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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 117/80

jury unanimous verdict

THE QUEEN

v.

WARWICK DUNCAN PATTERSON

Coram: Woodhouse J.
Richardson J.
Chilwell J.

Hearing: 19 August 1980

Counsel: K.G. Stone for Crown
G.D. McKay for Appellant

Judgment: 9 October 1980

JUDGMENT OF THE COURT DELIVERED BY CHILWELL J.

Warwick Duncan Patterson seeks leave to appeal against his conviction on two counts of indecently assaulting a boy aged 12 years upon the ground that the learned trial Judge misdirected the jury concerning the manner in which individual jurors should approach the task of arriving at a unanimous verdict.

The appellant is a school teacher and the complainant a pupil at his school. The complainant spent a weekend with the appellant. He stayed in the same house as the appellant on the Friday and Saturday nights of the 15th and 16th June 1979. They slept in the same bed. The evidence was that indecent acts occurred on both nights. There was no corroborative evidence. The appellant denied the

allegations. The issue was one of credibility. There was a third charge alleging indecent assault in similar circumstances on the 10th June 1979. The appellant was acquitted on that count.

The alleged misdirection occurred at the end of the summing up :-

> "It was said to you that each of you has taken a solemn oath to decide the case entirely upon the evidence and that that is an individual obligation and must be exercised individually. It was said to you that none of you should bow to pressure in your conclusions about this case. Well, that is so, that is so, but of course you also have to remember that the verdict of a jury must inevitably be the collective verdict of all twelve of you, and so you are only likely to be able to reach an agreement among twelve people if there is proper and responsible discussion among you and a preparedness to listen to the views of others. I do not suggest that if any one of you holds a firm view he or she should be readily persuaded to do something that he or she thinks is wrong. Indeed, none of you should arrive at a verdict which he or she thinks is wrong. But there must be discussion among you and the view, in the end, has to be a consensus view and so that involves deferring to the views of others.

> You must not come back to deliver your verdict unless you are all agreed as to what it is to be. The procedure is that the Registrar, when you return, will ask the Foreman if you are unanimously agreed upon your verdict and one assumes he will say you are. The Registrar will then ask the Foreman to deliver the verdict in each count, one at a time, guilty or not guilty, on three separate occasions and the Foreman will deliver that verdict. And the Registrar will then say, "And is that the verdict of you all?" It is at that moment that if there is any one of you who disagrees with the verdict just delivered by the Foreman he or she must say so. If there is no dissent from the verdict delivered by the Foreman I shall accept that verdict as a unanimous one."

Counsel for the appellant focused his submissions upon that portion of the summing up which has been underlined. It was his primary submission that that particular part of the summing up, read in its context, failed to achieve a proper balance between the necessity for the jury to reach a unanimous verdict and the prime duty of each juror to be satisfied individually of guilt beyond reasonable doubt. In particular counsel submitted that the Judge's direction might have led any individual juror to conclude :

(a) That the necessity for unanimity was in some measure relaxed.

(b) That although he himself might be in a state of uncertainty he was entitled to "sink his own view" and be persuaded to agree with the majority.

(c) That the corporate verdict could be one of consensus or compromise, such as that which might be arrived at by a committee.

By way of background counsel for the appellant drew our attention to the fact that at an earlier trial the jury had disagreed on all counts and he emphasised that in the absence of corroboration the issue of credibility was the key issue in both trials. He submitted that the verdict in the second trial might have been reached by an individual juror or jurors taking the view that it was permissible to submerge his or their assessment as to credibility beneath the view of the majority. It was further submitted that acquittal on one count and conviction on the other two counts is significant: that it is not clear on the evidence why the jury should have believed the complainant beyond reasonable doubt on two counts yet not have believed him to that degree on the other count and that this result suggests that individual jurors might have regarded the Judge's direction on consensus and the deferring of views as a statement that compromise would be acceptable. As to that we observe that the Judge directed the attention of the jury to certain differences in the circumstances surrounding the events of the 10th June (Count 1) and the events of the 15th and 16th June (Counts 2 and 3). He said in his summing up:

I suggest to you that count 1 is possibly in a different category from counts 2 and 3. Count 1 depends entirely upon the boy's story with no surrounding circumstances really of any kind to help you on it. Counts 2 and 3 have got some other matters which can be considered in conjunction with them, not corroboration but other background material, and so it is possible that you could think that there was a different situation on count 1 from that on counts 2 and 3.

