[2017 Gib LR 299]

FERRELL v. R.

COURT OF APPEAL (Kay, P., Smith and Rimer, JJ.A.): October 20th, 2017

Criminal Procedure—juries—challenges—conviction not unsafe or unsatisfactory even though juror had also sat in appellant's previous trial for similar offences—fair-minded and informed observer would not consider real possibility of bias as later jury aware of facts of previous trial and conviction

The appellant was charged in the Supreme Court with possession of cocaine with intent to supply.

In 2016, the appellant was convicted in the Supreme Court of possession of 7.2g. of cocaine with intent to supply and sentenced to 6 years' imprisonment. He appealed against his conviction.

At trial, the Chief Justice permitted the Crown to put before the jury evidence of the appellant's previous convictions in 2009 for possession of cocaine with intent to supply and money laundering related to his drug offending. There were similarities between the evidence in the present case and the appellant's modus operandi in 2009. On both occasions, the police had found the drugs wrapped in separate 1g. packets. Also, in both 2009 and 2016, the appellant alleged that he had been "stitched up" by the police.

Shortly after the commencement of the trial, it came to light that one of the jurors had also been a juror in the appellant's 2009 trial. The judge expressed the tentative view that it would not matter because the 2009 convictions and sentence were already before the jury. Defence counsel

did not apply for the juror (or indeed the whole jury) to be discharged. The prosecution resumed and the case against the appellant was very strong. In summing up, the Chief Justice did not give any special direction regarding the 2009 juror. The appellant was convicted and sentenced.

The appellant appealed against his conviction on the ground that it was unsafe and unsatisfactory because of the presence of the 2009 juror. It was the appellant's fundamental right under ECHR, art. 6, as imported into the Constitution of Gibraltar 2006, s.8, that he should be tried by an independent and impartial tribunal. The appellant submitted that (a) the Chief Justice should have discharged the 2009 juror of his own motion, regardless of the decision of the defence not to apply for his removal, and the failure to do so was an error of law which undermined the prosecution; and (b) regardless of whether he had consented to the juror continuing to serve, the appellant's right to an independent and impartial tribunal had been breached. There was a real possibility that the 2009 juror was biased and that he might have contaminated the thinking of the other jurors.

Held, dismissing the appeal:

(1) The Chief Justice's decision to allow the 2009 juror to continue was not an error of law or a material irregularity in the course of the trial. A defendant of full age and capacity was entitled to waive his right to apply for the discharge of a juror. A judge did not, in normal circumstances, have any duty to question a defendant to satisfy himself that he knew what he was doing. This was not like the situation where a judge had a duty to satisfy himself that a defendant was aware of his right to choose whether to give evidence. There had been no reason in the present case for the Chief Justice to suppose that the appellant had been unable to give proper instructions to his lawyer. It was not for him to enquire as to whether the appellant was content to keep the juror (para. 20).

(2) The trial had not been unsafe or unsatisfactory because of a risk of bias or contamination. The appropriate test in determining an issue of apparent bias was whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased. If, in the present case, the relevant facts had been solely that one of the jurors from a panel that had convicted the appellant of offences in 2009 was now serving on a panel whose impartiality was questioned, the court would have no hesitation in finding that a fair-minded and informed observer might well conclude that there was a real possibility that the individual juror might be prejudiced against the appellant and that he might, unless restrained, have contaminated the 2016 jury by sharing his recollections. However, the relevant facts and circumstances were far more extensive. By the time the jury retired, they knew a great deal about what had happened at the 2009 trial including the nature of the drugs charges of which the appellant had been convicted, the appellant's defence to the charges in both 2009 and 2016 being that he had been "stitched up" by the police, and that the modus operandi was the same on both occasions. In relation to apparent bias, it was difficult to

imagine what more the 2009 juror could have known that was potentially prejudicial to the appellant in addition to that which the 2016 jurors already knew. The fair-minded and informed observer, aware of these circumstances, would not think that there was any real possibility that the 2009 juror could have been additionally influenced against the appellant, nor that he might have contaminated the jury deliberations (paras. 22–25).

