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NOTE – THE PROCEEDINGS AGAINST THE JURORS IN THIS CASE HAVE NOW CONCLUDED. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO THE REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981 WHICH ARE REFERRED TO IN PARAGRAPH 22.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NOS 202103877/B2, 202103883/B2 & 202103895/B2
[2023] EWCA Crim 608

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 26 April 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION

LORD JUSTICE HOLROYDE

MR JUSTICE HOLGATE

MRS JUSTICE COLLINS RICE DBE

REX

v

SAAD ESSA

KIERAN NEILSON

JAMIL AMIN

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MISS B MOLYNEUX appeared on behalf of the Applicant Essa
MR M MASELLI appeared on behalf of the Applicant Neilson

MISS J AKHTAR appeared on behalf of the Applicant Amin
MR J COX and MR A PEARSON appeared on behalf of the Crown

J U D G M E N T
(Approved)

RESTRICTED ACCESS

1. THE VICE-PRESIDENT: After a trial in the Crown Court at Nottingham before His Honour Judge Godsmark KC and a jury, these three applicants were each convicted of conspiracy to supply a controlled drug of class A (count 1) and conspiracy to supply a controlled drug of class B (count 2). They were subsequently sentenced to substantial terms of imprisonment. Each now applies for leave to appeal against his convictions on grounds relating to possible jury irregularity. The applications for leave have been referred to the full court by the Registrar.
2. It is unnecessary to go into any detail about the facts of the case. It suffices to say that the existence of the conspiracies was not in dispute and the fact that other conspirators had pleaded guilty was before the jury. In relation to each applicant, the issue for the jury was whether they were sure that he was party to one or both conspiracies. There was ample evidence on which the jury could be sure that each applicant had been a party to both conspiracies. No issue is taken with the terms in which the judge directed the jury as to the relevant law. The grounds of appeal have been prompted solely by events occurring after unanimous guilty verdicts had been returned.
3. The trial lasted about five weeks. In the course of it the jury sent a number of notes raising questions to which the judge responded after discussions with counsel. It is therefore clear that they understood the procedure by which they could seek the assistance of the judge if they required it.
4. Towards the end of the morning on Monday 8 November 2021 the judge began his summing-up. His opening words reminded the jury that they must try the case on the evidence.
5. The summing-up was continued on Tuesday 9 November. When the judge resumed after the lunchtime adjournment he reminded the jury that one of them had asked to be able to

meet a personal commitment on the following day. He told the jury that they would observe that request and said:

"So if you're still involved in deliberations tomorrow after lunchtime we will break at whatever time you tell me. Just let me know."

6. The jury retired to begin their deliberations at 2.42 on that Tuesday afternoon and were sent home at about 4.30 pm.
7. At the start of the proceedings on Wednesday 10 November the judge again reminded the jury that they should let him know what time they wanted to break. The jury resumed their deliberations at 10.28 am. Just over an hour later they returned to court and the foreman announced the unanimous guilty verdicts against each applicant on each charge. Sentencing was thereafter adjourned and the court rose.
8. Later that day, via social media, a female juror made contact with the applicant Mr Essa and a male juror made contact with the applicant Mr Neilson. It appears that the jurors were on licensed premises and drinking alcohol around the time they made those contacts. We have seen screen shots saved by the applicants concerned which show some but not all of the exchanges of messages.
9. The female juror engaged in a friendly exchange with Mr Essa, including some mutual compliments, which led to Mr Essa saying:

"What if only being attractive was enough to get acquitted. I would be a free man."

10. The female juror replied:

"Saad we tried and then juror number one was like NONE OF YOU CAN HAVE ANY EMOTIONS."

11. She went on to say that juror number 1 "saw brown people and he thought they gotta go" and that "some of them said some disgusting racist stuff" for which she and another juror had "berated them ". Later in the exchange she said:

"No one wanted to send you down, we were all very reluctant to."

and:

"It still feels very wrong to make the decision we did ... I think most of us have been in the same position as you. That's why we all struggled."

12. She said that she and other jurors "were arguing for you guys" and added "Feel like a horrible human being. Should have held out for longer on the not guilty." She said that Mr Essa should delete their exchange.

13. It was submitted to us that the female juror had said that she felt pressured by the judge and other jurors, but we have not seen any message in those terms, and in oral submissions it was conceded that the suggestion of feeling under pressure was an inference to be drawn from the messages generally.

14. The male juror, who appears to have acted as foreman of the jury and therefore personally announced the unanimous verdicts, said in his exchange of messages with Mr Neilson:

"If you want my honest opinion a lot of jury really liked you. You seem like a good lad and I feel awful that I had to stand up and say it [sad face emoji]. Please don't hold it against me."

15. Mr Neilson replied:

"I don't mate. It is what it is."

16. The male juror then said:

"We felt like we had no choice. You seem like someone I could easily get along with. I hope after all of this is finished we could have a chat in person."

