[2010] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 43/2009

BEFORE: THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MRS JUSTICE McINTOSH JA (Ag)

MACHEL GOULDBOURNE v R

Robert Fletcher and Miss Tamika Harris for the applicant

Miss Natalie Ebanks for the Crown

21 June and 22 July 2010

MORRISON JA:

[1] This is an application for leave to appeal against conviction and sentence for the offence of murder in the Home Circuit Court, after a trial before Beckford J and a jury, on 2 April 2009. The applicant was sentenced to imprisonment for life and the court specified that the applicant should serve a period of 35 years before becoming eligible for parole. The application was considered and refused by a single judge of this court on 25 September 2009 and it has accordingly been renewed by the applicant before the court itself.

[2] The applicant was indicted for the murder of Glenda Simpson, who was killed at her home at 11 July Road, August Town in the parish of St Andrew on 13 November 2005. The case for the prosecution was based primarily on the evidence of the deceased's sister, Miss Sunji Marrett, who shared house with the deceased, another sister and her niece at 11 July Road. One side of the house faces the August Town Police Station and the August Town Primary School, which is also on July Road, is in close proximity to the premises.

[3] At some time after 6:00 p.m. on the day of the murder, a Sunday, Miss Marrett was in her bedroom at home with her two sisters and a niece when she saw the deceased walk through the room on her way to the kitchen, using a connecting door between the room and the kitchen. She overheard the deceased speaking to their Auntie Jennifer, who was outside in the yard, and then she heard the deceased ask, "Who dat under mi window?" Miss Marrett then went to the window in her room, which was a single window with wooden louvres, from which she had a view of the outside door to the kitchen and through which she saw two men standing outside, close to the kitchen door. She was able to see the men from the light in the kitchen, which projected outwards about 10 to 12 feet through the open kitchen door, as well as by the floodlights at the gate to the police station and also at the gate of the school, which

projected in the direction of her house. She recognised these men as persons known to her before as Kifari and Richie.

[4] Miss Marrett then saw the deceased trying to close the kitchen door, which was open to the yard, by pulling it in from the top of the door, but Kifari grabbed the door and swung it open and away from her. She realised at this point that he was armed with a gun, which he then pointed at the deceased and started firing at her, causing her to fall backwards. Immediately after this, Miss Marrett heard Kifari say, "Long time yuh fi dead gal". Both men then moved away in the direction of the nearby school. At this point, Miss Marrett, who had been observing all that had happened from her position at the window in her bedroom, moved towards the connecting door separating her room from the kitchen. Richie turned back in the direction of the house and fired some more shots, shattering a glass window, before continuing in the direction of the school, accompanied by Kifari. Miss Marrett then saw the deceased bleeding from her upper body and heard her say that Kifari and Richie had shot her. The deceased was also crying out for help, saying, "Cody, Jackson, Glenda…Jacko, come help mi, a Glenda". The reference to Jacko, Miss Marrett told the court, was to a police officer by the name of Jackson who was stationed at the August Town Police Station. In due course, the police arrived at the premises and the

deceased was taken to the University Hospital of the West Indies, where she succumbed to the multiple gunshot wounds which she had received.

[5] Miss Marrett had known the man she referred to as Kifari for two years before this incident. She also knew him as Machel Gouldbourne and in court she identified the applicant as that person. When asked where she knew him from, she said that he would pass her house from time to time ("maybe every other day") and she and he "would talk sometimes". They had also exchanged telephone numbers and would talk over the telephone as well, sometimes three times per week, as a result of which she knew his voice (which had "a rough, roughish tone"). In fact, Miss Marrett told the court, the applicant had been trying to have her become his girlfriend. Although they continued to speak to each other in this vein, her evidence was that "I never say yes or no". She had last seen him about a week before the incident. Asked by Crown counsel in examination in chief whether there was a reason for her not having said yes or no to the applicant's romantic entreaties, her reply was "I didn't want to tell him no, I was threatened by him", drawing an immediate protest from the applicant's counsel that no such evidence had been foreshadowed in Miss Marrett's police statements and that its "prejudicial value…far outweighs the probative value…and my friend is well aware of that". Despite counsel's intervention, with which the learned judge appeared to be somewhat sympathetic, the moment passed without a

ruling and the examination in chief continued. However, when the applicant's counsel returned to the point in cross examination, Miss Marrett clarified her earlier answer by saying that what she had really meant to convey was not that the applicant had threatened her, but that she "was scared of him".

