Neutral Citation Number: [2013] EWCA Crim 776

Case No: (1)2012/00330;(2)2012/00497;(3)2012/01400

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOLVERHAMPTON
His Honour Judge Walsh
T2009/7369

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE ROYCE
and
MR JUSTICE GLOBE

- -

Between :

(1) Ian Lewis (2) David Fellows (3) Anthony Charles Geeling	**Appellant**
- and -	
R	**Respondent**

- -
- -

(1) A J Jackson for the **Appellant Lewis**
(2) E Vickers for the **Appellant Fellows**
(3) B Nicholls for the **Appellant Geeling**
R Atkins QC and Miss J Josephs for the **Crown**

Hearing dates: 1st May 2013

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Approved Judgment

Lord Chief Justice of England and Wales:

1. On Friday 16 December 2011 in the Crown Court at Wolverhampton, after a very lengthy trial before His Honour Judge Walsh and a jury, these appellants were convicted on count 2 of conspiracy to steal. The verdicts were majority verdicts (10-2). A co-defendant, Martin Knight, was acquitted. The jury had not agreed their verdict on count 1, a count alleging commission of a similar offence at different dates by Lewis, Geeling, Simon Gray and Stephen Page. In due course, on 19 December, after further consideration, the jury were unable to agree their verdict, and accordingly they were discharged.

2. The prosecution arose from the wholesale theft of many thousands of containers used in the brewing industry. The kegs, sometimes made of stainless steel, sometimes of aluminium, and casks disappeared at an alarming rate. The industry suffered very large losses.

3. Accordingly, the major brewers set up their own organisation, intending initially to try and retrieve the missing kegs, and eventually to identify and investigate theft. On 29 February 2008 a van load of kegs was observed while it was driven to the premises of Lewis Baling Services Limited (LBS). The police were notified. Ian Lewis is the owner of LBS. Together with Geeling, Gray and Page he was subsequently charged with conspiracy to steal that load of kegs as count 1.

4. Three days later, the police visited M & S Alloys Limited (M & S Alloys) and discovered a very large number of kegs there. Fellows and Geeling were directors of the company. Further investigation revealed that M & S Alloys had bought many tons of kegs from 2004 to 2008. Together with Lewis and Knight they were charged on count 2 with a similar but more serious conspiracy, which had continued for a long time and involved very significant quantities of kegs received by M & S Alloys and LBS and baled for onward disposal by LBS.

5. Civil proceedings were taken in the High Court against these appellants, and others for conversion of the kegs and conspiracy to steal. The claim form was served on the same day as they were charged with conspiracy to steal. Damages of £95m were sought. This action was settled in March 2011. The brewers withdrew their allegations of conspiracy to steal, which were accordingly dismissed.

6. The criminal trial began in late summer 2011. Although Lewis and Geeling did not give evidence at trial, in essence the defence of the appellants was that having traded legitimately in the purchase of kegs, for onward sale to the scrap trade, they had no reason to suspect and did not suspect that the kegs which they handled were stolen. Therefore the essential issues during the 13 week long trial were whether the kegs which came into the possession of the appellants had been abandoned or sold on by the breweries, as the appellants suggested, and in any event whether the appellants had acted dishonestly in buying them.

7. On 16 December, after the jury had returned their majority verdicts on count 2, in due course the jury retired for the weekend. They were due to return to court on Monday, 19 December, to continue their deliberations on count 1.

8. As we now know, on Saturday 17 December, a member of the jury, Steven Pardon, went to Lewis' premises, and asked to speak to him. We very much doubt that this encounter was fortuitous. When he did so, according to Lewis, he gave an account of matters he said had arisen during the course of the trial. He asserted that extraneous material had been looked at by one juror and spoken of by others. He believed that the members of the jury in the majority, or some of them, had acted unfairly and were biased against the defendants, and they put pressure on one of the jurors to change her mind and convict him. According to Lewis, Pardon said that he "had convinced two of the others that you are innocent, they then said that we would have to go 10-2, at this point they managed to bash a woman into submission and she was in tears over it". He said that the jury were jealous of the defendants and their trappings of wealth, and one or more of them had searched for information on the internet. They refused to look at the substantial body of documentary evidence because some had made up their mind during the first week of the trial.

