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Judgments - Regina (Respondent) v. Wang (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

HOUSE OF LORDS

SESSION 2004-05
17th REPORT
([2005] UKHL 9)
on appeal from: [2003] EWCA Crim 3228

APPELLATE COMMITTEE
Regina (Respondent)
v.
Wang (Appellant)(On Appeal from the Court of Appeal (Criminal Division))
REPORT
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(HL Paper 42)

17th REPORT
from the Appellate Committee
10 FEBRUARY 2005
Regina (Respondent) v. Wang (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Steyn, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Carswell) have met and considered the cause *Regina v. Wang (Appellant) (On Appeal from the Court of Appeal (Criminal Division))*. We have heard counsel on behalf of the appellant and respondent.

1. This is the considered opinion of the Committee.

2. The question of law of general public importance certified by the Court of Appeal to be involved in its decision in this case is:

> "In what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty?"

For the appellant it is contended that the judge may never do so in any circumstances. The Crown contests that view, while acknowledging that the circumstances in which such a direction may be given are rare and exceptional. Such circumstances, it is said, exist where the burden of raising a defence rests on the defendant, and he has failed to discharge the burden upon him; or when the facts are agreed at trial, there is nothing calling for adjudication and there is no basis on which the defendant can properly avoid conviction on the uncontested facts.

3. Behind this clear but narrow issue dividing the parties lies an area of common ground which it may be helpful to identify, to obviate any possibility of misunderstanding. It is common ground that if a judge is satisfied that there is no evidence which could justify the jury in convicting the defendant and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit (*Director of Public Prosecutions v Stonehouse* [1978] AC 55 at 70, 79-80 and 94; Devlin, Hamlyn Lectures, "*Trial by Jury*", 1956, p 78). It is agreed that a judge should withdraw a defence from the consideration of the jury if there is no evidence whatever to support it, and he need not direct the jury on an issue not raised by any evidence. The appellant accepts that in a case where, on applying the law as expounded by the judge to facts which have been agreed or not disputed at trial, the only reasonable course is to convict, the judge may comment in stronger terms than would otherwise be permissible. But even in such a case the appellant submits that the judge may not direct the jury to convict; the Crown submits that he may in the limited circumstances identified above.

The facts

4. The appellant was waiting for a train at Clacton-on-Sea railway station on 27 February 2002 when his bag was stolen. A search was made and the bag found in the possession of a thief who tried to deter the appellant from calling the police by suggesting that the bag contained items the appellant should not be carrying. From the bag the appellant produced a curved martial arts sword, in its sheath. The police were called and on a further search of the bag a small Ghurkha style knife was found. In due course the appellant was indicted on two counts of having an article with a blade or point in a public place, contrary to section 139(1) of the Criminal Justice Act 1988, one count relating to the sword, the other to the knife.

5. The appellant was tried in the Crown Court at Chelmsford before Judge Pearson and a jury. There was no issue about the appellant's possession of the two articles on the day in question. But he testified that he was a Buddhist and that he practised Shaolin, a traditional martial art. Those who practised Shaolin were Buddhists and were called Shaolin followers. To learn Shaolin, one was instructed how to behave and keep the spirit. It was necessary to have a good personality. Shaolin followers learned to help society and protect people, to which end they relied on Buddhist teaching, especially love without denominations or limitations. The sword was one of eighteen weapons in which a Shaolin follower must become expert, and the knife was a "willow leaf knife" the use of which depended on high skill. One who excelled would become the teacher of all followers in the future. To practise Shaolin was not to worship Buddha but to keep the spirit of the people. On the day in question he had been on his way to see his solicitor. He had taken the sword and knife with him because he did not like to leave them in the place where he was staying in Clacton, and he liked to stop at remote and uninhabited places to practise Shaolin.

6. At the conclusion of the defence case, and before speeches, the judge sent the jury out and said to counsel that he could see no defence to these two counts. Mr Shaw, for the appellant, made plain his reliance on section 139(4) and (5)(b) of the 1988 Act, which provide:

> "(4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason . . . for having the article with him in a public place.

> (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him -
>
> (b) for religious reasons;
>
> . . ."

