Renewed application for leave to appeal a conviction for Indecent Assault determined in the Royal Court on 27 February 2023. Appeal dismissed.

[2024]GCA008

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
ON APPEAL FROM THE ROYAL COURT

CRIMINAL DIVISION APPEAL No. 515

14 February 2024

Before:

Clare Montgomery KC, President
James Wolffe KC JA
Michael Furness KC JA

Between:

Stuart Le Huray — **Appellant**

-v-

Law Officers of the Crown — **Respondents**

Advocate C. Green for the Appellant
Crown Advocate Dunford for the Respondents

MONTGOMERY JA

This is the judgment of the Court to which we have all contributed.

1. On 27 February 2023, following a trial in the Royal Court, the Appellant was convicted of an offence of indecent assault on a female complainant aged 16 by a majority verdict of 5 to 4. On 2 April 2023 the Appellant raised the possibility that 1 of the 9 Jurats who sat on his trial, Jurat Heather Reed, might have been a professional colleague of the complainant's father, in a medical centre (MC) for a period of up to 6 years. On 27 April 2023 grounds of appeal claiming that the verdict should be set aside on the grounds of bias were filed on behalf of the Appellant. The Appellant was sentenced to 2 years imprisonment on that same

day but was granted bail pending the hearing of this appeal by the Bailiff sitting as a single Judge of the Court of Appeal. The Bailiff also extended the time for the notice of appeal.

2. Directions were given on 15 June 2023 and statements were taken from the complainant's parents. It was established that the complainant's father had been a professional colleague of Jurat Reed from May 2012 until 2017 in the MC where they may have attended professional training seminars together. There was no evidence of any working, personal or social relationship between Jurat Reed and the father beyond that. The Appellant relies on the fact that the father recognised Jurat Reed as one of the jurats and submitted that it should be inferred that Jurat Reed must have recognised the father.

3. On 12 February 2024, the Court directed that a statement should be taken from Jurat Reed. In her statement Jurat Reed confirmed that she had been professionally acquainted with the father at the MC for some 5 years before her retirement in 2017. They had limited contact over that time. MC was a relatively large organisation of 50 consultants and 100 plus employees. They did not work in the same department of medicine. Jurat Reed was a partner, the father was an associate. Jurat Reed had not had any contact with the father since 2017 and she had never met the complainant or the rest of her family.

4. At some point during the trial, probably on the second day, Jurat Reed recognised the father in the public gallery and realised he must be associated with the complainant. She did not draw this fact to the attention of the parties or the court. She had drawn the attention of the court to the fact that she knew two other witnesses: Dr Vhadra and Dr McKerrell. Dr Vhadra was a retired GP who had been a witness to the disclosure made by the complainant shortly after the incident on 1 January 2022. Dr McKerrell gave evidence of a forensic medical examination. Both witnesses gave agreed evidence.

5. The Appellant does not contend that the relationship between Jurat Reed and the father was such as to give rise to actual bias. However, it is submitted that the appearances were such that Jurat Reed should have recused herself. It is common ground that the test to be applied is that identified in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357: Would a fair-minded and informed observer conclude that there was a real possibility, or real danger (the two being the same) that the tribunal was biased. This formulation is similar to that in *Law Officers of the Crown v Ogier*, Royal Court unreported 28 January 2002, relied on by the Appellant.

6. In our view nothing turns upon the minor differences in formulation. The test in *Porter v Magill* was expressly adopted by this Court in *Sherborne Corporate Services Limited v Public Trustee* [2022] GLR 97 (*Sherborne*) and we will apply it in this case.

7. The characteristics of the fair-minded observer and the extent of the information imputed to them has been the subject of detailed consideration in the courts.

8. Given the role of jurats as professional fact finders we consider that it is of some assistance to review the case law that has developed in England and Wales in relation to bias in jurors although we are, of course, mindful of the distinct nature of the office which jurats hold and exercise in Guernsey.

9. In *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679, the decision in *R v Pintori* (relied upon by the Appellant in this case) was considered. Three particular instances were considered where police officers and prosecutors had sat as jurors. No clear consensus emerged about the precise nature of the connections that might be "too close for comfort" (as it was put by Baroness Hale at [53]).

10. However, each of the judges in *Abdroikov* recognised the significance of a juror's oath of office. Lord Bingham at [33] emphasised the role of the oath as well as the judge's directions in dealing with many real possibilities of bias. Giving the example of unconscious sexual bias Lord Bingham observed; "the law regards that risk as being manageable and, so, acceptable. The law caters for the risk. It takes steps to minimise it by making jurors take an oath or affirm that they will 'faithfully try the defendant and give a true verdict according to the evidence'. It makes them sit and listen to the evidence in a solemn setting. It requires the judge to give them a direction that they must assess the evidence impartially."

