# R v Kemble

COURT OF APPEAL, CRIMINAL DIVISION
LORD LANE CJ, OWEN AND AULD JJ
8 JUNE 1990

*Evidence – Oath – Person who is neither Christian nor Jewish – Oath required to be administered 'in a lawful manner' – Oath must appear to be binding on person's conscience and he himself must consider it to be binding on his conscience – Oaths Act 1978, s 1(3).*

Whether an oath is administered 'in a lawful manner' within s 1(3)[a] of the Oaths Act 1978 to a person at a trial who is neither a Christian nor a Jew does not depend on the intricacies of the particular religion adhered to by that person but on whether the oath appears to the court to be binding on his conscience and whether it is an oath which that person himself considers to be binding on his conscience (see p 117 *j*, post).

*R v Chapman* [1980] Crim LR 42 applied.

**Notes**

For evidence on oath, see 17 Halsbury's Laws (4th edn) para 264, and for cases on the subject, see 22(2) Digest (2nd reissue) 224–226, 8390–8430.

For the Oaths Act 1978, s 1, see 17 Halsbury's Statutes (4th edn) 200.

**Case referred to in judgment**

*R v Chapman* [1980] Crim LR 42, CA.

**Application for leave to appeal against conviction**

Peter Kemble applied for leave to appeal against his conviction on 19 January 1989 in the Central Criminal Court before his Honour Judge Machin QC and a jury of having a firearm with intent to commit an indictable offence, namely blackmail, for which he was sentenced to two and a half years' imprisonment. On 16 January 1989 he had pleaded guilty to two offences of possessing a firearm without a certificate, for which he was sentenced to 12 months' imprisonment to run concurrently with the sentence for the offence of which he was convicted. The ground of the application was that the main prosecution witness, Tareq Hijab, who was a Muslim, took the oath using the New Testament before he gave evidence. The facts are set out in the judgment of the court.

*Robert J Banks* for the applicant
*Samuel Wiggs* for the Crown.

**LORD LANE CJ** delivered the following judgment of the court. On 16 January 1989 in the Central Criminal Court before his Honour Judge Machin QC the applicant pleaded guilty to two counts of possessing a firearm without a firearms certificate (counts three and four). On 19 January before the same court he was convicted by verdict of a jury of having a firearm with intent to commit an indictable offence (count two), the indictable offence being blackmail. He was sentenced to 12 months' imprisonment to run concurrently on counts three and four to which he had pleaded guilty, and he was sentenced to two and a half years' imprisonment on count two, the count to which he had pleaded not guilty but of which he was found guilty, namely having a firearm with intent to commit an indictable offence. All those sentences were to run concurrently.

This application for leave to appeal against conviction has been referred to the full court by the registrar, and the sole ground of the application is that the main, if not the only relevant, prosecution witness, namely a man called Tareq Hijab, who is a Muslim by religious conviction, took the oath using the New Testament before he gave evidence. Those are the basic facts of the case.

Counsel who has argued the case on behalf of the applicant argues that s 1 of the Oaths Act 1978 has not been complied with, that the chief witness for the prosecution was not properly sworn, that therefore there was a material irregularity and that the conviction accordingly was in any event unsafe and unsatisfactory.

The relevant section, s 1 of the 1978 Act, provides:

> '(1) Any oath may be administered and taken in England, Wales or Northern Ireland in the following form and the manner—The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almight God that . . .", followed by the words of the oath prescribed by law.
>
> (2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question.
>
> (3) In the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any lawful manner . . .'

The argument of counsel for the applicant goes as follows. The witness, he says rightly, is a Muslim by faith. Secondly he says, according to the strict tenets of the Muslim faith (which we have had explained to us carefully and in detail by an expert in the matter in the shape of Professor Yagub-Zaki, evidence which we of course accept unreservedly), no oath taken by a Muslim is valid unless it is taken on the Koran, and moreover taken on a copy of the Koran in Arabic. A translation into English or into any other language will invalidate, so to speak, the book so far as the oath is concerned under these strict religious tenets.

There are also many sub-rules which govern the taking of oaths by persons of the Muslim faith, according to the professor. For instance, a woman who is menstruating, and therefore considered to be unclean, cannot take a valid oath on the Koran.

What we have to consider however is something else. Whilst respecting, as of course we do, the religious tenets of other faiths, be it Muslim or Jewish or anything else, it is the 1978 Act which must govern our decision.

Assuming that one cannot simply stop after sub-s (2) of s 1, which appears to be the case, we have to ask ourselves this: in the case of a person who is neither a Christian nor a Jew, that is to say this particular witness, 'the oath shall be administered in any lawful manner'. Accordingly, was the oath in the present case administered in a lawful manner?

We had our attention drawn by counsel for the applicant, helpfully if we may say so, to the decision in *R v Chapman* [1980] Crim LR 42. The only passage I need read is a short passage in the part of the report which deals with the decision of the court. The court consisted of Roskill, Ormrod LJJ and Bristow J. The passage runs as follows:

> 'The efficacy of an oath must depend on it being taken in a way binding, and intended to be binding, upon the conscience of the intended witness.'

The case was on cognate facts, although the facts were not by any means precisely the same.

We take the view that the question of whether the administration of an oath is lawful does not depend on what may be the considerable intricacies of the particular religion which is adhered to by the witness. It concerns two matters and two matters only in our judgment. First of all, is the oath an oath which appears to the court to be binding on the conscience of the witness? And if so, secondly, and most importantly, is it an oath which the witness himself considers to be binding on his conscience.

