THE COURT OF APPEAL

Record Number: 114/2020

McCarthy J.
Kennedy J.
Ní Raifeartaigh J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

J.N.

APPELLANT

JUDGMENT of the Court delivered on the 27th day of July 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 27th January 2020, the appellant was convicted of rape contrary to s. 48 of the Offences Against the Person Act, 1861 and s. 2 of the Criminal Law (Rape) Act, 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act, 1990. On the 16th June, 2022, this Court dismissed the appeal, and indicated that reasons would be furnished in due course, which this judgment now does. The issue which arises relates to whether the jury commenced deliberations before the trial judge delivered his charge.

Factual background

2. It is unnecessary for the purpose of this appeal to set out the background to the offence in any detail. It is sufficient to state that the appellant faced a count of rape concerning his niece wherein it was alleged that on an occasion when she was staying with her grandparents, the appellant entered her room and raped her. The appellant contended that the allegation was fabricated.

The Appeal

3. The appellant was granted an enlargement of time to appeal by this Court on five grounds. Those grounds relate to allegations of jury misconduct, namely:-

    a) That the jury engaged in deliberations prior to retiring to consider their verdict and

b) That a jury member felt under duress to agree to a unanimous verdict.

4. During oral argument, counsel for the appellant advanced the grounds concerning premature deliberations, which are particularised in grounds 1,2,3 and 5:-

> *"Ground 1*
>
> *An indication was given to the Court that the jury may have been carrying out their deliberations and/or discussing the evidence as early as the sixth day of the trial before all evidence and directions were given by the trial Judge. A member of the jury enquired as to the timeline when they could consider the evidence. Upon enquiry, an undertaking was given by the foreperson of the jury that they had not embarked upon any such deliberations at that point in time.*
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> *Ground 2*
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> *Subsequent to the trial, correspondence received by the Applicant's Solicitor and brought to the immediate attention of Court indicates that the jury may well have commenced their deliberations prior to the presentation and completion of all evidence and the receipt of the Judge's charge.*
>
> *Ground 3*
>
> *The enquiry gave rise to further serious concerns that the jury was confused about the basic principles which must apply to a criminal trial.*
>
> *Ground 5*
>
> *The verdict returned is perverse, unsafe and unsatisfactory as it cannot be said that there was confidence that the jury properly understood any or all of the matters upon which they were charged throughout the trial by the learned trial Judge."*

Background giving rise to the appeal

5. The appellant was put in charge on the 14th January 2020. On the 21st January 2020, a note was provided by the foreman wherein a query in the following terms was raised:-

> "[a]t the end of the day jury members sometimes wish to talk for a little while to absorb and better understand the day's proceedings but not to discuss a verdict. On Friday last and yesterday we were told that we were not allowed to speak. We found this puzzling and a little frustrating. We would appreciate some clarification please."

6. The trial judge instructed the jury that they were not permitted to discuss their collective thinking until the judge's charge had concluded. The foreman asked a further question:-

> "Well, discussing what we have heard during the day, making sure that we have all heard the same thing and that we understand what's been said and this helps us to

understand and clarify what we have been listening to to make sure that we have all heard what's been said. Is this not allowed?"

7. The judge clarified that the jurors were allowed to speak with each other but could not attribute weight to what they had heard at that stage of the trial. Following discussion with counsel the judge went on to say:-

> "JUDGE: ……So, you must proceed in the knowledge that if you have missed something you can be reminded of that, either by the judge reading it back to you or simply by being told what the net effect of something was as the case may be but just to answer your follow on question, it seems to me that if you are proposing to discuss the case purely for the purposes of – purely for what I would call administrative purposes to determine what witnesses did we hear today, what evidence did they give in relation to whether there was a rape in 1978 or what, that is permissible but what is not permissible is to embark upon a judicial consideration of the weight to be attached to that evidence or whether you accept it or not. In other words you can clarify in your own minds what the evidence was but you are not allowed to begin on an assessment of whether you accept the evidence or whether you don't accept it. That's something that has to be deferred until such time as you have heard all of the evidence and received the judge's charge.
>
> FOREMAN: Thank you very much for that very helpful clarification, Judge, and the Court. We can—I think on behalf of the jury we will assure you that we have never at any stage discussed a verdict."

8. Jury deliberations commenced on the 24thJanuary 2020, and a unanimous verdict was returned on the 27th January 2020.

9. On the 29th January 2020, a juror, Mr. B, contacted senior counsel for the appellant and the following day, the appellant's solicitor received a letter which was furnished to the Court and to the respondent alleging jury misconduct. A letter was also furnished to the trial judge.

