R. v. MERCIECA

SUPREME COURT (Schofield, C.J.): April 23rd, 1996

Criminal Procedure—juries—challenges—court may, in exceptional circumstances, question and exclude jurors for participation in relevant events potentially affecting impartiality—size of Gibraltar population and absence of alternative forum for trial relevant to exercise of discretion

The accused was charged with various public order offences.

He applied for each of the jurors to be asked whether he had participated in any of a number of local demonstrations in relation to the ownership or use of fast launches, which had involved a significant proportion of the population of Gibraltar.

He submitted that it was necessary, in order for there to be a fair trial, to ascertain whether any member of the jury had strong views on the issue of fast launches, since this was likely to affect his ability to reach an impartial verdict.

The Crown submitted in reply that whilst a trial judge had the power to exclude from service particular jurors who were not competent to act, it would be improper for him to attempt to ensure that the jury was composed only of persons sharing particular views on a given subject.

Held, granting the accused's application:

The court had the power, in exceptional circumstances, and in order to ensure the jury's impartiality, to question each juror, and to exclude him from sitting if he had participated in events which might affect his judgment. The exercise of this power was necessary in Gibraltar where it was not possible for a trial to be moved to another court in which the jury would be unaffected by relevant events. It was reasonable in this case to ask specifically whether jurors had taken part in a demonstration, but the court's discretion did not extend to enquiring generally as to their views on fast launches (page 281, line 37 – page 282, line 20).

Case cited:

(1) *R.* v. *Kray* (1969), 53 Cr. App. R. 412, *dicta* of Lawton, J. applied.

R. Rhoda, Senior Crown Counsel for the Crown;
J. Mockett for the accused.

SCHOFIELD, C.J.: The application to which I acceded on April 18th, 1996 was made by Mr. Mockett on behalf of the defendant. He asked that I question each juror as he is called as to whether he has been involved in 45

any demonstration either for or against the ownership of fast launches in this jurisdiction, with the intention that a positive answer will result in the juror being asked to stand down. It is expected that the answers will be truthful, but counsel do have the right to question a juror if those they represent are dissatisfied with his answer.

The charges against the defendant arise out of disturbances which took place in Gibraltar on July 8th, 1995. These disturbances, I was told, are alleged to have been caused by supporters of the ownership of fast launches. There were subsequent demonstrations, which I was told were peaceful, against the ownership of fast launches. These demonstrations involved a good proportion of the population of Gibraltar. Feelings are high in Gibraltar about the ownership of the fast launches, as they are viewed by some to be central to smuggling activities. Others say they should have a right to own such a vessel. It is hard to have no view on the matter, given the amount of debate there has been on the subject and the way in which smuggling activity is affecting relations with Gibraltar's neighbour.

Previously both the Crown and the accused could peremptorily challenge a given number of jurors. That power was recently dispensed with and now cause has to be shown for any challenge. A basis of fact must be laid before such a challenge is permitted (see *R.* v. *Kray* (1)). The basis of fact—the occurrence of the demonstrations—was not in dispute here. What was disputed was the conclusions to be drawn from a person's participation in the demonstrations.

There is no local precedent for the ruling I have made. The English courts have set their faces against a judge altering the composition of a jury panel. Examples are given in Archbold, 1 *Criminal Pleading, Evidence & Practice*, 1995 ed., para. 4–198 – 4–199, at 518–519. The power of a judge to discharge a juror is to be exercised to prevent individual jurors, who are not competent, from serving. So it is wrong for a judge to order that a jury shall consist of only men, or women, or that it shall have a particular racial composition or that it should be drawn from a certain district. So much is accepted, for it would be improper, and against reason and experience, to assume that an all-male or all-female or a multi-racial jury or any jury of a particular composition will be more impartial in the trial of issues than a jury selected at random.

But in this case we are not determining the composition of the jury. We are ascertaining whether an individual juror has taken part in a demonstration which would show his leaning on a matter which could affect his impartiality. A person who did not manifest his views on the fast launches—either for or against them—can be expected to be more impartial in this trial. A person who demonstrated one way or the other may bring his views to the consideration of the issues in the trial.

The situation in England, from which I have drawn authoritative guidance, is very different from Gibraltar. Here we have a population of

some 30,000, which is far less than the catchment area of a Crown Court in England, and it is safe to say that if there were a trial there which involved local passions such as this trial, a transfer of the case to an area where passions were not so high would be almost inevitable. We cannot escape problems of potential partiality so easily in this jurisdiction. All we can do is attempt, on an individual basis and without subjecting jurors to indiscriminate questioning or detracting from the random nature of jury selection, to ensure that no partial juror sits on the panel. I should add that I am conscious of the practical difficulties my decision will place on ease of jury selection but such practical difficulties should not stand in the way of a fair and impartial trial.

I regard this case as exceptional and, in granting Mr. Mockett's application, I must record that it is only in such an exceptional case that I should grant it and that I shall limit the questions to be asked to the minimum. It would be improper to go beyond the one question to determine whether a juror has manifested his views on a matter which could affect his impartiality to ask what are his views on fast launches. We seek to ascertain only whether a potential juror has participated in a demonstration. Mere observers present at the events are not precluded from sitting.

In granting the application, I do not intend to detract from the following views expressed by Lawton, J. (as he then was) in *R.* v. *Kray* (1), with which I entirely agree (53 Cr. App. R. at 416):

> "It would, in my judgment, be regrettable if our courts got into the position of the courts in some countries where every time a juror comes into the jury box to be sworn he is likely to be cross-examined at length about his views and beliefs. Such a practice would be foreign to the spirit of the administration of justice in this country. No one must leave this court thinking that my judgment on this point amounts to a licence for counsel to examine and cross-examine prospective jurors as to what they believe or do not believe. Indeed, I want to stress—and I cannot stress too strongly—that the combination of facts which have brought about the situation with which I have had to deal in this case is, in my view, wholly exceptional."

Order accordingly.