

Regina v Naim Khan

[2018] EWCA Crim 2641

Before: Lord Justice Flaux Mrs Justice Cheema-Grubb DBE and Mr Justice Soole

Friday 14th September 2018

Representation

Mr A J G Grainger appeared on behalf of Appellant.
Mr A Gardner appeared on behalf of the Crown.

Judgment

Friday 14th September 2018 Lord Justice Flaux:

1 On 8th January 2018, in the Crown Court at Oxford, the appellant was found by His Honour Judge Ross to be in contempt of court. He was ordered to be committed for contempt for seven days, to run consecutively to the sentence already being served. He appeals against the finding of contempt and the sentence, pursuant to section 13 of the Administration of Justice Act 1960 .

2 The matter arose in this way. The appellant was one of a number of defendants being tried before the judge and a jury. During prosecution counsel's closing speech on the afternoon of Friday 5th January 2018, there were a number of unwarranted interruptions by counsel for one of the other defendants. After the jury had been sent home for the weekend, the judge raised with that counsel his displeasure at those interruptions and a somewhat heated exchange ensued, at the end of which the judge refused to allow counsel to raise what was said to be a point of law. At the end of this exchange, and as he was about to leave court, the judge saw and heard the appellant clapping his hands about six times. He said to Mr Grainger (counsel for the appellant):

"Mr Grainger, your client it was, I believe, who applauded at the end there. I will leave you to take instructions. I will deal with the matter on Monday."

The judge then rose.

3 On the morning of Monday 8th January 2018, just before the jury returned to court at 11.13am, the judge said:

"Mr Grainger, I will deal with the issues arising in relation to your client

later on today, at a time of a break."

4 Later that day, at 12.41pm, Mr Grainger sought to provide an explanation for the appellant's behaviour on which he had taken instructions after court on Friday. He explained that the appellant had a back injury from a historic car accident for which he took medication, which he did not always receive, and that he suffered from diabetes, for which he took insulin. The trial had been a long one and he had not felt well throughout, but particularly the previous week. Mr Grainger said that the appellant had not meant any disrespect or discourtesy. He did not even know why he had clapped and he was sorry that he had done so. The behaviour would not be repeated.

5 The judge then proceeded to rule that the appellant was in contempt of court. He said that the appellant had been disruptive on a number of occasions during the trial and he had excluded him from court after he saw him throwing something at a co-defendant. That was a reference to his throwing a piece of paper at his co-defendant during legal submissions the previous Thursday. The judge said that to behave in the way he did by applauding on Friday, after all the warnings he had been given, was not something that the judge was prepared to overlook. Notwithstanding what his counsel had said, it was a clear and now admitted contempt of court. The judge said that he would deal with it by way of a seven day sentence to start at the conclusion of the sentence the appellant was currently serving. Any further misbehaviour would be dealt with by a combination of exclusion from court and longer sentences for contempt. The judge concluded:

"Enough is enough. You have decided up until now that you would chance your arm and, thus far, I have dealt with you fairly leniently. No longer."

6 On behalf of the appellant, Mr Grainger explains in his written Advice — and has confirmed before the court this morning — that although he was aware that summary proceedings for contempt may have been at the forefront of the judge's mind, he proceeded on the basis that the initial discussions were preliminaries. In other words, there would be the opportunity to provide an explanation and an apology, after which the judge might or might not proceed with a contempt hearing. He says that the speed and short-circuited nature of the process was not something that he had anticipated. Mr Grainger submitted that because he and the appellant had not been put on notice that these were contempt proceedings and the appellant had not had the allegation of contempt put to him, he had not had the opportunity to admit or deny the allegation. Mr Grainger would have submitted that it was not a contempt as the hearing had concluded, the judge was in the process of leaving and the jury was not present.

7 Mr Grainger also submits that he was taken by surprise by the sentence. He would have wished to make submissions as to the appropriate sentence and would have submitted that a sentence of seven days' imprisonment for a short round of applause was manifestly excessive in the circumstances.

8 On behalf of the prosecution, Mr Gardner submitted that Mr Grainger's submissions amounted to an admission of contempt. The procedure required by Rule 48 of the Criminal Procedure Rules may not have been followed completely, but, nonetheless, the spirit of the rule had been complied with. Mr Gardner submitted that, in effect, it was to be inferred from all the circumstances, both of the previous conduct and what the judge had said on the Friday and first thing on the Monday morning, that the judge proposed to proceed with a contempt hearing. He submitted that the judge had afforded counsel sufficient time to take instructions and to prepare submissions, including as to punishment. In his Respondent's Notice, he submitted that the sentence was not excessive in the circumstances, given the appellant's prior misconduct and the fact that this was disorderly or insulting behaviour from the dock during a long trial. The fact that it occurred in the absence of the jury did not make it any less of a contempt in the face of the court.

