**BARBADOS.**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 39 of 2001**

**BETWEEN:**

**MICHAEL HUGGINS**

**(Appellant)**

**AND**

**THE QUEEN**

**(Respondent)**

**Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Errol DaC. Chase, Justice of Appeal, and the Hon. Frederick Waterman, Justice of Appeal**

**2002: February 1, February 7 and March 27**

**Mr. A. Pilgrim and Mr. K. Robertson for the Appellant**

**Mr. C. Leacock Q.C., Director of Public Prosecutions, for the Respondent**

**DECISION**

SIMMONS CJ: On July 19, 2001, the appellant was convicted and sentenced to death for the murder of Stephen Wharton ("the deceased"), committed on November 30, 1999. Independence Day is celebrated on November 30th each year.

[2] On that day in 1999, there were to be festivities in the Golden Rock area of Pinelands. A stage for live performances was set up and tape recorded music was being played. People began to congregate near the pasture on which the stage was set up. Vendors began to ply their different trades. One called Sheriff had a small shop from which he sold beer. Another, the deceased's brother, Neil Wharton, was selling fruit from his stall.

[3] About 11.30 a.m. the deceased and at least three other persons were in a little group. The deceased was drinking a beer. A man from the [1] group ran towards the back of the fruit stall and spoke to a man known as "Tone". Then he ran towards the Golden Rock Senior Citizens' Home where the appellant was.

[4] It was the Crown's case that at this point, the deceased's brother Neil saw the appellant tie a scarf around his head and go towards the deceased. Neil said that while the deceased was backing the appellant, the latter approached him from behind and shot him. After he was shot, the deceased ran and was pursued by the appellant who fired another shot. The deceased collapsed and fell by a post supporting an old shed.

[5] Rhonda Hollingsworth-Hinds was the second eye witness for the prosecution. While reading the transcript of the proceedings at the trial it was difficult not to conclude that she was a reluctant witness but, when roused, was prepared to be difficult and argumentative with counsel for both the prosecution and defence. She readily volunteered her reputation as a petty thief well-known to the police but she insisted that she was at the scene of the crime on Independence Day 1999 and saw what happened.

[6] Her account is that she was sitting on a plastic chair on the pasture with her young child. The pasture was near the Senior Citizens' Home. At the time when he was shot, she saw the deceased sitting on two old tyres. She testified that the appellant approached the deceased and shot him. The deceased got up and ran after he was shot pursued by the appellant who fired two more shots. She says she saw the deceased fall on the old shed.

[7] It was revealed during the cross-examination of the eye witnesses that there had previously been violence between the deceased and the appellant, and indeed the deceased and his brother Neil. Neil [2] admitted that the deceased had previously shot at him and also stabbed the appellant causing him to be hospitalised.

[8] Nevertheless, the Crown said that on this particular occasion, the appellant deliberately without provocation or lawful excuse, killed the deceased in a cold-blooded murder.

[9] Dr. Sree Ramulu, the Forensic Pathologist, found a gunshot wound to the deceased's back which perforated the left lung causing partial collapse of both lungs. Death was due to "blood and air in the chest cavity as a result of a firearm injury." He recovered a distorted projectile in the region of the left collarbone.

[10] The case for the Defence rested primarily upon the unsworn statement of the appellant from the dock. It was as follows:

"On the 30th November, 1999 I went to Golden Rock to see Hamilton Lashley, about finalizing a project because I was building a barber shop. On arrival at Golden Rock, Mr. Lashley was not there as yet, so I sat down behind the wall and in between the stage on a bench waiting on his arrival. While I was there Stephen walked on the right side of me and came and stand up to the left and asked me why I don't keep the police from going to his mother's house. I looked at Stephen and say, "Why don't you leave me." He told me he is going to kill me and give the police something to look for him for. When he told me those words he put his hand to the right side of his back and when his shirt raised I saw a gun. I was scared for my life because he had already stabbed me up and I was in hospital. I tried to lick the gun out of his hand and my hand either connect with his hand or the gun. On connection I heard two explosions and he ran off of me. When he ran off he turned round like he was going to fire at me and raised his hand. I ran from there. On running from there I went home and told my mother that Stephen come and troubled me again and pulled a gun on me. I told my mother I would like to call the police. My mother get hysterical and like she couldn't understand what I was saying, that is how she appeared to me. I went and explained it to my aunt in Brittons Hill. While I was there I called home to tell my mum that I am by my aunt. My mum told me she just heard the news that Stephen had died. I told my mum, well, I never went and troubled him. He came and told me he is going to kill me, he took out the gun so I would like her to get a lawyer for me to go to the police station and on the 6th of [3] December, 1999 I was accompanied to the Police Station by Miss Helga McIntyre and Andrew Pilgrim."