[6] Miss Marrett's evidence was that when she first saw the applicant outside the kitchen door he was ahead of Richie, facing her, and he was dressed in a black shirt and black pants and his hair was low cut at that time. When she saw him pointing his gun at the deceased, there was nothing obstructing her view of his left side and she was able to see him from her position at her bedroom window, which was higher than where the applicant was at the time. Her estimate was that she had the men in view for "around three minutes" and that the applicant had been facing her for "probably half of that".

[7] Miss Marrett was also asked in examination in chief whether she knew if the deceased "would visit the August Town Police Station", to which her answer was that she did in fact do so "very often". When pressed to say how often that was, her answer was that the deceased visited the station every day "more than once per day" and that she had in fact done so earlier in the evening of 13 November 2005. The applicant's counsel again protested, pointing out to the judge that that evidence did not

appear anywhere on any statement given by or deposition taken from the witness. Again, there was no explicit ruling on the admissibility of this evidence, the judge merely indicating to Crown counsel that he should "Pass that and go on to the next one". When she was challenged on this evidence in cross examination, counsel pointing out that she was saying this for the first time when she was in the witness box, Miss Marrett insisted that the deceased "was always at the police station, as I said every day", prompting Crown counsel to ask her in re-examination whether she had ever been asked about the deceased's visit to the police station on 13 November 2005 before, to which she answered that she had not.

[8] It emerged from Miss Marrett's examination in chief that she had in fact given three statements to the police in connection with the investigation of this matter. In due course she explained the differences, in particular between the first and the second statements, on the ground that she had been in fear of her life when she gave the first statement and so had not been truthful in it, but that she had given the second statement in order to say what she had really seen on 13 November 2005, that is, to speak the truth about the identity of the person who murdered her sister. In cross examination, she would amplify this explanation by saying that after she had given the first statement (on 15 November 2005) she had spoken to her sisters and, when she told them what she had "really seen", they had encouraged her to come forward and speak the

truth, which is how she came to give the second statement on 17 December 2005. The third statement had been given in July of the following year, apparently at the suggestion of the Resident Magistrate who conducted the preliminary enquiry, in order to clarify some issues relating to measurements and lighting arising from the earlier statements.

[9] In addition to Miss Marrett, the prosecution called the doctor who conducted the post mortem examination on the deceased's body, the deceased's aunt, who identified the body to the doctor, and Detective Sergeant Paul Robinson, who was at the time stationed at the Half Way Tree Police Station, but had been part of the police team that responded to a call over the police radio for assistance in August Town on the night of the murder. He told the court that he had in fact known the deceased before, having seen her talking to fellow officers at the August Town Police Station from time to time on occasions when he would visit the station.

[10] That was the case for the prosecution, at the close of which the applicant made a brief unsworn statement in his defence. He was, he told the court, 30 years of age, from the August Town Road, Kingston 7 area. He did not know Miss Marrett "by any form" and had never spoken to her before.

[11] That was the case for the defence and, after addresses from both counsel, the case was summed up and given to the jury by the judge.

However, before the jury returned their verdict in the case, there was an exchange between the judge and the foreman of the jury which was to become the subject of a ground of appeal of its own. The matter arose in this way. After the jury had retired for an hour, they returned to court and, in answer to the Registrar's standard enquiry, told the court that they had not reached a unanimous decision. This is what then ensued:

> "REGISTRAR: Mr. Foreman, please stand. Mr. Foreman and members of the jury, have you arrived at a verdict?
>
> FOREMAN: We do not have a unanimous decision.
>
> HER LADYSHIP: Okay, Mr. Foreman and your members, in anyway [sic] can I help you? In relation to the law, are you, is your inability to come to a decision based on the law?
>
> FOREMAN: Based on the evidence presented…
>
> HER LADYSHIP: Is it based on the facts or based on the law, your inability to come to a unanimous decision?
>
> FOREMAN: Miss, it's another way.
>
> HER LADYSHIP: Anyway, can I help you, can I assist you in coming to a decision?
>
> FOREMAN: I am not sure how to respond because there are some members who were for one

decision, and some who were for another decision.

