2 May 2024 | **Rory Mulchrone** – Counsel, Astraea Group

HM Solicitor General v Trudi Ann Warner: Climate Justice or a Contemnor's Charter?

"JURORS YOU HAVE AN ABSOLUTE RIGHT TO ACQUIT A DEFENDANT ACCORDING TO YOUR CONSCIENCE"

So read a placard held up by climate activist Trudi Warner outside Inner London Crown Court on 27 March 2023, shortly before the trial for public nuisance of a number of defendants associated with the environmental campaigning group, Insulate Britain.

Her actions were in response to rulings by the trial judge, HHJ Silas Reid, prohibiting defendants from mentioning the words "*climate change*", the civil rights movement or the issue of fuel poverty to the jury, such matters being strictly irrelevant to the issues that jurors had to determine.

When Ms Warner's conduct was brought to his attention, on 29 March, HHJ Reid was sufficiently concerned to have the 68-year-old, retired social worker arrested and detained to the end of the day. He then ordered her to appear before a High Court judge at the Old Bailey for "*contempt in the face of the court*", namely, "*attempting to influence the jury*". HHJ Reid directed the jury to ignore Ms Warner's sign, which he described as "*wrong about what the law is*", as well as protests occurring outside court against his earlier rulings.

Referring the matter to the Attorney General a few days later, Mr Justice Cavanagh described the allegations against Ms Warner as "*very serious*" and said: "*It is not the case in any trial that jurors can acquit by their conscience if by that it is meant they can disregard evidence and directions given by the judge and decide on their own beliefs whether a defendant is guilty of a criminal offence. To do so would be a breach of their jury oath and cause injustices*".

Subsequently, the Solicitor General took up the case and sought permission from the High Court to bring proceedings for contempt. He brought a claim alleging that Ms Warner was in contempt at common law, through conduct which was a direct interference with the administration of justice, undertaken with an intention to interfere with the administration of justice.

In particular, it was alleged that Ms Warner had "*…deliberately targeted jurors with her sign, including in one case hurrying to catch up with a juror so as to draw attention to the sign and, in another case, walking alongside the juror while showing the sign*". In doing so, it was said, she had "*…interfered with the rights of the jurors to go to and from court and perform their duties without let or hindrance, and thereby interfered with the administration of justice itself*".

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Ms Warner was accused of harbouring a specific intention to influence jurors to acquit climate change activists, whether or not such acquittal would be in accordance with the trial judge's legal directions.

By the time the matter came to a hearing, on 18 April 2024, there was no real dispute between the parties as to what Ms Warner had done as a matter of fact – it was captured on CCTV shown to the judge, Mr Justice Saini. In particular, there was no suggestion pursued on behalf of the Solicitor General that Ms Warner had compelled or pressured anyone to look at her sign. Nor was it argued that the fairness of the trial had been affected in any way by her actions.

There was nonetheless a profound dispute between the parties as to how Ms Warner's conduct should be characterised and whether it disclosed a reasonable basis for committal.

In a judgment handed down on 22 April, having summarised the relevant facts (which were broadly agreed), Mr Justice Saini went on to consider "*the tension between what is sometimes called "jury equity" (the power of the jury to give a verdict according to conscience), and the obligation of a jury to follow a judge's directions on the law and abide by the juror's oath/ affirmation, which is to "faithfully try the defendant and deliver a true verdict according to the evidence" ".*

The Solicitor General had accepted in submissions that juries have a "*de facto power*" to acquit a defendant regardless of judicial directions but there was some debate between the parties as to whether they enjoy any "*right*" to do so. Saini J considered this distinction "*not ultimately helpful*" and that it was "*probably best to describe jury equity as a principle of our law.*" It is, he said, "*an established feature of our constitutional landscape*"; one which is "*also recognised across the common law world*".

The origins of jury equity lie in *Bushel's Case* (1670) 124 ER 1006, which arose out of the prosecution of two Quaker preachers for holding an unlawful assembly. The Recorder of London, presiding at the trial, directed the jury to convict. The jury refused. They were fined and imprisoned until payment. It was this imprisonment that the jurors successfully challenged by writ of habeas corpus, on the basis that juries have a right to find facts and apply the law to those facts according to conscience and without reprisal.

