[2013] JMCA Crim 56

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 8 & 10/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

SHELDON ANDERSON
JOHN MORRIS v R

Ronald Paris for the applicant Sheldon Anderson

Chumu Paris for the applicant John Morris

Adley Duncan and Miss Sophia Thomas for the Crown

25 April, 31 May and 12 December 2013

LAWRENCE-BESWICK JA (Ag)

[1] The applicants, Sheldon Anderson and John Morris were charged jointly for the murder of Mr Afflick Turner. They were tried by a judge and jury in the Home Circuit Court from 30 November to 4 December 2009 and were each found guilty of the offence. On 16 December 2009, each was sentenced to life imprisonment, to serve 20 years before being eligible for parole. They applied for leave to appeal the convictions and sentences and on 4 November 2011, a single

judge refused leave to appeal. They renewed their applications before this court and on 31 May 2013, we refused those renewed applications and ordered the sentences to run from 16 March 2010. These are the reasons for that decision.

Background

[2] The case presented by the prosecution was that on 20 April 2007, Mr Afflick Turner, now deceased, was walking along the Pinto main road in Pinto District, St Andrew, when he was approached from behind by the applicants, each armed with a firearm. They called him by name and he turned around and faced them, at which time both applicants fired shots at him. Mr Turner ran and the applicants pursued him. There were several more explosions thereafter.

[3] Mr Mark Nelson testified that he had witnessed this encounter in the early morning at about 6:00 a.m. whilst he was sitting on a culvert at his gate. He had seen the applicants emerge from a lane and look up the road in the direction of the deceased, just before shooting at him. When the shots were being fired he, Mr Nelson, ran to his yard. Corporal George Roye testified that later that day at about 8 a.m. he saw Mr Turner's body, appearing to be dead, lying in the bushes in Pinto District. It had what appeared to be a gunshot wound to its head.

[4] There was no evidence as to how the applicants came to be in custody but the witness, Mr Mark Nelson, knew both applicants from before and identified each of them at an identification parade. Both applicants denied

having played any part in Mr Afflick's death and denied having been at the scene of the incident. Cross-examination elicited evidence that the applicant Morris had told the police that he and the witness had had a fight eight years before the incident. That was not explored further by the defence and there was additional evidence that the applicant Morris and the witness would "hail" each other in the community and that they were friends (page 89 of transcript). Whilst they were deliberating on the verdict, the jury returned to the courtroom and indicated that they had not reached a unanimous verdict. They asked the learned trial judge particular questions. She responded and thereafter they retired again and eventually returned with a unanimous verdict.

Grounds of Appeal – Sheldon Anderson

[5] Mr Ronald Paris on behalf of the applicant Anderson argued the four original grounds of appeal filed on 23 December 2009 and we gave him leave to argue 10 supplemental grounds which had been filed on 21 November 2012. These 14 grounds can be summarized into eight categories:-

Category one – Weakness in identification of Sheldon Anderson

[6] The first original ground was that the prosecution's witness wrongly identified Sheldon Anderson as the person or as being among any person who committed the alleged crime. The first of the supplemental grounds also concerned identification and stated that the learned trial judge "failed to analyze, remind and put before the jury the specific weaknesses in the identification

evidence adduced during the trial against the applicant, Sheldon Anderson so as to assist the jury in assessing and weighing carefully the strength of that evidence in arriving at their verdict".

[7] Mr Paris submitted that the eye-witness had not been consistent about the time in which he viewed Mr Anderson. At first, he had said the time was one to three minutes but in cross-examination he maintained that it was one minute. Further, there was no evidence to show what the witness meant by one minute. He also argued that the distance demonstrated by the witness from which he identified applicant Anderson, appeared to be different at the preliminary enquiry, from the distance he said at the trial and it was the prosecutor in fact who eventually suggested the distance. Counsel acknowledged however, that the jury would have seen the distance pointed out by the witness but he regarded the learned trial judge's directions as unhelpful in this regard. Counsel for the Crown responded that the issue of the precise timing for identification purposes was irrelevant. The defence was not that identification was mistaken, but rather, that because of malice, the witness had incorrectly stated that the applicants were the killers.

