HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 36

on appeal from: [2003] EWHC 1380 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Her Majesty's Attorney General (Respondent)
v.
Scotcher (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice)

ON
THURSDAY 19 MAY 2005

The Appellate Committee comprised:

Lord Steyn
Lord Hutton
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

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LORD STEYN

My Lords,

1. I have had the advantage of reading the opinion of my noble and learned friend, Lord Rodger of Earlsferry. I agree with it. I would also dismiss the appeal.

LORD HUTTON

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. I agree with it and for the reasons which he gives I would also dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

3. This appeal concerns the interpretation and application of section 8(1) of the Contempt of Court Act 1981 ("section 8(1)"), which provides:

> "(1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings."

The Facts

4. In January 2000 the appellant, Keith Scotcher, was summoned for jury service at Blackfriars Crown Court. Like all the other potential jurors, Mr Scotcher was given a booklet entitled "You and Your Jury Service", which he read. Just below the list of Contents the booklet said this:

> "Warnings are in grey boxes.
> You will find them on pages 1, 2 and 10.
> Please read them carefully."

Page 1 included this warning:

> "Warning
> When you become a juror you must never discuss the case with anyone who is not a member of the jury. Talk about the case only in the jury room when all the jury are present."

There was another warning on page 10:

> "Warning
>
> You must not talk about the case outside the jury room.
>
> You must not show or tell anyone details of:
>
> ¦ statements made ¦ opinions given
>
> ¦ arguments put forward ¦ votes cast
>
> by you or any other juror during the jury's deliberations.
>
> If you do, you will be in contempt of court and you may be sent to prison or have to pay a fine."

5. On the first day of their service the jurors were also shown a video, part of which said:

> "It is a contempt of court, which may be punishable by imprisonment, to get or disclose the opinions of jurors or the way they voted in their deliberations."

It went on to say:

> "Please remember that it is an offence punishable by imprisonment for anyone to disclose information about what is discussed in the jury room or the opinions of individual jury members about a case."

There was a notice to the same effect in the jury room.

6. The appellant was balloted to serve as a juror in a trial in which the two defendants were brothers. By the end of the trial on Friday 11 February, the jury had been reduced to eleven members. That afternoon the jury convicted both defendants by a majority of 10 votes to 1.

7. The following day, the appellant wrote to the defendants' mother in these terms:

"Dear Mrs Anderson

I was the one jury member who held out against the prosecution case at the trial of [A] and [B]. I would like you to seriously consider, as I'm sure you are already, talking to your counsels about appealing the convictions on the grounds of an unsafe conviction, miscarriage of justice, or whatever. [XXXX]

When we first went out the voting was close XXXX. Many changed their vote late on simply because they wanted to get out of the courtroom and go home. I was shocked at how readily some of them were ready to convict on a complete lack of evidence, and I tried to show them how the evidence there was, [A]'s jacket, [B]'s suit, the phone book could so easily have been 'fitted' into '[D]'s' statement – given after these items were taken from your house. It was never explained why policeman took these items.

The police searched the house 3 days after the incident. How did they know what items to take? They didn't find any drugs or anything associated with drug dealing. But, they took these items which they thought would be 'useful', as they were, when it came to concocting a 'statement' from [E]. This statement was not written down nor recorded. We only had the policeman's 'word' – evidence for it (all the jury thought he was 'dodgy'). Then, lo and behold, [A] and [B] were said to be wearing those very clothes the police just happened to take! Phone numbers from the book were said to have been known by [D]/[E]. In the 'statement' he got close, some numbers wrong, but in Court he was further away on [B]'s number. He had plenty of time to try and memorise them anyway, but how could he ever make a successful call? Of course there were other things that decided me they should not be found guilty. [F]? said in her statement that the jacket was GREEN! The only other mention of green was in [A]'s statement when policeman mistakenly said it was green! Indicating she was shown the statement. As well as her belatedly saying she knew of [A] and [B], who [E] said he knew as [G] and [H]. (said before couldn't recognise etc).

I tried to show the Jury that this was how people were fitted up, and that there was not enough evidence to convict anybody. I'm sorry I did not succeed and I wish you XX success in your further efforts.

