BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 2 of 2005

BETWEEN:

MITCHEL KEN O'NEAL LEWIS Appellant

AND

THE QUEEN Respondent

BEFORE: The Hon. Frederick L.A. Waterman, The Hon. Peter D.H. Williams and The Hon. John A. Connell, Justices of Appeal.

2005: October 21 and 28 2006: January 5

Mr. C. Lindsay Bolden Q.C., Mr. Marlon Gordon and Miss Alicia A. Archer for the Appellant.

Mr. Charles Leacock Q.C., Director of Public Prosecutions, and Mr. Douglas Frederick for the Respondent.

DECISION

I. INTRODUCTION

[1] Troy Walcott was murdered on 8 June 2000. The appellant, Mitchel Ken O'Neal Lewis, was convicted of the murder and sentenced to death on 16 February 2005 by ***Moore J*** (as he then was). The prosecution evidence was that Walcott was sitting on a sidewalk near his home in Brittons Hill, St. Michael, speaking to two girls when the appellant emerged from a passing car and shot him twice. The prosecution alleged that after shooting

Walcott the appellant returned to the car, which sped off. Walcott was pronounced dead on his arrival at the Accident and Emergency Department of the Queen Elizabeth Hospital.

[2] The appellant filed seven grounds of appeal, but the important issue for us to decide is whether he was afforded a fair hearing of his case in accordance with his constitutional rights. The issue involves interesting points that arise out of the somewhat unusual circumstances of an application for the judge to recuse himself from the trial. It has therefore been necessary for us to set out those circumstances in detail in order to determine the fairest manner in which to dispose of this appeal.

II. GROUND 1 – MATERIAL IRREGULARITY

(a) The ground

[3] Ground 1 of the appeal alleges:

> "There was a material irregularity in the trial in that the Learned Trial Judge should not have heard the application by Counsel for him to recuse himself in the presence of the entire pool of potential jurors."

(b) The application

[4] In order to understand this ground of appeal, we should allow the record to speak for itself as to what transpired at the commencement of the trial on 7 February 2005 and we quote extracts from page 1 to 8, as follows:

> "Monday 7th February 2005
>
> MR. BOLDEN: May it please Your Lordship, I appear on behalf of the accused in association with Mr. Marlon Gordon and Mr. Lancelot Applewhaite.
>
> THE COURT: Yes, Mr. Bolden.
>
> MR. BOLDEN: I think I should relate to the court how I became involved in this case so that it goes on the record. I was asked by the Director of the Legal Aid Department whether I would take the case for Mitchel Lewis who had already refused several attorneys-at-law. I agreed on the basis that I could get a copy of the depositions and that I could interview the accused. I interviewed the accused at Glendairy Prison and the first thing he said to me, My Lord, was, "I know you. I know you're a good lawyer, I know you're a Queen's Counsel, but if you don't do this case as I want it done, I will fire you too because it is my life at stake." My Lord, I assured him I will carry out his instructions. On Saturday 21st -- I eventually got copies of the depositions and I prepared the matter and I went to see him on Saturday morning at 10:30. He gave me **two** documents, My Lord, and if the court would so allow, I would like to read the document to the court.
>
> THE COURT: You may proceed, Mr. Bolden.

MR. BOLDEN: It said, "Mr. Bolden, with my most profound respect to you, I would greatly appreciate if you ask for a request for my case to be moved in front of another trial judge. I mean I want my case to be done this Assizes, but with Mr. Moore I have a very serious problem. Sir, I definitely don't feel that I would get a fair trial in front of Mr. Sherman Moore. **For one, the things he had said when he addressed the jury at the beginning of the Assizes.**" He gave me this document, My Lord, which I will read if the court so permits me. "**And two, the statements in which he had made to me at the January 2004 Assizes.** Mr. Bolden, Justice Moore told me that any time I come back in front of him for this matter that he would start the case with or without a lawyer, and sir, Mr. Moore also told me that if my case weren't a capital charge, that he would have told me something. He also assumed that in his book I am playing ping-pong with the court. Sir, the tone of his voice that he used when saying those things have led me to truly feel threatened and already defeated in this position, because he is speaking from his heart and personal feeling towards me. As you can see, sir, that in itself showed me that Mr. Moore will be more than prejudiced against me in hearing my case. Sir, I don't mean in any way to sound disrespectful to Mr. Moore, the rest of the court or you, Mr. Bolden, but this is my life and my freedom that I am fighting for, so I have to look for the safest way to deal with this thing. Sir, I hope that you understand what I am saying, sir, because by all means I would not be pleading in front of Mr. Sherman Moore. Yours truly, Mitchel Lewis."