Mr Shaw submitted that the appellant had advanced a lawful defence, which should be left to the jury. Miss Davey, prosecuting, referred to "some hesitancy where one is, effectively, withdrawing a defence from the jury", but acquiesced in the judge's view that the jury should not, properly directed, find there was "any conceivable reasonable excuse". The jury were then recalled, the judge told them that he would direct them to return guilty verdicts on both counts and he explained his reasons for doing so. He concluded:

> "As a matter of law, however, the offences themselves are proved and, under those circumstances, I direct that you return guilty verdicts on each of the two counts on this indictment."

The following colloquy then took place:

> "The clerk of the court: Madam, will you, please, answer 'guilty' to both of my questions? Members of the jury, you are agreed upon your verdicts. On his Honour's direction, do you find the defendant Cheong Wang guilty on count 1 of charging him with having an article with a blade or point?
>
> The foreman of the jury: Guilty.
>
> The clerk of the court: On count 2, do you find the defendant guilty of having an article with a blade or point?
>
> The foreman of the jury: Guilty.
>
> The clerk of the court: Those are the verdicts of you all?
>
> The foreman of the jury: Yes."

The appellant was conditionally discharged for twelve months and forfeiture orders were made.

7. The appellant appealed to the Court of Appeal (Laws LJ, Curtis J and the Recorder of Cardiff), which accepted a distinction between (a) cases in which it "is said that on the evidence an issue as respects which the burden of proof lies on the prosecution could only rationally be decided against the defendant" and (b) cases in which it is said that the defendant had failed to discharge an evidential burden lying on him: [2003] EWCA Crim 3228, para 8. Reference was made to *R v Bown* [2003] EWCA Crim 1989, [2004] 1 Cr App R 151, as an example of a recent case in the second class, in which the Court of Appeal had upheld a direction to convict. In rejecting the appellant's appeal the Court of Appeal said:

> "12. After careful consideration we have come to the conclusion that on this material the judge was justified in directing the jury to convict. The appellant's evidence was not capable of discharging the burden, which lay on him, of showing that he had the weapons with him for good reason (s.139(4), or for religious reasons (s.139(5)(b)). It is very far from clear that he had any settled intention to practise with them on the day in question; even if he did, there was on his own evidence no religious requirement that he do so, and in any event that was plainly not the predominant or only reason for his possessing them that day; the fact that 'there was no one at home to look after [them]' cannot, in our judgment, be a good reason for taking these weapons into public places. To borrow the words of Keene LJ in *Bown:* '[t]here was simply insufficient evidence to establish the defence to the degree of particularity which was requisite.'

> 13. The facts here are unusual. Nothing we have said is intended to encourage trial judges to direct convictions, even where the material issue is one on which the defendant carries the burden, unless it is plain beyond sensible argument that the material before the jury could not in law suffice to discharge the burden."

The law

8. Although a considerable volume of historical material was placed before the House on the hearing of this appeal, Mr David Perry, for the Crown, invited us to focus our attention on the criminal jury in its modern setting. This is an invitation we accept. The conduct of criminal trials has been profoundly changed by according the defendant the right to testify, by establishing a criminal appellate court and by extending access to free legal representation. Little help is therefore gained from pre-twentieth century authority. But over the last century or so the conduct of a trial on indictment has been much as it is today. Thus the trial is by judge and jury working together, although, as judges routinely explain, their functions are different. The judge directs, or instructs, the jury on the law relevant to the counts in the indictment, and makes clear that the jury must accept and follow his legal rulings. But he also directs the jury that the decision of all factual questions, including the application of the law as expounded to the facts as they find them to be, is a matter for them alone. And he makes plain that, whatever views he may express or be thought to express, it is for them and not for him to decide whether, on each count in the indictment, the defendant is guilty or not guilty. It is, as Sir Patrick Devlin pointed out in his celebrated Hamlyn Lectures on *Trial by Jury* (1956), Appendix II, p 194, a very unusual relationship:

