[2015] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 93/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

HUBERT FLETCHER v R

Delano Harrison QC and Oshain Cousins for the applicant

Ms Sanchia Burrell and Ms Theresa Hanley for the Crown

20, 21 April and 16 October 2015

SINCLAIR-HAYNES JA (AG)

[1] The applicant was tried by Sykes J and a jury in the Home Circuit Court for the offence of rape. On 29 July 2009, he was convicted and sentenced to 15 years imprisonment. His application for leave to appeal his conviction and sentence was refused by a single judge of this court. His renewed application for leave to appeal was heard and refused by the full court on 21 April 2015. The sentence was ordered to commence on 29 July 2009. We promised to provide our reasons for the decision and this is a fulfillment of that promise.

The Crown's case

[2] It was Sunday, 27 November 2005, at about 9:50 am. The complainant, a girl of 17 years, was on her way to a shop which was approximately one mile away from her home in Stony Hill, Saint Andrew where she lived with her mother and stepfather. Whilst walking along the Stony Hill main road, she saw the applicant whom she did not know, sitting on the pavement on the opposite side of the road. But for the applicant and her, the road was deserted. She found it odd and was concerned that he was sitting on the pavement. He greeted her by saying good morning and she responded. He beckoned to her and she went to him.

[3] He informed her that he was from Tivoli and he had ridden a bus without enough money to pay his fare. The conductor, as a result was disrespectful to him. According to her, he told her that he discovered that the conductor lived in a scheme which was close to the residential area and he was in search of him to kill him. She told him it was unnecessary and he "should leave the situation alone". His hitherto pleasant countenance transformed and he became aggressive. He angrily told her to shut up and listen to what he was saying. He told her he had a gun in his pocket which needed fixing. He pointed to an abandoned house which was nearby and informed her that that was where he intended to fix the gun.

[4] He then hauled her about 25-30 feet away (distance adjudged) to the back of an abandoned house. In vain she attempted to escape his grasp. She wept but because of fear she did nothing else. He questioned her about her religion and whether she was a

virgin. She answered. Angrily and loudly he commanded her to remove her pants and underwear and forcibly had sexual intercourse with her. During the assault, the dogs from a neighbouring house began barking. The occupiers of those premises were not at home (as they attended church on Sundays). The applicant then dragged the complainant some 12-15 feet away into some bushes by a broken down wall where he resumed sexual intercourse with her.

[5] She did not say anything because she felt weak. Nor did she attempt to escape because there was a precipice beside the broken down wall to which he had dragged her. She tried to co-operate with the applicant so as not to give him any reasons to shoot her. During the incident, he did not speak to her.

[6] Upon ending his assault, he warned her that he knew her and threatened to kill her if she told anyone. As a result of the threat, she became concerned for her family. She went to the front of the abandoned house. There the applicant inquired of her, where she was going. She intended to go to the station but instead deceived him that she was going to the shop.

[7] He allowed her to leave and she quickly walked away towards the bus stop. Whilst walking, a car drove alongside her. She initially continued walking because she feared that the occupants might have been the applicant's friends. She eventually spoke to the occupants whom she discovered were police officers. She took them to the abandoned house but the accused was not seen. She was then taken to the Stony Hill Police Station where she spoke to a Mr Wilkie who consequently took her to the Rape

Unit. There she gave a statement and was examined by a doctor. A sample of her DNA was also taken. On 10 January 2006, she positively identified the applicant at an identification parade.

Applicant's case

[8] It was the applicant's sworn testimony that he and the complainant were in a relationship. He had been visiting Brooks Level Road for some 15-20 years because his godfather, a Justice of the Peace lived there. He first met the complainant in March 2005 on Brooks Level Road whilst she was on her way from the shop. On that occasion, they conversed for about five minutes. He met her some two weeks later at the same place on her way to the shop.

[9] They subsequently met in Half-Way-Tree. It was his evidence that he drove a Honda motor car. He once took her to his sports club on Molynes Road where pool and skittles were played. He introduced her to the other club members. On that occasion, he picked her up on Washington Boulevard. She however disliked the game. When they left, he dropped her off at Brooks Level Road. On another occasion they went to Priscilla's, a night-club which was on Constant Spring Road. They met at the same stoplight at the intersection on Molynes Road and Washington Boulevard. He introduced her to the club members but she did not like the game so he took her back to Brooks Level Road.

