**Neutral Citation No. [2013] NICA 70** | *Ref:* **COG9036**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/11/2013**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**PAUL GREATBANKS**

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**Before Morgan LCJ, Coghlin LJ and Stephens J**

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**COGHLIN LJ (delivering the judgment of the court)**

[1] This is an appeal by Paul Greatbanks ("the appellant") from his conviction of the offence of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 (the "1861 Act"). The appellant had been indicted on a single count alleging unlawfully and maliciously causing grievous bodily harm with intent contrary to section 18 of the 1861 Act. Ultimately, he was convicted of assault contrary to section 47 of the 1861 Act by a majority of 11 to 1 and his appeal is based upon two discrete grounds. The first is that the learned trial judge erred in leaving alternative offences to the jury after the close of the defence evidence and the second is that the learned trial judge erred in his charge to the jury by delivering a "rolled up" direction incorporating a 'Watson' direction, a direction relating to a unanimous verdict and a direction relating to a majority verdict. The single judge granted leave in respect of the second ground of appeal but refused leave for an appeal based upon the first ground. For the purposes of the hearing before this court the appellant was represented by Mr Gavyn Cairns while Ms RoseAnne McCormick appeared on behalf of the Director of Public Prosecutions. The court is grateful for the care and industry with which both counsel prepared and delivered their written and oral submissions.

[2] The main prosecution witness was a 47 year old male (the "injured party") who gave evidence that on Tuesday 28 December 2010 he had visited the Ice Wharf Bar on Strand Road in the City of Derry with two friends at about 8.00 pm. After buying their drinks, the injured party said that they went to a table at which one man, the appellant, was already sitting. According to the injured party the appellant did not object to the three additional men sitting down at the table and they

commenced to converse among themselves. One of their number had lived in London and they noticed that the appellant had an English accent. There was a brief discussion about the area of London in which the appellant had lived. According to the injured party at one point the appellant stood up, drank three quarters of a pint of beer and a hot whiskey, lifted a bar stool and brought it down upon the injured party's head. The injured party gave evidence that he had been seated at the time of this completely unprovoked attack and had put his hand on his head for protection. In the course of his directions to the jury the learned trial judge observed that:

> "It is implicit in the Prosecution case that the defendant was annoyed at the three men, in a sense muscling in on his table and, in effect, forcing him away from his table, and that he must have been angry at this and acted in an unprovoked and hostile way assaulting Mr McLaughlin with the chair."

The account given by the injured party was, in general terms, supported in evidence at the trial by one of the other men by whom he had been accompanied.

[3] The appellant made the case in evidence that it was the injured party who had been the aggressor that he had been called an "English bastard" and that there had been references to Bloody Sunday. He said that he had felt intimidated and threatened and that when the injured party stood up he reacted instinctively, anticipating that he was about to be assaulted, and threw the barstool at the injured party. He relied upon self-defence as an answer to the charge that he faced.

[4] As a consequence of being struck by the barstool the injured party sustained a 7 cm laceration to his head that required six staples together with a fracture of the lower part of his little finger. The latter injury required surgery under general anaesthetic and the finger had to be wired. The injured party was required to attend for a number of weeks of treatment and physiotherapy at the fracture clinic.

**The indictment**

[5] The original indictment contained only a single count namely, causing grievous bodily harm with intent contrary to section 18 of the 1861 Act. In accordance with good practice, prior to delivering his charge to the jury, the learned trial judge held a discussion with counsel with regard to the form that his final directions should take. In the course of that discussion the learned trial judge indicated that he was minded to instruct the jury that if they entertained a reasonable doubt with regard to the count appearing on the indictment it was open to them to consider whether the appellant had been guilty of less serious offences including wounding with intent and assault contrary, respectively, to section 20 and section 47 of the 1861 Act. Mr Cairns objected to such a course of action.

emphasising that the Public Prosecution Service ("PPS") had opted to pursue a prosecution based solely on section 18 and that, in such circumstances, the prosecution should not be permitted to resile therefrom, particularly after the evidence had closed including testimony given by the appellant himself.