HER LADYSHIP: I take it that is why you were [sic] unanimous.

FOREMAN: Right.

HER LADYSHIP: So, I am asking if it is based on anything in law that I can help you with? Is there any way I can assist you? I don't know how else to say it. Do you think that there is anything that I have failed to tell you, that I have not done? Is there something you want me to elaborate on?

FOREMAN: I don't think -- is there any additional -- I may sit?

HER LADYSHIP: Yes, to talk to each other.

FOREMAN: M'Lady, we are asking permission to deliberate.

HER LADYSHIP: Sorry.

FOREMAN: We are asking permission to deliberate a little longer.

HER LADYSHIP: You want to go on a little longer and you feel that you can come to a verdict?

FOREMAN: Yes.

HERLADYSHIP: I didn't give you a time, so you were free to go on.

FOREMAN: My fellow jurors are asking if we have additional questions if we could ask for clarification.

HER LADYSHIP: That's what I am asking you, what is the wish?

FOREMAN: When we are deliberating, well, if we could send those to you?

HER LADYSHIP: No, I can't do it that way, everything is recorded,everything that goes on has to be recorded. This is a court of record so whatever goes on in the court must be recorded, I can't field questions. Perhaps incorrect questions that are being asked, you have to ask me, then I would know whether it is something that I can answer with both parties, both sides being present, I cannot answer you as that may be prejudicial to one side or the other. Because this is a collective decision, I don't know what the questions are...

MR. HARRISON: M'Lady, might I make a last comment. If there are questions which arise, probably we could return at that time, so that the record...

HER LADYSHIP: So every time they think of a question I must come back in here and have it recorded.

MR. HARRISON: Wasn't suggesting that, m'Lady, but it is collective decision…

HER LADYSHIP: This is why I am saying if they have a question now, Mr. Harrison, that they ask me now, I will know whether it is something that I can respond to or not. What am I to do wait on them, send me a question, and each time -- I have

never seen that happened [sic], I am not going...

MR. WALTERS: You are quite correct.

HER LADYSHIP: I cannot entertain it, they have to tell me what it is.

MR. WALTERS: The question you have asked, is whether it is misunderstanding, not understanding anything in the law, which is in your domain to explain, if it is not in that area and it is in the area of the evidence that has been given that they can't agree on, then it is a matter for them. The only thing that you might be able to do...

HER LADYSHIP: ...is to clarify certain things. There are some areas of the evidence that I may be able to elucidate, but I cannot…

MR. WALTERS: . . .give...

HER LADYSHIP: give them directives on that as I have been saying, they are the judges of the facts, but I cannot field questions from you. You are free to go back and deliberate."

[12] At this point, the foreman asked whether it would be possible for the jury to have the exhibits with them in the jury room and immediate steps were then taken to correct what had obviously been an omission on the part of all concerned. Thereafter the jury retired again and, after just over 20 minutes of further deliberation, returned a unanimous verdict of guilty

of murder, which was followed in due course by the applicant being sentenced to imprisonment for life as previously indicated.

[13] At the outset of the hearing of the application for leave to appeal, Mr Fletcher, who appeared for the applicant, sought and was given leave to abandon the grounds of appeal originally filed by the applicant and to argue in their place the following supplemental grounds of appeal:

> "1. The learned trial judge erred in allowing evidence which was not probative and highly prejudicial to the applicant to be admitted, pursued and expanded on, thereby denying him a fair trial.
>
> 2. The learned trial judge's management of the issues surrounding the fact that the jury had returned undecided were inadequate and in two respects amounted to material irregularities.
>
> 3. Some critical elements in the sequence of identification evidence were wholly unsatisfactory and the failure of the learned trial judge to identify them and treat with them appropriately amounted to a misdirection denying the applicant a fair and balanced consideration of his case (this ground was reformulated by Mr Fletcher during the course of his submissions – see para. [18] below).
>
> 4. The sentence is manifestly excessive (this ground was not pursued)."