[10] On the applicant's evidence, the day before he was accused, the complainant telephoned him requesting a sum of $10,000.00 which he had promised to give her

about a month before to purchase a cellular phone. Although the complainant had told him that the phone cost $5,000.00 he decided to give her $10,000.00.

[11] Consequently on the day of the alleged incident, he drove his car to Brooks Level Road to meet her. They met at his godfather's gate but he parked his car a couple feet away. They spoke and she told him she was going to the shop to purchase curry. They both walked to a building where the complainant removed her sweat pants and they had sexual intercourse as planned.

[12] That building was about three houses away from his godfather's. They did not go inside the building. They had gained access to the yard as there was no gate. There was no wall behind the house and no one was insight. They then returned to the road and spoke for a while. She then left alone for the shop having refused his request to accompany her. She told him she was late in returning home and very quickly hurried away. He did not give her the money as promised.

[13] He returned to Brooks Level Road on several occasions to work but he did not see the complainant. He did not call her and she did not contact him. While driving on Golden Spring Road, having left Brooks Level Road where he had been working, he was apprehended by police. He was, up to that point, unaware of her complaint.

[14] The applicant also relied on the evidence of Ms Camille Clarke. Ms Clarke testified that the applicant introduced the complainant to her as his girlfriend at a game

which was being played at Molynes Road. He did not tell her the name of the girlfriend. He merely said:

> "Brigette, see my girl here."

When pressed as to the time the introduction lasted she said:

> "How long? Hi and hello, lasted for about five minutes."

[15] The only description she was able to provide was that the girlfriend had "some scar on her cheek". In fact in answer to Crown counsel as to how long she saw the girl, she said:

> "All right, miss, him introduce mi, him goh inside, mi nah look, mi nah watch them every move. But I know him introduce me and go into the bar. I wasn't watching them to see how long them there."

[16] It was also her evidence that she had a good look at the girl. However in answer to the learned judge, she said:

> "Me inside a the place, eye contact me not watching her, but if me eye look round, him not duppy, me not see her stare pon her."

It was her evidence that she saw his girlfriend once or twice. She saw her on an occasion, a week or two after the introduction when he went to the gas station she worked to purchase gas. She saw them on another occasion at the gas station which might have been within the same month.

Grounds of appeal

[17] The applicant initially relied on the following four grounds of appeal:

"(a) **Unfair Trial:** – That the Court failed to recognised the fact that I only intercourse with the witness who I shared a [sic] intimate relation with for a period of time.

(b) **Lack of Evidence:** - That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me lack facts and credibility, thus rendering the verdict unsafe in the circumstances.

(c) **Misidentity by the Witness:** – That during the Trial the prosecution failed to put forward any piece of concrete evidence to link me to the alleged crime.

(d) **Miscarriage of Justice: –** That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict [sic] me, lack facts and capabilities, thus rendering the verdict unsafe in the circumstances."

Supplementary ground of appeal

[18] On 17 September 2012, the following supplementary ground of appeal was filed on his behalf.

> "The learned trial judge failed to ascertain the precise nature of the problems which the jury expressed to him that they had been experiencing during their deliberations. This default on the learned trial judge's part occasioned a miscarriage of justice."

Learned Queen's Counsel abandoned the original grounds of appeal filed. He sought and obtained the leave of the court to argue the sole supplemental ground.

The trial

[19] Scrutiny of what transpired is necessary in determining whether learned Queen's Counsel's criticisms are meritorious. The jury retired at 12:05 pm. At 2:10 pm they returned and sought, via the foreman, the learned judge's assistance in respect of a

question concerning what the foreman stated as a majority vote. The learned judge enquired whether they had arrived at a decision. The foreman having responded in the affirmative, he inquired of the division. He was informed that it was four, three. The learned judge informed them that he preferred clear majorities and further inquired whether he could provide further assistance on the law or evidence. Indeed, he inquired whether he could assist them further. The foreman responded thus (pages 73-79 of the transcript):

> "No, probably we need to go back and go through the evidence one next time."

