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*690 Regina v Watson
Regina v Salmon
Regina v Beeston
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Regina v Jackson
Regina v Finn
Regina v Doyle

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Criminal Division)

Judgment Date
9 March 1988

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[1988] 2 W.L.R. 1156
[1988] Q.B. 690

ICLR

Court of Appeal

Lord Lane C.J. , Sir Stephen Brown P. , Watkins , Russell and Taylor L.JJ.

1988 Feb. 16; March 9

Crime—Jury—Verdict—General direction given on unanimity—Whether direction necessary—Whether pressure exerted on jury—Whether direction to be given after majority verdict direction

Where it is thought necessary or desirable juries may be directed, in the judge's discretion, on the need to reach a verdict and such direction is probably best included as part of the summing up or given or repeated after the jury have had time to consider a majority direction, in the following terms:

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> "Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement you must say so" (post, p. 700F-G).

Seven appeals, each concerned with whether pressure was exerted on the jury to reach a verdict by the judge giving the so-called " *Walhein* direction," were listed before the court for consideration in the light of divergent views which had been expressed by different divisions of the court.

On the appeals: -

Held, making an appropriate order in each case, that, since a jury had to be free to deliberate without any form of pressure being imposed on them, they should, at the judge's discretion, be directed in terms that made it clear that no pressure was being exerted (post, p. 700A-B, F-G).

Reg. v. Walhein (1952) 36 Cr.App.R. 167, C.C.A. disapproved .

The following cases are referred to in the judgment:

Practice Direction (Crime: Majority Verdicts) [1967] 1 W.L.R. 1198; [1967] 3 All E.R. 137, C.A. .
Reg. v. Ashley [1987] 1 W.L.R. 712; [1987] 2 All E.R. 605, C.A. .
Reg. v. Brankin(unreported) , *13 July 1982, C.A.*
Reg. v. Creasey (1953) 37 Cr. App. R. 179, C.C.A. .
Reg. v. Davey [1960] 1 W.L.R. 1287; [1960] 3 All E.R. 533, C.C.A. .
Reg. v. Davey and Crawford(unreported) , *18 June 1987, C.A.* ***691**

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Reg. v. Donoghue [1988] Crim.L.R. 60, C.A. .
Reg. v. Isequilla [1975] 1 W.L.R. 716; [1975] 1 All E.R. 77, C.A. .
Reg. v. Jain; Reg. v. Roffman; Reg. v. Marrazzi(unreported) , *13 November 1987, C.A.*
Reg. v. Randall(unreported) , *16 November 1987, C.A.*
Reg. v. Smith (David Charles) [1985] Crim.L.R. 522, C.A. .
Reg. v. Walhein (1952) 36 Cr.App.R. 167, C.C.A. .
Reg. v. Wright(unreported) , *13 October 1987, C.A.*
Rex v. Klein (1932) 23 Cr.App.R. 185, C.C.A. .

The following additional cases were cited in argument:

Reg. v. Barr(unreported) , *7 March 1985, C.A.*
Reg. v. Boardman(unreported) , *19 March 1984, C.A.*
Reg. v. McKenna [1960] 1 Q.B. 411; [1960] 2 W.L.R. 306; [1960] 1 All E.R. 326, C.C A
Reg. v. Naghavi(unreported) , *2 December 1983, C.A.*
Reg. v. Oduro (1982) 76 Cr.App.R. 38, C.A. .
Reg. v. Winsor (1866) L.R. 1 Q.B. 289
Rex v. Mills [1939] 2 K.B. 90; [1939] 2 All E.R. 299, C.C.A. .

APPEALS against convictions.

Darren Antonio Watson, Michael Salmon, Dane Beeston, Lydia Adu Gyamfi, Terence Henry Jackson, Owen Joseph Finn, Stephen Peter Doyle were each convicted of a different offence at a different trial in the Crown Court before a different bench from the others. Each appealed on grounds which included the ground that pressure had been imposed on the jury to reach a verdict.

