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on the Range Rover being worth £51,550, and (ii) the rentals which would be payable, based on the actual value of the vehicle with its defects. This would apply up until the Range Rover was repaired for free.

The above criticisms apart, which concern the case's presentation, and which may have been influenced by commercial or tactical reasons, the case makes an important contribution to both hire and sale law, particularly for consumers.

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The Return of the Unreasonable Jury: *Rooney v HM Advocate*

The theoretical possibility that a criminal conviction can be quashed on the basis that the jury reached a verdict no reasonable jury properly directed could have reached has existed ever since the appeal court was established in 1926. Until *E v HM Advocate*,¹ however, an appeal had never been granted on this basis except on the extremely rare occasion that the jury's verdict was inherently illogical. For a while it seemed as if such a case was unlikely to recur, but in *Rooney v HM Advocate*² another unreasonable jury verdict was overturned by the appeal court. *Rooney*, however, is of an entirely different nature to *E* and cannot be taken as a sign that the appeal court is becoming more willing to re-visit the jury's assessment of the evidence.

A. THE LEGISLATIVE BACKGROUND

Under section 2(1) of the Criminal Appeal (Scotland) Act 1926, the newly established appeal court could allow an appeal "if they [thought] that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence".³ While this might seem to permit the court significant leeway in overturning jury verdicts, in practice its interpretation was extremely strict. In *Webb v HM Advocate*,⁴ it was held that an appeal should only be allowed if the verdict was "so flagrantly wrong that no reasonable jury discharging their duty honestly under proper direction would have given it".⁵ As such the only successful "unreasonable jury" appeals were a tiny minority of cases where the jury returned a verdict that was inherently illogical or that was self-contradictory.⁶ Where the "unreasonableness"

1 2002 JC 215.

2 2007 SCCR 49.

3 For a history of this ground of appeal, see P W Ferguson, "Unreasonable jury verdicts" 1999 SLT (News) 125.

4 1927 JC 92.

5 At 95 per Lord Justice Clerk Alness.

6 There are very few examples even of this, but see *Young v HM Advocate* 1932 JC 63; *Hamilton v HM Advocate* 1938 JC 134.

related to the jury's assessment of witnesses, the appeal court declined to interfere.⁷

The unreasonable jury ground of appeal, which by this time was contained in the Criminal Procedure (Scotland) Act 1975, temporarily disappeared from statute when the 1975 Act was amended by the Criminal Justice (Scotland) Act 1980. The 1980 Act introduced a single ground of appeal – that there had been a “miscarriage of justice” – although it was always envisaged that an unreasonable jury verdict could constitute a miscarriage of justice.⁸ The dearth of successful appeals continued, however, and this led the Sutherland Committee to recommend that the appeal court's power to quash a conviction where the jury had returned an unreasonable verdict be re-introduced into legislation in an attempt to encourage its use.⁹ This recommendation was implemented by the Crime and Punishment (Scotland) Act 1997, which amended the relevant legislation accordingly.

The current law is contained in section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 (as amended). A single ground of criminal appeal exists – that there has been a “miscarriage of justice” – and this may include a miscarriage of justice based on “the jury's having returned a verdict which no reasonable jury, properly directed, could have returned”.

At this point it is worth briefly considering why the appeal court has been so reluctant to interfere with jury verdicts. A number of reasons have been suggested. First, the court has stressed that, unlike the jury, it does not have the advantage of seeing the witnesses and so is not well placed to re-assess issues of credibility and reliability.¹⁰ Second, the jury are the people's representatives and if the appeal court was to overrule jury verdicts in anything other than the most exceptional of circumstances this could be seen as improper interference in the criminal justice process.¹¹ Third, there is the need for finality. If the appeal court interferes with jury verdicts too readily this may open the floodgates to more appeals than the court has the resources to deal with.¹² Fourth, the court may be reluctant to interfere with jury verdicts because to do so would call into question a trial process that operates on the assumption that such verdicts are reliable. If too many appeals of this nature are granted, this might start to raise doubts about the legitimacy of jury trials and undermine the stability of the present system.¹³

B. THE PREVIOUS DECISIONS

The first unreasonable jury appeal to reach the court following the 1997 amendment was *King v HM Advocate*¹⁴ and it was refused. In *King*, the appellant was convicted by

7 M Scott, “New criminal appeal provisions: back to the future” 1997 SLT (News) 249.

8 R W Renton and H H Brown, *Criminal Procedure according to the Law of Scotland*, 6th edn, by G H Gordon with C H W Gane (1996) para 29-18.

