[2019] EWCA Crim 1256

No: 201805326

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

27 June 2019

Before:

Lord Justice Holroyde
Mr Justice Warby
Mr Justice Julian Knowles

Regina
and
Leslie Allen

Mr J Doyle appeared on behalf of the **Appellant**

Mr M Liddiard appeared on behalf of the **Crown**

Mr Justice Warby

Leslie Allen is aged 62. On 23 November 2018, after a trial in the Crown Court at Warwick, he was convicted of three offences. Two were drug offences: possession with intent to supply class A drugs, and possession with intent to supply class B drugs, both contrary to section 5(1)(b) of the Misuse of Drugs Act 1971. The third offence was possessing a prohibited weapon in the form of pepper spray, contrary to section 5(1)(b) of the Firearms Act 1968. He was sentenced to a total of thirteen years' imprisonment.

This is Mr Allen's application for permission to appeal against conviction. At the heart of his case is the fact that, exceptionally, the decision on his guilt was made by the trial Judge, his Honour Judge Lockhart QC. The Judge had discharged the jury that had been sworn to try the case, and then proceeded to give judgment himself. The Judge was exercising the powers conferred by section 46 of the Criminal Justice Act 2003, in a case where there has been jury tampering. The applicant accepts that this was the case, and that it was necessary to bring the jury's role to an end. His case is that he was wholly uninvolved in the jury tampering, and that the right course of action would have been to terminate the trial altogether and start again with another jury. He submits that it was wrong for a Judge alone to determine whether he was guilty, and he seeks an order for a retrial.

The facts

The facts that are relevant to our decision on these issues can be quite shortly stated.

The prosecution followed a search of premises in Coventry adjacent to somewhere called the Capitol Gym. In the early hours of 16 June 2016, officers were seeking a red Jaguar X-Type car suspected of involvement in crime in the Lancashire area. They arrived at the applicant's home, where they found the car, the applicant, his son, and a third man. On searching the premises, the officers found in the kitchen, in front of the washing machine, shopping bags containing large quantities of cannabis. This was later valued at £78,800. In a drawer in the study a pepper spray was found. A search of the red Jaguar revealed, in the boot, a block of white power, and in the glove compartment some £4,700 in cash. The powder was later identified as unadulterated cocaine with a street value of nearly £100,000. The applicant was the registered keeper of the Jaguar and one of the

owners of the house. He had links to the Capitol Gym.

The prosecution case was that the applicant was a major drugs wholesaler who was in possession of all the items found in the house and the car. His case was that he had no knowledge of any of the drugs or the pepper spray. They belonged to others. His home was shared with several adult family members and he kept an open house, with a number of employees coming and going at all hours. His hospitality and openness had been abused. The money in the car was linked to boxing events which he promoted. The spray might have been confiscated by security from people attending those events.

The trial began on 13 November 2018. In the usual way, questions were asked of the jury panel before they were sworn. These included whether any of them knew of the Capitol Gym. The jury panel were told that it would exclude them if the answer was yes. Nobody did so. A jury was duly sworn and put in charge of the defendant.

The trial then proceeded without undue incident until the jury retirement. The prosecution called its evidence, which was largely agreed and not significantly challenged. The defendant gave evidence himself, and was cross-examined. A substantial number of witnesses were called in support of his case. One of these, Daniel Porter, gave evidence that it was he, not the applicant, who was supplying drugs. He was responsible for the cannabis and for putting the cocaine in the applicant's car. Another witness, Michael Kershaw, gave evidence corroborating other aspects of the applicant's case. The prosecution and the defence addressed the jury. The Judge gave legal directions in terms agreed by the prosecution and defence, and summed up the evidence to the jury. On 19 November 2018, the jury were sent out to consider their verdicts.

Nobody has suggested that there was anything irregular about any of these aspects of the trial process. On 20 November 2018, however, two jury notes were passed to the Judge that indicated that one juror, juror No 1, knew of Capitol Gym. One of the notes also stated that juror No 1 was “being defensive of all the evidence”, and that he had indicated that he would not be open-minded about the matter. The Judge decided to discharge that juror from further participation in the trial, but he refused a defence application to discharge the jury in its entirety. The remaining eleven jurors continued to deliberate. Meanwhile, the police took possession of the mobile phone of juror number one. The reason was that it had been suggested that this juror was using his phone to record jury deliberations.

