JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 250/01

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A.

REGINA V LINTON EDWARDS

Delano Harrison, Q.C., for the appellant

Mrs Janice Nelson-Brown for the Crown

April 7, and May 21, 2003

BINGHAM, J.A:

The appellant was tried and convicted in the Saint Catherine Circuit Court at Spanish Town for the non-capital murder of Calvin McLeod, committed on April 24, 2001. He was sentenced to imprisonment for life. By way of a non-sequitur given the provisions of section 6(4)(b)(ii) of the Parole Act, the learned trial judge ordered that he serve seven years before being eligible for parole.

His application for leave to appeal to the single judge having been considered and refused was renewed before this Court. We heard the submissions of counsel at the end of which we treated the application for leave to appeal as the hearing of the appeal, allowed the appeal, quashed the conviction and set aside the sentence. In the interests of justice, we ordered a new trial.

At the time of handing down our decision we undertook to reduce our reasons into writing. This we now do. As the matter will have to be retried our observations will of necessity be brief.

The facts out of which the charge arose related to a shooting incident on a farm at which the appellant was employed as a ranger. On the day in question he was at a section of the farm called "Coolie Common". The appellant was in the act of attempting to impound a goat that had just had kids. Some men including the deceased came up to where the appellant who was armed with a rifle was standing. A machete then fell to the ground from the hand of one of the men. The appellant retrieved the machete and in the process fired two warning shots in an attempt to scare off the deceased. A third shot was then fired by the appellant which caught the deceased causing a fatal injury. To quote the learned trial judge in his summation:

> "The defence is saying I was acting in self-defence. I was under pressure of attack. In any event, I did not mean to shoot the deceased. I fired to scare him off and he was shot and killed."

On the prosecution's case as presented, this case was one of non-capital murder. On that case this was the shooting of an unarmed man by the appellant in circumstances in which he harboured an intention to kill or cause grievous bodily harm to the deceased.

On the defence's case, the appellant said that he was acting in self-defence in circumstances in which he feared an attack on his person which was imminent. The appellant on the evidence also raised the issue of lack of an

intention to kill which if accepted by the jury, while absolving him of the capital charge, would have resulted in a verdict of guilty of the lesser offence of manslaughter.

Learned Queen's Counsel for the appellant sought and obtained leave to argue some six supplementary grounds of appeal. In view of the decision to which we came, it is only necessary for us to refer to supplementary ground 1. This ground reads:

> "**(1)** The procedure by which the learned judge ultimately received the jury's verdict was so flawed as to constitute a material irregularity."

The ground was fully explored in counsel's written submissions. Faced with this ground of complaint, learned Crown Counsel agreed that the manner in which the verdict was taken was irregular. She submitted that in the interests of justice a new trial should be ordered. Learned counsel for the appellant did not take issue with the position taken by counsel for the Crown. With this stand taken by counsel we are fully in agreement.

It may be convenient at this stage to set out the material which led to the complaint in this case. Following the summation of the learned trial judge the jury having retired to consider their verdict returned to the courtroom after being out in retirement for just fifty minutes (3:30 p.m. to 4:20 p.m.). After the roll call the following dialogue ensued:

> "REGISTRAR: Mr. Foreman, please stand. Members of the Jury, have you arrived at your verdict?

FOREMAN: No, we have not.

HIS LORDSHIP: How are you divided?

FOREMAN: Ten to two.

HIS LORSHIP: What time they retired? It has not reached – you see, a unanimous verdict – there are certain circumstances to accept verdicts that is not the verdict of you all. There are circumstances. That have not arrived, not arisen. You retire and see if each one of you are agreed. After the time I can accept a majority verdict, I shall call you and give you further directions. So, retire and when the time comes and you are not agreeing ...

JURY RETIRES AT 4:23 p.m.

COURT RESUMED AT 4:50 p.m.

JURY RETURNED AT 4:53 p.m.

REGISTRAR: Mr. Foreman, please stand. Have you arrived at a verdict in respect of murder?

FOREMAN: We are still the same where we were as before.

HIS LORDSHIP: Mr. Foreman, is there any area I could be of assistance to you in?

FOREMAN: Area? The area, the matter of manslaughter.

HIS LORDSHIP: In relation to murder, have you arrived at a unanimous – you are unanimous in relation to murder?

FOREMAN: Yes, your Honour.

HIS LORDSHIP: We take it you have arrived at a verdict in respect of murder, all agreed?

FOREMAN: We are unanimous

HIS LORDSHIP: I expect you would have been told what are the ingredients which constitute murder; what the Prosecution must prove. You have to come to a decision in relation to Murder before you can consider Manslaughter.

