The House of Lords in the case of Regina v Abdroikov, Green and Williamson, [2007] UKHL 37 [2007] 1 W.L.R. 2679, decided on 17 October 2007, examined the issue of jury composition, specifically considering the desirability of serving police officers or solicitors employed by the CPS serving on a trial jury.

The Court of Appeal certified that a point of law of general public importance was involved in the decision, namely, whether the presence of a serving police officer on a jury, in a criminal trial founded on a police investigation, was compatible with the defendant's right to a fair hearing by an independent and impartial tribunal.

The House of Lords looked at the perception of bias and whether such presence breached a defendant's right to fair trial.

Facts of the Appeals

In Abdroikov, the defendant was charged with attempted murder. At his trial, the jury were considering their verdict and were about to be sent home over a bank holiday weekend when the jury foreman informed the judge that he was a serving police officer who was due to report for duty over the weekend, during the course of which he might come into contact with the police officers in the case. The judge directed the officer not to report for duty. The matter was drawn to the attention of counsel but no objection was raised concerning the officer's presence on the jury. The defendant was convicted.

In Green, the defendant was convicted of assault occasioning actual bodily harm and having an article with a blade or sharp point in a public place. On the evidence at the trial, there was a dispute between the defendant and a police sergeant as to the manner in which the defendant had been searched, and about what had been said by each of them. Subsequently, the defendant's solicitor learnt that one of the members of the jury which had convicted the defendant was a police officer who served in the same borough as one of the police officers who had arrested the defendant, although it later emerged that the two officers did not know each other.

In Williamson, the defendant was charged with two counts of rape. At the beginning of his trial, the judge showed counsel a letter from one of the jurors, indicating that he was a solicitor employed by the Crown Prosecution Service. The juror did not know any member of the Crown Prosecution Service connected with the case, but the defendant objected to his presence on the jury because he was an employee of the agency bringing the prosecution. The judge ruled against the objection. The defendant was convicted.

Each of the three appellants appealed against conviction on the ground that, whilst individuals concerned with the administration of justice were now eligible for jury service, the presence of the police officer or the prosecuting solicitor on the jury had

deprived them of a fair trial, contrary to the common law and article 6 of the ECHR, because those individuals were closely connected with the prosecution.

Court of Appeal

The Court of Appeal (Lord Woolf CJ, Richards and Henriques JJ) dismissed the appeals and held that a fair minded and informed observer would not conclude that there was a real possibility that a juror was biased merely because he was involved in some capacity in the administration of justice, but that if a juror had special knowledge either of individuals involved in the case or as to the facts of the case apart from those provided by the evidence, he must draw the matter to the attention of the judge, who should then exercise his discretion as to whether in all the circumstances it was fair that the juror should remain part of the jury. The Court of Appeal held that on the particular circumstances of each defendant's case, the requirements of fairness had been met.

House of Lords
On the defendants' appeals the House of Lords held as follows:

(1) that although lawyers and serving police officers were no longer ineligible for jury service, the common law rule that justice should not only be done, but should manifestly be seen to be done, still applied; that there was no difference between the common law test and the requirement under article 6 that a person should be tried by an independent and impartial tribunal; that justice was not seen to be done if, on the particular facts of a case, a fair minded and informed observer would conclude that there was a real possibility of jury bias, whether conscious or unconscious; and that it was a matter which had to be decided by taking into account the circumstances of each case whether the inclusion of a serving police officer or a prosecuting lawyer would interfere with the independence and impartiality of the jury .
Dictum of Lord Hewart CJ in R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, 259, DC approved .

(2) Dismissing the appeal of the defendant Abdroikov , that since there was no conflict between the evidence of the police and the evidence of the defendant, and since there was no particular link between the trial court and the station where the police officer on the jury served or between the police witnesses and the juror, it would not appear to the fair minded and informed observer that there was a possibility that the jury was biased due to the inclusion of the police officer on the jury; that therefore there was no reason why his presence on the jury could be objected to other than the general undesirability of police officers sitting on juries, and there was no ground for that objection in view of the current legislation enabling police officers to sit on juries; and that, accordingly, the jury had been properly constituted and justice had been seen to be done .

(3) Allowing the appeals in Green and Williamson. In Green there was a crucial dispute on the evidence between the defendant and a police sergeant who, although not known to the police officer on the jury, shared the same local service background. In

Williamson justice was not seen to be done if a member of the jury was a full-time, salaried employee of the prosecuting authority, and the judge had given no serious consideration to defence counsel's objection to the prosecuting solicitor serving on the jury; that therefore, in both cases the defendants had not been tried by a tribunal which appeared to be impartial; and that, accordingly, justice had not been seen to be done and the convictions would be quashed.

Lead judgment

The lead judgment in the House of Lords was given by Lord Bingham of Cornhill.