The appeals were listed together before the five-judge court to enable consideration to be given to the various forms of direction given in the cases appealed, based on the direction in *Reg. v. Walhein (1952) 36 Cr. App. R. 167* , and the divergent views expressed by different divisions of the court on the appropriateness of the *Walhein* direction and adaptations of it. Only the general observations of the court on the question call for report.

David Jeffreys Q.C. and *Keith A. Mitchell* (assigned by the Registrar of Criminal Appeals) for the appellant Watson.

David Jeffreys Q. C. and *Alan Greenwood* (assigned by the Registrar of Criminal Appeals) for the appellant Salmon.

In each case the question arises about the timing and terms of the socalled *Walhein* direction - *Reg. v. Walhein (1952) 36 Cr.App.R. 167* . The prime submission is that the so-called Walhein direction, or indeed any variation of it, is inappropriate. Even if such a direction was ever appropriate at the time when the court approved it in *Walhein* , it no longer has any application to modern conditions, that is, when majority verdicts are permitted - see section 13 of the Criminal Justice Act 1967 , now section 17 of the Juries Act 1974 .

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Majority verdicts were introduced after considerable debate in both Houses of Parliament at a time when there were suspicions, if not hard evidence, of improper interference with juries. Moreover, at the time of their introduction, the accused was entitled to seven peremptory challenges.

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Reg. v. Creasey (1953) 37 Cr.App.R. 179 was probably the highwatermark of what was acceptable as a *Walhein* type direction, including the words "it is highly essential that you should come to a definite conclusion." It is doubtful that such a direction would be approved today. In *Reg. v. Isequilla [1975] 1 W.L.R. 716* Lord Widgery C.J. clearly had misgivings about the application of the *Walhein* type direction to conditions in which a majority verdict was possible. It is to be noted that the part of the direction not disapproved by the court in *Isequilla* , at p. 723, was to the effect that "jurors should not be stubborn and stick to their own points of view, but should discuss the matter amongst themselves" as opposed to that part which dealt with great public inconvenience and expense if jurors cannot agree owing to unwillingness. Hence *Isequilla* is not authority for the proposition that the totality of the *Walhein* direction, even adapted as approved by Lord Widgery C.J., was appropriate to majority verdict conditions.

If the *Walhein* direction is objectionable, it is objectionable at any stage of the jury's deliberations. It may be more objectionable when a jury has been in retirement for a long while, e.g., a day or more, than earlier, because the jury is more likely to be susceptible to pressure. If any part of the *Walhein* direction is permissible, it could perhaps be better introduced into the summing up as part of the judge's general directions, although even that might be said to be watering down the general directions on burden and standard of proof.

The *Walhein* direction has outlived its usefulness. As the spread of appeals has demonstrated, the *Walhein* direction creates more problems than it solves. Its approval and disapproval have been inconsistent. There is no longer any need for a *Walhein* direction.

Alternatively, if the *Walhein* direction has any application to present day conditions, it is to be limited to very special circumstances and the words used by the judge are to follow very closely the original *Walhein* formula to deal with the majority verdict direction.

Recent decided cases show two problems in particular that arise from the direction: (a) the precise form of words used; and (b) its timing. The authorities are: *Reg. v. Walhein, 36 Cr.App.R. 167* ; *Reg. v. McKenna [1960] 1 Q.B. 411* ; *Rex v. Mills [1939] 2 K.B. 90* ; *Reg. v. Creasey, 37 Cr.App.R. 179; Practice Direction (Crime: Majority Verdicts) [1967] 1 W.L.R. 1198* ; *Reg. v. Isequilla [1975] 1 W.L.R. 716* ; *Reg. v. Oduro (1982) 76 Cr.App.R. 38* ; *Reg. v. Brankin(unreported), 13 July 1982* ; *Reg. v. Naghavi (unreported), 2 December 1983* ; *Reg. v. Boardman (unreported), 19 March 1984* ; *Reg. v. Smith (David Charles) [1985] Crim.L.R. 522* ; *Reg. v. Barr (unreported), 7 March 1985* ; *Reg. v. Ashley [1987] 1 W.L.R. 712* ; *Reg. v. Donoghue [1988] Crim.L.R. 60* ; *Reg. v. Wright(unreported), 13 October 1987* ; *Reg. v. Jain; Reg. v. Roffman; Reg. v. Marrazzi(unreported), 13 November 1987* and *Reg. v. Randall (unreported), 16 November 1987* .