[11] That statement contained minimum evidence, in our view, to raise the issues of provocation, self-defence and accident. All three were put to the jury in the summation.

The Grounds of Appeal

Ground 1

[12] Counsel frames this ground of appeal in this way:

"The learned trial judge erred in law when he offered the jury an alternative opinion contrary to that given by the expert."

He identifies page 78 of the transcript as the object of his criticism of the summation where the judge told the jury:

"One does not have to study physics to understand that when a projectile meets with resistance, it can be deflected from its course. So according to what structures the bullet encounters in its path in the body, it can change direction and so we cannot assume without considering the structures in the flight path, that a bullet must travel through the body in a straight line. We cannot assume that. And remember what Dr. Ramulu said, that he recovered a distorted projectile.

At any rate, you are the sole judges of the facts and where I appear to express any view of the facts, you are not bound by my opinion, unless you agree with it."

[13] Counsel's complaint is that it was not open to the judge to draw a conclusion that the projectile "bounced off any structure other than those described by Dr. Sree Ramulu in the absence of other evidence to the contrary." In his submission the judge was offering an alternative expert theory on how the injury was caused and the possible flight path of the bullet and, coming as it did in the summation, the defence was not able to counter it.

[14] Contrary to Counsel's submission, however, there was an evidential basis for the judge's comment. Sergeant Graham Husbands, a [4] Forensic Firearms Examiner of over 15 years' practical experience with firearms, had offered the unchallenged opinion that the bullet had "apparently struck some hard object during flight." – p.35

[15] Far from being an alternative theory, it was, we think, a comment which the judge was well entitled to make on the basis of the evidence for what it was worth. Immediately after his comment the judge did remind the jury that they were not bound by any expression of opinion by him.

[16] We cannot agree that there was any prejudice to the appellant in the observation of the judge. Nothing in the case turned upon the distortion or otherwise of the projectile. Indeed none of the Crown's expert witnesses was cross-examined on this matter.

[17] Furthermore, the test to be applied in a case where it is argued that the judge was wrong to express his opinion on aspects of the evidence was stated by Lord Lane in the Jamaican case of Mears v. R. (1993) 42 W.I.R. 284. His Lordship in delivering the advice of the Privy Council said at p.289:

"Their Lordships have to take the summing up as a whole and then ask themselves in the words of Lord Sumner in Ibrahim v. R. [1914] AC 599 at p. 615 whether there was something which deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."

[18] The Barbados Court of Appeal in Vincent Harewood v. R. (1994) 48 W.I.R. 32 followed that test.

It is always necessary to examine the totality of a summation to determine whether there have been excesses of judicial comment. Having carefully examined the summation in this matter and the occasions when the judge allowed himself the freedom to comment, [5] we are satisfied that he did not exceed the proper bounds of judicial comment.

[19] There is no merit in this ground of appeal and it accordingly fails.

Ground 2

[20] It was argued that the judge had erred in law when he "offered excuses for the weaknesses in the quality of the evidence given by Crown witnesses."

[21] Complaint is made that the judge erred when he told the jury:

"Now, before I come to the evidence, I will tell you that where you find discrepancies or inconsistencies in the evidence, you will bear in mind that the witnesses are recalling an incident that took place in November, 1999. An incident involving gunfire, where they said that people were scampering all over the place, or as they said scattering all over the place."

[22] This ground was lightly argued and we can find no substance in it. A judge is under a duty to direct a jury as to the manner of dealing with discrepancies and, although Counsel did not submit that the paragraph following the judge's comments contained the proper direction on discrepancies, it is clear that the trial judge was doing no more than explaining to the jury that they had to bear in mind the total context in which a discrepancy might have arisen.

Counsel cited no authority in support of his argument. We merely wish to remind that, although a judge must, of course, be impartial, he should not be fettered or gagged to such an extent that he should withhold from a jury such difficulties and deficiencies as may appear in the evidence. It is the duty of the judge not only to direct the jury on the applicable law. He is also under an obligation to assist them in analyzing the facts.

