GLEN v. H.M. ADVOCATE

No. 8.
Jan. 8, 1988.

L. J.-C. Ross,
Lords McDonald, Hunter.

EILEEN GLEN, First Appellant. — *Batchelor.*
ANN MARIE GLEN, Second Appellant. — *Young.*
HER MAJESTY'S ADVOCATE, Respondent. — *The Lord Advocate (The Rt. Hon. the Lord Cameron of Lochbroom, Q.C.).*

Procedure — Solemn procedure — Trial — Judge's charge — Majority verdict — Trial judge directing jury that they could return any verdict by a majority only if there was at least eight of their number in favour of that verdict — No differentiation made between majority verdicts of guilt or acquittal — Whether wrong direction — Whether miscarriage of justice — Criminal Procedure (Scotland) Act 1975 (cap. 21) secs. 154[1] and 228[2].

The appellants were charged with offences under the Misuse of Drugs Act 1971. In his charge to the jury the presiding judge stated that for any majority verdict at least eight of their number must be in favour of that verdict. He made no differentiation between majority verdicts of guilt or acquittal.

Held that the trial judge's direction was wrong; what the jury should have been told was that there must be eight of them in favour of a verdict of guilt before they can convict.; the misdirection constituted a miscarriage of justice; and appeals *allowed* and convictions *quashed* on the charges for which the jury had given majority verdicts of guilt.

Affleck v. *H.M. Advocate* 1987 S.C.C.R. 150 *followed.*

EILEEN GLEN and Ann Marie Glen were charged on an indictment at the instance of the Rt. Hon. the Lord Cameron of Lochbroom, Q.C., Her Majesty's Advocate, the libel of which set forth various offences under the Misuse of Drugs Act 1971.

The pannels were tried before Lord Dunpark and a jury at Glasgow High Court on 27th, 28th and 29th April 1987. In the course of his charge to the jury the trial judge said:— "Let me summarise the verdicts open to you on the remaining charges. There are only three verdicts you may return; acquittal verdicts of not guilty or not proven — the choice is yours of acquittal verdict — or alternatively a guilty verdict." [His Lordship then dealt with some aspects of the evidence in the case and the appointment of a chancellor of the jury and continued.] "I have told you what verdicts are open to you. Any verdicts you may return need not necessarily be unanimous. It may be by a majority. But it is particularly important that if it is a guilty verdict you are going to return then of course the minimum majority of fifteen is eight, so there must be at least eight of you in favour of any verdict you return." Before the jury retired to consider their verdicts the advocate-depute interjected:— "It may be I misheard your Lordship, but I thought your Lordship just said that it must be any verdict — there must be eight in favour of any verdict." To this the trial judge replied:— "Any verdict is correct." The jury retired. On their return they

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[1]Sec. 154 of the Criminal Procedure (Scotland) Act 1975, as amended, provides:— "The verdict of the jury, whether the jury are unanimous or not, shall be returned orally by the foreman of the jury unless the court shall direct a written verdict to be returned: Provided that where the jury are not unanimous in their verdict, the foreman shall announce that fact so that the relative entry may be made in the record;..."

[2]Sec. 228 provides *inter alia*:— "(1) Any person convicted on indictment may appeal in accordance with the provisions of this Part of this Act, to the High Court — (a) against such conviction;... (2) By an appeal under subsection (1) of this section, a person may bring under review of the High Court any alleged miscarriage of justice in the proceedings in which he was convicted...."

found each pannel guilty by a majority in respect of charges 1, 2, 5 and 6 on the indictment as amended. The appellants presented notes of appeal against these convictions to the High Court of Justiciary on the ground that the trial judge had misdirected the jury in his charge to them.

