

Case Name:

R. v. Sims

**Michael Gary Sims, appellant;
v.
Her Majesty The Queen, respondent.**

[1992] S.C.J. No. 73

[1992] A.C.S. no 73

[1992] 2 S.C.R. 858

[1992] 2 R.C.S. 858

139 N.R. 305

J.E. 92-1313

10 B.C.A.C. 94

75 C.C.C. (3d) 278

15 C.R. (4th) 279

17 W.C.B. (2d) 107

File No.: 22443.

Supreme Court of Canada

1992: June 15 / 1992: August 27.

**Present: Sopinka, Gonthier, Cory, McLachlin and
Iacobucci JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (26 paras.)

Criminal law -- Jury -- Deliberation -- Jury deadlocked -- Exhortation to reach verdict -- Whether

trial judge should give his opinion on matters of fact while exhorting deadlocked jury to reach a verdict -- Whether jury prejudicially influenced by trial judge's opinion on strength of Crown's case.

The accused was charged with the murder of an elderly woman. At trial, the Crown relied heavily on statements made to the police by the accused while in a detention centre on other charges. In particular, a police officer testified that, in response to his remark as to the loyalty of the accused's father, the accused replied: "All the grief I have been causing ..., killing a 71-year-old woman, nice." In cross-examination, however, the officer appeared to have confirmed the accused's version of the statement that what he said was "now charged with killing a 71-year-old lady, nice." At the conclusion of the trial, the judge charged the jury. The jury deliberated for two days, twice interrupting their deliberations to ask that evidence be re-read to them, including the portions of the police officer's testimony as to the accused's statements. At 9:04 p.m. on the second day, the jury indicated to the court that they were deadlocked. The trial judge made a short address and, towards the end, told the jury that: "While matters of evidence are entirely up to you, ... I suggest if you accept the evidence of [the police officer] the Crown has a very powerful case. If you have a reasonable doubt on the whole of the evidence then the accused should be found not guilty. The matter is entirely up to you." The jury continued to deliberate for another hour before retiring. They reconvened the next day at 9 a.m. and delivered a guilty verdict at 9:59 a.m. The majority of the Court of Appeal affirmed the conviction, holding that the jury was not prejudicially influenced by the trial judge's opinion on the strength of the Crown's case. This appeal is to determine whether a trial judge should give his opinion on matters of fact while exhorting a deadlocked jury to reach a verdict.

Held: The appeal should be allowed and a new trial ordered.

The dangers associated with a trial judge's offering his opinion on issues of fact during an exhortation to a deadlocked jury are of such potential detriment to an accused's fair trial interest that judges, as a general rule, should refrain from offering such comments. An exception may arise in the case where the jury requests the judge's view or where it is apparent from the jury's questioning that the jury requires further clarification. Even then, the judge should be careful to offer the required opinion in a balanced and fair way which will not sway decision-making process in which the jury is involved to one side or the other.

In this case, in exhorting the jury to reach a verdict, the trial judge offered his opinion that "if you accept the evidence of [the police officer] the Crown has a very powerful case." This statement of opinion on the inference to be drawn from the police officer's evidence may well have affected the course of deliberations, and hence the verdict, to the prejudice of the accused. None of the accused's alleged statements constituted a clear confession of guilt. The choice of inference to be drawn from these statements was the critical issue and the words "very powerful case" used by the trial judge had the potential of communicating to the jury that there was little doubt in the trial judge's mind what inference they should draw from the evidence. There is thus a possibility that what the trial

judge said could have persuaded a juror to go along with the majority notwithstanding that he had not been persuaded that guilt had been proven beyond a reasonable doubt. The trial judge's reminder that matters of evidence were entirely up to the jury did not negate the possibility that the communication of the trial judge's opinion might have lead the jury to decide a question of evidence one way as opposed to the other. The fact that the jury deliberated almost two hours after the exhortation did not establish that they were not influenced by the trial judge's comment.

Cases Cited

Referred to: R. v. Palmer, [1970] 3 C.C.C. 402; Boulet v. The Queen, [1978] 1 S.C.R. 332; R. v. Littlejohn and Tirabasso (1978), 41 C.C.C. (2d) 161.