> "There is a fundamental difference between juries and other fact-finding bodies. The function of all other fact-finding bodies is to find the facts so that the judge can apply the law to them. This form of process enables the judge to reject as a matter of law a finding of fact that he considers to be unreasonable. If, for example, the primary facts proved permit as the only reasonable inference a judgment that the accused is driving a motor-car dangerously, the High Court would direct a bench of magistrates to convict. So where statute creates one jurisdiction for finding the facts and another for the law, as under the Income Tax Acts, the court will set aside a finding apparently based on a view of the facts that could not reasonably be entertained; it will proceed on the assumption that the error was due to a misconception of the law.
>
> In trial by jury the process is the other way about. The jury does not tell the judge the facts so that he can apply the law to them; the judge tells the jury the law so that they can apply it to the facts. The responsibility for its correct application is laid upon the jury and not upon the judge. If a judge wants to apply the law himself, the only way he can do it is by asking for a special verdict."

9. *Woolmington v Director of Public Prosecutions* [1935] AC 462 is of course remembered above all for the affirmation by Viscount Sankey LC of the onus lying on the prosecution to prove the defendant's guilt where issues of accident or provocation arise. But in reaching that conclusion he held, at p 480, in terms with which the other members of the House agreed:

> "If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law."

Lord Oaksey, giving the judgment of the Privy Council in *Joshua v The Queen* [1955] AC 121, 129-130, spoke to similar effect:

> "On the second question their Lordships are of opinion that it was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime exists) and to direct them on the facts if he thought that there was evidence to go to the jury, and it was for the jury to find whether the appellant was guilty upon those

> facts. It was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found that he had spoken the words alleged. To do so was, in their Lordships' opinion, to usurp the function of the jury . . . It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts ..."

10. The House had occasion to consider this topic in more detail in *Chandler v Director of Public Prosecutions* [1964] AC 763, which arose from a prosecution under the Official Secrets Act 1911 in which the trial judge had refused to allow cross-examination and evidence concerning the appellants' beliefs. The Attorney General submitted (p 783) that since the appellants' purpose had been to immobilise an airfield, which was a prohibited place, the judge should direct the jury to return a verdict of guilty and that any other verdict would be perverse. No member of the House acceded to that submission. Lord Reid (p 792) and Viscount Radcliffe (p 796) favoured a direction that if the jury were satisfied that the elements of the offence had been established, then they should convict. Lord Devlin was more expansive (pp 803-804):

> "It is said that the jury could return only one answer to the question in this case. I must confess that I find it difficult to see how a sensible jury could have acquitted. . . .
>
> But I do not reach such a conclusion as a matter of law and I cannot accept that the judge is entitled to direct the jury how to answer a question of fact, however obvious he may believe the answer to be and although he may be satisfied that any other answer would be perverse. The Attorney-General submitted that, while it is a question of fact for the jury whether the entry was for a purpose prejudicial, once it was proved that the purpose was to interfere with a prohibited place and to prevent its operating, then a judge should be entitled to direct a jury to return a verdict of guilty. With great respect I think that to be an unconstitutional doctrine. It is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal ....
>
> A judge may, of course, give his opinion to the jury on a question of fact and express it as strongly as the circumstances permit, so long as he gives it as advice and not as direction. The trial judge indicated a fairly strong opinion in the present case, particularly at the end of his summing-up, when he hinted to the jury that there was only one verdict that they could in conscience return. But this was not improper, for even in relation to the limited facts which he left for their consideration, he told them clearly several times that the question was for them to answer ...."

11. The most extended treatment of this topic by the House is found in *Director of Public Prosecutions v Stonehouse* [1978] AC 55, in which the appellant challenged his conviction on five counts of attempted obtaining by deception on the ground, among others, of judicial misdirection. The direction complained of was to the effect that (pp 72, 79, 87):

> "There is an attempt by the accused within the legal meaning of that word 'attempt' if you are satisfied that the matters I have stated to you are proved."

A minority of the House upheld that direction. Lord Diplock (p 70) equated the judge's power to direct a conviction with his power to direct an acquittal, regarding the contrary view as cynical and inconsistent with the proviso in section 2(1) of the Criminal Appeal Act 1968 as it then stood. But it would be very rare for such a direction to be permissible where the issue was one of proximity when an attempt was charged. Viscount Dilhorne also held (pp 72-74) that the judge had not erred. He acknowledged that the effect of the direction, if the jury found the facts proved, was not that those facts could constitute an attempt, but that they would. The direction was proper because, if those facts were found to be proved, there was no room for more than one conclusion and any other conclusion would be perverse. But such a direction would only be permissible in exceptional cases.