Category two - Lack of evidence

[8] The second original ground of appeal was that the prosecution failed to present any form of material, scientific or ballistic evidence to link the applicant Anderson to the alleged crime. The third of the original grounds of appeal was

that there was a lack of facts and credibility thus rendering the verdict unsafe in the circumstances. Although Mr Paris had stated that he was relying on these grounds, he did not expand on them except to argue that the learned trial judge had failed to address the omission in the evidence as to how and when both applicants had been apprehended. The approach of counsel was no surprise as all the pertinent evidence had been fairly placed before the jury. Further, there was never any challenge as to the apprehension of the applicants.

Category three - Alibi

[9] The final of the four original grounds filed was that: "I was misdirected by my attorney-at-law, in respect to my alibi, to confirm [sic] my innocence". This complaint was unclear but seemed to involve a perceived failing of the applicant's attorney-at-law at the trial, concerning an alibi. This too was not pursued, although counsel had stated that he was relying on all the original grounds. The meritorious directions on the manner in which the jury should treat with the alibi evidence (pages 289 - 290 of the transcript) could withstand any challenge, albeit the learned trial judge had omitted them from her initial directions and had called the jury back into the court room from their retirement, in order to give them the additional directions.

Category four - Identification parade

[10] The second supplemental ground of appeal concerned the fairness of the identification parade. It stated, inter alia, that: "The learned trial judge failed to

state the law correctly to the jury with respect to the ability of the applicant to choose the men on the identification parade and to absolve the Sergeant in charge of the parade from any responsibility to ensure that the parade was conducted with fairness". Mr Paris submitted that the procedure for the identification parade in which applicant Anderson was identified, was wrong. There had been an earlier identification parade for the co-accused Morris and some of the persons had been in both parades. This, he said, resulted in an unfair parade. [Although applicant Anderson was represented by an attorney-at-law at the parade, there had been no protest at the time. Mr Paris' submission was that counsel has no duty to protest while the parade is being conducted or to interfere with the manner in which it was conducted.] Counsel for the Crown, on the other hand, submitted that the identification parade was fair because its purpose was to connect the names of the persons whom the witness had stated were the killers, with the actual persons who were in custody, both of whom he had known from before the date of the incident. In any event, the applicants were represented by attorneys-at-law at the parade and they had a duty to protest any unacceptable situation at the parades. The Crown submitted that it was uncontroverted that the applicant Anderson had himself selected the men who stood on his parade.

Category five - Restriction on cross-examination

(a) about crime scene

[11] The third supplemental ground of appeal concerned restrictions placed by the learned trial judge on the cross-examination by defence counsel. It stated that the learned trial judge unfairly restricted defence counsel's use of an exhibited photograph of the culvert on which Mark Nelson had sat and by so doing "denied counsel the opportunity of exploring the additional relevant geographical and physical features of the crime scene visibly represented in the exhibit". Counsel for the Crown submitted that defence counsel could not use the photograph which was exhibited to ask other questions about the general geographical area because it had been admitted into evidence specifically to show the location of the culvert from where the witness said he had observed the incident he had described (pages 128 - 130 of the transcript).

(b) about cause of death

[12] The fourth supplemental ground of appeal also concerned the judge's restriction on cross-examination. It stated that the learned trial judge improperly and unfairly stopped defence counsel from "pursuing a legitimate line of cross-examination of Mark Nelson to establish the fact that the last time the witness saw Afflick Turner … he was alive and running and had not been shot. There being no evidence from Mark Nelson as to the death or cause of death of the deceased [sic]." This, Mr Paris submitted, meant that it was not necessarily the applicant Anderson who had fired any shot to kill the deceased. Counsel for the

Crown argued that there was more than enough evidence to infer that the deceased's death was caused by the applicants.

