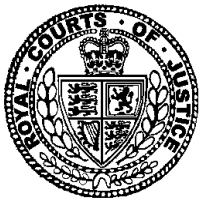

Neutral Citation Number: [2020] EWCA Crim 937

Case No: 201904582 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT DURHAM
HHJ ADKIN
T20197143

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE GARNHAM
and
MRS JUSTICE FARBEY DBE

- -

Between :

RN	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Anthony Hawks (instructed by **Richmond Anderson Goudie Solicitors**) for the **Appellant**
Mr Shaun Dodds (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates: 2nd July 2020

- -

Approved Judgment

Lord Justice Fulford :

Introduction

1. On 6 December 2019 in the Crown Court at Durham before Judge Adkin and a jury, the appellant (who is now aged 30) was convicted of two counts of causing or allowing serious physical harm to a child contrary to section 5 of the Domestic Violence Crime and Victims Act 2004 (counts 1 and 2).

2. On 17 January 2020 she was sentenced to concurrent terms of 30 months' imprisonment on each count.

3. CM, her then partner and co-accused, was also convicted on both counts and he was sentenced to two concurrent terms of 9 years' imprisonment.

4. Before this court, RN appeals against conviction by leave of SJ.

5. The victim of this offence ("H") is under the age of 18 and the publication of information which may lead to his identification is prohibited under section 45 of the Youth Justice and Criminal Evidence Act 1999. This order will cease to have effect once he turns 18.

The Facts

6. At the beginning of 2017, the appellant and CM were living together in the Stanley area of County Durham. They had three children, of whom H was the youngest (born in December 2016). At about 9 am on 13 February 2017, paramedics were called to their address. Once inside they saw the appellant holding H who was described by the paramedics as having a "very white waxy colour"; he was whimpering and breathing erratically. When asked what had happened, CM said that he had got up to look after the baby and noticed that he was not breathing properly and was unresponsive. The appellant said that the baby had been fine the night before. As the paramedics examined the baby, they noticed fresh bruising to his eye and chest. When asked about these injuries, the appellant said that a few days earlier the baby had "headbutted his dad" and the bruises to his chest were from being "winded". H was immediately taken to University Hospital Durham where, in addition to recording the bruising, a brain scan revealed a multi-location subdural haemorrhage overlying his brain, acute brain swelling and bleeding within the brain. There was also damage to the frontal lobes. He was transferred to the Royal Victoria Infirmary in Newcastle for neuro-surgery. Further scans revealed that he

had sustained a prior brain injury. A number of his ribs were fractured and there were metaphyseal fractures to both legs and his right arm.

7. It was not in dispute that H had been shaken on at least one occasion and that injuries had been inflicted on no less than two occasions. The issue for each count was whether the appellant was guilty either of causing this serious harm or of knowing there was a significant risk of the co-accused inflicting serious injury to H and thereafter failing to take steps to protect him. Count 1 related to the earlier fractures to the ribs and limbs and count 2 concerned the serious brain injury that was apparent on 13 February 2017. There was no dispute that H suffered serious physical harm which was the result of an unlawful act or acts which either caused fractured limbs (count 1) or involved violent shaking (count 2). Similarly, there was no dispute that each defendant was a member of the same household as H and they had frequent contact with him.

8. As to count 2, the prosecution contended that the medical evidence indicated that shaking a baby violently would have had an immediate effect, and since CM was supposedly looking after H on the morning of 13 February 2017, this provided compelling evidence that he had inflicted these injuries. Given the appellant was aware of his short fuse and must have known that he had previously hurt H, it was argued by the Crown that the jury could properly conclude she had put her affection for him above her commitment to protecting her own child.

9. The appellant contended that she had not injured H and she was unaware that he was at risk of being harmed by CM.

10. The judge gave the jury a written route to verdict for each accused on both counts, starting first with count 2. For the appellant, these were as follows:

> "Count 2
> Q1 Are we sure that RN caused the fresh subdural brain bleed? If Yes then she is guilty of count 1 and you would not need to consider Q2, if no. i.e. you are not sure she caused the subdural brain bleed then go to Q2.
>
> Q2 Are we sure that RN was aware (or ought to have been aware) that there was a significant risk that H would be caused serious physical harm by being assaulted by another (here CM) and she failed to take steps to protect H from serious violence. If you are sure she was aware of that risk and failed to protect H then she is guilty, if you are not sure then she is not guilty.

