

WARNING: reporting restrictions apply to the contents transcribed in this document, as stated in paragraph 2 of the judgment, because the case concerned sexual offending and involved children. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2022/03498/B3
[2023] EWCA Crim 615

On appeal from the Crown Court at Newcastle upon Tyne
HH Judge Bindloss

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 16th May 2023

B e f o r e :

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE HOLGATE

MR JUSTICE BRIGHT

R E X

- v -

BIJAN LAJEVARTI

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr S Reed appeared on behalf of the Applicant

Mr S W Reid appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 16th May 2023

LORD JUSTICE HOLROYDE:

1. On 10th November 2022, following a trial in the Crown Court at Newcastle upon Tyne before His Honour Judge Bindloss and a jury, the applicant was convicted of an offence of indecent assault, contrary to section 14 of the Sexual Offences Act 1956. He was acquitted of a similar offence alleged in respect of a different complainant. He now applies for leave to appeal against his conviction, and seeks a direction by this court that the Criminal Cases Review Commission should conduct an investigation into the conduct during the trial of one or more jurors. His application has been referred to the full court by the Registrar.

2. Each of the complainants, to whom we shall refer as "C" and "C2", is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of an offence or a person against whom an offence is alleged to have been committed.

3. Given the nature of the issues raised by the sole ground of appeal, it is unnecessary to go into any detail about the facts of the case. It suffices to say that the applicant was charged with indecently assaulting each of the complainants in 2004 or 2005, when he was aged 14 or 15, C was aged 5 or 6, and C2 was aged 7 or 8.

4. The trial began on Monday 7th November 2022. The judge gave the jury standard initial directions, including a direction that they should only discuss the case when they were all together in the privacy of their jury room and should not discuss the case when they were in twos or threes.

5. The evidence of C was completed on that first day. On 8th November C2's evidence was completed and the prosecution case was closed.

6. On 9th November the applicant gave evidence in his own defence and called a witness. Thereafter, the judge gave his directions of law and both counsel made closing speeches.

7. Before the court sat on the morning of 10th November 2022, a male juror ("Juror 1") asked to speak in private to the jury officer. He told the jury officer that he would like to bring something to the judge's attention. He said that the trial had brought back some memories of his past, that he had been sexually abused as a child, and that he wanted the judge to be made aware of that, given that he had directed the jury at the outset of the trial that they must bring any concerns to his attention. Juror 1 also said that the jury officer was the first person to whom Juror 1 had ever disclosed this sexual abuse.

8. The jury officer reported what had been said to the judge. The judge sat in chambers with both counsel, Mr Steven Reed for the applicant and Mr Paul Reid for the prosecution, and the applicant present. Guided by the provisions of Criminal Practice Direction 26M, the judge discussed with counsel two issues: whether Juror 1 was able to give a true verdict in accordance with his oath, or whether there was a suggestion of bias; and, as a secondary consideration, Juror 1's mental health and confidentiality.

9. After collective consideration of the seven steps identified in Criminal Practice Direction 26M.7, both counsel agreed with the judge that in the circumstances of this case the appropriate course would be for the judge to ask three specific questions of Juror 1. The judge would do so in the absence of counsel, but in the presence of court officials, and the inquiry would be recorded.

10. That course was then followed. After it had been completed, the judge again sat in chambers, with counsel and the applicant present. He told counsel what Juror 1 had said in answer to the three questions and invited submissions. The first question had been whether Juror 1 had spoken to any fellow juror about this matter. To this, Juror 1 replied that after the evidence of one of the complainants (though he could not remember which), he had spoken to another juror ("Juror 2"), when they were both in the toilets. He had said to Juror 2: "I know exactly how she feels because I've been in that situation myself". Juror 1 told the judge that Juror 2 had been supportive towards him and had asked if he was all right.

11. The second question had been whether Juror 1 wanted and felt able to continue with the trial. Juror 1 answered in the affirmative and gave his reasons, which the judge recorded as follows:

"He said he wanted to see it through to the end. He runs his own business. He said he is somebody who likes self-help books and he has been reading quite a lot and there were some influential ones about seeing things through, completing projects, and he felt this was part of his attitude to life, that once you start something you should see it through, and he was firm that he wanted to continue to do his public duty on the jury."

12. The third question had been whether Juror 1 could remain faithful to his oath and give a true verdict according to the evidence or whether he had any doubts about that. The judge said that Juror 1 had been very firm in his reply that he would be able to give a verdict according to the evidence and be faithful to his oath, adding that he was a practising Catholic and had taken his oath on the Bible. Juror 1 was, said the judge, adamant that he could remain faithful to that oath.