9. Lewis stated further, that Pardon told him that as a result of internet research the jury knew that the "Westwoods were involved", that they actively disliked his wife because she parked her Range Rover between two parking spaces in the car park, and were jealous of him because they thought that he owned an Aston Martin which actually belonged to his brother. He also said that Pardon spoke of one of the jurors as a "thieving little bastard" with previous convictions. Pardon did not confirm these matters when interviewed.

10. On the Monday morning, Lewis told the solicitor of this conversation and while the jury (including Pardon) continued their deliberations on count 1, the solicitor for Lewis informed the other parties and the judge. While the information was being communicated to and being considered by the court, the jury sent a note to the judge. The judge indicated to counsel that the jury were unable to reach a majority verdict on count 1 in relation to any of the four defendants. After hearing submissions, the judge decided that the jury should be discharged.

11. We do not know how the jury was divided, but it follows that in relation to count 1, at least three of them must have been clear in their own minds that the appropriate verdict was "not guilty". More important in the present context, they were prepared to stand by and return verdicts in accordance with their consciences. The same jury had, as we noted earlier, acquitted Knight on count 2.

12. Thereafter, the judge sought guidance from the Court of Appeal about the correct approach to Pardon's activities. At much the same time, on 19 December, Pardon approached the workplace of Geeling. On this occasion there was no conversation. He was simply turned away.

13. On 22 December the parties were informed that there would be an investigation by the West Midlands Police. On 13 January 2012 Pardon was interviewed by the West Midlands Police. On 26 June the Divisional Court gave the Attorney General leave to bring committal proceedings against him for contempt of court. On 8 November in the course of the committal proceedings, Pardon accepted that he was in contempt of court.

14. In his affidavit in the contempt proceedings, Pardon did not agree that he had said all the things attributed to him by Lewis. Thus he denied having claimed other jurors "managed to bash a woman into submission and she was in tears over it", in deciding that Lewis should be convicted, but asserted that this happened in the context of the conviction of Fellows. He denied having told Lewis that "the jury had checked on all the defendants and knew" this and that "about them". He denied telling Lewis that he was convicted because he had an established business with Jaguar, or that he was convicted "because he had not gone into the witness box". He also denied having commented to Lewis about other jurors. What he asserted was that he had spoken to Lewis because he felt that improper considerations had informed the verdicts on count 2. He was particularly concerned that one member of the jury had carried out research on the internet and had told the rest of the jury what he had discovered. He was also concerned that a female juror had, to his mind, been bullied into the guilty verdict. After considering matters raised in mitigation, he was sentenced to 4 months imprisonment.

15. Directly after Pardon was sentenced a directions hearing took place before the full Court of Appeal. The court directed that the Criminal Cases Review Commission (CCRC) should be supplied with the police interview with Mr Pardon, together with a copy of the affidavit made by him in the course of the contempt of court proceedings, and asked to carry out investigations of the jury:

    a) to explore any extraneous material which was used and considered by the jury in reaching its verdict.

    b) to explore whether any extraneous material was derived from the internet, and if so to identify it.

16. The CCRC has now produced the report in response to the requests made by the court. Given the sensitivities which surround any enquiry into or about or in connection with the deliberations of a jury, investigations of this kind are far from straightforward. We are grateful to the CCRC for the obvious care which characterised the investigation.

17. The question which arises for decision is whether the safety of the convictions is undermined as a result of jury misconduct or material irregularities. In essence it is submitted that some of the jury may have repudiated their oaths and may have taken account of extraneous material in reaching their verdicts. Leave to appeal on this ground was granted by the full court. The single judge refused leave to appeal on a number of remaining grounds, and some of them are renewed by Fellows and Geeling.

