

JAMAICA

IN THE COURT OF APPEAL

ON REFERRAL FROM THE SUPREME COURT

SUPREME COURT MISCELLANEOUS APPEAL NO. 1/07

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.(Ag.)**

KEVIN BRYAN V REGINA

**Robert Fletcher and Miss Tamika Harris for the convicted man
Kevin Bryan**

**Mrs. Simone Wolfe-Reece, Assistant Director of Public
Prosecutions (Acting) and Ms. Dahlia Findlay, Assistant Crown
Counsel, for the Crown**

September 24, 26, November 28, 2007

PANTON, P.

1. This matter was referred to us by Almarie Sinclair-Haynes, J., acting under powers set out in section 55 of the Criminal Justice (Administration) Act. She posed the following question for our consideration:

“Where the foreman stated in answer to the Registrar that the accused was guilty of carnal abuse but the jury by a majority including the foreman almost immediately after their discharge indicated that they did not deliberate on the question of carnal abuse, should the

verdict be allowed to stand or should there be a retrial?"

On September 26, 2007, having heard arguments in the matter, we ordered that the verdict would stand and that the convicted man was to be remanded in custody and taken before the learned judge immediately for sentencing.

2. The factual background is interesting, to say the least, and is not in dispute. Mr. Kevin Bryan was tried by the learned judge and a jury that comprised five ladies and two gentlemen. The indictment charged the offence of rape. Having received instructions in respect of not only rape, but also carnal abuse, the jury retired to consider its verdict. After a period of fifty-six minutes, the jury returned to render its verdict. The foreman, in clear tones, on being asked by the registrar, said that Mr. Bryan was not guilty of rape. Thereupon, she took her seat. The registrar invited her to stand and then proceeded to inquire of her whether they had found the accused guilty or not guilty of carnal abuse. The foreman replied thus:

"He is guilty of carnal abuse".

The registrar then said:

"Madam foreman and members of the jury, you say Kevin Bryan is guilty of carnal abuse?"

The foreman replied :

"Yes".

The registrar repeated:

“Madam foreman and members of the jury,
you say he is guilty of carnal abuse?”

The foreman replied:

“Yes”.

3. Following the above scenario, the learned judge discharged the jury having thanked them for listening. She added that she knew that they had discharged their duty. She said further that they had taken the time to listen keenly to the evidence, and had discharged their duty. The matter was thereupon adjourned to the 30th March, 2007, for sentence to be imposed. The time is not noted in the record of the proceedings but, by referring to the time that the jury had returned to the courtroom (11.51 a.m.), it may be taken that the adjournment of the matter occurred at about noon.

4. Counsel for the Crown and counsel for the defendant at the trial, in documents filed by them in this Court, have indicated that they had observed that the foreman had hesitated, and “half-smiled” before rendering the verdict of guilty. The record of the proceedings indicate that there was no reaction, verbally or otherwise, from any of the other jurors up to the moment they left the courtroom. Thereafter, Mr. Sheckleford, attorney-at-law, intervened at the request of Miss

Tamika Harris, the attorney representing Mr Bryan. Page 142 records the intervention thus:

“Mr. Sheckelford: ‘What can I say...’

Her Ladyship: ‘We have a difficulty, because what transpired in the jury room is not for our knowledge.’

Mr. Sheckleford: ‘What I would suggest, they all should return’.”

The learned judge described the situation as a “calamity”. Mr. Sheckleford then proceeded to advise the judge thus:

“...I think we should direct the Registrar to call them in court and they be asked again”.

At page 143, Mr. Sheckleford continued:

“M’ Lady, before they be asked any questions about anything again, perhaps the Foreman could be asked to clarify what she said before she is asked to say anything else, and what they all agreed before they came in, then they could be asked again; but they need to explain, before. If the explanation is such that there is not – I think an explanation ought to come from the Foreman in respect of what it is they said which was not properly heard by the Court, with respect”.

5. The record at page 144 shows the learned judge addressing the foreman without any indication that she (the foreman) and other jurors had by then returned to the courtroom. The time is also not shown on the record. However, the learned judge, in her referral of the matter to this Court, said that she (the judge):

“requested that the Registrar, Counsel for both Crown and defendant and police should speak to the members of the jury who were outside the courtroom to ascertain whether they were of the opinion that the verdict was erroneous without soliciting any information as to their deliberations”.

6. Upon the return of these persons, according to the learned judge, “the court was informed that that was indeed so”. However, she said, the foreman had already left the precincts of the court. She then gave instructions for all the jurors to be assembled. The court was reconvened at 2:00 p.m. The foreman and five other jurors were in attendance. There followed a dialogue between the judge and some members of the jury. The foreman said that at no time had they come to a verdict of guilty on either charge, and that they had mentioned carnal abuse as an aside, but they did not know “if it was a charge of rape or a charge of carnal abuse”. A male juror told the judge that the foreman had blurted out the verdict of guilty, while a female juror said “just about two or three persons had briefly mentioned carnal abuse to look at, but no in-depth conclusion was come to by all of us on that issue”. The foreman concluded by saying to the judge that, “it was not the intention of guilty of carnal abuse”.

