Article

Apparent bias: the inclusion of police officers on the jury and Article 6.1 of the Human Rights Act

by Zia Akhtar

INTRODUCTION

The Criminal Justice Act 2003 allows police officers to serve on juries in England. In many other countries that follow common law such as Scotland, Northern Ireland, Australia, New Zealand, and Canada – and also in a number of US states – this is not permitted. The inclusion of police officers on juries has become a significant issue because it may infringe the rule against bias, which is a cornerstone of English law along with the right to a fair hearing. This is of concern because the relaxation of the eligibility criteria following Lord Justice *Auld's Review of the Criminal Courts of England & Wales* in 2001 (the Auld Report) has increased rather than reduced the allegations of bias. This article looks at the jury trial and the inclusion of members of the police force that may lead to a breach of Article 6 of the Human Rights Act 1998.

TEST FOR DETERMINATION OF BIAS

In English law the principle set down by judges in order to ascertain the test for apparent bias is to ask whether the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility of bias. This rule applies not only to the courts but also tribunals of fact such as juries, where the eligibility criteria following the enactment of the Criminal Justice Act 2003 provides for police officers and lawyers to be summoned to jury service. There is a need to consider whether the prospect of a fair trial of the accused is reduced by this measure.

The test for the determination of bias was set down in *Porter v Magill* [2002] 2 AC 357, which states that a tribunal may have an appearance of bias but may still be objectively unbiased as to its findings. Lord Hope's formulation was based on the principle that because the fair minded and informed observer of the legal process differed from the casual observer, "the reasonable observer took account of all the relevant circumstances in the case; whereas a casual observer would be responding instinctively and without the knowledge of all the facts" in the context in which the tribunal was assessing the case (para 96).

His Lordship held the threshold to be if there was a "real possibility" and not the "danger of" bias (para 98). This would be an enquiry based not on any extraneous considerations which may have influenced the judge, but on the notion of what the court implied the reasonable observer may have concluded when presented with evidence of bias.

This perspective of the grounds for bias overruled the test laid down in *R v Gough* [1993] AC 646 by Lord Goff that the tribunal had to ascertain the test of bias by asking the question whether there was "a real danger of bias in any particular case and it had to be assessed by the court in the light of all the evidence before it" (p 670).

The various permutations regarding bias depend on revisiting precedents, and the fact that there is a value judgment involved when determining whether a decision-making process was flawed for bias. The requirement of impartiality is complimentary to the European Human Rights Convention Article 6.1 that stipulates a right to a fair trial. The principle is also enshrined in Articles 41 and 47 of the EU Charter of Fundamental Rights 2010 (EUCFR).

The English courts generally rule in accordance with the ECHR findings to preclude bias and retain the principle of impartiality. This raises the question of the administration of justice through the Crown Court where the conclusion is arrived at by the process of the jury verdicts.

The Criminal Justice Act 2003, section 321 has allowed police officers to serve on the jury panel by virtue of Schedule 33, which provides that every person meeting the requirements of jury service must attend the Crown Court, High Court and the County Court if summoned. This has placed the rule against bias on a tightrope, and there is increasing concern that it could tilt cases in the direction of the prosecution.

LACK OF JUDICIAL DISCRETION

Jurisdiction over jury panels is held by the Lord Chancellor under section (5) of the Jury Act 1974. This Act retains the

common law right to challenge a qualified juror for actual or apparent bias (s 12) However, only the prosecution or the judge can exclude a juror on grounds of bias. Section 118 of the Criminal Justice Act 1988 abolished the right of peremptory challenge by the defence. (New guidelines on the vetting of juries issued by the Attorney General which took effect on November 27, 2012 updated those issued in 1989 – see https://www.gov.uk/jury-vetting-right-of-stand-by-guidelines-2012).

The challenge by the defence takes place before the juror is sworn in. He may be questioned, but only after cause to challenge a juror has been shown. This means prima facie evidence of bias must already exist. The current Practice Direction 93 allows jurors to be excused who are "personally concerned on the facts of a particular case and closely connected with a party or prospective witness" (Criminal Practice Directions [2013] EWCA Crim 1631 - Judiciary).