18. We were not asked to and we did not examine whether what Pardon admittedly said to Lewis, or the contents of the interview with Pardon in the course of the contempt proceedings, or his affidavit in mitigation of the contempt, were inadmissible for the purposes of these appeals. To that extent the normally rigid prohibition on disclosure of jury discussions, at any rate as admitted by Pardon in the contempt proceedings, has been circumvented. This is an unusual situation, and in future contempt proceedings the possible consequences of public reference to any matters which come within the proper ambit of the deliberations of the jury

will have to be handled with great circumspection. It does not take much imagination to see how a professional criminal might seek to undermine a trial which had resulted in his conviction. In the particular circumstances we have decided that the correct way to approach the assertions made by Pardon is to examine them de bene esse, underlining that nothing decided in this appeal is intended, nor could it, undermine the principles identified by the House of Lords in *R v Mirza; R v Connor and Rollock* [2004] 1 AC 1118.

19. The jury questionnaire began by reciting the instructions received by the CCRC. The terms of s.8 of the Contempt of Court Act 1981 were explained. Each juror was told that the questions simply related to the use of "information that did not form part of the evidence was given to the jury"

20. It is unnecessary to set out all the questions. However question 1 read:

> "(a) Were you aware of any juror having access to the internet during the course of the trial?
>
> (b) Was any material or other information derived from newspapers or the internet or any sources other than the evidence given at the trial provided to you as a member of the jury by another jury or by anyone else?
>
> (c) Did you obtain any material or other information from newspapers of the internet or any other sources?
>
> (d) Was the issue or potential of accessing information from the news or internet or any other source discussed by the members of the jury at any time during the trial's process?
>
> (e) Was the jury given instruction regarding accessing the internet, or additional information, other than that presented in evidence? What was your understanding of those instructions?"

21. The results of the investigation can be briefly summarised:

(a) Nine members of the jury positively stated that they did not obtain any information about the case from the internet, the press or any other source, *and* that they were not aware of any other juror having obtained any information about the case from any such source.

(b) One of these nine jurors mentioned that early in the trial, one of the female jurors mentioned that a florist had said to her, when she said she was on jury service, that he knew one of the defendants who had been "getting away with it for years". The juror reporting this conversation said that as far as he could tell, the juror had not told the florist about the jury on which she was serving, and he did not believe that the remarks were intended to influence her. Indeed whether the florist was referring to one of the present appellants, or to one of the other defendants tried with him or indeed this trial, is open to some question. If this

reported conversation had been of any significance, it would presumably have been reported by Pardon.

(c)(i) Juror A (as described by the CCRC) said that at some point during the trial, but before the jury retired, two male jurors spoke about looking at the internet to see if a female relative, the daughter or wife, of one of the defendants appeared on it. These jurors were identified by her as Steven Pardon himself and juror C. Interestingly Pardon did not refer to his participation in this conversation, nor refer to the possibility that he himself had used the internet. Juror A did not know whether either of them had actually looked for or at the internet. She did not remember the men saying "why they were looking or indeed whether they actually did so or not". She did not suggest that she heard any conversation based on the internet. She also recollected that the two men had I-phones and that they regularly used the internet on these at lunchtimes. As to the conversation she described, she did not remember whether anyone else was present when she overheard it. She commented that Pardon was "bit of a joker … saying things that were untrue".

(ii) She ended her statement by reporting that at one stage during the deliberations, she had at one point become "tearful and emotional", but added that she did not feel "bullied by anyone". She was simply "feeling the pressure of the long trial".

(iii) This juror observed that she had seen a news report in the Express and Star on the internet during the trial and saw something about a previous case, but added that she did not read it. She said that they had been told that if they saw any reports about the case they could tell their family that they were sitting on it, but that they should say no more.

(iv) We have been shown a copy of what is believed to be the relevant article in the Express and Star. We have read it. Under the headline "*Twelve Sent for Trial Over Beer Thefts Plot*", it showed photographs of twelve men (including these defendants) who were accused of stealing beer kegs in the Black Country and set out their identities and the charges. It recorded that the prosecution was seeking trial at the Crown Court, and bail was granted to them all. This report can have had no bearing on the issues for decision in this appeal.

