

## BEDELPH v. THE QUEEN

1979. Court of Criminal Appeal: Green C.J., Crawford and Everett JJ.

Aug. 16, Nov. 9, 1979.

*Criminal Law—Appeal and new trial—Irregularities in relation to jury—Unanimity of verdict—Whether judge bound to explain—Evidence of irregularity—Juror's affidavit—Inadmissible to impugn verdict—Jury Act 1899 (63 Vict. No. 32), s. 48 (as reprinted, 1977).*

*Criminal Law—Practice and procedure—Juries—Verdict—Taking of—Proof of unanimity.*

*Criminal Law—Practice and procedure—Judge's summing up—Unanimous verdict—Duty of jurors to give—No need to explain—Jury Act 1899, s. 48 (as reprinted, 1977).*

*Evidence—Facts excluded from proof—On grounds of public policy—Impugning verdict—Inadmissible evidence—Of conversation in jury room—Of what juror meant or thought.*

The *Jury Act* 1899, by s. 48, provides that in the case of, *inter alia*, murder if "a jury has remained in deliberation for" six hours "without reaching a unanimous decision as to their verdict" a majority verdict may be taken.

At a trial for murder a verdict of guilty was given within the six hours. The judge had not explained to the jury what was a unanimous verdict. It was suggested the verdict given in court could have been that of a majority. An affidavit of a jurymen was tendered in which he said he had not consented to the verdict and had stood mute when asked "And so say you all?"

*Held, that—*

- (a) a trial judge is not bound to tell the jury that their verdict must be unanimous nor to direct them as to the nature and character of a unanimous verdict:

*Milgate v. The Queen* (1964), 38 A.L.J.R. 162, followed;

- (b) where a juror could have dissented from the verdict in open court, his affidavit that he meant to do so is inadmissible:

*Reg. v. Roads*, [1967] 2 Q.B. 108, followed; and

- (c) a jurymen may not give evidence of conversations in the jury room relating to the verdict:

*Burnside v. The Queen*, [1963] Tas.S.R. 174n., and *Sullivan v. The Queen*, [1963] Tas.S.R. 165, followed.

## APPLICATION FOR LEAVE TO APPEAL.

Sally Maree Bedelph was convicted at Hobart Criminal Sittings before Neasey J. on 30th October, 1978, of murder, contrary to s. 158 of the *Criminal Code* and sentenced to be imprisoned for the term of her natural life. She applied to the Court of Criminal Appeal on eight grounds that are not the subject of this report. The notice of appeal was by leave of the Court amended at the hearing so that it came to contain grounds 9 and 10 as follows:

"9. THAT the Trial Judge erred in law in failing to direct the Jury that if they reached any verdict within six hours of the commencement of their deliberations their verdict must be unanimous and the Trial Judge failed to direct the Jury as to the nature and character of a unanimous verdict.

"10. THAT the verdict reached by the Jury was not a unanimous verdict as required by law."

In fact, the judge had given no such direction. Ground 10 was based on the affidavit of a jury man that was tendered to prove that he did not agree with the verdict, that he had said so in the jury room, and that in court he had stood mute even when the clerk of the court asked "And so say you all?" The recording of the taking of the verdict gave the sound of several voices answering "Yes" to this question but they were not identifiable.

*Pierre Slicer* and *M. Chambers* for the appellant.

*W. J. E. Cox* Q.C., Crown Advocate and *A. N. Hope* for the Crown.

*Slicer* sought and obtained leave to add to his grounds of appeal a ninth ground that the jury was not told that their verdict must be unanimous and what was a unanimous verdict.

THE COURT. Ground 9 may be argued now and if necessary grounds 1 to 8 can be argued next term.

