, the judge, without objection from counsel, directed the jury bailiff to tell the jury that although they should not have their phones with them at all times, they could if they wished occasionally use their phones purely to check their travel arrangements. She explained her reason for giving the jury limited access to their mobile phones in that way by saying that she did not want the jury to worry as a result of not knowing the situation. No point arises from that direction. We observe with the benefit of hindsight that it would have been preferable if the judge had herself given that direction at the conclusion of her summing-up. We recognise however that it was a point which had not occurred to anyone until moments after the jury had retired. In all the circumstances we do not think there was any irregularity in this respect.

10. In further discussions with counsel, the judge indicated that her provisional view, if no verdict was reached during the afternoon, was that she would start to re-assemble the court at about 4.10 pm to send the jury home. By that time the jury would have been in retirement for nearly three hours, but she did not think it would be appropriate to give any majority direction until the following day.

11. Shortly after 4.00 pm the court reconvened. In the absence of the jury, the judge informed counsel that about 20 or 30 minutes earlier she had been informed "that the jury had written a note asking about split verdicts but I said just to let them know to carry on". We infer that that direction from the judge must have been communicated

to the jury in their retiring room by the jury bailiff. The judge went on to say this to counsel:

> "I didn't see the point in interrupting them, bringing them down, telling them I couldn't and sending them back up again but I do think, as a matter of courtesy, since they've written the note I ought to explain to them that there are time limits on these things, that even when it is appropriate to give a majority direction, given there are only 10 of them, it would be a verdict of at least nine of them that would be required, but that my view, given the time limits, was such that I couldn't give them any such direction this afternoon. Now, it may well be that they were just wondering - there was no indication of 'we are having problems', just ... "

At that point it appears that the judge must have been informed by the jury bailiff that the jury had reached their verdict. The judge continued with these words:

> "Have we just got a verdict? Yes. It was - it was phrased in such a flexible way that I didn't think it required any action."

The judge then expressed the hope that counsel "don't have any difficulty with the fact that I didn't choose to interrupt them earlier". Counsel indicated that they did not. The jury then returned to court at 4.08 pm and returned a guilty verdict.

12. This court has been provided with the note from the jury to which the judge had referred. It merely says:

> "Advice on a split verdict please".

13. We are grateful for the submissions of counsel, both of whom appeared below. For the appellant, Mr David Baird submits that there was here a material irregularity. He observes that counsel were not shown the jury note at any stage and he had assumed that it must have been a note containing some indication of voting figures. He submits that rather than sending a message to the jury via the bailiff to continue their deliberations, the proper course would have been for the judge to assemble the court and give that direction herself in open court. He submits that there is a risk that some or all of the jury may have felt pressurised by anxiety about the weather and the viability of their homeward journeys. Relying on what he suggests may have been the combined effect of weather-related anxieties and the irregularity in procedure, he submits that the jury ought to have been sent home when the note was received in order to avoid any possibility of pressure and told to return on the following day. In the events which happened, he submits, the conviction is unsafe.

14. For the respondent, Miss Samantha Wright accepts that there was a material irregularity in the manner in which the judge dealt with the jury's note. She concedes that the judge should have called the jury back into court and told them in open court that they should continue to try to reach a unanimous verdict. She submits, however, that this irregularity does not render the conviction unsafe. She relies on the decision of this court in Lamb (1974) 59 Cr.App.R 196. She refers to the judge's enquiry of counsel

hoping that they did not have difficulty with the course which the judge had taken and to Mr Baird's reply that he did not. Miss Wright further submits that the reported cases relating to issues of juries being under pressure of time for the most part relate to a time years ago when the treatment of jurors was very different from the manner in which they are treated today. On this last point she has the advantage of being able to refer by way of analogy to the recent decision of this court in Senna [2018] EWCA Crim 789, [2018] 4 WLR 84.

15. In the case of Lamb, two grounds of appeal against conviction had been advanced. The first ground was that the judge had misdirected the jury in that case as to the law. This court concluded that there had indeed been a gross misdirection and allowed the appeal on that ground. The court nonetheless went on to deal with the second ground of appeal, which raised a matter of more general importance. The court made clear that had this second ground of appeal stood alone it would have resulted in the conclusion that there had been a material irregularity in the proceedings but that no miscarriage of justice had resulted. The court would therefore not have quashed the conviction on that ground, but would have applied what was then the proviso to section 2(1) of the Criminal Appeal Act 1968.

16. That second ground of appeal related to the fact that whilst the jury were in retirement they sent a message that they could not reach a unanimous verdict. The judge authorised or directed the court clerk to go into the jury room and instruct the jury that they should continue to arrive at a unanimous verdict. Only 10 minutes or so later the jury returned a unanimous verdict of guilty. This court concluded that there had been a material irregularity and that the judge should have called the jury back into court and given publicly the direction which had in fact been given privately by the court clerk in the jury room. In that case the facts had been made known to counsel before the jury delivered their verdict and no application had been made at that stage for the jury to be discharged. The court concluded that clearly those present had thought that no harm had resulted from the incident and the court found that there was no miscarriage of justice.

17. The court gave general guidance in terms which are accurately summarised in the headnote as follows:

> "On a court being informed by the jury bailiff, after the retirement of the jury, of the wish of the jury to make a request of or communicate something to the court, the proper practice is that either the request or communication should be delivered in writing to the court and its contents and any reply thereto to be delivered by the bailiff made known in public in court before delivery, or the jury should be brought back into court to make the request themselves and the judge should answer their request in court."