So far as the present case is concerned, quite plainly the first of those matters is satisfied.

a Section 1, so far as material, is set out at p 117 *b* to *d*, post

The court did obviously consider the oath to be one which was binding on the witness. It was the second matter which was the subject so to speak of dispute before this court. Not only did we have the evidence of the professor, the expert in the Muslim theology, but we also had the evidence of the witness himself. He having on this occasion been sworn on a copy of the Koran in Arabic gave evidence before us that he did consider himself to be bound as to his conscience by the way in which he took the oath at the trial. Indeed he went further. He said,

> 'Whether I had taken the oath on the Koran or on the Bible or on the Torah, I would have considered that to be binding on my conscience.'

He was cross-examined by counsel for the applicant in an endeavour to show that that was not the truth, but we have no doubt, having heard him give his evidence and seen him give his evidence, that that was the truth, and that he did consider all of those to be holy books, and that he did consider that his conscience was bound by the form of oath he took and the way in which he took it. In other words we accept his evidence.

Consequently, applying what we believe to be the principles which we have endeavoured to set out to those facts, we conclude that the witness was properly sworn. We conclude accordingly that there was no irregularity, material or otherwise. There was nothing unsafe or unsatisfactory about the conviction. Accordingly this application is refused.

*Application refused.*

Solicitors: *Saunders & Co* (for the applicant); *Crown Prosecution Service.*

N P Metcalfe Esq Barrister.

# Douihech v Findlay and another

QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE DOBRY QC SITTING AS A JUDGE OF THE HIGH COURT
23 MAY, 13 JUNE 1989

*Practice – Parties – Joinder of parties – Inspection of property – Joinder of defendant to enable property to be inspected – No rights to be adjusted between person joined and any other party to action – Whether jurisdiction to join person as party to action solely for purpose of obtaining order for inspection of his property – RSC Ord 29, r 2.*

The plaintiff bought what was reputed to be a sixteenth century Italian cello for £50 from the first defendant, who was an antique dealer. The cello had been stolen from the second defendant and was returned to her when the theft was discovered. The plaintiff issued a writ against the first defendant claiming damages for breach of an implied condition that the first defendant had title to the cello. The first defendant admitted liability but disputed the amount of damages payable. The plaintiff contended that the correct measure of damages was the difference between the purchase price of £50 and the market price and sought to join the second defendant as a party to the action so that he could obtain an order under RSC Ord 29, r 2[a] for the cello to be inspected and valued by experts to ascertain the market price. The master made an order joining the second defendant as a party. The second defendant appealed against the order.

**Held** – A person whose property was the subject matter of an action but who was not in dispute with any of the parties to the action could not be joined as a party to the action solely for the purpose of obtaining an order under RSC Ord 29, r 2 for the inspection of his property, since in such a case there were no rights to be adjusted between him and any of the parties to the action. Since the only reason for the second defendant being joined as a party to the action was to enable the cello to be inspected the court had no jurisdiction to make an order joining her. The appeal would therefore be allowed (see p 122 *c d* and p 123 *b c g*, post).

*Shaw v Smith* (1886) 18 QBD 193 followed.

*Coomes & Son v Hayward* [1913] 1 KB 150 and *Penfold v Pearlberg* [1955] 3 All ER 120 not followed.

a Rule 2, so far as material, is set out at p 120 *d e f*, post



**Notes**

For joinder of parties, see 37 Halsbury's Laws (4th edn) para 218, and for cases on the subject, see 37(2) Digest (Reissue) 343–351, *2139–2189*.

**Cases referred to in judgment**

*Coomes & Son v Hayward* [1913] 1 KB 150, DC.
*Harrington v North London Polytechnic* [1984] 3 All ER 666, [1984] 1 WLR 1293, CA.
*Hetherington (decd), Re, Gibbs v McDonnell* [1989] 2 All ER 129, [1990] Ch 1, [1989] 2 WLR 1094.
*Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.
*Penfold v Pearlberg* [1955] 3 All ER 120, [1955] 1 WLR 1068.
*Shaw v Smith* (1886) 18 QBD 193, CA.

**Appeal**

The second defendant, Vivian Mackie, the owner of a cello which was the subject of an action brought by the plaintiff, Kamel Douihech, against the first defendant, Dennis Findlay, claiming damages for breach of an implied condition as to title in the contract of sale of the cello and who had been joined as a defendant in the action, appealed against the order of Master Creightmore made on 10 May 1989 ordering the inspection of the cello, and also applied to strike out paras 6 and 7 of the statement of claim in which the plaintiff claimed to be entitled to inspect and photograph the cello for the purpose of compiling an expert's report so as to give full particulars of loss and damage suffered as the result of the first defendant's breach of contract. The appeal was heard in chambers but judgment was given by his Honour Judge Dobry QC in open court. The facts are set out in the judgment.

*Stephen de B Bate* for the plaintiff.
Mr Simon Davies, solicitor, for the second defendant.
The first defendant did not appear.

*Cur adv vult*

13 June. The following judgment was delivered.

**HIS HONOUR JUDGE DOBRY QC.** The issue in this appeal is whether a person can be joined as a defendant solely to obtain an order for inspection and photography of a cello under RSC Ord 29, r 2(1).

The claim is for damages for breach of contract against Mr Dennis Findlay, the first defendant. He is an antique dealer and sold the cello to the plaintiff in March 1983 for £50. It then transpired that the cello had been stolen from a Mrs Vivian Mackie, who is now the second defendant. The cello was returned to her on 16 March 1983 a few days after the theft. It is reputed to have been made by Gasparo Da Salo, a sixteenth century Italian instrument maker. It is worth a great deal of money, considerably more than