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The point in *Jain* on which the court appeared to base its decision in allowing the appeal is not sound. The jury's voting figures, 9 to 3, were, wrongly as the court decided, disclosed. The argument which apparently found favour with the court was that the *Walhein* type direction could be said to be putting pressure on the minority of three. However, simply ***693** because voting figures are announced should make no difference. There must be many cases in which the figures are 9 to 3 but the fact that they are not announced cannot alter the effect of the pressure on the minority.

There is a secondary argument on which to fall back in each of the cases of the appellant Watson and the appellant Salmon.

Nicholas Purnell Q.C. and *Hezlett Colgan* for the Crown in the appeal of Watson; *Nicholas Purnell Q.C.* and *Gerald Gordon* for the Crown in the appeal of Salmon.

The *Walhein* direction is sometimes appropriate. The overriding principle is that no pressure may be exerted on a jury to return a verdict. The court jealously guards the judge's discretion to direct and assist juries.

The test before or after the Criminal Justice Act 1967 is whether or not pressure is applied. The test is not the time or circumstances in which assistance is afforded to the jury but the terms used.

For 150 years judges' discretion has been left unfettered: see *Reg. v. Winsor (1866) L.R. 1 Q.B. 289* .

The first part of the *Walhein* direction is permissible in every case. The question is, what should be the situation in future. The purpose of the direction is to provide the jury with an opportunity to take a mental "breath of fresh air" and enable the judge to invite them to stand back from entrenched positions and take stock. The judge must have a discretion left to him to give the assistance contemplated by the first half of the *Walhein* direction when he considers it necessary.

Jeffreys Q.C. replied.

Anthony Vlassopulos (assigned by the Registrar of Criminal Appeals) for the appellant Beeston.

Michael H. Lawson for the Crown.

Rhyddian Willis (assigned by Registrar of Criminal Appeals) for the appellant Gyamfi.

David R. Ellis for the Crown.

Angus F. Robertson (assigned by Registrar of Criminal Appeals) for the appellant Jackson.

Fergus Mitchell for the Crown.

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Yvonne Coppel (assigned by the Registrar of Criminal Appeals) for the appellant Finn.

Richard L . Marks for the Crown.

Yvonne Coppel (assigned by Registrar of Criminal Appeals) for the appellant Doyle.

Patrick Whelon for the Crown.

Cur. adv. vult.

9 March. LORD LANE C.J.

read the following judgment of the court. There have been divergent views expressed by different divisions of this court on the appropriateness of the so-called *Walhein* direction. It was to enable us to deal with such differences that we had a number of appeals raising the problem in various forms listed before a five-judge court. ***694**

In *Reg. v. Walhein (1952) 36 Cr.App.R. 167* itself, upon the jury's return to court, one of their number told the commissioner at the Central Criminal Court: "I cannot in my own mind find him guilty of the charge which prosecuting counsel have not proved." The commissioner then said:

> "You are a body of 12 men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."

This direction was, it is said, based on an earlier direction in *Rex v. Klein (1932) 23 Cr.App.R. 185* , the words of which have not survived. Lord Goddard C.J. had this to say of the direction in *Walhein, 36 Cr.App.R. 167* , 168:

> "In our opinion, that was a perfectly satisfactory direction. Jurors often have to be reminded that the case may be one in which some of them may start by

> taking one view and then, finding that the others are against them, may talk the matter over, subordinate their views to those of the majority and concur in the verdict.... The fact that Finlay J. in *Klein* referred to 'grave inconvenience and expense,' as did the commissioner in the present case, was not a threat to the jury, but merely pointed out to them the desirability of arriving at a verdict if they could. If they fail to agree, inconvenience and expense is caused not only to the prosecution, but also to the defendant, who will have to be tried a second time."