Yours sincerely – ANON

XXXX

I was a shop steward XXXX for 18 years and know how people get framed for things.

Some more thoughts on the case [E] was clearly lying about the phone call he made to [B]. He says he keeps the number [B's] in his head. But got it wrong in first statement, and even more wrong in witness box – so how could he make the call at all? DC (1) should have been asked if he is paranormal – knew what to take from [C] house before [E] statement. Why these items and not any others? Does it happen often in DC (1)'s cases, that he picks up the 'right' evidence before he even knows about it? What was he looking for in the search? Some of the jury thought the judge wasn't just summing up the case but indicating he wanted them found guilty. Some of the jury said they were ready to believe they were guilty despite almost complete lack of evidence. The 'leader' of this pack was XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX saying they are drug dealers,etc, and should be locked away. There was no proof of this. Only [E] said this.

I tried to argue strongly that our duty X was first to presume innocence until proven guilty. Despite the fact that I was prepared to go through all the 'evidence' present and show how it was a false case, when I challenged the others to prove the guilt case – none of them even tried! The just decide on prejudice and hearsay. (and wanting to get home for tea!). I hope these are grounds in law to show that the verdict was unsafe. Don't know if it can be shown that the Judge misdirected the jury.

good luck!

Its a terrible thing to say, but it now looks if it would have been better not to go before a jury. A judge could not have decided on the complete lack of evidence. This is hindsight of course. My opinion was that the Judge should have directed us to find not guilty due to lack of evidence (and clearly false evidence).

Please do not show this letter to: - police/judge/pros Counsel."

At the beginning of the letter the writer explained: "I've blocked out some words because apparently I'm 'in contempt of court' for writing to you." In the letter as reproduced above the words blocked out in this way have been marked by capital Xs and initials have been substituted for names.

8. Mrs Anderson sought advice about the letter from her solicitor who brought it to the attention of the Court of Appeal. The court in turn contacted the police, who then interviewed 11 of the original 12 jurors, including the appellant. All of them denied writing the letter. Handwriting samples were taken from the jurors and a handwriting expert examined the letter. The expert discovered that one piece of obliterated writing was the appellant's email address, while two other pieces of obliterated writing said "Keith S". On comparing the letter with the handwriting samples, the expert concluded that the appellant had written it. The appellant was then arrested and interviewed under caution. Despite the evidence of the expert, the admitted similarity between his writing and that in the letter and the similarities between some of the contents of the letter and his own personal history as a trade union official, the appellant continued to deny being the author.

9. The material assembled by the police was referred to the Attorney General for him to consider, in terms of section 8(3) of the 1981 Act, whether to give his consent to proceedings for contempt of court being instituted against the appellant in terms of section 8(1). On 25 March 2002 the appellant's solicitors wrote to the Attorney General admitting that he had written the letter but arguing that no proceedings should be taken against him. On 16 July 2002 the Attorney General informed the appellant that he had given his consent to proceedings being instituted.

10. On 23 October 2002 the Divisional Court granted the Attorney General permission to apply for a committal order against the appellant. When the matter came before the court again on 8 May 2003, the court decided to hear argument on whether a defence was available to a juror who disclosed the deliberations of the jury if the juror was motivated by a desire to expose a miscarriage of justice.

11. On 16 May 2003 the Divisional Court (Scott Baker LJ and Pitchford J) held that no such defence was available: [2003] EWHC 1380 Admin. The appellant then accepted that he had committed a contempt of court in terms of section 8(1). The Divisional Court ordered that the appellant should serve a two-month prison sentence suspended for one year and should pay costs of £2500. In passing sentence the court accepted that the appellant had a genuine belief that there had been a miscarriage of justice, although he was probably someone who was blind and unreceptive to the views of others.