(c) about gunshot injury

[13] The fifth supplemental ground of appeal complained of a restriction on the cross-examination concerning the gunshot injury to the deceased's body. The argument was that the learned judge ought to have allowed the utmost latitude in cross-examination in this regard since there was no evidence as to the cause of death, but had not done so.

Category six - Misquoting of evidence
(a) re gunshot wound(s)

[14] The sixth supplemental ground also concerned the deceased's wound(s), but the complaint was that the learned trial judge misquoted the evidence in saying that the body of Afflick Turner had gunshot wounds to the head.

[15] The seventh supplemental ground was very similar to the sixth supplemental ground. It extended the complaint to say that the learned trial judge had directed the jury that the prosecution was asking them to infer or find as a fact that the deceased had received gunshot wounds when this had been concocted by Crown counsel since the evidence concerned one wound.

(b) re explosion(s)

[16] The eight supplemental ground of appeal reflected a concern that the judge's direction was wrong in saying that the witness had heard explosions because the evidence was that he had heard one explosion. Counsel for the Crown conceded that the evidence was misquoted but submitted that what was important was that the witness had seen the applicants with guns pointed at the deceased and the deceased was later found in bushes, appearing to have a gunshot wound and appearing to be dead.

Category seven - Misdirection on circumstantial evidence

[17] The ninth supplemental ground of appeal was that the learned trial judge did not direct the jury adequately on circumstantial evidence. Counsel for the Crown argued that the judge had adequately reviewed the law (at page 267 and 268 of the transcript) and had directed the jury's attention to specific aspects of the evidence of the witnesses to be considered in deciding the value of the circumstantial evidence. He relied on ***McGreevy v DPP*** [1973] 1 WLR 276 and ***Loretta Brissett v R*** SCCA No 69/2002 delivered 20 December 2004.

Category eight - Directions on hung jury

[18] The final supplemental ground of appeal argued on behalf of the applicant Anderson was that the learned trial judge had not assisted the jury with their enquiry as to the meaning of a hung jury and as to the consequences of their not being unanimous in their verdict. Her failure to clearly do so might have

caused them to return the verdict of guilt as they would not wish to return for a retrial. Counsel acknowledged that there was no pressure on the jury to arrive at a verdict. The pressure, he submitted, was to be unanimous in the verdict. Crown counsel submitted that the learned judge had given adequate directions in this regard (pages 293 – 295 of the transcript). She had reminded the jurors that it was the evidence from the witness box that they should consider and the statements of the applicants. It was clear that the jury was aware of the burden of proof and knew that the prosecution had to satisfy them of the applicant's guilt so that they were sure before they could arrive at a decision.

Ground of appeal - John Morris

[19] The court gave leave for Mr Chumu Paris to consolidate the two original grounds of appeal filed, arguing one ground on behalf of the applicant Morris:-

> "Her ladyship failed to provide the jury with adequate guidance to resolve any misconceptions of the evidence amounting to a material irregularity affecting the fairness of the trial."

Counsel submitted that the learned trial judge had not assisted the jury adequately, when they had returned from the jury room seeking guidance. This was in substance the same as supplemental ground 10 filed on behalf of the applicant Anderson. He argued that the learned judge had assumed that the jurors had gone through an orientation process and therefore she failed to explain the consequences of a verdict which was not unanimous. Counsel submitted further that they may have had misconceptions about the

consequences of coming to a unanimous verdict. He relied on ***Graeme Bennett v R*** [2011] JMCA Crim 15 for his submission that the learned judge should have reminded the jury of their role, after giving the additional guidance.

