APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 51
HCA/2024/288/XC

Lord Justice Clerk
Lord Armstrong
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the appeal

by

RYAN McCONVILLE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Collins, (sol adv); Wilson McLeod, Solicitors
Respondent: Harvey, AD; the Crown Agent

18 December 2024

Introduction

[1] The appellant was convicted of rape under Section 2 of the Sexual Offences (Scotland) Act 2009 on 2 May 2024 at the High Court of Justiciary in Edinburgh. He appeals against conviction on the basis that no reasonable jury would have convicted the appellant

having, some hours prior to its verdict, asked questions of the judge which, it is submitted, suggested an acquittal verdict was to follow.

Circumstances

[2] It was a matter of agreement that the appellant penetrated the vagina of the complainer with his penis. The appellant maintained that the sexual intercourse was consensual. The jury heard evidence from seven witnesses, including the complainer and the appellant. It is not disputed that there was a sufficiency of evidence and a verdict of guilty was one which was properly open to the jury on the evidence.

[3] Having retired to consider their verdict, the jury returned with two questions which were in the following terms:

> "**Question 1:** In a situation where, for example, if 7 say guilty, 4 say not guilty and 4 say not proven – what is the verdict and how do we express that?
>
> **Question 2:** In a situation where, for example, if 7 say guilty, 2 say not guilty and 6 say not proven – what is the verdict and how do we express that?"

[4] It is clear that the trial judge interpreted this as an indication from the jury that they had reached a verdict of acquittal. Having discussed the matter with counsel, he gave the following additional directions:

> "… as I explained when directing you on verdicts, you cannot convict the accused unless there is an absolute majority of you, at least eight of you, in favour of a guilty verdict. From the nature of your questions, I can see that that is not so, that there are seven and therefore you are bound to return a verdict of acquittal. I explained that there are two verdicts of acquittal: each of them means that the accused cannot be tried again on the same fact. They are not guilty and not proven: each is a verdict of acquittal. I cannot take a combination of those verdicts. In other words, you have to decide amongst yourself whether you propose to return a verdict of not guilty or not proven. … each is a verdict of acquittal, and, in the circumstances of only seven people wishing to vote for guilty, then it is bound to be a verdict of acquittal one way or the other. I cannot direct you any more definitely or specifically than that. It will be for you to decide whether it is not guilty or not proven."

[5] Apart from these additional directions there was no further exchange between the trial judge and the jury. The jurors retired for further consideration. On their return, they convicted the appellant of charge 2 by a majority.

[6] In his report the trial judge explained that he addressed the jury on the basis that the jury had reached a concluded view represented by seven jurors only in favour of guilt, leading to the additional directions given in the terms already outlined. However, he adds on reflection his view that this was an incorrect assumption on his part, given the hypothetical nature of the questions posed. As he put it in his report:

> "Looking closely at the terms of the questions, it is clear to me now that they were couched in the hypothetical; they each begin with "In a situation where, for example...". On reflection, I see that I have proceeded to address them on the basis that a verdict of guilty was the already concluded view of 7 jurors and acquittal the concluded view of the remaining jurors. I see now that that assumption was not justified by the terms of the questions and I regret couching my directions in those terms."

In his report he suggests that his misapprehension might have arisen from something said by the clerk of court when providing the questions, but the questions themselves are clear.

Submissions for the Appellant

[7] The written submissions suggested that it was clear from the exchange that took place between the trial judge and the jury that the jury had decided to acquit the accused, a course of action signalled in open court. Eight jurors were in favour of an acquittal verdict, whereas only seven jurors were in favour of conviction. All that remained to be determined by the jury was the precise terms of the acquittal, as explained in the additional directions. It was reasonable, therefore, to anticipate that the jury, in resuming its deliberations, would confine their discussions to the additional directions that they had been given, and acquit.

The jury failed to follow clear directions given by the trial judge. In doing so, the jury acted unreasonably.

[8] Distancing himself somewhat from the written submissions, Mr Collins in oral argument accepted that the questions were hypothetical, that the jury were entitled to resume deliberations, and that the final verdict as delivered was the one they intended. He suggested however that there must have been something in the way in which the questions were presented to the judge to have created the misapprehension upon which he, and everyone else, proceeded. The eventual result would have led an impartial observer to conclude that something untoward had taken place in the aftermath of the directions being given and thus the accused had not been given a fair trial. The questions raised the indication that only 7 jurors were in favour of a guilty verdict and the judge had been entitled in the circumstances to give the directions in question. The jury should have followed those directions. A miscarriage of justice had occurred as a result of their ignoring the direction to return a verdict of acquittal.

Submissions for the Crown

[9] There had been no miscarriage of justice. The questions asked by the jury were posed in the hypothetical. There was no doubt of the jury's clear intention to convict when they delivered their verdict.