12. The majority of the House took a different view. Lord Salmon, having quoted the direction complained of, continued (pp 79-80):

"The criticism of that passage was that the judge should have explained to the jury the legal meaning of an attempt and directed them that if they were satisfied beyond a reasonable doubt that the facts proved established the attempt charged, then they should find the accused guilty, otherwise they should acquit him. I agree with that criticism. So did counsel for the Crown who conceded that there had been the technical misdirection of which counsel for the appellant had complained.

The learned judge conducted this trial lasting 70 days with outstanding ability and patience. The direction complained of came towards the end of a most fair, accurate and lucid summing up. It concerned a matter which was as plain as a pikestaff. No reasonable jury could have failed to find that the facts proved clearly established the attempt charged and convicted the appellant accordingly. It has never been suggested that when the appellant faked his death, he may not even have been giving his wife a thought and did what he did do solely to escape from being arrested and charged with the 13 other counts to which he had no defence and of which he was convicted.

Anyone in the judge's position might easily have made the slip which he did of not leaving the jury to decide whether the facts proved amounted to the attempt charged. However obvious it may be that they did and that the accused was guilty, technically, the judge should still have left it to the jury to decide whether or not the evidence established the attempt charged and to have found him guilty or not guilty accordingly. The technical slip on the part of the judge certainly made no difference to the result of the trial. There is no possibility that any reasonable jury could have had the slightest doubt that the facts proved did establish the attempt charged and accordingly would certainly have brought in a verdict of guilty. I am completely satisfied that no miscarriage of justice could have resulted from what technically was a misdirection and that therefore the proviso to section 2(1) of the Criminal Appeal Act 1968 should be applied.

With the greatest respect to my noble and learned friends, Lord Diplock and Viscount Dilhorne and the Court of Appeal, I am afraid that I cannot agree with their views on this aspect of the case. Whilst there is no doubt that if a judge is satisfied that there is no evidence before the jury which could justify them in convicting the accused and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit.

This rule, which has long been established, is to protect the accused against being wrongly convicted. But there is no converse rule - although there may be some who think that there should be. If the judge is satisfied that, on the evidence, the jury would not be justified in acquitting the accused and indeed that it would be perverse of them to do so, he has no power to pre-empt the jury's verdict by directing them to convict. The jury alone have the right to decide that the accused is guilty. In any appropriate case (and this was certainly such a case) the judge may sum up in such a way as to make it plain that he considers that the accused is guilty and should be convicted. I doubt however whether the most effective way of doing so would be for the judge to tell the jury that it would be perverse for them to acquit. Such a course might well be counter-productive."

Lord Edmund-Davies was of the same mind (pp 87-88):

"Eveleigh J approached this part of his very onerous task as if he were interpreting a statute containing the word 'attempt' and regarded himself as entitled to direct the jury that, as a matter of pure law, the acts itemised (if proved) *did* constitute the 'actus reus'. But just as it was for the jury and not the judge to decide whether the necessary mens rea had been established, so also it was for them to decide whether the proved acts of the accused were such as to constitute an attempt to commit the full offence of obtaining by deception . . .".

Lord Edmund-Davies considered

"the erroneous direction in the instant case [to be] but one example of a prevalent (though fortunately not universal) tendency in our courts in these days to withdraw from the jury issues which are solely theirs to determine."

Lord Keith of Kinkel was the third member of the majority and said (p 94):

