[2007–09 Gib LR 250]

GAIVISO v. ATTORNEY-GENERAL

COURT OF APPEAL (Stuart-Smith, P., Aldous and Kennedy, JJ.A.):
September 9th, 2008

Criminal Procedure—juries—eligibility of jurors—juror on jury list remains eligible to serve even if list not updated after two years as required by Supreme Court Act, s.22 and Jury Rules, r.7

Criminal Procedure—juries—validity of decisions—jury decision valid despite Registrar's failure to update jury list, under Supreme Court Act, s.22 if no injustice or prejudice suffered by accused—not legislative intention that every decision reached by jury summoned from outdated list be invalid

The appellant was charged in the Supreme Court with robbery.

The appellant and his co-assailant entered a petrol station disguised and armed with a knife which was used to threaten the petrol attendant and his two friends. Although the appellant did not himself threaten the victims, he stopped one of them from leaving the kiosk before the two men fled with stolen property. In the Supreme Court the appellant pleaded not guilty but was convicted and sentenced to seven years' imprisonment.

On appeal, the appellant submitted that (a) the jury at his trial had been improperly constituted and his trial was a nullity since the Registrar had failed to update the jury list as required by the Supreme Court Act, s.22. and as this had not been done since 2004, the names on the list had expired in 2006 pursuant to the Jury Rules, r.7 and the jurors summoned for his trial in 2008 were therefore ineligible to sit on the jury; and (b) the sentence was excessive since it exceeded the four-year starting point suggested by the English Sentencing Guidelines Council and his offence was not deserving of the seven-year maximum term of imprisonment.

In reply, the Attorney-General submitted, *inter alia*, that (a) the jury had been properly constituted as they were a random selection of people who satisfied the requirements of s.19(1) of the Supreme Court Act (which outlined those eligible and qualified to serve as jurors) and were originally listed on the jury list from which they were selected; (b) the failure to update the list in 2006 did not invalidate the appellant's trial since all of the jurors were eligible to sit on the jury and the legislature would not have intended that any decision of a jury assembled from an expired list would be invalid; (c) the appellant had suffered neither injustice nor prejudice as a result of the outdated jury list or the jury summoned from it;

and (d) the sentence was not excessive because although the Sentencing Guidelines suggested a starting point of four years, the court had been correct to depart from this starting point given the nature of the offence, its aggravating features and the appellant's plea of not guilty.

Held, dismissing the appeal:

(1) The appellant had been validly tried since the jury had been properly constituted—they had been appointed from, and originally listed on, the jury list and were all eligible and qualified to serve on the jury pursuant to s.19(1) of the Supreme Court Act. That they had not been selected from a current jury list in breach of s.22 and the Jury Rules, r.7 did not affect the validity of the trial as the appellant had not suffered, or been at risk of suffering, any identifiable injustice or prejudice. The purpose of s.22 was not to identify those qualified to sit as jurors by continually updating the list but to enable the Registrar to compile a list of those eligible to be summoned. It could not have been the intention of the legislature that every decision reached by a jury summoned from an outdated list be invalid and the jurors' duty to serve on the jury could remain after the expiry of the list (para. 14; paras. 17–19).

(2) The sentence was neither excessive nor contrary to the English Sentencing Guidelines as the offence contained five of the nine aggravating factors outlined: (i) it involved more than one offender; (ii) they were wearing disguises; (iii) they were armed (even if the victims were only threatened with the weapon); (iv) it was a pre-planned offence; and (v) it had been carried out at night. This justified a departure from the starting point suggested (para. 24; para. 26).

Cases cited:

(1) *Podesta* v. *R.*, 2007–09 Gib LR *N* [1], referred to.

(2) *R.* v. *Ashton*, [2007] 1 W.L.R. 181; [2006] 2 Cr. App. R. 15; [2006] Crim. L.R. 1004; [2006] EWCA Crim 794, *dicta* of Fulford, J. applied.

(3) *R.* v. *Berkeley*, [1969] 2 Q.B. 446; [1969] 3 W.L.R. 154; [1969] 3 All E.R. 6; (1969), 53 Cr. App. R. 524, considered.

(4) *R.* v. *Cronin* (1940), 27 Cr. App. R. 179, considered.

(5) *R.* v. *Clarke*, [2008] 1 W.L.R. 338; [2008] 2 All E.R. 665; [2008] 2 Cr. App. R. 2; [2008] Crim. L.R. 551; [2008] UKHL 8, applied.

(6) *R.* v. *Gray*, [2003] 2 Cr. App. R. (S.) 109; [2003] EWCA Crim 1241, referred to.

(7) *R.* v. *Kelly*, [1950] 2 K.B. 164; [1950] 1 All E.R. 806; (1950), 34 Cr. App. R. 95; 66 (pt. 1) T.L.R. 931, considered.