Count 1
Q1 Are we sure that RN caused any of H's fractures? If Yes then she is guilty of count 1 and you would not need to consider Q2, if no. i.e. you are not sure she caused any limb fracture then go to Q2.

Q2 Are we sure that RN was aware (or ought to have been aware) that there was a significant risk that H would be caused serious physical harm by being assaulted by another (here CM) and she failed to take steps to protect H from serious violence. If you are sure she was aware of that risk and she failed to protect H then she is guilty, if you are not sure then she is not guilty."

11. The jury retired to begin their deliberations at 2.25 pm on 4 December 2019. They were sent home at 4.02pm.

12. On 5 December 2019 at 10.16 am they were asked to retire to continue their deliberations. They were brought back into court at 3.12pm in order to be sent home, the judge having heard submissions on this issue and having decided to delay giving a majority direction until the following day. The jury were first asked if they had reached any verdicts. The jury indicated they had not reached a conclusion on count 1 for either defendant as it was still the subject of discussion, but they had reached verdicts on count two. The verdict on that count was taken and the jury convicted CM and acquitted the appellant. There was no equivocation in the way the verdicts were delivered. The jury were instructed to go home and return the following day.

13. At 3.35 pm the judge returned to court and told counsel that he had been given a message that the jury might be able to reach verdicts on count 1 if they were given more time that afternoon. The jury returned to court at 3.37 pm and the judge indicated that they should not feel under any pressure and they retired again to continue their deliberations on count 1.

14. At 4.18 pm, the court again reassembled in the absence of the jury and the judge stated:

"Gentlemen, can I just raise one slightly unusual point of procedure? I am given to understand from the usher that the foreman of the jury was dissatisfied with the way that he gave the verdicts. I think – I don't want to make a great big fuss about it – but I don't think he was quite asked the right questions in respect of the female defendant."

15. The judge added that "I don't think there has been any change of verdict", the foreman has "asked if he can properly enunciate it more carefully and be asked the questions again in respect of all counts" and that the message he had received from his usher was that the foreman thought he had stumbled over his answers in respect of count two.

16. At 4.25 pm the jury were brought back into court and, through a new foreman, without apparent hesitation, convicted CM and acquitted the appellant on count 1. There was then the following exchange:

> JUDGE ADKIN: Mr Foreman, can I just ask you, whilst you're on your feet to confirm your verdicts in respect of count two whilst you have got that document in front of you.
> THE FOREMAN OF THE JURY: Yes, your Honour.
> JUDGE ADKIN: I've recorded that in respect of count two, you'd reached verdicts upon which you were all agreed in respect of both defendants and that your verdict in respect of CM was a verdict of guilty on count two. Is that right?
> THE FOREMAN OF THE JURY: Correct, your Honour.
> JUDGE ADKIN: And that your verdict in respect of RN was a verdict of not guilty.
> THE FOREMAN OF THE JURY: Correct, your Honour.
> JUDGE ADKIN: Thank you very much indeed.
> MR HAWKS: May she be discharged, your Honour?
> JUDGE ADKIN: Yes, you may be discharged, RN, if you would like to leave the dock.

17. The jury were then thanked for their public service and discharged. The judge indicated that CM would receive a long custodial sentence.

18. The jury then left court, but shortly afterwards the judge was told via the court associate that there was a problem with the verdict, and he informed counsel that there may still be some element of confusion. The usher wrote a note that indicated that within a minute or two after leaving court, the foreman and several other members of the jury indicated that there had been a mistake and they had not returned "a complete verdict".

19. The foreman was separated from the rest of the jury and asked to write a short note describing what he thought had gone wrong.

20. The note was delivered at 4.53 pm and stated: "Count one, question two was not asked. Count two question two was not asked".

21. In light of the significant issues raised on this appeal, it is instructive to consider the exchange that then occurred in court, in that Mr Dodds, prosecuting counsel, asked the judge whether the jury had expected separate questions to be put to them for questions 1 and 2 on each of the two counts. The judge responded that he did not know "what it means" and that the verdicts were read out with vigour. After hearing short submissions, the judge decided that it was in the interests of justice to clarify the position with the verdicts. He then sent the jury home overnight, asking them not to discuss the case after they left the jury box and that on the following morning "we'll see where we can press on from there".