The second portion of the --

THE COURT: Mr. Bolden.

MR. BOLDEN: Yes, My Lord.

THE COURT: The newspaper did not carry what I said, so don't read that in here.

MR. BOLDEN: All right, as Your Lordship so pleases. But I made sure that I asked the Prison orderly to sign **both documents** at the time in the prison.

THE COURT: And as a matter of truth, I did not do the January 2004 Assizes.

MR. BOLDEN: Very well.

THE COURT: Yes.

MR. BOLDEN: So that is my position, My Lord, that **I feel that I am in a vice at this minute**. I feel that I am in a vice. I took a case to assist the process of law and to assist the court, but if the accused does not feel happy with me, with the way I want to do the case, I think it is in my own personal interest to ask to be excused, My Lord.

THE COURT: It doesn't seem that the accused feels unhappy with you. What you have read shows no unhappiness with you whatsoever.

MR. BOLDEN: But then, My Lord, if he is unhappy with the trial judge, it means that he wouldn't be happy and therefore I would have extreme difficulty.

THE COURT: The trial judge doesn't make decisions

in a criminal trial, Mr. Bolden. He makes no decision at

all.

MR. BOLDEN: I am well aware of that, My Lord.

THE COURT: He sums up to the jury, and I am very careful in my summations, Mr. Bolden. Mr. Director, can I hear you?

MR. LEACOCK: The basis upon which the judge recuses himself in law, as I understand it, is that the accused must show that there is actual bias or the potentiality of bias for a judge to recuse himself. I do not know whether the judge has any personal, financial, social or family connection with this matter, and if that is the case, I am confident that the judge will disclose that to us and recuse himself … the Court of Appeal in a capital case … characterised in rather trenchant terms, **the behaviour of accused persons who play 'fast and loose'** … whereby a number of attorneys were being dispensed with at Legal Aid … it is my understanding that the nature of the retainer in this case is through the Legal Aid. **The accused is not paying for his counsel**.

THE COURT: Thank you.

Are you ready to proceed, Mr. Bolden?

MR. BOLDEN: Sir, may I speak to the client before I answer that question? May I speak to the accused, My Lord, with the Court's permission?

THE COURT: About what?

MR. BOLDEN**:** My Lord, I have spoken to the accused. My direction, as he said before, he has no problem with me and my proceeding, but **he still says** he has -- **he does not want Your Lordship to try the case because he doesn't feel he is going to get a fair trial**.

THE COURT: Thank you, Mr. Bolden. Thank you.

Madam clerk, will you empanel the jury, please?

JURY SELECTION." (Emphasis added.)

(c) Background and analysis

[5] We should mention the factual background given to us by Mr. Lindsay Bolden Q.C. that does not form part of the record. Mr. Bolden, who with Mr. Marlon Gordon represented the appellant at the trial, stated that before the application was made on behalf of the appellant in open court, he had approached the judge in chambers in the presence of Mr. Charles Leacock Q.C. and Mr. Douglas Frederick representing the Crown, but the judge declined to hear the application in chambers and stated that it should be made in open court.