The Appeal

12. The House gave leave to appeal on 2 December 2003. Subsequently the House gave judgment in *R v Mirza* [2004] UKHL 2; [2004] 1 AC 1118. That decision corrected the previous interpretation of section 8(1), which the Divisional Court had applied in this case. As a result, the arguments for both sides before the House were different from those in the Divisional Court. Nevertheless, it remained common ground that, in terms of section 8(1), the appellant had revealed statements, opinions, arguments or votes of the members of the jury in the course of their deliberations. It was not disputed, either, that the mens rea for the offence was an intention to disclose and that the appellant had deliberately disclosed these aspects of the jury's deliberations to Mrs Anderson. So, unless some defence was available to the appellant in the circumstances of the case, he was guilty of contempt of court in terms of section 8(1).

13. The suggestion was that a juror is not guilty of contempt if he discloses the jury's deliberations with the bona fide aim of preventing a miscarriage of justice. On its face, section 8(1) makes no provision for a defence of that kind and Mr Starmer QC did not suggest that there was anything in the statute itself which would permit that defence to be implied into section 8(1). He argued, however, that in the particular circumstances of this case, by virtue of section 3 of the Human Rights Act 1998 ("the 1998 Act"), section 8(1) had to be interpreted as including such a defence so as to make it compatible with article 10 of the European Convention on Human Rights and Fundamental Freedoms. If this could not be done, then the House should make a declaration of incompatibility under section 4 of the 1998 Act.

14. Article 10 of the Convention provides inter alia:

> "1 Everyone has the right to freedom of expression. This right shall include freedom to … impart information and ideas without interference by public authority….
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for preventing the disclosure of information received in confidence, or for

> maintaining the authority and impartiality of the judiciary."

At its broadest, Mr Starmer's submission was that the appellant was free to impart information about the jury's deliberations without interference by the Attorney General when his intention was to secure the defendants' article 6 Convention right to a fair trial by a tribunal comprising an impartial jury. In fact, however, during the hearing Mr Starmer really confined his argument to the circumstances of this case.

15. The appellant wrote the letter containing the disclosures about the jury's deliberations on 12 February 2000, more than seven months before the 1998 Act came into force on 2 October 2000. Nevertheless, Mr Havers appeared to accept that the Act, and in particular sections 3 and 4, applied to these proceedings. In the absence of argument to the contrary, without deciding the point, I proceed on that basis.

16. Prior to the decision of the House in *R v Mirza*, the general assumption in the English courts was that the terms of section 8(1) were so broad as to apply to any court, whether the trial court or the Court of Appeal (Criminal Division), which might otherwise have wished to inquire into a matter relating to the jurors' deliberations. Section 8(1) in effect ruled out such inquiries by the courts. See, in particular, *R v Young (Stephen)* [1995] QB 324, 330 per Lord Taylor of Gosforth CJ. So a juror disclosing the jury's deliberations to the court would be in contempt under section 8(1). This understanding of the law presumably lay behind the blanket terms of the warnings in the leaflet for prospective jurors which the appellant was given and in the video which he saw. The House held, however, that if a trial judge were informed about any misconduct during the jury's deliberations but before they had returned their verdict, then section 8(1) did not prevent him from looking into the matter. Since jurors might well not appreciate that they could tell the judge about any misconduct of their fellow jurors, the House suggested that in future they should be given further guidance. This suggestion led Lord Woolf CJ to issue the Practice Direction (Crown Court: Guidance to Jurors) [2004] 1 WLR 665, which amended the consolidated criminal practice direction so as to provide inter alia:

> "IV.42.6 Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not wait until the case is concluded. At the same time, it is undesirable to

> encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.
>
> IV.42.7 Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right."

Subsequently, in *R v Smith (Patrick)* [2005] UKHL 12; [2005] 1 WLR 704 the House looked further at what form the trial judge's inquiries might take when a matter was drawn to his attention during the trial.

17. In reaching its decision in *R v Mirza* the House held that section 8(1) does not apply to the trial court or to the Court of Appeal. Nevertheless, as the House also held, by virtue of a long-standing common law rule, after the jury have returned their verdict, evidence directed to matters intrinsic to the jurors' deliberations is inadmissible. Such evidence is excluded in order to protect the confidentiality of the jurors' deliberations and the finality of their verdict. So neither the trial court nor an appeal court would use their powers of investigation to obtain evidence of those deliberations which would be inadmissible. Where, however, the jury is alleged to have been affected by extraneous influences, e g contact with other persons who may have passed on information which should not have been before the jury, evidence of those extraneous influences is admissible. The law is conveniently summarised in the speech of my noble and learned friend, Lord Carswell, in *R v Smith (Patrick)* [2005] 1 WLR 704, 712 – 713, para 16.