[23] This ground also fails. [6]

Ground 4

[24] This was a general ground alleging that the defence was not put. It was not pursued by Counsel who merely reminded us that this omnibus ground subsumed his submissions on accident and self-defence. We deal with these submissions next.

Ground 5

[25] The judge is criticized that at p.85 of the transcript he told the jury that "an accused man is not obliged to say anything, but you are entitled to examine his reaction and his demeanour and what he does say."

The appellant gave an unsworn statement from the dock. We see nothing wrong in the judge's direction to the jury.

This ground of appeal also fails.

Ground 3

[26] It was contended that the judge erred in law in failing to give any or any adequate directions on accident. Counsel only identified a few lines at p.73 of the transcript. This was where the judge said:

"You must also be satisfied that the death was no accident. You must be satisfied that the shooting was deliberate and with malice aforethought. If you are satisfied with all these elements, you must finally be satisfied beyond reasonable doubt and feel sure that the killing was unprovoked."

[27] But, the trial judge gave the jury other directions on accident in the context of the appellant's statement. This statement raised the issue of accident where the appellant alleged that he tried to knock (lick) the gun out of the deceased's hand and connected with the deceased's hand or the gun.

[28] The judge, having directed the minds of the jury to the words of the statement, immediately thereafter told them (p.89): [7]

"So from his statement, if you accept his statement you cannot find him guilty of anything, guilty of anything at all. Again if it leaves you in a state of reasonable doubt, you cannot find him guilty of anything at all, because according to that statement, the death of Mr. Wharton was either accident or self-defence, according to what he tells us and in either case you would have to acquit him."

And later, he said (p.90):

"Now, the Prosecution's evidence does not have to provide an answer to every question raised in the case. That would hardly ever be possible, but the evidence led by the Prosecution must satisfy you beyond a reasonable doubt that the accused is guilty. If you are not satisfied beyond reasonable doubt that the shooting of Stephen Wharton was not accident, you will find the accused not guilty, not guilty of anything at all."

[29] Counsel points out that the trial judge gave no definition of accident. It is true that the trial judge gave no definition of the defence of accident but we are not satisfied that this omission was of any significance in this case. The evidence upon which the issue was raised was left to jury followed immediately by a direction as to how they should treat the evidence and the proper verdicts that could be returned on that evidence. And, minutes before the jury retired, the judge gave them another direction emphasizing the need for the prosecution to negative the defence of accident and satisfy them beyond reasonable doubt that there was no accident in the case.

[30] Guidance on the proper directions to be given to a jury when accident is raised as a defence may be found in three Guyanese cases, the Jamaican case of R. v. Muir (1995) 48 WIR 282 and the Trinidadian case of Ramlogan v. The State [2000] 58 WIR 374. In the first, The State v.

Jaigobin Bissessar (Court of Appeal of Guyana No.19 of 1975 unreported) Haynes C advised that where the defence of accident is raised it was "absolutely essential for the [8] judge to make it clear to the jury that the defendant was relying on a sudden mischance that had befallen him and it was not on the defendant to establish that the mischance had actually taken place, but for the prosecution to negative the defence."

[31] The State v. Guy Simmons [1976] 24 W.I.R. 149 is the second Guyanese case. Here the appellant, upon being refused service of two cold beers in a gas station restaurant, threatened to blow out the barman's brains if he was not served. The deceased teased the appellant who pulled a gun from his pocket. In response to taunts that he was carrying a toy gun, the appellant having replaced the gun in his pocket, drew it a second time. He then held it in the air, spun the barrel and the gun exploded fatally wounding the deceased.

[32] The appellant's defence of accident was that he took out the gun to get some money to pay for the beers and, while replacing the gun, it exploded. The trial judge neglected to direct the jury that, when dealing with the issue of accident, the onus was on the prosecution to negative accident. The Court of Appeal of Guyana dismissed the appeal and in the course of his judgment, Luckhoo JA pointed out that the trial judge had defined the defence of accident to the jury. The Court approved a definition that an accident could be said to be an occurrence or event over which a person had no control in the sense that he had no causal connection with it.

[33] George Sutherland v. The State [1970] 16 W.I.R. 342 is the third case. Here it was held that it was important that the jury be directed that where an accused raises the defence of accident, the onus was on the prosecution to negative that defence.

