APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 48
HCA/2023/158/XC

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

SS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: D Adams; John Pryde & Co, Edinburgh
Respondent: Goddard KC, AD; the Crown Agent

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28 November 2023

Introduction

[1] The indictment which went to the jury in this case consisted of four charges:

Charge 1 - Lewd, indecent and libidinous practices and behaviour towards K, an 8 year old girl.

Charge 2 - Indecent assault of a 15 year old girl, L.

Charge 4 - Lewd, indecent and libidinous practices and behaviour towards D, a male aged between 11 and 13; and

Charge 5 - Indecent assault of D when he was between 14 and 21.

[2] For proof, these charges relied upon the doctrine of mutual corroboration, as the jury were appropriately directed. The jury purported to return verdicts of not proven on charges 1 (majority) and 2 (unanimous) but guilty on charges 4 (unanimous) and 5 (majority). They deleted one of the two specified addresses from the libel of charge 5. Such a verdict was incompetent, given that charges 4 and 5 involved the evidence of the same complainer.

[3] Before the verdict was recorded the trial judge directed the jury to withdraw. The Advocate depute argued that whilst the verdict was not in accordance with the directions given, nevertheless there had been a verdict of guilty on two charges and it would be appropriate to give further directions to enable them to clarify matters. The appellant's counsel submitted that the trial judge should direct the jury to acquit the appellant of charges 4 and 5. The verdict was unequivocal and unambiguous on all charges, and there was no basis to give the jury further directions or to ask them to reconsider the matter.

[4] Having taken some time to consider matters, and having heard further submissions, the trial judge decided, having regard particularly to the *obiter* remarks of the Lord Justice General (Rodger) in *Whyte* v *HM Advocate* 2000 SLT 544 at 546A-C, to give the jury further directions in relation to mutual corroboration. She said to the jury:

> "Essentially, the verdict which you delivered on Friday is not a competent one, and it is not in keeping with the directions that I gave you, and it's caused quite a bit of debate throughout the building, but I have considered legal arguments that were given this morning and I have taken the decision that a further direction to you is required."

[5] The judge then repeated the *Moorov* directions given earlier. The jury duly retired again and returned with different verdicts, namely guilty (majority) of charge 1 under deletion of "various occasions" and substitution therefor of "one occasion"; not proven (majority) charge 2; guilty (majority) charge 4 and guilty (majority) charge 5, subject to deletion of the same address as in their initial verdict.

Submissions for the appellant

[6] The jury's oral verdict indicated that they rejected the evidence of complainers K and L, and accepted the evidence of D. These were conclusions reasonably open to them on the evidence. There was no apparent concern amongst the jurors when this verdict was delivered (see *Cameron* v *HMA* 1999 SCCR 476), nor had the jury sought further guidance (see *Whyte* v *HMA* 2000 SLT 544). Reference was made to the Jury Manual (124.1/132), and the comment that:

> "The position in *Whyte* might be distinguished from that in which a jury has reached a final verdict which results in an acquittal on one *Moorov* charge and a conviction on the other. In such cases judges might conclude that, by necessary implication, the jury has rejected the evidence of one complainer and that an acquittal on both charges should be directed by the court. Some support for that approach might be found in the decision in *Kerr* v *HM Advocate* 1992 SCCR 281 which was not a *Moorov* case …."

[7] On that basis, it was submitted that the judge should have directed that an acquittal verdict be recorded, as urged by the appellant's counsel at the time. Both *Whyte* and *Took* v *HM Advocate* 1989 SLT 425 could be distinguished on their facts. In *Took, Cameron* and *White* v *HMA* 1990 JC 33 the plain intention of the respective juries was that they wished to convict the appellants, but had misunderstood how to state their verdicts in such a way as accurately to express their intention to convict based on their assessment of the evidence. In *Whyte,* it was apparent that deliberations remained ongoing.

[8] In the instant case, by contrast, the initial verdicts were final in nature. It was that plain intention to acquit that, despite the different circumstances, brought the case in line with the decision in *Kerr*.

[9] By taking the course that she did, the trial judge, albeit unintentionally, wrongly influenced the jury (*Cameron*, 483E) and/or caused confusion leading to a redistribution of votes that caused a miscarriage of justice (*Kerr*, 288B).

[10] Counsel referred to a minute in the case of *HMA* v *Shepherd*, 8 September 2022, where in similar circumstances the trial judge had directed the verdicts to be recorded as acquittals. It was submitted that this was in accordance with current High Court practice.

Submissions for the Crown

[11] The original verdicts were ambiguous and contrary to the directions given. The trial judge did not err in inviting the jury to continue their deliberations under further direction, nor did the additional directions result in a miscarriage of justice.