[6] The learned trial judge rejected the objection made by Mr Cairns and directed the jury that if they were not satisfied, so that they were sure, in relation to the count on the indictment it was open to them to consider that they were satisfied that the appellant had been guilty of less serious offences under either section 20 or section 47 of the 1861 Act. For the purpose of assisting them in their deliberations the learned trial judge provided the jury with a document identifying the constituents of the charge on the indictment and each of the alternative offences. He also supplied the jury with a document setting out a "route to verdict" as an aide memoire for use in the course of their deliberations.

**The "Watson Direction"**

[7] Approaching the end of his summing up to the jury the learned trial judge addressed them with regard to verdicts in the following terms:

> "Your first duty is to try to arrive at a unanimous verdict, that is a verdict on which you all agree, whether the verdict is guilty or not guilty. As was explained to you in the jury video at the beginning of your jury service the law permits me, in certain circumstances, to accept a verdict of guilty or not guilty which is not unanimous, but that is to say a majority of ten or more if you are agreed, but I cannot do that unless you have had at least two hours for deliberation and have, after that period of time, failed to reached a verdict upon which you are all agreed."

He then emphasised the importance of reaching a unanimous verdict noting that, if, regrettably, the jury were so divided that there was no hope that even ten of them would be able to agree they should come back as "having disagreed". His directions then continued in the following terms:

> "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, and that is the strength of the jury system. Each of you takes into the jury room with you your individual experience and wisdom. You do that and you decide the case by giving your views, and listening to the views of your colleagues. There must necessarily be

> discussion, argument, give and take within the scope of your oath - that is the way in which agreement is reached. If, unhappily, ten of you cannot reach agreement you must say so. If, on the other hand, you reach or are likely to reach a verdict on which at least ten of you are agreed, then you may be in a position to get a majority verdict but in such an event do not come back with a verdict in less than two hours and ten minutes. The period of two hours is laid down by Act of Parliament and the extra ten minutes is added on to ensure that a majority verdict is preceded by at least two hours deliberation, as sometimes the jury has to go some distance to and from the courtroom. But as I say, this may not arise as your first aim is to reach a verdict on which you are all agreed, if possible."

The jury returned with their verdict after some two hours and nineteen minutes.

**The respective arguments of counsel**

[8] Mr Cairns reminded the court that when the question of alternative verdicts had been raised by the trial judge counsel for the PPS conceded that a purposeful decision had been made by the Crown to proceed on the single count without adding any alternatives to the indictment. He also emphasised the fact that the question of alternatives had been raised after the completion of the evidence and that it was impossible for him to say with any confidence that he would not have conducted his examination of the witnesses differently had he anticipated such a development. In particular, he submitted that the proposed alternatives raised an entirely new strand to the Crown case which had not been present in relation to the indictment as drafted viz the question of recklessness. Mr Cairns further submitted that the learned trial judge had erred in the timing of the 'Watson' direction and the majority direction by rolling them up with the direction to the jury that their first aim should be unanimity. Mr Cairns argued that the combination of these two matters rendered the verdict unsafe.

[9] By way of response Ms McCormick referred the court to a number of standard texts and authorities dealing with the question as to whether, and if so, when alternative offences ought to be left to the jury and emphasised that the appellant had been unable to identify any prejudice alleged to have resulted from such a course of action. It is to be noted that Mr Cairns did not requisition the learned trial judge in relation to any unfairness or prejudice alleged to have arisen as a consequence of the delivery of the "rolled up" verdict directions.

**Leaving alternative offences to the jury**

[10] The basic principles were clearly and succinctly set out by Lord Bingham in R v Coutts [2006] 1 WLR 2154 at paragraph [12] when he said:

> "In any criminal prosecution for a serious offence there is an important public interest in the outcome (R v Fairbanks [1986] 1 WLR 1202, 1206). The public' interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (Von Starck v The Queen [2000] 1 WLR 1270, 1275; Hunter and Moodie v The Queen [2003] UKPC 69, paragraph [27])."