In his report to their Lordships in respect of the appellant Eileen Glen the trial judge stated *inter alia*:— "The sole ground of appeal is that I misdirected the jury when I said that, if they decided to return a majority verdict, 'there must be at least eight of you in favour of any verdict you return'. Presumably the submission will be that the jury should have been directed that a majority of at least eight is only required in the case of a guilty verdict. In my opinion this is not a unique misconception. At this trial the advocate-depute queried my direction.... The only section in the Criminal Procedure (Scotland) Act 1975 which refers indirectly to majority verdicts is sec. 154.... The section states *inter alia*:— '*The* (the emphasis is mine) verdict of the jury, whether the jury are unanimous or not, shall be returned orally by the foreman of the jury....' The precursor of this section (which was repealed by the 1975 Act) was sec. 20 [of the Jurors (Scotland) Act 1825], which required *all* verdicts (again the emphasis is mine) to be delivered by the mouth of the chancellor of the jury, unless the court directed that written verdicts be returned. Alison's *Criminal Law,* ii at p. 637, narrates the evolution from written to oral verdicts and at p. 639 refers to the chancellor announcing *the* verdict aloud, 'whether it be "guilty" or "not guilty", "proven" or "not proven".' Renton and Brown, *Criminal Procedure* (5th edn.) at p. 166/1 (para. 10-60) states that '*the* verdict must expressly find the accused guilty of not guilty, or the charge not proven.' As the jury have the option of returning one of three verdicts on each charge and the verdict which they return may be a majority verdict, it has always been obvious, to me at least, that, after it became the practice for the judge to remind the jury that a majority of fifteen was at least eight, that reminder applied to any majority verdict that they might decide to return. In *McPhelim* v. *H.M. Advocate* 1960 J.C. 17, at p. 22 the Lord Justice-Clerk (Thomson) said:— '[T]he recent and, in my view, correct practice is to tell them that that means that there must be eight of them for guilty before they can convict.' But he said that in the context of a unanimous guilty verdict and he was not concerned with majority verdicts of not guilty or not proven. A trial judge must direct the jury that their verdict need not be unanimous. If he is to remind them that a majority of fifteen means at least eight, as they may only return one verdict on each charge, I was bound, in my opinion, to direct this jury that 'there must be at least eight of you in favour of *any* verdict you return' (again the emphasis is mine). A verdict of, say, five for guilty, seven for not proven and three for not guilty would not be a valid verdict."

The appeals were heard before the High Court of Justiciary comprising the Lord Justice-Clerk (Ross), Lord McDonald and Lord Hunter on 8th January 1988.

Eo die, at advising the opinion of the court, within which the arguments of counsel are adequately set forth, was delivered by the Lord Justice-Clerk (Ross).

OPINION OF THE COURT.—The appellants are Eileen Glen and Ann Marie Glen who were found guilty in the High Court at Glasgow of various charges. These were charges of contraventions of the Misuse of Drugs Act 1971. They have both appealed against conviction and in each case it has been made plain that the appeal is against their conviction of charges 1, 2, 5 and 6. In the case of both appellants they were found guilty of these charges by the jury by a majority. The ground of appeal which is common to both appellants may be taken from the note of appeal in the case of the appellant Eileen Glen. It is in these terms:— "The learned trial judge misdirected the jury by charging them that whilst there were three verdicts open to them and that they could return a verdict unanimously or by a majority they could only return a verdict by a majority if there were at least eight of their number in favour of that verdict and that said misdirection