*Slicer*. Though there is no statutory requirement so to do, there is a need for the trial judge to direct the jury on (a) the need to return a unanimous verdict, and (b) the options open to the jury as to the time for the delivery of a majority verdict. This need is based on (a) the practice of and authorities in the Court of Criminal Appeal in England since 1967, and (b) the particular complexities of the *Jury Act* 1899, s. 48. The practice here is not so to direct, nor in New South Wales: *McKim on Criminal Procedure and Practice in New South Wales*, p. 50. The common law applies here until a certain time when the exception operates. A unanimous verdict which is in fact a verdict of the majority in which the minority has acquiesced is a bad verdict. If judges have directed that the minority should give in, the verdict has been set aside: *R. v. Mills*, [1939] 2 All E.R. 299, at p. 301, [1939] 2 K.B. 90, at p. 93. The nature of a unanimous verdict should, therefore, be explained. We cannot know the dynamics of a jury reaching a verdict. The charge sets limits to those dynamics. It is not enough to ask, "And so say you all" after delivery of the verdict: *Reg. v. Davey*, [1960] 3 All E.R. 533, at p. 537, [1960] 1 W.L.R. 1287, at p. 1291. It is different in Australia: *Milgate v. The Queen*, (1964) 38 A.L.J.R. 162. The weakness of the system was shown in *Reg. v. Roads*, [1967] 2 All E.R. 84, [1967] 2 Q.B. 108, which was followed by a practice direction [1967] 3 All E.R. 137, [1967] 1 W.L.R. 1198. Evatt J. criticized the Tasmanian position in *Newell v. The King*, (1936) 55 C.L.R. 707, at p. 713. In England

before the practice direction the Court of Criminal Appeal had dealt with unanimous verdicts: *R. v. Mills* (*supra*), *Reg. v. Davey* (*supra*, at p. 537), *R. v. Klein*, unreported on this point, 9th February, 1932, C.C.C. See [1939] 2 K.B., at p. 90, 23 Cr. App. R. at p. 81, *Reg. v. Kalinski*, [1967] 2 All E.R. 398n., [1967] 1 W.L.R. 699. *Milgate v. The Queen* (*supra*) was decided on Queensland law which then required all unanimous verdicts. Where there must always be unanimous verdicts there may be no need to give a special direction, but where a complex system has continued for thirty-three years there is a need. Since that practice direction there have been other cases: *Reg. v. Georgiou*, (1969) 53 Cr. App. R. 428, *Reg. v. Bateson*, [1969] 3 All E.R. 1372, at p. 1375, *Reg. v. Barry*, [1975] 2 All E.R. 760, [1975] 1 W.L.R. 1190. An earlier case is *Reg. v. Shoukatallie*, [1961] 3 All E.R. 996, [1962] A.C. 81. An article in 44 A.L.J., at p. 482 describes the Australian position. Australian cases are *Reg. v. Sergi*, [1974] V.R. 1 [Everett J. Can there be majority verdicts in Victoria?] No. *Reg. v. Bacon*, [1973] 1 N.S.W.L.R. 87, at pp. 100, 101. In Tasmania there is special complication in the *Jury Act* 1898, s. 48, as amended in 1966, which was misunderstood by all at the second trial of *Reg. v. Phillips*: *Phillips v. The Queen* [No. 2], [1971] Tas.S.R. 360. There insanity and provocation were raised so that after six hours majority verdicts of guilty of manslaughter, not guilty on the ground of insanity, and not guilty were open and the jury may have thought there could be a majority verdict of guilty of murder.

We seek to introduce an affidavit. We know of *Sullivan v. The Queen*, [1963] Tas.S.R. 165, and *Burnside v. The Queen*, [1963] Tas.S.R. 174n., but we distinguish between the way the jury reaches its verdict and the actual delivery of it, between the jury room and the jury box, and we seek to show the problem and consequence of non-direction. I tender the affidavit *de bene esse*. [THE COURT. It is not to be tendered *de bene esse*. It is part of your application and we are being asked to say if it is admissible.] The affidavit can be looked at to see whether there was a substantial miscarriage of justice. The affidavit is made under the *Criminal Code*, s. 419. Section 48 of the *Jury Act* 1899 is mandatory. This is not evidence of how the verdict was reached but that that section was not complied with. This distinction is shown in *R. v. Hancox*, (1913) 8 Cr. App. R. 193, at p. 197, *R. v. Thomas*, [1933] 2 K.B. 489, *Ras Behari Lal v. The King Emperor*, [1933] All E.R. Rep. 723, 15 L.T. 3, 30 Cox C.C. 17. Cases subsequent to those do not preclude evidence of some things that happen in the jury room. *Reg. v. Box*, [1963] 3 All E.R. 240, [1964] 1 Q.B. 430, *Reg. v. Hood*, [1968] 2 All E.R. 56, [1968] 1 W.L.R. 773. What exactly is the public policy involved and what are its limits? This was a bad verdict. [Everett J. That is not one of your grounds of appeal.] We only say that is an unsafe verdict to show the effect of non-direction. *Reg. v. Thompson*, [1962] 1 All E.R. 65, at p. 67. *Reg. v. Roads*, [1967] 2 All E.R. 84, [1967] 2 Q.B. 108