[34] There is no criticism in the instant appeal that the various directions of the trial judge were not correct statements of the law. Rather, it is [9] argued that because he did not give a definition of the defence of accident, this omission is somehow fatal to the conviction.

[35] In R. v. Muir, Counsel had raised the possibility that the deceased had died as a result of having accidentally caused the very gun which he was holding to go off. The Court of Appeal of Jamaica held that, in the particular circumstances of that case, it was not necessary for the trial judge to explain to the jury the meaning of "accident".

[36] The Chief Justice of Trinidad and Tobago has recently provided useful assistance to trial judges in the following dicta taken from Ramlogan v. The State [2000] 58 WIR 374. At page 384, de la Bastide CJ says:

"When a defence of accident whether caused by the accused or by someone else is raised, the judge should identify the issue which arises on the evidence for the jury and remind them in substance of the evidence on both sides which bears on that issue, and make sure they understand that the burden of proof lies on the prosecution in relation to it. But he may do so without ever using the word 'accident' although in this, as in other aspects of a summing up, it may be both safer and more convenient for him to adopt a tried and tested formula of words."

[37] We are of opinion that, though it was desirable that accident should have been defined, nevertheless having regard to the setting of the facts of this case and, having regard to the other proper directions given on the issue, the omission is not fatal. The contending facts were relatively simple and straightforward.

[38] On the one side, the prosecution was alleging that the deceased was shot from behind and this was seen by two witnesses. On the side of the defence, the jury was being asked to believe that the deceased was threatening the appellant (presumably face to face) and, the appellant with his bare hand, tried to knock the gun away; it [10] exploded twice and the deceased received a wound to his back after which the bullet lodged in the region of his collar bone. The medical evidence was that the bullet entered from the back. Whether this story was true, false, incredible or implausible was entirely a matter for the jury.

[39] We do feel that, even if the jury had been given a legal definition of accident, they would still have rejected the appellant's story. Accident is not a defence whose definition includes concepts or elements not easily intelligible to the ordinary person. It is not in the same mould as, say, self-defence and provocation whose constituent elements require careful explanation to a jury. At any rate, the fact that the trial judge explained to the jury that if they were in doubt as to whether the shooting was really accidental, they should acquit, in our judgment, would have had the effect on the jury if they were doubtful as to the meaning of accident, to lead them to an acquittal. They would have been entitled, on the directions given to say to themselves: "We are not sure what accident means so we have to acquit."

[40] This Court has recently offered guidance to judges when the issue of accident is raised – See Andre Orlando Best v. R. (Criminal Appeal No.18 of 2001). In the light of that decision, it is unnecessary for us to make detailed statements in this case. We merely reiterate that cases in the Caribbean establish that where accident is raised as an issue in a criminal trial, judges should direct juries in accordance with five principles.

(i) A definition of 'accident' should be offered. [11]

(ii) It should be explained that the burden of proof is upon the prosecution to negative the defence of accident. A defendant has no burden of proof.

(iii) It should be explained that accident provides a complete defence and, if a jury accepted that defence, they would have to acquit.

(iv) It will also be absolutely essential where accident is raised to direct the jury that if they have a reasonable doubt about the issue of accident, then the defendant is in law entitled to the benefit of that doubt.

(v) In accordance with the well established obligation on the part of a trial judge to assist the jury with resolving issues of fact and, indeed assisting them with the facts, the judge should ensure that he relates the issues of fact giving rise to the defence of accident to the legal principles of the defence.

[41] We are of opinion that the judge made it clear to the jury that if they entertained a reasonable doubt about the issue of accident, they were obliged to give the benefit of that doubt to the appellant.

[42] What could have been the impact on the jury of the judge's failure to define accident? We do not think that this omission could have had any adverse effect on the jury.

In the context of this case we do not construe the omission as a material irregularity. Where, however, there is such an irregularity, the test has often been stated. Anderson v. The Queen [1971] 3 AER 768 is still the leading authority. The Privy Council in that case dealt with the impact of a serious misdirection and expressed the test to be whether, if the irregularity had not taken place, or if [12] there had been no misdirection, the jury would inevitably have come to the same conclusion.