On the 30th March, 2007, when the matter came back before the Court, all seven jurors were in attendance. In the absence of Mr. Bryan (the convicted man), the judge posed a few questions to the

juror who was absent during the enquiry on the 9th March. This juror indicated that he had left the precincts of the court immediately after the verdict, went to the washroom, and was "not aware of a mistake as to the verdict".

7. Before us, Mr. Robert Fletcher, now appearing for the convicted man, submitted that it was still the law that once a jury has been discharged, it is *functus officio*, no longer existing for the purpose for which it was convened, and ought not to be reconvened except in certain circumstances. He said that the Court holds to itself a discretion that it will not yield, to act in the interests of fairness and justice if the right circumstances obtain. He referred to the following cases:

1. **R. v. Andrews** (1986) Crim. L.R. 124
2. **Daniel Aylott** (1996) 2 Cr. App.R. 169 at 175
3. **R. v. Connor and Another and R. v. Mirza** [2004] UKHL 2
4. **R. v. Charnley** [2007] EWCA Crim. 1354

8. In **Andrews**, a jury returned a verdict of not guilty, but ten minutes later while they were still in the courtroom, they handed a note to the judge saying they thought that they had returned a verdict of guilty. The judge after hearing submissions took an amended verdict. The appellant appealed against the conviction, submitting that it was wrong for the judge to have accepted the amended verdict. The

English Court of Appeal, in dismissing the appeal, held that the judge had discretion whether to allow the alteration of the verdict. In exercising that discretion, he should take into account all the circumstances, in particular, the length of time from the original verdict, the probable reason for the initial mistake, and the necessity for justice to be done not only to the defendant but also to the prosecution. It should be pointed out that the jury had not been discharged.

9. In **Aylott**, there were two accused persons on trial. The jury foreman sent a note to the judge, whereupon the judge, misunderstanding the note, discharged the jury. A second note indicated that the jury had arrived at a verdict prior to the sending of the first note. The judge accepted the verdicts which included the conviction of the appellant of the offence of murder. On appeal, the English Court of Appeal held that the discharge had been based on a fundamental mistake, and that in the circumstances, the judge was entitled to reconsider the situation and take the verdicts. The principle underlying the cases was the fundamental concern of the courts to ensure that proceedings were fair both to a defendant and the public, and that justice was done.

10. So far as the happenings in a jury room are concerned, Mr. Fletcher contended that although there is a rule against the revelation of discussions in the jury room, there is a discretion in the judge to make enquiries where justice demands it. In other words, the rule against revealing the deliberations in the jury room is not absolute. The overriding mischief, he said, is the question of contamination of the jury. In the instant case, he submitted, the learned judge was correct to have inquired into the inner workings of the jury as it was in the interests of fairness. A jury, he said, has not completed its job until it has considered and answered all counts on an indictment, or what has been left for them to consider.

11. Mrs. Simone Wolfe-Reece, for the Crown, submitted that the question whether the verdict should stand should be answered in the affirmative, and that the question of a retrial was irrelevant. She pointed to the fact that the jury had dispersed, and that telephone contact had to be made with four of them to return for 2:00 p.m. She said that no exceptional reason had been put forward that would make it acceptable for the judge to go behind the veil of secrecy. The Crown, she said, was relying on the case **Laichan Nanan v The State** (1986) 35 WIR 358, a decision of the Judicial Committee of the Privy Council.

12. The principles stated in **Nanan** remain the law of Jamaica. This Court upholds the long-standing and well-established principle that once a verdict has been delivered and accepted, and the jury discharged, the court receiving that verdict is not at liberty to receive evidence from the jury that they meant otherwise. The time for jurors to express their dissent is when the foreman is misrepresenting their decision. In the instant case, the jurors, whom the judge described as having listened keenly, remained absolutely silent in the face of the response by the foreman to the registrar on two separate occasions that the accused was guilty, and that was the verdict of the members of the jury and herself. It was unusual for the question to have been posed twice, but that is what occurred; and it received two clear identical positive responses from the foreman. The jurors then left the courtroom to resume their normal lives, without any of them showing any sign of dissent.

13. In this country, it is not unknown for persons to loiter in the precincts of the courts and, at times, subtly attempt to intimidate jurors and witnesses with a view to influencing the outcome of cases. There is no evidence that this happened in the instant case. However, the courts have to guard against situations wherein a juror, having served and been discharged, may feel that it is politic to return to say that he or she did not agree to the verdict that had been rendered. As

Harman, LJ said in **Boston v Bagshaw** (1966) 1 W.L.R. 1135 at 1137 D: "There would be no end to it".

14. The answer to the query made by the learned judge is that the verdict stands, and the case is to proceed to the next stage. Mr. Bryan will be remanded in custody and taken before the Home Circuit Court immediately for a date to be fixed for the completion of the matter before the learned judge.

HARRIS, J.A.

I agree.

DUKHARAN, J.A. (Ag.)

I agree.

PANTON, P.

ORDER

The question posed by the learned judge is answered in the affirmative. The verdict of the jury is hereby ordered to stand. Mr. Bryan remanded in custody to be taken before the Home Circuit Court immediately for the matter to be fixed for completion before Sinclair-Haynes, J.