The Appellant's Broad Submission

18. Starting from *R v Mirza*, Mr Starmer submitted that if, before the verdict, the trial judge could enquire into allegations of misconduct in the jurors' deliberations, or the Court of Appeal could enquire into allegations of improper extrinsic influences even after the jury had returned their verdict, then in either event it must be lawful for a juror to disclose the deliberations of the jurors to the extent necessary to bring

these matters to the attention of the trial judge or the appeal court. In practice the line between intrinsic and extrinsic factors relating to the jury's deliberations was not clear-cut: what appeared at first sight to be nothing more than the stubborn refusal of a juror to follow the judge's directions (and so a matter intrinsic to the jury's deliberations) might turn out on investigation to be due to bribery (an extraneous influence). So a juror could not be expected to know on which side of the line his disclosure would fall. It followed that, in proceedings for contempt of court under section 8(1), a defence must be open if the juror was motivated by a genuine desire to remedy a miscarriage of justice, irrespective of whether the complaint was of intrinsic or extrinsic misconduct.

19. I would accept the substance of much, but not all, of that submission. A juror who complains to a court about misconduct which is intrinsic to the jury's deliberations is in effect tendering evidence which, on examination, turns out to be inadmissible. The mere fact that the evidence is inadmissible does not mean that there is anything improper or unlawful about the juror's action in bringing it to the attention of the court. On the contrary, the juror may well be acting from the very best of motives in an effort to avoid what he regards as a miscarriage of justice. Not surprisingly, therefore, there is nothing to suggest that, before the 1981 Act, his action would have been regarded as a contempt of court or as being otherwise unlawful.

The Origins of Section 8(1)

20. The circumstances which prompted the enactment of section 8(1) are well known and they were examined in some detail in the speech of Lord Lowry in *Attorney General v Associated Newspapers* [1994] 2 AC 238. Following the acquittal of a prominent politician on a charge of conspiracy to murder, the New Statesman magazine published an article, based on an interview with one of the jurors, which gave an account of significant parts of the jury's deliberations. The Attorney General applied for an order for contempt of court against the New Statesman. In *Attorney General v New Statesman and Nation Publishing Co Ltd* [1981] QB 1 the Divisional Court held that a juror's disclosure of the jury's deliberations was not a contempt of court unless it tended, or would tend, to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations. Since, the court held, the article in question would not have had that effect, the Attorney General's application was refused. Towards the end of his judgment Lord Widgery LCJ said this:

> "The evidence before us shows that for a number of years the publication of jury room secrets has occurred on numerous occasions. To many of those disclosures no exception could be taken because from a study of them it would not be possible to identify the persons concerned in the trials. In these cases, jury secrets were revealed in the main for the laudable purpose of informing would-be jurors what to expect when summoned for jury service. Thus, it is not possible to contend that every case of post-trial activity of the kind with which we are concerned must necessarily amount to a contempt.
>
> Looking at this case as a whole, we have come to the conclusion that the article in the 'New Statesman' does not justify the title of contempt of court. That does not mean that we would not wish to see restrictions on the publication of such an article because we would. But our duty is to say what the law is today and to see whether today the activity in question is a contempt of court. We are unable to say that it is and we would therefore refuse the application."

21. Taking their cue from the wish expressed by the Divisional Court, the government introduced a clause into the Contempt of Court Bill, which was designed to make it a contempt of court to publish details of a jury's deliberations or to disclose them with a view to their being published, or with knowledge that they might be published, or to solicit their disclosure with intent to publish them or to cause or enable them to be published. As a result of pressure during the course of the passage of the Bill through Parliament, the original clause was considerably amended so as to produce the wider provision which is now to be found in section 8(1). The discussions in both Houses suggest – what the trilogy of verbs in section 8(1) also suggests - that the principal concern of Parliament was to prevent jurors from being harassed to reveal their deliberations. By contrast, the case of a juror spontaneously communicating his worries about the jury's deliberations to the court authorities does not feature in the debates as a cause for concern. There is accordingly nothing, either in the circumstances preceding its enactment or in the debates in Parliament, to suggest that section 8(1) was ever intended to apply to a juror who communicated to the court authorities his worries about misconduct during the jurors' deliberations.