(3) Nor could it be said that the Chief Justice should have given the jury a special direction reminding them that it was possible that one of their number might have been involved in the 2009 trial and that they must take care not to allow any discussion of material from 2009 other than that which had been put before them in the current trial. The Chief Justice gave the usual direction that they must decide the case only on the evidence they heard in court. Although the direction might be targeted primarily at informing the jurors that they must not be influenced by media reports or things heard outside the courtroom, it was wide enough to encompass what a juror might say in the jury room that went beyond the strict bounds of the evidence they had heard. The general direction was sufficient in the present case. It might have been better if, out of an abundance of caution, the Chief Justice had specifically addressed the need to avoid introducing into the current deliberations anything additional that the 2009 juror might have remembered about the 2009 trial. The absence of such a direction did not undermine the safety of the appellant's conviction (paras. 26–27).

Case cited:

(1) *Porter* v. *Magill*, [2001] UKHL 67; [2002] 2 A.C. 357; [2002] 2 W.L.R. 37; [2002] 1 All E.R. 465; [2002] H.R.L.R. 16, applied.

Legislation construed:

Gibraltar Constitution Order 2006, Annex 1, s.8:

> "(1) If any person is charged with a criminal offence . . . the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law . . ."

K. Azopardi, *Q.C.* and *P. Vasquez* for the appellant;
R. Rhoda and *M. Zammitt* for the respondent.

1 **SMITH, J.A.:**

Introduction

This is the judgment of the court in an appeal against the conviction of Andrew Ferrell for an offence of possession of 7.2g. of cocaine with intent to supply. He was tried by the Chief Justice and a jury and was convicted on November 17th, 2016. He was sentenced to 6 years' imprisonment. His co-defendant was acquitted. He appeals with permission of the Chief Justice.

2 The trial which resulted in his conviction began on November 14th, 2016. Prior to that, a trial had begun on September 26th, 2016 at which the prosecution had applied to put before the jury the appellant's previous convictions, from 2009, for possession of cocaine with intent to supply, and several offences of money laundering which were related to his drug offending. The Crown contended that this material was relevant to a matter of importance between the Crown and the defence, namely that it tended to show a propensity to deal in drugs. The application was not strongly opposed; it plainly had merit. At the same time, the Crown made a pre-emptive application to put before the jury all the appellant's previous convictions as it was apparent that he was going to make an attack on the honesty of the prosecution witnesses and it was clear from correspondence from the appellant's solicitor that he was going to allege that, in the appellant's words, the police had "stitched him up." The Chief Justice ruled that that application was premature and must be renewed at the right time. In granting the application under the propensity gateway, the Chief Justice said that the Crown should limit itself to the bare facts of the 2009 convictions and must not introduce evidence of the appellant's modus operandi without making a further application.

3 Soon after the September trial began, it had to be aborted because the co-defendant, who was on bail, absented herself. The trial began again on November 14th. At the outset, the Chief Justice reminded the parties of his earlier ruling on propensity and it was formally admitted into the record of the new trial. On that occasion, nobody referred to the limit which the judge had placed on the permission he had granted and, when prosecuting counsel opened the case to the jury, he referred not only to the 2009 convictions but also to the fact that there were similarities between the evidence in the current case and the appellant's modus operandi in 2009. On both occasions, the police had found the drugs wrapped in separate 1g. packets. Also, in both 2009 and 2016, the appellant had alleged that he had been "stitched up" by the police. Neither the judge nor defence counsel appears to have noticed that Crown counsel had gone beyond the bounds of the judge's permission.

4 The first Crown witness was D.C. Cassaglia, the officer in charge of the case. In the afternoon of November 14th, prosecuting counsel put to him a document containing the appellant's previous convictions and asked him to confirm the nature and extent of the 2009 convictions for possession of cocaine with intent to supply and money laundering. The witness was not asked and he did not say anything about the modus operandi adopted in those cases; nor was he asked anything about the nature of the defence advanced. Only the convictions themselves were put before the jury. We do not have the complete record of the proceedings but it appears that no questions relating to 2009 were put in cross-examination of that officer.

5 On the second day of the trial, a spokesperson for the jury sent the judge a note saying that one of the jurors believed that he may have been a juror in the appellant's 2009 trial; he was not 100% sure. He was not prepared to be identified. The judge asked the court staff to investigate the court records to see if this were true and, in due course, the Registrar informed the judge that there was one juror who was common to both cases. In the meantime, there was discussion in court about what should happen. The judge observed that if he had known about this juror at the outset, he would have stood the juror down out of an abundance of caution. He then expressed the tentative view that, if the juror had indeed been on the 2009 jury, this would not matter because the 2009 convictions and sentence were already before the present jury. He allowed a short adjournment for defence counsel to take instructions from his client. After doing so, defence counsel did not apply for the juror (or indeed the whole jury) to be discharged. Unfortunately, the transcript of what counsel said to the judge is not entirely clear but it appears that he told the judge that he and prosecuting counsel were of the view that the presence of a 2009 juror would not "make much difference." The judge said that if they were agreed about that (which was the view he had tentatively expressed) then he too was content. The judge called the jury back in and told them that, because the 2009 convictions and sentence were already before them, it did not matter that one of them may have been involved in the 2009 trial. He thanked the jury for bringing the matter to his attention. The judge did not refer to these matters again during the entire trial.

6 The prosecution resumed. The case against the appellant was very strong. The Crown evidence was that, not only had the drugs been found in his car, in separate 1g. plastic wraps (along with £100 in cash and two mobile phones), but there was also evidence of the appellant's DNA on one of the drug packets. In interview, the appellant had said that he had been "stitched up" by the police. There was also evidence relating to the co-defendant which was unhelpful to the appellant. She was the appellant's girlfriend. At some time after his arrest, she had gone with him to his solicitor and had sworn an affidavit saying that the drugs found in the car were hers and that he knew nothing about them. She later retracted this affidavit and said she had made it out of affection for him. If he were to rely on her evidence, it was inconsistent with his assertion that the police had planted the drugs in his car.

7 During cross-examination of the police officers, counsel for the defence accused the officers of planting the cocaine in the appellant's car and of later contaminating the drug packet with the appellant's DNA.

8 The Crown did not adduce any evidence of the modus operandi of the 2009 offence. Evidence was put before the jury that the usual way in which cocaine was prepared for sale by drug dealers was in 0.5g. or 1g. wraps or deals.

9 The appellant gave evidence. He denied the offence and accused the police of planting the drugs and placing his DNA on one of the packets. Bearing in mind the attacks which had been made on the honesty of the police officers, prosecuting counsel applied to the judge for permission to introduce the whole of the appellant's previous convictions. They included offences of dishonesty including burglary and offences of violence including robbery as well as the drugs offences from 2009 about which the jury already knew. Defence counsel unsuccessfully tried to persuade the judge not to let the convictions in. No criticism is or could be made of the judge's ruling to admit them.

10 In cross-examination, the appellant had to accept the convictions. He agreed that he had accused the police of "stitching him up" in respect of the current allegations and also in respect of the 2009 trial. He was not asked about whether, in 2009, the drugs had been wrapped in 1g. packets.

11 The co-defendant gave evidence, denied her involvement in possession of the drugs and explained why she had sworn an untrue affidavit.

12 In his closing speech, prosecuting counsel relied heavily on the appellant's previous convictions, in particular those of 2009, and on the modus operandi (which he said was the same on both occasions) and on the fact that the appellant had alleged that the police had planted the drugs on both occasions. It appears that defence counsel did not take any objection to the fact that prosecuting counsel referred to a matter (the 2009 modus operandi) which was not in evidence.

13 So far as we are aware, counsel did not address the judge as to any particular matters which they considered should be included in the summing up. In particular, counsel did not invite the judge to give any special direction to the jury on the subject of the juror who had been present at the 2009 trial.

14 No criticism is made of the judge's summing up so far as it went, nor could it be. The judge gave all the usual and appropriate directions of law. However, he did not give any special direction about the position of the 2009 juror. Indeed he did not mention this issue at all. As we have said, the appellant was convicted and was duly sentenced.

The appeal

15 In February 2017, the appellant applied for an extension of time to submit an appeal. Fresh counsel were assigned to him, we assume because he no longer had confidence in his previous team. It appears that he was concerned about the presence of the 2009 juror on the 2016 jury. The new team took instructions from him about why no application had been made to discharge the juror concerned. The gist of his account was that the appellant had wished his counsel, Mr. Debono, to make that application

because he thought that juror might contaminate the others; he had told counsel so no less than three times. Counsel's reply had been that the presence of the juror would not affect the other jurors. The appellant became convinced that he was not getting his point across to Mr. Debono and, after repeating his point of view once more, had told Mr. Debono to do as he wished. In the course of preparation for the appeal, the appellant's account was put to Mr. Debono about what had been said when he took instructions about the juror. He agreed that the appellant had expressed a wish to have the juror discharged but said that he had advised the appellant that the presence of the juror would not make much of a difference given that his convictions, particularly the 2009 convictions, and, he said, some details of the offences, were already before the jury. Also, he advised that if the 2009 juror could not even remember whether he had been a juror at the 2009 trial, then there was as much of a prospect of bias in relation to him as there was in relation to the other jurors who had already heard details of his previous convictions. He had assured the appellant that he would apply for the juror to be discharged if he so wished but that it might be counter-productive, given that this was the fourth attempt at trial and there had been problems with jurors trying to wriggle out of their jury duty. Mr. Debono asserted that the appellant then instructed him to proceed in the presence of the juror, although he was clearly reluctant.

16 In the light of the evidence of the appellant and Mr. Debono, we do not think we can reach any conclusion other than that the appellant consented (albeit reluctantly) to the continuance of the trial with the juror in place.

17 Mr. Azopardi, Q.C., who now represents the appellant, expressly declined to make any criticism of Mr. Debono or the advice he had given his client.

The grounds of appeal

18 The main ground of appeal was that the conviction was unsafe and unsatisfactory because of the presence of the 2009 juror. It was the appellant's fundamental right under art. 6 of the ECHR, as imported into the Constitution of Gibraltar 2006, s.8, that he should be tried by an independent and impartial tribunal. The juror should have been removed because there was a real risk of bias in the 2016 jury.

19 First, Mr. Azopardi submitted that the judge should have discharged the juror of his own motion, regardless of the decision of the defence not to apply for his removal. The judge's failure to do so was an error of law which undermined the conviction. However, he accepted that it was possible for a defendant to waive even a fundamental right. He accepted, when it was put to him, that a defendant whose trial was going well for

him might not wish to lose a juror (possibly because it might risk the loss of the whole jury) even if he had solid grounds for seeking the juror's discharge because of the risk of bias or contamination. Having accepted that, Mr. Azopardi submitted that the judge should have been slow to accept that the right had been waived and should have ensured that it really had been. However, he could give no authority for such a proposition.

20 In our view, a defendant of full age and capacity is entitled to waive his right to apply for the discharge of a juror. Moreover, we do not think, in normal circumstances, that the judge has any duty to question the defendant to satisfy himself that he knows what he is doing. This is not like the situation where the judge has a duty to satisfy him or herself that the defendant is aware of his right to choose whether or not to give evidence. We say nothing about what the judge's duty might be where a defendant is unrepresented or is a juvenile or appears to be vulnerable in some way. Here there was no reason for the judge to suppose that the appellant was unable to give proper instructions to Mr. Debono. It was not for him to enquire as to whether the appellant was content to keep the juror. We reject the submission that the judge's decision to allow the juror to continue was an error of law or a material irregularity in the course of the trial.

21 Secondly, and regardless of whether the appellant had consented to the juror continuing to serve, Mr. Azopardi submitted that the appellant's right to an independent and impartial tribunal had been breached. There was, he said, a real possibility that the 2009 juryman was biased and also that that juror might have contaminated the thinking of the other jurors by discussing material of which only he was aware as the result of serving on the 2009 jury. He said that, for example, the juror might have discussed the modus operandi of the 2009 offences (which was not in evidence) or by mentioning some other aspect of the 2009 case.

22 Dealing first with the risk of bias, the test to be applied is set out in *Porter* v. *Magill* (1). The headnote to the report in *The Law Reports* states ([2002] 2 A.C. 357) that—

> "the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased . . ."

23 What are the relevant facts in the present case? The basic fact was that one of the jurors from a panel which had convicted the appellant of some offences in 2009 was now serving on the current jury whose impartiality was in question. The juror had not been certain of his involvement in that trial and it might therefore be thought that he could remember little about it. We would accept that, although the juror might

have been uncertain at the start of the trial, his memory might well have been refreshed by hearing more evidence and in particular by hearing the appellant give evidence. If those were the relevant circumstances, we would have no hesitation in saying that the fair-minded observer might well conclude that there was a real possibility that the individual juror might be prejudiced against the appellant and that he might, unless restrained, contaminate the 2016 jury by sharing his recollections.