[14] On ground 1, Mr Fletcher brought three matters to our attention. The first was in respect of the evidence that was elicited from Miss Marrett by counsel for the Crown that the reason that she had not given in to the applicant's entreaties that she should become his girlfriend was that she

had been threatened by him, or that, as she later put it, she was scared of him (see para. [5] above). Mr Fletcher's comment on this evidence in his skeleton arguments was that, because it had nothing to do with any issue in the case, it could only have been led to establish that the applicant was steeped in "a personal culture of violence". As such, he submitted, it required clear directions from the trial judge "if its prejudice was to be cauterized". However, far from doing this, Mr Fletcher submitted, Beckford J had directed the jury on it in a manner that was likely to prejudice them and so deny the applicant a fair trial.

[15] Counsel's second complaint on this ground related to the evidence that had been elicited from Miss Marrett, again by counsel for the Crown, as to the frequency with which the deceased visited the August Town Police Station. Mr Fletcher submitted that this evidence could only have been led to establish a connection between the deceased's visits to the police station and the killing and that it therefore called for "very careful and sensitive directions" from the judge, which were not given, "if the prejudice inherent in it was to be removed".

[16] And finally on this ground, Mr Fletcher complained of what he characterised as "potentially prejudicial comments" by the learned trial judge, when she told the jury, in respect of whether Miss Marrett's evidence that she knew what a gun looked like could be relied upon,

that Jamaica was "now called the murder capital of the world…so everybody knows what a gun looks like". This comment, it was submitted, had the potential of inciting the jury to "an emotive rather than a dispassionate consideration of the facts" of the case.

[17] With regard to ground 2, Mr Fletcher submitted that the entire exchange between the judge and the foreman described at paras. [11] – [12] above amounted to undue pressure on the jury to arrive at a verdict and a "failure to accommodate" their "reasonable request" for further assistance. This failure on the part of the judge, it was submitted, was a material irregularity which, when taken in the context of the applicant's other complaints, "goes to the crux of the case". In support of these submissions, Mr Fletcher referred us to ***Berry v R*** [1992] 2 AC 864 and a passage from Archbold's Criminal Pleading and Practice, 1999, para. 4 - 431.

[18] After some discussion during the course of his argument on ground 3, Mr Fletcher sought and was granted leave to reformulate it as follows:

> "The quality of the identification evidence was weak, compromised by the credibility of the eye-witness, the sequence of the statements given and the omissions in the case. This weakness cannot be corrected."

[19] In support of this ground, Mr Fletcher directed our attention to three aspects of the evidence which, he submitted, affected the "potential cogency" of the identification evidence in the case. These were the fact that (i) Miss Marrett gave three statements in the matter, the first of which had her being unable to see or to identify the assailants, (ii) the witness' second and third statements were respectively given after urging by third parties, and (iii) the absence of any evidence whether a warrant had been issued for the applicant's arrest or of the circumstances in which he came into police custody. As a result of all of these factors, it was submitted, there ought to have been an identification parade and, in its absence, bearing in mind that the applicant had denied any knowledge of Miss Marrett, the judge ought to have warned the witness about the dangers of dock identification. In any event, Mr Fletcher submitted, the evidence of identification required the most careful analysis from the trial judge, which it did not receive.

[20] Miss Ebanks replied for the Crown. With regard to ground 1, she accepted that the evidence of the deceased's frequent visits to the police station was unnecessary and ought not to have been led by the Crown. However, she submitted that the nature of that evidence was not inflammatory and as a result had resulted in no prejudice to the applicant. The trial judge's summing up was, Miss Ebanks submitted further, fair to the applicant taken as a whole and there had therefore

been no miscarriage of justice in all the circumstances. On ground 2, she submitted that the exchanges between the judge and the foreman of the jury after the jury had retired for the first time (see para. [11] above) did not amount to the judge placing undue pressure on the jury and that the judge had been correct to tell the jury, as she did, that the court was a court of record and that all that took place during the trial had to be done and recorded in court. And on ground 3, Miss Ebanks submitted that the evidence of identification in the case was of a sufficient quality to have been left to the jury and that while the judge's directions to the jury on the credibility of the eyewitness were not as integrated with her directions on identification generally as they might have been, they were nevertheless adequate to give the jury the assistance which the case called for. But in the event that the court felt that there were any imperfections in the directions, this was a fit case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