17. Mr Neilson inquired:

"No choice?"

18. The male juror responded:

"It's complicated as I had to argue with 11 other people. But trying to convince everyone else was hard. It didn't work and I feel awful. Genuinely my heart goes out to you because I don't think what you did was wrong."

19. Mr Neilson inquired whether there were really 11 other jurors who thought he was guilty and the male juror responded:

"No, it was split 50/50. Let me message you when I'm not with everyone else though as they don't know I am taking [talking]. Old vs the young, just leaving Slug and Lettuce but I promise I'll chat later with you."

20. We are told and are prepared to accept, though we have no application to receive formal fresh evidence, that one of the jurors sought the details of the applicant Mr Amin from one of the other applicants, but Mr Amin declined to allow his details to be provided.

21. Mr Neilson through his solicitors reported the contact to the judge, who referred the matter to His Majesty's Attorney General.

22. The two jurors were interviewed by the police and each has subsequently been charged with an offence of disclosing jury deliberations, contrary to section 20D of the Juries Act 1974. The timetable for the proceedings against those jurors is not at present known.

The court has made an order pursuant to section 4(2) of the Contempt of Court Act 1981 postponing the publication of any report of these proceedings until after the conclusion of proceedings against the jurors.

23. When interviewed under caution, the female juror made clear that she understood it was her responsibility to decide the case solely on the evidence. She explained that she had just wanted to say sorry to the applicant because she felt guilty about sending down someone her own age. She said she was quite drunk, "nine out of ten drunk", when she was exchanging messages. She went on to say that she had felt guilty because she "gave up too quickly" but she thought the applicants were guilty and she "knew there was no other way round it with the law". She confirmed that in the light of the judge's directions of law she was happy that the applicants were guilty of conspiracy and that she had done the right thing. She said that she should probably have reported the racist comments which she overheard but had not felt confident enough to do so.
24. The male juror when interviewed said that he was "seven or eight out of ten" drunk when exchanging messages. He said a lot of jurors felt pressured that they had made the wrong choice and he was struggling to come to terms with what he had done. He wanted to make his peace with the applicant and say it was not personal. He said he had felt pressure from "the older generation" and that he had made his decision without being sure of the guilt of one applicant.
25. At a directions hearing in February 2023 this court declined to direct that there be an investigation by the Criminal Cases Review Commission, but allowed the applicants time to perfect their initial grounds of appeal.
26. There is a long-established common law principle that jury discussions must remain confidential, that no inquiry may be made into jury deliberations and that evidence as to

those deliberations is inadmissible. To that principle there are only two narrow exceptions: first, where there has been a complete repudiation by the jury of their oath to try the case according to the evidence, for example if a jury were to reach its verdict by tossing a coin; and secondly, where extraneous material, not the subject of evidence adduced during the trial, has been introduced into the jury's deliberations.

27. The principle, and the narrow exceptions to it, were confirmed by the House of Lords in R v Mirza [2004] 1 AC 1118: see in particular the speech of Lord Hope of Craighead at paragraphs 102, 107 and 123. Lord Hobhouse of Woodborough at paragraph 163 of his speech referred to two features of a jury trial which safeguard the accused's right to a fair trial, namely the judge's directions of law and the foreman's announcements of the verdicts in the presence of all the jurors. His Lordship continued:

"In the absence of any overt indication to the contrary, such as returning inconsistent verdicts on different counts on the indictment, the law assumes that the jurors will have duly applied the judge's directions. So, if the judge gets the directions wrong in a material respect, the jury's verdict must usually be quashed. The law proceeds on the view that, if a juror who can hear the foreman's words makes no objection when the verdict is announced, he or she must be taken to have assented to the verdict as accurately reflecting the proper conclusion of the jurors' deliberations. Accordingly, when duly announced, the verdict is regarded as the authentic expression of the outcome of the jury's deliberations on the issues in the case, in the light of the directions given by the judge."

28. Cases in which the principle has been reaffirmed include R v Thompson [2010] 2 Cr.App.R 23, in particular at paragraphs 2 to 5; and more recently, R v James [2022] EWCA Crim 928.

29. Each of the applicants submits that this case is exceptional and that his convictions are unsafe. Taking the submissions of counsel collectively, and giving each applicant the

benefit of all the arguments, it is submitted that there is evidence of some jurors being unduly pressurised by others and evidence of potential bias on grounds of race. It is further submitted that there is evidence of failures by jurors to obey the judicial directions given during the trial and failure to achieve the unanimity which was expressed when the verdicts were announced. Counsel rely on their recollections that some jurors appeared visibly upset when they were being sent home at the end of the day on 8 November, again at the end of the day on 9 November and yet again when the foreman announced their verdicts the following day. It is acknowledged by counsel that no one raised any concern in that regard with the judge at any stage. Nor had any juror at any stage prior to verdicts raised any concern.