[20] The Crown's response was that the further directions were acceptable as the learned judge had reminded the jury that they could not speculate about what had occurred, and that they must consider the evidence and the applicant's statements [***R v Keith McKnight*** SCCA No 18/1992]. Mr Chumu Paris also submitted on behalf of the applicant Morris that although the judge's directions on time and distance in the identification process of applicant Morris were adequate, the evidence did not point in one direction only, that Mr Morris was on the scene. Additionally, the witness had acknowledged that he had a bad eye and counsel submitted that the identification of Mr Morris had not been properly addressed in this regard by the learned judge.

[21] Counsel argued further that the jury had not been assisted in understanding their role. Both credibility and accuracy were in issue [***Noel Campbell v The Queen*** [2010] WCPC 26] and the learned trial judge had failed to instruct the jurors to satisfy themselves firstly, that the witnesses were truthful and that only after that, should they go on to consider the ***Turnbull*** directions (***Beckford v R*** (1993) Cr App Rep 409]. Mr Paris also submitted that the learned judge failed to adequately point out the effect of the evidence that the witness Nelson and the applicant Morris had fought eight years before,

which would require his evidence to be treated with even more care. Counsel Mr Paris urged the court to find that the directions about the identification parade were faulty as outlined above in the similar submission on behalf of applicant Anderson. Finally, he argued, the judge had not instructed the jurors that there was no direct evidence that the applicant Morris had inflicted the injury to the deceased. The conviction of applicant Morris was thus unsafe.

Analysis and discussion

[22] We shall consider the issues raised, by both applicants, rather than individual grounds because of the overlapping of the individual grounds of the applicant Anderson and also the overlapping of the ground of applicant Morris with the grounds of applicant Anderson.

Identification

[23] The directions concerning identification were without fault. The learned trial judge told the jurors that identification was the main issue in the trial and she reminded them of pertinent evidence of identification, pointing out specific weaknesses. Two aspects of the identification evidence were in issue – the time for which the witness viewed the applicants and the distance from which he viewed them. Firstly, though, was the fundamental fact as to whether or not the witness Mr Mark Nelson could see at all.

[24] Mr Nelson was the sole eyewitness who gave evidence. He testified that he could see perfectly with his right eye but had difficulty seeing with his left

eye. The learned judge pointed this out as a weakness in the identification evidence reminding the jurors that the witness's vision had not been tested.

> "Another weakness here, is that the witness Nelson has told you that he has a difficulty with his left eye and he only sees with the right, but, madam foreman and members of the jury, he told you that he sees perfectly with the right eye and he said he can see anything in this courtroom. He wasn't tested, but you saw him. He was looking and he was able to tell you that, so it [is] a matter for you because this is what he's saying he said, 'I only have the right eye but I see perfectly, I can see anything in the courtroom (page 257-8 of the transcript)."

[24] The judge also drew the jury's attention to other weaknesses in the identification evidence, reminding them of the lighting, of the distance from which the applicants were said to have been identified and the time for which the witness had seen the applicants (see pages 262 - 263 of the transcript). She highlighted that there was another weakness in the case in regard to the positioning of the two applicants which might have obscured a clear view of each of them. The judge explained finally, the caution which is needed before convicting on visual identification and gave full directions in accordance with ***R v Turnbull*** [1977] QB 224, alerting the jury to the dangers of convicting on visual identification evidence (pages 251-252 of the transcript). The jury was fully equipped to consider the issue of identification.

The identification parade

[25] The complaint is that the learned judge failed to correctly state the law to the jury concerning the fairness of the applicant Anderson's identification parade. The reason for holding an identification parade is to provide as best as possible fair circumstances in which a witness can accurately, and without assistance, identify a suspect. Rule 552 of the Rules and Regulations relative to the Jamaica Constabulary Force in the Jamaica Gazette Extraordinary of 29 July 1939, which deals with identification parades, provides:

> "In arranging the personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b) to make sure that the witness' ability to recognize the accused has been fairly and adequately tested."