resulted in a miscarriage of justice." In presenting the appeal counsel for the first appellant drew our attention to the relevant portions in the judge's charge. The learned judge at one stage said to the jury this:— "Let me summarise the verdicts open to you in the remaining charges. There are only three verdicts you may return. Acquittal verdicts of not guilty or not proven, the choice is yours of acquittal verdict, or alternatively, a guilty verdict." Subsequently the trial judge said this to the jury and again I quote:— "I have told you what verdicts are open to you. Any verdicts you return need not necessarily be unanimous. It may be by a majority but it is particularly important that if it is a guilty verdict you are going to return then of course the minimum majority of fifteen is eight so there must be at least eight of you in favour of any verdict you return." The jury were then told to retire but before they actually retired the advocate-depute intervened [their Lordships quoted the exchange between the advocate-depute and the judge *cit. supra* and continued.] The jury then retired and returned, on the charges to which I have referred, majority verdicts. The direction which the trial judge gave has to be contrasted with what was said to be the practice in the case of *McPhelim* v. *H.M. Advocate* 1960 J.C. 17, at p. 22, the Lord Justice-Clerk said this:— "Clearly, the presiding judge omitted to tell the jury that their verdict could be by a majority. Clearly, he should have told them so and the recent and in my view correct practice is to tell them that that means that there must be eight of them for guilty before they can convict." In the more recent case of *Affleck* v. *H.M. Advocate* 1987 S.C.C.R. 150, at p. 151, the Lord Justice-General (Lord Emslie) again described the proper course for a judge to follow when charging a jury in this regard. What he said was this, and I quote:— "The proper course for a judge to follow when it comes to telling the jury what action they may take, having considered the evidence, is to explain the verdicts which are open to them, to inform them that they may return a verdict by a majority, and then to emphasise the only matter of importance: that no verdict of guilty can be returned unless eight members of the jury are in favour of that verdict."

In our opinion in the present case the direction which the trial judge gave to the jury to the effect that there must be at least eight of them in favour of any verdict which they returned was a wrong direction. The trial judge in his report makes it plain that this was a deliberate decision upon his part to give this direction. He states in his report that the suggestion that the jury should have been directed that the majority of eight was only required in the case of a guilty verdict was what he describes as "not a unique misconception." In our opinion however the misconception is on the part of the trial judge and not on the part of those who recognise that what the jury should be told is that there must be eight of them in favour of a verdict of guilty before they can convict. The learned judge in his report also draws attention to Renton and Brown *Criminal Procedure* (5th edn.) at pp. 166/1. He does not however draw attention to an earlier reference in Renton and Brown at p. 163 where the following passage appears:— "The jury should be directed as to the majority required for the verdict of guilty but it is not necessary to direct them as to the majority sufficient for an acquittal."

We were referred to the case of *Mackay* v. *H.M. Advocate* 1944 J.C. 153. That was a case which arose in the days when there was in force wartime legislation providing for juries of seven persons and providing that a verdict by a majority could not be returned unless five of the jury were in favour of such a verdict. In that case the question arose as to whether it was necessary for a judge to give

any special directions in regard to a verdict of acquittal as opposed to a verdict of guilty. Lord Fleming, at p. 156, having referred to the particular direction given by the trial judge said this, and I quote:— "Now, that made clear to the jury that they were not entitled to return a verdict against the accused on any of these charges unless there was at least a majority of five to two in favour of that course or the jury were unanimous. It is, however, said that the jury received no direction with regard to the conditions under which they were entitled to return a verdict of acquittal, and that this may have led to a miscarriage of justice. It is, of course, proper for the presiding judge to inform the jury of the special conditions under which a verdict of guilty can now be returned, but I cannot hold that it is indispensable for the judge explicitly to tell the jury the conditions under which a verdict of acquittal may be returned. In this case the jury were informed quite correctly that there were three verdicts open to them, *Guilty, Not Guilty* or *Not Proven.* They were also told the condition on which alone a verdict of 'guilty' could be returned, and they would naturally assume that, if that condition was not satisfied, their verdict must be one of acquittal. If the jury had felt any difficulty with regard to this matter, one would suppose that they would have asked instructions with regard to it, and it is a fair inference from the fact that they did not ask for any instructions that they experienced no such difficulty." Similar views were expressed by Lord Moncrieff [at p. 157].