[6] It is important to analyse what transpired in open court. It was not disputed by counsel for the appellant and the respondent, who were also counsel for the parties at the trial, that the application for the judge to recuse himself took place in the presence of the panel of jurors before the jury was selected. Mr. Bolden informed the judge that the appellant gave him **two** documents, a letter and a newspaper article, and requested that they be read to the court. He was allowed to read the letter but not the newspaper article. In the letter the appellant expressed the view that he would not get a fair trial before the judge for two reasons. First, because of the things the judge said when he addressed the jury at the beginning of the Assizes. Secondly, because of the statements the judge made to the appellant at the January **2004** Assizes, the essence of which was that the judge would "start the case with or without a lawyer", that if the case was not a capital charge the judge would have told the appellant something and that in the judge's book the appellant was "playing ping-pong with the court". The appellant felt threatened by the judge's tone of voice and believed that the judge would be prejudiced against him. It is accepted that the Assizes began in January **2005** and that the judge did address the jury at that time. However, according to the judge he "did not do the January 2004 Assizes".

[7] It is also not disputed that the second document to which Mr. Bolden referred was a newspaper article, which he was prevented from producing since the judge felt that the newspaper article was not a true report of what he said, "The newspaper did not carry what I said, so don't read that in here". Mr. Bolden obeyed the court's order.

[8] Mr. Leacock implied that the appellant was playing "fast and loose" with the court and referred to the fact that the appellant was receiving legal aid and not paying for his counsel. We should quote the comment of ***Lord Parker of Waddington CJ*** in ***Barnes (1970) 55 Cr.App.R.100*** in response to the trial judge who was critical of hopeless cases being defended "at public expense" when ***Lord Parker*** said at ***page 104***:

> "Pausing there, one has of course great sympathy with all trial judges today when, under legal aid, a number of quite hopeless cases are being contested, thus clogging the machine, with the result that trials of many cases of greater merit are seriously delayed. However, as the law stands, **it is an accused person's right to have counsel under legal aid** to defend him should he elect to plead Not Guilty." (Emphasis added.)

[9] Thereafter Mr. Bolden felt that he was "in a vice". The judge then heard Mr. Leacock, who stated that it would have been necessary for the appellant to show actual or potential bias for the judge to recuse himself. After Mr. Leacock's submissions, Mr. Bolden responded. The judge thanked him and asked him if he was ready to proceed. Mr. Bolden quite properly took his client's instructions, after which he informed the court that his client did not wish the judge to try his case because he did not feel he was going to receive a fair trial. The court again thanked Mr. Bolden and instructed the court clerk to empanel the jury. The trial then proceeded.

(d) Appellant's submissions and our comments

[10] Mr. Gordon submitted that the fact that the judge prevented Mr. Bolden from reading the newspaper article was "indicative that the Court recognised that there was something that had been said that could have potentially tainted these jurors' view". Whether the newspaper article was an accurate report or not, it was in the public domain and the panel of jurors may well have read it. It was important therefore for Mr. Bolden to have been allowed to read the article and to make his full submissions thereon without being curtailed. We may add that Mr. Bolden was at pains during the hearing of this appeal to remind us that he is an attorney-at-law of over 40 years' standing.

[11] This Court has stressed that it is important to allow counsel to complete their submissions. In ***Thomas (Compton) v. R. (1992) 44 WIR 76*** when the applicant's counsel sought to make an application that the jury be discharged from returning a verdict on the ground that the trial judge's comments had unfairly prejudiced the trial of the applicant, the judge refused to hear the application and dismissed it without hearing the submission upon which it was being made. The appellant's conviction for wounding was quashed and the sentence of three years' imprisonment was set aside. ***Sir Denys Williams CJ*** at ***page 80*** said:

> "It was unfortunate that (counsel) was not permitted to complete his submission that the jury be discharged. Our system of justice requires not only that justice be done but that it is seen to be done and as said by Lord Goddard CJ in *R v Clewer* (at page 40):
>
> > 'The first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial and that he should not be left with any sense of injustice.' "

[12] We also note that the judge made no formal ruling and gave no reasons, but implicitly rejected Mr. Bolden's submissions and instructed the court clerk to empanel the jury. It has been stated that a failure to give reasons in certain circumstances "may amount to a denial of natural justice (and) detract from the right to a fair trial": ***English Public Law,*** edited by ***David Feldman (Oxford, 2004)*** at ***para. 23.448***.

