



# Turning a blind eye

Ignoring evidence revealed after a trial of bias or prejudice within a jury leads to injustice and threatens public faith in the system, says **Lucy Corrin**

**AS THE FIRST** judge-alone trial takes place in the *Twomey* case at the Royal Courts of Justice, it seems appropriate to reflect on how juries are composed and whether the system can protect defendants against bias or prejudice within the jury.

The test for establishing whether bias by a juror may have infected a trial is described in *Porter v Magill* [2001] UKHL 67 as “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

The mythical fair-minded and informed observer adopts a balanced approach as a reasonable member of the public, “neither unduly complacent or naïve nor unduly cynical or suspicious”.

The difficulty arises where evidence of bias or prejudice only comes to light post-trial, due to the common law rule rendering such evidence inadmissible.

In the House of Lords case *R v Mirza and R v Connor* [2004] UKHL 2, Lord Steyn gave a powerful dissenting judgment, parting ways with the majority who concluded that, where evidence of prejudice was revealed post-trial, it was inadmissible and could not be acted upon. *Mirza* considered whether evidence about the deliberations of a jury, which reveal a lack of impartiality on the part of the jury, is always inadmissible under the common law secrecy rule however compelling and grave the circumstances may be.

## Inadmissible evidence

Mr *Mirza* was a man of good character. He was charged with six counts of indecent assault, being specimen charges reflecting alleged sexual abuse of his step-daughter. This was upon a retrial after an earlier jury had failed to agree. One of the jurors had expressed concern in a letter after the trial that some of the jury believed the use of an interpreter was in some way a devious ploy. This was supported by the fact that on two occasions the jury sent notes to the judge about the matter. Mr *Mirza* was convicted by the jury by a majority of 10:2.

The joined appeal of *Connor and Rollock* featured a joint charge of wounding. They were both convicted by a majority verdict of 10:2. Again, there was a letter from a juror about the course of the deliberations of the jury. The point of concern was that although many of the jury thought it could be one defendant or another that was responsible, “they would give the guilty verdict to both, because as many of them said this would teach them a lesson, things in this life were not fair and sometimes innocent people would have to pay the price. Also, as the defendants were young, the sentence would not be too severe.”

The majority of the lords in *Mirza* confirmed that despite the worrying content of these letters, the evidence was inadmissible and the convictions would stand; the possibility of a miscarriage of justice being the unfortunate but necessary price for the preservation and protection of the jury system. Two principles underpin this ruling: ensuring the finality of verdicts and the protection of jurors from reprisals to ensure full and frank debate. Do these principles demand confidentiality under any circumstances?

In *R v Abdoukoff* [2007] UKHL 37 the House of Lords faced the now familiar dilemma of CPS employees and police officers serving on juries: “The informed observer would rightly consider that there would be an unacceptable risk of a juror going wrong if he was a friend of the defendant or of the victim or of one of the witnesses... Adopting the stance of the fair-minded observer, the law would hold that such a person should be discharged from sitting on the jury.”

Surely, the converse must be true. If someone has expressed antipathy towards a defendant solely on the basis of race, class or other irrelevant factor and that matter came to light during the trial, discharge would surely be warranted.

An artificial distinction arises where evidence which compromises the integrity of jury deliberations comes to the court’s attention after the verdict has been delivered. If it relates to a jury’s deliberations, then it remains inadmissible despite the miscarriage of justice

that may follow. The only exception is that where there has been, or may have been, an irregular occurrence of an extraneous nature, which may have compromised the impartiality of the jury, the evidence may be admitted. In *R v Young* [1995] QB 324 (the Ouija board case), intervention was possible based on this exception as the attempt to contact the deceased had taken place in a hotel where the jury were sequestered rather than during deliberations in the jury room.

## Admirable intentions

How quickly we forget that the Royal Commission on Criminal Justice identified in 1993 that the Court of Appeal must be readier to examine possible miscarriages of justice. One of the recommendations was the creation of new and independent arrangements for identifying miscarriages of justice; this embryonic proposal became the Criminal Cases Review Commission. Yet, those admirable intentions seem strangely absent from our domestic approach to post-verdict evidence on jury deliberations. In Lord Steyn’s words: “One is not dealing with a cost/benefit analysis: a miscarriage of justice bears on real individuals, their families, and communities. If the law requires individual cases to be subordinated to systemic considerations affecting the jury system, one may question whether the law has not lost its moral underpinning.”

The jury system enjoys public confidence but this is based on trust in the process. Where prejudice or bias is exposed, the idea that it can be ignored is damaging to our faith in the system. In 2001, Lord Justice Auld recommended that legislation should be introduced, inter alia, to permit enquiry “into alleged impropriety by a jury, whether in the course of its deliberations or otherwise”.

Experience shows the potential for injustice, and now is the time to debate how we protect our jury system and guarantee a fair process.

Lucy Corrin is a barrister at Doughty Street Chambers