R v Caley-Knowles; R v Jones [2006] EWCA Crim 1611

COURT OF APPEAL (CRIMINAL DIVISION)

TUCKEY LJ, LEVESON, IRWIN JJ

20 JUNE 2006

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Criminal law — Trial — Direction to jury — Verdict — Direction to return guilty verdict — Judge causing jury to enter guilty verdict without retiring to deliberate — Subsequent authority that no circumstances existing in which judge could direct a guilty verdict — Whether material irregularity — Whether material irregularity rendering conviction unsafe — Whether conviction unsafe despite defendant's admissions at trial and lack of defence in law

J Dugan for the Appellant Caley-Knowles

A Whalley for the Crown

J Tucker for the Appellant Jones

H Rees for the Crown

Registrar of Criminal Appeals; Crown Prosecution Service

TUCKEY LJ:

(reading the judgment of the court)

[1] These two References by the Criminal Cases Review Commission raise the question whether it is ever open to the Court of Criminal Appeal to conclude that a conviction is safe in a case where the judge has directed a jury to convict following the recent decision of the House of Lords in *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782, [2005] 1 WLR 661, which held that such a direction should never be given.

[2] In each case the judge directed the jury to convict because the Appellant had not raised any defence in law to the indictment he faced and the jury did so without retiring. Is it enough for this court to conclude that the only reasonable and proper verdict which a jury properly directed

could have returned was one of guilty, or is such misdirection or irregularity so serious that the conviction must be quashed irrespective of the answer to that question?

[3] The First Appellant, Mr Edward Caley-Knowles, is now 69. On 19 October 1972 in the Crown Court at Kendal before His Honour Judge Edmondson and a jury, he was convicted on the judge's direction of assault occasioning actual bodily harm contrary to s 47 of the Offences Against the Person Act 1861. He represented himself at this trial which lasted one day. He was subsequently sentenced to nine months' imprisonment suspended for two years.

[4] On 5 April 1973 his case was listed before the Court of Criminal Appeal (Scarman LJ and Phillips J) when an application which he had made was dismissed. It is not clear whether this was an application for leave to appeal or for an extension of time in which to appeal. At all events it proceeded no further.

[5] The background to the offence was that the victim of the assault, Mr Barton, had worked with the Appellant on the railways until July 1967 when the Appellant was dismissed. The Appellant believed that Mr Barton was in some way responsible for his dismissal and all its consequences.

[6] On 23 June 1972, Mr Barton was travelling on a train between Carlisle and Whitehaven. Mr Barton, whose evidence was supported by two passengers on the train, said that the Appellant approached him and started shouting and threatening him. Whilst he was still sitting in his seat, the Appellant punched him twice in the face causing bruising and cuts to his gum – injuries later confirmed on examination by a doctor.

[7] At the trial, after the prosecution had closed its case, the Appellant elected not to give evidence. He then addressed the jury for 25 minutes about the circumstances of his dismissal from the railway, at which point the judge said: “Five minutes from now you really will have to start on the case that this jury are hearing, you know.” Undeterred, the Appellant continued for a further five minutes when the judge intervened again and in the exchanges which followed the Appellant admitted that he had punched Mr Barton twice in the face causing him actual bodily harm, that he had not acted in self defence and that it was not an accident. He simply asked the jury not to convict him and maintained that the assault was justified because of Mr Barton's involvement in his dismissal. He added that if he was convicted he would be sent to prison and transferred to Broadmoor.

[8] After these exchanges the judge reminded the jury of the ingredients of the offence and said that the Appellant's justification for his admitted conduct did not constitute a defence in law because in a civilised country “you are not allowed to go around hitting people because they have misbehaved towards you in the past”. He directed them that they had to return a verdict of guilty. What happened can be seen from the transcript when the judge said:

> “I am taking the matter right out of your hands. I am taking full responsibility for this verdict . . . If I have made a mistake you need not fear any injustice: it will be put right on appeal . . . but as far as today is concerned I am directing you to return a verdict of guilty.
>
> Members of the jury, will someone please stand as foreman and when you are asked the appropriate question by the Clerk of the court say 'Guilty'. This I am afraid is a formality as far as you are concerned.”

