Regina v Jesse Jones Brown

No. 2015/04637/B4

Court of Appeal Criminal Division

22 March 2016

[2016] EWCA Crim 523

2016 WL 01745131

Before Lord Justice Gross Mr Justice Males and His Honour Judge Kramer QC (Sitting as a Judge of the Court of Appeal Criminal Division)

Tuesday 22nd March 2016

Representation

Miss S Stevenson appeared on behalf of the Appellant.

Mr N Cooper appeared on behalf of the Crown.

Judgment

Tuesday 22nd March 2016

Lord Justice Gross:

1 On 14th September 2015, following a retrial in the Crown Court at Inner London before His Honour Judge Madge and a jury, the appellant was convicted on a single count of robbery, contrary to section 8(1) of the Theft Act . On 8th October 2015, at the same court and before the same judge, he was sentenced to 42 months' detention in a young offender institution. A direction was made that time spent in custody on remand should count towards sentence. Various other orders were made which need not be recounted here.

2 The appellant appeals against conviction by leave of the single judge.

3 The single ground of appeal involves a short point: that the judge's response to the jury note, which suggested a degree of deadlock and concerns about the sufficiency of the evidence, was insufficient.

4 The facts may be briefly summarised. In the early hours of Saturday 31st May 2014 a Mr Jobling was robbed of his mobile phone, wallet and watch by three black men, one of whom was armed with a tool resembling a household hammer. After the robbery Mr Jobling went home and called the police. Approximately one week later he received a parcel addressed to him at his home address. The parcel contained his bank cards and loyalty cards, but not his wallet, money, mobile phone or watch. A letter was enclosed which read:

> “I am so sorry you had to go through that, sir. We are very broke and desperate. I hope you can accept this. Once again, we're sorry for that, sir. This won't happen again. My won't give phone or watch back. I'm sorry.”

5 Mr Jobling handed the parcel and letter to the police. The letter was subjected to forensic examination and a fingerprint was recovered which matched the appellant, resulting in his arrest. The writing on the letter was examined by a handwriting expert and compared with writing samples provided by the appellant following his arrest. The expert's findings provided very strong support for the proposition that the writing on the letter was written by the appellant.

6 In his first interview on 24th July 2014 the appellant said that he probably was not out on the night in question because he was doing exams. He did not know the victim and knew nothing about the robbery or the letter. He and his friends did not commit robberies and he was not broke. The whole idea of robbing someone and then writing a letter of apology sounded weird. It did not make sense for his fingerprints to be on the letter. Other people might be trying to fit him up by dishonestly getting his fingerprints on the paper.

7 In his second interview on 13th October 2014 he said that he had never committed a robbery in his life and accused the police of trying to pin this on him. The reason his handwriting matched was because the police would do anything to pin it on him. He said that he was not there and did not write the letter.

8 A Defence Statement was served prior to the first trial which advanced the account given in interview. At the first trial on 20th May 2015 the appellant gave evidence. He denied the robbery but admitted that he had written the note at the request of other associates who had taken part in the robbery. The jurors were unable to reach a verdict and the jury was discharged.

9 An addendum Defence Statement setting out the new defence was served in advance of the retrial. At the retrial the prosecution case was that the appellant was one of the robbers and that the letter sent to the victim amounted to a confession. The defence case was that the appellant knew about the robbery, but was not one of the robbers and was not present at the scene of the robbery. He admitted writing the letter at the request of the men who did, in fact, commit the robbery.

10 The issue for the jury was whether the appellant was one of the perpetrators.

11 When he gave evidence at the retrial the appellant said he had not been at the location where the offence was committed. He knew about the robbery. He admitted writing the letter. He knew the men concerned because he played football with them, but he would not give their names. They had told him about the robbery the night before and said that they wanted to return some of the items because they felt sorry for the victim. They asked the appellant and his friends for advice and together they parcelled up the items. The robbers did not want to write the note because it would be traced back to them. They therefore asked the appellant to do so. He said that he would. He was not pressurised into doing it and did not see anything wrong in doing so. He admitted lying to the police in interview. He was under pressure and was trying to defend himself. He also thought that an identification parade would be held and that the victim would say that he was not one of the robbers.

