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BEFORE

LORD JUSTICE SHAW, MR. JUSTICE SWANWICK AND MR. JUSTICE MARS-JONES

LAWRENCE FREDERICK HARRINGTON
MICHAEL JOSEPH HANLON

May 17, 1976

Trial—Jury—Challenge to Juror—Peremptory Challenge to be Made Before Juror Takes the Oath—Juries Act 1974 (*c.* 23), *s.* 12 (3).

By section 12 (3) of the Juries Act 1974: "A challenge to a juror in any court shall be made after his name has been drawn by ballot . . . and before he is sworn."

The strict rule (laid down in BRANDRETH (1817) 32 St.Tr. 755) that a peremptory challenge had be be made to a juror "as he came to the book to be sworn and before he is sworn" has not been affected by section 12 (3) of the Juries Act 1974.

However, a trial judge, in his discretion, may relax the above rule and allow a challenge before the reading of the oath is concluded.

Appeal against conviction and application for leave to appeal against sentence.

On April 18, 1975, at Cardiff Crown Court (Judge Watkin Powell) the appellants were convicted on two counts of burglary and were sentenced, Harrington to seven years' imprisonment concurrent and Hanlon to five years' imprisonment, also concurrent. The case is reported only on the first ground of appeal, *i.e.* whether the trial judge had been right in ruling, in his discretion, that a juror could not be challenged peremptorily after he had taken the Bible in his hand and commenced to take the oath.

Aubrey Myerson, Q.C. and *D. E. Morgan* for the appellants. *Gerard Elias* (who did not appear below) for the Crown.

SHAW L.J.: These two appellants were convicted on April 18, 1975, at the Cardiff Crown Court before His Honour Judge Powell, after a trial which extended over 30 days. They were charged in two counts with burglary. When the learned judge came to pass sentence on April 21, Harrington was sentenced to seven years' imprisonment concurrent on each of the two counts and Hanlon to five years' imprisonment concurrent.

They appeal against conviction by leave of the single judge. The circumstances were these. In July 1974 two tons of tin ingots were stolen from a warehouse in Cardiff. They were taken off to some unknown destination. A month later six tons were stolen from the same warehouse making a total of eight tons of ingots to a value of £32,000.

The police made inquiries. These led them to Harrington as well as to his brother-in-law, Hanlon, and Harrington's son Patrick and also to others who were tried at the same time. One was a man named Fry who was convicted and sentenced to three years' imprisonment. His application for leave to appeal against conviction having been refused he has not renewed it. Another was a man called Hurford who was sentenced to two years' imprisonment. Patrick Harrington, the son of the appellant, was acquitted. No evidence was offered against a man called Monks who was

similarly charged. Yet another accused named Brown was convicted on count 3 and sentenced to three years' imprisonment. He does not appeal.

The evidence against Harrington was substantial. Much of it came from Monks who gave evidence for the prosecution. Some came from the appellant Harrington himself. As he had been troubled by the fact that his son Patrick was in custody charged in relation to these matters, as was his brother-in-law, he approached the police on the basis he had information which might, in certain circumstances, enable the property to be recovered. There were several meetings between him and the police. In the end they came to the conclusion that Harrington's real position in the matter was not merely that of a potential informant but of a person in complicity. He was accordingly charged as a party to the offences. The conviction and sentences followed.

His appeal is based upon a number of grounds. Mr. Myerson who appeared for the appellant Harrington in the Court below and appeared for both appellants in this Court, has not pursued them all. The first one stems from a question of procedure and goes to jurisdiction. The trial had originally begun on February 25, 1975, but it turned out that one member of the jury was acquainted with an important witness in the case so that it was undesirable that that juror and also his colleagues who had sat in the box with him should continue to try the matter. They were therefore discharged.