(d) Juror C was specifically questioned about the matters raised by juror A about possible misuse of the internet. He stated that he had not obtained any information from the internet, the press or any other source, and he was not aware of any other juror having done so. He had not had any discussion about looking up the wife or daughter of any of the defendants on Facebook. He had not read about the case on the website. Indeed he said that "people were saying that they had not seen the case in the paper". That was one of the ladies sitting behind him, but he could not remember which of them it was. He added that he saw Pardon out of court, "just by chance" and he knew that Pardon caught the tram to travel into court with the defendants who did not drive to court, a source of amusement to Pardon.

22. Pardon refused to co-operate with the Criminal Cases Review Commission. He has made no further statements over and above those obtained and submitted in the contempt proceedings.

23. It is also clear from his affidavit that Pardon remembered that the jury had been directed not to discuss the details of the case with anyone outside their number, nor to visit any of the sites or locations mentioned during the trial. They were also directed that if they had any concerns relating to the trial "or our colleagues", they should be drawn to the attention of the jury bailiff.

24. Standing back, the simple reality is that Pardon disagreed with the guilty verdict. He was one of the dissentients. Notwithstanding the clear directions by the judge, and his recollection of these directions, none of the concerns he made about his fellow jurors was reported by him to the judge. He confined his comments about the jury to Lewis, and someone who was with Lewis at the time. He returned to court on the Monday morning to resume deliberations on count 1. Although Judge Walsh complied with the requirement that jurors should be directed to report any irregularities during the course of the trial itself, and Pardon appreciated the meaning of his direction, even then, before the jury resumed its deliberations, he did not disclose any of the anxieties said to be playing on his conscience to the jury bailiff or to the judge.

25. Given the clear instructions which are now given to juries, and obviously were given to this jury, a post verdict complaint by a member of the jury, whether it takes the form of a letter or a visit to the solicitors for the defendant or indeed a visit to the defendant himself, simply will not do. As Gage LJ remarked in *R v Adams* [2007] 1 Cr. App. R 34, "Silence as to any such irregularity will … almost certainly mean that this court will assume that none occurred". In view of the additional directions given since *Adams* was decided, the inference that complaints after verdicts simply represent a protest by a juror at a verdict with which he disagrees is likely to be overwhelming. As the court observed in *R v Thompson and Others* [2010] 2 Cr. App. R27:

> "We acknowledge the danger that a juror who is in a minority may be disturbed at his or her failure to persuade the other jurors to his or her point of view, and where the majority has convicted, to the sensitivity of a dissenting juror that an injustice may have been done. Once the juror is in that frame of mind, perfectly ordinary events can be perceived as suspicious."

26. In this case, for example, Pardon reported in fairly dramatic terms that a female juror had been bullied into changing her mind. We now know that a female member of the jury did indeed cry, but the cause was not bullying, but the stress of the trial, and her responsibilities as a juror. In our view it seems clear that Pardon was not prepared to accept the decision conscientiously reached by ten jurors, and at best, he persuaded himself that their decision could only be explained by discreditable conduct by one or more of them. In short, the entire basis of this appeal depends on post trial assertions by one juror, which are unsupported in any material respect.

27. We do not know which of the eleven jurors other than Pardon disagreed with the majority verdict on count 2, nor the jurors who were unable to agree to a guilty verdict on count 1. We do know however that the jury as a whole acquitted one of the defendants in count 2, and that at least three members of the jury were not

prepared to convict any one of the four defendants in count 1. Although an attempt was made on behalf of the appellants to find a distinction between the two counts on the indictment, not least in terms of the relative gravity of count 2 when considered against count 1, these counts were tried together, and however one looks at it, if the jury was improperly biased when reaching guilty verdicts on count 2, it is surprising, to put it at its lowest, that one of the defendants was acquitted on that count, and perhaps more important, that so far as Lewis and Geeling were concerned, precisely the same bias did not carry over to its verdicts on count 1.

28. Finally, it is absolutely clear that whichever juror was in the minority on count 2 and all those jurors who were for acquittal on count 1, none has made any complaint or raised concerns about the conduct of other members of the jury.

29. The end result of considering all this material in the overall context is that we have no reason to doubt that the appellants were properly convicted, and that this ground of appeal should be rejected.