[43] We are profoundly aware that this is a capital case and great care is to be taken in evaluating the approach to a misdirection or non-direction, but we are not convinced that the failure to define accident in this case should be elevated to the status of a material irregularity or a serious misdirection. Applying the Anderson test, we think that the jury would have inevitably have convicted the appellant if the omission had not happened. The evidence against the appellant was compelling. We think that the issue of accident was fairly left to the jury who, by their verdict, rejected it.

This ground of appeal is rejected.

Ground 7

[44] It is convenient to deal with the issue of self-defence here. It is contended that the directions on self-defence were inadequate and confusing. There were three.

[45] First (at pp.73-75) the trial judge gave this direction:

"Now, let us return to self-defence. It is both good law and good sense that a person who is attacked or believed that he is about to be attacked, may use such force as is reasonably necessary to defend himself. If that is the situation, his use of force is not unlawful, he is acting in self-defence and he is entitled to be found not guilty. As it is the Prosecution's duty to prove the case against the defendant, it is for the Prosecution to make you sure that he was not acting in lawful self-defence. The defendant does not have to prove that he was.

What does acting in lawful self-defence mean? The law is, that a person only acts in lawful self-defence, if in all the circumstances he believes it is necessary for him to defend himself and the amount of force which he uses in doing so is reasonable.

It follows that in relation to this issue, you must answer two main questions: Firstly, did the defendant believe or may he honestly have believed that it was necessary to defend himself? A person who is in reality the aggressor, [13] or who injures another purely out of revenge, or retaliation or anger, is not acting in self-defence when it is not necessary for him to use force at all.

If the Prosecution has made you sure that the defendant did not do what he did in the belief that it was necessary to defend himself, then self-defence simply does not arise in this case. If you decide that he was, or may have been acting in that belief, you must go on to answer the second question, which is, having regard to the circumstances as the accused believed them to be, was the amount of force which he used reasonable?

The law is, that force used in self-defence is unreasonable if it is out of proportion to the nature of the attack, or if it is in excess of what is really required of the defendant to defend himself.

It is for you the jury to decide whether the force used by the defendant was reasonable. You should also bear in mind that a person who is defending himself, cannot be expected in the heat of the moment to judge the exact amount of defensive action which is necessary. The more serious the attack or threatened attack upon him, the more difficult his situation will be.

If in your judgment the defendant believes, or may have believed that he had to defend himself and he did no more than what he honestly and instinctively thought was necessary to do so, then the amount of force used by him was reasonable.

If bearing these matters in mind, you are sure that the force used by the defendant was not reasonable, then he cannot have been acting in lawful self-defence and is guilty. If it was or may have been, he is not guilty."

[46] Then while examining the contents of the appellant's written statement (at p.89), the judge explicitly told the jury that if they accepted the statement they could not find the appellant "guilty of anything at all." He said:

"According to that statement, the death of Mr. Wharton was either accident or self-defence, according to what he tells us and in either case you would have to acquit him."

[47] And later, in summarizing the case for the defence the judge put the issue of self-defence in the context of the case. [14]

"So the defence says that this man, that the deceased was a man – was a bad man, a bad man who shoots about, shoots at his own brother; a bad man who stabbed up the accused on some earlier occasion and put him in hospital and that it was he, the deceased who had the gun on this occasion and that he was shot by his own gun when the accused, acting out of self-defence tried to lick it away.

It you accept that, well that's the end of the matter, you must find the accused not guilty of anything. If it leaves you in a state of reasonable doubt, well then again you must acquit the accused, you must find him not guilty."

[48] The classic exposition of the correct directions on self-defence is that of Lord Morris in Palmer v. R. [1971] AC 814, a case from Jamaica. Its

statement of the law has been accepted and followed in numerous cases since. The learned trial judge was obviously aware of Palmer and his direction at paragraph 38 demonstrates a careful attempt to follow the guidance of Palmer.

Subsequent to Palmer, Edmund Davies LJ offered further assistance to judges in R. v. Abraham (1973) 57 CAR 799. He said this at p.803:

"What accordingly is the drill, if that term may be used, which a trial judge should faithfully follow in dealing with such special pleas as self-defence? Surely it is this: give a clear, positive and unmistakable general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus and standard of proof applies and go on to deal for example….with the issue of self-defence by telling the jury something on these lines: 'Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of "Not Guilty". Since it is for the Crown to show that the plea of "Not Guilty" is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case'. Having done that, the trial judge can then proceed to deal with the facts of the particular case. The [15] last thing I seek to do is to lend support to the misconception that any prescribed words have to be used in giving the direction (see Palmer v. R (1971) 55 Cr.App.Ref.223, [16 WIR 499], PC)."