That was never substantiated, but on 21 November 2018 the prosecution provided the Judge with a transcript of a phone conversation between the juror and his mother which had been recorded on the phone. This suggested that the juror, at the instigation or with some encouragement from his mother, had set out to assist the applicant by doing his best to ensure his acquittal. The mother appeared to have been in contact with someone who knew the applicant, who was encouraging such activity. Moreover, the juror had spoken to his mother about the inner workings of the jury deliberations, including numbers and voting strengths. There had been a discussion about the number of dissenters required to achieve a not guilty verdict. As a result, the Judge was satisfied so that he was sure that jury tampering had taken place and he decided to discharge the entire jury. The defence made no contrary submission, and the jury was discharged.

The Judge then heard submissions from counsel about what should happen next. The prosecution argued that he should proceed without a jury. The defence submission was that the trial should simply be terminated. Mr Doyle, who appeared below as he does today, submitted that trial by jury was a hallowed principle and a right of which a defendant should not lightly be deprived. The Judge's decision was that the trial should continue to verdict without a jury. He prepared a detailed written ruling dated 21 November 2018, which he handed down on the morning of 22 November, giving the salient parts orally by reading out or summarising them in open court.

The Judge then proceeded to give judgment on the merits. That was done by way of a judgment which he gave orally in full on 23 November 2018, followed by the handing down of a written version in identical terms.

No criticism has been levelled at any part of the reasoning contained in the judgment on the merits. The attack is on the Judge's decision to embark on the process at all.

The applicable law

Part 7 of the Criminal Justice Act 2003 makes provision for trials on indictment without a jury.

Section 46 deals with the discharge of the jury because of jury tampering. Where the judge is minded to discharge a jury because jury tampering appears to have taken place, he must inform the parties, identify the grounds on which he is so minded, and allow the parties to make representations. All of that occurred in this case. The procedure that follows is governed by section 46(3) and (4), which provide as follows:

> "(3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied—

(a) that jury tampering has taken place, and(b) that to continue the trial without a jury would be fair to the defendant or defendants; but this is subject to subsection (4).

> (4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial."

Section 47 of the 2003 Act provides that an appeal to the Court of Appeal lies from an order under section 46(3), subject to obtaining the leave of the Judge or the Court of Appeal. Five business days are allowed for the lodging of an application for leave to appeal, and the order is not to take effect before that period expires or, if an appeal is brought, before the appeal is finally disposed of or abandoned.

Section 48 governs the procedure to be followed if a Judge makes an order under 46(3) and it takes effect. Put simply, the Judge is invested with all the powers that would otherwise be vested in the jury, but instead of simply rendering a verdict, he must give a judgment stating the reasons for the conviction. He must do this "[…] at or as soon as reasonably practical after the time of the conviction." Rights of appeal under the Criminal Appeal Act 1968 that would ordinarily apply to the conviction by jury are applied to the conviction entered under section 48.

There has never been any application for permission to appeal under section 47 of the 2003 Act. The application that is before us now is an application for permission to appeal against conviction under section 1 of the Criminal Appeal Act 19678. The test for allowing an appeal under that provision is whether the conviction is safe.

Grounds of appeal

The first of the two grounds of appeal advanced by Mr Doyle is that the Judge erred in, as he puts it, "refusing to allow the applicant the opportunity to appeal", pursuant to section 47.

Secondly, Mr Doyle contends that the Judge erred in making his order under section 46(3) for the trial to continue without a jury. He makes two main submissions:

> (1) First, that the applicant was wholly uninvolved in the process of jury tampering.
>
> (2) Second, that the interests of justice required the trial to be terminated in this case.

It has not been suggested, and nor do we consider, that the applicant is precluded from advancing any of these grounds of appeal merely because he did not seek to appeal under section 47 of the 2003 Act. But the question for the Court on an appeal under section 1 of the 1968 Act is different from that which would arise on an appeal under section 47. The issue for us today is whether the applicant has shown a real prospect of establishing that his conviction is unsafe.