By way of refinement Lord Bingham confined the rule to alternative verdicts obviously raised by the evidence which would suggest themselves to the mind of "any ordinarily knowledgeable and alert criminal judge" excluding alternatives which ingenious counsel might identify through diligent research after the trial. He considered that the trial judge was free to exercise his discretion irrespective of the wishes of trial counsel noting, at paragraph [23], that "A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency." However, he also emphasised that it was fundamental that the duty should not be exercised so as to infringe a defendant's

rights to a fair trial. At paragraph [24] of his judgment Lord Bingham noted that:

> "There may be unfairness if the jury first learn of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct."

[11] In R v Hodson [2009]1 EWCA Crim 1590 Keene LJ referred to the commentary on Coutts contained in the decision in R v Foster [2008] 1 Cr App R 38 noting that the unequivocal principle from Coutts was that it was for the judge to determine whether alternative verdicts should be left to the jury, notwithstanding united submissions by counsel to the contrary, but that there was no automatic requirement for the judge to leave an alternative verdict if such a verdict would not properly reflect the facts of the case, when judged realistically, or would not do justice to the gravity of the case. Keene LJ emphasised that the exercise of the discretion was highly fact specific and that it was particularly important that the discretion should be exercised where the offence charged require proof of a specific intent and the alternative offence did not. It is to be noted that Hodson involved an allegation of "glassing" in which the Recorder had failed to leave an alternative offence of section 20 wounding in an indictment charging only section 18 wounding. Neither the prosecution nor the defence had sought to persuade the Recorder to leave a section 20 charge to the jury - the real issue being one of self-defence. In that case the omission to leave a section 20 charge to the jury was held to render the conviction unsafe. There had been no discussion between counsel and the Recorder with regard to such a possibility nor had the decision in Coutts been drawn to the Recorder's attention. The principles set out by Lord Bingham in Coutts were also referred to with approval by this court in R v Croome [2001] NICA 3 including the reference by Lord Hutton in that case to a passage from the speech of Lord Clyde in Von Starck v The Queen [2000] 1 WLR 1270 emphasising the overarching function and responsibility of the trial judge.

[12] In this case the learned trial judge quite properly raised with counsel the question as to whether alternative offences should be left to the jury. According to the note prepared by his instructing solicitors in submissions on the 12 November 2012 Mr Cairns objected upon the ground that the prosecution had limited itself to the section 18 count. The note also records that he referred to the learned trial judge to the decision in Mandair [1995] 1 AC 208 and submitted that "If the jury accepts self-defence all is irrelevant." It appears that, in such circumstances, he conceded that he would not have changed his defence if the alternatives had been originally present. Counsel appears to have thought further about the matter overnight and a

note dated 13 November 2012 refers to a further discussion between counsel and the judge in the course of which Mr Cairns maintained that, had the alternatives been present on the original indictment, he would have tailored "the cross-examination regarding recklessness". The learned trial judge took further time for consideration and delivered his ruling at 12.15 pm on 13 November 2012. In the course of that ruling the learned trial judge explained that he intended to place alternative verdicts of section 20 and section 47 before the jury in the interests of the defendant in order to avoid the risk that the defendant might be "over-convicted" if a jury were left to choose between section 18 and an acquittal.

[13] It is clear from the authorities referred to above that the responsibility for deciding whether or not to leave additional alternative offences to the jury remains at all times with the trial judge. In discharging that responsibility the learned trial judge must have regard to the overall interests of justice insofar as they relate both to the public interest and to the defendant's right to a fair trial. It is clear that counsel for the appellant was given a full opportunity to deal with the proposal to leave additional offences to the jury prior to the closing speeches and the judge's final directions. At no stage was counsel able to particularise his general references to "recklessness" in such a way as to establish any degree of significant prejudice on the part of the appellant. In such circumstances, we are not persuaded that the decision of the learned trial judge has rendered this conviction unsafe.