Rule 553 provides further, for the details of the parade:

> "…
>
> (iii) The accused shall be placed among not less than eight persons who are as far as possible of the same age, height, general appearance and position in life.
>
> (iv) The accused shall be allowed to select his own position in the line, and shall be expressly asked if he has any objection to the persons present with him or the arrangements made. If he desires to have his Solicitor or a friend present at the Identification, this shall be allowed and he shall be informed of this privilege.
>
> …"

[26] Two identification parades were held on the same day. Applicant Morris was the suspect on the first parade and applicant Anderson was the suspect on the second parade. On the first parade the witness Mark Nelson chose the applicant Morris from the lineup of nine men, as one of the killers of the deceased. On the second parade he chose the applicant Anderson as the other killer. It is not in dispute that six of the nine men in the line-up were in both parades.

[27] No complaint can properly be made about the conduct of the parade for applicant Morris. However, the parade for applicant Anderson cannot be spared of criticism inasmuch as when the witness selected him, he was effectively pointing him out from three, not nine, men, since he had already seen six of the men on the previous parade and would have known that they were not the suspect. At the identification parades in this matter, not only did the suspects and their attorneys-at-law choose the men to be on the lineup but they also made no complaint about the conduct of the parades. Mr Paris' submission that an attorney-at-law representing a suspect at an identification parade need not make his complaints about the parade known at the time does not find favour with us. In our view, it would make a mockery of the system, for any party to be aware of a wrong occurrence on the parade, and to be silent about it until some later time when the proverbial horse has gone through the gate.

[28] In her directions to the jury, the learned trial judge reminded them that each accused had been pointed out by the witness at the identification parade

but she gave no explanation about the process (page 283 of the transcript). She did not invite them to examine the evidence of the procedure at the identification parade, nor did she instruct them to reach any particular conclusion concerning the fairness of the parades. A direction to examine carefully the circumstances of the identification parade for each applicant, to decide if the parade had allowed for each to have been fairly pointed out, *was clearly called for.*

[29] However, in our view, in the circumstances of this case, no injustice was caused to Mr Anderson by the shortcomings of his identification parade. The unchallenged evidence was that the witness had known him for about three months before, knew where he lived next door to the other applicant, some yards from where the witness himself lived. He would see Mr Anderson almost daily, they would speak and hail each other. Indeed the uncontradicted evidence was that earlier in the week, the applicant Anderson and the witness had been at an ackee tree at the same time, reaping the fruit (page 31-38 of the transcript). The witness ought certainly to have been able to identify the applicant Anderson from any number of men. In referring to the lineup at the parade, his evidence was that "me know him in person suh me point pan him" (page 45 of the transcript). Indeed the transcript records the witness as saying at the identification parade:

> "Me see him long time a true me just a do weh yuh tell me fe do, No. 4." (page 203 of the transcript)

Applicant Anderson was at position No. 4. The question really is whether the witness is truthful in testifying that the applicants were the perpetrators or whether he had stated that they were the perpetrators, well knowing that they were not.

Restrictions on defence counsel's cross-examination

[30] Defence counsel was prevented from cross examining about the physical features of the crime scene and also about the fact that the witness had not seen the deceased actually die. It is true that the learned trial judge is in charge of the conduct of the trial and has a duty to ensure that the evidence being placed before the jury is relevant to the case. However, the defence has a right to ask such questions as are pertinent to the trial. It is counsel who has the instructions concerning the defence case and who would best know the areas to be explored in cross-examination. Here, the photograph of the culvert was put into evidence as the photograph of the culvert where the eye-witness sat when, according to him, he saw the men. It was put into evidence at the request of the defence, but not without strenuous objection by the Crown. The learned trial judge allowed only questions about the culvert and did not allow questions concerning anything else in the photograph, including the physical features of the scene. That decision, she said, was based on the witness having testified that the environment shown in the photograph had changed. The witness had given evidence that the culvert had remained the same as when he had sat on it, but the surroundings had changed. According to him:

> "This is not the way the place did stay when the crime happened." (page 133 of transcript)

In the circumstances of this case, that decision by the judge, to exclude the cross examination concerning the surroundings was, in our view, correct.