Ground 1

An assessment of Ground 1 calls for some examination of what took place before the Judge in relation to the possibility of a section 47 appeal. After submissions had been made on 21 November 2018 as to whether the trial should proceed by judge alone, there was the discussion of right of appeal under that section, and when it should be exercised. The Judge and Counsel were all in unfamiliar territory. Thankfully, these provisions are only rarely invoked. A provisional consensus was arrived at, namely that the ruling, if it went against the applicant, would not be amenable to an interlocutory appeal; any appeal would be against the ultimate decision under section 48, if that went against the applicant. Mr Doyle said that he would not trouble the Judge further. The Judge, addressing Mr Doyle, said:

> "If you want to make any further submissions on it tomorrow you will do any research you feel necessary and do it."

When the Judge delivered his reasoned decision the following day, no further submissions were made. In these circumstances, it cannot fairly be said that the Judge "refused to allow" the applicant the opportunity to exercise the right of appeal under section 47. On the contrary, he made it clear that the applicant was free to argue on 22 November that he had a right of appeal, and to seek leave to appeal against the ruling under section 46(3). Mr Doyle evidently maintained, at that time, the view that the consensus arrived at on 21 November was correct.

We agree with Mr Doyle's further thoughts on behalf of the applicant. There was a right of appeal and, if an application had been made within the five-day period allowed by the statute, an appeal could have been pursued, with leave. But what happened here was that the applicant took an informed view on advice and decided not to appeal. He cannot now complain of injustice. Furthermore, and in any event, the Judge's decision and its consequences can still be assessed, albeit in the different framework of the present application. We do not think it arguable that the conviction is unsafe on this account.

It might be said that it was irregular for the trial to proceed when it did, before the five days prescribed by the statute had elapsed. But nobody sought to delay proceedings below on that or any other ground, nor has Mr Doyle made any complaint on that score today. For our part, we do not think that makes the further process a nullity, or that the conviction could on that ground be characterised as unsafe.

Ground 2

Nor do we consider that Mr Doyle's second ground of appeal would have a real prospect of success before the full court.

For section 46 to be engaged it must be proved to the criminal standard that jury tampering has taken place. Here, though, it was beyond dispute that this had occurred, or at any rate, nobody did dispute it. Section 46(3) then required the Judge to ask himself two questions First, was it necessary in the interests of justice for the trial to be terminated, in which case he was obliged to do so. If not, would it be fair to the defendant to proceed without a jury? If the answer to that question was "yes", he had a discretion.

In R v McManaman [2016] EWCA Crim 3, this Court gave guidance on the application of the provisions of section 46(3). In a judgment given by Lord Thomas CJ the Court observed, among other things, that it is not necessary to determine whether or not the defendant was involved in the tampering. A number of reasons for that were identified. Among them were that the legislation is clear; it only requires proof of tampering, not proof that the defendant did it. It was also said that it cannot have been intended that the trial Judge should have to determine whether the defendant was involved in the tampering. At paragraph 25 Lord Thomas said:

> "The courts should not, therefore, qualify the provisions of the Criminal Justice Act 2003 by requiring any proof of the involvement of the defendant."

Lord Thomas considered an observation in the earlier case of R v Guthrie [2011] EWCA Crim 133, to the effect that it might be harsh for a defendant to be deprived of trial by jury if and in the unlikely event that it was shown that the tampering was carried out by a person unconnected with the defendant. Lord Thomas said this:

> "We agree that such a case is highly unlikely ever to arise … If, however, such a case were to arise, then it is difficult to see why it should make any difference, as the terms of the CJA 2003 are clear and there are sound reasons for the maintenance of the efficacy of trial by jury why that is so."

The Court in R v McManaman then addressed the twin questions of fairness to the appellant and the interests of justice. At 27 the Court approved an observation of Lord Judge in the case of R v Twomey [2009] EWCA Crim 1035 at paragraph 20, which was said accurately to express the intention of Parliament in relation to section 46. Lord Judge referred to the purposes of the legislation, the inconvenience and expense involved in a retrial and the desirability of reducing any possible advantage to the perpetrators or beneficiaries of jury tampering. Citing, in addition, the desirability of ensuring that trials proceed to verdict, rather than ending abruptly with the discharge of the jury, he concluded:

> "[…] save in unusual circumstances, the judge faced with this problem should order not

> only the discharge of the jury but that he should continue the trial."

The Court in R v McManaman said that a Judge should approach section 46(3) with these observations firmly in mind.

In his ruling in this case his Honour Judge Lockhart recited the statutory provisions, the commentary in Archbold, and the guidance in R v McManaman, which he set out fully. He also considered a decision made at first instance by Goss J in a case called R v Hussain. The Judge concluded that the law was clear. He summarised it in this way:

> "A judge being sure that jury tampering has taken place will in all ordinary circumstances order that a trial will continue provided that this can be a fair trial. The judgment to be made is one that takes into account all the matters set out in the legislation and in the authorities of Twomey and McManaman."

Under the heading of "Fairness to the Defendant and the Interests of Justice", the Judge identified five chief features of the case.

> (1) the case had run for over a week.
>
> (2) the prosecution case was in a short compass and mostly agreed.
>
> (3) the defence had called a large number of witnesses to the facts, all of whom had been cross-examined.
>
> (4) one of those witnesses had come in what the Judge called "unusual and controversial circumstances" to admit at least one of the offences with which the defendant was charged.
>
> (5) other witnesses as to character were called.

The Judge was wholly unpersuaded that the case had any "unusual" feature, in the sense described by the authorities, which would make it wrong to continue with the trial. He was satisfied that the interests of justice did not require him to terminate the trial and that it would be fair to continue. He recorded that he had neither read nor heard anything other than the evidence which the jury had received and had no knowledge of the defendant other than that received during the trial. He could direct himself on the law, as he had directed the jury in terms agreed by the defence. He could assess the evidence and come to clear conclusions in a reasoned and reviewable judgment. There would be huge inconvenience and expense if the case was retried. Proceeding to judgment would reduce any possible advantage to those responsible for the tampering or those for whose perceived benefit it had been arranged.

Mr Doyle has not challenged the Judge's summary of the applicable law. Nor, as we have mentioned, has he challenged the way the Judge arrived at his conclusions on the merits. In his written grounds, however, Mr Doyle has submitted that the Judge's assessment of the interests of justice was wrong. Those, he submits, are fact specific to the case in hand, and in this case they required the Court to terminate the trial. He reiterates his submission below that trial by jury is a hallowed principle, adding in his written grounds that it is an Article 6 right.

That last point is clearly wrong. Many criminal trials across the Convention countries are conducted without a jury. In this jurisdiction the majority of criminal trials are conducted before lay magistrates. The broad submission that the Court should give the desirability of jury trial pre-eminent weight in a case under section 46(3) cannot be sustained in the light of the authorities we have cited.

Mr Doyle's grounds rely on Guthrie as authority for the proposition that it would be harsh to deprive this applicant of a jury trial. In our judgment, that submission does not go far enough to make good his main point, and is misplaced. That aspect of Guthrie is authoritatively addressed in R v McManaman. Judge Lockhart rightly proceeded on the basis that it did not have to be shown that the applicant was responsible for the tampering, and that he should not attempt to reach a conclusion on the issue. His focus should be on the interests of justice and the fairness of a non-jury trial.

Today Mr Doyle has argued that this was an “unusual” case. He has identified the gravity of the charges, the age of the applicant, and his previous good character as factors that count in favour of his application for leave to appeal. Those, however, are not in themselves unusual factors in jury tampering cases, or indeed, at all. It is unusual for a defendant to call a witness who then admits to the offences with which the defendant is charged; but what is needed is not just something unusual but something that, unusually, makes it contrary to the interests of justice to proceed without a jury or unfair to do so.

This was, in fact, quite a straightforward case evidentially, and Mr Doyle has failed to identify for us anything about the particular facts of this case which arguably meant that the procedure adopted was contrary to the interests of justice, or for that matter, unfair. We do not consider that either the Judge's decisions or the process followed by the Judge can be impugned.

We have dealt with these issues so far as if this were an application for permission to appeal under section 47. We would have refused such an application. Returning to the issue that is the before us on this appeal, in our judgment it cannot be argued that this conviction is unsafe, and for those reasons the application is refused.