[12] Reference was made to Renton and Brown, Criminal Procedure (6th edition) para 18.89 where it is stated:

> "The judge has a duty to ensure that the jury's verdict is not inconsistent or incompetent, and that there is no confusion among the jurors as to what the verdict is. When, therefore, the foreman announces a verdict which is incompetent, inconsistent, or contrary to the judge's directions either in respect of one charge or one accused, or when seen in the context of other verdicts on an indictment where there is more than one charge or accused, or where the result of deletions made by the jury is that the charge is irrelevant and/or lacking in specification, or where the reaction of other jurors to what the foreman says suggests that they do not agree with it, the judge should take personal charge of the matter and do what is necessary to clarify the verdict or the jury's intention before the verdict is recorded. This may or may not involve his giving them further directions or inviting them to retire to reconsider their verdict."

[13] The passage from the Jury Manual quoted by the appellant should be read in its entirety. The passage concludes:

> "On the other hand, in a classic *Moorov* case it might be thought that inconsistent verdicts disclose an ambiguity in the verdict rather than a mere question over the effect of the jury's decision. On that analysis the proper course of action might be to give the jury an appropriate direction and invite them to consider the matter further."

[14] *Whyte* v *HM Advocate* was supportive of the approach taken by the trial judge. In that case the court stated:

> "We should add that, even supposing that the jury had returned their two dissimilar verdicts, one of acquittal and one of convicting, those verdicts would plainly have been incompetent. On the authority of the case of *Took v HM Advocate* it would have been proper for the sheriff, even in those circumstances, to give an appropriate direction and to ask the jury to consider the matter further in the light of that direction. This reinforces our conclusion that the position here was not one where the verdicts had to be accepted" (at 546B).

This was consistent with the approach taken in *Took, Cameron,* and *White. Kerr* could be distinguished as the trial judge did not confirm with the jurors whether they had reached a verdict before sending them out to reconsider. Had he done so, and the jurors had confirmed that the numbers on the piece of paper represented their verdict, then the proper course would have been to record an acquittal (in that case by way of a not proven verdict). That would have been a competent verdict. In the instant case, however, the verdict was clearly incompetent.

Analysis and decision

[15] Our system of jury trial hinges on a strong presumption that jurors follow the directions given to them. The present case is an example of the problems which can arise when it is manifestly clear that they have not done so. This case was one which depended for proof entirely on the doctrine of mutual corroboration. The verdicts initially delivered by the jury were not consistent with the correct application of that doctrine, which would necessarily have resulted either in conviction in respect of at least two complainers, or an

acquittal across the board. Parties were agreed that in the circumstances which arose it was incumbent on the trial judge to take action: the dispute was as to the nature of that action. Counsel for the appellant, relying on *Kerr* v *HMA*, as well as the minute in *HMA* v *Shepherd*, submitted that the judge should have directed that the verdict be recorded as one of acquittal, and that the failure to do so resulted in a miscarriage of justice. The learned advocate depute submitted that the judge was right, based on the obiter remarks in *Whyte* v *HMA*, to repeat the directions on mutual corroboration and ask the jury to retire for further consideration.

[16] The various authorities to which the court was referred serve merely to illustrate how difficult it is to lay down specific rules or guidance to cover the many different situations which might arise when the verdict returned by the jury may not conform to the directions given. A great deal turns on the precise circumstances of the case.

[17] For example, in several of the authorities the fact that the jury were plainly intending to convict was deemed an important element in how the verdict should be determined and recorded. In *White*, the jury convicted of both possession and possession with intent to supply when they should have treated these charges as alternatives. A finding that the appellant was in possession of the drugs would be a necessary precursor to a finding that he was in possession with the intent to supply them. Thus it was clear that the jury had concluded as a matter of fact that the appellant was in possession and was so with intent to supply the drugs. Recording the conviction as relating to the more serious charge was entirely consistent with what, by necessary implication, had been the jury's conclusions on the facts. In *Took* on the other hand, the position was somewhat less clear. There the jury convicted of assault but deleted the entire modus thereof making the verdict both incompetent and somewhat ambiguous. There was an apparent intention to convict of

assault, but the means had been deleted. That case must be viewed as a more borderline one, but the problem was pointed out to the jury; they were asked whether they wished to reconsider; and they said that they did. These steps would have minimised the risk identified in *Kerr* that jurors might feel that they were being directed to alter their verdict, and that some might reconsider factual decisions already reached on the evidence, and even change the way they had voted.

[18] *Cameron* was another case where the appropriate outcome was reasonably obvious. There when the judge indicated that the verdict on the second charge would be recorded as an acquittal the clear consternation amongst the jury indicated that there was something wrong, and that the verdict as delivered was not in accordance with their intentions. Inviting them to retire to see whether they could rectify the matter and return a verdict in accordance with their true wishes was the obvious and appropriate course of action, again with minimal likelihood of the risks identified in *Kerr*.