[49] The cases of Palmer and R. v. Shannon (1980) 71 CAR 182 were examined by Lord Lane CJ in R. v. Whyte [1987] 3 AER 417. At p.418 his Lordship explained the effect of the two cases. He said:

"The effect of those two decisions seems to be this. A man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence. Simple avoiding action may be enough if circumstances permit. What is reasonable will depend on the nature of the attack. If there is a relatively minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone who is in imminent danger, it may be necessary to take instant action to meet that danger."

[50] Notwithstanding counsel's submission that the direction was confusing, we think that it was indeed a proper direction. The test whether force used in self-defence was reasonable is not purely objective. There is an element of subjectivity. For Lord Morris did say:

"If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken."

[51] On the evidence of the appellant's written statement, he was raising the issue of self-defence in this way. The deceased was threatening him verbally, then he put his hand to the right side of his back and when his shirt was raised, the appellant saw a gun. He was scared because the deceased had previously stabbed him. He then defended himself against the deceased with the gun by using his hand to knock (lick) the gun away and his hand connected with either the gun or the deceased's hand. The gun exploded twice. [16]

[52] In accordance with Palmer, the trial judge had explained to the jury that if the appellant had believed that he had to defend himself and he did no more than what he honestly and instinctively thought was necessary, then the amount of force used by him was reasonable. Clearly on the appellant's statement he thought that he had to defend himself against the deceased with a gun. In using his hand to knock away the gun the force used would have been reasonable. All this assumes that the jury accepted a view of the facts as presented by the appellant. His version of the events was that his act was essentially defensive in character and he used no gun as the prosecution's witnesses had testified.

[53] As we see it, the issue for the jury was simple. Which version of the evidence to accept. What was required was a proper direction to assist them in resolving the issues of fact. By their verdict it seems clear that in the same way as they rejected accident so too did they reject self-defence. They obviously did not believe the appellant's story.

There were implausibilities and illogicalities in the appellant's case. He was saying that, in the face of a threatened attack by the deceased with a gun, he tried to knock the gun away with his hand. Yet the bullet did not go downwards. It entered the back of the man holding the gun and ended up somewhere in the region of his left collarbone. In fact, the entry point of the bullet in the deceased's back was evidence consistent with that of the eye witnesses for the prosecution. [17]

Ground 6

[54] Counsel for the appellant submits that "the trial judge erred in law when he failed to ascertain the difficulties faced by the jury on their return for further directions."

[55] We think that we should first set out that part of the transcript recording the proceedings from the time that the jury retired until they gave their verdict. (pages 91-93)

…….. "(Jury withdraws under sworn Marshals at 11:29 a.m.)

(Court adjourns at 11:30 a.m.)

(Court resumes at 01:05 p.m.)

(Jury returns to Courtroom at 1:07 p.m.)

THE CLERK: Madam Foreman, please answer yes or no. Have you reached a verdict upon which you all are agreed?

MADAM FOREMAN: (Foreman nods head)

THE COURT: Madam Foreman, is there any further assistance that I can give?

MADAM FOREMAN: It is needed.

THE COURT: All right. If you can indicate where I can be of assistance I will like - - or if you'll like to consult and - -

MADAM FOREMAN: I don't know what you can say, what else to convince - - you can give it a try.

THE COURT: All right. I will ask you to return and try once more to reach a unanimous verdict, but if you are unable to reach a unanimous verdict, then I can accept a verdict on which at least nine of you are agreed. A verdict on which at least nine of you are agreed would have to be on manslaughter, because a verdict of guilty or not guilty of murder has to be unanimous. So any verdict, any verdict on murder, guilty or not guilty has to be unanimous, but I can accept a verdict on which at least nine of you are agreed on manslaughter.

Director, anything else?

MR. LEACOCK: No Sir.

THE COURT: All right. Mr. Pilgrim.

MR. PILGRIM: Did you say guilty or not guilty of manslaughter, the majority?

THE COURT: Now, I think what I said has come straight from the book. I've got nothing to add to it.

MR. PILGRIM: As the court pleases. [18]

THE COURT: Thank you very much.

(Jury retires at 1:10 p.m.)