As they were about to retire, the foreman said:

> "I was just about to say maybe you could give us again how we view opinions that we have formed. Evidence was presented, how do we weigh these two things? Opinions in terms of—okay, the witness has presented himself in a certain way. How you believe them and how you weigh that actual evidence?"

The learned judge replied:

> "All right, okay, I suspect I understand what you are asking. Please have a seat, Mr. Foreman. Whenever you have a trial – now the oath that you took is to return a true verdict according to evidence. And so, as the trial goes on – since you are not blank slates, I imagine that you would be forming views and so on about the particular witnesses. But as I kept reminding you, that you ought not to come to a fixed position until you have heard all the evidence and then the addresses and the summation from the trial judge.
>
> It is only at that point now that you are required, and indeed in a position, to take diminutive position. Until that time you have any opinion, you

don't form them too firmly. Wait until everything has been said and during deliberative process, you go through the evidence in light of the directions in law and make your decision.

Now, when a witness testifies, you will have to use your window of opportunity that you have of seeing the witness because that is not one of those instances we are going to have when you are taping your favourite soaps. Some of you may have your electric equipment- -twelve o'clock comes, whatever it is - - okay, we can go home at six o'clock and play and review to our hearts' content.

The conflict of a trial, your window of opportunity is: One, the witness is in the box and that is it. And you will have to use, now, your individual experiences and collective experiences to determine whether or not to believe a particular witness.

So, you have regard to all things about the witness, the age, the gender, the apparent levels of education, how they express themselves or how they don't express themselves. You look at their, lawyers call it demeanor, but it is their body language; how they respond to particular questions. All of that you take into account when assessing the witness and you use your individual experiences as well as the collective.

So, you as individuals and then, collectively- - and one of the strengths of the jury system is that you have persons here, you have a mixed jury, men and women, different age groups, different positions, possibly different socio-economic backgrounds. To the expectation is when deliberative process is going on. All of that is brought to bear, firstly, as individuals and then as a body. So for example - - let me see if I can give you an example of bringing home the point. Well

for those of you who are old enough, you know when they had offences where persons were charged for holding years and years ago - - early 70's and 80's and so on and person were brought for these things and there is actually a case that went to Sutton Street, where all the witnesses were prosecuted twice. Someone from the agency had gone into a shop and seen some item in the shop and wanted to purchase it. The person said no that is for evening stock, as the case may be. So, was brought to court, same prosecutor, same witness, same defender and you had two different result. One, she was convicted; the other, she was acquitted. And what made the difference was the decider of fact had different experiences. One judge had the experience of operating a job. So, it makes perfect sense that one would have day stock and night stock, one would not have sufficient experience in his life. So, the different background and experience may cause people to express things differently. But then, collectively, you in that process, in your individuality, you try to act as jury to decide a verdict. No one can do it for you but nonetheless, even though you are trying to agree as a group you are nonetheless individuals, yes.

So, if in this process after all this is said and done and simply unable to agree so be it. But nonetheless, you are to bring to assist your own background because you are who you are. Your backgrounds have shaped your level of education, your exposure. All of that is what you bring to the Court. No one can take that away from you, neither should you subdue it or represent as you don't have it. Don't want you to sit so friendly here because you are acting as a body. The decision may take place, another one may say 'A', another one may say 'B', and in the process of discussion, you know, such a wonderful girl, really didn't thought about it like that and it make sense to you, feel free to use it and say

> now that the person has pointed it out to, you know, when you and the person argued about things and you point, my goodness, I didn't thought about it like that before. Now, that I start to think about it, I now agree with you. Or you may say have [sic] heard what you have had to say but I still don't agree with you. So, that is what was meant when I indicated that, yes, this was what I said to you that your task is to prove the wisdom and experience and that you do that by giving your views to each other and within that, there must be discussions, arguments, give and take within the scope of oath; that is, to return a true verdict and this is how you have diminutive dialogue. Don't be afraid of it, to embrace the dialogue. Put forward your interpretation, hear what the other person have to say and the dialogue going backward and forward. You may adopt the other person's view or the other person may adopt your view, yes? So, that is how it is expected, sir.
>
> This part of the assessment, now, is solely your responsibility. I just simply point out the law and remind you of the prominent features of the evidence and the significance of that kind of evidence, what doesn't it mean and so on, for the purposes of issue. The case, all the assistance and interpretation is for you, starting at the individual level, your open perceptions but in the discussion, now, the collective experience, the give and take, the dialogue, the back and forth and so on. And so, you resolve the issues. So, I don't know if I have assisted. Have I assisted? Doesn't this - - and your concerns - - or I have missed the mark by a mile? You can tell me, you know. My ego is not that sensitive. If you tell me that I have missed the mark, all right, then I am going [sic] ask you to retire to deliberate."

