SCCRC Scottish Criminal Cases Review Commission

Position Paper

Unreasonable Verdict

Introduction

1. Grounds of review alleging a miscarriage of justice by way of unreasonable verdict are commonly submitted in applications to the Commission. However, as a ground of referral it is less common; the Commission has referred just three applications on this ground, most notably that of Abdelbaset Ali Mohmed Al Megrahi. Mr Al Megrahi abandoned his appeal before the matter was determined by the Court[1]. A second referral, that of Dominic Ferrie, led to an unsuccessful appeal[2]. The other referral was decided under reference to a different ground of review[3].

2. The ground of appeal was first established, along with the Court of Criminal Appeal in Scotland, by the Criminal Appeal (Scotland) Act 1926[4]. The Court could "if they [thought] that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". In practice the interpretation of the ground was extremely strict.[5]

3. While the ground of appeal was retained in the Criminal Procedure (Scotland) Act 1975, it disappeared from statute when the 1975 Act was amended by the Criminal Justice (Scotland) Act 1980 and a single ground of appeal - that there had been a miscarriage of justice - was introduced. Although it was always envisaged that an unreasonable jury verdict could constitute a miscarriage of justice there was a dearth of successful appeals. This led the Sutherland Committee to recommend that the Court's power to quash a conviction where the jury had returned an unreasonable verdict be re-

[1] http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/8205528.stm
[2] 2011 SCL 8
[3] http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/7619299.stm
[4] Section 2(1).
[5] In *Webb v HM Advocate* 1927 JC 92 it was held that an appeal should only be allowed if the verdict was "so flagrantly wrong that no reasonable jury discharging their duty honestly under proper direction would have given it".

introduced into legislation in an attempt to encourage its use[6]. This recommendation was implemented by the Crime and Punishment (Scotland) Act 1997, which amended the relevant legislation accordingly.

The Commission's Position

4. The Commission's starting point is section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 (as amended), which provides::

> *"… a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage… based on – (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."*

5. The question of whether the jury returned a verdict which no reasonable jury, properly directed, could have returned must be addressed by assessing the principles laid down in the leading cases, particularly *King v HMA*[7] and *E v HMA*[8], which can be summarised as follows:

- The test under section 106(3)(b) is objective and an appellant who relies on it must establish that, on the evidence led at trial, no reasonable jury could have been satisfied beyond reasonable doubt that he was guilty[9].
- A miscarriage of justice is not identified simply because, in any given case, the court might have entertained a reasonable doubt on the evidence[10].
- A jury can reasonably reject evidence precisely because that evidence is inconsistent with the Crown evidence that it has decided to accept[11].
- In light of section 106(3)(b), the issue of reasonable doubt is not at all times within the "exclusive preserve" of the jury, and the court has to assess the reasonableness of the verdict with the benefit of its collective knowledge and experience[12]. Situations may arise in which the jury's

[6] *Criminal Appeals and Alleged Miscarriages of justice,* Cmnd 3245, para 2.71.
[7] 1999 SCCR 330
[8] 2002 SCCR 341
[9] *King* at page 333
[10] *King* at page 334
[11] *King* at page 342
[12] *E* at page 351

judgment on a question of credibility or reliability "simply cannot be supported on a consideration…of what occurred at the trial."[13]

- In making that assessment, the Court must keep in mind that the jury saw and heard the witnesses: the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the Court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in those respects[14]. The court will, in assessing the evidence do so "through the lens of judicial experience which serves as an additional protection against unwarranted conviction."[15]
- As part of that assessment "it is no doubt correct in broad terms to say… that the evidence must reach a 'base line' of quality".[16] For an appeal of this kind to succeed, the Court requires to be satisfied that there was no "cogent framework of evidence" that the jury were entitled to accept as credible and reliable and which would have entitled them to return the verdict which they did.[17]
- The test for unreasonable verdict is applied strictly. Such appeals will only succeed in the "most exceptional circumstances".[18] The court in *MacKinnon*[19] observed that, in order for that appeal to have succeeded, it would have required to conclude that "the evidence was so grossly riddled with deficiencies, contradictions and inconsistencies that no reasonable jury, properly directed, could have stamped it with the description of being reliable or credible."