The clerk then said: “Will one of your number please stand?” Someone obviously did because he continued: “Mr Foreman, have you reached a verdict on which you are all agreed?” To which the foreman said “Yes”. The Defendant then intervened saying:

> “What a complete farce. They are supposed to adjourn to make a decision. It's ridiculous. It's a farce. If this is British justice it stinks. This is a kangaroo court.”

The clerk said: “Guilty or not guilty?” And the foreman said “Guilty”.

[9] The other Appellant, Mr Iorwerth Jones, is now 72. On 13 September 1994 in the Carmarthen Crown Court before His Honour Judge Lewis-Bowen and a jury, the Appellant was convicted on the judge's direction of damaging property contrary to s 1(1) of the Criminal Damage Act 1971. He was sentenced the same day to 12 months' imprisonment. Again the Appellant represented himself in a trial which lasted one day.

[10] The facts of the offence were that on 5 July 1994 the Appellant, then aged 60, climbed onto the roof of the Llandovery Town Hall and damaged it. He admitted causing the damage as a protest against an incident which had happened in 1983 when he was waiting to appear as a prosecution witness at the Llandovery Magistrates Court, which is in the same building as the Town Hall. He felt he had been deliberately intimidated by the barrister acting for the Defendant in that case, a former Mayor of Llandovery, who was alleged to have assaulted the Appellant. The case in the magistrates court arose out of a dispute over some land adjoining the Appellant's home. That dispute related to the local council's decision to allow a light industrial park to be built on this land. The Appellant contended that subsequent use of the land was not light industry and he had been campaigning to expose what he characterised as 'serious corruption' within his local authority on that account.

[11] The Appellant gave evidence at the trial and called a witness. This evidence elaborated on the reasons for the Appellant's protest.

[12] Lawful excuse is a defence to a charge of criminal damage contrary to s 1(1) of the 1971 Act. These words are not defined but s 5(2) says that a person charged with such an offence “shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated . . . as having a lawful excuse [if] . . .” (and we summarise) he believed the owner of the property consented to the damage or he was acting to protect his own or other property.

[13] At the end of the Appellant's case the judge asked the jury to retire and then asked whether there was any reason why he should not direct them that there was no defence. Counsel for the prosecution submitted that there was no legal defence. The Appellant submitted, somewhat ambiguously, that he had a lawful excuse but the judge disagreed and said he was going to direct the jury to convict. The Appellant was told that he could not address the jury because there was no point in his doing so if the direction was going to be to convict.

[14] The judge then told the jury that the Appellant had admitted causing the damage and said that he had decided that:

> “. . . somebody who does this amount of damage to get an inquiry into some incident about whether or not he was spoken to improperly by a barrister in 1983 or in 1984, that in my judgment as a matter of law could not amount to 'lawful excuse' for doing damage to the slates of the courthouse in Llandovery.”

He continued:

> “I am taking the step, therefore, ladies and gentlemen, of directing you to bring in a verdict of 'guilty' because there is no alternative.”

He then asked one of the jurors to stand and act as the foreman and said: “When the Clerk puts to you the question, would you please return the verdict of 'guilty'.” The clerk then said:

> “Mr Foreman, upon the directions of his Honour do you find the Defendant Iorwerth Jones guilty?
>
> The Foreman: Yes.
>
> The Clerk: And that is the verdict of you all?
>
> The Foreman: Yes.”

The judge then apologised for the fact that the jury might think this to be a rather strange procedure but he said:

> “. . . this is the only way that it can be done. In effect, the issue of innocence or guilt has been withdrawn from you, and I take it upon my responsibility.”

[15] So those are the facts of the two cases which have been referred to us. Before considering the matter further we should like to make it clear that no possible criticism can be made of either of the judges who tried these cases. There were a number of decisions of this court which supported the course they took and in each case it is clear that the judge dealt with a difficult Defendant fairly and courteously.

