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## Case Comment

### The exceptional case of the Watson direction

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**Case:** R. v G [2014] EWCA Crim 2508 (CA (Crim Div))

**\*J. Crim. L. 85** The appellant appealed against his conviction of one count of indecent assault on a male aged under 16. The two grounds of appeal were that the trial judge erred in law by giving the *Watson* direction to the jury and that, based on the evidence of the case, the finding of the jury was perverse and thus unsafe.

At trial, it was alleged that the appellant sexually abused his stepson between 1976 and 1980. At the time of the alleged incidents, the complainant, M, was aged between 12 and 16. The four counts on the indictment included two counts of indecent assault on a male under 16, one count of gross indecency with a child under 14 and one count of buggery. The charges were contested, with the defence case being that there had been a family argument which caused a rift in the family and that the resultant complaints were false. The trial lasted four days, with the complainant giving evidence for the prosecution, supported by statements provided by his wife and a work colleague. The appellant gave evidence in his defence, as did his wife and M's brother. The trial judge summed up the case and the jury retired to consider their verdict.

After five hours of deliberation, the judge, with agreement from counsel, gave the majority direction. One hour and thirty-seven minutes later, the jury sent the judge a note stating:

**\*J. Crim. L. 86** Having carefully considered the evidence in front of all of us we are unable to find an agreement at this stage. We are in a 8 to 4 [*sic*] and would be grateful if you could guide us to the next step. [7]

A discussion took place between counsel and the judge where the judge alluded to the use of the *Watson* direction. They agreed that the jury should be sent home for the weekend and would reconvene the following Monday. When the jury returned on the Monday, the judge once again suggested to counsel that he was inclined to give the *Watson* direction. Counsel for the defence opposed the use of the direction at all while counsel for the prosecution deferred to the judge's discretion. The jury was then called back into the court and the *Watson* direction was given. At 12.55 pm that day, the jury returned with a guilty verdict on count one by a majority of 11 to 1 and verdicts of not guilty on the remaining three counts. The Appellant was sentenced to four years' imprisonment.

**Held, allowing the appeal and quashing the conviction**, that the judge was wrong to use the *Watson* direction in this particular case as the direction should only be used in exceptional circumstances and as a last resort. It was also held that on the facts of the case, no reasonable jury applying their minds properly to the evidence could have concluded that they were not satisfied beyond all reasonable doubt on counts 2, 3 and 4 but could be sure of guilt on count 1, rendering the conviction unsafe. It was premised that there was a real possibility that the jury compromised on their verdict due to the pressure of the *Watson* direction.

## Commentary

The *Watson* direction takes its name from the case of *R v Watson* [1988] QB 690. In the instance that a jury is unable to reach a majority verdict, Lord Lane suggested that they should be directed in the following manner:

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. [700]

In *R v Arthur* [2013] EWCA Crim 1852 Lord Justice Pitchford emphasised the necessity that 'it is of the first importance that no individual juror should feel under any compulsion or pressure to conform with the views of the majority if to do so would compromise their conscience and, therefore, their oath'. [43] His Lordship then suggested that there may be exceptional circumstances when a judge is required to deal with 'exigencies of the moment', but generally there is no requirement for a judge to provide such guidance. He suggested that the *Watson* direction should only be a 'last resort following a prolonged retirement after the majority verdict direction has been given'. [44] His Lordship failed to elaborate on the type of exceptional circumstances he foresaw as giving reason to apply a *Watson* direction. He continued to state that '[i]f the effect of the judge's direction to the jury is to create a significant risk that the jury or individual jurors may have felt under pressure to compromise their oaths, the verdict is likely to be unsafe'. [44]

The Court of Appeal in *Malcolm* considered the requirement of exceptional circumstances set out by Lord Justice Pitchford. Lord Justice Bean reviewed the circumstances of the *Watson* direction at first instance, which included an initial five hours of deliberation, a majority direction, an additional 97 hours of deliberation followed by the jury's note being sent to the judge. At trial, Judge Ader had suggested the following:

I think the request for help is unusual. Whether it is exceptional, I suppose I can say for my own experience it is. They normally say, 'we can't agree'. They haven't said that, they have said, 'We aren't in agreement. Can **\*J. Crim. L. 87** you help us and take it to the next step?' ... I think this case - it's an exceptional case in terms of its evidence but then many cases are. Every case is unique and this is a very unusual case, even of its type and it seems to me that if the jury are asking for help and I do have something I can say then I am inclined to do it, in the exercise of my discretion. [16]

Lord Justice Bean disagreed with His Honour's suggestion that the case was exceptional. 'We do not understand the passage in the transcript where the judge appeared to indicate that it was' [26]. His Lordship did not consider the deliberations of the jury, which lasted a total of six hours, to be particularly prolonged and the note failed to suggest that there was an 'irretrievable deadlock' [26]. He concluded that the case was nowhere near a situation of last resort. His Lordship conceded that Pitchford LJ in *Arthur* had not defined 'exceptional circumstances' and 'we shall not attempt to do so now' [26]. The decision in *Malcolm* begs the question of what constitutes the exceptional circumstances in which the *Watson* direction will be appropriate?

Such circumstances were deemed to have existed in *R v Farooqi* [2013] EWCA Crim 1649, where the use of the *Watson* direction was one of the grounds for appeal. At trial, Lawrence McNulty acted as leading counsel for the appellant. After a series of incidents throughout the trial of incompetence and flagrant misconduct, which resulted in Mr McNulty's conviction of professional misconduct in 2014 by an Inns of Court disciplinary tribunal, an appeal was brought regarding the prejudice of a fair trial due to the barrister's behaviour. During Mr McNulty's closing speech he made reference to the role of the jury, suggesting that it was not about compromise but failed to mention their collective responsibility in the concept of give and take. The trial judge, in rectifying Mr McNulty's defective summing up, was forced to deliver his own summing up containing numerous corrections. In addressing the role of the jury the *Watson* direction was given. It was held by the Lord Chief Justice that due to the exceptional circumstances of an incompetent lead counsel, the judge was correct to use the *Watson* direction.

Such explicit endorsements of the use of the *Watson* direction are quite rare. Rather cases are often raised highlighting concerns with judicial deviation from Lord Lane's wording and will be subject to criticism but will not necessarily render the conviction unsafe. Cases such as *R v Herbert* [2009] EWCA Crim 2518 where the phrase 'give and take' was used or *R v Dublin* [2007] EWCA Crim 3240 where reference was made to the 'cost of another trial' have been criticised as an inappropriate use of the *Watson* direction. Despite disapproval, the convictions were still upheld as it was satisfied that there was no undue pressure placed on the jury. The circumstances which were apparent in *Farooqi* are extremely rare and perhaps reflect the extreme end of the spectrum; however, it is quite clear that Lord Justice Bean was correct in finding that a mere note requesting further guidance and six hours of deliberation falls significantly short of the type of exceptional case that Lord Justice Pitchford had in mind when deciding the case of *Arthur*.

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