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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 27 March 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
(VICE PRESIDENT OF THE CACD)

MR JUSTICE PHILLIPS

MRS JUSTICE MCGOWAN DBE

R E G I N A

v

JOHN PHILLIP MCALEER

Mr S Mayo QC and Mr W Aleeson appeared on behalf of the **Applicant**
Mr J Price QC and Ms A Evans appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

Background

1. On 20 November 2015, at the St Albans Crown Court, before Her Honour Judge Catterson, the applicant was convicted by a majority of 11 to 1 of an offence of attempted murder. On 1 April 2016, Her Honour Judge Catterson sentenced him to an extended sentence of 20 years, comprising a custodial term of 15 years' imprisonment and an extension period of 5 years.

2. His application for leave to appeal against conviction and to rely on fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968, has been referred to the full court by the single judge.

3. Represented by fresh counsel, Mr Simon Mayo QC, he now pursues one ground of appeal based on an alleged jury irregularity.

The facts

4. Late in the evening of 29 June 2015, the applicant and his girlfriend, Danielle Hammond, went with friends to the applicant's sister's flat. It was on the fourth floor of a residential building and had a balcony to the front of the building. Most present had drunk a lot and been taking drugs. An argument took place between the applicant and Danielle Hammond in the hallway. Jake Hulse heard a loud thud and went out to the hallway to find the Ms Hammond lying on the floor. The applicant was trying to pick her up and she was crying. He and a friend ushered the applicant away and told him to apologise to Ms Hammond. The applicant went to the her and they were initially in the front room together. They later moved out onto the balcony and shut the balcony door behind them.

5. Mr Hulse heard the balcony door slam. He walked into the front room and saw Ms Hammond with her back to the balcony railings. Her elbows were propped on the railings. According to Mr Hulse, the applicant took one step back into the front room from the balcony. Ms Hammond spoke, causing the applicant to spin round as if to hit her. She raised her leg to protect herself, the applicant grabbed her leg and shoved her over the balcony. The applicant looked over the balcony, turned and walked back in the flat. He told a witness in the front room, "Danielle jumped". The witness told him that he had seen what he had done and the applicant became hysterical.

6. Ms Hammond sustained serious injuries and did not give evidence at the trial.

7. The Crown case was that the applicant had deliberately forced Danielle Hammond over the balcony with the intention of killing her. The prosecution also relied, apart from the evidence of Mr Hulse and others at the scene, upon the evidence of two earlier incidents in June 2015 which they said indicated the applicant had been physically abusive towards Ms Hammond in the past and demonstrated a propensity for him to abuse her and for her to be reluctant to complain.

8. The defence case was accident and a denial of intention.

The fresh evidence of a possible jury irregularity

9. The jury irregularity came to the attention of the authorities when a few days after the verdict one of the jurors, Ms CA, emailed the trial judge with her concern about members of the jury researching the case and the applicant online. Cambridgeshire Police conducted an investigation in relation to potential juror offences under the Juries Act 1974. Statements were taken from all the jurors and one juror, Mr MD, was interviewed under caution. He denied researching the case on the internet and no charges were brought against him. None of the nine other jurors knew of any internet research. We must focus on the statements of Ms CA, the jury foreman Mr JP and another juror Ms JB.

Ms CA

10. The investigation established that during her time as a juror CA discussed the case with a friend who was not a juror, in breach of the judge's direction. She made it clear to the friend she would not convict and was having a battle with her fellow jurors. They discussed her tactics. Soon after the verdict she was in touch with the applicant's brother and his partner, Lauren Wiseman. At that time, she was complaining about the conduct of her fellow jurors but appeared to be focusing on allegations of bullying. CA got in touch with the applicant's solicitor and was advised to contact the court. She emailed the court on 26 November 2016, claiming that she knew "some jury members had Googled the case and the defendant. Some were very knowledgeable about Mr McAleer's previous convictions. This worries me that the decision made by some of the jurors could have been swayed by the information obtained by them independently".