(8) *R.* v. *Solomon*, [1958] 1 Q.B. 203; [1957] 3 W.L.R. 915; [1957] 3 All E.R. 497; (1957), 42 Cr. App. R. 9, considered.

(9) *R.* v. *Soneji*, [2006] 1 A.C. 340; [2005] 3 W.L.R. 303; [2005] 4 All E.R. 321; [2006] 2 Cr. App. R. 20; [2006] 1 Cr. App. R. (S.) 79; [2006] Crim. L.R. 167; [2005] UKHL 49, *dicta* of Lord Steyn applied.

(10) *R.* v. *Sykes*, [2008] 2 Cr. App. R. (S.) 37; [2008] EWCA Crim 2990, referred to.
(11) *R.* v. *Wakefield*, [1918] 1 K.B. 216; (1918), 13 Cr. App. R. 56, considered.
(12) *Rojas* v. *Berllaque*, 2003–04 Gib LR 271, referred to.

Legislation construed:
Supreme Court Act 1960, s.22: The relevant terms of this section are set out at para. 2.

M. Turnock for the appellant;
R.R. Rhoda, Q.C., Attorney-General, for the Crown.

1 **KENNEDY, J.A.,** delivering the judgment of the court: On March 28th, 2008 in the Supreme Court of Gibraltar, this appellant, Antonio Gaiviso, was convicted by a jury of robbery, that offence being committed on December 9th, 2005 at night, at a petrol station. On April 1st, 2008, he was sentenced to seven years' imprisonment. He now appeals against the conviction and sentence by leave of the Chief Justice and, for the purposes of the appeal against conviction, nothing more needs to be said about the offence.

2 The sole ground of appeal is that the jury was improperly constituted and therefore, it is said, the trial was a nullity. This point was not taken before the trial judge and it stems from the provisions of s.22 of the Supreme Court Act 1960. That section is to be found in Part III of the statute which deals with trial by jury, and is headed "Jury List." Section 22 reads as follows:

> "(1) The Registrar shall before the first Sunday in September in each alternate year make a list in the prescribed form of all persons qualified and liable to serve as jurors under the provisions of this Act and shall cause a copy of the list to be published at such time and at such places as the Chief Justice may direct, and shall attach to each such copy a notice stating that all objections to the list will be heard by the justices at a time and place mentioned therein being not less than fifteen nor more than twenty-one days from the date of publication of the notice.
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> (2) At the time and place so mentioned, the justices shall hold a petty session for the revision of the list and shall upon any evidence adduced before them or of their own knowledge, information and belief strike out from the list the name of any person therein included who is not qualified or liable to serve or add to the list the name of any person who is qualified and claims the right to serve as a juror.
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> (3) Any person may appear before the justices at the revision of the list either personally or by his advocate and claim that he is or is not liable to serve as a juror.

> (4) The list when revised shall be signed by the justices and delivered by them to the Registrar, and shall be in force from the 1st day of October next after it is allowed for the two years next following.
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> (5) Every person whose name is included in the jury list as revised by the justices shall be liable to serve as a juror notwithstanding that he may have been entitled by reason of some disqualification or exemption to claim that he ought not to be in the jury list."

3 The Jury Rules 1960, made under s.38 of the Supreme Court Act, made further provisions in relation to jury service and r.7 reads as follows:

> "The Registrar shall keep the list in alphabetical order and arranged in groups, one group for each letter of the alphabet, and shall cause the same to be fairly and truly copied in the same order into a book to be by him provided for the purpose, which book shall be called 'the Jurors' Book', and every such book shall be brought into use on the first day of October next after the list has been allowed, and shall be used for two years then next following."

4 It is common ground that due, no doubt, to an oversight on the part of the Registrar at the time of the appellant's trial, the procedure envisaged by s.22 had not been carried out since early 2004, so the jurors who tried him were summoned by reference to the 2004 list. Having discovered the oversight, Mr. Turnock for the appellant now submits that the 2004 list expired on September 30th, 2006 (see Jury Rules, r.7) and that once it had expired, those on that list became ineligible to serve. The Act and the Rules say nothing else relevant to the problem we now have to consider. Obviously it was intended that the list would be revised every two years but nothing is said about the consequences of using a list which ought to have been revised. In England, s.18 of the Juries Act 1974 deals with the problem but there is no equivalent provision in Gibraltar legislation.

5 Mr. Turnock has drawn our attention to three decisions of the English Court of Criminal Appeal, decided between 1918 and 1957, and one much more recent decision of the House of Lords. The Attorney-General has added four cases and some statutory provisions to that list. I shall deal first with the earlier cases.