18. An issue about a communication received from a jury in retirement also arose in the later case of Gorman [1987] 1 WLR 545. In that case, an appeal against conviction at a retrial was dismissed on the ground that the court had no jurisdiction to review a decision to discharge the jury at the earlier trial. The court however went on to

consider the extent to which a trial judge should disclose any communication received from a jury. Again, the headnote provides an accurate summary of the court's conclusions:

> "A judge who receives a communication from a jury who have retired to consider their verdict should, (i) if the communication raises something unconnected with the trial, eg a request to pass a message to a relative, simply deal with it without reference to counsel and without bringing the jury back to court; (ii) in almost every other case state in open court the nature and content of the communication and, if he considers it helpful so to do, seek the assistance of counsel (this assistance will normally be sought before the jury is asked to return to court and then, when the jury returns, the judge will deal with their communication); and (iii) exceptionally, if the communication contains information which the jury need not and should not have revealed, such as details of voting figures, then so far as possible the communication should be dealt with in the normal way save that the trial judge should not disclose the detailed information which the jury ought not to have revealed."

19. The procedure to be followed when the jury ask a question is now the subject of Rule 25.14 of the Criminal Procedure Rules. So far as is material for present purposes the rule states:

> "After following the sequence in rule 25.9 (Procedure on plea of not guilty), the court must—
>
> (c) direct the jury to retire to consider its verdict;
>
> (d) if necessary, recall the jury—
>
> (i) to answer jurors' questions, or
>
> (ii) to give directions, or further directions, about considering and delivering its verdict or verdicts, including, if appropriate, directions about reaching a verdict by a majority... "

In our view, the use in that rule of the phrase "if necessary" in sub-paragraph (d) is not intended to depart from the principles stated in Gorman. In our view, save in the limited situation of an uncontroversial communication raising something unconnected with the trial, it will in almost every case be necessary for the judge to recall the jury if they have asked a question and to answer their question in open court.

20. We turn to consider the application of these principles to the present case. We have no doubt that Miss Wright was correct to make her concession that a material irregularity occurred. The answer to the jury's question, namely that they must for the time being continue to try to reach a unanimous verdict, was in itself uncontroversial and we accept that the judge wished to avoid interrupting the jury's deliberations by bringing them back into court to receive that direction. Nonetheless, with all respect to the judge, it was not proper for her to cause her direction to be communicated in the jury

room by the jury bailiff. Such a method of communication offends against the important principle of open justice. It gives rise to the obvious risk that in response to the bailiff's statement the jury might be tempted to ask a supplementary question. There is the further obvious objection that there would be no recording of precisely what is said in the jury room. For at least those reasons, the jury bailiff, however experienced and however punctilious, should not have been used in that way.

21. Moreover, in the circumstances of this case the following of the correct procedure would have provided an important opportunity for counsel, if they wished to do so, to make submissions to the judge as to whether she should not merely direct the jury as to the need for their verdict to be unanimous, but should also reiterate her earlier direction that the jury must not feel under any pressure of time, whether by reason of the adverse weather or for any other reason.

22. It is then necessary to consider whether that material irregularity renders the conviction unsafe. In considering this point we do not think it would be right to attach any great weight to the fact that Mr Baird did not immediately ask for the jury to be discharged. It seems to us that his assumption that the note must have contained some voting figures, and for that reason could not be shown to counsel, is an assumption which many experienced criminal practitioners would have made. Had the normal procedure been followed as it should have been, there would have been at least some opportunity for counsel to consider all the implications of the jury's enquiry and to make submissions accordingly if they wished to do so. As it was, both counsel were put on the spot by the judge's enquiry as to whether they were concerned about the course she had taken some 20 or 30 minutes previously, and they had no opportunity for reflection. No doubt Mr Baird could have asked for a moment to consider the position, but we would not think it right to decide this appeal on the basis that he did not immediately object.

23. The much more important considerations, in our view, are these. First, in the words which we have quoted from the end of her summing-up, the judge had made it entirely clear to the jury that they must not rush their verdict because of the weather, that they could come back on the following day if they wanted more time and that they should let her know if they became worried about their ability to get home. She had moreover enabled them to check their travel arrangements from time to time if they became concerned about getting home. Secondly, although the jury cannot conceivably have forgotten those words when some two-and-a-half hours later they sent their note, they conspicuously confined their enquiry to a request for advice on split verdicts and said nothing at all to suggest any concerns relating to the weather or their homeward travel. Thirdly, it follows that although the correct procedure would have provided an opportunity for counsel to make submissions and for the judge then to reflect on what she should say to the jury, she would not have been under any obligation to say anything further about the weather conditions. The direction which she sent via the jury bailiff was correct in law, albeit communicated by an improper means, and it said all that it was necessary to say. The judge's observations to counsel referred to above indicate that if the jury had been brought back into court, as they should have been, she would have given them a somewhat expanded explanation of the legal position relating

to majority verdicts, but her observations do not suggest that she would have thought it appropriate to refer again to the weather.

24. Lastly, in the circumstances of this case, we can see no basis for inferring that in continuing their deliberations and reaching their unanimous verdict the jury acted in haste or out of a feeling of pressure or indeed were anything other than conscientiously obedient to their oaths and affirmations.

25. We are therefore unable to accept Mr Baird's submission that the judge should not only have answered in open court the jury's enquiry about split verdicts, but should also have sent the jury home. If the jury had been worried about their homeward travel at the time when they sent their note, or if they had become worried about it after the jury bailiff had communicated the judge's direction, they were able to use their phones to check their travel arrangements and they knew from the judge's earlier direction that they could and should raise any concerns with her. They did not do so and in the circumstances of this case we see no reason to doubt that they continued conscientiously to deliberate upon their verdict.

26. For those reasons, we conclude that the material irregularity which undoubtedly occurred does not cast doubt on the safety of the conviction. The appeal accordingly fails and is dismissed.