11. She was interviewed by the police on 15 December 2015 and was less than frank with them about her conduct with members of the applicant's family and how she knew the name of the applicant's solicitor.

12. In a statement dated 26 January 2016, she claimed that during a break in the trial one juror declared, "He's got a criminal record as long as his arm. He needs to be thrown under the bus", that another juror fell asleep and had to be woken by a member of court staff and also during the jury deliberations one juror declared, "Oh yes, when I saw it on the BBC news website". That juror was reprimanded by the foreman.

13. We were invited by Mr Mayo to hear from CA with her examination confined to the issue of whether she heard a fellow juror speaking about the result of his research into

the applicant's antecedent criminal history. It was common ground that great care would be necessary if we agreed to this course so as not to trespass into the jury's deliberations.

14. The importance of observing the common law rule that prohibits investigating jury deliberations was confirmed by the House of Lords in the R v Mirza [2004] 2 Cr App R 8. However, the decision in Mirza and paragraph 4 of a subsequent decision of this court in R v Thompson [2010] 2 Cr App R 27 indicate that the rule is subject to two narrow exceptions:

> "The first arises if it emerges that there may have been a complete repudiation of the oath taken by the jurors to try the case according to the evidence ...
>
> The second exception arises in cases where extraneous material has been introduced into the jury deliberations ... Examples are provided by earlier decisions of this court. They include telephone calls into or out of the jury room, papers mistakenly included in the jury bundle, discussions between jurors and relatives or friends about the case, and in recent years, information derived by one or more jurors from the internet ... Where the complaint is made that the jury has considered non-evidential material, the court is entitled to examine the evidence (possibly after investigation by the CCRC) to ascertain the facts."

15. It is said that this case falls into the second exception.

16. However, given the very thorough police investigation, the wealth of material they have produced and given the obvious comments that could be made about CA's accounts on the papers, coupled with a concession made by Mr John Price QC, who now represents the prosecution, as to the effect of JB's account, we decided this morning it was not necessary to hear from CA.

17. Ms JB

18. JB informed the court that CA herself had looked up the applicant and the witness Mr Hulse on Facebook. She also volunteered that during a tea break with another juror called MD, he told her that the applicant had a conviction for breaking a man's jaw. She informed MD that it did not surprise her to learn the then defendant had been in trouble with the police as a result of evidence adduced in the trial including the fact the applicant had admitted being banned from the town centre. She told him in direct terms that what he was saying was irrelevant; she intended to focus solely, as the judge had directed them to do, on the evidence called in the trial. She then described the very methodical and fair way in which she says the jury approached its task of deciding the case.

Mr JP

19. JP was the foreman who facilitated the jury deliberations and he confirmed JB's account of their methodical approach to an analysis of the evidence and the arguments.

He accepted that towards the end of their deliberations as they struggled to reach a unanimous verdict there was a degree of frustration at CA's behaviour. It seemed to the other jurors that she was obviously determined to acquit come what may. He also heard MD express his frustration at what was happening and MD explained that he had come across a news article on the case on the BBC News website to confirm just how serious the matter was. JP told MD that he had been wrong to look at the article. JP and the others jurors were taken aback at what MD had said but felt that no harm had actually been done.

Appeal

20. In the light of that material and the concession made by the Crown, it is not in dispute that in flagrant breach of the trial judge's express directions, one juror, MD, carried out research about the applicant and discovered information about his criminal record. The investigation has established that this information was disseminated to at least two other jurors: JB and CA. The improper disclosure to a jury of a defendant's previous convictions is regarded by this court as a grave irregularity - see, for example, R v Brandon 53 Cr App R 466, where a comment made by a jury bailiff suggestive of the defendant's previous convictions was regarded as so serious as to require the conviction to be quashed.