Renewed applications

30. Fellows and Geeling renew their applications for leave to appeal on some of the Grounds on which the single Judge refused leave.

The acquittal of Westwoods (Fellows Ground 2, Geeling Ground 4)

31. Paul Westwood and Mark Westwood were directors of Cronimet which received baled keg material. They had originally been Defendants in count 2. After they belatedly disclosed a goods in book which recorded all the baled kegs received by Cronimet the prosecution reviewed the case and decided not to continue against them. They formally offered no evidence and not guilty verdicts were entered.

32. On behalf of Fellows and Geeling it was sought to adduce evidence of those acquittals. They were relevant, first because the prosecution had, until their change of heart, maintained that the Westwoods knew that M and S Alloys had been buying stolen kegs and second, because the Westwoods were, evidentially, in a similar position to Fellows and Geeling.

33. Those arguments have been repeated and developed before us by Mr Vickers and Mr Nicholls. It is apparent from paragraph 2.3 of Mr Vickers' skeleton argument that the defence were reluctant to call the Westwoods because the prosecution would have been " able to cross examine them in such a way that could lead to the assertion that they did in fact know what was going on all along". The prosecution was invited to make it clear to the Jury that the words " together and with others" in the particulars of the count did not refer to the Westwoods. They did so.

34. The single Judge in refusing leave said:

> "The Judge ruled against the admission of such evidence in a ruling given on 3 October 2011. The prosecution had made it clear that they no longer alleged that the applicants

> were involved in a criminal conspiracy with the Westwoods, and that it was therefore for the Jury to determine whether each of the applicants was involved in a criminal conspiracy with one or more of his co defendants and / or persons unknown, but not including the Westwoods. He therefore concluded that the fact that verdicts of not guilty had been recorded in relation to the Westwoods at his direction was not relevant to the issues to be determined by the Jury."

He concluded:

> "Neither the acquittal of the Westwoods, nor the reasons for their acquittal were relevant to the issues to be determined by the Jury. The evidence was properly excluded."

With those observations we agree.

Settlement of civil proceedings (Fellows and Geeling Ground 3)

35. The proceedings brought by five UK brewers against defendants including Cronimet, the Westwoods, M and S Alloys, Lewis, Fellows and Geeling included claims in conversion and conspiracy to steal. They were settled on terms not disclosed on the face of the Consent Order, but of which the Judge was informed. He set those out in his ruling. It was argued that the fact that the claimants had settled the claims against Cronimet and M and S Alloys for a small percentage of the sum claimed and the claimants had withdrawn the allegation of conspiracy to steal were matters that should be adduced before the Jury. In addition it was contended they had argued against M and S Alloys paying any contribution towards the settlement, but had been forced to agree by the Westwoods.

36. The single Judge said "There may be many reasons why civil proceedings are compromised prior to trial, and in my judgement, the fact of settlement and the limited information as to the terms of settlement and the reasons for the settlement can provide the Jury with no assistance in determining the issues which lie at the heart of the criminal trial. The fact that an allegation of conspiracy to steal is not pursued in civil proceedings cannot be relevant or admissible as evidence in the criminal trial here". Once again, we agree with the reasoning of the Judge.

Admissibility of Bowater evidence

37. The next submission, made on behalf of Geeling, is that the judge erred in refusing to allow the defence to call Edward Bowater to give evidence.

38. Edward Bowater was a VAT tax specialist employed by HM Revenue and Customs. The prosecution had obtained a witness statement from him dated 22 September 2011. In it, he stated that in 2008 he was part of a team of tax inspectors who were asked to look at the tax returns from M and S Alloys as part of a Revenue project looking at the scrap metal industry as a whole. Documentation was examined for one quarter ending December 2008. Queries were raised in relation to a number of companies to whom M and S Alloys had

paid VAT. Six companies were specifically identified. Two of the companies were regarded by HMRC as "missing trader" companies which, as VAT registered companies, had failed to complete VAT returns and enquiries had failed to locate the owners of the company. Two others had been dissolved in October 2006. A fifth had become insolvent in May 2007 and had previously been regarded as a "missing trader". After consideration, a letter had been sent to M and S Alloys stating that no further action would be taken in relation to transactions with these companies. The letter was not intended to imply that the dealings that M and S Alloys had had with the companies had been legitimate.

39. It is contended that a major part of the prosecution case involved paperwork purporting to show purchases of scrap between 2004 and 2008 by M and S Alloys from eleven different companies which did not exist and the paperwork had been falsified to conceal an illicit trade in kegs. Evidence in the case established suspect features of the eleven companies relating to their trading activities including false trading addresses, the nomination of directors without their knowledge and the use of delivery vehicles with false registration plates. Most of the eleven companies could be traced to a company formation agent in Scunthorpe. Geeling submitted that the contents of the Bowater statement supported the defence proposition that the suspect features were consistent with a missing trader fraud rather than an involvement in the count two conspiracy. Upon the prosecution not calling the witness, the judge ruled that the defence could not call him on the ground that it was inadmissible.

40. In response, the prosecution explained that the Bowater statement was obtained at a late stage of the preparation of the case solely as a precaution to deal with an allegation raised in the absence of the jury by counsel for Fellows that M and S Alloys had been given a clean bill of health during a VAT inspection. It was the prosecution contention that whether or not M and S Alloys had been given a clean bill of health during such an inspection was irrelevant to the issues that had to be decided. Nonetheless, the statement was obtained to rebut evidence that might be adduced by Fellows and/or Geeling that M and S Alloys had been given a clean bill of health.

41. Further, the prosecution dispute the contention as to how the case was presented. In accordance with the opening, it was presented on the basis of the eleven companies not existing as viable trading companies at the time they were allegedly selling metal to M and S Alloys. The possibility that a purpose of the eleven companies may have been solely to facilitate a missing trader fraud was not something suggested in Geeling's defence statement. It was not raised in his evidence because he chose not to give evidence. At its highest, it was a theory raised after the Bowater statement was served and on the limited information within that statement. In this context, the Bowater evidence was irrelevant and inadmissible.

42. In his ruling of 30 November 2011, the judge refused to allow the defence to call Bowater on the basis that he was not satisfied that his evidence was admissible or relevant. We share the single judge's conclusion that the trial judge's decision does not give rise to any arguable ground of appeal. The single judge was correct.

Disclosure of a BDO Forensic Accountancy Report

43. The next submission, on behalf of Fellows is that the judge erred in refusing to order disclosure by the prosecution of a forensic accountancy report prepared by BDO Stoy Hayward in the civil proceedings. In the course of submissions, Mr Vickers conceded that this was not the strongest of grounds and presented his argument on the basis that it could be considered as part of a cumulative effect when considering the overall safety of the conviction.

44. The defence argued before the judge that BDO Stoy Hayward had been instructed to prepare a forensic accountancy report into the business dealings of M and S Alloys and Croninet by Wragge and Co, solicitors acting for the claimants in the civil action. It was said to be potentially relevant because it was a forensic accountant's report into the defendant's business. The prosecution should have looked at the report and should have made a decision whether it contained anything in it that required its disclosure to the defence.

45. The response was that the report was not in the possession of the prosecution. Enquiries had been made of Wragge and Co and the prosecution informed that the report had been prepared for the purpose of assisting with the drafting of the particulars of claim in the civil case, in particular the assessment of quantum. It was therefore a privileged document. It had not been prepared for the purpose of considering the business dealings of and trade in kegs by M and S Alloys. For these reasons, its disclosure would not be sought. If the defence wanted a copy of the report, a third party application could be made for its production.

46. On 25 October 2011, the judge ruled that the report was not in the possession of the prosecution and, in any event, there were no reasonable grounds or cause for believing that the report contained material that either undermined the prosecution case or assisted the defence case. Accordingly, he dismissed the section 8 application made by the defence. He added that it was of course open to the parties to make a third party application if they saw fit. None was made.

47. Notwithstanding the renewed oral submissions by Mr Vickers, we agree with the single judge's conclusion that the judge's ruling is unimpeachable.

48. The renewed applications are refused.

49. These appeals against conviction are dismissed.