Counsel for Ms Warner noted that *Bushel's Case* and the principle it established are commemorated in a plaque displayed at the Central Criminal Court, the Old Bailey, which is visible to any serving juror or court user passing through the Grand Hall.

It was not in dispute before Mr Justice Saini that the principle remained undisturbed and had been endorsed at the highest level in this jurisdiction:

> *"As Lord Thomas held in R v Goncalves [2011] EWCA Crim 1703; [2013] 2 Cr App R 14 at [38] "a jury is entitled to acquit and its reasons for so doing are unknown. It is their right which cannot be questioned." It is a corollary of the principle endorsed by the House of Lords in R v Wang [2005] 2 Cr App R 8 that a judge cannot direct a jury to convict a defendant. Lord Bingham, delivering the unanimous opinion of the Committee, confirmed the constitutional role of the jury as the sole arbiter of guilt, and answered the certified question by saying that there are "no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty"… "…the public… over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges. That the last word should rest with the jury remains… 'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement… The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average Member of Parliament or of the average juryman'".*

However, while the principle might be well established, counsel for Ms Warner and for the Solicitor General both agreed that participants in the trial process cannot lawfully invite a jury to apply the principle of jury equity or even inform them of it. That prohibition was "*how the common law squares the jury equity and the oath that jurors are required to swear*". On one view at least, Ms Warner's conduct on 27 March 2023 was therefore unlawful – but did it disclose a reasonable basis for committal?

Having set out the competing arguments on both sides, Mr Justice Saini answered that question firmly in the negative. There were five reasons why Ms Warner's conduct did not amount to an actionable contempt.

Firstly, "*the species of contempt based on the principle that jurors should be free to attend court without being "molested or assaulted or threatened with molestation" and without "let or hindrance"*" had "*no application here*". At no point had Ms Warner assaulted, threatened, blocked accosted or hindered anyone's access to the Court. This was far from a case of confronting defendants as they arrived at court and questioning them in an intimidating manner in "*aggressive and provocative terms*", as in Yaxley-Lennon [2019] EWHC 1791 (the Tommy Robinson case).

Indeed, it was "*fanciful to suggest that Ms Warner's behaviour falls into this category of contempt*", which was "*limited to threatening, intimidatory, abusive conduct or other forms of harassment (whether physical or verbal).*" Moreover, the judge rejected the Solicitor General's arguments that Ms Warner had "*confronted*" or "*followed*" jurors as being a significant mischaracterisation of the evidence. The CCTV did not disclose a reasonable basis on which a court could be sure of those matters, on the contrary.

Secondly, Ms Warner's placard did not present, as the Solicitor General had it, an "*instruction or encouragement*", or constitute a "*plain invitation*" to passers-by to discharge their duties in a particular way. The impugned text was essentially informative and Ms Warner's behaviour was consistent with information sharing. She had done strikingly little to engage with people, to get their attention or persuade them of anything. She was, in essence, "*a human billboard*".

Thirdly, "*Ms Warner's conduct did not even arguably amount to the old common law offence of embracery, as was submitted for the Claimant.*" The rare authorities concerning this ancient offence did not concern conduct bearing any resemblance to Ms Warner's. In any case, the offence had been abolished by the Bribery Act 2010.

Fourthly, "*as to the substance of the Placard, Ms Warner accurately informed potential prospective jurors about one of their legal powers. She did not comment on the merits of the case or make an imputation of the defendants' innocence.*" The proper forum for the Solicitor General to address any concerns about the tension between the principle of jury equity and the obligation to follow judicial directions was Parliament, not contempt proceedings. It was "*not unlawful to accurately communicate the bare principle of law to potential jurors in a public forum*". As to whether jurors had a right or a power to acquit, in the context of Ms Warner's placard, that was a distinction without a difference.

Fifthly and finally, "*on the basis that the legal test for the common law species of contempt relied upon in this case is a serious risk of/ actual interference with the administration of justice, the Claimant does not come even arguably close to meeting this test.*" The highest that the Solicitor General could put his case was that, as a result of Ms Warner's acts, HHJ Reid had delivered a short, tailored judicial direction the day after the events. While that was a complication that the judge could have done without in a challenging series of cases, it was standard practice as matters arise during the course of a criminal trial. Any risk arising out of jurors being made aware of the legal principle of jury equity on the first day of trial would have been adequately addressed by the direction given and could not, on any proper analysis, be considered serious.