[16] We start by reminding ourselves of our jurisdiction and the way in which it should be exercised. Section 2(1) of the Criminal Appeal Act 1968 (as amended) says:

> “Subject to the provisions of this Act, the Court of Appeal –
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> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
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> (b) shall dismiss such an appeal in any other case.”

[17] In *R v Davis and others* [2001] Cr App Rep 115, [2000] Crim LR 1012 at pp 131 and 132, Mantell LJ giving the judgment of the court said:

> “The court is concerned with the safety of the conviction. A conviction can never be safe if there is doubt about guilt. However, the converse is not true. A conviction may be unsafe even where there is no doubt about guilt but the trial process has been 'vitiated by serious unfairness or significant legal misdirection' . . . Usually it will be sufficient for the court to apply the test in *Stirland* (1945) 30 Cr App Rep 40, which, as adapted by [counsel], might read:
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> 'assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty'?”

[18] This view was encapsulated in other words by this court's approval in *R v Hanratty* [2002] Cr App Rep 30 (para 95), of what Lord Chief Justice Carswell had said in an unreported case in Northern Ireland as follows:

> “It seems to us that it is now possible to formulate two propositions in respect of irregularities at trial . . .
>
> 1. If there was a material irregularity, the conviction may be set aside even if the evidence of the Appellant's guilt is clear.
>
> 2. Not every irregularity will cause a conviction to be set aside. There is room for the application of a test similar in effect to that of the former proviso, viz whether the irregularity was so serious that a miscarriage of justice has actually occurred.”

[19] The question for us is which side of this line do the instant appeals fall? We turn first to *Wang* to see whether it provides the answer to this question. There the Appellant was indicted on two counts of having a bladed or pointed article in a public place – a martial arts sword and a Gurkha-style knife. Relying on ss 139(4)(5)(b) of the Criminal Justice Act 1988, his defence was that he had good reason (including religious reasons) for having these articles with him because he was a Buddhist and practised Shaolin – a traditional martial arts. The judge had ruled that this did not amount to good reason as a matter of law and directed the jury to convict in the way

the judges did in our two cases. The House rejected the Crown's submission that exceptionally such a direction could be given where the burden of raising a defence rested on the Defendant. In doing so it followed the decision of the majority in *DPP v Stonehouse* [1978] AC 55, [1977] 2 All ER 909, [1977] 3 WLR 143. However, in *Stonehouse* the House of Lords had upheld the conviction of the Defendant despite the judge's misdirection, although this only related to one ingredient of the offences concerned and the jury were left to consider and decide the main issues in the case.

[20] In para 16 of the House's opinion delivered by Lord Bingham, he met the criticism encapsulated by the question "If we really wish juries to give untrue verdicts why do we require them to be sworn?" by saying that experience in England and Wales showed that juries were generally conscientious and did their best to follow judge's directions. Lord Bingham added:

> ". . . 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."

This passage gives some support for the proposition that a Defendant does have a constitutional right to what lawyers would characterise as a perverse verdict.

[21] In para 17 Lord Bingham said:

> "Had the 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 . . . 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. 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."

One can well understand this conclusion on the facts of *Wang* but we do not think this passage supports the proposition that in every case where a direction to convict is given the conviction should be considered unsafe. Lord Bingham does not ask the *Davis* question in terms or any similar question or base his conclusion upon any assessment of the seriousness of the misdirection or irregularity involved in that case.

[22] Before us the Crown in both cases have relied on the decision of this court in *R v Kelleher* [2003] EWCA Crim 3525. This was another case of criminal damage in which the Appellant, who had decapitated a statue of Margaret Thatcher, claimed that he had a lawful excuse for doing so because he wanted to protect his young son from the effects of globalisation. The trial judge directed the jury that this did not amount to a lawful excuse as a matter of law. He explained why and then said: "I must direct you that there can only be one verdict in this case and that is one of guilty." But he subsequently asked the jury to retire, which they did, and in due course they came back with a guilty verdict. On appeal to this court, Mantell LJ said:

> "44. Now whilst it is true that any other verdict might be regarded as perverse, and the judge would certainly have been entitled to say 'you may think that there can only be one verdict in this case and that is one of guilty', it can hardly be denied that the words used could be taken as a direction to convict. We can well understand . . . how this conscientious judge came to express himself as he did and we certainly do not criticise his withdrawal of the defence of 'lawful excuse'. But in our view the general issue of guilt or innocence should have been left to the jury and the words used crossed the line which separates forceful comment from a direction to convict."