10. On the 11th February, the trial judge received submissions regarding the letters and determined that he had no jurisdiction to query the jury deliberations and on the 21st February, sentence was imposed.

Premature deliberation

11. In essence, the issue in this appeal concerns communications by a juror post-trial wherein it is alleged that members of the jury had their minds made up after the appellant's evidence and before the judge's charge, notwithstanding the trial judge's instruction on day 6 of the trial.

Submissions of the appellant

12. The appellant refers to the juror's letter to the solicitor who represented him at trial wherein he stated:

> "…. a section of these people had their minds made up after the J.X. evidence was finished."

13. The appellant relies on *The People (DPP) v Mulder* [2007] IECCA 63 and says that this decision is of some assistance concerning the threshold for review. In *Mulder*, while a jury was empanelled to try the accused on a charge of murder, a member of the deceased person's family shouted from the public gallery. A further incident occurred whereby it transpired that a juror felt a relative of the deceased's brother was overly familiar. The Court of Appeal found that the cumulative effect of the incidents "would have all led an observer to be concerned that there would be a risk of an unfair trial."

14. In *The People (DPP) v Tobin* [2001] 3 IR 469, the test as to jury bias is an objective one and such decisions must be made in light of Article 38 of the Constitution. In *Tobin*, the appellant's conviction was quashed where a juror, during deliberations in a rape and sexual assault trial, disclosed that they had been a victim of sexual assault. It was said that while "the actual facts are very meagre" it could not be ruled out "that the juror might have been unconsciously influenced by his or her personal experience."

15. The appellant acknowledges that the juror did not explicitly state that the jury engaged in premature deliberations; however, it is submitted that there is sufficient evidence to persuade this Court that the jury engaged in a level of pre-deliberation such that would undermine the reasonable observer's confidence that the appellant received a fair trial.

16. In addressing whether the findings of a jury will be investigated, the appellant refers to *R v Mirza* [2004] 1 AC 1118 which states that the findings of a jury will not be investigated unless one of two "narrow exceptions" are met, the first being the repudiation of a jury's' oath and the second being the involvement of outside material. Mr. Gageby SC, now representing the appellant, places considerable emphasis on the dissenting judgment of Lord Steyn where he held that applying a narrow test would undermine confidence in juries at para. 16:-

> "Public confidence in the legitimacy of jury verdicts is a foundation of the criminal justice system. And there must be a general rule making inadmissible jury deliberations. But it is difficult to see how it would promote public confidence in the criminal justice system for the public to be informed that our appellate courts observe a self-denying rule never to admit evidence of the deliberation of a jury even if such evidence strongly suggests that the jury was not impartial. In cases where there is cogent evidence demonstrating a real risk that the jury was not impartial and that the general confidence in jury verdicts was in the particular case ill reposed, what possible public interest can there be in maintaining a dubious conviction?"

17. Mr. Gageby argues that a rigid application of the jury secrecy rule breaches the right to a fair trial.

18. It is contended on behalf of the appellant that the jury disregarded the trial judge's instruction not to deliberate until all evidence was heard and the charge delivered. It is said that this is demonstrated by the foreman's note and query of the 21st January and the juror's letter asserting that some jury members had their minds made up at an early stage of the trial and following the judge's instruction. It is argued that this is a clear breach of a jury's duty and has constitutional implications in that it deprives an accused of the right to a fair trial. Moreover, it is contended that the general no impeachment rule cannot be without some exceptions.

19. Insofar as the absence of sworn evidence grounding the allegation of jury misconduct is concerned, the appellant refers to *The People (DPP) v McDonagh* [2003] 4 IR 417 where two jury keepers engaged with the jury to an inappropriate degree during sequestration. In *McDonagh*, no sworn evidence was adduced before the Court; witness statements taken during a subsequent Garda investigation into the events during the jury sequestration were furnished to the Court and relied upon by it in reaching its conclusion to quash the jury verdict.

Submissions of the respondent

20. In the first instance, the respondent stresses that there is no evidence as such before this Court from the juror in question. The appellant's present solicitor filed an affidavit exhibiting copies of the correspondence, which correspondence cannot be treated as sworn evidence.

21. Notwithstanding the first line of argument, it is the respondent's position that even if the substance of the juror's complaints were submitted by way of sworn evidence to this Court and if the Court were disposed to accept such evidence, it would come nowhere near establishing any irregularity in the jury deliberations.