12 A close friend of the appellant gave evidence. He said that he was present at the house with the appellant and saw him write the letter. He did not want to name the robbers because of fear for his life.

13 The jury were sent out to consider their verdict on Friday 11th September 2015. At 11.29am on Monday 14th September the jury were called into court and given a majority direction. At 12.27pm, after the jury had been in retirement for some five hours and nine minutes, the jury sent a note to the judge which the judge read out to counsel as follows:

> "The jury is divided. In the light of lies told to the police, the jury is divided as to whether the lies were innocent or evidence of guilt. The jury is also divided regarding whether the prosecution has provided evidence of a sufficient standard to prove that the defendant was one of the three men who carried out the robbery. We have considered the evidence and debated our views at length. Currently no member of the jury is of the opinion that their view might be changed based upon the evidence available. Please advise."

14 The judge informed counsel that in his view, given the background to the case, the jury should simply be asked to continue discussing. The jury were brought back into court and informed that the note had been read out to counsel. The judge asked them to continue their discussions to attempt to reach a unanimous verdict, or, failing that, to try to reach a majority verdict. The jury retired again to continue their deliberations at 12.30pm. At 2.12pm they returned a unanimous guilty verdict.

15 We turn to the rival cases before us. For the appellant, Miss Stevenson attractively developed a single point as to the insufficiency of the judge's note. She began by accepting that she had made no submission to this effect to the judge when he indicated how he proposed to deal with the matter. She also accepted that the decision of this court in R v Payne (to which we shall come) made it clear that there was no blanket rule as to what a judge should do when receiving a note indicating a degree of deadlock on the part of the jury. All turned on the facts and circumstances.

16 Here the tenor and nature of the note suggested that the jury had given consideration to the matter and had not been able to reach agreement. This was a detailed note after lengthy jury deliberation had already taken place. The trial had been relatively short. The deliberation had been relatively long, and the danger in the judge's treatment of the matter was a risk of unseen pressure that they had to come to some agreement. Miss Stevenson rightly absorbed her original point about reminding the jury of the burden and standard of proof into this single submission which she developed this morning.

17 For the Crown, Mr Cooper, in writing, submitted that here had been no irregularity here. The judge had a broad discretion to be exercised as it was here in the light of all the circumstances. It was noteworthy that some time elapsed between the judge inviting the jury to continue and the jury's verdict. In any event, the conviction was safe.

18 Our discussion focuses essentially on Miss Stevenson's point as to the risk of pressure on the jury, but we shall also say something briefly at the end as to the safety of the conviction.

19 As to the risk of pressure on the jury, it is convenient to begin with the central facts. The jury were sent out at about 1pm on the Friday. Having indicated that they were unable to reach a majority decision, they were sent home at about 4pm. On the Monday they resumed their deliberations shortly after 10am. At about 11.30am they were given a majority direction. The jury note in question was produced at about 12.27pm (hardly an inordinate time after the majority direction). The judge promptly discussed the note with counsel, recalled the jury and directed them to continue their discussions. The judge did not ask the jury as to the chance of their reaching agreement. At 2.11pm (one hour and 40 minutes later, though that period does include lunch) the court became aware that there was a verdict. In the event, the verdict was unanimous.

20 In the course of counsel's written submissions we were helpfully referred to a number of authorities: R v Watson [1998] QB 690 ; R v Rose 75 Cr App R 322 , at 329; *R v Wharton [1990] Crim LR 877* ; *R v Payne [2001] EWCA Crim 274* ; and *R v William Brown [2005] EWCA Crim 2306* .

21 In our view it is unnecessary to review the authorities in detail. We can state our conclusions relatively briefly:

(1) Where a judge receives a note from the jury indicating disagreement, or even apparent deadlock, he has a discretion as to how to deal with it.

(2) Neither Rose nor Wharton stated an inflexible principle that, whenever a note is received from the jury indicating deadlock or possible deadlock, the court should be re-assembled and the jury asked as to whether there was a chance of reaching a verdict, or whether further deliberation would simply be a waste of time. Wharton was very much a case on its own and striking facts. As explained in William Brown at [15], following a short trial on a charge of rape and on the last scheduled day of the trial, the jury retired to consider their verdict at 3pm. At 5.34pm the jury were given a majority direction. At 6.10pm the jury sent a note saying that they had reached a 9:3 verdict. The judge, with the concurrence of counsel, sent them a message asking them to carry on with their deliberations. At 6.25pm they returned a 10:2 majority verdict of guilty. An appeal was allowed. This court was obviously concerned as to the second-hand nature of the communication with the jury and the risk of pressure, given the time of the evening.

(3) Payne , by contrast, involved a very long trial over a period of months, followed by a note at 11.30am, after some days of jury deliberations. Perhaps surprisingly, the judge, who was conducting another trial elsewhere in the building, did not reconvene the court – an

approach which we would not commend. At all events, shortly before 1pm the jury sent another note saying they had reached a verdict. In dismissing the appeal this court said this at [29]:

"… We do not accept that either Lloyd LJ in Wharton or Lord Lane in Rose was stating an inflexible principle that whenever a note indicating a deadlock or a possible deadlock is sent by the jury, the court should be re-assembled. In Wharton the jury were not sent out until after 3pm. It was a short case. It was heard at a time when there was no provision for jurors to go to their homes overnight as distinct from having hotel accommodation found for them. In our judgment a judge conducting a trial has a discretion as to whether or not to re-assemble the court when a note, including a note in the terms of the 11.30 note in this case, is received. Each member of this court has experience of juries which have apparently been deadlocked but nevertheless have been able to reach a verdict."

(4) The principle which emerges from all the authorities does not go to some inflexible mode of responding to a note from a jury indicating deadlock or possible deadlock. Instead, the principle which emerges is the need to ensure that no juror should be put under pressure to reach any particular verdict. Desirable though it obviously is that any trial is brought to a conclusion, a jury must be free to deliberate without any form of pressure being imposed upon them, and no juror must be made to feel that it is incumbent upon them to express agreement with a view that they do not hold, simply because it might otherwise be tiresome, inconvenient or expensive: Wharton , cited in Payne at [22].

(5) Indeed, it is to avoid the risk of any juror perceiving that they are under pressure that the Watson – give and take direction – is sparingly given.

(6) Reverting to the facts of the present case, on receipt of the jury note, the judge promptly discussed it with counsel, equally promptly re-assembled the court, and directed the jury to continue deliberating so as to try to reach a unanimous, alternatively a majority, verdict. All that the judge did not do was enquire of the jury whether there was any prospect of them reaching a verdict. The course he adopted was amply within the ambit of his discretion. That some judges might have asked the jury as to the chance of reaching a unanimous or majority verdict is neither here nor there. Given the timescale, whatever the jury's answer to any such question, they would in all probability have been asked to continue deliberating. There is nothing whatever to indicate that any juror could realistically have felt under pressure to reach a verdict with which he or she did not truly agree.

(7) As to the fact that there was a change (and not an immediate change at that) from apparent deadlock to a unanimous verdict, it is not at all remarkable. This court would echo the observations of the court in Payne at [35]:

"There remains the question whether the individual juror – a juror, as the note indicated, who had not made up his mind – was possibly in the circumstances put under pressure. That point needs further consideration because of the words of the note. We have referred to the experience of each member of this court that there are cases of apparent deadlock where a jury by further discussion in accordance with their oaths reach a verdict. It is contemplated by the Watson direction that there shall be give and take. A man is tried by his peers and jurors must have every reasonable opportunity to reach a verdict. In many situations in life, not only in the jury room, reasoned argument appears to have failed to achieve agreement but with more discussion it does. The jury system depends upon the existence of some degree of trust in the conscientiousness and honesty of individual jurors …"

22 It follows that, notwithstanding Miss Stevenson's submissions, this ground of appeal fails.

23 In the light of the conclusion we have just expressed, the judge was not in error. Accordingly, the question of the safety of the conviction, which would have arisen had the judge been in error, becomes academic.

24 Nonetheless, we add that even had the judge been in error, we would have entertained no doubt as to the safety of the conviction. The appellant's account as to the letter (that is, the account given at the retrial when he finally alighted upon it) was simply fanciful.

25 This appeal is dismissed.