9 *Report on Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245: 1996) para 2.71.

10 *Rubin v HM Advocate* 1984 SLT 369 at 371 per Lord Justice-General Emslie; *King v HM Advocate* 1999 JC 226 at 236 per Lord Justice-General Rodger.

11 L H Leigh, “Lurking doubt and the safety of convictions” [2006] Crim LR 809 at 810.

12 *Webb v HM Advocate* 1927 JC 92 at 99 per Lord Anderson; *Macmillan v HM Advocate* 1927 JC 62 at 62 per Lord Justice-General Clyde.

13 R Nobles and D Schiff, “The never ending story: disguising tragic choices in criminal justice” (1997) 60 MLR 293.

14 1999 JC 226.

a majority verdict of the murder of Gilbert O'Donnell, who lived in the same block of flats. There was convincing evidence – the appellant's admission and the accounts of other residents – that he had visited Mr O'Donnell's flat and had a violent fight with him in the early hours of Saturday morning. There was, however, also evidence from four witnesses, none of whom knew each other, who all claimed to have seen Mr O'Donnell – alive and well – later on Saturday morning and on Sunday morning. Mr O'Donnell's body was discovered on Sunday afternoon. The principal pathology witness testified that he died from severe abdominal injuries, which would have prevented him from walking. Thus if the evidence of these four witnesses was accepted, Mr O'Donnell must have survived the appellant's attack and been killed by someone else. The appeal court declined to quash the conviction, stating that:¹⁵

... it is not for us simply to substitute our view of [the] evidence for the view which the jury took. In particular, a miscarriage of justice is not identified simply because, in any given case, the members of [the appeal court] might have entertained a reasonable doubt on the evidence.

In *E v HM Advocate*,¹⁶ the appellant had been convicted of the rape of his two young children. The main source of evidence against him was the children's accounts, and the Crown relied on the *Moorov* doctrine for corroboration. However, the account of the younger child in particular was contradictory and inconsistent and there was no physical evidence of penetration. There was also some suggestion that the appellant's wife – they were separated – might have encouraged the children to make up their stories, although this was not fully explored at trial. On a majority of 2 to 1, the appeal was granted. Lord Justice Clerk Gill reviewed the history of section 106(3)(b) and concluded that:¹⁷

While this is not a court of review and while we are not at liberty under this provision to disturb a jury verdict merely because we disagree with it, we cannot now regard the issue of reasonable doubt as being at all times within the exclusive preserve of the jury.

Commenting on the argument that the jury are better placed to determine questions of witness reliability and credibility, the Lord Justice Clerk went on to state that, while this was a concern to keep in mind:¹⁸

We have many years of experience of criminal jury trials as advocates deputes, as defence counsel and as presiding judges. In deciding whether the verdict is reasonable, we should bring all of that experience to bear. We should do that with confidence rather than interpret section 106(3)(b) out of existence by excessive deference to the judgment of the jury.

On this basis, it was suggested in *Renton and Brown* that “the Court may, for the future, be less inclined to accept the infallibility of the jury's assessment of the evidence”.¹⁹ But a more sceptical take on *E* might be that it was a case where the

15 At 230.

16 2002 JC 215.

17 Para 29.

18 Para 35.

19 *Renton & Brown*, *Criminal Procedure* (n 8) para 29-20.3.

appeal court could be seen to be using the unreasonable jury ground – thus deflecting criticism that the test was too difficult to satisfy – when it was entirely safe for them to do so because the appeal would have succeeded anyway. The unreasonable jury verdict was not the only ground of appeal – the appellant also argued defective representation – and, in a unanimous decision, his appeal succeeded on this basis as well. Following *E*, it certainly seemed as if normal service had resumed as several cases came and went in which unreasonable jury appeals were unsuccessful.²⁰ But then came *Rooney v HM Advocate*,²¹ where the unreasonable jury ground of appeal has succeeded again – this time in a case where there was no other basis upon which the appeal could have succeeded.