9 Notwithstanding Mr Gardner's submissions, we consider that the real difficulty in the present case is that the judge did not at any stage, either on the Friday evening or when the court reconvened on the Monday, or when he dealt with the matter later in the day, say in open court, in front of the appellant and his counsel, that he considered the appellant to be in contempt of court and why, or that he would hold a contempt hearing later that day, let alone provide the explanation required by rule 48.5(2) and 48.6(3) of the Criminal Procedure Rules. These provide:

(2) Unless the respondent's behaviour makes it impracticable to do so, the court must –

(a) explain, in terms the respondent can understand (with help, if necessary)–

(i) the conduct that is in question,

(ii) that the court can impose imprisonment, or a fine, or both, for such conduct,

(iii) (where relevant) that the court has power to order the respondent's immediate temporary detention, if in the court's opinion that is required,

(iv) that the respondent may explain the conduct,

(v) that the respondent may apologise, if he or she so wishes, and

that this may persuade the court to take no further action, and

(vi) that the respondent may take legal advice; and

(b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise.

...

(3) On the review, the court must—

(a) unless the respondent is absent, repeat the explanations required by rule 48.5(2)(a); and

(b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise."

10 We do not consider it sufficient that the appellant's counsel was aware that summary contempt proceedings may have been at the forefront of the judge's mind, as he candidly accepts in his Advice. In particular, we accept Mr Grainger's explanation that, whilst this was the case, he thought that what was taking place on the Monday were "preliminaries" — in other words, an opportunity for the appellant, through his counsel, to apologise for his behaviour, after which, if the judge nonetheless considered that there had been a contempt which should receive a sanction, he would hold a formal contempt hearing. Had the judge stated at any point prior to that hearing that he proposed to hold a contempt hearing on the Monday and explained the nature of the contempt, as he saw it, Mr Grainger would have had the opportunity to give advice to the appellant, to make submissions as to whether there was a contempt, including whether the clapping had been intended to be sarcastic and disrespectful of the judge, and as to mitigation, including the appropriate punishment if it was a contempt.

11 In effect, Mr Gardner submits that it was perfectly obvious that the appellant was being sarcastic and disrespectful. But however much one suspects he is correct about that, it is an assumption that may be incorrect. As Mr Grainger says in his written submissions, it remains unclear whether the appellant was applauding the judge's robust handling of the situation, or the impertinence of the other defendant's counsel. In fairness, it cannot simply be assumed that it was the latter, without the appellant, through his counsel, having been afforded the opportunity to challenge the judge's view that he was in contempt and make submissions in mitigation. We consider that the judge was in error when he said

in his ruling that contempt of court was "now admitted".

12 We should add that nothing in this judgment should be taken as discouraging or impeding the summary approach to contempt in the face of the court, which is required in certain cases. As Lord Burnett of Maldon CJ said recently in giving the judgment of this court in *R v Yaxley-Lennon (aka Tommy Robinson)* [2018] EWCA Crim 1856 at [27]:

"It has long been the case that a judge may, but not must, deal with a contempt committed in the face of the court summarily, albeit after ensuring a fair hearing. So too may a judge deal summarily with a contempt which amounts to an interference in the course of the proceedings he or she is conducting. The power to punish such contempt arises under the common law in addition to statute. Its purpose is to equip the court with the means to protect its processes and penalise those who seek to impede or subvert them. Common examples include noisy and intemperate interruptions from the public gallery and witnesses improperly refusing to answer questions during the course of giving oral evidence. Because of the need to respond quickly and decisively in such cases, the court is empowered to act summarily and, if necessary, impose a term of immediate imprisonment. However, this jurisdiction should be exercised sparingly. As Lawton LJ observed in *Balogh v St Albans Crown Court* [1975] QB 73 at page 93:

'In my judgment this summary and draconian jurisdiction should only be used for the purposes of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment.'"

However, as the Lord Chief Justice went on to say:

"29. Procedural fairness has always been a requirement in contempt proceedings, including the need to particularise the alleged contempt at the outset. An alleged contemnor must know what it is he has done which is said to amount to a contempt of court so that he can decide whether to accept responsibility or contest the allegation. Whilst that is a common law requirement, it chimes with article 6(3) of the European Convention on Human Rights which requires, amongst much else, that anyone charged with a criminal offence must '(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and (b) to have adequate time and the facilities for the preparation of his defence'.

30. Such safeguards are now to be found in Part 48 of the Rules."

13 It follows that, even in cases dealt with summarily, as this one essentially was, the requirements of those Rules should be complied with: in particular, the explanations and reasonable opportunity to which Rule 48.5 and 48.6 refer. In such cases, nothing more formal by way of notice to the alleged contemnor is required. However, in our judgment, perhaps because of the heated way in which the matter arose, the judge did not provide those explanations or provide the appellant thereafter with that reasonable opportunity. Nor did the judge afford the appellant's counsel any opportunity to make submissions as to the appropriate sentence.

14 Accordingly, we consider that the procedure which the judge adopted did not provide the requisite procedural fairness and that the appeal in respect of the finding of contempt and in respect of the sentence passed must be allowed.