[10] The jury had been directed in the usual way that they could not convict unless there were at least eight of them in favour of a guilty verdict. When the two jury questions arose, it was not clear that the jury had reached a decision. Any suggestion that it had was not supported either by the exchanges between the trial judge and the jury, nor by the content and nature of the jury questions, which were stated hypothetically. There were two

questions, each with different permutations. There was no basis for thinking that the jury had even taken a vote. Considering the whole of the proceedings together, it could not be said that a final verdict had been reached at the time the jury asked their questions.

[11] The trial judge required to give the jury further guidance that they could not convict without at least eight of their number in favour of conviction, but his further directions were irrelevant, since no concluded view had been reached. There having been no final verdict, the jury were entitled to continue to deliberate and to reach a verdict, whether of guilt or otherwise.

[12] When the jury did return their verdict, there was no dissent either when the verdict was delivered or when it was read over to them. They signified their assent in the usual way. Such facts mean that there has been no miscarriage of justice.

Discussion

[13] The trial judge has frankly and fully acknowledged his error in this case. When the jury returned from their deliberations, they posed two questions, both stated in the hypothetical. Taking into account the whole of the proceedings, on no view can it be said that the jury had reached their final decision. The written questions did not justify any inference that a decision had been made nor did the jury give any impression in open court that this was the case. There was no basis for the trial judge to conclude that these questions indicated that the jury had reached a settled intention to acquit. Unfortunately, the trial judge misinterpreted the situation, and gave directions which contained two components. The cause of the mistake is not relevant, because the judge clearly states that "there were no exchanges in court between me and the jury other than those set out in the transcript", in other words nothing was said by or in the presence of the jury other than the additional

directions. The judge had before him two very clearly hypothetical questions which were not challenged, altered or qualified by anything said by the jury.

[14] We note that the trial judge did not read the questions out to the jury, as is commonly done. Had he done so the very act of reading them out might have avoided the error which ensued. We consider that it is generally good practice to read jury question(s) back to the jury once the court reconvenes. This not only has the advantage of entering the questions into the official record of the trial, it helps clarify that the questions as posed do reflect the issues upon which the jury are seeking assistance.

[15] The first component of the additional directions related to the numerical requirements in relation to a verdict of guilt. The critical additional direction given here was that which had already been given in the charge, namely that in order to return a verdict of guilt, at least 8 of their number required to be in favour of such a verdict. This direction required to be given. It was not only correct, it provided the jury with the only essential information they needed. As the court noted in in *Affleck* v *HM Advocate* 1987 SCCR 150, where the trial judge had given confusing directions about how many jurors were required for a guilty verdict, the Lord Justice General (Emslie), delivering the opinion of the court, gave the following guidance:

> "The proper course for a judge to follow when it comes to telling the jury what action they may take, having considered the evidence is to explain the verdicts which are open to them, to inform them that they may return a verdict by a majority, and then to emphasise the **only matter of importance**: that no verdict of guilty can be returned unless eight members of the jury are in favour of that verdict."

Thus, it is clear that what is of essential importance is for the jury to be properly directed on the numerical requirement for a conviction (see also *Glen* v *HMA* 1998 JC 42).

[16] The second component of the additional instructions, essentially that the jury required to return a verdict of acquittal, was a misdirection. It is true that the jury did not follow this direction, which proceeded on the basis of an erroneous assumption of fact by the trial judge. It was submitted that the failure to follow this misdirection resulted in a miscarriage of justice, based on the verdict being one which could not have been returned by any reasonable jury. The question, however, is whether a reasonable jury was in these circumstances required to follow a misdirection which proceeded on an error by the judge in the interpretation of the questions they asked. It should be noted that section 106(3)(b) qualifies the concept of the reasonable jury, by referring to a "reasonable jury, properly directed". This jury were not properly directed. The effect of this was considered in *Geddes* v *HMA* 2015 JC 229, where the Lord Justice Clerk (Carloway), delivering the opinion of the court observed:

> "[88] The first [preliminary matter of law] is whether the assessment of the reasonableness of a verdict is to be gauged on the basis that the trial judge's directions were in fact proper ones (i.e. correct in law), even if they are demonstrated to have been wrong, or upon the assumption that proper directions had been given (ie upon a hypothesis). The answer to this is to be found in the statutory provision itself. Section 106(3)(b) of the 1995 Act states that a person may bring under review any alleged miscarriage of justice which may include such a miscarriage based on 'the jury's having returned a verdict which no jury, *properly directed*, could have returned'.
>
> [89] The task for the court is thus to look at all of the evidence and decide whether, if the jury had been properly directed upon it, no reasonable jury could have convicted. Thus, any erroneous directions, especially but not exclusively those favouring the defence, fall to be ignored in favour of an assumption that the correct directions had been given."

[17] Turning to the question whether, if properly directed, a reasonable jury could have returned this verdict the answer is clearly yes. The result is that the appeal must be refused.