The second trial begun on March 3. In order to preclude a repetition of the difficulty which had arisen at the first trial, the defence solicitors were provided with lists of all who were on the jury panel. That gave them the opportunity to ensure that no one on the empanelled jury was unsuitable either because of acquaintance with any particular person or because of private knowledge of the case. On March 3, the process of swearing the jury began after the pleas had been taken from the accused. There were a number of challenges, not all on behalf of the accused. Three or four came from the Crown, but something like 30 from the accused between them.

When the tenth or eleventh juryman came to be sworn, junior counsel for the appellant Harrington had undertaken the burden of exercising the right of challenge not only on behalf of his client, but on behalf of another defendant as well. When that juryman had risen, taken up the book and begun reading from the card with which he had been provided, it seems that Harrington intimated that he wanted to challenge that juror. Apparently he uttered the word "challenge" but it does not seem to have been audible beyond the confines of the dock, but counsel, as was his duty, pursued the matter and repeated the challenge audibly at the stage when the juryman had spoken the words: "I swear by Almighty God," while holding the book, as he had been told to do.

The learned judge said that was too late to be an effective challenge of that juror. This direction was at the time accepted. No complaint or protest was made, the swearing of the jury was completed and the trial was opened by Mr. Rhys Roberts who appeared for the prosecution and continued the whole of that day when it was adjourned part-heard.

After the Court had adjourned that afternoon, counsel discussed the matter between themselves. The following day it was mentioned to the learned judge, not by the counsel for the defendant particularly concerned but by Mr. Rhys Roberts who thought it right, as indeed it was, that he should indicate to the judge that there might have been an irregularity affecting the validity of the whole proceedings. From that stage a good deal was said by counsel not all of whom were directly concerned, but who felt it their duty to venture their own view and so assist the circuit judge in resolving the difficulty.

What was urged on behalf of the appellants Harrington and Hanlon was that the jury should be discharged and that the trial should be restarted before another jury because there had been a material irregularity in denying Harrington and Hanlon the right to challenge the particular juror peremptorily.

Mr. Myerson in this Court has not sought to say that the rule is different from what was stated in BRANDRETH (1817) 32 St.Tr. 755. It was there said at p. 774, *per* Richards C.B., that the time for challenging a juryman is *before* the swearing of the juror begins. In practice there is often a relaxation of this rule and judges allow challenges made before the reading of the oath is concluded. This is a matter of discretion. The strict rule remains the rule. The common form then was that a challenge might be made to a juror "as he comes to the book to be sworn and before he is sworn." The Juries Act 1974 now enacts in section 12 (3) that: "A challenge to a juror in any court shall be made after his name has been drawn by ballot (unless the court, pursuant to section 11 (2) of this Act, has dispensed with balloting for him) and before he is sworn." The effect is precisely the same. The right of challenge does not arise until the juror's name has been drawn by ballot from those on the jury panel and it continues until he is sworn, that is to say until the process of being sworn begins.

Mr. Myerson does not challenge that statement of the strict rule but he says that the practice is to extend the opportunity to challenge a juryman until the oath is completed, and that in the circumstances of this case it was wrong for the judge to have refused to relax the rule.

This Court sees no reason why the strict rule should not be enforced. It has the merit of being clear-cut for it delimits the opportunity for challenge precisely. It prevents indecorous and unseemly interruption of what is a solemn process, namely, the undertaking on oath by the juror to do justice in the trial. While it may be in some cases thought right to allow the challenge to be effective or allow it to operate after the commencement of the taking of the oath, that does not, in the opinion of this Court, make it incumbent upon a judge at a trial to give that indulgence. Accordingly the first ground of appeal is one which this Court thinks should be rejected.

[The learned Lord Justice then went on to consider the other grounds of appeal against conviction and dismissed them and also refused the appellant Harrington's application for leave to appeal against sentence.]

Appeals dismissed.
Application refused.

Solicitors: Registrar of Criminal Appeals, for the appellants. Edwards, Geldart & Stephens, Cardiff, for the Crown.