> "In the second place it was argued that the trial judge misdirected the jury in respect that he failed to leave it to them to decide whether in their view the appellant's acts were sufficiently proximate to constitute an attempt or were merely preparatory. The learned trial judge did indeed direct the jury that if they were satisfied that the appellant falsely staged his death by drowning, dishonestly intending that a claim should be made and the policy moneys obtained in due course, then in law there had been an attempt to commit the offence. I am of opinion that it should properly have been left to the jury to say whether what the appellant did amounted to an attempt, and indeed this was accepted by Mr Tudor Price for the [Crown]. It is the function of the presiding judge at a trial to direct the jury upon the relevant rules of law. This includes the duty, if the judge takes the view that the evidence led, if accepted, cannot in law amount to proof of the crime charged, of directing the jury that they must acquit. It is the function of the jury, on the other hand, not only to find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed upon it, to the facts as they find them to be. I regard this division of function as being of fundamental importance, and I should regret very much any tendency on the part of presiding judges to direct juries that, if they find certain facts to have been established, they must necessarily convict. A lawyer may think that the result of applying the law correctly to a certain factual situation is perfectly clear, but nevertheless the evidence may give rise to nuances which he has not observed, but which are apparent to the collective mind of a lay jury. It may be suggested that a direction to convict would only be given in exceptional circumstances, but that involves the existence of a discretion to decide whether such circumstances exist, and with it the possibility that the discretion may be wrongly exercised. Thus the field for appeals against conviction would be widened. The wiser and sounder course, in my opinion, is to adhere to the principle that, in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge. I see no reason to doubt that the good sense and responsible outlook of juries will enable them to perform this task successfully."

13. Certain important points must be made on the majority opinions in *Stonehouse.* First, they are plainly authority for what they decide, binding on lower courts and on the House itself unless and until departed from. Secondly, while they are consistent with previous authority in the House and the Privy Council, and with some previous Court of Criminal Appeal and Court of Appeal authority such as *R v John West* (1910) 4 Cr App R 179; *R v Beeby* (1911) 6 Cr App R 138; *R v Hendrick* (1921) 15 Cr App R 149; *R v Waters* (1963) 47 Cr App R 149; *R v Cook* (1963) 48 Cr App R 98; *R v Guttridge* [1973] RTR 135 and *R v Vickers* [1975] 1 WLR 811, they are not easily reconcilable with such earlier decisions as *R v Larkin* [1943] KB 174 and (1942) 29 Cr App R 18; *R v Eastwood* [1961] Crim LR 414; *R v Draper* [1962] Crim LR 107; *R v Comerford* [1965] 1 WLR 1059 and (1964) 49 Cr App R 77; *R v Kelly* [1970] 1 WLR 1050; *R v Ferguson* (1970) 54 Cr App R 415; *R v Pico* [1971] Crim LR 599 and *R v Morris* [1972] 1 WLR 228. To the extent that these last cases are irreconcilable with the majority opinions in *Stonehouse* they are no longer to be regarded as authoritative. Thirdly, the majority opinions give no support to the distinction drawn by the Court of Appeal in the present case between cases in which a burden lies on the defence and those in which the burden lies solely on the Crown. That distinction is indeed inconsistent with the rationale of the majority opinions, which is that no matter how inescapable a judge may consider a conclusion to be, in the sense that any other conclusion would be perverse, it remains his duty to leave the decision to the jury and not to dictate (to use the language of *R v Hendrick,* above, p 155) what that verdict should be. Fourthly, the majority opinions reject the argument of Lord Diplock based on the proviso to section 2(1) of the 1968 Act as enacted, before amendment by the Criminal Appeal Act 1995. In his essay "The Judge and the Jury" (*The Judge*, 1981, 117 at 142), Lord Devlin convincingly explained why application of the proviso is not inconsistent with denial of a power or duty to direct conviction:

> "Looked at in this way, it does not at all follow that the propriety of a summing-up is to be tested in the same way as the application of the proviso. The latter, as I have said, necessarily involves some invasion of the jury's province. When the necessity is lacking, there can be no justification for the invasion. If a point depends upon the decision of a

> particular tribunal and the tribunal is still open, it must be better, however obvious the answer is thought to be, to get the tribunal itself to give it. It is only when the tribunal is closed, when the jury that decided the case is *functus officio*, and there is no way of getting another one, that the judges are forced themselves to determine what a jury might think."