In his report the trial judge says this in relation to the direction which he gave the jury in this case:— "A verdict of say five for guilty, seven for not proven and three for not guilty would not be a valid verdict." In our opinion that statement is incorrect. Such a verdict would be a valid verdict for acquittal. The problem which arises, arises because there are three possible verdicts open to the jury and because one cannot know what takes place in the jury room. Having regard to the direction which the trial judge gave in this case we find ourselves unable to distinguish this case from the case of *Affleck* v. *H.M. Advocate*. In that case the sheriff in the course of directing the jury to the effect that for a majority verdict there must be not less than eight of their number in favour of it said this, and I quote:— "If, for example, seven of your number were voting for guilty on a particular charge, four for not guilty and four not proven, then clearly those voting for guilty are in the minority, and if that happens during your preliminary discussions, you would have to go and reconsider the matter in order to reach a verdict, any one of the three verdicts: guilty, not guilty or not proven and not less than eight voting in favour of that." The court in that case held that the jury must have been confused by these directions which were unsound in law. Although in the present case the trial judge did not give such explicit directions to the jury regarding the way in which they might divide, it is plain from his report that he recognised that the jury might divide in three ways in the manner which he suggested. Given a direction that there must be a majority of eight in favour of any verdict there is necessarily a risk that a waverer on the jury might be induced to change his mind and side with others in order to produce the required majority of eight. Of course, as the Lord Advocate recognised, it might be contended that a direction that no majority verdict of guilty can be returned unless at least eight of the jury are in favour of that verdict might induce one or more jurors to change sides so as to produce the requisite majority. That may be so but the direction that there must be at least eight in favour of guilty is now well-established and has not in our experience caused problems. It is however

important that the jury should realise that if there are not eight for guilty, the verdict must be one of acquittal.

Accordingly we have come to the conclusion that in the present case what the learned judge said to the jury to the effect that there must be at least eight of them in favour of any verdict was a misdirection. The Lord Advocate recognised that if what the trial judge said was held to constitute a misdirection it could not be suggested that there had not been a miscarriage of justice. It follows since we are satisfied that there was this misdirection causing a miscarriage of justice that the conviction of each of these appellants on charges 1, 2, 5 and 6 will be quashed.

THE COURT allowed the appellants' appeals and quashed the convictions on charges 1, 2, 5 and 6.

Ross Harper & Murphy — Bird Semple Fyfe Ireland, W.S. (for B. McConville & Co., Glasgow) — The Crown Agent.

CAMPBELL v. ALLAN

No. 9.
Jan. 19, 1988.

L. J.-G. Emslie,
Lords Brand, Allanbridge.

CAMERON CAMPBELL, Appellant. — *The Rt. Hon. the Lord Morton of Shuna, Q.C.*
JOHN DOUGLAS ALLAN (Procurator fiscal, Edinburgh), Respondent.
— *D.R.A. Emslie, Q.C., A.-D.*

Procedure— Summary procedure — Trial — Witness — Crown witnesses being recalled to give evidence in replication to contradict evidence given by another Crown witness and by defence witnesses — Whether competent — Whether a miscarriage of justice — Criminal Procedure (Scotland) Act 1975 (cap. 21), sec. 350A (1) (a).[1]

Procedure — Trial — Witness — Crown witness giving evidence contradicting earlier Crown witnesses — Defence witnesses contradicting earlier Crown witnesses — Crown witnesses being recalled to give additional evidence — Whether competent — Whether a miscarriage of justice — Criminal Procedure (Scotland) Act 1975 (cap.21), sec. 350A (1) (a).[1]

Section 350A (1) (*a*) of the Criminal Procedure (Scotland) Act 1975 enacts, *inter alia*, that a judge may, on the motion of the prosecutor made after the close of the defence evidence, permit the prosecutor to lead additional evidence for the purpose of contradicting evidence given by any defence witness which could not reasonably have been anticipated by the prosecutor.

The appellant was charged on a summary complaint with assault. The appellant, working as a steward at a public house, had refused the complainer entry and had then allegedly assaulted him. At trial in the sheriff court, the Crown led two witnesses, who spoke to the complainer's account of the incident. The Crown then led evidence from another steward at the public house, who stated that the previous witnesses had been refused entry to the

[1]Sec. 350A (1) (*a*) of the Criminal Procedure (Scotland) Act 1975, so far as material, is as set forth in the opinion of the court at p.49, *infra*. — *Ed.*