[2021] EWCA Crim 360

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202000651/B3-202100372/B3

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 5 March 2021

LORD JUSTICE BEAN

MRS JUSTICE CHEEMA-GRUBB DBE

HER HONOUR JUDGE WENDY JOSEPH QC

(Sitting as a Judge of the CACD)

REGINA

V

IBRAHIM USMAN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR D CHERRETT appeared on behalf of the Applicant.

COUNSEL NAME appeared on behalf of the Crown.

J U D G M E N T

1. LORD JUSTICE BEAN: This is an application for leave to appeal against conviction by Ibrahim Usman following refusal by the single judge. It is unnecessary to refer in any detail to the facts of the allegations against Mr Usman because the point which arises does not depend on the facts nor indeed on to nature of the charge. It was, as it happens, a charge of possession of firearms with intent to endanger life among other things.
2. The defendant was giving evidence and that evidence had reached the point where following his evidence in-chief, he was being cross-examined by counsel for a co-defendant prior to being cross-examined again by counsel for the prosecution. There was a break in the proceedings and, as the jury were on their way out of court, one of them sang words of the Fleetwood Mac song "Tell me lies, tell me sweet little lies". The judge had to deal with this outburst and decide what to do; he decided to discharge the individual juror, explaining to that juror that he had to consider how the outburst would have looked to an independent and impartial observer. He then informed the remaining jurors of this decision and enquired as to whether each of them considered that they could continue to try the case properly and fairly. Each of them did, so the trial continued with 11 jurors and in due course the defendant was convicted.
3. On his behalf Mr Cherrett submits that the judge should have discharged the whole jury not merely the one juror, and that the prejudice caused to the defendant by this outburst at a critical point in the case was simply irremediable.
4. Mr Cherrett has referred us, as he referred the judge, to one reported authority, the case of R v Kellard [1995] 2 Cr App R 134. That was an appeal on a multiplicity of issues from convictions recorded in the course of a trial which lasted about a year (which was remarkable in those days) before Potter J and a jury. At the close of the defendant Kellard's evidence, counsel on his behalf submitted that one of the jurors should be discharged because of certain hostile remarks and/or grimaces she had made in the course of the defendant's cross-examination. The application was not, we note, to discharge the whole jury. The judge declined to discharge the juror; it was submitted that he was wrong to do so. The argument was reinforced by reference to the fact that the juror concerned had been elected foreman. The Court of Appeal approved the following remarks of Potter J in refusing to discharge the juror:

> "... it may often be the case that it becomes apparent to a defendant that some of his evidence is not being well received by a particular juror or jurors and I do not consider that what I have heard takes the position anywhere near the point where I need, in the interests of justice, discharge a juror who there is no reason whatever to suppose will not be true to her oath and decide the question of his guilt or innocence according to the overall weight of the evidence once properly directed by me as to the law."

5. Mr Cherrett submits that the present case is more serious than the case of the juror in Kellard. We consider that the course taken by the judge was clearly correct. It was quite sufficient to discharge the single juror who had by singing this song in court expressed prejudice and done so indeed in a way which may have been considered a contempt of

court. But it was quite unnecessary and inappropriate for the judge to have discharged the jury as a whole and required the case to start again. Indeed, it seems to us that the fact that the offending juror had been discharged must have acted as a salutary reminder to the jury of the need not to exhibit prejudicial conduct.

6. There is not, in our view, any real risk of bias or unfairness. A reasonable observer to what had taken place would, in our view, have considered that the judge had adequately and fairly dealt with the case by discharging the offending juror. If Mr Cherrett's submission were right, it seems to us it would have very far-reaching consequences. It would mean that any expression of prejudice by one juror in the course of a trial, for example, by calling out "liar" or making some such remark, even without musical accompaniment, would potentially lead to the case having to be started again. There is no such principle in our view. Each case of this kind must be dealt with by the judge on its facts. These cases are very fact sensitive. Like the single judge, we do not consider that it is arguable that the judge made any error in this case.
7. The renewed application for permission to appeal against conviction is accordingly dismissed.
8. We also have before us a reference by the Registrar of one aspect of the sentence passed on Mr Usman. Mr Cherrett has, quite rightly, not sought leave to appeal against the sentence imposed on Mr Usman on the merits but there was one minor technical error committed by the learned judge. Usman had, prior to trial, pleaded guilty to an offence of simple possession of a prohibited firearm. That plea was unacceptable to the prosecution. Consequently the case proceeded to trial and he was convicted of the far more serious offence of possession of the prohibited firearm with intent to endanger life. The correct course therefore should have been not to pass a concurrent sentence of imprisonment on count 5 but simply to order that count 5 should lie on the file on the usual terms. We will therefore quash the concurrent sentence of 5 years' imprisonment on count 5 and substitute for it a direction that count 5 should lie on the file, on the usual terms; that is not to be proceeded with save by leave of this Court. This makes not a day of difference to the term of imprisonment that Mr Usman will have to serve but it does put the record straight.
9. LORD JUSTICE BEAN: Mr Cherrett, we are very grateful to you for your submissions; I am afraid our gratitude is all you get but there it is.
10. MR CHERRETT: I will take that, my Lord, as always. Thank you very much.