should be distinguished. If it is correct we should succeed because it relied on a careful direction on unanimity. *Reg. v. Roads* (*supra*) relied on civil cases except for a criminal case of 1817, *R. v. Wooller* 2 Stark. 111. It relied on *Boston v. W. S. Bagshaw & Sons*, [1966] 1 W.L.R. 1135n., [1967] 2 All E.R. 87n. in which the jury wished to explain their verdict. This juror was never a party to the verdict.

He then applied to amend ground 9 and add ground 10 by consent and it was allowed:

He continued. A majority verdict cannot be returned without deliberating for six hours: *Jury Act* 1899, s. 48, *Criminal Code*, s. 383. This court is not bound by precedent to reject the affidavit. *Burnside v. The Queen*, [1963] Tas.S.R. 174n., *Sullivan v. The Queen*, [1963] Tas.S.R. 165, *Reg. v. Georgiou*, (1969) 53 Cr. App. R. 428, at p. 431.

The Court called on Cox Q.C. to argue the inadmissibility of par. 10 of the affidavit.

Cox Q.C. It is irrelevant. [Crawford J. It is relevant to whether the jury answered yes.] The tape does not show that all answered yes. Several voices are heard saying yes, none saying no. I do not contend that it is inadmissible in itself, but it is irrelevant to the grounds of appeal. Where the foreman gives the verdict in open court in the hearing of all the jurors and without objection, the verdict cannot be impugned.

THE COURT. We reject grounds 9 and 10 for reasons to be given later.

NOVEMBER 9.

THE COURT, after stating how the point for decision arose, continued:

It is convenient to deal first with ground 10. The court had before it a transcript which showed that the learned trial judge had not given any direction to the jury that a verdict of guilty of murder could be reached only by a unanimous decision of the jury (see the *Jury Act* 1899, s. 48) and that, upon the return of the jury to the court, after they had been in deliberation for some three hours twenty minutes, questions were asked by the clerk of the court and replies made by the jury as follows:

"Clerk of the Court: Ladies and Gentlemen of the jury, are you all agreed upon your verdict?"

"Jury Members: Yes.

"Clerk of the Court: How say you: Is the Prisoner at the Bar Guilty or Not Guilty of one count of murder?"

"Foreman: Guilty.

"Clerk of the Court: Hearken to your verdict as the court records it: You say Sally Maree Bedelph is guilty of one count of murder. And so say you all?"

"Jury: Yes."

Counsel for the appellant and counsel for the respondent informed us that they had listened to the recording of the trial and that, where the answers "Yes" are attributed to "Jury Members" and "Jury", in each case more than one voice could be heard answering "Yes".

Counsel for the appellant sought leave to read the affidavit of a member of the jury (not the foreman). The application was opposed but the court read the affidavit for the purpose of determining its admissibility and the extent to which it would be proper to have regard to it for the purposes of the appeal. The affidavit contained: (a) statements about conversations between members of the jury while in the jury room, (b) an allegation that the deponent did not agree with the verdict of guilty of murder but that he said nothing after the jury's return to the court to show that he disagreed with the answers given by the foreman and the other member or members of the jury, (c) an allegation that, since the trial, he had written a letter concerning the matter and (d) a statement of what was said and by whom it was said when the jury returned to the court to give the verdict.