11. *Abdroikov* was subject to further analysis in the case of *R v Khan* [2008] EWCA Crim 531, [2008] 2 Cr App R 13. In *Khan* at [9-11] Lord Phillips CJ distinguished between partiality towards the case of one of the parties and partiality towards a witness. Lord Phillips said there were two questions: "Where an impartial juror is shown to have had reason to favour a particular witness, this will not necessarily result in the quashing of a conviction. It will only do so if this has rendered the trial unfair or given it an appearance of unfairness. To decide this, it is necessary to consider two questions:

    [1] would the fair-minded observer consider that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness? If so

    [2] would the fair-minded observer consider that this may have affected the outcome of the trial.

12. The distinction that is drawn in *Khan* is not directly in issue since the complainant's evidence was central to the case against the Appellant, and accordingly, in the circumstances of this case, we focus on whether the association between Jurat Reed and the complainant's family was such as to suggest, to the fair-minded observer, that she may have had reason to favour the complainant and her evidence. If that were so, it would, in the circumstances of this case, follow that the test for apparent bias would be made out and the appeal would be allowed on the grounds that there had been a substantial miscarriage of justice.

13. In *Lesage v Mauritius* [2012] UKPC 41 [47] the Privy Council confirmed that the notional observer must be presumed to have full knowledge of all the material facts. The obligation to determine the material facts is an incident of the Article 6 ECHR obligation on every national court to ensure that it (and any court from which an appeal lay to it) is an "impartial tribunal", see *Remli v France* [1996] 22 EHRR 253.

14. It is for the court to ascertain the circumstances that would inform the observer's analysis. The court must approach the issues in two stages. First, it is for the court to find the facts on the balance of probabilities. It is then for the court to decide on the balance of probabilities whether, with knowledge of the facts so found, the putative observer would conclude that that the juror was or may have been biased see *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8 at [53].

15. As was the case in *Tibbetts*, it is to be observed that in jurisdictions such as the Bailiwick of Guernsey, with a small and closely-knit population, there is always the possibility that a Jurat may be associated in some way with one of the witnesses in a trial. This possibility does not however justify any less exacting standard being applied by the putative observer to the question of bias. If anything, whilst the test for apparent bias is neither more nor less exacting than in jurisdictions of the United Kingdom, greater attention must be paid to the question, both because the risk of association between a jurat and a witness may be greater than in a populous metropolitan environment, and because the appearance of bias may have a significant impact on the understanding and public acceptance of the rule of law in an island community.

16. The following points must however be made:
[1] The observer is of practical common sense, neither naïve or complacent nor unduly suspicious or cynical, see *Sherborne* [43].

[2] The observer will take the trouble to inform themselves on all matters that are relevant. This will include what may be immediately observed by the onlooker but also the material background facts, see *Lesage* above.

[3] The observer is able to put whatever they know in its overall social, political or geographical context, see *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416 per Lord Hope at [3].

[4] The observer will take into account the particular role played by jurats under the constitution of the Bailiwick of Guernsey and the judicial oath that they take, see *Abdroikov* per Lord Bingham above.

17. In our judgment it is necessary to subject the question of bias to a process of analysis rather than treating it as a matter of impression. This requires the identification of the matters that might be said to give rise to the real possibility that the jurat would decide the case other than on its legal and factual merits.

18. Then, critically, there must be an identification of the logical connection between those matters and the feared deviation from the course of deciding the case on its merits. The bare assertion that a jurat has an interest in or a connection to a witness, does not help. The nature of the interest, or the asserted connection, carrying with it the possibility of a departure from impartial decision making, must be articulated. Only then can the reasonableness of any asserted apprehension of bias be assessed.

19. In this case, other than the historic professional acquaintance with the complainant's father, the Appellant has not been able to identify anything that might have caused the Jurat to depart from her duty of impartial decision making and in particular to favour to the complainant in this case.

20. The test for apparent bias is not an atavistic one but must be founded on reason. In our judgment the relationship between the Jurat and the complainant's father was too remote in time and too limited in intensity for the fair-minded observer to consider it might have affected the judgment of the Jurat in this case.

21. The connection (such as it was) lasted less than 6 years and there is no evidence that the Jurat and the complainant's father had any close contact during that period. They were both medical practitioners in a relatively large organisation. But they did not work together on a team and, even assuming Jurat Reed is to be regarded as one of the partners employing the complainant's father, there was no evidence of any working relationship that might give rise to an apprehension of bias. A nodding acquaintance in hospital corridors or the occasional attendance with others at seminars is not sufficient to lead the fair-minded

observer to conclude that the Jurat would have been partial to the father still less his child in carrying out her judicial tasks.

22. This is particularly so since the trial took place a further 5 years after Jurat Reed left the MC with no intervening contact with the father. We do not consider that a solitary 'like' posting by the father on social media in 2021 in response to an article headed "Former [MC] partner takes over Jurat role" breaks this period or establishes an interim connection; it may be taken to be a response to a headline referencing the organisation. Other than the historic acquaintance with the father, no other reason was identified for the Jurat to favour the complainant.

23. It is a relevant consideration that, by contrast with a juror, a Jurat has been elected to an established office, which has a recognised place in the system of justice in Guernsey. On election, a Jurat takes an oath. The one taken by Jurat Reed required her to swear to "attend and help the Bailiff or his Lieutenant, together with your fellow Jurats, your fellows, in the Ordinary Courts according to your rota and in Extraordinary Courts, whenever you are required to do so, to dispense good and proper justice between Her Majesty and her subjects, and between party and party, equally to the humble and to the great, and especially to widows and orphans, showing favour to no-one."