22. Further, the respondent submits that even if sworn evidence were submitted to this Court by the juror, this Court could not realistically reach a conclusion as to the safety of the conviction based on the contention, even in sworn form, of one juror alone. The respondent cites Lord Rodger of Earlsferry in *Mirza* to demonstrate the danger of an appeal court proceeding on the basis of a letter received from one juror, in that other jurors, if requested to testify, could provide testimony seriously challenging that of the complaining juror. Lord Hope of Craighead, also in the majority in *Mirza*, is cited in this regard.

23. The respondent further relies on *R v Young* [1995] QB 324 wherein the Court of Appeal ordered an affidavit be sworn from each of the 12 jurors and the two jury keepers before reaching a decision on alleged jury misconduct.

24. The respondent submits that it is clear from the totality of the correspondence that the juror's main cause of dissatisfaction appears to be that, once deliberations had begun, the other jurors did not agree with his views on the evidence or the conclusions he would have liked to draw from it. In this way, it is the respondent's position that the allegation of premature deliberation by the jury is entirely unsubstantiated.

25. It is the respondent's position that there is no basis for the grounds of appeal relating to premature deliberation. It is submitted that it is quite clear from the sections of the transcript quoted above that the trial judge, on having questioned the foreman, was satisfied that the jury had not begun its deliberations.

26. *The People (DPP) v McDonagh* is relied on by the appellant as a comparator case. In *McDonagh*, it was alleged that two jury keepers engaged with the jury to an inappropriate degree during deliberations. Hardiman J. commented that: "In the circumstances of this case we find it difficult to be confident that the events which occurred had no effect." It is the respondent's position that there is no allegation herein of any external or extrinsic influence having been brought to bear on the jury deliberations.

27. A Law Reform Commission Report on Jury Service is also cited by the appellant wherein the Commissioners highlighted "the need to ensure that public confidence in the jury system is not impaired through any perception of inappropriate juror behaviour." Similarly, *Mirza* is cited to emphasise the importance of public confidence in the legitimacy of jury verdicts

28. In *Mirza,* the complaint was based on a perception held by one juror that other jurors were racially prejudiced against the accused, it is the appellant's position that the evidence in this case is far stronger evidence than that of a juror who felt others exhibited less than ideal behaviour.

29. The respondent submits that there is no evidence or even suggestion of bias in this case and that this sets the instant case apart from many English and American cases where such an allegation was made. It is pointed out that in Mirza, Lord Steyn alone would have allowed *Mirza's* appeal.

Consideration by this Court of issues arising post-verdict

30. The respondent submissions address the question of whether this Court may entertain an appeal against conviction based on a claim, made post-verdict, by a member of the jury that the approach adopted by the jury during its deliberations was somehow irregular or improper.

The "no impeachment rule"

31. It is the respondent's view that the appellant is asking this Court to depart from the "no impeachment" rule which can be traced back to Lord Mansfield's decision in *Vaise v Delaval* (1785) 99 Eng Rep 944. The "no impeachment rule" prohibits post-verdict juror testimony and was expressly recognised by the Irish Supreme Court as recently as 2019 in *The People (DPP) v Mahon* [2019] IESC 24. The rationale for this rule is to ensure jurors are able to deliberate, candidly, openly and honestly without fear that what they say will later be revealed in court proceedings, the media or anywhere else. The only exception to this rule, as identified by the respondent, is the racial prejudice exception as carved out in the case of *Pena-Rodriguez v Colorado* 580 US (2017).

32. The respondent sets out numerous quotations from US, Canadian and UK law detailing the "no impeachment rule", its rationale and its exceptions. It is said that the racial

prejudice exception was a very limited one and expressly related to the need to respond vigorously to any evidence of racial prejudice or discrimination which is a major issue in US constitutional law. It is the respondent's view that there was not even a hint of any prejudice towards the appellant during his trial and thus the "no impeachment rule" stands.

No extrinsic interference

33. The respondent sets out that most of the leading UK and US authorities on the secrecy of jury deliberations permit investigation into alleged irregularities where these irregularities are extrinsic to the deliberations, provided there is no investigation into the deliberations themselves. *R v Young* and *R v Brandon* are cited in this regard. It is said that as there is no evidence or suggestion of extrinsic influence in the instant appeal, there is no basis on which there can be an investigation into what transpired in the jury room.

Finality of jury verdicts

34. A jury verdict is presumed to be final and to represent the decision of the entire jury or a majority thereof. The respondent quotes from Lord Rodger in *Mirza*;

> "…if a juror who can hear the foreman's words makes no objection when the verdict is announced, he or she must be taken as having assented to the verdict as accurately reflecting the proper conclusion of the jurors' deliberations..."