**The verdicts direction**

[14] We were referred by counsel to a number of authorities supporting the proposition that a "Watson" direction, if it is to be given at all, should only be given in circumstances in which there is no danger of subjecting a jury to undesirable pressure to bring in a verdict. The transcript confirms that the learned trial judge did complete his charge to the jury by giving them a form of "rolled up" direction with regard to their verdict. In the course of doing so he referred to their "first duty" to seek to arrive at a unanimous verdict while at the same explaining by reference to the jury video that the question of a majority verdict would not arise until at least two hours of deliberation had elapsed. His direction incorporated the "Watson" phraseology. Counsel drew our attention to a number of cases in which courts had deprecated the combination of a Watson direction with a majority direction. In R v Atlan [2004] EWCA Crim 1798 a five member Court of Appeal in England and Wales affirmed the cardinal principle that a jury should be free to deliberate and reach a verdict free from improper pressure and in R v Buono [1992] 95 Cr App R 338 the Court of Appeal held that, if it was to be given, a Watson direction should be delivered either during the summing up or after the jury had considered the majority direction for a reasonable time. The relevant authorities have been comprehensively reviewed most recently by the Court of Appeal in England and Wales in R v Arthur [2013] EWCA Crim 1852.

[15] It is important to recognise that the law on this subject has followed a rather different course of development in this jurisdiction as compared to that taken in England and Wales where the Criminal Justice Act 1967 was followed by the formal Practice Direction 1 WLR 1198. Directing a jury in accordance with that Practice Direction had the result that, apart from knowledge acquired by other means, the jury would not know how to approach a majority verdict without further specific direction. In R v Deegan [1987] NI 359 Lord Lowry LCJ observed that a deliberate decision had been taken in Northern Ireland not to impose any particular procedure upon the trial judge beyond what the Criminal Procedure (Majority Verdicts) Act (Northern Ireland) 1971 (the "1971 Act") required. He helpfully set out a formula for the instruction of the jury that he had devised after the passing of the 1971 Act and recommended that a judge should charge the jury along the lines set out in that formula. In doing so Lord Lowry observed, at p366:

> "This direction tells the jury at once not only that they can bring in a majority verdict either way (a point which can be overlooked), but also the size of the majority needed and the time which must elapse before such a verdict can be accepted. We consider that, since in these days one or more jurors are bound to have heard of majority verdicts, it is better to give the jury a clear picture rather than leave them in doubt."

As the learned author of *Valentine on Criminal Procedure in Northern Ireland* (2nd Edition) notes in the footnote on p 437 that "differs sharply from English practice." In concluding his judgment Lord Lowry noted that if a jury returned to court after deliberating for at least two hours and ten minutes the judge would retain a discretion as to whether it would be reasonable to receive a majority verdict having regard to the nature and complexity of the case.

[16] In R v McMoran [1999] NIJB 50 Carswell LCJ, delivering the judgment of this court, said at page 53:

> "Finally, we would say on the question of the proper procedure to be adopted in majority verdicts there is no canonical content of what a judge should say at any individual stage, so long as the correct direction is eventually given about majority verdicts. By way of guidance we would say that our own preference would be that a judge, when a jury is first addressed by him on majority verdicts before it originally leaves to consider its verdict, might touch upon the possibility that a majority verdict could be received in due course, as many jurors will be quite well aware

> that these exist; but he might find it preferable to indicate that he would not give them any direction upon that then, but if they had not been able to reach the desirable conclusion of a unanimous verdict he would take the opportunity at a later stage to do so. We offer that purely by way of guidance; every judge is entitled to do it in his own way and to take his own course."

[17] In R v Gault [2004] NICA 25 Kerr LCJ identified the principle underlying the decision in Watson and subsequent authorities as the need to avoid placing the jury under pressure to reach a verdict and, at paragraph [50] of the judgment he said:

> "[50] It appears to us that whether the 'Watson' direction should be given and, if so, at what time, will depend very much upon the circumstances of each individual case. With respect to the Court of Appeal in Buono and the authors of Archbold we do not favour a prescriptive approach to this question but believe rather that a decision on whether, when and in what terms to give a 'Watson' direction should be taken in the light of the particular situation at the time that the question is being considered. The guiding principle should be that every effort should be made to avoid putting pressure on the jury."