[31] Defence counsel's cross-examination of the witness was again curtailed by the learned trial judge. Counsel asked, as was his right, about the death of the deceased. He asked the witness if the last time he saw the deceased he was not dead, but was running. *The reason for that question, in our view, was to challenge whether the prosecution had proved the cause of the deceased's death and the person who caused it, since the evidence was that the deceased was still running after the shot or shots had been fired.* The witness agreed whereupon counsel twice repeated the question (page 50 and 51 of the transcript). It was when counsel asked that same question yet again, that the learned judge intervened and told counsel that the witness had given his evidence and that counsel could use it in his address to the jury. She cannot be faulted for that intervention, which arose from the duty to ensure proper conduct of the trial and this includes preventing questions being repeated unnecessarily.

Cause of death

[32] Medical evidence of the cause of death was absent. However the deceased had been found dead with what appeared to be a gunshot injury shortly after there had been the sound of gunshots. The jurors were reminded that the evidence was that the deceased was still running across the road after

the applicants had pointed their guns at him and after the gunshots were heard. The verdict shows that the jurors drew the inference that the deceased had been killed by the applicant(s) by gunshot(s). The evidence was sufficient to allow the jury to draw the inference which they did, about the cause of death of the deceased. The learned judge had accurately directed the jury on the law concerning inferences:

> "You are entitled to infer from the facts that you find proved, other facts which may be necessary to complete the evidence of guilt or to establish innocence. You may draw inferences from proven facts, but you must not draw any inference unless it is a reasonable inference and the only one that can reasonably be drawn" (pages 244 - 245 of the transcript).

[33] She drew the attention of the jury to the importance of inferences in this particular case, and said:

> "… [T]his case is one in which you are going to be called upon again and again, to draw inferences, so it is important that you pay attention to that" (page 244 of transcript)

The question on the cause of the death of Mr Turner, which the learned trial judge prevented defence counsel from pursuing, was

> "So, the last time you saw him he was alive, true?"
> (see page 51 of the transcript)

The witness had already answered and said that the last time he had seen the deceased he had been running (page 51 of transcript).

The judge intervened and said:

> "Mr. Townsend, that is for addresses. He has given you his evidence." (page 51 of the transcript)

The defence had already elicited from Mr Nelson, the evidence that the deceased was still alive even after the gunshot explosion. The learned trial judge could therefore properly restrict questioning on this area which had been thoroughly explored by the defence.

Misquoting of evidence

[34] Counsel, Mr Ronald Paris, was accurate in stating that the learned trial judge in summing up, had referred to the deceased's body lying in the bushes with gunshot wounds to the head, appearing to be dead (page 276 of the transcript) whereas the transcript shows that Sergeant Roye had testified as to seeing a gunshot wound to the deceased's head (page 165 of the transcript). Crown counsel is recorded as having also asked the same witness about gunshot wounds to the head. (page 166 of the transcript) despite his evidence of there being "a" wound. Also, the learned trial judge told the jury that the prosecution was asking them "to infer or find as a fact, from your inference, that the deceased received gunshot **wounds**" (page 278 of the transcript) [my emphasis].

[35] The importance of the apparent misquoting of the evidence must be considered in the context of the entire summing up. At the stage where the learned judge referred to wounds, instead of one wound, she was directing the

jury about the elements of murder, one of which was that the deceased died as a result of the injury received (page 272 of the transcript). It is of course the aim that the learned trial judge must accurately recount the evidence when adverting the jurors' minds to it. However, where an error occurs, as it did with this aspect of the evidence, one important question must be as to whether the jury might have reached a different verdict had the evidence been accurately recounted. In our view, what was important here was the cause of death of Mr Turner. The actual number of injuries, it seems to us, was of no consequence in deciding on this verdict where the challenge is as to the identity of the killers, and not to the death of the deceased by the firearm. The judge's direction to the jury that the prosecution must satisfy them so that they were sure that it was the injury that caused the deceased's death (page 278 of the transcript), was accurate and would rectify any misconception caused by the misquoting.