[23] Mantell LJ then went on to consider whether the conviction was safe, noting that the evidence was truly overwhelming, that the Appellant had admitted the constituents of the offence and that no defence was available to him and so, following a proper direction, a verdict of guilty was, or should have been, inevitable.

[24] But the court identified a problem which Mantell LJ identified in para 46 where he said:

> "As has already been noticed, so long as the Defendant remains in charge of the jury only the jury can return a verdict of guilty or not guilty. Where there has been a direction to convict, therefore, can it be said that the verdict returned is the voluntary and therefore the true verdict of the jury and, further, if not, in such a case can it be said that there has been a conviction, let alone a safe conviction?"

After referring to the decision in *Stonehouse* and the *Davis* test, the court concluded in para 52:

> "Applying that test and following the powerful precedent provided by the House of Lords in *R v Stonehouse* and notwithstanding the logical difficulty to which we have referred, we conclude that the conviction of Mr Kelleher is to be regarded as 'safe'."

So the appeal against conviction was dismissed.

[25] The Appellant sought leave to appeal the certified question: "Can a verdict of guilty ever be considered safe if it results from a direction to convict?" Leave to appeal was refused by this court and by the House of Lords. *Kelleher* is referred to in the opinion in *Wang* (see para 14) but not for the purpose of considering that certified question.

[26] There is clearly a distinction between our cases and Kelleher which is that in Kelleher the jury were left to make a decision and retired in order to enable them to do so. In our cases, as the facts which we have related show, the judges said in terms that they had taken the decision away from the jury who were given no opportunity to retire and consider the matter for themselves. We think these are crucial distinctions. The decision in each of our cases was not in reality made by the jury at all. In each case it was made by the judge. Following clarification of the law in Wang, this must, we think, be characterised as a significant legal misdirection or a material irregularity, even though the evidence of the Appellant's guilt in each case was clear.

[27] It follows that in these two cases we are driven to conclude that the convictions were unsafe and must be quashed, despite the fact, as we conclude, that neither of them had any defence as a matter of law to the offences with which they were charged.

[28] But our decision is confined to the facts of these two cases. If we were having to decide *Kelleher* today we think we would have reached the same conclusion as this court did in 2003 and for the same reasons. We were not told whether there were any other cases dependent upon our decision, but we make it clear it is not to the effect that in any case where there has been a direction to convict the conviction should be quashed because it is unsafe. We are only deciding that a conviction will be unsafe where, as here, the issue as to the Defendant's guilt has been completely taken away from the jury.

[29] Finally, we should add this. A criminal court has always had the power to exclude irrelevant evidence and argument. The Criminal Procedure Rules 2005 include as an overriding objective "dealing with the case efficiently and expeditiously". By r 3.2(1) the court must further that objective by actively managing the case. That of course includes the exercise of the power to which we have referred during the course of a trial. Robust but reasonable use of this power is the way to ensure that a trial is not side-tracked into consideration of matters which are not as a matter of law relevant to the issues which the jury has to decide.

MR TUCKER: **[30]** Have your Lordships considered the matter of a retrial for the Appellant Jones?

TUCKEY LJ: **[31]** A retrial is quite out of the question, we would have thought.

LEVESON J: **[32]** It is unusual for the Appellant to apply. The Crown sometimes do.

MR TUCKER: **[33]** Indeed, my Lord, I just wondered whether the court had considered the matter.

TUCKEY LJ: **[34]** We have considered it, only to dismiss it very summarily.

MR DUGAN: **[35]** There is no such invitation after 34 years on behalf of Mr Caley-Knowles.

Judgment accordingly.

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