24. By the time of the trial Jurat Reed been in post for nearly 2 years. Her service as a jurat, although not the subject of formal training, is bound have exposed her to the importance of the principles of justice and fair dealing. We are advised that as a jurat she would have sat for an average of 80 days a year (dealing with both civil and criminal cases) and that by the time of this trial she had sat on 9 criminal trials and many more sentencing procedures. True it is that there is no formal training, but the Jurat was by the time of the trial an experienced judicial officer.

25. Jurat Reed had also been given directions by Judge Fooks at trial that made her duty of impartiality and the need to focus on the evidence absolutely clear. The directions required the jurats "to deal with this case on the written and oral evidence adduced before you and nothing else whatsoever. The burden of establishing guilt throughout lies on the prosecution. Take into account, if you consider it relevant, the emotions and demeanour of the witnesses, but do not allow your own emotions to take over. Consider also the characters but be careful not to base your verdict on a moral judgment to which I have already referred. You may have read or heard, opinions expressed in the media about whether people who allege they have been abused, tell the truth, or tell lies. You may have a view formed in advance as to how you would expect a person, making an allegation of sexual misconduct with a child or young person or indeed accused of such misconduct, to appear or behave when being questioned or giving evidence about it. The experience of the Courts is that

assumptions of any kind are not likely to assist. Consequently, the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying. This is not to invite you to suspend your judgement but to approach the evidence without prejudice. You are concerned only with a fair and calm evaluation of the evidence in this case. Your verdict must turn on what you make of that evidence and nothing else."

26. The fair-minded observer would consider that the oath of office as well as Jurat Reed's experience as a serving jurat since her appointment in 2021 taken together with the directions of the trial judge would be sufficient to dispel any lurking doubt which that observer might have had that there could be vestigial partiality for the complainant's father carried over from the Jurat's former professional life.

27. The only issue which has caused us some concern is the fact that the Jurat did not inform the parties that she had had a professional acquaintance with the father of the complainant once she appreciated the connection. Her failure to do so is understandable and does not reflect on her good faith. She may not have considered the relationship to be forensically relevant. Moreover, she may have been concerned that the disclosure would disrupt what was a difficult and sensitive trial. However, we consider that the Jurat should have disclosed the connection to the trial Judge once it became apparent to her.

28. We accept that the fair-minded observer may take into account the non-disclosure of a doubtful relationship as one of the factors which bear on the assessment of whether the test for apparent bias has been met.

29. However, we do not consider that the failure to disclose in this particular case would give rise to any legitimate doubt on the part of the fair-minded observer given the remoteness of the connection. The Jurat had a limited acquaintanceship with a man whom she had never worked with directly, and who was not himself a witness in the case. We do not consider that her failure to reveal the connection is sufficient to cause the fair-minded observer to determine that there was a real possibility or appearance of bias.

30. We were advised that the jurats are provided with a list of witnesses in advance of any trial so that any relationships can be identified and drawn to the attention of the parties. That is clearly a prudent practice. Whenever a jurat becomes aware of circumstances which might give rise to an appearance of bias the following steps should be taken, at whatever stage in the proceedings the circumstances emerge, in adaptation of the procedure identified in Jones *v DAS Insurance Service* [2003] EWCA Civ 1071:

[1] If there is a chance of objection being taken by the fair-minded observer before the trial starts, the jurat should ascertain whether another jurat is available to hear the case as it is better to transfer than risk a complaint of bias.
[2] If the possibility of transfer is not available, the matter should be disclosed to the judge, so that decisions on further disclosure and the constitution of the tribunal are not made by the jurat alone.
[3] The jurat should clarify what their interest is, relevant to the conflict, so that the full facts can be put before the parties, if necessary.
[4] The options open to the parties should be explained in detail. These may include the jurat being removed from the panel provided at least 7 jurats remain.
[5] The parties should be told that they will be given time before electing whether to continue with the jurat and the trial or seeking a fresh trial.

31. The trial judge will of course be required to assess each case on its individual merits. In some cases, a jurat's interest in the case or association with a party or a witness may make it inappropriate for the jurat to continue to participate in the proceedings, regardless of whether disclosure is made, and the parties agree. Equally, cases may arise where the trial judge would properly take the view that the matter should be disclosed to the parties (not least because such disclosure is a factor which supports the integrity of the process) but that even if a party objects the interest is not such that the jurat should recuse herself.

32. Our decision in this case is the product of the information which would be available to the fair-minded observer and the impact of that information of a level-headed neutral spectator. We recognise that the Appellant may nevertheless harbour doubts in the matter. However, his doubts are not the test. The test is whether there is any reasonable apprehension that Jurat Reed was not able to act impartially. In our judgment there was no such reasonable apprehension. For these reasons although we will grant leave to appeal, the appeal against conviction is dismissed.