IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 499

No. 201803392 B3

Royal Courts of Justice

Tuesday, 24 March 2020

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE BRYAN
MR JUSTICE NICKLIN

REGINA
v
NICHOLAS WARNER

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MS E. JOAO-MANUEL appeared on behalf of the Appellant.
MR T. LITTLE QC appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE HOLROYDE:

1 The appellant was found to be in contempt of court. He was fined £500. He now appeals, pursuant to s.13 of the Administration of Justice Act 1960, against the finding of contempt.

2 The appellant is a Jehovah's Witness. He was at the material time an elder or religious minister in a Congregation of Jehovah's Witnesses in Cornwall. Two other members of that Congregation, Mr Jones and Mr Davies, were respectively the complainant and the defendant in a trial before HHJ Linford and a jury in the Crown Court at Truro in July 2018.

3 Mr Davies was charged with inflicting grievous bodily harm, contrary to s.20 of the Offences Against the Person Act 1861. The charge arose out of an incident outside the Kingdom Hall of the Jehovah's Witnesses in January 2018 in which Mr Jones had suffered a fractured hip. This appellant saw that incident. He was called as a witness by the prosecution. He gave evidence that he had seen Mr Davies push Mr Jones from behind, causing Mr Jones to fall heavily to the ground.

4 In cross-examination by counsel for Mr Davies the appellant confirmed that, following a trial by what was referred to as a judicial committee, Mr Davies had been "disfellowshipped", that is to say expelled from the Congregation and shunned by other Jehovah's Witnesses. He was asked if he knew that that was because Mr Davies had been accused of using cannabis, and he was asked who had chaired the judicial committee. He replied that he could not answer because it was confidential. The judge intervened, explaining that the question was not improper and asking the appellant to answer it. The appellant responded:

> "I am sorry, sir, but I cannot answer that question because it is confidential. We do not answer questions on past or present cases that are taking place."

5 The judge then directed the appellant to answer, saying that if he did not there was a very strong likelihood that he would be in contempt of court. The appellant again said that he was sorry, but he could not answer.

6 The judge at that point asked the appellant and then the jury to leave court. In their absence, counsel for Mr Davies told the judge that his instructions were that it was the appellant who had chaired the judicial committee which disfellowshipped Mr Davies. Counsel was initially inclined to leave the matter where it stood, but after a further exchange he indicated that he would like an answer to his question.

7 The appellant and the jury were brought back into court. When defence counsel repeated his questions, the appellant again said that he could not answer because as an elder he could not comment on past or present cases. The judge again directed him to answer and the appellant again refused.

8 After a further adjournment to allow time for legal research, the judge in discussions with counsel said that the questions were proper, because they were relevant for the jury's assessment of the appellant's independence as a witness, and that the appellant had no legitimate claim for confidentiality. He indicated that if the appellant maintained his refusal to answer, he would stay the indictment.

9 The appellant was then brought back into court. In the absence of the jury, the judge told the appellant that a witness had no option as to whether to answer questions except in very

unusual circumstances which had not arisen. He explained that in some circumstances there could be a claim of confidentiality, but such circumstances had not arisen in the trial. He warned that a failure to answer a proper question could be a contempt of court for which the court might send the witness to prison. He said he would shortly adjourn until 2.30 p.m., and asked what answer the appellant would give to counsel's question when they resumed. The appellant replied:

> "Sir, as an elder for the congregation, I care for the spiritual and the physical needs of my congregation, sir I cannot answer questions about cases that were past or present. That is the instruction by my legal desk."

10 To this the judge replied:

> "The person, if anybody, whose privilege that kind of information would involve would of course be [Mr Davies], because it was he that was alleged to have been the subject of the disfellowship, and so it is in his gift and it is his barrister that is asking the question."

No further explanation was given.

11 The judge warned the appellant not to speak to anybody about the case during the short adjournment. The appellant asked if he could call the legal desk, to which the judge replied "Absolutely not." He told the appellant that if he would not answer the questions, the trial would be thrown out.