6 In *R.* v. *Wakefield* (11) one of the jurors who convicted the defendant at the Central Criminal Court was not who he purported to be. He was that man's bailiff, sent by his master to perform jury service on his behalf and he personally was not qualified to serve as a juror. That was held to result in a mistrial because the accused was deprived of his legal right of challenge and of trial by 12 qualified persons but the court was careful to say that its judgment was limited to that case, where those circumstances applied. Plainly, they do not apply here.

7 In *R.* v. *Cronin* (4) the appellant was convicted after a trial before a Deputy Recorder who was not qualified to sit in that capacity because he was not a barrister of five years' standing and only such a person could be validly appointed to sit pursuant to s.166(1) of the Municipal Corporations Act 1882. As a result, it was said by the Court of Criminal Appeal that the lower court was not empowered to try anyone and the proceedings were void *ab initio*.

8 In *R.* v. *Kelly* (7) it was discovered after trial that one of the jurors had previously been convicted of receiving stolen property, which rendered him ineligible to serve as a juror, but his name appeared in the Jurors' Book and the Court of Criminal Appeal declined to hold that there had been a mistrial. It pointed out that verdicts had only been set aside and new trials ordered in cases where there had been impersonation in one form or another (as, for example, in *Wakefield* (11)).

9 In *R.* v. *Solomon* (8) the jurors had been sent away on the previous day so the Clerk of the Peace prayed a tales to collect 12 persons to form a jury. The Court of Criminal Appeal held that at common law a jury could not be formed in that way because for there to be a tales there must be a quales. There had therefore been no valid trial and a fresh trial was ordered. This morning, Mr. Turnock relied to some extent on the case of *Solomon*, but of course it was concerned, as we have just indicated, with the interpretation of the provisions of common law in relation to praying a tales, not a matter with which we are concerned.

10 Finally, in *R.* v. *Berkeley* (3) the legally represented defendant was not informed that he would be able to challenge jurors as they came to the book to be sworn. The Court of Appeal refused to hold that the omission entitled him to a fresh trial.

11 In our judgment, counsel for the respondent is right in his submission that the correct starting point in this case is to look at those statutory provisions which set out "who is qualified" to sit as a juror in Gibraltar. They begin with s.19(1) of the Supreme Court Act which provides that—

> "subject to the exemptions and disqualifications hereinafter contained every male person between the ages of eighteen and sixty-five years resident in Gibraltar having a competent knowledge of the English language shall be liable to serve as a juror at any trial held by the Supreme Court in Gibraltar."

12 We can pass over, for the moment, s.19(2) which deals with the eligibility of women and which was considered by the Privy Council in 2003 in *Rojas* v. *Berllaque* (12). Section 20 lists those who are ineligible to serve as jurors and s.21 lists those who are disqualified. In the present case, it is not contended that the appellant was tried by anyone who was ineligible or disqualified and, as counsel for the respondent submits, s.22

of the Supreme Court Act and the Jury Rules have to be read in the light of the earlier sections. They are, as the Attorney-General put it, administrative provisions. They are concerned with the mechanical operation of preparing a reliable list of those eligible and qualified so that from that list jurors may be summoned to attend at court.

13 How then should this court approach a failure to comply with the requirements of s.22? In our judgment the answer to that is to be found in the decision of the House of Lords in *R.* v. *Soneji* (9) as applied in later cases. In that case a confiscation order was made more than six months after the date of conviction. In the House of Lords it was said that the proper approach to the legislation laying down the time limit was to ask whether it was the intention of the legislature that an act done in breach of the time provision should be invalid. Lord Steyn said ([2006] 1 A.C. 340, at para. 23) that "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

14 Lord Rodger pointed out that the relevant legislation, like the legislation with which we are concerned, dealt with the duty of the court and it may well be right to envisage that duty continuing after the expiration of the prescribed time.

15 In *R.* v. *Ashton* (2) Fulford, J., giving the judgment of the Court of Appeal (Criminal Division), set out the principles to be derived from *Soneji* (9) and an earlier decision of the Court of Appeal, when he said ([2007] 1 W.L.R. 181, at paras. 4–5):

> "4 The outcome of each of these cases essentially depends upon the proper application of the principle or principles to be derived from the decision of the House of Lords in *R.* v. *Soneji* ([2006] 1 A.C. 340), together with the earlier decision of this court in *R.* v. *Sekhon* ([2003] 1 W.L.R. 1655). Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant's case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such

a risk, the court must decide whether it is just to allow the proceedings to continue.

5 On the other hand, if the court acts without jurisdiction—if, for instance, a magistrates' court purports to try a defendant on a charge of homicide—then the proceedings will usually be invalid."

16 That passage was accepted as accurate by Lord Bingham in *R.* v. *Clarke* (5) ([2008] 1 W.L.R. 338, at para. 14), a case concerned with an indictment which was defective in that it had not been signed until part way through the trial and the passage encapsulates the test. We consider it right to apply it here.