The appeal was dismissed.

First, this was a case where one juror (judging from his words and those of the judge) was closing his ears to the arguments of the other eleven. The judge accordingly invited him to change his attitude, listen to the other point of view and if he could then do so conscientiously, alter his view, thereby avoiding the expense and inconvenience of a retrial. Secondly, this was at a time when unanimity was required of a jury, and when, so we are told, there were suspicions that in some cases improper pressure was being put upon jurors to disagree with their fellow jurymen and so cause the trial to be aborted.

Up to 1967 that or a similar form of words continued to be used when jurors announced that they had failed to reach unanimity. In *Reg. v. Creasey (1953) 37 Cr.App.R. 179* , the words used were:

> "It is very desirable that you should come to a conclusion one way or the other... because it only means that some other jury have got to do your work for you all over again, if you do not... and ***695*** that is why it is highly essential that you should come to a definite conclusion. It is a hardship upon all concerned if you do not. The way that juries arrive at a verdict is, of course, by a method of one member listening to what the other has to say and by a process of give and take. Of course, it is a verdict which you must all be agreed upon one way or the other..."

The jury convicted. That direction was held not to invalidate the conviction, though Lord Goddard C.J. did go so far as to say, at p. 181, "Perhaps it might have been put a little differently." He distinguished another decision which had disapproved of a direction containing the words, "It is essential that you should give a verdict." It was perhaps a fine distinction. Fine distinctions are inevitable in this type of situation.

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With the benefit of hindsight it is possible, even at that early stage, to detect signs of danger. It will not have escaped notice that in *Reg. v. Walhein* itself Lord Goddard C.J. used the phrase "Jurors... may talk the matter over, subordinate their views to those of the majority and concur in the verdict." Taken literally that might be construed as an encouragement to the dissentient minority to fall in with the majority whilst continuing to disagree with their views.

The court in *Reg. v. Davey [1960] 1 W.L.R. 1287* , 1294 had this to say about those words:

> "If the word 'subordinate' means sink their own views and adopt a view which is contrary to the view they really hold in order to achieve unanimity, it seems to me that passage... runs contrary to previous decided cases... we think that the words 'subordinate their views' must mean come to a different conclusion after proper discussion, and not sink their views in order to achieve unanimity."

On 1 October 1967 section 13 of the Criminal Justice Act 1967 came into force. Section 13(1) introduced into the English criminal law for the first time the concept of the majority verdict. Subsection (2) required the foreman of the jury to state in open court the number of jurors who agree to and dissent from the verdict. Subsection (3) required the jury to have had not less than two hours for deliberation before a majority verdict is permissible. On 31 July 1967 *Practice Direction (Crime: Majority Verdicts) [1967] 1 W.L.R. 1198* was issued by Lord Parker C.J., setting out the procedure for the taking of majority verdicts. It was not however until the decision in *Reg. v. Isequilla [1975] 1 W.L.R. 716* that any consideration was given to the possible effect of the introduction of the majority verdict upon the *Walhein* direction. The matter was only raised so to speak by a side-wind, but this is what Lord Widgery C.J. had to say, at pp. 723-724:

> "I pause only to make one brief reference to another point on which Mr. Blom-Cooper invited us to express an opinion if we thought fit. It is a procedural matter but not without importance, and it relates to the direction which the judge gave to the jury in this case when the jury failed to produce a unanimous verdict. The judge had given them the proper instruction at the proper stage, that they could bring in a majority verdict if they wanted, and in ***696** respect of one count they brought in a majority verdict but remained in disagreement on the other two which were before them. At this stage the trial judge gave the jury a direction which has been given by trial judges ever since 1952, and which has obtained the approval of the Court of Appeal, to the effect that jurors should not be stubborn and stick to their own points of view, but should discuss the matter amongst themselves and see whether other

