Case Note

The Meaning of Jury Unanimity in *KBT v The Queen*

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The requirement that a jury be unanimous in reaching a verdict is on its face a simple proposition. Whether jurors who are unanimous in their verdict are entitled to differ in their reasons is the subtle, underlying question that relates to the precision required of jurors in their deliberations and, more generally, to the required standard of proof in criminal cases. This was the question before the High Court of Australia in *KBT v The Queen*.[1]

The appellant had been convicted of maintaining a sexual relationship with a child under 16 and his appeal to the Queensland Court of Appeal was unsuccessful.. Under s 229B(1A) of the *Criminal Code* (Qld) liability required that the offender have done acts constituting offences of a sexual nature in relation to the child on three or more occasions during the specified time period. In this case, child M had been raised by KBT and his wife on their Queensland farm, and she testified to several incidents said to have taken place during work or recreation on the farm. Trial Judge Dodds instructed the jurors that a conviction required that they be "satisfied beyond a reasonable doubt that on at least three occasions within the time frame charged the [appellant had], for instance, unlawfully and indecently dealt with the child".[2] No instruction was given upon a requirement that the jury had to be unanimous in its identification of the same three occasions.

The Court of Appeal held that the jury should have been instructed on the need for unanimity in this sense. However it also held that there was no substantial miscarriage of justice, because no complaint on the absence of this instruction was made at trial, and because the jury must be taken to have accepted the complainant's evidence over that of the accused with no room for doubt about her account of the many different occasions on which acts constituting sexual offences occurred.

The High Court made short shrift of the Court of Appeal's reasons for

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1 (1997) 72 ALJR 116.

2 *Ibid* 118.

dismissing the appeal. While the 'no substantial miscarriage of justice' provision may sometimes be applied with respect to a matter on which no issue was taken at trial, the fact that no complaint was made is irrelevant if the accused was deprived of a chance of acquittal that was fairly open.[3] Further, it was not the case that the jury had to be taken to have determined that all to which the complainant deposed must have happened, "It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts.....It follows that the accused was deprived of a chance of acquittal that was fairly open".[4]

The majority of the High Court observed that there was a sense in which the crime of maintaining a sexual relationship with a child under 16 could be described in terms of a course of conduct, but that the gist of the offence consisted of committing a sexual offence in relation to the child on at least three occasions. The prosecution had therefore to prove the three or more offences that constituted maintenance of the sexual relationship in question. Evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour was not in itself sufficient to allow a jury to be satisfied as to the commission of these offences.

Justice Kirby's concurring judgement emphasised the risks to an accused when prosecuted with an offence "as inherently broad and imprecise"[5] as this. The safeguard lies in giving full effect to the statutory prerequisite that the offender has done an act constituting an offence of a sexual nature on three or more occasions by requiring unanimity in identifying the same three occasions together with explicit judicial instructions to that effect. However, in the present case,

> The possibilities of various combinations of juror resolution of the accusations and denials about such incidents are such that it cannot be affirmatively determined that upon any of the, categories of incident, the requisite juror unanimity was obtained. Logically, it is equally possible that particular jurors were convinced of some, but not all, of the categories of incident. Each one of them may have been convinced as to three offences. They were properly instructed that three were required. But not having been instructed that the same three were required, it cannot be denied that the jurors may have severally reached their conclusions upon the basis of different offences.[6]

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3 *Ibid* 119.
4 *Ibid* 119, 120.
5 *Ibid* 124.
6 *Ibid* 127.

Every jury is carefully instructed that a verdict must be unanimous and that the prosecution must prove its case beyond a reasonable doubt. Judicial summaries of the case for and against the accused will sometimes convey some guidance on how the evidence is to be considered in a particular case. In general, however, jurors are left to themselves in their deliberations on the meaning and relative significance of evidence, and in drawing the conclusions on which their verdicts are based. To convict they must arrive at the same destination - guilt beyond a reasonable doubt - but they do not have to arrive by the same route.