Ground 1

[21] Mr Fletcher's first point on this ground related to the evidence elicited from Miss Marrett that she had not rejected the applicant because she was scared of him. There is no question in our view that the evidence which was elicited from Miss Marrett by counsel for the Crown was potentially prejudicial to the applicant, tending, as it did, to depict him as a person, certainly in the eyes of the witness, not beyond the use of

violence in some form as a means of influencing the personal choices of others. In such circumstances, it is always a difficult decision for a trial judge to make as to the best way to mitigate the effects of such evidence. Occasionally, the potential of prejudice is so clear and serious that the only appropriate step for the judge to take will be to discharge the jury and have the matter begun anew before a freshly constituted jury. Sometimes it may be best to tell the jury immediately after the evidence comes out that it is irrelevant and should be completely ignored by them. Or it may sometimes be best left to the end when the judge is summing up to the jury to tell them to leave it out of their consideration entirely. Often the judge may decide on a combination of these two approaches, that is, to tell the jury immediately to ignore the evidence and to reinforce this with a further explicit warning in the summing up. And, in yet other circumstances, the judge could well decide, in her discretion, that the best way to deal with an inadvertent casual disclosure is to say nothing at all about it, rather than, by making a comment on it, to recall it to the jury's mind when they might otherwise have forgotten about it entirely (see, for an example of a case in which it was held on appeal that, in the particular circumstances of that case, the trial judge could not be faulted for adopting this last approach, ***R v Coughlan*** (1976) 63 Cr App Rep 33, esp. at page 38).

[22] The authorities are clear that every case will depend on its own facts and that the decision as to the appropriate course to be adopted in a particular case is primarily a matter for the discretion of the trial judge, based on the facts before him. Further, an appellate court will not lightly interfere with the manner in which the judge chooses to exercise that discretion in the face of what is usually a completely unexpected and (hopefully) purely gratuitous eruption from a witness during the course of giving his evidence at the trial. As Sachs LJ put it in the well known case of ***R v Weaver*** [1967] 1 All ER 277, 280, to which we were referred by Mr Fletcher, the correct course "depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted…" (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in ***McClymouth v R*** (1995) 51 WIR 178).

[23] In the instant case, no complaint is made by Mr Fletcher about the fact that Beckford J obviously thought that this bit of evidence was best left to be dealt with in her summing up. His real complaint in this regard has to do with the way the judge dealt with it in her summing up to the jury. This is what the judge told the jury:

> "So what she is saying is that she knows him for two years. Mr. Foreman and members of the jury, we can -- none of us can divorce ourselves from what is happening in society.

> What happens in certain areas is that if a person or persons say they want to have a relationship with you, and you are a young lady, you can't just say no. Not if you want to remain whole. So, this is what she is saying to you. She said she never tell him no because she was afraid. That is what she explained.
>
> You see, Mr. Foreman and members of the jury, this is our society. We are Jamaicans, we don't live in foreign. We live right here. Those of us who don't know what is happening, get out there and find out."

[24] We agree with Mr Fletcher's submission that, far from reducing the potential of prejudice to the applicant, this direction could only have deepened it. While there is no basis upon which it can be said, in our view, that counsel for the Crown deliberately set out to elicit the very answer which he got from the witness, it is nevertheless clear to us that, it having been made, it called for a firm and unequivocal statement to the jury that Miss Marrett's stated reason for not saying no to the applicant was completely irrelevant to any issue in the case and that they should accordingly ignore it altogether. Far from doing this, the judge's comments instead sought to explain and, so it seems, to commend to the jury the reasonableness of the fear of danger that the witness apprehended in not declining the applicant's advances.