[19] *Kerr* was a case where the verdict as indicated by the jury in a note passed to the judge – 7 for guilty, 4 for not guilty, 4 for not proven- was clearly a verdict of acquittal, and should simply have been recorded as such. The effect of the judge's repeating the general directions as to majorities and verdicts was that the jury reconsidered the whole verdict and returned with a majority guilty verdict. It seems that there was some confusion as to whether the verdict as indicated was the final verdict, and the court considered that this should have been clarified by the judge in the first place, since:

> "A negative answer would have confirmed that the jury were still in the course of their deliberations and that it was appropriate for them to retire after receiving the further directions in order to reach a verdict. But an affirmative answer would have shown that there was no need for the jury to retire, since the only question was how their verdicts for acquittal should be expressed."(at 286G – 287A)

[20] In fact the court reached the conclusion that the verdict was likely to have been the final one, given the way the jury had announced it, the foreman having stated that "we have a split jury here". The repeat directions given to them might well have been thought to be an indication that they should reconsider what their verdicts ought to be. Where a jury returned with a split vote, the proper course of action was to record the verdict as it stood:

> "This is because directions of this issue may be difficult for them to understand and because the risk is that a further discussion on this issue may lead to a redistribution of votes as between those for guilty and those for an acquittal … It is not inconceivable that a member of the jury who is in favour of a not proven verdict but against a verdict of not guilty could change his vote to guilty in order to prevent that result. There is more than a suspicion that that indeed is what occurred in this case." (at 288A–D)

[21] *Whyte* was a very different type of case. It was one where the jury actively sought advice on the fact that at that particular stage of their deliberations they had reached verdicts inconsistent with the *Moorov* directions given to them. They also indicated to the judge that they had not concluded their deliberations, so there was no final verdict determined upon. In those circumstances it was a proper course of action to give the jury further directions and ask if they wished to deliberate further, which they did. Although the obiter comments in the final paragraph seem to suggest that this course of action would reasonably have been open to the judge if the inconsistent verdicts had been final ones, it is notable that the court was not referred to the case of *Kerr* and the concerns expressed there. Moreover, the basis for the obiter comments was *Took*, which concerned a very different set of circumstances.

[22] We have reached the conclusion that the concerns expressed in *Kerr* are very real ones applicable in the present case. It is abundantly clear that after receiving the additional directions certain members of the jury changed their votes, and changed their assessment of the evidence, including the credibility and reliability of one of the complainers. A majority

not proven verdict became majority guilty with a deletion and substitution; a unanimous not proven became majority not proven; and a unanimous guilty became majority guilty. It is not necessary for the court to be able to divine exactly what happened in the jury room to conclude that the result of this should be categorised as a miscarriage of justice, as in *Kerr* where the court noted

> "The result of the vote disclosed by the piece of paper was an acquittal verdict, yet this became a verdict of guilty by a majority some [twenty] minutes later after the jury had reconsidered their verdict following the directions by the trial judge. It is hard to believe that this was due to a further consideration of the evidence. The more likely explanations are that the jury were misled into thinking that it was necessary for them to arrive at a majority view as to which verdict of acquittal they should return or that they thought that there were in effect only two verdicts open to them, these being guilty or not guilty. Whatever the explanation, it is clear that a miscarriage of justice has occurred, and we are in no doubt that we must allow the appeals." (at 288C–E)

[23] We are not persuaded by the Advocate depute's submission that the obvious explanation for the changed result is that in the first instance the jury had not properly applied the *Moorov* directions whereas the second time it can be inferred that they did so. In any case such as this there are two primary issues for the jury to determine: first, whether they find individual complainers credible and reliable; and second whether, if so, they are satisfied that the evidence which each gave meets the requirements of similarity of time, place and circumstances to allow the inference that the events were all part of one course of conduct, thus justifying the application of the doctrine of mutual corroboration.

[24] These are two separate exercises, even although in making the assessment of credibility and reliability of any individual complainer the jury may, indeed must, have regard to all the evidence that may be relevant to that issue. The jury were directed that there were these two stages to the process:

> "In reaching your decision as to whether each witness is credible and reliable, you can have regard to the evidence from the other witnesses in coming to that decision.

> So if you believe the complainer in any particular charge, then you would have to find corroboration from a credible witness who speaks to any of the other charges. If you do believe that witness, you then have to decide if by reason of the character, circumstance, place of commission and the time of each charge, the crimes are so closely linked that you can infer the accused was pursuing a single course of crime."

[25] The necessary implication of the verdict initially reported by the jury was that they had considered the complainer on charges 4 and 5 to be credible and reliable, but had not been able to reach such a conclusion regarding the other complainers. A correct application of the doctrine of mutual corroboration to that factual finding must inevitably be an acquittal. The verdict was not, as the Advocate depute submitted, "ambiguous"; the legal effect of the verdict which the jury indicated was clear, as in *Kerr*, and the verdict should simply have been recorded as an acquittal. We are satisfied that there has been a miscarriage of justice and the appeal must succeed.