

Jury Selection, Protection and Misconduct

Colin Wells writes on the important issues of jury selection

PROCESS

The Lord Chief Justice of England and Wales gave judgment, on December 13, 2013, in the Court of Appeal Criminal Division (COACD) in *R. v. Mehmet Baybasin, Andrew Molloy, Martin McMullen* (appellants) reported at [2013] EWCA Crim 2357, on important issues of jury selection, protection and misconduct. The decision contains important guidance on the principles and procedures to be followed when complaint is made of trial unfairness surrounding the choice, safeguards and conduct of a trial jury.

Appeal Hearing

The Court of Appeal (Criminal Division), sitting at Liverpool Crown Court, Thomas LCJ, Cox J and Holroyde J, considered (on November 13-14, 2013) and dismissed the appellants appeals against conviction and sentence; following conviction on a large scale conspiracy to import Class "A" drugs at the Crown Court of Liverpool before His Honour Judge David Aubrey QC and a jury (May 18 – July 8, 2011).

Prosecution Case

At trial the prosecution alleged that there was a well planned conspiracy to import cocaine between (1) criminals in London headed by Baybasin, (2) criminals in Liverpool headed by Taylor and (3) other drug dealers based overseas, from Central America to the UK. The evidence adduced by the prosecution comprised surveillance evidence and evidence of recorded conversations obtained from probes installed in buildings.

Conviction Appeal Grounds

The applications of *Baybasin, McMullen and Molloy* for leave to appeal against conviction were based on two principal grounds:

- (1) The general practice of the Crown Court at Liverpool of balloting jurors by number in cases of over two weeks in length was said to be unlawful. There was no basis for the trial Judge to have balloted by number, as the prosecution had specifically abandoned their application for that to be done. The trial Judge had also failed to give proper directions to the jury in relation to arrangements relating



to their transportation to the court from a city-centre pick-up point and to their separation from other jurors during the course of the trial.

- (2) On the basis of fresh evidence obtained through an inquiry by the Criminal Cases Review Commission, it was contended that a member or members of the jury had found on the internet and in a book material relating to the members of the Baybasin family who had been engaged in drug dealing. The trial Judge had specifically excluded evidence relating to the activities of Baybasin's family. Four of the trial jurors gave live evidence before the COACD. The two grounds gave rise to more general issues relating to the adoption of local practices and inquiries into alleged misconduct by jurors. The COACD rejected the juror misconduct outright, but granted leave on the local practices ground.

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Ground 1: Balloting by Number and Other Jury Practice Measures

The COACD granted leave on this ground and gave judgment in the following terms:

- (a) The general practice as to ballot by number: *R. v. Comerford*:

"[10]The usual procedure for empanelling a jury is to ballot from those assembled by calling out the names of the jurors in open court in the presence of the defendant. As

each person's name is called, that person steps into the jury box and is sworn. In this way everyone in court knows the names of the jurors who are to try the defendant.

[11] In *R. v. Comerford* [1998] 1 Cr App R 235, this court (Lord Bingham CJ, Potts and Butterfield JJ) considered an appeal from a trial in the Crown Court at Middlesex Guildhall where jury nobbling was anticipated. The assembled jurors were each allocated a number before being brought into court. Instead of their names being called out in the ballot, their number was called for the ballot. No juror was identified in court by name. This court held that this procedure was lawful as it had no material and adverse effect on the fairness of the trial for reasons we set out below. At the conclusion of the judgment Lord Bingham giving the judgment of the COACD made clear:

"It is highly desirable that in normal circumstances the usual procedure for empanelling a jury should be followed. But if, to thwart the nefarious designs of those suspected of seeking to nobble a jury, it is reasonably thought to be desirable to withhold juror's names, we can see no objection to that course provided the defendant's right of challenge is preserved."

The COACD then considered balloting by number in this case.

(b) Prosecution application for balloting by number, its withdrawal and Judges decision.

Immediately before the trial was due to begin, the Judge raised with counsel the empanelling of the jury. The prosecution initially invited the judge to proceed to ballot by number, but then withdrew the application. The trial Judge in ordering balloting by number stated: "it is standard practice in this building for juries in long cases to be balloted by number. This court is clearly of the view that no prejudice whatsoever is occasioned by such a jury provided, of course, that the panel is told that it is the normal practice in this building for cases of some length." The trial Judge concluded that the overriding objective in dealing with a criminal case justly included not only dealing with the case efficiently and expeditiously, but by respecting the interests of jurors. The court then proceeded that day to empanel the jury by balloting it by number. The Judge explained the process to the assembled jurors in waiting saying in the following terms that it was standard practice in the court. That practice had originated in a Guidance Note: *Trial Management in Long/Secure Cases* issued on January 15, 2004 by the then Recorder of Liverpool and approved by the Presiding Judge of the Northern Circuit.

The Guidance set out the practice to be followed at Liverpool Crown Court including: "Special jury arrangements during the trial" of collection points in the city and the provision of tea and coffee making facilities in the jury room.

The practice applied by the trial Judge had been modified in the period after 2004 so that in all cases of more than two weeks in length, subject to the discretion of the Judge, jurors were balloted by number and special arrangements about transportation and refreshment were made for them. Each

jury to which this practice was applied were told that these arrangements were standard practice.

(c) The effect on the fairness of the trial of the appellants.

The COACD found that although it is clear that the practice adopted in the Crown Court at Liverpool is one that is unique to that location of the Crown Court, the COACD could not see how in the circumstances of this case it had any effect on the fairness of the trial, stating:

"[27] In *Comerford* the COACD court determined the fairness of the trial was not affected by the procedure of balloting by number as long as the right of the defendant to challenge was not impaired. It is difficult to see how these rights could be impaired given the right to inspect the panel from which the names of jurors might be drawn under s.5(2) of the Juries Act 1974. There is no suggestion in the present case that the right of challenge was in any way impaired."

The COACD also stated that it could not have had any effect on the perception of the jury in the light of the explanation given by the Judge to the jury. Further, observing:

"[29] In any event we would agree with the comment made in the *Criminal Law Review* in its report on *Comerford* at [1998] Crim LR 285: With the procedure adopted by the

Judge in this case, it is unlikely that the jurors themselves would have known that the procedure was unorthodox, so there is no reason to suspect that they adopted a different attitude to the accused because of it.

[30] Nor in our view did the arrangements for lunch and coffee have any effect on the fairness of the trial. Although the jury were not directed that they should not hold these arrangements against the defendants,

the jurors would have attached no significance to the court making such arrangements for refreshments; it is fanciful to suggest that these could have that effect . . .

[32] The practice of picking jurors up at a point in the City is, in our judgment, not a measure that is akin to special protection of which the jury might become aware and so lead jurors to be tempted to 'view with disfavour an accused person whose friends or associates are thought likely to act in a criminal way'. It is, however, an unusual step and could give rise to some suspicion as to why it was being done. In the present case, as this was the practice at Liverpool in cases of over two weeks duration, the jury were rightly told that this was the usual practice. There was no risk that the jury would therefore hold this against these applicants."

The COACD therefore reached the conclusion that the fairness of the trial was not affected and the safety of the conviction was not in any way impaired by the practice adopted at Liverpool. (To be concluded next week)

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