Finally, our attention was drawn to the fact that the jury retired at 12.07 p.m. and returned with its verdict at 4.56 p.m. It was submitted that the time involved, which included a meal break, was unusually long for a short case where the essential issue was credibility thereby indicating that a compromise verdict was ultimately reached.

The well known direction which is sometimes given after a jury has been in retirement and has returned to the Court seeking further guidance from the judge when it emerges that the jury are finding difficulty in agreeing upon a verdict has been discussed in cases such as R v. Mills (1939) 27 Cr. App. Rep. 80, R v. Walhein (1952) 36 Cr. App. Rep. 167, R v. Creasey (1953) 37 Cr. App. Rep. 179, Shoukatallie v. R (1962) A.C. 81 and, since majority verdicts were introduced in England, R v. Mansfield (1978) 1 All E.R. 134. The direction given by the trial judge in R v. Walhein, which was regarded as proper by the Court of Criminal Appeal, was as follows :-

> "You are a body of 12 men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."

but that direction is now modified in England in the light of the present procedure there relating to majority verdicts. R v. Mansfield (supra).

The direction in R v. Walhein was approved by the Judicial Committee in Shoukatallie v. R (supra), and by the Full Court of Victoria in R v. Cartledge (1956) V.L.R. 225. It was referred to without disapproval by the High Court of Australia in Milgate v. R (1964) 38 A.L.J.R. 162. Apart from R v. Papadopoulos (1979) 1 N.Z.L.R. 621 where coercion of the jury was in issue (and it is not the issue here) this Court has not been called on to rule on such a direction but

we are aware, of course, that Judges have from time to time directed juries in accordance with its terms or in similar terms.

As we have said the challenged direction was included in the summing up rather than at a later time during the jury's deliberations. That was the case too in R v. Davey (1960) 45 Cr. App. Rep. 11. There the direction was held to be wrong, not because it was included inthe summing up, but because it was uncertain in expression and invited jurors holding a minority view to sink it and agree with the majority. In most cases the usual simple direction that the verdict must be unanimous will suffice. In the present case the learned Judge considered it necessary to give a more specific direction because of the emphasis placed by defence counsel in his final address upon the individual obligation of each juror. Mr. McKay did not criticise the learned Judge for giving a more specific direction. His criticism is directed at the content of the direction: it did not, in his submission, go far enough because it failed to underline the individual juror's duty to differ. He relied upon those words in the speech of Lord Denning delivering the opinion of the Judicial Committee in Shoukatallie v. R (supra) page 91 where, referring to the direction sometimes given when the jury has indicated difficulty in agreeing upon a verdict, he said :-

"He reminds them that it is most important that they should agree if it is possible to do so: that, with a view to agreeing, they must inevitably take differing views into account; that if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view, and remember that he may be wrong; that if, on so doing, he can honestly bring himself to come to a different view and thus to concur in the view of the majority, he should do so, but if he cannot do so, consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and for want of agreement, there will be no verdict.

It is everyday practice for a judge thus to exhort a jury to reach a verdict. There is nothing wrong in it, indeed it may be very proper he should do so, so long as he does not use phrases which import a measure of coercion such as was held to have been exerted in Rex v. Mills."

Coercion is not in issue in this case. What is in issue is whether the direction might have misled a juror who held a conscientious opinion contrary to the majority or a juror who was unable to form a concluded opinion into believing that he was entitled to surrender to the majority opinion. The altered opinion must be honestly and sincerely held (R

v. Mills supra) it must not be the consequence of mere compromise (R v. Cartledge supra) and it must be an opinion positively held in contrast to nemine contradicente (R v. Davey supra).