21. Information that the applicant had a previous conviction for serious violence whereby he had fractured another person's jaw in an unprovoked attack was highly prejudicial. There was, Mr Mayo asserted, therefore a very high probability that being privy to such information would impact adversely on a juror's judgment of the defendant and his actions. It is extremely difficult, Mr Mayo argued, for this court now to analyse the extent of any impact upon the jury deliberations without encroaching on the common law rule endorsed in Mirza.

22. When considering JB's assertion that the disclosure of the information had no impact on her personally, he invited us to be alert to two matters:

(1) JB failed to bring the misconduct of a fellow juror to the attention of the judge. This fact, consciously or not, is likely to have led her to seek to minimise the importance of the event to mitigate her failure.
(2) To accept that the information may have affected her judgment would involve her also accepting she had not been faithful to her oath to decide the case solely on the evidence presented in court. Consciously or not, there would be an obvious tendency for someone in her position to deny the true impact that the disclosure had had on her.

23. Mr Price invited us to add a third factor to our consideration or her account, namely that she was not in any way forced to disclose the conversation with MD and had she not done so, this court would have been none the wiser.

24. As far as MD is concerned, other than the foreman's evidence that suggests he was convinced of the applicant's guilt and was frustrated at CA's behaviour, we know nothing of the possible impact upon him.

25. Furthermore, Mr Mayo submitted the prejudice the applicant would inevitably suffer through the introduction of the extraneous information was all the greater because the judge did not give the jury a bad character direction tailored to this particular evidence. She gave them a bad character direction directed at the alleged propensity evidence but nothing about this particular conviction. Had she done so, it would have provided, Mr Mayo submits, significant safeguards against the jury using the evidence improperly.

26. Defence counsel, similarly unaware of the fact the extraneous material had been introduced, was deprived of the opportunity to seek to set the conviction in context and to advance argument as to why it was not relevant. In this regard, we were invited to note that Ms Evans, who had prosecuted at trial, had applied to admit the evidence of propensity but had deliberately not sought to adduce the defendant's previous conviction through the bad character gateways of the Criminal Justice Act 2003. The applicant's previous convictions were not, as acknowledged by the Crown, relevant to any matter in issue or probative.

27. Mr Mayo placed emphasis on this court's repeated recognition of the importance of the trial judge giving a jury an appropriate direction when evidence of a defendant's bad character has been admitted. The direction must be crafted to meet the needs of the individual case but a warning against attaching undue weight to the evidence will always be an essential component. This is consistent with observations of the then Vice President, Rose LJ, in R v Edwards [2006] 1 Cr App R 3 at paragraph 3.

28. Mr Mayo posed a situation for us in which the prosecution adduced bad character evidence during a trial but the trial judge had failed to any give direction as to how the jury should approach it. In this event, he described the lack of directions as a serious deficiency and, in his submission, such a deficiency would render a conviction unsafe. He gave as an example the decision in R v Sullivan [2015] EWCA Crim 484.

29. Finally on this particular aspect, Mr Mayo reminded us of the observations of Judge LJ (as he then was) in R v Karakaya [2005] 2 Cr App R 5 to the effect that accessing extraneous and prejudicial material contravened two fundamental principles of justice. He stated at paragraph 24:

> "It is easy, but superficial, to dismiss these rules as purely technical or procedural. In truth, they reflect something much more fundamental. If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally,

however, we need to remind ourselves of them."

Finally, Mr Mayo observed that had the irregularity come to the trial judge's attention, the defence would have made an application to discharge the jury and it is highly unlikely the prosecution would not have resisted the application. Even if they had, the trial judge would have concluded that the only safe course was to discharge the whole jury.

30. In response, Mr Price, having Ms Evans as his junior before us, did not dissent from that final proposition. Mr Price accepted there is "credible evidence that prejudicial extraneous material was accessed by one juror, MD, and communicated to one other: JB. An application to discharge the jury would probably have succeeded. But he invited us to find that the proven disclosure was limited to one juror JB. It went no further.