C. THE DECISION IN ROONEY

The facts of *Rooney* are somewhat complex. The charges stemmed from a fight between members of the Niven and Higgins families. There was a history of bad feeling between the families and it was alleged that, on the day in question, the Nivens went to the Higgins' home carrying baseball bats and knives with the intention of attacking James and Scott Higgins. A fight developed, with the result that James Higgins was killed and Scott Higgins (his son) seriously injured. The appellant – Thomas Rooney, who was part of the Niven family – was charged alongside four co-accused with (1) breach of the peace (2) the attempted murder of Scott Higgins, and (3) the murder of James Higgins. He was found guilty of charge (1), was convicted of culpable homicide in relation to charge (3), but was acquitted on charge (2).

There was direct evidence that Thomas Rooney had attacked Scott Higgins – Rooney admitted as much to a colleague and Scott Higgins gave evidence to this effect – but there was no direct evidence that he had attacked James Higgins. The essence of the Crown case against Rooney on charge (3) was that he had acted in concert with other members of the Niven family and that in the course of the fight he had materially assisted the criminal attack on James Higgins by fighting Scott Higgins who otherwise would have gone to his father's aid.

Rooney appealed against the culpable homicide conviction on the basis that no reasonable jury, properly directed, could have returned the verdict. He argued that the foundation of charge (3) was his involvement in the attack on Scott Higgins, and that, the jury having acquitted him of that charge, the conviction in relation to charge (3) was perverse. The appeal court agreed. The opinion of the court was delivered by Lord Osborne, who acknowledged that the case was presented on the basis that Rooney fought with Scott Higgins and thus prevented Scott from aiding his father. But if this was the basis upon which the jury reached its verdict, then logically the appellant should have been convicted on charge (2) as well. Lord Osborne continued:²²

In these circumstances we are driven to conclude that the verdict of the jury on charges (2) and (3) in relation to the appellant lacks rationality. Standing his acquittal on charge (2), we

20 See e.g. *Nolan v HM Advocate* 2005 SLT 474; *Smith v HM Advocate* 2005 JC 242.

21 2007 SCCR 49.

22 At para 24.

consider that the verdict against the appellant on charge (3) in particular, must be regarded as one which no reasonable jury, properly directed, could have returned.

D. CONCLUSION

It is unlikely that *Rooney* marks the start of a new dawn for unreasonable jury appeals. *Rooney* is quite different in nature from *King* and *E*. In *King*, the fact that there were four witnesses who spoke to having seen the deceased alive and well after the appellant's attack might be thought to cast at least some doubt upon the appellant's guilt. But the jury's verdict in *King* was not inherently *illogical*. The jury simply preferred one version of events over another, presumably having made a decision about the reliability of those four witnesses.

E bears slightly more similarity to *Rooney* in that the jury's decision to convict seems perverse when the crucial evidence of one of the witnesses – the youngest child – was so obviously unreliable. But it was not *illogical* for the jury to have convicted. *E* is far more of a landmark case than *Rooney*, in that the court substituted its own opinion about the evidence for that of the jury.

Rooney did not involve any assessment of witness reliability. The appeal succeeded because the jury's verdict was inherently illogical and thus *Rooney* has far more in common with cases such as *Young v HM Advocate*²³ and *Hamilton v HM Advocate*²⁴ (where the verdict was similarly illogical) and perhaps also with *White v HM Advocate*²⁵ and *Ainsworth v HM Advocate*²⁶ (where juries returned verdicts that the trial judge had directed them they were not entitled to return). *Rooney* certainly cannot be taken as a sign that the appeal court is becoming increasingly willing to substitute its own assessment of the evidence for that of the jury. *E* is still the only case in which this has happened – and here the appeal would have succeeded anyway on an alternative ground. Thus in Scotland there is yet to be a case in which an appeal has succeeded on the sole basis that the appeal court considered the jury's assessment of the evidence to be an unreasonable one.

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²³ 1932 JC 63.

²⁴ 1938 JC 134.

²⁵ 1990 JC 33.

²⁶ 1997 SLT 56.