13. Mr Steven Reed, on behalf of the applicant, expressed concern that Juror 1, notwithstanding what he had told the judge, might in fact be unable to remain true to his oath

and might be unable to concentrate on his duty as a juror when he had for the first time revealed what had happened to him in childhood. Mr Reed was also concerned as to what Juror 1 might say during the jury's deliberations. He submitted that the judge should discharge Juror 1 and then speak to Juror 2 to ascertain whether Juror 2 could remain true to his oath.

14. Mr Paul Reid, on behalf of the respondent, submitted that there was no reason to discharge Juror 1. He submitted that all jurors bring with them their experience of life and their understanding of people, and that it is not a bar to jury service that they have been victims of crime. There was, Mr Reid submitted, nothing to counter Juror 1's categorical assertion that he could remain true to his oath.

15. The judge considered step 7 in the process set out in the Criminal Practice Direction. He also considered the well-known decision of the House of Lords in *Porter v Magill* [2001] UKHL 67. He asked himself whether a fair-minded and informed observer would conclude that there was a reasonable possibility or real danger that Juror 1 was biased. The judge answered that question in the negative, for four reasons: Juror 1 had shown a fair-minded approach by raising the point with the jury officer for the judge's attention; he had spoken candidly and impressively when answering the three questions, and the judge had been impressed by him; there was no general rule that a victim of crime was excluded from sitting as a juror; and there was nothing to suggest any bias towards the applicant or towards any witness. The judge observed that Juror 1's philosophical and religious comments had indicated an attitude of detachment, of ethical care, and of moral maturity. He concluded that there was no question of bias – conscious or unconscious – and was entirely satisfied that Juror 1 could be true to his oath and would be able to come to a fair-minded decision on the evidence. The judge therefore declined to discharge the jury. He completed his summing up and in due course the jury returned verdicts, convicting the applicant of the offence against C and finding him not guilty on the count relating to C2.

16. Mr Steven Reed advances a single ground of appeal, namely that the conviction is unsafe because the judge "failed to properly respond to a jury note by failing to make adequate enquiries", in particular because the judge did not make any enquiries of Juror 2. Mr Reed submits that what passed between Juror 1 and Juror 2 was a comment on the reliability of a complainant's evidence, made other than in the presence of the whole jury and in the privacy of their room. Mr Reed suggests that it is not possible to be sure that the exchange was not overheard by someone. In those circumstances, he submits, the judge should have made enquiries of Juror 2 to establish whether Juror 2 had been influenced by what Juror 1 said, and whether Juror 2 had discussed it with any other jurors. Mr Reed argues that it was particularly important for the judge to do so in a case which largely turned on the jury's assessment of the credibility of the complainants. He relies on the decision of this court in *R v Edwards* [2021] EWCA Crim 1870 at [21], in which the court said:

"In our judgment juries, like any Tribunal deciding facts, are entitled to consider and discuss the case as it goes along, so long as they do so when all members of the jury or Tribunal are present and so long as they keep an open mind until they have heard all of the evidence, the speeches and the directions. For this reason, many trial judges remind the jury that they are entitled to discuss matters among themselves, so long as they are all present and so long as they keep an open mind until they have heard all of the evidence, speeches and directions. ..."

17. Mr Reed further submits that before determining the sole ground of appeal, this court should direct the CCRC to make specific enquiries of Juror 1 and Juror 2, the proposed terms of which Mr Reed has helpfully set out in a draft, in order to establish whether juror 2's ability to remain true to his oath was affected by what Juror 1 said to him.

18. On behalf of the respondent, Mr Paul Reid resists those submissions. He submits that the judge followed the correct procedure, asked himself the correct questions, and was entitled to

reach the conclusion he did. He submits that there is nothing to suggest anything more than the brief exchange reported by Juror 1, and no reason to think that anyone overheard it. Mr Reid submits that that brief exchange cannot amount to a discussion about the case. In any event, he argues, it is inconceivable that Juror 2's view of the case could have been altered by what Juror 1 said.

19. We are grateful to both counsel for their written and oral submissions and are particularly grateful for the succinct and focused way in which each of them has addressed the court this morning and has responded to the questions of the court.

20. The Crown Court Compendium, at section 3-1, gives judges valuable guidance as to the instructions which should be given to juries at the start of a trial, including as to the responsibilities of jurors. This section of the Compendium includes a reference to the passage which we have cited from the judgment of this court in *R v Edwards*. It is accepted that the judge correctly instructed the jury in this case in accordance with that guidance. Each member of the jury would also have been provided with a copy of a standard notice setting out their responsibilities, which includes the following rule:

"During the trial you can ONLY DISCUSS the case with the 11 OTHER JURORS on your jury and only when you are ALL TOGETHER and there is no risk of you being overheard."