12 At 2.30 p.m. the judge, in the absence of the jury, again asked the appellant what answer he would give if counsel repeated his question. The appellant replied, "As a minister of religion, I cannot answer." Prosecution counsel thereafter offered no further evidence and, on the judge's directions, the jury returned a not guilty verdict against Mr Davies. Arrangements were made for the appellant to be represented at a hearing on the following day.

13 At that hearing, counsel for the appellant emphasised that the appellant had not acted out of wilful defiance or disrespect to the court. He explained that the appellant, then aged 53, had been a Jehovah's Witness for 36 years and an elder for two years. The role of elders is to provide counselling and encouragement, to receive any concerns from other Witnesses, to provide guidance and to watch over their spiritual wellbeing. That role is underpinned by a principle of confidentiality and members of the Congregation who seek guidance do so in the knowledge that the matter will remain confidential. Breach of that confidentiality would have serious consequences for the appellant and would lead to his removal, not only as an elder, but also as a Jehovah's Witness. The appellant had sought guidance before attending the trial and had been told categorically that confidentiality remained absolute. During the hearing on the previous day, he had understood that the confidentiality remained and had not appreciated that Mr Davies had effectively waived the confidentiality of the judicial committee. The judge at this point intervened to say that he had told the appellant that the privilege, if it existed, was that of Mr Davies. Counsel replied that her instructions were that the appellant had not understood that Mr Davies had gone to the extent of telling why he had been disfellowshipped, and who had chaired the committee, and that was why he had maintained the position of confidentiality. Having been permitted by the judge to speak to others overnight, the appellant had sought guidance and had been told that he could have answered the questions, because the confidentiality had been lifted by Mr Davies. Counsel expressed the appellant's sincere apologies, which were also expressed in a letter the appellant himself had written to the judge.

14 The judge found the appellant to be in contempt. He observed that the appellant had been put before the jury by the prosecution as an independent witness, who was partial to neither side and who was an important witness because he had seen the push. Defence counsel's questions were relevant and important, because they went to the issue of whether the appellant was in fact independent. He had given the appellant ample time to reflect on his refusal to answer the question. He found it difficult to accept that the appellant had not understood that Mr Davies had already disclosed the confidentiality. He was satisfied that the appellant had not acted out of malice and said:

> "I accept this is not a case where he is being disrespectful. It was more than obvious that as he spoke yesterday he was in enormous emotional turmoil and was struggling to know what to do. He nonetheless displayed nothing but the greatest of respect for the court, but I conclude that there was a wilful defiance of my clear direction to answer questions."

15 In imposing the fine of £500 the judge accepted that the appellant is a devout man who genuinely, but erroneously, believed that he was doing what was right.

16 The ground of appeal is that the judge erred in finding the appellant to be in contempt of court. He failed to explain to the appellant that he could take legal advice and failed to allow him to take legal advice at the point when it was observed that he was potentially in contempt of court.

17 In support of that ground, Ms Joao-Manuel makes the following submission. She refers to Part 48.5 of the Criminal Procedure Rules, which applies where the court observes conduct which the court can deal with as, or as if it were, a criminal contempt of court, and which goes on to provide in para.2:

> "(2) Unless the respondent's behaviour makes it impracticable to do so, the court must—
>
> (a) explain, in terms the respondent can understand (with help, if necessary)—
>
> (i) the conduct that is in question
>
> (ii) that the court can impose imprisonment, or a fine, or both, for such conduct
>
> (iii) (where relevant) that the court has power to order the respondent's immediate temporary detention, if in the court's opinion that is required
>
> (iv) that the respondent may explain the conduct
>
> (v) that the respondent may apologise, if he or she so wishes, and that this may persuade the court to take no further action, and
>
> (vi) that the respondent may take legal advice;
>
> (b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise."

18 In the present case, it was not impracticable for the appellant to be permitted to contact what he referred to as the "legal desk", by which he meant the legal department of the Jehovah's Witnesses. It was procedurally unfair to refuse him the opportunity, before he was asked for his final answer to the questions, to take legal advice regarding his duty of confidentiality as a religious minister. Although the appellant was legally represented the following day, it was by then too late: the jury had been directed to return their not guilty verdict as a result of the appellant's refusal to answer the questions and it was likely that the judge would find him to have been in contempt of court.