Authors Cited

Salhany, Roger E. Canadian Criminal Procedure, 5th ed. Aurora, Ont.: Canada Law Book Inc., 1989.

APPEAL from a judgment of the British Columbia Court of Appeal (1991), 64 C.C.C. (3d) 403, dismissing the accused's appeal from his conviction on a charge of murder. Appeal allowed and new trial ordered.

David J. Martin and G. Delbigio, for the appellant. Austin F. Cullen, for the respondent.

Solicitor for the appellant: David J. Martin, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, New Westminster.

The judgment of the Court was delivered by

1 McLACHLIN J.:-- This appeal raises the issue of whether a judge should give his or her opinion on matters of fact while exhorting a deadlocked jury to reach a verdict.

The Facts

2 This appeal arises from the trial of Sims for the murder of an elderly person, Flora Nelson, in the course of a break and enter into her home in Victoria. By January of 1987, the police investigation led the police to conclude that Sims and one Norman Johnson had been present in the deceased's apartment on the day of the murder, and that one or both of them might have murdered her. In February of 1987, Sergeants Oakley and Ross travelled to Toronto to interview the appellant,

who was being detained on other charges in Ontario. In the course of subsequent questioning, Sims made certain statements to the police.

3 Sims talked to the officers about the possibility of pleading guilty to the lesser charge of manslaughter. He stated that he was sick and needed help -- that he "couldn't keep on hurting old people". He expressed a wish to be transferred to Victoria to "get Norm off", asking out loud: "if Norm wasn't actually involved in the hitting it may affect his sentence?" The interviews led to a critical statement. In response to a remark as to the laudable loyalty of Sims' father, Sergeant Ross testified that the appellant stated: "All the grief I have been causing ..., all the shit I have been doing, killing a 71-year-old woman, nice."

4 Sims was charged with murder. His statements to the police were found to be voluntary and were admitted into evidence. The appellant took the stand and denied committing the murder. He said what he had really said in the critical portion of his comments to Sergeant Ross was, "All the grief I have been causing ..., all the shit I have been doing, now charged with killing a 71-year-old lady, nice." (Emphasis added.) In his cross-examination, Sergeant Ross appears to have confirmed the appellant's version of the statement.

5 At the conclusion of the trial on January 20, 1988, the trial judge charged the jury completely and correctly. He emphasized that all matters of fact were for them to decide, and them alone. The jury deliberated throughout the following day and into the next day. They clearly did not find the case easy. They twice interrupted their deliberations to ask that evidence be re-read to them, first the evidence of an inmate and later the portions of Sergeant Ross's testimony as to the appellant's statements to him in Toronto. At 9:04 p.m. on January 22, the jury indicated to the court that they were deadlocked. The trial judge recalled the jury and delivered an exhortation, which read, in part:

I must also emphasize that the minority do not have to agree with the majority. All I want to remind you is of the fact that you as reasonable people might reconsider your position again and decide whether or not in good conscience you can change your mind so that a verdict may be given in this trial of guilty or not guilty.

On the other hand, if, consistent with your oath, you cannot honestly alter your view or views to conform with that of [the] majority, and you cannot bring the other jurors around to your own point of view, then it is your duty to differ and there will be no verdict.

Now, it seems to me the issue in this case is whether Michael Sims was in the apartment of Flora Nelson at the time and place mentioned in the indictment. While matters of evidence are entirely up to you, as I told you before, and I tell you now, I suggest if you accept the evidence of Sergeant Ross the Crown has a

very powerful case. If you have a reasonable doubt on the whole of the evidence then the accused should be found not guilty.

The matter is entirely up to you. All that I can do is ask you to try once again and listen to the arguments of your fellow jurors. [Emphasis added.]

6 The jury continued to deliberate for another hour before retiring. They reconvened January 23 at 9 a.m. and delivered a verdict of guilty at 9:59 a.m.

The Judgments Below

7 The Court of Appeal (1991), 64 C.C.C. (3d) 403 was unanimous that the trial judge's charge to the jury was more than adequate; in the words of Gibbs J.A.: "[he] reviewed the evidence with scrupulous care and impartiality. He instructed on the law with precision and clarity ..." (p. 418). The disagreement between the majority, per Gibbs J.A. and the dissent, per Lambert J.A., centered on the propriety and the potential effect of the trial judge's statement of opinion as to the strength of the Crown's case when exhorting the jury to reach a verdict.