[13] At the trial the appellant sought to have the judge recuse himself on the basis that the facts and circumstances gave rise to the alleged reasonable apprehension of bias. However, in the appeal the appellant did not argue that the judge should have recused himself, rather that the application by his counsel should not have been heard in the presence of the panel of jurors.

[14] In appeals this Court has before it a transcript of the proceedings. It is impossible to capture the atmosphere of the trial purely from the written word. We do not see the interplay between the parties or their body language or the timing of their various interventions. We do not hear the tone of voice in which submissions and interjections are made and we cannot hear or sense any reactions to the same. In ***R. v. Hare and Sullivan [2004] TLR 608,*** the English Court of Appeal listened to a tape recording of exchanges between counsel and the trial judge before deciding to quash the convictions of the appellants of robbery and false imprisonment because the judge had

been discourteous to counsel and thereby damaged the defendants' confidence in the trial process and in counsel's capacity to represent them. The sentences of nine years' imprisonment were set aside and a retrial ordered. In this appeal, we have not had the advantage of listening to a tape-recording of the proceedings complained of.

[15] Mr. Gordon's skeleton argument stated, "the question for consideration is whether there was a real danger that the nature of the submission and the comments attributed to the judge might have created a bias in the minds of the jurors, thus prejudicing the fair trial of the appellant. Even though a person may in good faith believe that he is acting impartially, his mind may have been subconsciously affected. The nature of the comments that the appellant was playing "ping-pong" with the courts and was seeking to pick and choose which judge his matter should be heard before would give to any reasonable person an unfavourable view of the appellant's character and leave the impression that he had something to hide. The overriding public interest is that there should be confidence in the integrity of the administration of justice. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done".

(e) Respondent's submissions

[16] The respondent's skeleton argument was as follows:

> "1. The submission was made by the defence in the presence of the jury pool. No application was made for Chamber hearing nor was notice of the application given to the Court or prosecution.
>
> 2. Section 18 of the Barbados Constitution provides that all criminal trials should be afforded **a fair hearing** within a reasonable time by an independent and impartial Court established by law.
>
> 3. No material was placed before the Court to suggest bias or potentiality of bias for removal of the Judge.
>
> 4. All trials in Barbados are public trials except for in camera hearings provided by the statute."

The skeleton argument was supplemented by Mr. Leacock's oral submissions to the effect that, there was no request for the jury to be removed from the court during the hearing of Mr. Bolden's submissions; there was no application for the case to be traversed to another Assizes and, in any event, the appellant suffered no prejudice as a result of the submissions being made in the presence of the panel of jurors.

(f) The constitutional right to a fair hearing and discussion

[17] ***Chapter III*** of the ***Constitution of Barbados*** provides for the protection of the fundamental rights and freedoms of the individual and ***section 18 (1)*** thereof sets the overall standard to be applied in criminal proceedings, as

follows:

> "If any person is charged with a criminal offence, then
>
> unless the charge is withdrawn, the case shall be afforded
>
> **a fair hearing** within a reasonable time **by an independent and impartial court** established by law." (Emphasis added.)

The appellant's constitutional right to a fair hearing by an independent and impartial court is not a hollow declaration, but a fundamental right to which this Court is required to give meaning and to enforce.

[18] In view of the comments quoted from the record at paragraph [4] above, it is necessary to dispel any misconception about the judge's role to make decisions in a criminal trial. Although there is a division of functions between the judge and the jury, they collectively have a responsibility to ensure a fair trial. ***Lord Hutton*** giving the decision in ***R. v. Mushtaq [2005] 1 WLR 1513 HL,*** at ***para. 22***, the facts of which are not material, approved the following passage from the Court of Appeal's judgment of ***Kay LJ***:

> "In a criminal trial, it is the court acting collectively that has the shared responsibility of ensuring a fair trial. The judge and the jury are, by the system employed, given distinct functions to perform which will collectively protect the rights of the person standing trial. In fulfilling their distinct functions, both the judge and the jury must recognise the need to ensure that the accused receives a fair trial but that does not require the jury to take upon themselves functions that the law properly entrusts to the judge. Provided each fulfils its role the accused will receive a fair trial."