31. Given the breath of the police investigation, this court has the advantage of knowing what happened; it does not need to speculate as to the possible impact on the jury. Looking at all the material we have from all the jurors save MD, it is clear, he submitted, that the extraneous information did not feature at all in the jury's deliberations and did not influence its verdict. Nine jurors knew nothing of any researches on the internet, the foreman only knew of MD's looking at the BBC website, where there was no prejudicial material, and both he and JB are confident the jury focused solely on the evidence adduced at trial and the arguments advanced.

32. He also invited us to find that CA's accounts are incredible, they are full of inconsistencies and they appear to have been prompted by her having lost the battle to persuade her fellow jurors that the case against the applicant was not proved. He took us through her various accounts in his written submissions to highlight the inconsistencies, the contact between her and members of the applicant's family and what he called her lies about that contact. He described her conduct as having been improperly motivated to the extent that it suggests she was and remains biased. She was in clear breach of the trial judge's direction not to discuss the case herself and acted in contravention of section 20D(1)(a) of the Juries Act 1974.

33. Mr Price did, however, invite us to accept the account given by JB, that MD had told her he had searched on the internet and discovered the applicant had previous convictions, including one for breaking a man's jaw. The police have conducted a similar search on the internet and discovered the information relayed by MD to JB. The question posed for the court by Mr Price is whether what JB stated happened, viewed as a whole, tainted the jury's deliberations and thus undermined the safety of the conviction. Mr Price maintained it did not.

34. When JB heard the information, she did what she could to suppress it and it was not communicated to the other jurors. It did not taint or influence her and could not have tainted or influenced the others. The jury were already aware that the applicant was "well known to the police". Although JB did not report MD's conduct, Mr Price suggested the reasonable inference is that she did not do so because she genuinely regarded what she had learned as utterly immaterial.

35. The foreman, JP, it is obvious from his statement, was a conscientious juror who discharged his duties in full compliance with his oath and the directions of the judge. He was unaware of any misconduct in the same way as the other eight jurors were. Thus, Mr Price submitted, the extraneous information played no part in the jury's deliberations and even CA herself does not suggest otherwise.

36. Mr Price described this as a very simple, if serious, case. There was but one real issue: did Danielle Hammond fall or was she pushed? A witness saw her pushed and said so at once to another witness present and to a police officer. The applicant gave three different inconsistent accounts and the jury was in retirement for 10 hours and 19 minutes before the majority direction and a further 100 minutes after it, spread over a period of 3 days. This indicates the extent of their careful analysis of the evidence put before them.

Our conclusions

37. First, we wish to express our gratitude to the parties for the great care they have taken in ensuring we have not infringed the principles set out in Mirza. We are also grateful to the police for their detailed and thorough investigation.

38. Second, we wish to express our concern at the contact between the applicant's family and CA. We appreciate and understand why they wish to support the applicant given his conviction for such a serious offence but once CA had spoken to them, they should have put her in touch with the applicant's solicitor and withdrawn.

39. Third, for the reasons Mr Price gave, we have very considerable reservations about the accounts given by CA. Her approach to jury service was surprising to say the least. She was well aware of the judge's directions but the text messages she sent indicate she was prepared to discuss the details of the jury's deliberations with a friend. She may well have lied about her contact with the applicant's family and how she knew to approach the applicant's solicitor. Her accounts have been inconsistent and they suggest an improper motive and a bias.

40. It comes to this. We would not be prepared to receive anything that CA may say save and insofar as it is confirmed by other sources. However, there is one important respect in which CA's account is confirmed by another source and that is the allegation that one juror accessed the internet in direct violation of the judge's directions, discovered a previous conviction and informed at least one other juror of the result of his research. JB knew that MD had discovered the applicant had broken a man's jaw.