35. It is said that the rationale for this is similar to that of the "no impeachment rule", if a verdict could be upset by one or more jurors later on claiming they did not agree with it after all, no conviction would be safe. The respondent states that as Mr. B was present while the verdict was being delivered and he did not object to it, he must be conclusively presumed to have assented to it.

Discussion

36. The starting point for this discussion rests with two salient features; firstly, that this Court is asked to set aside a conviction on foot of a claim of jury misconduct in deliberations which claim is made post-verdict and secondly, the absence of sworn evidence before this Court.

37. It is clear that jury deliberations are sacrosanct and protected by the jury secrecy rule. This rule prohibits any person from disclosing information about discussions, opinions and arguments had within the confines of the jury room. The rationale for this is well-stated in Lord Steyn's judgment in the *Mirza* case at para.13, quoting the Canadian Supreme Court in *R v Pan* [2001] 2 SCR 344 at pp 373-375 as follows;

> *"The first reason supporting the need for secrecy is that confidentiality promotes candour and the kind of full and frank debate that is essential to this type of collegial decision making. While searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred. This rationale is of vital importance to the potential acquittal of*

an unpopular accused, or one charged with a particularly repulsive crime. In my view, this rationale is sound, and does not require empirical confirmation.

The Court of Appeal also placed considerable weight on the second rationale for the secrecy rule: the need to ensure finality of the verdict. Describing the verdict as the product of a dynamic process, the court emphasized the need to protect the solemnity of the verdict, as the product of the unanimous consensus which, when formally announced, carries the finality and authority of a legal pronouncement. That rationale is more abstract, and inevitably invites the question of why the finality of the verdict should prevail over its integrity in cases where that integrity is seriously put in issue. In a legal environment such as ours, which provides for generous review of judicial decisions on appeal, and which does not perceive the voicing of dissenting opinions on appeal as a threat to the authority of the law, I do not consider that finality, standing alone, is a convincing rationale for requiring secrecy."

38. Mr. Gageby argues that a rigid application of the jury secrecy rule breaches the right to a fair trial and says that there should be a more nuanced balance between jury privacy and an accused's right to a fair trial. In effect, this Court is asked to enquire into the jury's deliberations; specifically, that the jury came to its decision prior to the completion of the evidence and charge.

39. The rationale underpinning the jury secrecy rule is very logical. It is essential that juries are in a position to fully canvass all issues in the jury room without fear that at some point those discussions may be subject to interrogation. As elegantly stated by Arbour J. in Pan:- "While searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred."

40. *Gregory v United Kingdom* 25 EHRR 577, recognised the necessity of the rule where the European Court of Human Rights at para. 44 said:-

> "[t]hat the court acknowledges that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard."

41. It is clear therefore from the jurisprudence of our neighbouring jurisdiction, Canada and our Supreme Court that a premium is placed on the necessity for jury secrecy. Again, with reference to *Mirza*, Lord Slynn at p. 1144 para. 47, stated the rationale for the rule:-

> "How far this rule is justified has been examined in a number of cases. The courts have indicated a number of considerations to show that it is justified. Thus the need to encourage jurors to speak frankly without fear of being quoted or criticised has been very much relied on. Jurors need to be protected from pressures to explain their reasons and it is important to avoid an examination of conflicting accounts by different jurors as to what occurred during the deliberation. It has also

been said on a number of occasions that the need for finality once a verdict has been given justifies the rule being applied strictly. On the other hand it has to be observed that in the Canadian Supreme Court case of *Sawyer* (supra) finality was thought to be an unsatisfactory basis for the rule. On the other hand it seems plain that discussion and disagreement public confidence in the jury system *(R v Armstrong* [1922] 2 KB 555, 568."

42. The recent decision of the Supreme Court in *The People (DPP) v Mahon* acknowledged the protection afforded to a jury's deliberations with Charleton J., delivering the judgment of the Court, saying at para. 17:-

> "Rightly, a jury's verdict is protected against intrusion into the reasoning behind it. Jury confidentiality has been recognised by the European Court of Human Rights in *Gregory v United Kingdom* (1988) 25 EHRR 577 at paragraph 44 as being 'a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard.' *There can be no interrogation of a verdict as to the reasoning whereby a decision was reached."* (our emphasis).