8 The majority found that any decision as to the propriety or prejudicial effect of the impugned statement must be made in the context of the entire exhortation, the judge's charge to the jury and the evidence which was the focus of the impugned statement of opinion; "the matter does not stand to be judged on the extraction of 17 words from a charge and exhortation which took upwards of three hours in the total to deliver ..." (p. 418). Gibbs J.A. found that the members of the jury "could never have been in any doubt, or under any misapprehension, about their duty or their critical role in the process" (p. 419). Gibbs J.A. also regarded the sequence of events following the exhortation as significant to the issue of whether the appellant had been prejudiced. Distinguishing *R. v. Palmer*, [1970] 3 C.C.C. 402 (B.C.C.A.), where a verdict was returned 15 minutes after an impugned exhortation, he concluded that the hour of deliberation, followed by some overnight thinking time, then followed by another hour of deliberation, negated concern that the jury might have been prejudicially influenced by the trial judge's opinion on the strength of the Crown's case.

9 In dissent, Lambert J.A. took into account the context in which the impugned words were spoken, particularly the fact that the trial judge's opinion was stated to a jury which had been deliberating for two days, and found potential interference with the jury's role (at pp. 408-10):

In my opinion, the conclusion is absolutely inescapable that, at that point [when the jury indicated that it was deadlocked], one or more members of the jury thought that the evidence other than Sergeant Ross's testimony was not in itself sufficient to support a verdict of guilty against Sims, and that Sergeant Ross's evidence of what Sims had said was not sufficient, when added to the rest of the evidence, to establish that Sims was guilty beyond a reasonable doubt.

...

In short, the trial judge had effectively shifted the focus for the decision of the jury from the difficult question of the weight to be attached to Sergeant Ross's evidence of what Sims had said to the simple question of whether Sergeant Ross was a truthful witness.

...

My view is that the time lapse from when the trial judge made his observation that the Crown had a very powerful case until the delivery of the jury's verdict was just about the amount of time that would have been required for the members of the jury who were in favour of a guilty verdict to emphasize to the member or members of the jury who were in favour of a not guilty verdict that the trial judge had expressed his view and that view was that unless they were prepared to say that they disbelieved Sergeant Ross then Sims was guilty.

Issues

10 This appeal presents two basic issues:

- (1) What rule governs the statement of a trial judge's opinion on the facts to a deadlocked jury in the course of an exhortation?
- (2) Did the exhortation in this case violate that rule?

Discussion

- (1) The Rule Governing Statements of Opinion on Matters of Fact to a Deadlocked Jury

11 I have concluded that the appropriate rule is the following: a trial judge ought not to offer his or her opinion on the facts to a deadlocked jury, in the course of an exhortation, except to the extent that the jury has indicated the need for assistance on some particular point. My reasons for this conclusion are as follows.

12 It is not disputed that the trial judge can offer opinions on matters of fact to the jury in the course of his or her address: *Boulet v. The Queen*, [1978] 1 S.C.R. 332, and *R. E. Salhany*, *Canadian Criminal Procedure* (5th ed. 1989), at pp. 291-92. This raises a threshold issue: is an exhortation to a deadlocked jury to be viewed as a continuation of the charge or do different considerations apply?

13 In my view, an exhortation to a deadlocked jury is generically different from a charge to a jury. They are alike in that both are directed to assisting the jury in coming to a just verdict. But they differ in their more particular purpose. The purpose of an exhortation is to impress on the jury

the need to listen to each other and consider each other's views in order to avoid disagreement based on fixed, inflexible perceptions of the evidence that one or other of them may have developed. The purpose of an exhortation is not to suggest to the jury that one view of the evidence may be preferable to another, or that this inference as opposed to that inference should be drawn from the evidence. To put it another way, the focus of the exhortation is the process of deliberation which is the genius of the jury system. An essential part of that process is listening to and considering the views of others. As a result of this process, individual views are modified, so that the verdict represents more than a mere vote; it represents the considered view of the jurors after having listened to and reflected upon each other's thoughts. It is on that process that the exhortation should focus. In this respect it differs from the charge, which is aimed primarily at offering guidance and assistance to the jury on the legal issues, and their relation to the facts over which the jury is the sole arbiter.

