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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00577/B3
[2023] EWCA Crim 814

On appeal from the Crown Court at Portsmouth
HH Judge Bowes KC

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 14th June 2023

B e f o r e:

VICE-PRESIDENT OF THE COURT OF , CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE MORRIS

HER HONOUR JUDGE ANGELA MORRIS
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

JORDAN HERNANDEZ

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Mr R J Bryan appeared on behalf of the Appellant

Mr E Divaris appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 14th June 2023

LORD JUSTICE HOLROYDE:

1. On 6th February 2023, following a trial in the Crown Court at Portsmouth before His Honour Judge Bowes KC and a jury, this appellant, Jordan Hernandez, was convicted of sexual assault, contrary to section 3 of the Sexual Offences Act 2003. He appeals against his conviction by leave of the single judge.

2. The victim of the offence is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the offence.

3. It is unnecessary for present purposes to say more than a few words about the circumstances of the offence. The appellant had been admitted to hospital because of seizures caused by his misuse of drugs and alcohol. His behaviour was erratic and difficult. The prosecution case was that he intentionally squeezed the breast of a female nurse who was assisting him to change his soiled clothing.

4. The defence case was that he had been disorientated because of the medication given to him and that any touching of the breast was neither intentional nor sexual.

5. The sole ground of appeal is that the conviction is unsafe because there was a real possibility of bias on the part of a juror.

6. We shall refer to the juror concerned as "Juror 11". He had initially been summoned to attend the court for jury service on 3rd January 2023, but his service was deferred because he

was unwell. He was thereafter summoned to attend on 30th January 2023. In advance of his attendance he wrote to the court and also, it seems, to the Central Jury Summoning Service in the following terms:

> "After discussing my forthcoming juror duty with my wife, I realise that I was deluded in believing that I could come to an unbiased decision.
>
> Thirty years' service as a police officer (I retired ten years ago) has left me with the unshakeable belief that if both the investigating police officers and the Crown Prosecution Service feel that the evidence is sufficient to charge, then the individual is most definitely guilty of the offence(s).
>
> I suspect that my time in the jury room after the evidence has been heard will be spent just persuading the other jurors of the defendant's guilt.
>
> I am willing to answer the summons and perform jury service, but believe it is only fair that I point out the bias that I now realise I hold.
>
> I apologise for any inconvenience caused."

7. The judge had been provided with that letter and was accordingly alert to the potential problem. When Juror 11 was selected by ballot to serve as a juror in this trial, the judge stopped the process of empanelling the jury and discussed with counsel how he would proceed. He referred to the case law conveniently summarised in the 2023 edition of Archbold at 4-293, and in particular to a passage indicating that where a question of possible bias of a potential juror arises, the test is that approved in *Porter v McGill* [2001] UKHL 67, [2002] AC 357: namely, whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

8. Both counsel, then as now Mr Bryan for the appellant and Mr Divaris for the respondent, agreed that it was appropriate for the judge first to question Juror 11 in the absence of any other prospective member of the jury. Juror 11 was accordingly brought back into court. The

judge reminded him of the contents of his letter, emphasised that jury service is an important civic duty, read to him the words of the affirmation he would be asked to make, and asked whether Juror 11 was prepared to make the affirmation and give a true verdict according to the evidence. There was then the following exchange:

> "JUROR 11: I think that, after 30 years' service and spending a lot of time in trials, that I am biased without a doubt. I should have realised this when I first got it, my service, my summons through. I submitted that letter some two weeks before being here. I also sent an email through to the Central Jury Summoning Service stating the same thing and thought that I will probably be told that I wouldn't come here.
>
> THE JUDGE: Yes, jury selection is not a voluntary process ---
>
> JUROR 11: No.
>
> THE JUDGE: --- where people can do it if they feel like it. And you have not actually answered my question – and it is really important you listen to my question and answer it.
>
> JUROR 11: Sorry, yes.
>
> THE JUDGE: Are you prepared to abide by the affirmation, which is: 'I do solemnly, sincerely and truly declare and affirm that I will faithfully try the defendant and give a true verdict according to the evidence'? Are you prepared to abide by that affirmation?
>
> JUROR 11: If I make that affirmation, I will abide by it, your Honour.
>
> THE JUDGE: You will?
>
> JUROR 11: I will, your Honour.
>
> THE JUDGE: Right. So you are saying that you are in a sense warning everyone that you have potential bias, but what you are saying is that, if called on, you are prepared to abide by that affirmation and give a true verdict according to the evidence?
>
> JUROR 11: That's correct, your Honour.
>
> THE JUDGE: And you understand what that means?
>
> JUROR 11: Yes.
>
> THE JUDGE: It means putting aside bias or any

> preconceptions and trying the case according to the evidence.
>
> JUROR 11: Yes, Your Honour.
>
> THE JUDGE: And that is a solemn affirmation.
>
> JUROR 11: That is correct, yes. Yes, your Honour.
>
> THE JUDGE: Which, if you take it – if you are selected – you then have to abide by. It is binding. Do you understand that?
>
> JUROR 11: I do, your Honour."

9. Juror 11 then left the court, the judge having directed that he should be kept apart from other prospective jurors. Mr Divaris indicated that the respondent did not object to Juror 11 serving on the jury as he had said that he would abide by his affirmation. Mr Bryan submitted that Juror 11 should not serve, because of a real possibility of bias.

10. The judge ruled that it was appropriate for Juror 11 to serve as a juror. He referred to the need for persons to abide by the public service commitment of acting as jurors, and to his experience that many persons may approach jury service with preconceived ideas, but properly put them to one side once they take the juror's affirmation. He noted that Juror 11 had twice stated clearly that he was prepared to abide by the terms of the affirmation and to return a true verdict according to the evidence. In those circumstances the judge ruled that the *Porter v McGill* test was not made out.