Statement (d) in the affidavit is admissible but is not material as this matter was resolved by the agreement of counsel as to what was said in court. As to (c) it was conceded by the appellant's counsel, correctly, that evidence of the fact that a letter had been sent and of the contents of such letter was not admissible. As to (a), a jurymen may not give evidence of conversations in the jury room relating to the verdict: *Burnside v. The Queen* (1963) Tas.S.R. 174n., but the reasons for which fully appear in an otherwise unreported judgment, Serial No. 61/1961, and *Sullivan v. The Queen* (1963) Tas.S.R. 165. As to (b), a jurymen may not give evidence that he failed to agree with the verdict delivered in court if he did not take the opportunity while in court to say so. As Lord Parker C.J. said in *Reg. v. Roads* [1967] 2 Q.B. 108, at p. 115, where a verdict has been returned not only in the presence of a juror but in his hearing, the court may not receive an affidavit of a jurymen that he meant to return a verdict different from the one returned in court. It was submitted by counsel for the appellant that that decision was wrong, as it depended on decisions relating only to juries in civil cases. But one of the decisions cited in that case was *R. v. Wooller*\* (1817) 6 M. & S. 361, which was a criminal case in which there was doubt as to whether a jurymen had been able to hear what was said by the foreman, and, although the court was prepared to act upon the evidence of some bystanders and upon the report of the trial judge, the court refused to receive the affidavit of a jurymen in relation to the issue. In any case there is no reason to distinguish between the application of the principle to criminal cases and its application to civil cases.

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\*This is the same case as *R. v. Wooller*, 2 Stark 111, but that report ends with 6th June, 1817, and the report in 6 M. & S. covers also two motions in the cause made the next day.

We have no reason to doubt the application of *Reg. v. Roads* (*supra*), a decision of the Court of Appeal, to this case. In *Public Transport Commission (N.S.W.) v. J. Murray-More (NSW) Pty. Ltd.* (1975) 132 C.L.R. 336, Barwick C.J. said at p. 341: "in the first place the Supreme Court at first instance, where there is no relevant decision of this Court, should as a general rule follow the decisions of the English Court of Appeal. Further in the same circumstances the Supreme Court on appeal would be well advised as a general rule to do likewise". Gibbs J. said at p. 349: "In my judgment, the learned judges in the Supreme Court should have treated *Cory & Son Ltd. v. France, Fenwick & Co. Ltd.* [1911] 1 K.B. 114" (a decision of the English Court of Appeal) "as an authority binding upon them" (*Ibid.*, p. 349). In *Viro v. The Queen* (1978) 141 C.L.R. 88, at p. 121, Gibbs J., speaking of the position of State Courts, said that although the decisions of the Court of Appeal were not technically binding they "should generally speaking be followed if they are applicable and are not themselves in conflict with a decision of this Court or of the Privy Council".

In *R. v. Woodfall* (1770) 5 Burr. 2661 which was a prosecution for libel, Lord Mansfield giving the judgment of the court said at p. 2667 "an affidavit of a juror can never be read, as to what he then thought or intended". See also *R. v. Brown* (1907) 7 S.R. (N.S.W.) 290.

In our opinion those parts of the affidavits which we have identified as (a), (b) and (c) above were not admissible on the hearing of this appeal and application for leave to appeal.

As to ground 9, as Barwick C.J. said in *Milgate v. The Queen* (1964) 38 A.L.J.R. 162, at p. 162, speaking of the law in Queensland, "There is . . . neither a rule of law nor a rule of practice that a jury in a criminal trial must be told by the trial judge that their verdict must be unanimous. The law and practice of England is the same. The interrogation of the jury by the Clerk of Arraignment upon the return of their verdict by their foreman is the traditional method of ensuring unanimity on the part of the jury, coupled to some extent with the form of the oath individually administered to each juror". Owen J. (*Ibid.*, at p. 163) said that he did not agree that the trial judge must give such a direction in all cases. Kitto J. and Windeyer J. agreed with the judgments of Barwick C.J. and Owen J. There is no reason to think that that case is not equally applicable in Tasmania as in Queensland. In the circumstances of the present case the trial judge ascertained that the verdict was unanimous from the questions and answers mentioned in the transcript and he was entitled to accept any of the verdicts which he had left open to the jury if the jury were unanimous. (See the *Jury Act* 1899, s. 48). There was nothing then to make or to lead him to think that it was necessary or desirable that he should put any further question to ascertain whether in fact the decision was a unanimous one. There could have been no miscarriage of justice.

It is implicit in the foregoing that we are also not persuaded that there was any need for the trial judge to "direct the jury as to the nature and character of a unanimous verdict".

For these reasons we considered that grounds 9 and 10 could not be sustained.

The application was continued on the other grounds.

*Leave to appeal granted—Appeal dismissed.*

Attorney for the appellant: *Australian Legal Aid Office.*

F.D.C-S.