14 Not only is the purpose of the charge and the exhortation different; the time when each occurs gives a different dynamic to each. The charge comes before the jury begins its deliberations. It sets out the general parameters which the jury should have in mind in the deliberations to follow. Because such deliberations have not yet commenced, there is no danger of interfering with the course of the jury's deliberations. Things are quite different with an exhortation to a deadlocked jury. Discussions have been underway, usually for some time. Those discussions have produced different points of view. One may presume that those holding one point of view have sought to persuade those holding different views of the rightness of their point of view, and vice versa. The dynamic of deliberations requires that the jurors work their differences out among themselves. It is a delicate dynamic, which can be upset by interjection of a judicial opinion on a matter of fact. A trial judge's interjection is rendered more problematic by reason of the fact that his or her reasons are not divulged to the jurors, and thus are not subject to examination and challenge. In short, the judge's opinion becomes part of the deliberative process, but in a way which runs counter to the assumption of examination and discussion which underlies the jury verdict.

15 It is not surprising, in view of the different purpose and dynamic underlying the charge and the exhortation to a deadlocked jury, to find that courts which have considered the matter view an interjection of judicial opinion at the stage of the exhortation very seriously. The fact that no prior case like this one was referred to the Court suggests that trial judges rarely if ever offer their opinions on the evidence to the jury in the course of an exhortation. Those judicial comments which are to be found on the proper bounds of an exhortation focus on whether the trial judge, coerces or interferes with the jury's right to deliberate in complete freedom, rather than whether the trial judge has improperly influenced the jury's view on a substantive matter one way or the other. Typically, an accused's fair trial interest has been found to have been prejudiced when the judge's remarks indicated to the jurors that they 'should be' or 'ought to be' unanimous or that minority members should conform to the opinion of the majority. Implicitly, however, the caselaw underlines the great danger of comment to a jury on an exhortation as opposed to a charge.

16 In *R. v. Littlejohn and Tirabasso* (1978), 41 C.C.C. (2d) 161, at p. 168, Martin J.A., on behalf

of the Ontario Court of Appeal, stated:

It is well established that in exhorting a jury to endeavour to reach agreement, the trial Judge must avoid language which is coercive, and which constitutes an interference with the right of the jury to deliberate in complete freedom uninfluenced by extraneous pressures: see *R. v. McKenna* (1960), 44 Cr. App. R. 63. The trial Judge equally must avoid the use of language which is likely to convey to a juror that, despite his own doubts, genuinely entertained, he is, none the less, entitled to give way and agree with the majority of his colleagues in the interest of achieving unanimity: see *R. v. Davey* (1960), 45 Cr. App. R. 11.

In deciding whether the line has been crossed between what is permissible as mere exhortation, and what is forbidden as coercive, the entire sequence of events leading up to the direction which is assailed, must be considered.

17 In *R. v. Palmer*, supra, at p. 412, Bull J.A. speaking for the British Columbia Court of Appeal stated the following:

It is obvious, from their very nature and purpose, that all exhortations of unanimity to a jury are of a very delicate nature and the greatest care must be taken by a trial Judge to ensure that no such criticism, always lurking at the edge, can arise. It must be in very few cases that a trial Judge would intentionally try to influence a jury one way or the other, and there certainly could not be the slightest suggestion that in this case the learned trial Judge was doing anything else than endeavouring fairly and impartially to have the jury come to grips with the problems they had been sworn to decide. But, nevertheless, such exhortations, no matter how benevolent in tone and purpose, must be examined with the greatest of care to ensure that no prejudice to the accused has resulted therefrom. This may be particularly so where, as in this case, an exhortation to strive to reach a verdict given after many hours of apparent disagreement is followed very shortly by a guilty verdict.