30. It is further submitted that the fact that the jurors were able to contact the applicants raises the possibility of improper internet research during the trial. However, the female juror told the police, during her interview under caution, that the male juror found Mr Essa's contact details whilst they were drinking in the public house after verdicts and after the jury had been discharged. In addressing that point in her interview the female juror said in terms that "Obviously during the trial you just, you don't, obviously you're not allowed to like search them or anything to do with it".
31. For the respondent, it is submitted that there is no basis for departing from the well-established rule that jury discussions must remain confidential and that evidence relating to them is inadmissible. It is submitted that neither of the two exceptions to that rule arises in the circumstances of this case.
32. Reflecting on these submissions we have reached the following conclusions. The reason for the common law principle to which we have referred is that it is a necessary and integral part of the jury system that the deliberations of a jury must remain confidential.

Without that general rule, the jury system would be seriously undermined. Those summoned to perform jury service would do so in a state of constant anxiety as to whether anything said during their deliberations would, without more, become the subject of speculation and perhaps investigation. The exceptions to the rule are accordingly narrowly defined, and it will only be in the most exceptional circumstances that this court will direct an inquiry into how a jury's verdict was reached.

33. Moreover, the applicants in this case face the substantial difficulty that at the outset of the trial the jury were directed, as juries are routinely directed, that it was their duty immediately to bring any apparent misconduct by a fellow juror to the attention of the trial judge. Lord Judge's observations on that point at paragraph 6 of R v Thompson were taken up by his successor as Lord Chief Justice, Lord Thomas of Cwmgiedd in R v Baybasin [2014] 1 WLR 2112. At paragraph 63 of the judgment in that case, Lord Thomas CJ said that it should be presumed that jurors will obey that direction and that accordingly, where a complaint of irregularity was first made after the taking of a verdict, inquiry should not be ordered and the finality of the verdict should be accepted absent other strong and compelling evidence.
34. We are satisfied, notwithstanding a submission to the contrary made on behalf of Mr Neilson, that the matters relied upon by the applicants relate to the deliberations of the jurors in this trial. The issue for this court is whether there is strong and compelling evidence that the case falls into one of the narrow exceptions to the general principle that such deliberations must remain confidential.
35. There is here no basis for suggesting that the jury completely repudiated their oath to try the case on the evidence. On the contrary, the messages sent by the two jurors are in our view consistent with their loyalty having followed the judge's directions and being sure of

guilt, notwithstanding some instinctive personal sympathy for the applicants and an acute consciousness of the importance of the decisions which they were called upon to make as jurors. Nor can we see any basis for suggesting that the verdicts were affected by extraneous material being introduced into the jury's deliberations. The suggestion that there may have been improper internet research by one or more jurors during the trial was and remains entirely speculative. It is contradicted by what was said in interview by the female juror in the passage to which we have referred.

36. We would add that a suggestion made in the written submissions on behalf of one applicant, to the effect that jurors may have felt themselves under pressure of time, was similarly wholly speculative, and is in our view contradicted by the judge's observations, to which we have referred, about rising early to accommodate a juror's personal commitment.
37. If any juror did express racist views, he or she was of course quite wrong to do so. But our focus must be on whether there is any basis for thinking that the verdicts were affected by actual or apparent bias. We can see no such basis. In particular, the comments of the female juror, on which primarily this ground of appeal is based, may be no more than an expression of her obvious dislike for the juror whom she alleges to have displayed a racist attitude. There is nothing in her account to the police which provides any evidence that either she or any other juror decided the verdicts on a basis other than the evidence in the case. We note that the male juror does not make similar allegations.
38. This is not a case in which any member of the jury questioned the correctness of the verdicts announced by the foreman either at the time of that announcement or shortly afterwards. Indeed, as we have noted, the male juror was himself the juror who acted as foreman and announced those unanimous verdicts. The applicants are therefore not

assisted by some of the case law which has been drawn to our attention.

39. For those reasons, we are satisfied that the circumstances of this case do not fall within either of the two narrow exceptions to the general principle. It follows that evidence relating to the jury's deliberations is inadmissible.

40. As this court said in R v James at paragraph 17, it has to be borne in mind that jury deliberations can often involve give and take and a changing of initial views in the light of the discussion. The answers given by the female juror in her police interview seem to us to provide a good example of a juror initially wishing to acquit if she could properly do so, but coming to the sure conclusion that the prosecution had proved its case and that it was her duty to convict. It is no surprise, and no basis for departing from the important principle as to the confidentiality of jury discussions, that one or more jurors may show signs of feeling the emotional strain of returning guilty verdicts in a serious case, particularly if an individual juror for personal reasons had been reluctant to reach the verdict which the law and the evidence obliged them to return.

41. In those circumstances, we are satisfied that there is no ground on which it could be argued that all or any of these convictions are unsafe. Each of the applications for leave to appeal accordingly fails and is refused.

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

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