There is, therefore, no doubt that Juror 1 and Juror 2 must have been aware of their responsibility in that regard.

21. We see no basis for the suggestion that what was said between Juror 1 and Juror 2 may have been overheard by someone else. We think it most unlikely that either Juror 1 or Juror 2 thought he was acting in breach of the judge's instruction, because we doubt if either of them

thought they were "discussing the case". We see the force of Mr Paul Reid's submission that their brief exchange did not amount to a discussion of the case. It is, however, strongly arguable that the exchange included an implied comment by Juror 1 on his present view of the credibility of one of the complainants, and that comment was made to one fellow juror in the absence of the other ten, in a place other than the jury room. It is, therefore, arguable that Juror 1 acted in breach of the initial instructions given by the judge.

22. As the judge recognised, the course which he should take was set out in the Criminal Practice Direction at CPD6 Trial 26M. It should be noted that paragraph 26M.2 defines a jury irregularity as anything, including potential bias, that may prevent one or more jurors from remaining faithful to their oath or affirmation to faithfully try the defendant and give a true verdict according to the evidence. It has not been suggested in this case that either Juror 1 or Juror 2 had committed any offence of engaging in prohibited conduct, contrary to section 20C of the Juries Act 1974, or any other offence under that Act.

23. The issue of a possible jury irregularity arose during the trial, and the judge therefore correctly directed himself to follow the stepped procedure set out in paragraph 26M.7. He also correctly applied the familiar test set out in *Porter v Magill*. The ground of appeal challenges the judge's action in relation to step 4 of that procedure, which required him to seek to establish the basic facts of the jury irregularity.

24. So far as Juror 1 is concerned, the judge took the course which he had agreed with counsel. He rightly focused on the issue of whether the juror, notwithstanding his unhappy personal experience in childhood, would be able to return a true verdict according to the evidence. In the light of the answers which Juror 1 gave to the three questions, and of the manner in which he gave them, the judge was plainly entitled to reach the conclusion he did. He explained his reasons for that conclusion clearly and cogently. The ground of appeal does not challenge the

judge's conclusion in relation to Juror 1, and, as Mr Steven Reed realistically recognises, there is no basis on which it could be challenged.

25. The focus of Mr Steven Reed's submissions has been his contention that the judge should also have made enquiries of Juror 2, but failed to do so. We observe that when counsel were discussing matters with the judge, it does not appear that Mr Reed then asked the judge to make immediate enquiries of Juror 2. Rather, his submission was that Juror 2 should be questioned if the judge concluded that Juror 1 should be discharged. Nor did Mr Paul Reid for the respondent suggest that immediate enquiries of Juror 2 were necessary. Nonetheless, this is an important point which, whether or not directly raised with the judge below, this court must consider at this stage.

26. Issues of possible jury irregularity often arise without warning, and it can be difficult for judges and counsel immediately to identify every point which will become apparent with the benefit of hindsight. With respect to all concerned, it seems to us that there was a collective oversight of the desirability of the judge questioning Juror 2, as well as Juror 1, when establishing the basic facts. It would have been better if that course had been taken.

27. However, even viewing the matter at its highest in the applicant's favour, we see no basis for saying that the conduct of Juror 1 casts doubt on the safety of the conviction and no basis for saying that further investigation is necessary. Jurors, as we have said, are entitled to bring with them their own life experiences and knowledge of the world; and the fact that Juror 1 had as a boy been a victim of sexual abuse would not in itself disqualify him from serving on the jury in this trial. In itself, it provides no basis for saying that he may have been biased, or appeared to be biased, in his assessment of the evidence. Jurors may discuss a trial as it goes along, provided they do so when they are all together in their room and provided they keep open minds until all the evidence, submissions and directions have been completed. The judge,

for the reasons which he explained, was satisfied that Juror 1 could return a true verdict according to the evidence. We accept Mr Paul Reid's submission that there is no basis for saying that Juror 1's revelation gave rise to any appearance of bias on the part of Juror 2. We cannot accept that it is arguable that a fair-minded and informed observer would think that the revelation of Juror 1's childhood experience might somehow have caused Juror 2 to alter his own independent view of the evidence of the two female complainants, still less that it might have caused Juror 2 then to influence other jurors. We, therefore, see no ground for directing an investigation by the CCRC.

28. We would add that the contrasting verdicts of the jury provide no support for any suggestion that one or more jurors may have been affected by bias. They are, on the contrary, consistent with the jury, in accordance with the judge's directions, having given dispassionate assessment to the evidence relating to each of the two charges separately.

29. For those reasons, grateful though we are to counsel, the application for leave to appeal against conviction is refused. The application for a direction to the CCRC accordingly falls away.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk