IN THE COURT OF APPEAL

CRIMINAL DIVISION

No. 202301230 B4
[2023] EWCA Crim 1531

Royal Courts of Justice

Wednesday, 25 October 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE GARNHAM
HER HONOUR JUDGE DE BERTODANO

REX

V

AZT

REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992

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MS P HOARE appeared on behalf of the Appellant.
MR V WARD appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as a victim of the offence. Due to the familial relationships involved in this case, our decision will be reported as *R v AZT*. We shall refer to the victims as "C1" and "C2"

2 On 19 May 2021 in the Crown Court at Teesside before HHJ Jonathan Carroll and a jury, the appellant was convicted of one count of causing or inciting a child under 16 to engage in sexual activity, one count of false imprisonment and one count of rape. The offence involving the child was count 6 on the indictment. The verdict was returned by a majority of 10 to 2. The counts of false imprisonment and rape were counts 7 and 9 on the indictment. The verdicts of guilty on those counts were unanimous. Count 6 related to C1. Count 7 and 9 concerned C2. The appellant was acquitted of five further sexual offences relating to C1 and two further counts of false imprisonment and rape in relation to C2. There was a count on the indictment of controlling and coercive behaviour in respect of C2. Because that count was effectively subsumed by the other counts, no evidence was offered and the jury were never required to consider that count.

3 The appellant was sentenced on 19 July to a total of 10 years' imprisonment which was ordered to be served consecutive to a sentence he was already serving.

4 He appeals against his conviction by leave of the single judge who also granted an extension of time of 666 days. He has been represented today by Ms Penny Hoare. She did not appear in the court below. Mr Vince Ward appeared for the prosecution below. He has appeared before us. We are grateful to them for their submissions.

5 We can take the facts relatively briefly given the issue in this appeal. The first six counts related to the appellant's son ("C1"). The offences were alleged to have occurred between 2008 and 2016 up to C1's 14th birthday. A substantial part of the evidence related to a course of conduct alleged by C1 involving sexual assault. That course of conduct was not accepted by the jury. The jury did convict the appellant of count 6 which related to a specific incident when C1 was approaching his 14th birthday. He stayed over at the appellant's house following an argument with some family members. Whilst he was there, he was woken up during the night by the appellant. The appellant took hold of his hand and placed it on the appellant's penis. C1 ran out of the room, calling the appellant "nonce", which led to an argument and culminated in C1 leaving. That was the single discrete episode which was the subject of a conviction by the jury. C1 did not complain at the time. In due course his sister alleged that she had been the subject of sexual assaults by the appellant. The appellant was convicted of such assaults in 2018. Following that C1 complained to the police.

6 C2 was the appellant's wife. She described a difficult marriage. She described the appellant as bullying. Their relationship ended in 2015. However, after that the appellant's nanna or grandmother became unwell. C2 assisted in caring for that lady during the night and would stay overnight at the property. It was on occasions when that was occurring that the two offences of false imprisonment and rape occurred. The false imprisonment was to trap the victim, C2, in a bedroom. The rape was to have sexual intercourse thereafter. Counts 7 and 9 were specific incidents and charged as such. Counts 8 and 10 of which the appellant was acquitted were further incidents, charged as multiple incident counts but the jury clearly were not satisfied that there were a number of other occasions.

7 We need say no more about the nature of the evidence or the verdicts. The judge summed up the case fully and fairly. There is no ground of appeal that criticises any part of the judge's directions to the jury. It is not argued today that the verdicts of guilty on counts 6, 7 and 9 were in any way contradictory or inconsistent with the evidence. There is no argument that these verdicts were inherently unsafe on that basis. What the verdicts meant was that the jury were sure about some aspects of the evidence of C1 and C2 but not others. That is a view commonly taken by a jury, particularly in cases such as these. When summing up the judge dealt with each count separately. At no point did he suggest that one or more counts stood or fell together.