There is a general rule of admitting evidence of racial bias from local prejudice against visible racial minorities by juries. The Auld Report stated at chapter 2, paragraph 7 that: "Provision should be made to enable ethnic minority representation on juries where race is likely to be relevant to an important issue in the case" (http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/).

The main issue is if there was a possibility of bias in the composition of the jury, regardless of its appearance. It is a question that has been posed where police personnel have formed the nucleus of the jury in a criminal trial. In *R v Abdroikof, R v Green, R v Williamson* [2007] UKHL 37 three appellants were tried on indictment in different courts on related charges that led to their conviction in the Crown Court. In the first two cases the trial jury included among its members a serving police officer, and in the third case it included a solicitor employed by the CPS. The common question raised in these three conjoined appeals was whether a fair minded and informed observer, on the facts of the three cases, would conclude there was a real possibility that the trial jury was biased.

At the Court of Appeal stage the case against the defendants was ruled in accordance with the decision in *Porter v McGill* that the mere appearance of bias did not vitiate the decision on grounds of bias. Lord Woolf CJ ruled that "a fair-minded and informed observer would not conclude that there was a real possibility that a juror was biased merely because his occupation was one which meant that he was involved in some capacity or other in the administration of justice" ([2005] 1 WLR 3538, at para 30).

The court acknowledged the risk that a juror might depart from his solemn duty of impartiality, but the system could not work "on the basis that that risk could be excluded" (para 32). Lord Woolf stated further that the system could not be watertight in attaining the attainment of fairness, but if a juror had "special knowledge of a case or individuals involved in it, that should be drawn to the attention of the judge and jurors were fully instructed on their duty" (paras 33-34).

When the case reached the House of Lords the central argument of all the appellants was that these cases did not involve the ordinary "prejudices and predilections" but were based on the possibility of unconscious bias. This flowed inevitably from the presence on a jury of persons professionally committed to one side only in the adversarial trial process, and not merely involved in some capacity or other in the administration of justice.

Lord Bingham in giving his ruling evaluated the circumstances in which police forces may coalesce in giving their testimony at trial, which his Lordship held "was not a criticism of the police service, but a tribute to the bond that exists in a disciplined force" (para 25). In the case of the first appellant the identity of the officer was revealed at a late stage in the trial, and at very short notice to the judge and defence counsel.

However, even if the possibility of bias had been raised at the start of the trial it could not have been envisaged that an argument could be raised – except for the general undesirability of police officers serving on juries – that was not precluded by legislation. Therefore, the involvement of the police officer, who was foreman of the jury, made no difference and the verdict of the jury could not be vitiated for bias.

In the case of the second appellant there was a crucial dispute between him and the prosecution witness, who was a police sergeant. One of the jurors came from the same service background as the police officer who was to give evidence. They were not personal acquaintances and only had a service affiliation. It was decided that:

> *"In this context the instinct, (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug addicted defendant would be judged by the fair minded and informed observer to be a real and possible source of unfairness beyond the reach of standard judicial warnings and discretion" (para 26).*

The conviction of this defendant was quashed.

The third appellant raised the issue that one of the jurors had conveyed to the court prior to the commencement of the trial that he worked for the Crown Prosecution Service and had done so since its inception in 1986. His letter was passed to defending counsel, who sought to challenge the juror on the grounds of potential bias and the defendant's right to fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

His Lordship held that in the case of the third appellant there could be no possible criticism to be made of the juror who acted in strict compliance with the guidance given to him and left the matter to the judge's discretion. However, the judge gave "no serious consideration to the objection of

defence counsel, who himself had little opportunity to review the law on this subject" (para 27).

