Watson directions

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The appellant was convicted of one count of causing or inciting a child under the age of 16 to engage in sexual activity, one count of false imprisonment, and one count of rape. The victim of the first of these convictions was the appellant's son (referred to as 'C1'). The victim of the false imprisonment and the rape was the appellant's wife (referred to as 'C2'). The appellant was sentenced to a total of 10 years' imprisonment, to be served consecutively to a sentence that he was already serving. The appellant was acquitted of five further sexual offences relating to C1 and two further counts of rape relating to C2. He appealed against his convictions.

The first six counts on the indictment related to C1 and were alleged to have occurred between 2008 and 2016, up to C1's 14th birthday. The first five counts involved allegations of a course of conduct by the appellant which involved sexual assault against C1. The appellant was acquitted of counts 1 to 5. Count 6 related to a specific incident when C1 stayed over at the appellant's house after having had an argument with some family members. He was woken in the night by the appellant, who took hold of the victim's hand and placed it on the appellant's penis. The appellant was convicted of count 6, namely causing or inciting a child under the age of 16 to engage in sexual activity.

The second victim in these proceedings was the appellant's wife (C2). She stated that they had a difficult marriage and described the appellant as bullying. Their relationship ended in 2015; however, the appellant's grandmother became unwell after that and C2 assisted in caring for her and would stay at the appellant's property overnight in order to do so. The offences of false imprisonment and rape (counts 7 and 9 on the indictment) occurred when C2 stayed overnight at the appellant's property. The false imprisonment occurred when the appellant trapped her in a bedroom and the rape took place thereafter. The appellant was convicted of these offences but was acquitted of two further counts of rape.

The appeal against conviction arises in respect of a *Watson* direction that the trial judge gave to the jury. The jury retired to consider their verdicts on Tuesday 18th May 2021 at 12 noon. The jury sent a note to the trial judge at 15:52 on that day. The judge said that he could not discuss the note with counsel. At appeal stage, it was revealed that the note stated:

> 'We have 11-1 agreement for counts 1 to 6 and unanimous decisions for counts 7-10.'

Since one of the jurors needed to leave for reasons unconnected with the trial, the judge decided not to take action on the note that same afternoon but decided to wait until the following morning. By the next morning, another note had been sent to the judge by an individual juror. The trial judge decided not to disclose the entirety of the note to counsel, but did disclose that it asked for clarification about the term 'sure' as used in the legal direction on the standard of proof. At appeal stage, it was revealed that the note included the following:

> 'Even though we all agree that the defendant is a bullying, controlling horrible man and think he is guilty of all/most offences, we are getting stuck on the wording of your brief: we have to be sure the offence happened.'

In response to this note, the trial judge gave the jury further direction about the meaning of 'sure'. This is not the subject of the appeal. By this time, the jury had been deliberating for two hours and 54 minutes. Even though the jury had been deliberating for a relatively short period of time, the content of the notes provides context to the trial judge's decision to give the jury a majority verdict direction.

After nearly seven hours of deliberation, the judge decided to call the jury back into court and he gave them a *Watson* direction. There was no discussion in court with counsel about whether it was appropriate to give the jury a *Watson* direction. There is also no record of any such discussion occurring out of court, although counsel for the prosecution recalled being asked to see the judge in his room along with defence counsel. Counsel could not recall the reason for that meeting with the judge, nor did he make a note of it. However, he does remember that at some point during that meeting, the judge raised the possibility of giving the jury a *Watson* direction.

The direction given to the jury was:

> 'I just wanted to say the following to you. Each of you has taken an affirmation to return a verdict according to the evidence, a true verdict according to the evidence, and no-one must be false to that affirmation, but you have a duty not just as individuals but also collectively. That is the strength of the jury system. Each of you takes with you into the jury box your individual experience and wisdom, and you do that by giving your views and listening to the views of others. There must necessarily be discussion and argument and give and take within the scope of your affirmation. That is the way in which agreement is reached. If, unhappily, 10 of you cannot reach an agreement, then you must say so. So, I am sending you back to your deliberations. You are free to continue deliberating for as long as you wish. I am not stopping you but if at the end of the day you cannot get at least 10 of you to agree, and if you are of the view that that is not going to change, then your foreman might wish to consult with you all and then send me a note. It is entirely a matter for you. I am not terminating your deliberations. I want to make that clear, that you are free to continue deliberating for as long as you think your discussions will deliver a result.'

After the *Watson* direction was given, the jury retired and they returned around 45 minutes later with their verdicts. The appellant appealed against his convictions.

HELD (DISMISSING THE APPEAL), that although there was a material irregularity in giving the *Watson* direction and in the manner in which the direction came to be given, the verdicts themselves were safe.

The Court of Appeal held that the trial judge's decision to discuss the prospect of giving the jury a *Watson* direction with counsel in private was wholly wrong. This discussion was not recorded in open court, and it amounted to a material irregularity. If the judge wished to discuss this with counsel, he should have done so in open court, in the absence of the jury, but with the appellant present. The Court of Appeal held that it is well settled that a judge trying a criminal case must not meet in private with counsel, particularly on matter of any substance in relation to the trial, and it should not have happened in this case (at [17]).