[25] Mr Fletcher's second complaint in ground 1 relates to the evidence of the frequency of the deceased's visits to the August Town Police

Station before her death on 13 November 2005. The submission was that the clear implication of this evidence was that the deceased was a police informer and thus could only have been led to establish a connection between the deceased's visits to the police station and the killing. While we fully agree that this evidence was wholly irrelevant to any issue which was properly before the jury at the trial, it is less clear to us what inference the jury might have drawn from it. It could equally have suggested, it seems to us, that the deceased had friends who were police officers stationed at that station (indeed, the evidence was, as will be recalled, that after she had been shot the deceased was heard crying out for help to "Jacko" in apparent reference to a police officer assigned to the station), or equally that the deceased had had some apprehension of danger before she was killed.

[26] It seems to us that it is precisely for the reason that the jury might have been tempted into all kinds of speculation as to the meaning or effect of this evidence, that, it having been allowed into evidence, a firm and clear direction was required from the trial judge to the jury that they should ignore it altogether and not take it into account in their deliberations. However, in her summing up, Beckford J contented herself with a summary of the evidence to the jury ("she told you that her sister, Glenda, would visit the August Town Police Station very often, every

day…") and, apart from a single other brief reference to it, which took the matter no further, left it at that.

[27] Mr Fletcher's third complaint in ground 1 had to do with Beckford J's observations to the jury on the prevalence of murder in the country. It is necessary to set out the judge's remarks in full in order to appreciate the context:

> "You know, Mr. Foreman and members of the jury, what we have to understand in this country is that, this is no [sic], as it was say five, ten years ago
> when guns were something that people did not know, today, everyone, the little babies know about guns, everyone, the babies. As a matter of fact, the young people know more about guns than the older ones, unless you are really into the firing business, unless you are into the gun, unless you are into the gun business, the babies know more than you, it is on the television, it is something that happens, you are walking on the street, and you have to be very careful, because, even if you see people using the guns you can't say anything, broad daylight, is Jamaica we live in, is Jamaica we live in. We are now called the murder capital of the world, what is a disgrace but you are -- that's how it is, so everybody knows what a gun looks like."

[28] We agree with Mr Fletcher that these comments were wholly uncalled for and could have been of absolutely no assistance to the jury in respect of what they were required by their oaths to do, that is, to decide on the basis of the evidence placed before them whether the

guilt of the applicant had been proved to the requisite standard. While, as Mr Fletcher accepted, the crime situation in the country is an inevitable fact of all our lives, it is difficult to disagree with his further comment that the effect of the judge's observations had been "to move it from the background to the foreground".

[29] The applicant's complaint in ground 1 is that, taking these three "highly prejudicial" matters into consideration, the applicant was denied a fair trial. It may well be the case that each of the matters complained of, taken separately, might not have had that effect, particularly bearing in mind Miss Ebanks' reminder to us that the judge did tell the jury that, if they disagreed with any comment on the facts offered by her, they should "toss it out". However, it nevertheless seems to us that the cumulative effect of the matters complained of might equally well have been to entrench in the jury's minds a degree of prejudice against the applicant that it would at the end of the day have been difficult, if not impossible, to dispel. In these circumstances, it seems to us that ground 1 has accordingly been made good.

Ground 2

[30] We have already set out (at para. [11] above) the circumstances that gave rise to this ground. In ***Berry v R***, the appellant complained that the trial judge had failed to deal with a problem which the jury had

indicated to him that they had on returning to court after an hour's deliberation. Having ascertained that the problem related not to the law but to the evidence, the judge said this to the jury (at page 382):

> "All right, well I have told you that the facts are for you; you have seen all the witnesses in the case, you have heard them and it is for you to assess their evidence and to decide which of them you believe, if any, which of them you disbelieve, if any."

[31] The judge then went on to give a brief and accurate summary of the factual contest in the case and reminded the jury of his earlier directions on the burden of proof and their role as the sole judges of the facts. However, as Lord Lowry, who delivered the judgment of the Board, pointed out (at page 383), the judge "did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no one knows what the problem was". Lord Lowry went on to say the following:

> "The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since if the jury return a 'guilty' verdict, one cannot tell whether some misconception or irrelevance has played a part. If the judge fears that the foreman may unwittingly say something harmful, he should obtain the query from him in writing, read it, let counsel see it and then give openly such

> direction as he sees fit. If he has decided not to read out the query as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances, but their Lordships need not decide how in this case they would have viewed such failure, seen in isolation."