22. On the following morning the judge heard submissions from counsel. In his ruling he set out the relevant circumstances and then indicated as follows:

> "It seems to me that the only proper inference that can be drawn from the note was that the jury were expecting more questions to be asked of them. The reference to question two must be a reference to their route to verdict, which asked two questions of each count. And so, the inevitable inference from that is that confusion has crept in about the contrast between the route to verdict asking two questions of each defendant per count and the indictment itself which asks one question. Time pressed on and by five past 10 (sic) I had the jury back and sent them home with the usual warnings that a judge would give a jury who were mid-retirement.
>
> What is the way forwards? Mr Hawks accepts that the judge has a discretion to allow the jury to go back into retirement to consider their verdict but he urges that that discretion should be exercised in favour of his lay client and the not guilty verdict should stand. Mr Dodds take a contrary view and says this is a confusion case and that authority suggests that the jury should be given the opportunity to enter a proper and considered verdict. I have also considered the Criminal Procedure Rules. The overriding objective is that criminal cases are dealt with justly, the innocent are acquitted, the guilty convicted, and that the prosecution and defence should be dealt with fairly.
>
> It seems to me if one poses the rhetorical question, "Would the acquittal of RN be just if it was based on a misunderstanding of what the jury were being asked?", I don't think so. I am convinced that a

court has the discretion to allow the jury to reconsider their verdicts after *Andrews* 82, C.A. 148, Court of Appeal. The judge has a discretion to allow an alteration to be made. Factors to consider are the length of time that has elapsed between the original verdict and the moment the jury expressed their wish to alter it, the probable reason for their desire to change it, the necessity to ensure justice was done, not only to the defendant but to the prosecution too. If the jury had been discharged and if a jury had been dispersed it might well be impossible for the judge to allow the alteration to be made. It is notable, reading the facts of *Andrews* that there is a superficial similarity between the two cases. They both involve issues as to whether a defendant was a perpetrator or failed to protect.

The case of *Tantram*, [2001] CLR 824, is cited by Mr Hawks where a delay of I think just over 40 minutes between a verdict being given and the judge allowing the jury to change the verdict is reported. In due course the Court of Appeal quashed convictions. There is a distinction, though, because in my judgment this is not a changing of the mind of the jury. They had been confused about what they were being asked. There's no suggestion in this case that the integrity of the jury has been in any way compromised. The period of time that elapsed between discharge and the expression of unhappiness in respect of count one was very short. On count two there seems to have been some initial disquiet, though admittedly before the jury wrote the note, a longer period of time had expired. That being said, again I reiterate there is no suggestion that the integrity of this jury has been in any way compromised.

The complaint made by the foreman as they left the court was essentially within a minute or a minute and a half of the verdict on count one being entered. So, it's my judgment that the jury should be brought back into court. I propose to give them a further short direction, which I will discuss in a moment with counsel, and they should be asked to reconsider their verdicts or asked their verdicts in respect of RN […]."

23. The jury were brought back in and were directed as follows:

"Ladies and gentlemen, I think that some confusion has crept into your deliberations because of the difference in approach between, on the one hand, the questions that you are asked in the route to verdict, in your legal document, which has two questions per defendant per charge. On the other hand, the actual charge on the

> indictment has one question per defendant, just guilty or not guilty. When you go through your route to verdict, you are specifically asked whether you are sure a defendant was a perpetrator or failed to protect. I say, "failed to protect". That is shorthand because what the prosecution must prove is set out in detail in your legal direction. All right? So, you're right. On the route to verdict you are being asked two questions. Now, you remember on the indictment, the charges, you are only ever asked one question in relation to each factual scenario: count one, the fractures, count two, the brain injury. When it comes to considering your verdicts on the charges you are only asked one question, "Guilty or not guilty". That is because each charge on the indictment contains both ways of committing the same crime, either (a) "causing [H] serious physical harm by an unlawful act", or (b) "being aware of the risk and failing to such steps", etc., etc. So, when you are giving your verdicts, the only issue is "guilty or not guilty", i.e., "Are you sure the defendant was either a perpetrator or failed to protect". If you were sure of either of those scenarios, then your verdict would be guilty, and if not sure, your verdict would be not guilty. Right?
>
> So, what I am going to ask you to do is to back out into retirement to consider your verdicts in relation to RN. Okay?'

24. The jury retired at 10.44 am and at 11.11 am they returned to court and returned unanimous guilty verdicts against the appellant on both counts.

Submissions

25. The appeal is advanced on the basis that the judge was wrong to exercise his discretion to permit the jury to amend their verdicts on both counts 1 and 2. It is submitted there was no proper foundation for him to conclude that the jury had made a genuine mistake in returning not guilty verdicts on both counts and he failed safely to exclude the possibility that the jury had simply changed their minds.