18 The jury system places a heavy responsibility in the hands of jury members. Individuals are asked to make grave decisions bearing upon the rights and liberties of their peers. It is a burden which may prey heavily on the minds of some. While deadlock may reflect dispassionate disagreement among jury members, on occasion it may also arise from an inability or unwillingness by the jury or its specific members to accept that the future of a fellow citizen lies in their hands. The trial judge's exhortation reminds the jury that their oath requires them to discharge the onerous responsibility which has been placed on them on behalf of society. If the judge expresses an opinion at this point, it may give troubled jury members an easy means of escape from their responsibilities. They may fasten onto the opinion of the trial judge and thereby reach a verdict without truly having

deliberated and been convinced of the guilt of the accused. At this point, the trial judge must encourage such jurors to have faith in their own judgment.

19 I conclude that the dangers associated with a trial judge offering his or her opinion on issues of fact during an exhortation to a deadlocked jury are of such potential detriment to an accused's fair trial interest that judges as a general rule should refrain from offering such comments. An exception may arise in the case where the jury requests the judge's view or where it is apparent from the jury's questioning that the jury requires further clarification. Even then, the judge should be careful to offer the required opinion in a balanced and fair way which will not sway the process of decision-making in which the jury is involved to one side or the other.

(2) Application of the Rule to this Case

20 In exhorting the jury to reach a verdict, the trial judge offered his opinion that "if you accept the evidence of Sergeant Ross the Crown has a very powerful case." This constitutes a statement of opinion on the evidence, and a strong one.

21 It is argued that the statement is conditional ("if you accept the evidence ..."), and does not direct the jury to accept or reject the evidence. But this argument misses the point. The danger of the statement lies not in the effect it might have on the jury's acceptance or rejection of the evidence, but in the inference it invites the jury to draw from the evidence. The record discloses no serious issues of credibility; Sergeant Ross in cross-examination agreed with the accused's version of the statements he had made to the police. The problem lay, rather, in what inferences should be drawn from the statements. None of the statements alleged to have been made by the accused constituted a clear confession of guilt. For example, one could infer guilt from the statement about killing or being charged with killing a 71-year-old woman; or one could take it merely as an expression of concern over the charge. The choice of inference, not credibility, was the critical issue. In stating that if the jury accepted the evidence of the Sergeant, the Crown had a very powerful case, the trial judge was throwing his weight behind the inference of guilt. As Lambert J.A. put it, the trial judge was suggesting that unless the jury disbelieved Sergeant Ross, Sims was guilty.

22 It is argued that taken in its context, the appellant's statements to Sergeant Ross in Toronto clearly indicated guilt, so that the trial judge's comment was justified. For the reasons I have just given, I cannot agree.

23 It is argued that the trial judge's expression of opinion could not have created prejudice because of his repeated statements to the jury, including one connected to that very statement, that matters of evidence were entirely up to them. Such reminders do not negate the possibility that the communication of the judge's opinion might have lead the jury to decide a question of evidence one way as opposed to the other.

24 Finally, it is argued that the fact that the jury deliberated almost two hours after the

exhortation establishes that they were not influenced by the trial judge's comment. I concur with Lambert J.A.'s finding on this point (at p. 410):

My view is that the time lapse from when the trial judge made his observation that the Crown had a very powerful case until the delivery of the jury's verdict was just about the amount of time that would have been required for the members of the jury who were in favour of a guilty verdict to emphasize to the member or members of the jury who were in favour of a not guilty verdict that the trial judge had expressed his view and that view was that unless they were prepared to say that they disbelieved Sergeant Ross then Sims was guilty.

25 In short, I am satisfied that the statement of opinion on the inference to be drawn from Sergeant Ross's evidence may well have affected the course of deliberations, and hence the verdict, to the prejudice of the accused. This was all the more the case because the trial judge did not confine himself to neutral terms; the use of the phrase "very powerful case" had the potential of communicating to the jury that there was little doubt in the trial judge's mind what inference they should draw from the evidence. I agree with Lambert J.A. as to the appropriate standard in such a case and concur in his conclusion thereupon (at p. 410):

The question is whether there is a possibility that what the trial judge said could have persuaded a juror to go along with the majority notwithstanding that he or she had not been persuaded that guilt had been proven beyond a reasonable doubt.

I think that could have happened here.

Conclusion

26 I would allow the appeal and order a new trial.