Overall, the claim was based "*on a mischaracterisation of what Ms Warner did that morning and a failure to recognise that what her Placard said outside the Court reflects essentially what is regularly read on the Old Bailey plaque by jurors, and what our highest courts recognise as part of our constitutional landscape*".

Given his conclusions on reasonable basis for committal, Mr Justice Saini did not strictly need to address the issue of public interest. He nonetheless did so briefly, "*given the nature of the arguments made*" (and no doubt with an eye on the possibility of an appeal by the Solicitor General).

Counsel were agreed that the Court has an obligation at each stage of a speech-based contempt case to address a defendant's Article 10 ECHR rights. The issue here was whether, assuming there had been a reasonable basis for the charge, it had been shown that requiring Ms Warner to face substantive criminal proceedings was a proportionate response in ECHR terms to her conduct, as part of the public interest test. That was a matter for the judge's assessment. He had to be satisfied that the issuing and pursuit of contempt proceedings – an interference with Ms Warner's right to freedom of speech – corresponded to a pressing social need and was proportionate to the pursuit of a legitimate aim.

Mr Justice Saini was not so satisfied. The speech and conduct at issue were "*a form of expression in a highly charged and current debate*". The prosecution of the Insulate Britain cases, the decisions of law reached by judges in those cases, and the scope for the jury to hear evidence on matters of conscience in relation to offences allegedly committed as acts of political protest had become "*matters of serious public debate*". He concluded:

> *"Contempt proceedings pursue the legitimate aim of maintaining the integrity of the trial process (including protecting jurors) and the authority and impartiality of the judiciary within Article 10(2) ECHR. However, in my judgment, it has not been shown by the Solicitor General, even on an arguable basis, that the interference with Ms Warner's Article 10(1) ECHR rights is necessary for, and proportionate to, achievement of those aims. The words on Ms Warner's Placard reflected in substance what is recognised as a principle of our constitution. However, even if her words had been wrong in law and her conduct inappropriate, the succinct Direction given by the judge was sufficient to deal with any prejudice to the trial. A criminal prosecution is a disproportionate approach to this situation in a democratic society."*

The judgment has sparked a heated debate across the political spectrum. Some commentators have hailed it as "*a huge win for democracy*". Others have suggested that the judgment should be appealed, failing which, there would be little to stop a fascist sympathiser (or multiple fascist sympathisers) from holding up the same or similar signage outside the trial of a far-right terrorist.

Even allowing for the fact that Ms Warner appears to have been a relatively sympathetic defendant, with what many would regard as an attractive cause, it is not entirely easy to see how the judge accepted submissions from both parties that it would be unlawful for trial participants to inform jurors of the principle of jury equity, yet went on to hold that she had done nothing unlawful by doing so. It is also difficult to imagine what other motive Ms Warner might have had for acting as she did, if not to encourage jurors to acquit climate change activists, regardless of judicial directions and the evidence heard in court. Ms Warner herself has publicly stated that she "*wanted to challenge*" the directions given by the trial judge as to what defences were and were not available to the Insulate Britain defendants, describing these restrictions as "*an abuse of power, a miscarriage of justice*" and "*a scam*".

On the face of it, such remarks are not easy to square with a finding that the Solicitor General's allegation that Ms Warner intended to interfere with the administration of justice was not even arguable.

That said, it does appear that the Solicitor General seriously overcooked his case against Ms Warner, to the extent of "*significantly*" mischaracterising the evidence against her. Such findings of fact will be difficult to overturn on appeal.

As noted in the judgment, in 2001, Sir Robin Auld recommended that the law should be changed so that it would be "*declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly*". Parliament did not enact this recommendation then and it appears unlikely that it will do so before the next election. However, as disruptive climate change protests by the likes of Insulate Britain and Extinction Rebellion become an increasingly divisive social issue, it may well be that the next government will look again at whether jury equity is a "*valuable constitutional safeguard*" or an "embarrassing anomaly", ripe for abolition.

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