The Reasoning in R v Mirza

22. In *R v Mirza* the House was concerned with two matters: first, the admissibility of allegations of misconduct made by a juror after the verdict and, secondly, the power of the trial court to investigate allegations of misconduct coming to light before the jury returned their verdict. In these circumstances the House did not need to consider the position of the juror making the complaint. Nevertheless, the reasoning of the House casts light on that question.

23. Section 8(1) specifies types of conduct which constitute contempt of court. So, if that subsection applied to a court, it would mean that the court could itself be in contempt of court. This would be a very strange notion, as the High Court of Justiciary pointed out in *Scottish Criminal Cases Review Commission, Petitioners* 2001 SLT 1198, 1202G – I:

> "we have some difficulty in applying the idea of contempt of court to a situation where a court itself makes inquiries, not with the aim of bringing the court in question into contempt but with the very different aim of trying to ensure that justice does not miscarry. Moreover, Parliament has not qualified the appeal court's powers under section 104 of the 1995 Act [Criminal Procedure (Scotland) Act 1995] by reference to section 8…. In these circumstances, since the point does not actually arise for determination, we need say no more than that we reserve our opinion both as to the effect of section 8 on the appeal court's powers under section 104 of the 1995 Act and as to whether, in any event, the court would ever use those powers to inquire into a jury's deliberations."

In this passage the High Court referred to the provision containing the Scottish appeal court's powers of investigation. The equivalent English provision is section 23(1) of the Criminal Appeal Act 1968 under which the Court of Appeal can receive evidence relating to an alleged irregularity in a trial. When enacting section 8 of the 1981 Act, Parliament did not qualify that power in section 23(1).

24. In *R v Mirza* [2004] 1 AC 1118, 1146, para 57, it therefore seemed clear to Lord Slynn of Hadley

> "that in enacting section 8 of the Contempt of Court Act 1981 (primarily with the intention of preventing disclosure by and to the press) Parliament did not intend to fetter the power of a court to make investigation as to the conduct of a trial. Properly construed, section 8(1) does not apply to the court of trial or to the Court of Appeal hearing an appeal in that case. It cannot properly be read as categorising what the court does in the course of its investigation as a contempt of the court itself. What was said in *R v Young (Stephen)* [1995] QB 324, 330 should not be followed. The court is restricted in its inquiry into what happened in the jury's deliberations, not by section 8 of the Act but by the longstanding rule of the common law."

My noble and learned friend, Lord Steyn, dissented from the decision of the majority to dismiss the appeals, since he considered that in the cases then before the House evidence of misconduct during the deliberations of the jury was admissible. But he agreed with the majority in holding that section 8 did not impinge on the powers of the Court of Appeal. Explaining why there was no need to resort to section 3 of the Human Rights Act when interpreting section 8, Lord Steyn said, at p 1139, para 25:

> "The reason is simple: the notion that the Court of Appeal could be in contempt *of itself* if it exercised the jurisdiction to hear evidence about what happened in the jury room is an absurdity. Properly construed, on ordinary principles of construction, section 8 does not impinge on the jurisdiction of the Court of Appeal to receive evidence which it regards as relevant to the disposal of an appeal. I understand this to be an agreed position between counsel. But I would, in any event, rule accordingly. Section 8 is therefore not an impediment to a consideration of the appeals before the House on their legal merits. If it had been such an impediment, it would in my view have been an appropriate case for reading down the statute under section 3. Moreover, if the issue were to arise whether a juror who reported an irregularity during jury deliberations to the Court of Appeal would commit an offence by so doing, an appropriate reading down of the statute might become necessary."