14. The majority opinions of the House in *Stonehouse* have been faithfully followed in such later decisions as *R v Thompson* [1984] 1 WLR 962, *R v Challinor* (1984) 80 Cr App R 253, *R v Gordon (Note)* (1987) 92 Cr App R 50, *R v Gent* (1989) 89 Cr App R 247; and *R v Kelleher* [2003] EWCA Crim 3525, the last of these cases being heard and decided by the Court of Appeal very shortly before the judgment now under appeal and containing, in the judgment of Mantell LJ, a very lucid and accurate exposition of the law. *R v Hill and Hall* (1988) 89 Cr App R 74 is not easy to reconcile with the majority opinions. If in those cases there was in truth *no* evidence of lawful excuse which the jury could be asked to consider, the trial judges were entitled to withdraw that issue from the jury. But the relevant conclusion appears to have been (p 77)

> "that the causative relationship between the acts which [the defendant] intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively."

Like the issue of proximity in *Stonehouse*, this was a question to be left to the jury, however predictable the outcome might reasonably be thought to be. In any event, the juries should not have been directed to convict, as they evidently were (p 81).

15. In contending for the limited exceptions specified in para 2 above, Mr Perry was able to rely on the powerful support of Lord Justice Auld (*Review of the Criminal Courts of England and Wales*: Report, 2001, paras 99-108, pp 173-176), and on a formidable body of academic literature including Professor Glanville Williams, *The Proof of Guilt*, 3rd ed, (1963), pp 261-262, Professor Griew [1972] Crim LR 204 and [1989] Crim LR 768 and Professor McConville [1973] Crim LR 164. He drew attention to the question posed by Professor Glanville Williams (*op. cit,*, p 262):

> "If we really wish juries to give untrue verdicts, why do we require them to be sworn?"

Mr Perry advanced a number of reasons why the power of juries to return untrue or perverse verdicts of not guilty should be constrained to the limited extent which he contended for. This, he said, involved no objectionable erosion of the jury's role. It would not undermine public confidence in the jury, but would instead enhance it, by eliminating the risk of obviously unjust acquittals where the victim of the crime was for any reason the subject of public hostility, perhaps on grounds of race, ethnic origin, religion or sexual propensity. Denial of the right to direct conviction might, indeed, encourage prosecutors to frame charges not offering the option of jury trial, or encourage the legislature to provide that new offences should be triable only summarily for fear that juries might not convict. It was for Parliament to enact the law, and not for juries to resist the enforcement of laws duly enacted. There was no need to provide a safeguard against judicial tyranny.

16. The answer to Professor Glanville Williams' question is of course that we wish juries to give true and not untrue verdicts, and that is why we require them to be sworn. It is obviously true, as Professor Glanville Williams went on to point out, that in some countries a jury system has proved to be inoperable. But in England and Wales it has been possible to assume, in the light of experience and with a large measure of confidence, that jurors will almost invariably approach their important task with a degree of conscientiousness commensurate with what is at stake and a ready willingness to do their best to follow the trial judge's directions. If there were to be a significant problem, no doubt the role of the jury would call for legislative scrutiny. As it is, however, the acquittals of such high profile defendants as *Ponting*, *Randle* and *Pottle* have been quite as much welcomed as resented by the public, which over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges. That the last word should rest with the jury remains, as Sir Patrick Devlin, writing in 1956, said (Hamlyn Lectures, pp 160, 162),

> "an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement …. The executive

> knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average member of Parliament or of the average juryman. I know of no other real checks that exist today upon the power of the executive."

Mr Perry did not invite the House to depart from its decision in *Stonehouse*. In our opinion it covers this case. We are not persuaded by the policy considerations advanced by Mr Perry that that decision should be revised.

17. Had the learned judge left the present case to the jury and directed them in the ordinary way, it seems very likely that they would have convicted. There could then have been no effective appeal. As it is, the Court of Appeal's judgment highlights the dangers of judicial intervention. It may well have been "very far from clear" what the appellant's intentions were. The nature and extent of the appellant's religious motivation had been the subject of evidence. The appellant's evidence of not wanting to leave the weapons at home with no one to look after them may well have given rise to nuances (to adopt the language of Lord Keith in *Stonehouse*) not recognised by the judicial mind. These were pre-eminently matters for evaluation by the jury. Belief that the jury would probably, and rightly, have convicted does not in our judgment entitle us to consider this conviction to be other than unsafe when there were matters which could and should have been the subject of their consideration.

18. We would accordingly allow the appeal, quash the appellant's conviction and answer the certified question by saying that there are no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty.

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