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> jurors' views were not worth looking at and proper to be adopted. Those are my words, and not the words of the direction, but that is the sense of it. This direction was given to the jury at a stage when they had produced one majority verdict and were still in disagreement about the other two counts. Counsel for the defendant says, correctly, that that direction was first approved when majority verdicts were unheard of. He says it is inappropriate to use such a direction now when majority verdicts are available, and particularly inappropriate to use such a direction when the jury have already had a majority verdict direction and indeed have produced one such verdict.
>
> "We do not think that this is a case in which we would seek to lay down hard and fast rules, because we think them unnecessary. We think it obvious that if a trial judge seeks to use the general direction to which I have referred after he has given a majority verdict direction, he ought to adapt the language to make it suitable for the new situation for which it was not originally designed. We also think that before giving such a general direction at that stage, the judge ought to remember that to some extent the fact that majority verdicts are possible has taken away the mischief at which the original direction was aimed; but despite all that we are not disposed to say that it is improper for the judge to give the general direction at the point at which it was given in this case, though we would counsel trial judges to use some discretion in the matter and not repeat the direction in its exact and precise terms without regard to the changing circumstances in which it is operative."

What emerges from that passage in the judgment is this. First of all Lord Widgery C.J. was clearly troubled about the appropriateness of the *Walhein* direction in the light of the fact that the majority verdicts were now permissible. Secondly, giving in his own words the sense of the *Walhein* direction, he exposed the fact that there are two halves to that direction. The first half points out that there must in any jury's deliberations necessarily be argument and a certain amount of give and take and adjustment of views within the scope of the juror's oath. There can be no possible objection to the judge making that fact clear to the jury. The second part however contains the warning that it may cause great public inconvenience and expense if jurors cannot agree. The use of those words or expressions like them may be far from harmless.

It is clear that Lord Widgery C.J. was not directing his attention to that aspect of the direction. That is not surprising in the particular circumstances of that case. Once again with the benefit of hindsight, it might have been better if the second half of the *Walhein* direction had at that stage received the disapproval of this court, first as being less ***697** necessary when a majority verdict is possible; and secondly, as in some circumstances, imposing improper pressure on those members of the jury holding the minority view.

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In the result the direction, more often than not embellished or adapted according to circumstances, has continued to be used. Nothing has until recently happened to discourage judges from using it. Indeed in the specimen directions which were issued in 1982 (but revised and reissued in August 1987) to all judges and recorders by the Judicial Studies Board, which were, I must confess, expressly approved by myself, appears the *Walhein* direction including the passage:

> "and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of some of their number to listen to the arguments of the rest."

Sometimes this court has ruled that the words used in the particular circumstances of the individual case have amounted to improper pressure upon the jury and have quashed the conviction. On other occasions this court has declined to interfere. A typical example of the former was *Reg. v. Brankin (unreported), 13 July 1982* . The recorder gave a *Walhein* direction, as to which no criticism was made, but later added the words which seemed to impose pressure on the dissentient minority of the jury by urging them not to "stop a decision." The conviction was quashed.

By 1985 questions had started to arise as to the proper time at which the *Walhein* direction should be given. In *Reg. v. Smith (David Charles) [1985] Crim.L.R. 522, 7 February 1985* , after the jury had been considering their verdict for some 2½ hours, they indicated by way of a note that they were divided eight to four, and saw no prospect of reaching any unanimous agreement. The assistant recorder then gave, with immaterial alterations, the *Walhein* direction. The jury came back very soon afterwards with a unanimous verdict. Complaint was made that the assistant recorder should have given the majority direction before the *Walhein* direction. There was no criticism of the direction itself. In dismissing the appeal the court observed that the whole matter was in the discretion of the judge and that there was nothing wrong in the way the judge had, in his discretion, chosen to put the matter before the jury.