[20] His further summation concluded at 2:20 pm and the jury withdrew for further deliberations. They returned at 2:41 pm with division of six, one. The learned judge

informed them that because they were given additional instructions they were required to deliberate for a further hour. He instructed them to retire for another 40 minutes before he could take a divided verdict. The jury withdrew at 2:46 pm and returned at 3:38 pm with the same division in favour of a guilty verdict.

Submissions on behalf of the applicant

[21] Learned Queen's Counsel complained that the judge failed to heed the uncertain tenor of the foreman's response that the problem was "the evidence" when he said:

> "No probably we need to go back and go through the evidence …"

He submitted that the learned judge failed to ascertain what it was about the evidence that required further deliberation.

[22] He argued that the learned judge ought to have inquired whether the difficulty lay with the prosecution or the defence's case or with aspects of both. He posited that the judge's response "to retire once the question has come up…either way…" was unclear as to what "question" the learned judge was referring the jury's mind to. He complained that the jury's inquiry as to how opinions which they formed and certain evidence ought to be dealt with were not clarified by the learned judge namely:

> (a) The manner in which the witness presented himself (the witness presented himself a certain way).
>
> (b) How you believe them.
>
> (c) How you weigh that actual evidence.

He said that those concerns were extremely unclear. It was therefore incumbent on the learned judge to establish clarity as to the nature of the "opinions" and what evidence which "was presented" posed the problem. He ought to have found out which witness' evidence posed the problem. And importantly, what was "that actual evidence".

[23] He submitted that instead of clarifying the specific problem the jury was experiencing, the learned judge directed them in broad and general terms concerning their role and duty. He highlighted the judge's directions at page 74 through to page 79 of the transcript. Learned Queen's Counsel postulated that it was apparent from pages 72 and 73 that the problem which the jury "grappled with during three (3) deliberations might have arisen from differing 'opinions' that had been formed concerning some evidence". He said that the learned judge's failure to ascertain the problem made it impossible to determine, from his "general" directions before the jury retired on the second occasion, whether he had resolved the problem. He said that it was the duty of the trial judge, whenever a jury returned for assistance on the facts or law, to ascertain from the foreman, the precise nature of the assistance required and provide the appropriate direction. Learned Queen's Counsel referred the court to the Privy Council decision in **Berry (Linton) v R** (1992) 41 WIR 244.

The law /analysis

[24] Lord Lowry's following enunciations in **Berry (Linton) v R** provide guidance on how trial judges ought to treat with problems which might confront the jury after they retire. In **Berry's** case the learned judge having ascertained from the foreman that the

problem concerned the evidence and not the law, did not inquire what the problem was. At page 259 of the judgment, Lord Lowry quoted the learned judge:

> "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."

Lord Lowry noted also that the learned judge reminded the jury that they were the sole judges of the facts and accurately summarized the "factual contest". He however said:

> "…But he 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… 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 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 circumstance, but their Lordships need not decide

how in this case they would have viewed such failure, seen in isolation."

[25] The issue in this case was solely credibility. The applicant's version of the facts was that he and the complainant were involved in a relationship. The difficulty with which the jury grappled was not legal. The problem was plainly the evidence. Had it been legal, the learned judge's failure to ascertain the specific problem would have been fatal. The issue is whether by not specifically ascertaining the precise aspect of the evidence which posed the problem, the learned judge withheld assistance which could be considered as constituting a material irregularity. The circumstances of the case dictate the answer.