Lord Hobhouse of Woodborough was equally clear that section 8(1) did not apply to a court. He was also prepared to hold that it did not apply to a juror who brought misconduct to the attention of a court. He said, at pp 1169 – 1170, para 139:

> "But it must be added that the concept of a court being in contempt of itself cannot, on any view, be correct. Thus a communication by a juror to the court itself cannot without more, e g malice, dishonesty or improper motive, be a contempt of court; nor can be an inquiry addressed by the court or an authorised agent of the court to a person and a response to the court by that person to that inquiry."

He said further, at p 1172D - F, para 146:

> "The question of admissibility relates not to what the judge or judges see or read but what they take into account in making a substantive decision and what they treat as legitimate evidence for the parties to use in argument. Thus a jury note or letter will, save in exceptional circumstances, always be looked at by the trial judge and, if there is an appeal, by the Court of Appeal (the legal expression is de bene esse – i e for what it is worth); its existence and character will normally be disclosed to the parties' counsel and submissions as to its significance be invited and/or responded to."

Lord Hope of Craighead's treatment of the point is entirely consistent with that construction. He explained that counsel had suggested two possible approaches, one being based on section 3 of the 1998 Act. He continued, at p 1155, para 92:

> "I would, for my part, hold that the ordinary rules of statutory construction provide a sufficient vehicle for giving a meaning to section 8(1) of the 1981 Act which will enable the court to do what is necessary in the interests of justice. Where allegations are made which suggest that a defendant is not receiving, or did not receive, the fair trial to which he was entitled under article 6(1) of the Convention, they must be considered and investigated. Any investigation must, of course, be within

> the limits that are set by the common law. Evidence which is struck at by the common law rule will be inadmissible, and the court should not ask for or receive such evidence. But there is nothing in the statute that expressly inhibits or restricts the court in its performance of this task, and I do not think that an intention to do this can or should be read into it."

Lord Hobhouse agreed with the reasons given by Lord Hope: p 1172, para 147. I agreed with both of them: p 1174, para 149.

25. The decision of the House in *R v Mirza* is accordingly authority for the proposition that section 8(1) of the 1981 Act does not apply to a court when it considers a juror's complaints about misconduct during the jury's deliberations, since a court cannot be in contempt of itself. By necessary implication, the complaint which the court may lawfully consider must itself be lawful. Therefore, as Lord Hobhouse held, a juror who discloses to the court what is said or done during the jury's deliberations with the intention of prompting an investigation is not, without more, e g malice, dishonesty or improper motive, in contempt of court in terms of section 8(1). The subsection no more applies to the juror than to the court. The background to the enactment of the provision is wholly consistent with that interpretation, which can be reached on ordinary principles of statutory construction without resort to section 3 of the 1998 Act.

Applying the Law to this Case

26. It is not disputed that the appellant genuinely believed that there had been a miscarriage of justice due to what he perceived to be failings on the part of his fellow jurors. Accordingly, if he had written his letter to the Crown Court or to the Court of Appeal, he would not have been in contempt of court in terms of section 8(1). During the hearing of the appeal before the House, Mr Havers accepted this. Mr Starmer sought to take the matter further, however, by arguing that, although the appellant had not written to the court directly, he had written to the defendants' mother with an intention that the matter should be raised by lawyers presenting an appeal to the Court of Appeal on their behalf. Even though he had chosen this indirect route, the appellant was intending to disclose the matter to the appeal court. This was, Mr Starmer submitted, sufficient to exclude him from the scope of section 8(1).

27. Frequently, what can be done directly can also be done indirectly and to hold otherwise would be to promote form over substance. For example, if instead of writing to the trial judge or to the appeal court, the appellant had spoken or written to the jury bailiff or to the clerk of court, he would not have been in contempt. Similarly, if he had sent a sealed letter containing his complaint to the defendants' solicitors or counsel, or even to a citizens' advice bureau or similar organisation, and had asked them to forward it unopened to the appropriate court authorities, any disclosures in the letter would have been disclosures to the court and so outside the terms of section 8(1). There may be other such cases.