11. The empanelling of the jury was thereafter completed and the trial proceeded. No criticism is made of the directions of law which the judge gave to the jury.

12. Mr Bryan submits that the test in *Porter v McGill* was made out and that the judge should have stood Juror 11 down. He submits respectfully that the judge made the wrong decision and that, as a result, the conviction is unsafe. He submits that there was a real possibility that

Juror 11 was biased and that his bias might contaminate and influence other jurors. Mr Bryan suggests that after his many years of police service, Juror 11 must have known what sort of affirmation he would be required to make and must have taken that into account when writing, as he did, to the court. Mr Bryan emphasises that the juror had given careful thought to his position and had taken the trouble to write to the court in advance to alert everyone to his preconceptions and prejudices. In those circumstances Mr Bryan argues that, notwithstanding the juror's later assertion that he would abide by the affirmation, there remained a risk which should not have been taken. He invites our attention to the juror's initial response to the questions asked by the judge, rather than solely to the later responses to the later questions.

13. Mr Divaris submits that the judge was entitled to rule as he did. He submits that the judge followed a correct procedure and made a sufficient inquiry of Juror 11, who confirmed that he would make and abide by the affirmation. Mr Divaris points out that if Juror 11 had felt unable to comply with the affirmation, he had numerous opportunities to say so in the course of the judge's inquiry.

14. We are grateful to both counsel for their written and oral submissions, and would particularly commend the focused manner in which each of them has addressed the court this morning. We have been greatly helped by their respective arguments. Having reflected on them, our conclusions are as follows.

15. Juror 11's letter was a statement of actual bias: an expression of a fixed view that any person charged and brought to trial was guilty of the offence charged, whatever evidence might be adduced. The same may be said of Juror 11's initial response to the judge in the exchange which we have quoted. Juror 11 did not, however, maintain that stance. On the contrary, having been confronted with the importance of the civic duty of jury service and the

words and meaning of the affirmation he would be required to make, he twice stated, in unequivocal terms, that he would make and abide by that solemn affirmation and would try the case according to the evidence.

16. The issue then arose of whether, applying the familiar *Porter v McGill* test, a fair minded and informed observer would conclude that there remained a real possibility that Juror 11 was biased. In particular, it was necessary to consider whether the fair minded and informed observer would conclude that the risk of conscious or unconscious bias remained because, notwithstanding the assurance he had just given to the judge, Juror 11 had previously asserted a wholly different attitude to his ability to try the case according to the evidence.

17. The judge was right not to take the letter at face value and to stand Juror 11 down without further inquiry. As he correctly observed, jury service is a very important public duty and not something which a person summoned for jury service need only do if he or she feels like it. The legal responsibilities of jurors, including their duty to try the accused only on the evidence heard in court, are clearly spelled out in a notice issued to all, and are reiterated in the standard instructions given at the start of the trial to those selected by ballot to serve on a particular jury. It is of course important that an accused person is not tried by a jury which includes a person who is genuinely incapable of returning a true verdict in accordance with the evidence in the case. But judges must be alive to the risk that a prospective juror who asserts an irremediable bias either for or against all persons accused of crime, whatever the circumstances and whatever the evidence, may merely be looking for a means of avoiding his duty.

18. No criticism is or could be made of the procedure which the judge adopted in order to test whether there was a risk of bias. He correctly directed himself as to the applicable law. He conducted what we respectfully commend as a careful and thorough inquiry, which gave

Juror 11 every opportunity to state, if it were the case, that he could not abide by the juror affirmation, or to answer the judge's questions in a manner which cast doubt upon his ability to do so.

19. An inquiry of that nature is a case-specific inquiry, in which much will turn on the nature of the case, the issues in the trial and the nature of and reasons for the asserted or suggested bias. To take an obvious example, the question whether a serving or former police officer should be stood down as a juror merely because of that office will depend on the issues and anticipated evidence in the case concerned. Moreover, a judge conducting such an inquiry is in the best position to judge the reliability of a prospective juror's responses, the manner and tone in which the questions are answered, and the strength or weakness of an asserted willingness and intention to abide by the juror affirmation. This court will therefore be slow to interfere in the judge's assessment.

20. In this case, we have no doubt that the judge was entitled to reach the conclusion he did. We think it no surprise that Juror 11, who had devoted 30 years of his life to public service as a police officer, quickly acknowledged what his public duty required of him and expressed his willingness and his ability to comply with that duty. The judge, who had questioned him directly and had been able to observe and assess his response, was entitled to accept the answers given and to conclude that the fair minded and informed observer would not think it a real possibility that Juror 11 remained biased. We emphasise that in this context, the informed observer is invested with the judge's knowledge and assessment of the inquiry which has just been undertaken.

21. The suggested risk that Juror 11 might not only be biased himself but might contaminate other jurors does not, in the circumstances of this case, strengthen the appellant's submission. Nor is the appellant assisted by reference to the length of the jury's deliberations before they

returned their verdict and speculation about what Juror 11 may have said to other jurors. It is standard practice for judges, in their initial remarks to juries, to emphasise that they must decide the case solely on the evidence, and to emphasise that they have a collective responsibility to bring to the judge's attention any matter of concern, including any concern about the conduct of a fellow juror. It is not suggested that any of the jurors in this case raised any concern about the conduct of Juror 11 either during the evidence or during their deliberations.

22. For those reasons, grateful though we are to Mr Bryan, we are satisfied that the conviction is safe. This appeal accordingly fails and is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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