The third appellant's conviction was similarly quashed on the grounds that he did not have a fair trial in the case. This was despite the fact that he had been accused of very grave crimes of which he may have been guilty. His Lordship made reference to a possible omission in the Auld Report in not precluding CPS personnel from jury service when he stated (at para 30):

> *"It must, perhaps, be doubted whether Lord Justice Auld or Parliament contemplated that employed Crown prosecutors would sit as jurors in prosecution brought by their own authority. It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full time, salaried long- serving employee of the prosecutor."*

The main issue here is that the casual observer would feel that there was bias, as would a reasonable man who was fair minded and well informed. This is because the composition of the tribunal of the jury is a clear reflection of the manner in which the decision will be arrived at by its verdict. The apparent bias will be genuine on both perspectives because of the possibility of bias in the constitution of the tribunal of fact.

CONFLICT OF INTEREST

It is not possible to evaluate how a jury composed of police officers would arrive at a verdict any differently from a panel which did not have any personnel from the criminal justice system. This is because the deliberation of juries cannot be inquired into and the overall quality of jury verdicts is hampered by the fact that under the Contempt of Court Act 1981, section (8), it is it is not permitted to publish or make a solicitation for publication details of what transpired in a jury room (as illustrated in the case of *Attorney General v Associated Newspapers* [1994] 1 ALL ER 556).

However, in cases where there are police officers are on the jury panel it may be possible to exclude their participation by determining if there is conflict of interest relating to their presence and the substance of the charges. The European Court of Human Rights judgment in Hanif and Khan v United Kingdom (Application nos 52999/08 and 61779/08, December 20, 2011) considered whether the accused had a fair trial in 2007 under Article 6 when there was a serving police officer on the jury.

The applicants were tried for conspiracy to supply heroin. The evidence of police officers was in dispute, and in particular Mr Hanif had alleged that there was a third person in his car whilst it was under observation by the police and that it had been this man who had left the drugs in his vehicle. When the prosecution began to state its case a juror informed the judge that he was a serving police officer and was acquainted with one of the police witnesses by being involved in professional dealings with him in another case.

The trial judge refused a defence application to discharge the police officer from the jury and the defendants were convicted. The Court of Appeal dismissed the appeal in March 2008 *(R v Khan (Bakish); R.v. Hanif* [2008] 2 Cr App R 161), and the court declined an appeal to the House of Lords on a point of law.

In its decision the European Court of Human Rights stated that there was a need to ensure that juries are free from basis and the appearance of bias. The court observed that where there was an important conflict "regarding police evidence, and an officer who was personally involved with another member of the police on the jury", then that would compromise the evidence submitted of the police (para 48). Accordingly Mr Hanif had not been tried by an impartial jury in violation of Article 6.

While the judgment does not set down any precedence that police officers can never serve on a jury it does echo the ruling in *R v Abdroikof* that implied there was the possibility of bias (possibly unconscious) which inevitably flowed from the presence on a jury of persons professionally committed to one side only of an adversarial trial process. This decision affirms the notion that the issue of police officers on juries is not about the ordinary preconceptions to which members of the public are subject, but raises the possibility of bias.

CONCLUSION

In order to preserve the rule against bias as established in *Porter v Magill* it is necessary to reverse the rule of jury attendance for serving police officers. The promulgation of the Criminal Justice Act after the Auld Report loads the dice in favour of the prosecution. This is likely to impact on the fair minded and well informed observer who would consider likely to cause bias in the reaching of a verdict at the trial of the accused.

There is an argument that the jury trial should be abolished because jurors are not legally qualified and may not all understand the case which they are trying. The trial process could be conducted by a single judge and lay assessors who could conduct the hearing, which is a method of adjudication in Scandinavian Countries and Northern Ireland. This could also preserve, more robustly, the rule against apparent bias by focussing on a judge rather than a quasi-judicial tribunal that is imbalanced and where the level of knowledge and prejudice could influence the verdict in the case.

There is a need to preserve the process of a fair trial for the accused under Article 6.1. This can only be achieved if there is more challenge possible in the composition of juries and lack of fetters for the judge. The principle that justice must not only be done but also be seen to be done should be overriding.

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