At para. 10 Lord Bigham examined the historical reviews of jury composition , including that carried out by Auld LJ in his comprehensive Review of the Criminal Courts of England and Wales (September 2001). In ch 5 Lord Justice Auld wrote, in para 30:

"There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. ……I acknowledge that there may be article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk."

Thus, acknowledging anxiety about what he recognised as an undoubted risk of prejudice, the Lord Justice recognised that all risk of prejudice or partiality could not be eradicated and appears to have envisaged that any question about the suspicion or apprehension of bias on the part of any particular juror could be resolved by the trial judge on the facts of the particular case. He recommended that everyone should be eligible for jury service save for the mentally ill. This recommendation was given effect by section 321 of and Schedule 33 to the 2003 Act.

The Metropolitan Police, by Notices 20–2004 Item 1, informed police officers and staff that they were no longer exempt from jury service. The notice advised that "Where possible, police officers should not attend the court where their operational command unit commits its work".

The CPS notified its staff in June 2004 that in accordance with the Criminal Justice Act 2003 "CPS employees are now eligible to sit on a jury where the CPS is not the prosecuting authority". Employees summoned to attend court for jury service were required to notify the court in advance, alerting it to the fact that they were CPS employees and ascertaining whatever there were any cases to sit on where the CPS was

not the prosecuting authority. Later guidance on 23 July 2004, following guidance issued by the Department for Constitutional Affairs, endorsed the practice of alerting the court. But it acknowledged that CPS employees were being asked to sit on cases where the CPS was the prosecuting authority. Having sought guidance from the DCA, the CPS advised that decisions on whether a CPS employee could sit where the CPS was the prosecuting authority rested ultimately with the judge, and CPS employees should follow the court's judgment as to whether it was appropriate to sit as a juror on a particular case. The June 2004 notification was re-published in November 2004.

Appearance of bias

At para. 14 of his judgment Lord Bingham quoted from the Lord Hewart's extempore judgment in R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256 , 259:

"it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

This principle was quoted with approval by the European Court of Human Rights in one of its very early decisions: Delcourt v Belgium (1970) 1 EHRR 355 , 369, para 31.

There is, as Lord Steyn on behalf of the House ruled in Lawal v Northern Spirit Ltd [2003] ICR 856 , para 14, now no difference between the common law test of bias and the requirement under article 6 of the European Convention of an independent and impartial tribunal.

As Lord Hewart's aphorism recognises and later case law makes clear, justice is not done if the objective judgment of a judicial decision-maker (whether judge or juror) is shown to be vitiated by actual partiality or prejudice towards any of the parties. But actual bias, hard as it usually is to prove, is rarely alleged, and is not alleged in any of the cases before the House.

In the three appeals neither of the police officers, nor the Crown prosecutor, was alleged by the respective appellants to have leant in favour of the prosecution side for any improper reason.

The appellants rely on the second part of Lord Hewart's aphorism: that justice should manifestly and undoubtedly be seen to be done. This condition, the appellants say, is not met where one of those charged to decide whether the appellant was guilty or not, is employed full-time by a body dedicated to promoting the success of one side in the adversarial trial process.

Following the decision of the Court of Appeal in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 , the accepted test is that laid down in Porter v

Magill [2002] 2 AC 357 , para 103: “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.” As the House pointed out in Lawal v Northern Spirit Ltd [2003] ICR 856 , para 14, “Public perception of the possibility of unconscious bias is the key”, an observation endorsed by the Privy Council in Meerabux v Attorney General of Belize [2005] 2 AC 513 , para 22. The characteristics of the fair minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: see Lawal v Northern Spirit Ltd [2003] ICR 856 , para 14.

Conclusion

In conclusion Lord Bingham highlighted Auld LJ's expectation that each doubtful case would be resolved by the judge on a case by case basis, unlike other jurisdictions (such as Scotland, Northern Ireland, Australia, New Zealand, Canada, Hong Kong, Gibraltar and a number of states in the United States, the remainder of the states providing a procedure to question jurors on their occupations and allegiances) where serving police officers remain ineligible for jury service.

The first appeal (Abdroikov) was dismissed. The argument of the general undesirability of police officers serving on juries is a difficult argument to advance in face of the parliamentary enactment. The first appeal was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant.

The second appellant's case (Green) was different. There was a crucial dispute on the evidence between the appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial. The appeal was allowed. The second appellant's conviction was quashed.

In the case of the third appellant (Williamson), Lord Bingham observed :

“It must, perhaps, be doubted whether Auld LJ or Parliament contemplated that employed Crown prosecutors would sit as jurors in prosecutions brought by their own authority. It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor…. The third appellant was entitled to be tried by a tribunal that was and

appeared to be impartial, and in my opinion he was not. The consequence is that his convictions must be quashed".

Appeal dismissed in the case of Abdroikov .
Appeals allowed in the cases of Green and Williamson .
Case of Williamson remitted to the Court of Appeal (Criminal Division) for consideration as to whether to order retrial.

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