8 The jury retired to consider their verdicts on Tuesday, 18 May 2021 at 12 noon. The trial had begun the previous Tuesday. At 15:52 on that day the jury sent a note. The judge said that it was not a note he could discuss with counsel. Because a juror needed to leave, for reasons unconnected with the trial, the judge said that no action would be taken on the note that day; rather he would wait until the following morning. The jury therefore retuned to court for the usual directions that are given at the point of separation. The judge referred to the fact he had had a note which would not be discussed in open court.

9 The court sat again the next morning. By this time another note had been received. It appeared to be a note from a single juror. The judge decided that that was not a note he could disclose in its entirety to counsel, save to say that it did appear to be from an individual juror and that it asked for clarification about the term "sure" as used in the legal directions of the standard of proof. When the jury returned, the judge gave a further direction about the meaning of "sure". Nothing turns on that direction. No criticism is made of it. At the same time, or immediately thereafter, he gave a further direction, namely the majority direction, in conventional terms. The jury at this point had been deliberating for two hours and 54 minutes. They then retired to continue their deliberations.

10 By 3.18 p.m. the jury had been in retirement for a total just short of seven hours. The judge called them back into court. He gave what is known as "a *Watson* direction". The jury then retired and returned again at 4.05, namely something like three-quarters of an hour later. They returned the verdicts to which we have already referred.

11 There was no discussion in court about that direction given in accordance with the case of *Watson* [1988] Q.B. 690. There was no discussion with counsel as to whether it was appropriate. The Exhibit log which we have seen records nothing indicating any discussion

out of court. However, Mr Ward recalls being asked to see the judge in his room, together with defence counsel. We asked him today what his trial note reveals. He said that it gives no relevant information. At this distance of time he could not recall what reason they were given before they were asked to go and see the judge. However, at some point when they were with the judge in his room, the judge raised the possibility of giving a *Watson* direction. Mr Ward told us today, perhaps somewhat surprisingly, that he had never heard of a *Watson* direction. Nonetheless, the position having been explained to him, he said that he "counselled caution in giving it". At this point neither counsel knew the full content of the notes to which we have referred.

12 The direction given was:

> "I just wanted to say the following to you. Each of you has taken an affirmation to return a verdict according to the evidence, a true verdict according to the evidence, and no-one must be false to that affirmation, but you have a duty not just as individuals but also collectively. That is the strength of the jury system. Each of you takes with you into the jury box your individual experience and wisdom, and you do that by giving your views and listening to the views of others. There must necessarily be discussion and argument and give and take within the scope of your affirmation. That is the way in which agreement is reached. If, unhappily, 10 of you cannot reach an agreement, then you must say so. So, I am sending you back to your deliberations. You are free to continue deliberating for as long as you wish. I am not stopping you but if at the end of the day you cannot get at least 10 of you to agree, and if you are of the view that that is not going to change, then your foreman might wish to consult with you all and then send me a note. It is entirely a matter for you. I am not terminating your deliberations. I want to make that clear, that you are free to continue deliberating for as long as you think your discussions will deliver a result."

13 The notes that the jury had sent were quite properly not disclosed to counsel at the time. However, it is relevant for our consideration of the case, and indeed for counsel's submissions to us, to know what those notes said. The note that was received shortly before the jury left for the day on the afternoon of 18 May read as follows:

> "We have 11-1 agreement for counts 1 to 6 and unanimous decisions for counts 7-10."

14 We can understand in the circumstances why the judge, notwithstanding the relatively short time that the jury had been in retirement, concluded that a majority direction was appropriate. The note received first thing the following morning said, amongst other things:

> "Even though we all agree that the defendant is a bullying, controlling horrible man and think he is guilty of all/most offences, we are

> getting stuck on the wording of your brief: we have to be sure the offence happened."

15 The note then went on to ask about how they should approach that task when there was no independent evidence. The note concluded with an observation from the individual juror: "In my heart, I really don't think he is innocent."