[26] The problem, as deduced from the conversation between the foreman and the learned judge, did not necessitate the foreman informing the judge, whether verbally or in writing, as to the specific aspect of the evidence. Primarily, what was sought was guidance in weighing the evidence. The foreman specifically requested guidance on how to "view opinions" they formed. He required general assistance on the manner in which the evidence was presented, to wit: how to weigh the evidence; and how to deal with issues regarding the demeanour of the witnesses.

[27] The judge, having rightly understood that the difficulty was in assessing the evidence, adequately provided guidance by painstakingly explaining how to consider the evidence before them. He in fact implored them to inform him whether he had dealt adequately with the problem. The problem, having been a matter of how to "view opinions" and "weigh evidence", had the foreman shared the specific aspect of the

evidence which troubled them, the judge could not have properly provided any further guidance without risking conflation of his role, with that of the jury's role as deciders of the facts.

The Watson direction

[28] Ms Sanchia Burrell, for the Crown, submitted that the learned judge adequately and properly addressed the questions at pages 74 through to 79 of his summation. She argued that the foreman's question was clear and necessitated the **Watson** direction which the learned judge prudently gave. She submitted that the learned judge cautiously respected the safeguard which allows juries to arrive at verdicts free from judicial interference and without revealing their reasoning. The learned judge therefore maintained the line of demarcation between his function and that of the jury. Counsel referred the court to the cases **R v Watson and Others** [1988] 1 All ER 897; **Regina v Tommy Walker** SCCA No 105/2000 delivered 20 December 2001; and **Patrick Brown and Richard McLean v R** [2014] JMCA Crim 24.

[29] It is the view of the court that the learned judge confined himself to the acceptable parameters of what has become known as the **Walhein** direction as delineated by the English Court of Appeal in the case **R v Watson** and which is now regarded as the **Watson** direction. The learned judge reminded the jury of the oath which they had taken, which in his words, was to "return a true verdict according to [sic] evidence." He scrupulously avoided exerting any hint of pressure on them by not referring to any public inconvenience or expense which could result from a dissent as did the learned judge in **Walhein's** case. He correctly advised them that in their

deliberations they were to apply both their individual and collective experiences. He urged them to share their perspectives, but also to be willing to adapt the view of others if they agreed. He impressed upon them that although they were "trying to agree as a group" they were "nonetheless individuals".

[30] The words used by the learned judge, in our view, amply conveyed to the jurors, the words approved by Lord Lane CJ at page 903 in **Watson**, that:

> "In the judgment of this court there is no reason why a jury should not be directed as follows:
>
> 'Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the Jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily [ten of] you cannot reach agreement you must say so.
> It is a matter for the discretion of the judge whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought to be necessary or desirable, they are probably best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction.'"

[31] Learned Queen's Counsel relied on a number of authorities which are, in our view, distinguishable. First is the case of **Regina v Dwight Hylton** SCCA No 28/2000 judgment delivered 20 December 2002. The appellant in that case was tried and convicted for the offence of non-capital murder. His defence was alibi. The decisive issue in that case was identification. A complaint by the appellant was that the learned judge had failed to provide the appropriate assistance to the jury. The following is the discourse between the judge and the foreman.

"Registrar:	Madam Foreman please stand. Madam Foreman and members of the jury, have you arrived at a verdict?
Foreman:	No, we have not. Despite the fact we have listened to the evidence, we have listened to the prosecution …
His Lordship:	Just tell me, at present in terms of numbers only, how are you divided.
Foreman:	Eleven to one.
His Lordship:	Thank you. Is there any area of the law on which you would require any further directions?
Foreman:	Yes, m'Lord. Particular juror is not convinced that the lighting was sufficient.
His Lordship:	Thank you. Well, members of the jury, at the outset of this trial each of you took an oath to return a true verdict according to the evidence. That means that each of you as individuals must decide what you consider to be a true verdict. But of course, you have a duty not only as individuals, but collectively and this means that it is the collective

verdict of all of you that has to be returned. No one must be false to the oath that he or she has taken to return a true verdict. But in order to arrive at a collective verdict, that is the verdict of you all, there must necessarily be argument and discussion amongst you and also a certain amount of give and take and adjustments adduced as individuals within the scope of the oath you took. None of you should be unwilling to listen to the argument of the rest. If any of you have a strong view or you are in a state of uncertainty, you are not obliged or entitled to sink your views and agree with the majority, but argue out and discuss the matter together, within the scope of the oath you took initially. If you still cannot agree, come back and say so, but I have noted that the division now is eleven to one, so just go and talk it out further and see if you can come back with a collective verdict.

