

Neutral Citation No. [2014] NICC 20

Ref: TRE9450

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 18/11/2014

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

ANTRIM CROWN COURT SITTING IN BELFAST

R

v

FRED McCLENAGHAN

TREACY J

[1] The Accused is charged with one count of murder, the particulars of the offence being that on 11 March 2011 he murdered Marian Millican.

[2] The Defence has applied to discharge the jury as a result of circumstances which have arisen beginning with the irregular separation of three jurors during lunch break without the permission of the Court and whilst not in the custody of any jury keeper. Subsequent investigations have revealed that there were other matters not drawn to the attention of the Court which should have been including the fact that at least one juror was not receiving adequate sustenance and complained of that fact although this complaint was not drawn to the Court's attention.

[3] These matters, to which the Court's attention has now been drawn, were relied upon by the Defence in support of their application to discharge the jury. The Prosecution did not object to the application to discharge because of the concerns it shared with the Defence. Indeed, as matters progressed, Senior Counsel for the Prosecution went further and positively supported the application.

[4] As I indicated on Monday 29 September 2014 I was persuaded that in light of all of the events that have happened that the jury must be discharged. I announced

this decision in open Court and indicated that I would provide more detailed reasons at a later stage. This I now do.

[5] During the second week of the trial, on Tuesday 23 September 2014, shortly before the Court was about to rise, I was passed a note from Ms McKee, the Crown Court Office Manager, who requested the Court not to release the jury for that day until she had had an opportunity to speak to the Judge. Accordingly, the jury was not released until I had the opportunity to speak to her. It was then that I learned that three jurors had separated at lunchtime that day without the permission of the Court and whilst not in the custody of a jury keeper.

[6] An incident report was then requested from G4S who supply the jury keepers. This incident report was received the following morning. It confirmed that three jurors had been allowed to separate for the purposes of going out for a hot lunch. It appears that they went to a local chip shop and returned within 15 minutes. They were not accompanied by any jury keepers whilst thus separated.

[7] As part of the incident report the Court was furnished with a number of statements including two from the jury keepers. From this the Court discovered that in the preceding week, on Tuesday 16 September 2014, one female juror had indicated to the jury keeper that she "needed" a hot lunch. The jury keeper explained that the lunches were cold and that she could make a written complaint to the Court Service. Two jurors furnished a note indicating that they did not like sandwiches or cold food and requesting access to hot food facilities. The jurors were not informed that they could raise the matter with the Court, the correspondence from the two jurors was not furnished to the Court, and the Court was not otherwise made aware that food had become an issue. Thus the Court, Counsel and the parties were wholly unaware of the fact that food had become an issue for at least some of the jurors in this murder trial.

[8] In my view, the important issue the jurors raised regarding the provision of food should have been brought to the attention of the Trial Judge. Had it been, the parties and the Court would have been alerted to the issue and steps could have been taken to address the issue at that point in time.

[9] The jurors note was never responded to by those who received it and the issue about food which had been raised went unacknowledged and unaddressed. A week later on Tuesday 23 September 2014 one of the jurors raised the issue of food again with officials outside Court stating "I'm starving, can I not go outside for hot food?" A number of the other jurors also enquired about going out. The jurors concerns were not drawn to the Court's attention nor was the permission of the Court sought for them to separate. Without the knowledge or permission of the Court three jurors were allowed to leave unaccompanied by any jury keepers and left Laganside for approximately 15 minutes and returned with bags of hot food.

[10] The genesis of the problem appears to have been a change in policy in relation to the provision of food for juries. Formerly Laganside juries had been provided with hot meals but as a cost saving measure it was decided that from September 2014 they would now be provided only with cold sandwiches. There was also no provision in the jury room by way for example of a microwave for jurors to warm food if they chose to bring it in. The Court and the parties were completely unaware that there was an issue about something as basic as proper food for the jury. As far as the Court and the parties are concerned the matter came to a head on Tuesday 23 September 2014 when the Crown Office Manager drew the issue of jury separation to the attention of the Court.

[11] The net effect of what occurred was that three jury members were allowed to separate at lunchtime on 23 September 2014 contrary to what the parties assured me was the uniform practice in this jurisdiction. This was done without the permission or knowledge of the Court or the parties.

[12] Jury keepers are sworn as follows:

“I swear by almighty God that I will well and truly keep all juries committed to my charge. I will not speak to them or suffer any person to speak to them or communicate with them touching any matter relative to the various trials at this Court, except to ask them at an appropriate time if they are agreed upon a verdict.”

[13] Art 20 of The Juries (NI) Order 1996 provides:

“Separation and detention of jurors

20.(1) In the course of a criminal trial the judge may at any time (whether before or after the jury has been directed to consider its verdict) permit the jury to separate.

(2) In the course of the trial in the High Court of any action or issue therein the jury may in the discretion of the judge be detained during an adjournment of the court (other than an adjournment at the termination of proceedings for the day).”