16 Guidance in respect of giving a *Watson* direction is to be found in *R v Arthur* [2013] EWCA Crim 1852. At [43] and [44] Lord Justice Pitchford said:

> "43 ... once the jury is in retirement it is of the first importance that no individual juror should feel under any compulsion or pressure to conform with the views of the majority if to do so would compromise their conscience and, therefore, their oath. Furthermore, the jury as a whole, despite the heavy cost and inconvenience of a re-trial, should not feel under any pressure to return a verdict if, conscientiously, they are not unanimous or cannot reach the required majority. ... It is undesirable to give a Watson direction before or at the time of the majority verdict direction because its effect may be to undo the benefit of the majority verdict direction for which Parliament has provided. Exceptional circumstances may arise that will require the trial judge to deal with the exigencies of the moment but, in general, there is no occasion to make exhortations to the jury to arrive at a verdict. This is why the Watson direction is rarely given by trial judges and, when it is, only as a last resort following a prolonged retirement after the majority verdict direction has been given...
>
> "44. the question for this court is whether the words used were appropriate in the circumstances or carried with them the risk that jurors would feel undue pressure to reach a verdict. If the effect of the judge's direction to the jury is to create a significant risk that the jury or individual jurors may have felt under pressure to compromise their oaths, the verdict is likely to be unsafe ... each case must be considered on its own particular facts."

17 We make these observations about the giving of a *Watson* direction in this case. First, the judge determined that the way in which he would discuss this with counsel was in private in his room. The discussion was not recorded. It was not rehearsed in open court afterwards so that there was no record on the court transcript or the Exhibit log. The procedure adopted was wholly wrong. It amounted to a material irregularity. If the judge wished to consider the propriety of giving a *Watson* direction, he should have raised it in the absence of the jury in open court with counsel and with the appellant present. The fact that he did not do so means that we have no indication at all as to what defence counsel said about the matter. Unsurprisingly prosecution counsel's recollection is not of the first order. It is well settled that a judge trying a criminal case must not meet in private with counsel, particularly on matters of any substance in relation to the trial. It should not have happened in this case.

18 As to whether a *Watson* direction was appropriate in this case, our view is that it was not. The jury were not under any pressure of time. This trial had stared on a Tuesday of one week. The jury retired on the Tuesday of the following week. When these events occurred it was the Wednesday of the second week. There is no indication that this was a jury who was in any way finding it difficult to sit at least until the end of that week. To say that this was something that needed to be done as a last resort after a prolonged retirement is in our judgment not sustainable. Mr Ward, on behalf of the prosecution, argues that this sort of decision is a matter for the judge's discretion and that in this case his decision was within the bounds of reasonable decisions open to him. Given the potential risks that follow from such a direction, we consider it ought not to have been given.

19 However, that is not the end of it. We have to ask, as Pitchford LJ identified in *Arthur*, whether the verdict in fact was unsafe. We observe that it is perhaps odd that, having had a note which indicated the jury had some unanimous verdicts, the judge did not on the morning of 19 May require the clerk to ask the jury the usual question in relation to unanimity on any count. That ought to have revealed the unanimous verdicts referred to in the note. There is no reason to suppose that the jury had changed their minds. Although the judge did not do that, the notes demonstrate that the position of the jury, namely unanimity in relation to C2, and a majority sufficient to satisfy the Juries Act in relation to C1. There is no reason to think that what the judge said in the late afternoon of 19 May had any impact at all on the jury's thinking. Their verdicts, on the face of it, represented what they had said a day before. Indeed, the only difference between what they had said on the 18th and what they said by way of their verdicts on the 19th was that one of them had moved away from the position of being sure in relation to the appellant's guilt on count 6 in relation to C1. The majority on that count was 10 to 2 rather than 11 to 1.

20 It has been argued on behalf of the appellant that the content of the notes raise more concerns than answers because the verdicts were not in accordance with the notes. In our judgment, taking into account the content of those notes and the nature of the direction given, it is unsustainable, in our view, to argue that the verdicts were anything other than what might sensibly have been expected had the *Watson* direction never been given.

21 It follows that notwithstanding our views as to the propriety of giving the direction, and in particular the propriety of the way in which it came to be given, we are quite satisfied that the verdicts that eventually resulted were safe. It follows, therefore, that notwithstanding the material irregularity in this trial, we dismiss the appeal against conviction.

CERTIFICATE

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