[19] Before we proceed to consider whether there is any merit in this ground of appeal, it is important to try and identify what prejudice, if any, the appellant may have suffered by the submissions that were made in the presence of the panel of jurors. As we see it, the focus of the case started with an issue between the appellant and the judge; the appellant complained of an appearance before the judge in January 2004 and remarks made by him at the opening of the Assizes in January 2005. Inevitably an issue had been created between the appellant and the judge and indirectly the appellant's counsel. Mr. Bolden was not allowed to read the newspaper article or to complete his submissions; the panel of jurors would therefore have been uncertain of the content of the article and the full nature of the appellant's complaint. The jurors may have formed an unfavourable impression of the appellant; namely, that he was trying to avoid his trial because he was guilty. Moreover, from the response of Mr. Leacock, the jurors may have concluded that the appellant, as a defendant receiving legal aid should be regarded less favourably than a defendant who had paid for his own legal representation. The members of the jury would have been conscious throughout the trial of these matters and may not have approached the case with the same openness of mind as if they had not heard the appellant's application. We do not know, and it would be speculating to surmise how the jury would have been affected by what they heard.

[20] In ***Hinds v. Attorney General of Barbados [2002] 1 AC 854,*** the ***Privy Council*** had to consider on different facts to the present case, whether the right to a fair hearing had been infringed. ***Lord Bingham of Cornhill***

considered and commented on the constitutional provisions for a fair hearing, as follows:

> *"The Constitution of Barbados* _____
>
> 5. The Constitution of Barbados, adopted in 1966, is expressed in section 1 to be "the supreme law of Barbados" …
>
> 17. … First, and most importantly … the Constitution ... does guarantee a fair hearing to every … defendant and there is nothing … which qualifies or undermines that right. It is indeed one of the fundamental human rights and freedoms to which the people of Barbados have pledged allegiance in the preamble to the Constitution.
>
> 18. Secondly, the Board would reiterate what it said in *Mohammed v The State* [1999] 2 AC 111, 124, that "… breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. **The Board and the House of Lords**, construing the European Convention, **have observed that "the overall fairness of a criminal trial cannot be compromised" and have described the right to a fair trial as "absolute":** *Brown v Stott* [2001] 2 WLR 817, 836; *R v Forbes* [2001] 1 AC 473, at 487. **This does not mean that every legal error, every irregularity, every deviation from good practice, every departure from procedural propriety in the course of a trial must deprive a defendant of a fair hearing … Thus questions of degree are relevant, as are the facts of a particular case and the circumstances of a particular defendant. A case cannot properly be assessed objectively, without taking account of the particular defendant**". (Emphasis added.)

[21] We must now embark on the difficult task of determining whether what transpired prior to the jury being empanelled was "so prejudicial or so irremediable" that we have no choice but to condemn the trial as unfair and quash the conviction as unsafe. Mr. Leacock advanced essentially two arguments against condemning the trial as unfair. First, the matters complained of preceded the empanelling of the jury, and he submitted that it could not therefore be said that because of this circumstance the trial itself was unfair. In ***Barnes,*** *op. cit.* at para. [8], the conviction was quashed although the matters complained of took place in the absence of the jury. ***Lord Parker*** stated at ***pages 106*** and ***107***:

> "The question then arises as to the legal position resulting from this improper conduct [comments by the judge on the waste of time caused by hopeless defences]. As has been said, this all took place in the absence of the jury, and no one has suggested that before the jury the judge was other than completely impartial … The partiality shown in the absence of the jury did not of itself result otherwise than in a fair trial; nor again so far as partiality is concerned, could any observer of the whole trial feel that in the end the appellant had had anything but a fair trial … However, the matter does not rest there, because in the result the appellant was forced to continue with counsel in whom he had lost confidence, and counsel who himself felt that it was in the appellant's best interests that he should no longer continue to act. It is clear that in those circumstances counsel would be gravely handicapped in conducting the defence, especially before a judge who had expressed his strong view as to the appellant's guilt, and as to the waste of time involved in fighting the case."