24 However, the relevant facts and circumstances in this case are far more extensive. By the time the 2016 jury retired, they knew a great deal about what had happened in the 2009 trial. They knew, through evidence properly admitted, the nature of the drug supply charges of which the appellant had been found guilty, the amount of drugs involved and the fact that the appellant had also been convicted of money laundering offences related to drug dealing. They knew that the appellant's defence to these charges had been to allege that the police had "stitched him up." They had also been told (although not through properly admitted evidence), that in 2009, the drugs had been found in 1g. plastic wraps. It seems to us that the fact that this information had not been properly put before the 2016 jury is immaterial when considering the question of bias. The jury knew or believed that the modus operandi was the same on both occasions. The 2016 jury also knew that the appellant had many other convictions besides the drugs offences of 2009, some of which included offences of dishonesty. As to apparent bias, it is hard to imagine what more the 2009 juror could have known which was potentially prejudicial to the appellant over and above what he had been told in 2016 and what the rest of the 2016 jurors also knew. We think that the fair-minded observer, who knew all the circumstances we have listed, would not think that there was any real possibility that the 2009 juror could be additionally influenced against the appellant by his past knowledge than he was influenced by what he had just heard at the 2016 trial.

25 Similar considerations apply to Mr. Azopardi's submissions on jury contamination. He submitted that the 2009 juror might well have talked to the rest of the jury about matters he knew of from the 2009 trial but which the others did not know about. The jury had not been specifically warned not to talk about anything from the 2009 trial over and above what they had heard in evidence. Clearly, where one juror knows something prejudicial about a defendant, such as a previous conviction which the others do not know about, there may well be a risk that he might mention his special knowledge and contaminate the jury deliberations. But we do not think there was a real possibility of this happening in this particular case. Given what all the members of the 2016 jury had just been told, it is hard to imagine what significant additional material the 2009 juror could have brought to the jury table in 2016.

26 Linked to Mr. Azopardi's submissions on contamination was his contention that, even if the judge had not been wrong to allow the juror to continue to serve, he should have given the jury a special direction. This would have entailed reminding them that it was possible that one of their number might have been involved in the 2009 trial and that they must all be careful not to allow any discussion of any material from 2009 over and above what had been put before them in evidence in the present trial. It is common ground that the judge did not do so. He did, of course, give the usual direction that they must decide the case only on the evidence they had heard in court. Although that direction may be targeted mainly at making the jury understand they must not be influenced by media reports or what anyone might say to them outside the courtroom, it is in fact wide enough to encompass what a juror might say in the jury room which went outside the strict bounds of the evidence they had heard. As the President remarked during argument, there must always be a slight risk that one of the jury might know something or have heard something about a defendant and might say something extraneous to the evidence during deliberations. The general direction or warning to decide the case only on the evidence has to suffice to cover those unavoidable and unknowable possibilities.

27 In our view, the general direction was sufficient in this case. It might have been better if, out of an abundance of caution, the judge had said something specific about the need to avoid introducing into the current deliberations anything additional that the 2009 juror might have remembered about that trial. However, we do not think that the absence of such a direction undermined the safety of this conviction. As we have said, the judge gave the usual direction as to the scope of the material to be taken into account. He gave it clearly and we have no reason to think that the jury would not have understood it and given it full effect.

28 Mr. Azopardi submitted that the fact that some inadmissible material had been put before the jury may have affected their deliberations. He did not explain how it might have affected their deliberations or how it might have affected the safety of the jury's verdict. His point was that the jury should not have known about the 2009 modus operandi. That is true. Mr. Rhoda, Q.C., who prosecuted at trial and responded to this appeal, admitted that he had forgotten that he had not had permission from the judge to lead evidence about the 2009 modus operandi. He had told the jury about it in opening, then he had not realized that he had not called evidence about it. He had referred to it in his speech to the jury. He apologized for these errors. In mitigation, one has to observe that neither the judge nor defence counsel seems to have noticed the mistake. Mr. Azopardi naturally tried to make something of this situation but to no real avail. It was wrong that the jury was told something which was not proved. However, the jury was not misled as it has not been suggested that

what they were told was untrue. If they had been misled, that would obviously have been very serious. In our view it cannot sensibly be said that, if the jury had not been told about the 2009 modus operandi, the jury might not have convicted. The evidence properly admitted was overwhelmingly strong. The presence or absence of this small piece of information could not, in our view, have made any possible difference to the outcome of the trial.

29 For the reasons we have given, we reject the grounds of appeal. We reject the submission that the appellant's fundamental rights were breached or that the trial was unsafe or unsatisfactory because of the risk of bias or contamination. We also reject the submission that the absence of a special direction on contamination affected the safety of conviction. However, if we were wrong about that, we would say that the evidence was so strong that we should apply the proviso on the ground that, notwithstanding the lack of that special direction, the conviction is safe.

30 The appeal is dismissed.

31 **KAY, P.,** I agree.

32 **RIMER, J.A.,** I agree.

Appeal dismissed.