17 In our judgment, the provisions of s.22 of the Supreme Court Act were not concerned with identifying those qualified to act as jurors. They were concerned with enabling the Registrar to create an accurate and complete list of those eligible to be summoned which included giving members of the public an opportunity to say whether they should or should not be on the list.

18 A member of the public qualified to act as a juror in accordance with s.19(1) could, at any time after the first Sunday in September 2006, have required the Registrar to act in accordance with s.22(1) so as to ensure that a new list came into existence which included his name. But it cannot in our judgment have been the intention of the legislature to say that if s.22(1) were not complied with and the 2004 list continued to be used, every decision reached by a jury summoned by reference to that list would be invalid.

19 Theoretically, in time the list might have become so out of date as to result in a defendant no longer being tried by a random selection of those truly qualified to try him but that was not the situation in March 2008 when this appellant was tried and in reality he suffered no identifiable prejudice whatsoever. The Attorney-General helpfully considered what prejudice there might be. No-one who tried him has been shown to have been disqualified; no-one who tried him was someone who, enquiries have shown, was ineligible in any way to sit as a juror. He therefore, on the face of it, plainly received a fair trial by those qualified to sit as jurors and Mr. Turnock on behalf of the appellant has raised no point to suggest that he was in any way prejudiced by the make-up of the jury which convicted him. So far as we are aware, everything on the face of it was properly done, save for the fact that the 2004 list was not revised as it should have been in 2006. For those reasons it seems to us plain that, applying the approaches identified in *Soneji* (9) and underlined in the case of *Clarke* (5), to the provisions of the Supreme Court Act with which we are concerned, this appeal against conviction has no merit and must therefore be dismissed.

20 If we had found that there was a material irregularity in the course of the trial, then we would have had to consider the impact of the proviso to s.14(1) of the Court of Appeal Act upon the circumstances of this case. In the event it is unnecessary for us to follow that route.

Sentence

21 This was a nasty offence committed by the appellant with another man in the early hours of the morning. The assailants were disguised and armed with a knife. The petrol attendant and his two friends were threatened and the knife was brought into contact with the neck of one of them, sufficiently closely to cause a visible mark. The appellant was not the man with the knife but he was a full participant and stopped one of those in the kiosk when they tried to leave.

22 Having taken a significant amount of property (namely £800, 320 reload cards, a mobile phone belonging to the petrol station attendant and some cigarettes) and having cut the telephone wires, the assailants left. The victims were so shaken that they were visibly in tears or were almost in tears at the time when they were seen by the police some time later. The appellant was only identified because his disguise slipped and his face and voice were known to the petrol station attendant because he had been there before.

23 The appellant is 30 years of age and by December 2005 he had a large number of previous convictions for both dishonesty and violence. He also continued to commit similar offences in 2006 and 2007 prior to his trial. Normally, he has been fined or received a short sentence. Plainly this offence merited a substantial custodial sentence but Mr. Turnock submits that in the light of the guidance given by the English Sentencing Guidelines Council in February 2008, the sentence was too long and indeed manifestly excessive.

24 The Guidelines suggest that for a first-time offender who pleads "not guilty" in relation to this type of offence where a weapon is produced and used to threaten, the sentence actually imposed should be between two and seven years with the starting point of four years. The bracket is wide because the gravity of such offences varies enormously. This offence had five of the nine suggested aggravating features, namely (i) more than one offender was involved; (ii) the offence was pre-planned; (iii) the offenders were wearing a disguise; (iv) the offence was committed at night; and (v) the offenders were in possession of a weapon that was not used. There were no mitigating features to be identified amongst those listed. So, inevitably, this appellant fell to be sentenced at the upper end of the bracket.

25 In the case of *R.* v. *Gray* (6), the Court of Appeal, Criminal Division suggested that, for this type of offence, an appropriate sentence would be

seven years. In *Podesta* v. *R.* (1), this court upheld a sentence of six years' imprisonment imposed on four robbers who had pleaded guilty. It had been said by the Chief Justice of Gibraltar to be a deterrent sentence. We accept that both of those decisions preceded the publication of the Guidance to which we have just referred, but we doubt whether they were out of line with it.

26 In *R.* v. *Sykes* (10) the Court of Appeal, Criminal Division allowed the appeal of an offender who had, on three occasions, robbed a small shop when disguised and carrying a knife and on one occasion he had been accompanied. That offender pleaded guilty and was sentenced to seven years' imprisonment which was reduced to five years on appeal because the level of violence was relatively low and there had been a plea of guilty. Here, there was no plea of guilty and although the sentence can be said to have been severe, it was not, in our judgment, outside the boundaries of the Guidance or at odds with the sentencing pattern in this jurisdiction and cannot therefore properly be said to be manifestly excessive. Accordingly, this appeal against sentence is dismissed.

Appeal dismissed.