43. Charleton J. goes on to say: –

> "Thus, the verdict of the jury cannot be impeached, even if the allegation is that the decision has been reached not by consideration of the evidence but by a random tossing of a coin by two of their number; *Vaise v Delaval* (1785) 1 TR 11, see also *Harvey v Hewitt* (1840) Dowl 598 where it alleged that the jurors had drawn lots to decide their verdict. An affidavit from the jury bailiff who had witnessed this take place was admitted as evidence. In *O'Callaghan v The Attorney General* [1993] 2 IR 17 at 26, O'Flaherty J. dismissed a claim that legislation providing for majority verdicts offended the Constitution in its guarantee of jury trial in Article 38.4 and trial in due course of law in Article 38.1, but reiterated the unimpeachable nature of jury deliberations:
>
> …
>
> 'In our opinion the principle is well established that the nature of the deliberation of the jury in a criminal case should not be revealed or enquired into.'"

44. The appellant herein relies on *Mulder*, *Tobin* and *McDonagh* as support for the contention that a jury verdict can be set aside on the basis of alleged jury misconduct. However, these cases, in our view, provide no assistance to the appellant.

45. In the present case, neither the juror in question nor any member of the jury brought any matters of complaint to the attention of the trial judge. In *Mulder* and *Tobin*, the issues which arose were brought to the attention of the trial judge and therefore, on appeal the Court was in a position to determine whether the trial judge had exercised his discretion appropriately.

46. Reliance is also placed on *McDonagh*, in which case there was inappropriate conduct on the part of the jury minder whilst the jury were sequestered and deliberating. The inappropriate conduct had however occurred *outside* the jury room. The present case is quite different.

47. Indeed, support for the contention that a court may not receive affidavits or oral evidence from a juror concerning deliberations may be found in the decision of Lord Mansfield of 1785 in *Vaise v Delaval*, a case involving the toss of a coin, where he stated: –

> "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour; but *in every such case the court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some such other means."*

48. Jury secrecy is therefore sacrosanct and what transpires in a jury room must remain private for the very good reasons, as stated in Pan. In *Mahon* Charleton J. also referred to *Mirza* at para. 18 stating:-

> "In *R v Mirza , R v Connor and Rollock* [2004] 1 AC 1118, the allegation in relation to the first case was of racial bias based on an accused using an interpreter, and in relation to the second, allegations of some jurors not being too bothered about the trial and wanting to come to a quick verdict, with one member allegedly raising the idea of a coin toss. The House of Lords commented that a mere allegation was not enough, since what was asserted by one person might not represent the reality. To get to the bottom of such a situation would require an enquiry, an undesirable reality that would undermine the certainty of jury verdicts. External evidence, as opposed to internal allegations of jury misbehaviour, such as consulting an occult instrument in *R v Young* [1995] QB 234, or of bribery may open a verdict to scrutiny."

49. In the circumstances of the present case, we are entirely satisfied that the verdict of the jury should not be interrogated. As already stated, it is essential that jurors are in a position to speak their mind without any fear or concern or pressure of any kind. Candour in the jury room is essential and we are not at all persuaded that in the present case an enquiry ought to take place. The "no impeachment" rule remains steadfast.

External Evidence

50. Court intervention into alleged jury irregularities have been permitted where highly exceptional circumstances grounded in external evidence arise. In *R v Young*, external evidence was given that some of the jurors consulted a Ouija board while staying in a hotel to ask the victim in a murder case who he was murdered by in order to come to a decision. As the period in the hotel "was a hiatus between sessions in the jury room" and was not at a time when all the jurors were deliberating, the evidence was found to be admissible; it was external evidence and not internal allegations of jury misconduct. The

court had jurisdiction to enquire into events which occurred at the hotel, but *not* what happened in the jury room thereafter. In *McDonagh*, the irregularity concerned conduct other than the jurors' deliberations.

51. Nothing of that external character exists in the present case.

52. There might be some very exceptional circumstances where further inquiry might be warranted, and further evidence-taking possibly necessitated, but the present case comes nowhere near such a situation.

Premature deliberation

53. It is contended that the jury may have been deliberating prior to all evidence and prior to directions from the trial judge. However, it is entirely clear from the transcript that when the issue as to jury discussions was raised by the foreman, the trial judge dealt with the matter appropriately and comprehensively. There is no merit to this complaint.

54. Secondly, and as addressed above, reliance is placed on the juror's contention that, having received the directions from the trial judge regarding discussions and, prior to the completion of the evidence and the judge's charge, certain members of the jury had already made up their minds. We are entirely satisfied for the reasons in the preceding paragraphs that there is equally no merit to this complaint.

55. Accordingly, the appeal against conviction is dismissed.