19 Counsel submits that all the indications are that if the appellant had received appropriate advice before the questions were asked for the final time, he would have answered them, because he would then have known in clear terms that any confidentiality had been waived by Mr Davies. Reliance is placed on *Attorney General v Mulholland and Foster* [1963] 2 QB 477 in support of the submission that the judge should have heard representations as to the materiality of the questions which were asked, and should have weighed that against the duty of confidentiality which the appellant owed to his Congregation.

20 Counsel submits that the judge's comments regarding the issue of privilege, which we have quoted earlier, did not amount to a clear and comprehensive explanation and, in any event, the appellant should have been entitled to take independent legal advice. The requirements of Rule 48.5(2)(a) were therefore not satisfied. The judge should have clarified what the appellant meant by “the legal desk” and permitted him to seek advice on clearly defined issues. Had that happened, the appellant would have been advised that he could answer the questions in cross-examination.

21 For the respondent, Mr Little QC submits that the rule does not require the provision of legal advice to every witness whenever it is thought a contempt of court may be committed by a refusal to answer questions. Mr Little argues that the requirements of the rule only arise when contempt proceedings are or are about to be instigated. In his written submissions, he helpfully refers to case law in support of that submission. He points out that in the present case the questions asked were very clear and succinct. That, he says, is relevant to a consideration of what was required to secure a fair hearing. He suggests that the factual circumstances of the present appeal are unusual and that the real issue is whether procedural fairness required more to be done to ensure that the appellant understood that he both had to, and could, answer the question. He identifies the passage which we have quoted, in which the judge referred to the confidentiality being in the gift of Mr Davies, as a critical passage for the assessment of this court. He acknowledges that the judge, if concerned about the prospect of the appellant speaking to “the legal desk”, might have taken the exceptional course of permitting prosecution counsel to speak to the appellant in order to explain the position about confidentiality.

22 We are grateful to both counsel for their submissions, which we have summarised very briefly. Having reflected upon all that they have said in writing and orally, our conclusions are as follows.

23 The appellant was a competent and compellable witness in the criminal trial. As the judge ruled, the questions he was asked in cross-examination were relevant and permissible, and the judge required them to be answered. The witness was therefore bound to answer, and failure to do so would be a contempt of court unless he could validly claim an immunity or privilege against answering.

24 There was here no question of public interest immunity or of legal professional privilege or of journalistic privilege. 19th century case law suggests that a priest cannot strictly claim

a privilege not to answer questions about what is said to him in the confessional, but should not be required to do so. It is not necessary for us to explore that point in detail. It suffices to say that we agree with Mr Little's submission that the circumstances here are very different from those of a religious confession.

25 The judge was therefore correct in his view that the appellant could not claim any recognised claim of privilege against answering the relevant questions.

26 However, in *Attorney General v Mulholland and Foster* - also a case in which there was no valid claim of privilege - Donovan LJ at p.492 said this:

> "...I add a few words only about the need for some residual discretion in the court of trial in a case where a journalist is asked in the course of the trial for the source of his information. While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand - I prefer that expression to the term 'necessary'. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.
>
> For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible. Indeed, I understood the learned Attorney General to concur in this view, namely, that the judge should always keep an ultimate discretion. This would apply not only in the case of journalists, but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship."

27 Procedural fairness is required in contempt proceedings both at common law (see *R v Yaxley-Lennon* [2018] 1 WLR 5400) and by the provisions of Rule 48.5 and by the Convention requirement relating to fair trial. Given the terms of the Criminal Procedure Rule, we do not think it necessary to refer to the previous case law mentioned to us by counsel.

28 The discretion of which Lord Justice Donovan spoke required careful consideration in this case. Defence counsel's questions were relevant and were properly asked, although we would emphasise that they were by no means the only route by which defence counsel would have been able to put before the jury the contention that the appellant was not an impartial witness because he had chaired the committee which disfellowshipped Mr Davies. On the other hand, it was clear to the judge that the appellant was not wilfully defying the court and that it was the appellant' belief as to what his religion required of him, and his role as a minister of that religion required of him, which was that the obstacle to his answering the questions. The witness had stated that he was following the advice he had

been given by his legal desk, an imprecise term, but one which clearly indicated that he had sought to take legal advice before giving his evidence.