In contrast to that was *Reg. v. Ashley [1987] 1 W.L.R. 712 (12February 1987)* . The appellant was tried on charges in the alternative of wounding and wounding with intent. The jury retired for 2½ hours and were then given a *Walhein* direction. The judge then indicated that he could, if necessary, accept a majority verdict. After about 20 minutes the jury returned with a majority verdict of 10 to 2. It was held on appeal that the *Walhein* direction had been given far too early. The jury had not previously been given a majority direction. The words might well be taken as putting pressure upon the jury. These matters amounted to material irregularities, and the conviction was quashed.

In *Reg. v. Davey and Crawford (unreported), 18 June 1987* , the jury returned after almost three hours of retirement to announce that they had not reached agreement. The judge then gave the

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Walhein direction ***698*** unembellished. The jury returned again and after about half an hour they returned with a unanimous verdict of guilty. It was held that there had been a material irregularity, because, first the retirement had not been sufficiently long, and secondly, the *Walhein* direction had been given before any majority direction. Indeed there was no majority direction. This, it was said, was likely to bring pressure on the jury. The convictions were quashed.

In *Reg. v. Donoghue [1988] Crim.L.R. 60(16 July 1987)* , the appellant was convicted of wounding with intent by a majority of 11 to 1. The jury returned after a retirement of 2 hours 10 minutes. They had not agreed upon a verdict. The judge then addressed the jury thus:

> "Members of the jury, the time has now come when I can accept from you a majority verdict, that is to say, a verdict upon which at least 10 of you agree. Members of the jury, it is obviously better if you can reach a unanimous verdict and you want to try to do so. Do not be so stiffnecked as to not listen to the other person's point of view, but none the less, members of the jury, [you] still have to be true to your oaths and be consistent with the jury oath. You can perhaps bend to the other person's point of view and should do so; but, on the other hand, if you cannot, you must be true to your oath."

After a further retirement of 14 minutes the majority verdict was announced.

It was held that the judge's direction contained none of the potentially objectionable features of a true *Walhein* direction. It was little more than an invitation to the jury to listen to the arguments of their fellow jurymen and, if they thought fit, to change their mind consistently with their oaths. Watkins L.J. in the course of giving the judgment of the court said:

> "objection could undoubtedly be taken if the direction placed any improper pressure upon any member of the jury to subordinate his or her own judgment in order to avoid the expense and inconvenience involved in a new trial and the hardship suffered by a defendant who has to be tried again. In the present case we do not consider that there was any improper pressure. Accordingly this ground of appeal fails."

In *Reg. v. Wright (unreported), 13 October 1987* , the appellant was convicted by a majority verdict of theft. The jury were out for some 3½ hours. The recorder then gave them a *Walhein* direction. Twenty minutes later the jury were brought back into court again to be given a majority direction.

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After a further 12 minutes they returned with the majority verdict of guilty. On appeal the court concluded that the *Walhein* direction was given at an inappropriately early stage and at a time before the majority direction. As in *Reg. v. Ashley* this was a material irregularity.

Reg. v. Jain; Reg. v. Roffman; Reg. v. Marrazzi (unreported), 13 November 1987 , concerned an international conspiracy to supply cannabis. The jury first retired at 2 p.m. on Tuesday, 17 June 1986. ***699** They spent that night at an hotel. At 4.08 p.m. on the following day, Wednesday, the judge received a note indicating that the jury had reached stalemate so far as Jain was concerned - voting figures "9-3 guilty." After one defendant, as to whom the jury were unanimously in favour of acquitting, had been discharged, the jury went back to their hotel. They returned on Thursday morning at 10 a.m. They were then given the majority direction and the judge added the following words:

> "Now nobody's conscience is to be forced. You all took the oath at the beginning of this trial. But it is very desirable, if possible, to bring this trial to a conclusion: therefore you should be prepared to listen to the arguments, again, of other people; keep your minds open. and if you cannot agree - even to the limited extent of at least 10 - well then you will have to let me know, and it means that that person will have to be tried again, which is obviously unsatisfactory in some ways. It is a great ordeal for the person who has to be tried again; and of course it means another judge and another jury will have to do the whole trial again. So it is a course to be avoided, if possible; although, as I have said, no one's conscience is to be forced."