41. This would be potentially bad character evidence of some significance in the context of a trial for an offence of attempted murder where the issue was: did the applicant push Ms Hammond over the balcony or did she fall? It was potentially very damaging to the appellant’s case. It was evidence of bad character that the prosecution did not consider was probative of their case against him. Had it been admissible, it would have been accompanied by a clear direction from the judge on why it was admissible and the approach the jury should adopt to it. The judge was unaware of the juror’s misconduct and gave no such direction.

42. Had the defence been aware that two jurors knew of the applicant's previous conviction, they would undoubtedly have made an application to discharge the whole jury. In all probability, this would have been granted.

43. We are in the position therefore that ignoring CA's account save in that one respect and accepting JB's account, as Mr Price invited us to do, we know at least two jurors, possibly three, knew of the applicant's bad character. We have nothing from MD on whether that knowledge affected him. We have no reason to doubt JB's assertion that she truly believes the information he provided did not affect her. However, we cannot be sure. We cannot be sure it did not affect her subconsciously and we cannot be sure it did not affect MD. If so, we cannot be sure that what they had learned of his conviction did not influence the other jurors as they contributed to the discussions. Neither JB or MD had the benefit of clear directions from the judge on bad character or, most importantly, submissions from the defence on its relevance. Both were in the convicting majority.

44. For those reasons, therefore, we have concluded that there was a serious irregularity of a kind that has undermined the safety of the conviction. We give the applicant leave to appeal against his conviction. We quash it and we will hear any representations on a retrial.

45. Mr Mayo, you know that there is an application. I can see no reason for not ordering one.

46. MR MAYO: None at all. My arguments were predicated on the basis that the court would.

47. THE VICE PRESIDENT: Indeed. Very well. The first thing to say is that there will of course be reporting restrictions in relation to this judgment pending the outcome of any retrial. We allow the appeal. We quash the conviction. Ms Evans, he was convicted on count 1. I cannot remember, were there other counts?

48. MS EVANS: Off the top of my head, I do not think there were.

49. THE VICE PRESIDENT: Mr Aleeson, were you at trial?

50. MR ALEESON: I was not, but I think there was just the single count.

51. THE VICE PRESIDENT: It was just a single count, was it?

52. We quash the conviction on count 1. We order a retrial on count 1. We direct that a fresh indictment be served. The appellant, as he now is, will be re-arraigned on the fresh indictment within 2 months. The venue for the retrial should be determined by the Presiding Judges for the South East circuit. There is no reason why it cannot go back to Her Honour Judge Catterson but it will all depend on the decision of the Presiding Judges. The appellant will remain in custody until the retrial and, as I have indicated, we make an order under section 4(2) of the Contempt of Court Act restricting reporting. Anything else we need to do?

53. MR MAYO: May I tentatively raise one matter. My Lady, we have all read about the important public interest principle which underlines the common law rule and that, to state it shortly, is to protect the jury from any criticism, ridicule or harassment; those are the words that their Lordships used. Now, it occurs to me that in the course of argument in this appeal both sides have made criticism of the conduct of jurors and, quite properly, my Lady in giving the judgment today has repeated those.

54. THE VICE PRESIDENT: You think we should anonymise them?

55. MR MAYO: I wonder whether that might be appropriate.

56. THE VICE PRESIDENT: I did wonder that earlier this morning. I was going to invite your submissions. I am glad you have raised it.

57. MR MAYO: I do invite the court to consider that, because, of course, they personally have not had an opportunity to respond to those criticism and I just wonder whether --

58. THE VICE PRESIDENT: Mr MD has denied it.

59. MR MAYO: He has.

60. THE VICE PRESIDENT: We have not actually heard from Ms CA, although we have made criticisms on the papers.

61. Ms Evans, it is a thought.

62. MS EVANS: I agree actually, I do.

63. THE VICE PRESIDENT: Very well, when I come to perfect the ex tempore judgment I will anonymise, I will just refer to them by their initials.

64. MR MAYO: I am grateful.

65. THE VICE PRESIDENT: Thank you all very much for your help.