[32] Reference was made to the above passage from ***Berry*** in the subsequent case of ***Mears v R*** (1993) 30 JLR 156, in which, in response to an intimation from the jury some two hours after they had retired that they had a problem relating to the evidence, the trial judge had done no more than repeat his earlier summary of the evidence to them. Delivering the judgment of the Board, Lord Lane observed (at page 159) that "the failure to ascertain what it was about the evidence which was puzzling to the jury" was one of the factors which led their Lordships to conclude that the ensuing conviction could not be allowed to stand.

[33] In the instant case, Beckford J did not receive a direct response to her enquiry whether the difficulty which the foreman of the jury had reported was "based on anything in law". When the foreman then enquired whether the jurors could send any additional questions they had to her while they were deliberating, her response was that it could not be done that way, since the court was a court of record and everything that

"goes on has to be recorded". Upon counsel for the Crown then proffering, somewhat diffidently, the seemingly innocuous suggestion that "if there are questions which arise, probably we could return at that time, so that the record…", the judge's impatient response was, "So every time they think of a question I must come back in here and have it recorded". Mr Linton Walters, who was the applicant's counsel at the trial, then tried to be of assistance by seeking to distinguish between any misunderstanding as to the law, "which it is within your domain to explain" and something "in the area of the evidence", in respect of which the judge appeared to agree that her role might be "to clarify certain things". However, the matter was not pursued any further and the judge herself brought an end to these exchanges by reiterating that she could not "field questions" from the jury and directing the foreman that they were "free to go back and deliberate". The jury then retired for the second time and returned in 20 minutes with the verdict of guilty.

[34] It is clear that a jury is entitled at any stage of the proceedings to the help of the judge on either the facts or the law. In our view, the learned trial judge in the instant case failed to give to the jury any assistance at all, as it did not emerge at any time during or at the end of the exchanges between the judge and the foreman what was the nature of the difficulties that the jury had encountered in their deliberations. If the difficulties concerned issues of law, then it would have been the duty

of the judge to provide the necessary guidance; if they had to do with issues of fact, then it might have been possible for the judge to be of some assistance in clearing up any misconceptions of the evidence in the case. There could have been no objection, in our view, to the foreman being allowed to put any queries to the judge in writing, once these were shared with counsel and any resulting directions would then be given in open court for the record. While we would not go so far as to say that that what took place in this case amounted to undue pressure on the jury (indeed, the judge did tell the jury through the foreman that they were free to go continue their deliberations if they needed more time), we are clearly of the view that it did amount to a material irregularity that might have affected the fairness of the applicant's trial.

Ground 3

[35] In the light of our conclusions on grounds 1 and 2, and in the light of the manner in which we propose to dispose of this appeal, we do not think it necessary to embark on a detailed consideration of this ground, in which complaint was ultimately made about the quality of the identification evidence. It is sufficient to say, we think, that we do not immediately see a basis for Mr Fletcher's contention that an identification parade should have been held in this case or that the quality of the identification evidence in the case was "wholly unacceptable".

Conclusion

[36] We do not think that this is a case in which we could properly accede to Miss Ebanks' submission that the proviso should be applied, since it cannot be said in our view that this is a case in which "if the jury had been properly directed they would inevitably have come to the same conclusion" (which is the test propounded by Viscount Sankey LC in ***Woolmington v Director of Public Prosecutions*** [1935] AC 462, 482-483). In the result, we consider that the application for leave to appeal must be granted, the hearing of the application treated as the hearing of the appeal and the appeal allowed. In relation to the matters raised in grounds 1 and 2, upon which the applicant has succeeded, we agree with Mr Fletcher, who accepted that, as he put it, "these may be retrial issues". We accordingly order that in the interests of justice the applicant should be tried anew in the Home Circuit Court as early as is convenient.