Secondly, Mr. Bolden did not object to the jurors being present when the application was made; further the application was not for a traversal of the case to another Assizes, but for the judge to recuse himself. However, it was understandable that no objection was taken to the presence of the jurors in view of the fact that the judge

had already refused to hear the application in chambers. It was also understandable that no application was made for a traversal of the case to another Assizes in view of the history of the case and the virtual certainty that any such application would not have been favourably entertained.

[22] On the other hand, there are two important considerations that are in favour of allowing the appeal. First, the judge did not direct the jury in his summing-up that when deciding the case, they must disregard entirely what they may have heard prior to their selection and he said nothing to counteract or minimise any prejudice the jury may have formed against the appellant by reason of the preliminary objections. Secondly, and decisively, this is a capital case. In such a case, there is no room for error; looked at objectively, the defendant must receive a fair hearing, interpreted in its widest sense, taking into account the defendant's particular circumstances.

[23] In ***Brown v. Stott [2003] 1 AC 681,*** a ***Privy Council*** decision in a Scottish devolution case interpreting the right to a fair hearing under the European Convention, ***Lord Steyn*** considered the proper approach where there is an absence of a fair trial and stated at ***page 708***:

> "The present case is concerned with … a fair trial … But even in respect of this basic guarantee, there is a balance to be observed. First, it is well settled that the public interest may be taken into account in deciding what the right to a fair trial requires in a particular context … Secondly, once it has been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or on any other ground. This is to be contrasted with cases where a trial has been affected by irregularities not amounting to denial of a fair trial. In such cases it is fair that a court of appeal should have the power, even when faced by the fact of irregularities in the trial procedure, to dismiss the appeal if in the view of the court of appeal the defendant's guilt is plain and beyond any doubt. However, it is a grave conclusion that a defendant has not had the substance of a fair trial. It means that the administration of justice has entirely failed. Subject to the possible exercise of a power to order a retrial where appropriate such a conviction can never be allowed to stand."

Brown was a case in which Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) was under consideration. Article 6 (1) of the European Convention provides that "in the determination of any criminal charge every person is entitled to a fair hearing". It is well known that the fundamental rights provisions of the ***Constitution*** were "greatly influenced" by the European Convention: ***Minister of Home Affairs v. Fisher [1980] A.C. 319, 328F.*** Both in the ***Constitution*** and in the European Convention the word "hearing" is used and the provision has been regarded as setting the overall standard to be applied in determining whether a trial has been fair.

[24] In ***Randall (Barry) v. R. (2002) 60 WIR 103,*** the issue the ***Privy Council*** had to decide was whether the trial was fair in the light of the conduct of prosecution counsel and of the failure of the judge to control the proceedings. We appreciate that the facts in ***Randall*** were very different from those in the instant case. However, the guidance of ***Lord Bingham*** as to what constitutes a fair trial is helpful as set out at ***para. 28***:

> "**[T]he right of a criminal defendant to a fair trial is absolute**. There will come a point when the departure from good practice is so gross, or so persistent, or **so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed**

to be innocent until proved to be otherwise in a fairly conducted trial." (Emphasis added.)

[25] We also quote the words of ***Lord Bingham*** in ***Brown****, op. cit.* at para. [23], at ***page 693***:

> "[T]here is nothing to suggest that the fairness of the trial itself may be qualified, compromised or restricted in any way, whatever the circumstances and whatever the public interest in convicting the offender. If the trial as a whole is judged to be unfair, a conviction cannot stand."