Upon appeal this court, after considering the judgments in *Reg. v. Ashley [1987] 1 W.L.R. 712* and *Reg. v. Donoghue [1988] Crim.L.R. 60* decided that the words used by the judge might well have had the effect of placing improper pressure on the three members of the jury who had indicated that they were in favour of a not guilty verdict. The conviction was quashed.

The last of this series of cases which we deem it necessary to cite is *Reg. v. Randall(unreported), 16 November 1987* . Randall was convicted of inflicting grievous bodily harm by a 10 to 2 majority. The jury returned after 2 hours 40 minutes of retirement. The recorder then gave them the *Walhein* direction. After another hour's retirement they still had not reached unanimity. A majority direction was then given and they returned after 10 minutes with their 10 to 2 verdict.

Following the decisions in *Reg. v. Ashley [1987] 1 W.L.R. 712* ; *Reg. v. Davey and Crawford, 18 June 1987* and *Reg. v. Wright, 13 October 1987* , the court held that since the Walhein direction was given before the jury had been allowed enough time to consider their verdict, and before the majority direction, there had been a material irregularity and that the conviction had to be quashed.

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The result of these more recent decisions seems to be this: there is or may be a material irregularity if the *Walhein* direction is given either (a) at too early a stage in the jury's deliberation or (b) before the majority direction or (c) whenever it is given, if given in terms which may have had the effect of placing improper pressure on the dissentient minority of the jury.

Not only is there an irreconcilable difference apparent between the decisions in *Reg. v. Smith (David Charles) [1985] Crim.L.R. 522* on the one hand and *Reg. v. Ashley [1987] 1 W.L.R. 712* and its consequent cases on the other, but it is also clear that the use of the *Walhein* ****700*** direction in its original form, and particularly before the majority direction, may lead to a conviction being quashed.

This is an important matter of procedure and a re-appraisal of the situation is overdue. One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed upon them, whether by way of promise or of threat or otherwise. They must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so.

Experience has shown that the *Walhein* direction, sometimes in its original form, sometimes amended, may contravene that cardinal rule. In some cases the very short time required by the jury to reach a unanimous or majority decision after the *Walhein* direction shows the impact it must have had on a minority who up to that time had apparently been unmoved by the argument. The mere exhortation to listen to the contrary view seems unlikely to have had such a dramatic effect. The suggestion of expense and inconvenience is doubtless a much more potent incentive to agree. Hints that it may be of benefit to the defendant if the jury can only sink their differences may be misleading if, as is usually the case, the minority are for an acquittal. Agreement will in those circumstances mean conviction, continued disagreement will mean at the worst a retrial with the consequent chance of acquittal.

There are occasions when the circumstances will show that the *Walhein* direction did not impose any pressure on the jury, but the risk that it may do so has convinced us that the time has now come for judges to stop using it in its original form. If it is objectionable as imposing pressure on a jury, it is objectionable at whatever stage it is used, whether during the summing up proper or before or after any majority direction.

In the judgment of this court there is no reason why a jury should not be directed as follows:

> "Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom.

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> Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement you must say so."

It is a matter for the discretion of the judge as to whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought to be necessary or desirable, they are probably ***701** best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction.

We now turn to consider against that background the individual cases which have been the subject of argument before us. [His Lordship stated the considerations relating to each individual appellant and, in the event, that the appeals of the appellants Watson, Finn and Doyle were allowed and the appeals of Salmon, Beeston, Gyamfi and Jackson were dismissed.]

Representation

Solicitors: Crown Prosecution Service, Snaresbrook ; Crown Prosecution Service, Inner London ; Crown Prosecution Service, Inner London ; Solicitor, Customs and Excise ; Crown Prosecution Service, Kingston and Tolworth ; Crown Prosecution Service, Manchester ; Crown Prosecution Service, Isleworth .

Orders accordingly. (L. N. W.)

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