Perhaps unsurprisingly the Court of Appeal in England and Wales came to a somewhat similar conclusion in Arthur and in the course of giving the judgment of the court Pickford LJ said at paragraph 44:

> "44. As the decisions to which we have referred demonstrate, if complaint is made about the trial judge's words of explanation, encouragement or exhortation the question for this court is whether the words used were appropriate in the circumstances or carried with them the risk that jurors would feel undue pressure to reach a verdict. If the effect of the judge's direction to the jury is to create a significant risk that the jury or individual jurors may have felt under pressure to compromise their oaths, the verdict is likely to be unsafe. No juror should feel required to compromise their oath in order to fall in with the majority and no jury should feel under pressure to reach a verdict if to do so would require any one of them to compromise their oath. The danger is that all

> jurors, particularly the minority, will feel pressure to return a verdict unanimously or by an acceptable majority at the expense of conscientious consideration of the evidence. The closer the jury is to unanimity or to an acceptable majority the greater is the pressure to which the minority may feel exposed. As these decisions demonstrate each case must be considered on its own particular facts."

[18] In this case the Watson formula was incorporated into the trial judge's summing up, in accordance with the direction approved by this court in Gault. At that stage the possibility of the jury returning a majority verdict simply had not arisen. In accordance with modern day practice the jury had been given the helpful benefit of seeing a video prior to being sworn in. That video referred to the possibility of delivering a majority verdict and it appears that in such circumstances, the learned trial judge was doing his best to ensure that the members of the jury understood that their primary duty was to endeavour to reach a unanimous verdict and that the possibility of a majority verdict, while it existed, would not arise until they had been afforded a significant period of deliberation to assist them to do so. His words were simply explanatory in that context. At that point:

- The jury had heard all the evidence and speeches.
- While the trial had lasted for a number of days, a significant portion of that time had been taken up with legal argument in the absence of the jury.
- The jury had been excused attendance during the morning.
- There was only one accused.
- There was only one count on the indictment with two alternative charges to consider each of which related to the same set of facts.
- The issues were clear - had the appellant struck the injured party with the chair as a weapon in the course of an unprovoked deliberate assault or by throwing it at him in an act of self- defence?
- The Learned Trial Judge had provided a clear and helpful written 'route to verdict' for the assistance of the jury.

In such circumstances there can be no question that the use of the Watson formula at that point was likely to place the jury under any degree of improper pressure to bring in a verdict. The jury had not yet retired and there was no reason to anticipate any difficulty was likely to arise with regard to the jury's deliberations. In fact no formal majority verdict direction was ever required in this case, the jury returning with their verdict after just over two and quarter hours of deliberation. Having carefully considered the matter in the light of the written and oral submissions of counsel we have not been persuaded that this direction rendered the conviction unsafe.

[19] We have not been persuaded by the grounds of appeal advanced, either separately or in combination, that this conviction is in any respect unsafe and, accordingly, the appeal must be dismissed.

[20] The guidance contained in the current Crown Bench Book at 6.1 relating to Majority Verdicts reflects the practical, non-prescriptive approach adopted in this jurisdiction. Every criminal trial before a jury must be considered in terms of its own specific legal and factual context. The primary aim for the jury is to try to reach a unanimous verdict and that aim should always be emphasised by the trial judge prior to the jury retiring. The 1971 Act provided for the acceptance of a majority verdict but only in certain conditions one of which is that the jury must have had not less than two hours for deliberation "or such longer period as the court thinks reasonable having regard to the nature and complexity of the case." Thus the trial judge retains a statutory discretion as to whether to accept a majority verdict even if the requisite time has elapsed. The fundamental principle is the need to ensure that the jury is not put under unfair pressure to bring in a verdict in the circumstances of the particular case. That is the principle that should be clearly kept in mind by the trial judge both when completing his charge and, if required, when delivering a specific majority direction and it is that principle, carefully related to the legal and factual framework of the particular case, that should determine the amount of detail and degree of emphasis to be imparted to the jury with regard to majority verdicts. The ultimate form and structure of his directions must always remain the responsibility of the judge but, given the difference of approach that has developed between jurisdictions, a judge may well feel it to be prudent to include this topic in the pre-charge discussions with counsel which have proved so helpful a feature of modern criminal practice.