26. Additionally, on count 2 it is contended that the verdict of not guilty had been returned, and then confirmed, several hours before the jury indicated the nature of their concern. It is submitted that the lapse of time in respect of the amended verdict on count 2 is fatal to the safety of the conviction.

27. The respondent submits that each count expressly reflected the possibility that the offence could be committed in one of two ways. It is submitted that the jury, based on the route to verdict, were expecting to be asked two questions for each count, namely i) whether they were sure the appellant

had caused the relevant harm and, if unsure of the first basis, ii) were they sure the appellant had failed to take reasonable steps to protect the victim. provided with copies of the indictment.

28. Against that background, the Crown argues that taking all the circumstances into account, and out of fairness to both parties, the judge correctly exercised his discretion to allow the jury to reconsider their verdicts. The cause of their disquiet was a mistake or misunderstanding rather than any suggestion that they had had a change of mind.

Discussion

29. This court in *R v Paul Andrews* [1986] 82 Cr App R 148 summarised the principles to be applied in this situation as follows:

> "It seems to this Court, both on those two authorities (*Parkin* [1824] 1 Mood. C.C. 45; 168 E.R. 1179 and *Vodden* [1853] Dears. C.C. 229; 169 E.R. 706) and as a matter of general principle, that the position in law is as follows: where the jury seeks to alter a verdict which has been pronounced by the foreman, the judge has a discretion whether to allow the alteration to be made. In exercising that discretion he will, it goes without saying, take into account all the circumstances of the case; in particular the important considerations will be the length of time which has elapsed between the original verdict and the moment when the jury express their wish to alter it, the probable reason for the initial mistake, the necessity to ensure that justice is done not only to the defendant but also to the prosecution. The fact that the defendant has been discharged from custody is one of the factors but is not necessarily fatal to the judge's discretion to alter the verdict to one of guilty. If the jury have been discharged and *a fortiori* if they have dispersed, it might well be impossible for the judge to allow the verdict to be changed. That however it is unnecessary to decide upon the instant appeal. **Clearly if there were any question of the jury's verdict being altered as a result of anything they heard after returning their initial verdict, then there could be no question of allowing a fresh verdict to be returned**." (our emphasis)

30. However, to this formulation of the approach to be followed there needs to be added the following cautionary observation of Lord Bingham CJ in *Millward* [1999] 1 Cr App R 61, at 65G:

> "It would in our judgment set a very dangerous precedent if, save in quite extraordinary circumstances, an apparently unanimous verdict of

> a jury delivered in open court, and not then and there challenged by any juror, were to be re-opened and subjected to scrutiny. Suppose, for example, a majority verdict of 10 to 2 were publicly announced without contradiction and a third juror thereafter claimed to have dissented. Or suppose there were in the circumstances of a case such as the present, disagreement whether the jurors had dissented or not. It is very difficult to see how that is a question which this court could properly investigate."

31. Furthermore, in *R v Peter Tantram and others* [2001] EWCA Crim 1364, a case in which 27 minutes after unanimous verdicts had been given, the jury sent a note to say that on a number of counts they had not been unanimous (the number of counts on which they had not been unanimous varied between two notes from the jury), and, moreover, on some counts they had been undecided. The judge allowed the jury to "rectify its verdict", mainly on the basis that the probable reason for the mistake was that "the taking of verdicts had been sprung on them" [16]. In allowing the appeal on this ground, Rose LJ VP observed:

> "42. There is, on the authorities, no doubt that the trial judge in the present case had a discretion whether or not to permit amendment of the verdicts which had been delivered. But in our judgment, not without some hesitation, we are of the view that he exercised his discretion wrongly and in a way which was not open to him. We say this because the 27 minute delay between the jury leaving court and sending the second note, even allowing for the three minutes or so it would have taken to walk from the court to the jury room and for the note to be delivered, was such as to provide the opportunity for further deliberation. When to this feature is added the varying numbers in relation to unanimous verdicts to which we have drawn attention **this, as it seems to us, is a case not only outwith the category of prompt correction but one in which both the opportunity for further deliberation and the possibility of a change of mind both arise.** In our judgment and as Mr Nolan QC for the Crown rightly accepted, a possibility that the jury may have changed their minds is sufficient to question the reliability of the amendments to their verdicts. As Lord Justice Watkins pointed out in Williams [1987] 84 Cr App R 274 at 277
>
> > " The appearance of things may be as important as almost anything else "
>
> 43. Accordingly we do not regard this case as being one in which it