28. What the appellant actually did was very different. By writing the letter to the defendants' mother he was not merely disclosing the jurors' deliberations to the court authorities by an indirect route; on the contrary, he was disclosing them to a third party who had no authority to receive disclosures on behalf of the court and who might, or might not, pass the contents of the letter on to the court. Indeed, the closing words of the letter, where the appellant urged Mrs Anderson not to show it to the police, to the judge or to prosecuting counsel, are scarcely consistent with an intention on the appellant's part that she should, in effect, act as a conduit between him and the court authorities. Moreover, the appellant had no control over what Mrs Anderson did with his letter. She could have passed it on to anyone, including the media. It does not lie in his mouth to argue that, unlike him, Mrs Anderson or anyone else would necessarily have been restrained by section 8(1). Fortunately, thanks to her good sense, all that happened was that the jurors were interviewed by the police and the appellant's – doubtless very one-sided – version of their deliberations was not given any wider circulation. By his action the appellant created all the risks to the confidentiality of the jurors' deliberations which section 8(1) was designed to prevent. In these circumstances section 8(1) applied to the appellant and he was accordingly – as he himself realised at the time - in contempt of court.

Section 3 of the 1998 Act

29. As I have already explained, it was not disputed that the appellant could, if appropriate, invoke sections 3 and 4 of the 1998 Act. In my view, however, neither section avails him in this case. The appellant's rights under article 10(1) were, of course, engaged but in terms of article 10(2) the right to freedom of expression can be subject to a restriction which is prescribed by law and is necessary in a democratic society "for preventing the disclosure of information received in confidence." In *Gregory v United Kingdom* (1997) 25 EHRR 577, 594, para 44, the

European Court acknowledged that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law. Therefore, in so far as section 8(1) serves to reinforce that rule by making it an offence for a juror to disclose the information which he receives in confidence from his fellow jurors, the objective is sufficiently important to justify limiting the juror's freedom of expression in this way. The provision is rationally connected to its aim and the means adopted are no more than is reasonably necessary, since the restriction does not apply to bona fide disclosures to the court authorities. The measure is accordingly "reasonably justifiable in a democratic society": *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80. Mr Starmer indeed accepted that, once the Practice Direction came into force, section 8(1) did not infringe a juror's article 10 rights, since he would know that he could draw his worries to the attention of the trial judge before the jury returned their verdict.

30. He pointed out, however, that when the appellant served as a juror, the material shown to him suggested that the ban on disclosure was absolute – and that indeed was the position as generally understood following the earlier rulings of the Court of Appeal. Therefore, he argued, the appellant did not know, and could not have been expected to know, that he could contact the trial judge or the Court of Appeal. In those circumstances the law was not sufficiently clear and there was a disproportionate interference with the appellant's freedom of expression. Section 8(1) should therefore be interpreted as being subject to a defence that it did not apply to a juror who disclosed the jury's deliberations to a third party rather than to the court, if the juror was motivated by a desire to expose a miscarriage of justice and he did not contact the court authorities because he had been told that he could not disclose the deliberations to anyone.

31. I would reject that argument. Section 3 of the 1998 Act comes into play only where it is needed in order to make a legislative provision compatible with a Convention right. As Mr Starmer accepts, however, when properly interpreted according to domestic canons of construction, section 8(1) is compatible with article 10 of the Convention. That being so, section 3 does not apply. In reality Mr Starmer is complaining about the warnings to jurors, which were based on a misinterpretation of section 8(1). But the terms of those warnings could not affect either the interpretation of the statute or the appellant's guilt, one way or the other. At most, they might have been relevant to mitigation. In fact, however, the warnings are irrelevant since, by writing the letter, the appellant showed that he was not restrained by being warned that he would be in

contempt of court if he disclosed the jury's deliberations to anyone. That being so, the warnings would not have stopped him from contacting the court authorities, or consulting a lawyer about the matter, if he had wanted to. Instead, he deliberately chose to write to Mrs Anderson, even though – as the letter makes clear - he was well aware that in doing so he was in contempt of court.

32. For these reasons I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

33. For the reasons given in the opinion of my noble and learned friend Lord Rodger of Earlsferry, with which I agree, I too would dismiss this appeal.

LORD CARSWELL

My Lords,

34. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Rodger of Earlsferry. For the reasons which he has given I too would dismiss the appeal.