However, not just any route will do. A guilty verdict must withstand scrutiny to ensure that the burden of proof in criminal cases has not been compromised. Although the charge in *KBT* related to maintaining a sexual relationship, the elements of that crime were in turn other crimes - the three or more sexual offences. In this context the burden on the prosecution should not he less than if the accused were charged in multiple counts with the sexual crime in question. Conviction on three counts would require a unanimous jury verdict on each of those three counts. If it were open to jurors to find that the prohibited sexual relationship existed on anything less than a unanimous finding that the same three crimes were committed, a lesser burden of proof would rest upon the prosecution on this charge than that required if the underlying offences were charged as three counts in a multiple count indictment.

The High Court decision in *KBT* is welcome for two reasons. It precludes a diminished burden of proof when the offence charged is a course of conduct resting on the commission of underlying offences; and it clarifies the proper scope of the doctrine that jurors do not have to be unanimous in the ways in which they arrive at a verdict. This doctrine does have limitations that extend beyond judicial instructions on. the permissible uses of evidence.

But the reach of the limitations is not clear. Do they extend, for example, to the mode of participation in criminal activity? In *The Queen v Hubbick*[7] the Queensland Court of Appeal agreed that *KBT* applied to the facts of that case, but questioned whether it would apply where two accused "are proved to have been involved in causing the death of another, but it was unclear which of the two was the principal offender and which merely an aider...".[8] This is a question that has generated some controversy in Canada[9] but one that has been resolved in that country by the decision of

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7 Unreported decision, Supreme Court of Queensland Court of Appeal, Pincus JA, McPherson JA, MoynihanJ, 17 February 1998.

8 *Ibid* 2.

9 For the different perspectives on the subject see M Gelowitz "The Thatcher Appeal: A Question of Unanimity" (1986) 49 *Criminal Reports* (3rd) 129;

the Supreme Court of Canada in *R v Thatcher*.[10] In that case the accused was charged with murder and the theory of the prosecution was that he was either the perpetrator or a party to the offence. The prosecution was not obliged to specify the alleged mode of participation or alternative modes in separate counts of an indictment. Thus the prosecution's theory went to the jury unconstrained either by judicial instructions or by alternative counts that would have required unanimity on the question of whether the accused was himself the perpetrator or a party to the offence.

The Supreme Court of Canada found no error in this situation because it was legally irrelevant whether the accused was one or the other. In either case he was a murderer and subject to the same punishment This was the correct decision. If a jury is not unanimous in determining the precise mode of participation but is unanimous in finding beyond reasonable doubt that he participated as a murderer, on what principle should he be entitled to an acquittal?

The question, of course, is rhetorical. Yet it is an important question - in part because there is an articulate contrary view of this issue[11] and in part because it is not an uncommon problem. There is often difficulty in determining the precise roles played by different persons in criminal offences. Sometimes the difficulty lies in the attribution of causation; most of the time it lies in ambiguity about who played the principal and subordinate roles. Suppose, for example, that A and B are jointly charged with and tried for the beating death of C. The jury concludes that either A killed C with B's assistance, or that B killed C with A's assistance. Surely the conviction of both A and B is appropriate? What is important is liability for the offence, however committed, and juries should not be unduly fettered in their deliberations on this essential question.

CONCLUSION

KBT is a wise and important decision. The prosecution must prove any allegation of crime beyond a reasonable doubt - whether it is the precise offence charged or an underlying offence in a broader charge. In either case the jury must be unanimous that the crime was committed by the accused, but this requirement does not mean that

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D Stuart "Annotation to Thatcher v R" (1984) 42 *Criminal Reports* (3rd) 259; and P MacKinnon, "Jury Unanimity: A Reply to Gelowitz and Stuart" (1986) 51 *Criminal Reports* (3rd)134.

10 [1987] 1 S.C.R. 652.

11 See Gelowitz *supra* n. 9 at fn 9.

the jury must also be unanimous on mode of participation where the offence was committed by more than one person.