> was appropriate for the judge to re-open the 10 unanimous verdicts which had been delivered without dissent." (our emphasis)

32. For our part, we consider that it should be emphasised that although the judge has a discretion in these circumstances, if there has been a material opportunity for further discussion after the verdict in question was delivered, thereby potentially leading to a change of mind, no amendment to the conviction or acquittal should be permitted. In this context – although it is not necessarily determinative – of clear importance will be whether the jury promptly indicated that the verdict needed correcting, and whether the court thereafter dealt with the issue straightaway and before any significant further deliberations occurred, or might have occurred, thereby excluding the risk of a change of view on the part of one or more jurors.

33. We feel considerable sympathy for the judge in this case, who had to deal with an unusual set of circumstances, in which the jury potentially failed to follow the clear route to verdict with which they had been provided in writing, and thereafter they were somewhat less than clear as to the nature of their concerns.

34. The key timings are as follows. At 3.12 pm on 5 December 2019, the jury without equivocation or dissent, acquitted the appellant on count 2 (they simultaneously convicted CM on the same count). They were permitted to separate for the evening. At 3.35 pm, however, the judge indicated to counsel – without referring to any potential problem with the verdicts on count 2 of which he was aware – that given more time the jury might be able to reach verdicts on count 1 that afternoon. The jury shortly afterwards returned to court and were asked to continue considering their verdicts on count 1. No issue was then raised as to the correctness of the verdict vis-à-vis the appellant on count 2. Approximately 40 minutes later, the judge indicated he had been informed that there was some dissatisfaction with the verdicts already delivered, albeit he did not anticipate that the result would change because, as he understood the position, the foreman thought he had "stumbled" over the answers as regards count 2. At 4.25 pm, again without any equivocation or dissent, the appellant was acquitted on count 1. The judge asked the new foreman to confirm the verdict was not guilty for the appellant on count 2, and the foreman simply and unhesitatingly replied "correct, your Honour". The appellant was discharged.

35. Shortly thereafter, the usher communicated to the judge that the foreman and "several" other jurors had indicated there had been a mistake and that

the verdict was incomplete. The foreman was isolated from the other jurors and asked to write the note rehearsed at [20] above. The jury then separated and were sent home. The following morning the judge repeated the bases on which both defendants were liable to be convicted on counts 1 and 2 (*viz.* either as a perpetrator or on the basis of failing to protect H). Although he used slightly different language, his directions at this stage rehearsed the principal elements of the written route to verdict. The jury again retired to deliberate on the appellant alone and 27 minutes later they returned to court and reversed their earlier verdicts, convicting the appellant on counts 1 and 2.

36. Although it is credible to surmise, as did the judge, that the jury may have been waiting for a second question to be asked for counts 1 and 2 to reflect the alternative basis on which the appellant could be convicted, namely that she had failed to take steps to protect H, this explanation is inconsistent with the failure on the part of the jury to express any concerns of this nature, first, when they returned to court at 3.35 pm and, second, when, at 4.25 pm, they acquitted the appellant on count 1 and confirmed without reservation that she was not guilty of count 2. There is, therefore, a lack of clarity as to the reservations with the verdicts that the foreman was describing shortly after 4.25 pm.

37. The determining factor, however, is that this was not a clear-cut instance of a jury indicating that there had been a mistake in the way the verdicts had been delivered, with that indication being provided promptly and the matter being resolved in circumstances which excluded the possibility of any further deliberations and a change of mind. The foreman had been isolated from the rest of the jury, rendering it unclear whether his short note of explanation reflected the views of the entire jury or only some of them. Furthermore, the jury were expressly asked by the judge to reconsider their verdicts as regards the appellant. Following that direction, they deliberated for over 25 minutes before convicting the appellant on both counts, having previously returned verdicts of not guilty. In these circumstances, the court cannot exclude the real possibility that the jury's verdicts, as finally delivered, may have been influenced by things they heard or discussed after the original acquittals. Although the verdict on count 2 stood unaltered for a longer period of time than that on count 1, the underlying considerations are identical for both counts.

38. It follows that the judge should not have re-opened the unanimous verdicts and he should not have directed the jury to reconsider their verdicts on both counts.

39. We allow the appeal. The convictions against the appellant on counts 1 and 2 are quashed. Given the acquittals on counts 1 and 2 should not have been reversed, there is no question of a retrial.