[36] It is also true that the learned trial judge had referred to the witness' evidence that he saw each applicant point a gun at the deceased and then heard explosions (page 267 of the transcript). However, the witness had testified that there was one explosion or gunshot at first, he ran and then after that, he heard more explosions. Here again, the context in which the judge gave this inaccurate review of the evidence is important. She was, at that stage in referring to the explosions, directing the jury on the law concerning common design and said:

> "Your approach to the case should therefore be, in looking at the case for each of the accused, you are sure that with the intention I have mentioned, each took some part in committing the offence with the other, each is guilty." (page 267 of the transcript).

She concluded to the jury that it did not matter which of the applicants shot the deceased, if they accepted the evidence that both men pointed a gun at the deceased and then there were explosions. The reference to explosions, rather than explosion, is inaccurate, but in the circumstances of this case, would not have affected the verdict.

Circumstantial evidence

[37] The directions of the learned trial judge in this regard were without fault. She highlighted the fact that "circumstantial evidence can be powerful evidence but it is important that [the jury] examine it with care" (page 269 of the transcript). She reminded them of the circumstantial evidence on which the prosecution was relying and concluded at page 270 of the transcript:

> "…[Y]ou have to look to see whether the evidence reveals any other circumstance which may be of sufficient reliability and strength to weaken or destroy the prosecution's case."

The submission by counsel that the trial judge did not direct the jury adequately on circumstantial evidence is without merit.

Pressure for the verdict to be unanimous

[38] It is agreed that the learned trial judge did not place any pressure on the jury to return a verdict speedily. The issue is whether the jury were pressured into returning a verdict that was unanimous. In any event, even if there had been pressure for a unanimous verdict, such a verdict need not have been one of guilt. It could be a unanimous verdict of not guilty. After they had retired for 1 hour and 15 minutes, the jury returned and announced that they had not come to a unanimous verdict. After some exchanges with the judge, the foreman asked:

> "Madam Foreman: We just want to find out at this point in time, do we all have to have one decision?
>
> Her Ladyship: That is what I say, your verdict must be unanimous.
>
> Madam Foreman: And it is not, your Honour.
>
> Her Ladyship: And do you think that if you have some more time to talk it over, you will come to a unanimous decision? Because the whole point of it, you have to give and take, you have to listen to each other's views and give your own and then you come to a decision that is the whole point of the jury service. Do you think that you need additional time and I can assist?" (page 293 of the transcript)

In our view, far from pressuring the jury to be unanimous, the judge was here enquiring as to whether they wished additional time to discuss each other's

views in order to make a decision, and whether there was any assistance which she could give.

Assistance to the jury

[39] Counsel, Mr Chumu Paris, for the applicant Morris argued that the learned judge had not properly ascertained what the problem was that the jury had encountered which had caused them to return to ask questions of the judge, and this would therefore be a material irregularity in the trial (**Linton Berry v R** Privy Council Appeal No 40/1990). When the jury had returned to the court room and announced that they had not arrived at a unanimous verdict, the judge asked them if there was something that they needed in law and whether they wanted any direction in law (page 292 of the transcript). The foreman then wanted to understand what the judge meant when she had referred to questions that they might have "in law". The foreman had said:

> "Your Honour, can you just explain to us in law, the question it must be in law?" (page 293 of the transcript)

The learned trial judge did not directly answer the question posed but offered to hear the question and herself determine if it would be proper for her to answer.

