APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 48
HCA/2018/552/XC

Lord Justice Clerk
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

GARY GODDARD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Fyffe, Sol Adv; Paterson Bell, Solicitors (for Bruce Short, Solicitors, Dundee)
Respondent: A Prentice QC, Sol Adv; Crown Agent

10 July 2019

[1] The appellant, charged with assault to severe injury, impairment, and permanent disfigurement by means of a knife, was convicted unanimously under deletion of the word "permanent". In accordance with usual practice in the court in question jurors were asked to submit, anonymously, feedback forms reflecting on their experience and the facilities provided to them. One of these forms indicted that one juror had "googled" the appellant, had discovered that he had a prior conviction, and had shared this with at least one other

juror, namely the author of the form. It is a matter of agreement that the form should be taken as a reflection of what occurred, and that the information which would have been obtained by the juror in question would have been that the appellant was previously convicted on indictment in the Sheriff Court in 2015 for an assault with a metal pole for which he was sentenced to 17 months' imprisonment.

[2] From the terms of the form, it can reasonably be inferred that at the time the juror conducted the search he or she had not yet received a warning not to do so. The feedback form does not allege any impropriety on the part of the juror, suggesting that the action was one of naivety. It is not known at what stage the writer of the form was told of the conviction, whether before or after the verdict, or whether any other jurors were also so informed. Importantly there is no suggestion that the information played a part in the jury's assessment of the case, nor that it had any effect on their deliberations.

[3] The test to be applied in circumstances such as the present is that set out in *Carberry* v *HM Advocate*, 2014 JC 56 at paragraph 43, namely:

> "…whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (*Porter* v *Magill* 2001 UKHL 67; 2001 2 AC 357, adopted in *Helow* v *Advocate General for Scotland*, 2008 SLT 967, Lord Rodger, para 14). Such an observer reserves judgment until he has seen and fully understood both sides of the argument. He is not unduly sensitive or suspicious. He is informed on all relevant matters (*Helow* v *Advocate General for Scotland*, 2008 SLT 967, Lord Hope, paras 1–3). These will include the directions given to jurors."

It was submitted for the appellant that the awareness of at least some jurors of an analogous conviction, also involving a weapon, was sufficient at least to raise justified and legitimate doubts about the jury's impartiality. Given the nature of the conviction there was a real possibility that the jury has accessed information it ought not to have had which would be

prejudicial to the appellant's interests in a material way, since his credibility was central to the issue of self-defence.

[4] The submission was that the jury having lacked impartiality, a miscarriage of justice had occurred. As in *Carberry* v *HM Advocate*, 2014 JC 56 para 45, the juror in question had accessed information which was not already in the public domain and which was prejudicial to the appellant's interests in a material way. The court had no control over the material, unlike the situation where a witness has volunteered information which can be the subject of immediate correction and instruction, as well as subsequent direction. If even one of those who took part in the decision could not be seen to have been impartial, that flaw affected the collective decision, *McTeer* v *HM Advocate* 2003 SCCR 282, para 16.

[4] As the advocate depute pointed out, the disclosure of an analogous previous conviction to the jury, prior to their determination of the charge, does not of itself require the jury to be considered biased: for a trial to be deserted or a conviction quashed the disclosure must have had a prejudicial effect- *Fraser* v *HM Advocate* 2014 JC 115 at paragraph 51. Nor does such disclosure automatically render a trial unfair. This is not a case where a juror possessed, but did not disclose in advance, private information tainting the character of the accused, or permitting the inference that the juror in question may be biased against the accused, and have sought to influence other jurors accordingly. *McTeer*, for example, was such a case where the jury foreman was in fact the father of an individual who had been the victim of a prior assault by the appellant, a fact which could hardly do other than create an impression of partiality. The case of *MacLean* v *HMA* 2001 SCCR 526 was also one which involved personal knowledge on the part of an individual juror reflecting seriously on the honesty of the appellant. This is not such a case.

[5] It is suggested in the sheriff's report, and was submitted on behalf of the appellant, that the juror in question must have failed to listen to or ignored the clear instructions given by the sheriff that the jury were not to conduct their own inquiries. In our view, the natural interpretation of the information contained in the form is that the action of searching took place prior to any warning being given, so the obtaining of the information was not done in breach of any instructions from the court. If the information was imparted to the other juror(s) after the jury were balloted, this would have been in disregard of instructions on the matter. However, it is not known when this occurred. In any event, as noted already, the mere act of disclosure does not justify an inference of bias. No information has been provided to establish that the juror's knowledge of the appellant's previous convictions was translated into effective action in the jury room (*McCadden* v *HM Advocate*, 1985 JC 98; 1985 SCCR 282). The sheriff also suggests that the fact that the jury returned with a question about deletion of the word "permanent" supported the idea that the jury might have failed to listen to or understand the express directions he had already given on this matter. We reject that supposition unhesitatingly. There are many reasons why a jury may return with such a question: they may be seeking to confirm that they have understood correctly, before acting; they may be seeking to reassure one of their number who had misunderstood the direction; there are other possibilities. Seeking confirmation in this way, suggests, contrary to the sheriff's comments, that the jury is in fact taking care over its verdict and seeking properly to apply the directions which have been given.

[6] For these reasons we do not consider that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased or lacked impartiality.

[7] In any event, we do not consider that the circumstances would have constituted a miscarriage of justice. We agree with the advocate depute that in cases where a juror has accessed publicly available hearsay information it is not unreasonable to expect that juries will normally continue to act in accordance with the standard directions to decide the case solely upon the evidence properly led in court: see *Carberry*, paragraph 42. There was here no reason to suspect that the jury departed from their oath or that it did not follow the judge's directions to determine the case on the basis of the evidence alone, directions which were repeatedly and clearly given. Such directions are deliberately given to reinforce for the jury the necessity of determining the case only on the basis of the evidence led in court. In the present case such directions were given an appropriate and strong emphasis. The advocate depute submitted that it was not established, or even suggested, that the jury's deliberations were corrupted by the information obtained; the author of the form made no complaint about improper conduct during the deliberations: had that occurred one would expect the issue to have been raised. We agree with that submission.

[8] Furthermore, the case against the appellant was a compelling one. There was no dispute at trial that the appellant had stabbed the complainer; the only issue, as maintained in his police interview, was whether he had acted in self-defence. Considering the evidence noted below, and in particular that there was no evidence that the complainer was in possession of any weapon, this line was a difficult one for the appellant, the case against him being a strong one. The principal evidence came from a relatively sober witness who had hitherto been a good friend of the appellant. The sheriff described him as having no axe to grind, and being "near sober" at the time of the incident, having consumed 3 bottles of beer over an eight hour period. He gave clear and unequivocal evidence that following an exchange of words between the appellant and complainer in the hallway of the locus, the

appellant had gone in the direction of the kitchen and returned with a knife with which he repeatedly stabbed the complainer, who had done nothing to justify or provoke this attack. This was corroborated by the complainer, who gave evidence that the appellant stabbed him for no reason. There was also a degree of circumstantial evidence available.

[9] In these circumstances the appeal must be refused.