In the present case the Judge began his direction by exhorting individual jurors to be true to the oath; he told them not to bow to pressure; he reminded them that the verdict must be the collective verdict of them all; and he advised them to enter into discussion amongst themselves. All of these were clearly proper directions. But when he directed them on the vital issue of reaching agreement he said that in the end the corporate view had to be a consensus view which involved deferring to the views of others. It seems to us that a verdict based upon a consensus view involving deferring tothe views of others is not the unanimous verdict as commonly understood. In Milgate v. R (supra) where the trial judge failed to give a direction that the verdict must be unanimous Barwick C.J. said at page 162 :

> "Whilst the trial judge should not lead the jury to think that a general consensus, as distinct from unanimity, will suffice (See R. v. Davey (1960) 45 Cr. App. R.11) there is no imperative need for him in the summing up to tell them that their verdict must be unanimous."

It is significant that the Chief Justice drew a distinction between consensus and unanimity. And such a distinction is equally applicable to the gradual change that has affected the flavour of the word "consensus" in ordinary usage in this country. Its meaning has gradually veered in the direction of an accommodation or the mutually acceptable position that may exist within varying points of view rather than unison. For example within a few days of the present hearing an article appeared in a local newspaper in which a summary of the various political approaches to government was described as "an astute analysis of the consensus approach to politics, avoiding hard decisons and their prospectively unpleasant electoral consequences ..." The New Zealand Herald, 28 August 1980, p.6. A week or so earlier The Times of London spoke of strong and varying views about the prospective value of gold and added - "If there is a consensus it is that a sharp fall below the present range is unlikely": 8 August 1980, p.16. It is this general use of the word we think which could well act upon the mind of a juror. Certainly it is a use which must be taken to exist.

The unanimous verdict of a jury in a criminal trial involves something more than twelve jurors being of the one mind or opinion, it requires like-mindedness on the part of each of the twelve jurors. In this case "consensus" may have meant "agreement" for individual jurors. But an

agreement which is arrived at by deferring to the views of others is not necessarily one which is arrived at by like-minded people who have reasoned their way to a common result. In Thomas v. R (1972) N.Z.L.R. 34, 41 Turner J.said:-

> "It is of course inherent in the process of conviction by jury that the jury must be convinced as a whole, and each member must be convinced individually, beyond reasonable doubt of the guilt of the accused."
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> "While, as I have said, the presumption of innocence cannot be rebutted unless the members of the jury are individually and collectively convinced beyond reasonable doubt of the guilt of the accused, it does not logically follow that each of the members of the jury must base his or her individual conclusion upon the same reasoning as the others. Different members may individually be convinced beyond reasonable doubt of the guilt of the accused, by their individual acceptance of different facts."

We have come to the conclusion that the direction of the learned Judge in the present case might well have encouraged any individual juror to surrender his reasoning to others. While in the closing stages of the summing up the jurors were exhorted to return with a "unanimously agreed" verdict which is the "verdict of you all" the immediately preceding

direction that "in the end" there has "to be a consensus view" which "involves deferring to the views of others" might have led an individual juror to conclude that it would be sufficient compliance with the Judge's direction for the Foreman to announce that the jury as a whole were of the one mind or opinion although not like-minded as a result of individual reasoning.

For the foregoing reasons we conclude that the direction in this case was unsatisfactory and that it would be unsafe to allow the convictions to stand. Nor is there room for application of the proviso to s.385(1) of the Crimes Act. Apart from the uncertainty surrounding the influence of the direction upon the jury there are the further facts that there was a disagreement at the first trial and the Crown case turned upon the uncorroborated evidence of a young complainant.

Leave to appeal is granted, the convictions will be quashed and a new trial ordered.

Solicitors:

Bell, Gully & Co., Wellington, for Appellant

Crown Solicitor, Wellington, for Crown