29 The initial attitude of defence counsel had been that he did not think it necessary to pursue his line of cross-examination, although he subsequently expressed a different view. Moreover, and in our view crucially in the circumstances of this case, it was apparent to the judge that Mr Davies had waived any confidentiality which might otherwise exist and there was in fact no obstacle to the appellant answering the question. That was a very important fact, which had only emerged during the trial and therefore necessarily after the appellant had taken advice from the legal desk. With all respect to the judge, the brief explanation he gave to the appellant, to the effect that any privilege was that of Mr Davies, whose barrister was asking the question, was not one which could be expected to make everything clear to a layman; and the judge thereafter refused a request from the appellant to speak again to the legal desk.

30 It is in that context that the importance of providing an opportunity to take legal advice must be considered. We are not immediately convinced that it is possible to draw any bright line as to the stage at which the court's duty under Rule 48.5(2) will arise. It seems to us that much will depend on the precise circumstances. In all the circumstances of this case, we think there was a clear need to allow the appellant an opportunity to take legal advice before he was given a final opportunity to answer the questions. We do not suggest that that will often be the case where a witness is faced with a conflict between his duty as a witness, and his desire to avoid answering questions which have been properly asked and which the judge is satisfied need to be answered. In many cases, it will be entirely clear that there is no possible justification for excusing the witness from answering, and the judge can make that plain in terms which the witness will readily understand without a need for any additional independent advice.

31 We recognise that in this case the judge was understandably anxious not to permit a witness to pick and choose which questions he chose to answer, but, again with respect to the judge, the position was more nuanced than his approach recognised. Although the judge rightly allowed time for reflection, he treated the appellant as making a fully-informed choice between conflicting priorities and, in particular, treated him as understanding that any confidentiality had been waived by Mr Davies. We do not regard that as the true position, and the basis on which the judge was assessing the necessity for the questions to be answered was, accordingly, flawed.

32 Had an opportunity been granted for the appellant to take legal advice, it would have emerged that the witness could in fact answer the questions without in any way going against the dictates of his religion. It seems highly likely, to say the least, that he would then have answered them, and in that way the trial would have been able to continue. We accept, of course, that in general a witness must not speak to anyone about the case before he has concluded his evidence; but exceptions can be made and this, in our view, was a situation which called for a limited and carefully defined departure from the normal rule. We also accept that there may have been reasons why resort to the legal desk might on analysis have proved inappropriate; but if that had been the conclusion, there were other ways in which the necessary advice could have been obtained. In any event, we think it unfortunate that the judge dismissed the appellant's request without making any inquiry as to what was meant by “the legal desk” or as to whether an alternative source of legal advice could be found.

33 Even if the appellant had maintained his stance after taking advice, a careful consideration was needed, as we have said, of whether the judge should exercise his discretion to excuse the appellant from answering the questions. If the opportunity for advice had been given, it would have emerged at that stage, instead of on the following day, that confidentiality underpinned the work of the Jehovah's Witnesses' elders and that an insistence on answering would therefore not only expose the appellant personally to very severe consequences, but might also undermine the work of the elders generally. Given that the point which defence counsel wished to make could have been made in other ways, we think that it is strongly arguable that the discretion could have been exercised in the appellant's favour. To put it in the phrase used by Lord Justice Donovan, we think it is strongly arguable that the judge may, upon analysis, have concluded that more harm than good would result from compelling answers from the appellant. As it was, the point was not considered at all.

34 For those reasons we conclude that, in the very particular and unusual circumstances of this case, there was a serious procedural unfairness in not fully and clearly explaining to the appellant that any confidentiality had been waived by Mr Davies, and in refusing the appellant's request for an opportunity to take legal advice before being asked the questions again. Had those steps been taken, it is highly likely that the situation in which the appellant was found to have acted in contempt would never have arisen. There was, therefore, a material irregularity in the proceedings.

35 We are satisfied that we must exercise our power under s.13(3) of the 1960 Act to reverse the order of the court below. This appeal accordingly succeeds and the finding of contempt of court is quashed.

CERTIFICATE

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