6. A distinct category of "unreasonable verdict" arises where it may be said that the verdict of the jury is irrational in the sense that it cannot be reconciled with the case before them. The leading authority is *Rooney v HMA*[20], in which the appellant had been convicted of (1) and (3) on an indictment, but not of charge (2), although the other co-accused were found guilty of this charge. It was argued at appeal, and accepted by the

[13] *Jenkins v HMA* 2011 SCCR 575 at paragraph 42
[14] *E* at page 352
[15] *R v Biniaris* [2000] 1 SCR 381, cited in the opinion of the court in *Gage v HMA* [2012] HCJAC 14
[16] *McDonald v HMA* 2010 SCCR 619, per Lord Carloway, as cited in *MacKinnon and Millar v HMA* [2015] HCJAC 6, paragraph 5
[17] *Wilson v HMA* 2010 SCL 1041, paragraph 23, as cited in *MacKinnon and Millar v HMA*, paragraph 6
[18] *Harris v HMA* 2012 SCCR 234 at paragraph 67
[19] At paragraph 10
[20] 2007 SCCR 49

Court, that the verdict lacked rationality in view of the fact that the case against the appellant was prosecuted on the basis of concert. As a consequence his conviction on charge (3) was quashed. The verdict was described as being internally inconsistent. Similarly, in *Climent v HMA*[21], the court held the jury's verdict a miscarriage of justice on the basis that it could not be reconciled with the manner in which the trial judge had charged the jury.[22]

7. Appeals subsequent to *E* on the basis that the jury's verdict was unreasonable as a result of the weakness of the Crown case have not generally met with success. Most appeals on these grounds relate to alleged inconsistencies in respect of the evidence of one or more witness and identification evidence in particular is a common focus.

8. The following are examples of unsuccessful cases:

- *Kerr v HMA*[23] - an appeal ground suggesting the credibility of one of the complainers had resulted in an unreasonable verdict was rejected on the basis that the appellant could not satisfy the demanding test set by s106 and explained in *King* and *E*.

- *Anderson v HMA*[24] - the appeal was rejected on grounds that it was well settled that a jury may accept parts of a witness's evidence and reject other parts.

- The cases of *McDonald v HMA*, *Affleck v HMA*[25], *Gage v HMA*[26] and *Henry v HMA*[27] are all cases where grounds of appeal alleging an unreasonable verdict as a result of the quality of the identification evidence were refused. Both *Gage* and *Affleck* were cases referred to the Court by the Commission but not on grounds of unreasonable verdict. These grounds were submitted by the applicant at the appeal stage.

- *Toal v HMA*[28] - an appeal ground suggesting that the verdict was unreasonable on the basis of contradictions in the Crown case was rejected.

[21] 2015 SCL 965
[22] *Contra Ferrie v HMA* 2011 SCL 8
[23] 2004 SCCR 319
[24] 2007 SCCR 507
[25] 2010 SCCR 782
[26] 2012 SCCR 254
[27] 2012 SCCR 768
[28] 2012 SCCR 735

9. The following is a rare example of a post *E* case that was successful:

- *Jenkins v HMA*[29] - the appellant was involved in an altercation involving up to twenty persons from different families. He faced three charges: charge one included allegations of rioting and mobbing, property damage and various serious offences against the person; charge two was of the murder of a woman; and charge three concerned the assault with a knife of another woman. The appeal concentrated on the confused testimony of one witness, whose mother's murder was the subject of charge two. At first, he described his mother's attacker to the police in broad terms, but doubted whether he could identify him. He confirmed in a later statement that although he had seen the assailant, he did not know him. Thereafter, he was shown a picture of some men from a social networking site and identified the appellant's nephew as his mother's assailant with "100%" certainty. At a subsequent VIPER parade the witness again "showed interest" in the image of the appellant's nephew, but identified a police stand-in as either the perpetrator of the murder or a convincing lookalike. At a second VIPER, which included a picture of the appellant, he failed to make a positive identification (though he later claimed to have been sleep-deprived and "away with it" at the time). Subsequently, he had attended at the local Sheriff Court on an unrelated matter. There, the appellant was called in relation to a separate charge of breach of the peace. The witness recognised the appellant (again with "100%" certainty) as the man who had stabbed his mother. By this stage, the witness knew that the appellant was in custody for the murder, and also knew his name. At trial, the witness was the only person to identify the appellant in relation to the murder, and he was asked by the Crown to perform a dock identification. The trial judge told the jury that they could only convict the appellant of charge two if they believed that the dock identification was credible and reliable. In upholding the appellant's appeal against conviction the court distinguished between credibility and reliability: a witness may come across as entirely credible but, on reflection, be held to be unreliable. A person who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed. Credibility may be judged on the moment, whereas reliability may be only capable of being

[29] 2011 SCCR 575

addressed having regard to the person's “track record”, so to speak. In a particular case, the advantage the jury has in seeing and hearing a witness may be reduced, or undermined, in approaching the evidence of the witness in the context of the case as a whole in a judicial manner.

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