Foreman: May, I say something? The particular juror is asking if you would be kind enough, although you have done it already, to go over the question of the recognition as you have them in your notes and which you have guided us already. His view is that he is not convinced the lighting was sufficient for us to use recognition as a fact.

His Lordship: There is nothing in my view that I can add to the directions which I have given you on the subject of lighting. I dealt with the torch-lamp, I dealt with the distance and there is nothing that I can usefully add to what I told you already. The point is, you are to go back out and discuss the matter, bearing my instructions as regards the disagreement

> in terms of numbers in mind. You may retire again and come back."
> (Emphasis supplied)

[32] The jury retired for one hour and 16 minutes and returned a unanimous verdict of guilty of non-capital murder. Bingham JA opined that the judge, in his charge to the jury following their first retirement, had "entirely missed the point" as it was "clear that the jury needed further assistance from the presiding judge on a matter touching on the circumstances of identification", which request the learned judge ignored. He pointed out that the learned judge did not enquire the nature of the problem which caused them to return to court. In the circumstances he said:

> "…it was impossible to determine as to whether anything said further to the jury by the learned judge had resolved the problem or not as no one knew what the problem was."

He opined that:

> "… there can be no doubt that the jury had a problem with the evidence as to the state of the lighting, a factor which was crucial in determining the relative strength or weakness in the identification of the appellant."

[30] The failure of the learned judge in that case to render this assistance constituted a material irregularity. Also in **Machel Gouldbourne v R** [2010] JMCA Crim 42, the learned judge failed to ascertain the nature of the problem which confronted the jury. She did inquire whether the problem was "based on anything in law". The exchange between the learned judge and the foreman continued thus:

> "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."

[33] The learned judge then discovered through her inquiry that they were not unanimous. She further inquired whether their difficulty was based on the law. She inquired of them whether she could assist them; whether there was anything she had failed to tell them and they wished her to elaborate on anything.

[34] The foreman however asked of her if they would be able to seek clarification in respect of additional questions during their further deliberations by sending the questions to her. The learned judge unfortunately rejected the foreman's offer to send questions in writing and erroneously expressed the view that she was unable to entertain written questions. She was entirely unhelpful and rather impatient in her treatment of the problem which confronted the jury. Indeed, she rejected counsel's suggestion that should a question arise, the court could reconvene in order to have the question, if appropriate, recorded. The learned judge opined that she was able "to clarify certain things" and there were some areas of the evidence she could elucidate.

[35] Morrison JA (as he then was), in delivering the decision of the court at paragraph [33], pointed out that:

> "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…"

[36] At paragraph [34], he expressed that:

> "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…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."

[37] In **Mears (Byfield) v R,** (1993) 42 WIR 284, the Privy Council advised that conviction of the appellant for murder should be set aside and the sentence of life imprisonment quashed. In that case two hours after the jury had retired they returned and informed the judge that they had a question/problem relating to the evidence. The learned judge recapitulated the evidence instead of instructing them to retire and to state the problem in writing in order for him to assist. It is also noteworthy that in his recapitulation of the evidence he repeated comments which weighed against the appellant. Lord Lane, at page 290, on behalf of the Board, expressed, *inter alia* that:

> "…Finally, the failure to ascertain what it was about the evidence which was puzzling the jury and the re-

> iteration thereafter of some of the questionable parts of the summing-up proper are sufficient to convince their lordships that this conviction cannot be allowed to stand."

[38] The circumstances of the instant case are entirely distinguishable from the foregoing cases upon which learned Queen's Counsel relied. In the instant case, not only did the learned judge ascertain the nature of the problem which confronted the jury but he, without trespassing on the jury's province, sufficiently provided the guidance within the bounds of the law. The jury was obviously satisfied with the guidance that the learned judge provided as there was no response to his offer to provide further assistance.

[39] For the foregoing reasons, we made the orders as set out in paragraph [1] above.