On the question of whether a *Watson* direction was appropriate in this case, the Court of Appeal referred to the guidance on giving a *Watson* direction which is found in *R v Arthur* [2013] EWCA

Crim 1852. The guidance states that the *Watson* direction should rarely be given by trial judges, and it should only used be as a last resort after a prolonged retirement after the majority verdict direction has been given (at [43]). Once the jury has retired, no individual juror should feel under any pressure to conform with the views of the majority if that would be contrary to their conscience. Furthermore, the jury as a whole should not feel under any pressure to return a unanimous or majority verdict if, conscientiously, they are not unanimous or cannot reach the required majority. The guidance states that '[i]t is undesirable to give a *Watson* direction before or at the time of the majority verdict direction because its effect may be to undo the benefit of the majority verdict direction for which Parliament has provided' (at [43]).

The Court of Appeal concluded that the *Watson* direction had not been appropriate in this case and should not have been given. The jury were not under any pressure of time. The trial had started on the Tuesday of the first week and they retired to consider their verdict on the following Tuesday. Note 1 was sent to the judge at the end of the day on Tuesday and note 2 was sent to the judge the next day. The Court of Appeal stated that there was 'no indication that this was a jury who was in any way finding it difficult to sit at least until the end of that week' (at [18]) and that in light of the potential risks that follow from such a direction, it ought not to have been given.

Nevertheless, the Court of Appeal considered that the verdict was safe. The Court observed that the jury had sent a note which indicated that the jury had some unanimous verdicts and commented that it was odd that the trial judge did not require the clerk to ask the usual question about unanimity on any count at this point. The note demonstrated the jury's position at the time (unanimity in relation to C2 and a majority verdict in relation to C1) and there was no reason to suppose that they had changed their minds. In light of these notes, 'it is unsustainable, in our view, to argue that the verdicts were anything other than what might sensibly have been expected had the *Watson* direction never been given' (at [20]). Therefore, although the Court held that there had been a material irregularity in the trial, the verdicts were safe.

Commentary

What is a Watson *direction?*

A *Watson* direction was designed to deal with the situation in which pressure is exerted on a jury to reach a verdict. It is derived from the case of *Watson* [1988] QB 690 in which seven appeals, each concerned with whether pressure was exerted on the jury to reach a verdict were joined together in the Court of Appeal.

The Court of Appeal in *Watson* held that a jury must be free to deliberate without any form of pressure being imposed upon them. Referring to the earlier case of *R v Walhein* [1952] 36 Cr App R 167 which provided a direction designed to encourage jurors to reach a unanimous decision (before majority verdict directions were introduced by the Criminal Justice Act 1967), Lord Judge CJ highlighted a danger inherent in the second part of the *Walhein* direction which alluded to the trouble and expense of a re-trial in the event that the jury is unable to reach a verdict. Lord Judge CJ stated that jurors 'must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so' (at p.700). He further emphasised that directions which allude to the expense and public inconvenience that a failure to agree on a verdict would cause are 'far from harmless' (p.696).

His Lordship provided a direction in *Watson* which judges would have the discretion to use where they thought it necessary or desirable to do so. A jury might be directed in the following terms:

> ‘Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement you must say so.’ (at pp.694-5)

This direction was designed to advise a jury that they must be true to their oaths to decide the case based upon the evidence, but also remind jurors that there should be some ‘give and take’ within the scope of the oath, in terms of giving their own views and listening to the views of others.

The Court emphasised that there would usually be no need to give the direction, but whether or not the direction is given and at what stage of the trial it is given, is a matter for the discretion of the judge. The Court warned against individual variations of the direction and advised that, if given at all, the direction would be best included as part of the summing up and it could be given or repeated after the jury have had time to consider the majority direction.

Further guidance

Further guidance on the use of the *Watson* direction was provided in the case of *R v Arthur* [2013] EWCA Crim 1852. In *Arthur*, the Court of Appeal held that the introduction of the majority verdict direction under the Criminal Justice Act 1967 had alleviated the pressure on jurors to reach a unanimous verdict:

> ‘Parliament has provided for the circumstances in which a majority verdict can be accepted by the court. …interference with this process may have the effect of placing undue pressure on the jury to reach a verdict, either sooner rather than later, or at all, the consequence of which may be to encourage the minority to abandon their conscientious assessment of the evidence simply for the convenience of returning a verdict unanimously or, following the majority verdict direction… By introducing majority verdicts Parliament was alleviating pressure on the jury to be unanimous’ [43]

The Court held that a *Watson* direction should not be given before or at the time of the majority verdict direction ‘because its effect may be to undo the benefit of the majority verdict direction for which Parliament has provided’ [43]. The Court of Appeal held that a *Watson* direction is now rarely given by judges and is only given as a last resort where jurors have been deliberating for a prolonged period after the majority verdict direction has been given.

The present case

Turning back to the present case, the trial judge decided to give a *Watson* direction after the jury had been deliberating for around seven hours. This was not a ‘prolonged’ period of deliberation and the case had not reached a point of ‘last resort’.

The Court of Appeal also took issue with the procedure adopted by the trial judge when he discussed the jury notes with counsel in his private chambers. That this was not discussed in

open court and that there was no record of the discussion, was ‘wholly wrong’ and a ‘material irregularity’. This discussion, along with the question of whether a *Watson* direction was necessary and appropriate in this case should have been conducted in open court, in the presence of both counsel and the defendant, and in line with principles of open justice.

Nicola Monaghan