If you have to all agree, be a unanimous decision, whatever it is, in relation to Murder before you can go to consider the question of Manslaughter. Do you think there is any likelihood of your coming to a unanimous verdict in respect of the murder?

Just probably, you ought to retire again.

MR.FOREMAN: And swing that way. It is a bit –

HIS LORDSHIP: Decide as to how you are going to swing in relation to what you are saying.

Okay, you said you are retiring. You may retire. Yes?

JURY RETIRES AT 4:55 p.m.

JURY RETURNED AT 5:08 p.m.

REGISTRAR: Mr. Foreman, please stand. Mr. Foreman and your members, have you arrived at a verdict in respect of murder.

MR. FOREMAN: Before I answer, I would ask His Lordship to clarify what he says on murder.

HIS LORDSHIP: I don't know if you need more clarification on this.

MR. FOREMAN: A few members are not clear.

HIS LORDSHIP: Before you can go on to consider manslaughter, you have to be unanimous in respect of your decision to murder.

MR. FOREMAN: That's clear as I understand it sir.

REGISTRAR: Mr. Foreman have you arrived to a verdict in murder.

A. Yes.

Q. Is it unanimous?

A. Yes.

Q. That is are you all agreed?

A. Yes, sir. Yes.

Q. How say you, do you find the accused man guilty or not guilty of murder?

A. Guilty."

From the printed record the Foreman made it known that the jury had not yet arrived at a verdict. A discreet enquiry from the learned trial judge in relation to the two offences left for the consideration of the jury would have revealed whether it was murder or manslaughter that had created a problem. They ought then to have been sent back into retirement after having been reminded that they first needed to be unanimous in considering murder. If they were all of the view that the accused (appellant) was guilty of murder, they could then return from the jury room and say so. If they all agreed that the accused was not guilty of murder then they could go on to consider the alternative offence of manslaughter. If unanimous as to manslaughter, then they could say so. If not all agreed, on manslaughter, then a divided verdict in the proportion of nine to three or less could also be taken by the trial judge. If the division was eight to four or upwards, then they could be sent back into

retirement to further consider the matter to see if they could come to an agreement or if still divided, then in an attempt to break the deadlock.

From the dialogue in the printed record between the learned trial judge and the Foreman, it is clear that even though the jury had been told before retiring for the first time, that they needed to consider murder first, they were not then told that they needed to be unanimous. This omission was compounded when on returning from retirement for the first time, an enquiry was made by the learned judge as to whether they were divided and the extent of the division. At that stage it was not known which offence the division was related to.

On the second occasion that they returned from the jury room, it was now even more apparent that they were considering manslaughter and although they were still divided, the hour having passed since the first retirement, (3:30 p.m. to 4:53 p.m.), the way was now clear for taking a verdict in respect of both offences. The jury were made aware before their second retirement that they had to consider murder first and that they had to be unanimous in respect to this verdict. To be considering manslaughter, they had to have come to a conclusion of not guilty in respect to the charge of murder.

For the learned trial judge not to take the verdict at that stage but to resort to sending the jury back into retirement rather than resolving the problem which regrettably he had created from the outset, only served to further confuse them. This was made more apparent when the jury, directed to retire for a third

time to consider both murder and manslaughter, the response of the foreman was;

"... and swing that way. It is a bit –"

suggesting thereby that as they had already indicated, they were unanimous as to murder and were now considering manslaughter in respect of which they were divided. For them to be then told by the learned trial judge that they still needed to be considering murder, was an error. The failure on the part of the learned judge to take the verdict rather than sending the jury back out, into retirement for a third time in our view, amounted to a procedural irregularity of a material nature as to vitiate the entire trial.

It is significant that even after the third retirement, the jury were still not clear on the exercise they were undertaking. On being told by the Foreman that;

"A few of our members are not clear."

the learned trial judge's response was:

"I don't know if you need more clarification on this."

We wish to take issue with this statement made by the learned judge as there can never be any stage of a trial with a jury that the jury may not need some assistance from the learned trial judge.

For guidance we would wish to refer in passing to the sage words of advice contained in the judgment of The Board of the Judicial Committee of the Privy Council in ***Berry v The Queen*** [1992] 3 All E.R. 881, a decision on an

appeal from this Court. In that case Lord Lowry in delivering the advice of the Board said (p. 894 H-I):

> "Their Lordships have already met this difficulty in some other recent cases. The jury has sought assistance and once it appears that the problem is one of fact, the judge has not inquired further but has merely given general guidance as in the present case. 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 upon the circumstances, since if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part." (Emphasis supplied)

It is in this regard that we must emphasize that taking of verdicts is as much an integral part of the trial process and that every effort should be taken by trial judges to ensure that such verdicts are properly taken reflecting the true and correct decision to which the jury have come.