[26] In the context of a subsequent ***Privy Council*** devolution decision, ***Mills v. HM Advocate [2004] 1 AC 441***, ***Lord Steyn*** said in relation to the fair hearing guarantee under Article 6(1) of the European Convention at ***page 448***:

> "First, it is well established that the fair hearing guarantee is separate and absolute in character… The only degree of flexibility is in regard to the content of a fair trial: in that respect the triangulation of the interests of the defendant, the victim and his family, and society, do arise … Once it is established that a defendant has not had a fair hearing at trial the conviction must be quashed."

[27] The authorities make it clear that a criminal defendant has an absolute right to a fair trial, guaranteed as a fundamental right under the ***Constitution***. It will generally be an inadequate response to an allegation that the defendant has not had a fair trial for a respondent to contend that the evidence was conclusive against the defendant and that therefore the defendant's conviction was safe and satisfactory, unless there has been a thorough enquiry into the issue of fairness. It follows that where the trial is unfair, the conviction should be set aside on the ground that it is unsafe or unsatisfactory.

[28] We think that in the particular circumstances of this case it was unfortunate that the trial judge did not deal with Mr. Bolden's instructions in chambers when Mr. Leacock was present. A great deal of prejudicial matter was raised in the hearing of potential jurors; the objections struck at the fairness and impartiality of the trial judge. Although they may have been in fact baseless, we are unable to know what effect they may have had on the jury. In addition, the judge omitted to give any direction or warning to the members of the jury not to allow their verdict to be influenced by anything that they heard during the exchange prior to their being empanelled. We conclude that there was a material irregularity in the course of the trial process, which rendered the trial unfair and therefore the conviction unsafe.

III. DISPOSAL

[29] We have considered the first ground of appeal in the light of the overall fairness of the trial and the other grounds of appeal. We conclude that the cumulative effect of the matters raised in the appeal taken together as a whole was to deprive the appellant of a fair hearing, interpreted in accordance with the ***Constitution***, such as to render the verdict unsafe or unsatisfactory. If a conviction is to be upheld as safe and satisfactory, it should have resulted from a trial in compliance with the rules of good practice and the high professional standards established for criminal trials. The right to a fair hearing in a criminal case is absolute.

[30] The conviction should be quashed but this does not put an end to the matter. The appellant stressed that it was

his life that he was fighting for and insisted that Mr. Bolden carry out his instructions. The appellant had a fundamental constitutional right to a fair hearing of his case. Troy Walcott also had a fundamental constitutional right; the right to his life, of which he was deprived when he was fatally shot. The jurisprudence on Article 6 of the European Convention has made it clear that there must be a balance between competing interests. In ***Dyer v. Watson [2004] 1 AC 379***, another ***Privy Council*** devolution decision, ***Lord Bingham*** stated in relation to Article 6 at ***page 401*** that:

> "[T]he individual does not enjoy these rights in a vacuum. He is a member of society and other members of society also have interests deserving of respect. This was recognised by the [European Court of Human Rights] when it referred to the striking of a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for which balance was said to be inherent in the whole of the Convention."

[31] The interest of justice requires that we order a retrial. We have taken into account the principles to be applied in deciding whether to order a new trial including the date of the alleged commission of the offence: ***R. v. Stephenson (1974) 22 W.I.R. 458 CA Jamaica, Reid v. R. (1978) 27 WIR 254 PC*** and ***Bennett (Andre) and John (Augustus) v. R. (2002) 60 WIR 123 PC.*** In the instant case the paramount consideration must be the public interest in having a fair trial of a serious crime.

[32] We wish to commend Mr. Gordon for the balanced and restrained, yet effective, manner in which he presented this appeal. We allow the appeal, quash the conviction and set aside the sentence. We order under ***section 15(1)*** of the ***Criminal Appeal Act, Cap 113A*** that the appellant be retried and under ***section 16(2)(a)*** of the ***Act*** that the appellant remain in custody pending his retrial. The retrial should take place as soon as possible, preferably at the January Assizes of 2006.

Justice of Appeal Justice of Appeal

Justice of Appeal