[14] The issue of unauthorised separation is dealt with at para D19.7 of Blackstone's Criminal Practice (2014) which states:

"Consequences of a Lapse of Custody If the jury leave the custody of the jury bailiff, it constitutes a material irregularity in the course of the trial which will almost certainly necessitate the quashing of any conviction. For example:

- (a) In *Neal* [1949] 2 KB 590, the jury (with the judge's permission) left the court building in order to buy lunch at a restaurant. The conviction was quashed because, even assuming the circumstances justified the judge in allowing the jury to leave the court precincts, it was essential that the bailiff went with them. In his absence, there was no way of knowing who might have spoken to them about the case. It should be noted that the Juries Act 1974, s15, now permits the jury to purchase reasonable refreshment at their own expense during the course of their retirement.
- (b) In *Ketteridge* [1915] 1 KB 467, where one of the jurors by mistake did not go to the jury room on retirement but left the court and was on his own for some 15 minutes before re-joining his colleagues, there was a breach of both of the rule that the jury must not separate (see D19.8) and of the rule that the jurors must remain in a bailiff's custody."

[15] The issue of jury separation is also helpfully considered in *Criminal Procedure Northern Ireland* 2nd Ed by B J A C Valentine:

"9.16 Jurors, after having been sworn, may, in the discretion of the judge, be provided, free reasonable refreshment (Art 23). Throughout the time when the court is sitting in the trial of the case which is in their charge, the jury must be kept together as a 'locked-up' jury with no unauthorised contact with any other person. Sworn jury-keepers ensure this. Either the jury are in the jury box listening to the evidence and speeches or, during proceedings heard by the judge in their absence (eg a *voir dire* on a confession or a submission of no case to answer),

they are locked in an adjacent jury-room. At one time, in felony trials, the jury had to be locked up during recesses of the court and overnight adjournments. But now the judge may at any time (whether before or after the jury have been directed to consider its verdict) permit the jury to separate (Art 20(1)). This includes periods when the judge is hearing lengthy proceedings in the trial in their absence, in which case the judge should ban all the jurors from entering the court. The separated jury may go their own way unsupervised. The judge will warn them not to talk to any person about the case,¹ nor to read of it in the newspapers, nor to engage in private research on the internet for information about the case or the law generally, but there is no means of enforcing that.² The Contempt of Court Act 1981 (s8(2)) allows the judge to question jurors to find out if any juror has talked about the case to an outsider and if he has passed on extrinsic information to the other jurors.³

If the judge has not allowed separation under Article 20 the locked-up jury must not communicate with anyone about the case, nor about anything save in so far as necessary.⁴ They are kept under constant supervision by the jury-keepers and police. They need not be together all the time in one room – sleeping accommodation will be separate – and they may talk to waiters etc and if necessary a doctor. By leave of the judge, a juror may deal with urgent personal business,⁵ and may be taken on excursions for fresh air and exercise if kept together with the others under strict supervision.⁶ The jury-keeper must not socialise with any jurors or have any discussion at all with them about the general approach to their deliberations.⁷ In all cases the jury must be locked up after the judge's summing up, when they retire to consider their verdict.⁸ Save as allowed by the judge,

¹ *R v Prime* [1973] 57 Cr App R 632

² In *R v Twiss* [1918] 2 KB 853, where it was discovered that a juror had spoken to a Crown witness, the Court of Criminal Appeal upheld the conviction because nothing prejudicial had been said. (See also *People v Quinn* [1965] IR 366, at 378-9)

³ *McCadden v HM Advocate* 1986 SLT 138, at 140

⁴ *R v Taylor* [1950] NI 57, at 72-3; *People v Herrernan (No.2)* [1951] IR 206

⁵ *R v Taylor* at 71

⁶ *R v Taylor* at 75.

⁷ *People v McDonagh* [2003] 4 IR 417

⁸ *R v Taylor* [1950] NI 57, at 70

they must speak to nobody except to the jury-keeper to say whether they have reached a verdict.⁹ During intervals for meals or overnight they should be treated like a locked-up jury before retirement. The whole jury should be discharged if one juror separates from the others without leave of the judge.¹⁰ In an exceptional case the judge may order police protection for the jury.¹¹ [Emphasis added]

[16] Blackstone and Valentine thus make it abundantly clear that unauthorised separation of the jury can lead to the discharge of the jury as constituting material irregularity.

[17] What is clear and undisputed in the present case is that without leave of the Court three jurors separated from the jury and the jury-keepers were not present during their separation. This was a violation of the Juries Order which only permits separation with the permission of the trial judge. It was also a breach of the jury keepers oath set out above. The three jurors were allowed to leave the precincts of the Court to go to a local shop to purchase hot food. They did not discuss the case amongst themselves or with any third parties. One of them did however see some friends with whom she stopped and got a light for her cigarette but did not discuss the case.

[18] I enquired of the three jury members what had transpired whilst separated. I considered at the time that this was appropriate since the absence of prejudice might be relevant to the exercise of the Court's discretion to discharge the jury. This was an uncomfortable process even though the Court made it abundantly clear to them that there was not the slightest suggestion that they had themselves done anything wrong. They hadn't. The individual jurors were entirely blameless and had acted with permission of court officials. On reflection it is difficult to see how such an exercise can be conducted without at least running the risk of generating such apprehension in the mind of a juror. The Court and juries ought not to be put in that position. I am now inclined to the view that it may be inappropriate in circumstances *such as those in the present case* to conduct enquiries if they entail a risk that individual jurors may be discomforted by such enquiries.

[19] In light of the clear line of authority regarding the consequences of unauthorised separation of the jury and the justified agreement of the parties that the jury should in the circumstances of the present case be discharged I acceded to the application to discharge the jury.

⁹ *R v Taylor* at 72

¹⁰ *R v Ketteridge* [1915] 1 KB 467

¹¹ *R v Dodd* [1982] 74 Cr App R 50