> "HER LADYSHIP: Maybe you don't understand, so tell me and if I can answer I will answer you, and if I can't, as long as what you are asking it does not border on your function." (page 293 of the transcript)

The question that they then posed was whether they had to be unanimous, a question with which the learned judge adequately dealt, as detailed below. The

effect of that answer is that although the jury did not get a response as to what was meant by "in law", they were given the opportunity, and took the opportunity, to ask any question they wished. The submission that there would therefore have been an irregularity resulting from their lack of understanding as to their role is therefore without merit. The judge had repeatedly reminded the jury of their role to come to a proper verdict. She had told them that they could not reach a guilty verdict unless the prosecution satisfied them so that they were sure of the guilt (pages 245, 272, 274, 277, 286 of the transcript).

[40] Another issue raised was whether the learned judge explained to the jury the effect of their failure to arrive at a unanimous verdict and whether they themselves would be required to hear the same case again. After indicating that their verdict at that stage was not unanimous, the jurors then asked:

"Madam Foreman	....Your Honour, instead of us taking this longer than we would like to, I would like to ask a question. What if they do not change their minds from the decisions that were taken from the jury room, what happens from here? Because we are not sure.
Her Ladyship:	Well, it is what is called a hung jury. If you can't decide then the whole process will be gone through again.
Madam Foreman:	Thank you, your Honour. Your Honour, the jury would like to find out if this would be the same set of jury that will try the case again or a new set?" (page 295 of the transcript)

[41] The query of the jury as to whether it would be those same jurors who would hear a re-trial, in our view, is open to two interpretations. It could reflect a concern/worry that the jury would have had to hear the same trial again if their verdict were not unanimous or it could reflect their curiosity as to the normal procedure for a re-trial. The question now, though, is whether that enquiry by the jury, whatever it may have meant, was adequately dealt with by the judge. Did the jury understand that their duty was to come to a proper verdict, not necessarily a unanimous one? Did they come to a unanimous verdict because of an erroneous view that they would have been required to hear the same case again if the verdict were not unanimous?

[42] The discomfort with which the judge viewed the question which was being asked was apparent, when she responded:

> "Oh dear, this really not -- and I think this was told to you when you got your orientation. What you have to ask me is something that has to deal with the case…" (page 295 of the transcript)

She did not answer the jurors' question as to whether they would have to sit as jurors in the event of a re-trial. Instead, she reminded them of their duty to consider the evidence and the statements of the accused:

> "So I am going to ask you to go back and to talk again and see if you can arrive at a verdict." (page 295 of the transcript)

[43] It is well-established that one of the roles of the trial judge is to assist the jury to come to a proper verdict by giving them clear and accurate directions on the law and by reminding them of the salient features of the evidence. It is critical to their decision-making function that the jurors have a full understanding of the law and complete recall of the evidence. The jury's deliberations must be free of any pressure whatsoever and the jurors must be made to understand that they should take as much time as is necessary in their deliberations, in order to reach the proper verdict. Throughout the summing-up, the learned trial judge had referred to their duty to discuss among each other and come to a verdict. The directions to the jury show no indication whatsoever that the jury were being hastened to come to a unanimous verdict or indeed, any verdict at all. The jury had been deliberating for 51 minutes before being called back by the judge to receive additional directions which she had omitted. After receiving those directions, they considered for an additional 1 hour 11 minutes before returning with questions for the judge. They asked for, and received assistance, with those queries, then deliberated for a further 1 hour and 20 minutes before returning the guilty verdicts. They had therefore considered the verdict for a total of 3 hours 22 minutes before reaching their decision, which does not in our view, reflect a speedy decision. In our view, the assistance which the learned judge gave to the jury in this regard was adequate.

Conclusion

[44] The jury in this matter showed keen interest in the proper determination of this matter as evidenced by their questions as to certain aspects of the case for which they sought and received more clarity. The learned trial judge did not respond to each question directly but nonetheless dealt fully with each enquiry ensuring that the jurors were fully cognizant of their role and of the procedure to reach a true verdict according to the evidence. The jury returned the verdicts of guilt, after due consideration and the sentences fall within the usual range for this offence. There is no reason to disturb the convictions and sentences. For these reasons we refused leave to appeal.