(Court adjourns at 1:11 p.m.)

(Court resumes at 1:33 p.m.)

(Jury returns at 1:35 p.m.)

THE CLERK: Madam Foreman, please answer yes, or no. Have you reached a verdict upon which you all are agreed?

MADAM FOREMAN: Yes.

THE CLERK: What is your verdict?

MADAM FOREMAN: Guilty.

THE COURT: Of?

MADAM FOREMAN: Murder.

THE COURT: That's the verdict of you all?

MADAM FOREMAN: Yes. Unanimous."

[56] It is plain that the jury needed the further assistance of the judge. The Madam Foreman said it was needed. The judge quite properly at that stage asked her to indicate where he could be of assistance to them. She then expressed the opinion that she did not know what the judge could say; "what else to convince" them. It is clear, here, that the jury were having some difficulty. Should the judge have probed more to ascertain precisely what was the nature of the difficulty? That is the question. To probe, not to probe or how far to probe!

[57] Counsel cited Linton Berry v. R. [1992] 2 AC 364. The facts of that case relevant to this ground of appeal were that, after retirement, the jury returned to court and informed the judge that they had a problem. He ascertained that it related to the evidence and not the law, but he did not find out what the problem was and merely gave general guidance. The Privy Council held that the judge had erred [19] in failing to ascertain what the jury's problem was and to give the requisite help.

[58] Lord Lowry delivering the advice of the Board said at p.383:

"The judge then gave a brief and accurate summary of the factual contest, adverted again to the burden of proof and reminded the jury that they were the sole judges of the facts. 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. 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 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 circumstances, but their Lordships need not decide how in this case they would have viewed such failure, seen in isolation."

[59] We have to try our very best to interpret the dialogue between the trial judge and the foreman of the jury. The Director of Public Prosecutions, who appeared in the court below, informed us (and it was not disputed by Mr. Pilgrim) that when the jury returned at 1.07 p.m., after deliberating for one and a half hours, it was in response to a summons from the judge. They had already deliberated for more than the statutory minimum of one hour before they could be called [20] back. It was the judge's initiative to recall them. He must have sensed that they were having difficulty.

[60] The Director seeks to distinguish Berry. He argues that, in that case, there was an identifiable problem and the judge had a duty to probe and ascertain the nature of the problem. On the other hand, in this case, says Mr. Leacock, there was no known or identifiable problem. What was the judge to do? Speculate? Revisit the evidence? Restate the law? The Director says that the judge did as much as he could reasonably have been expected to do.

[61] In this appeal, the judge, recognizing that the jury were in difficulty quite properly asked them if he could be of further assistance. Madam Foreman replied "It is needed." A signal for help was thereby raised. At that point, the judge must help. The learned trial judge tried to respond to her signal. He asked her to indicate where they were having problems; where he could be of help. The Foreman was unable to help the judge. She did not know what else he could do to help them. In her own words: "I don't know what you can say." We construe those words as meaning "I do not know how you can be of any assistance to us."

[62] We suspect that the phrase, "what else to convince" may have been an impulsive, abbreviated indication that certain of the jury needed to be convinced about something. But of course we cannot know for sure.

Madam Foreman invited the judge to "give it a try".

[63] The assistance which the judge then tried to give was to request them to be unanimous in their verdict. In the absence of unanimity he told them he could accept a majority verdict on manslaughter.[21] When they retired a second time they deliberated for 24 minutes before returning a unanimous verdict of Guilty of murder.

[64] In Berry, the Privy Council allowed the appeal. It is important, however, to read that case carefully. It seems to us that the appeal was allowed for three reasons.

First, the failure by the prosecution to disclose to the defence statements of two witnesses constituted a material irregularity.

Secondly, the judge's failure to direct the jury adequately as to the defendant's previous good character was a material misdirection which could have caused injustice to him.

Thirdly, the judge's failure to ascertain what the jury's problem was and to give the requisite help constituted an irregularity which might be material, depending on the circumstances.

[65] Lord Lowry described the failure to disclose the witness statements as being "by far the most important ground of appeal". The judge's failure to ascertain the problem which the jury had, was one of three other subsidiary grounds under the rubric "trial judge's treatment of the jury."

[66] We understand Lord Lowry as saying in his advice that it is not enough for the judge to ascertain that the jury's problem related to a legal or factual matter. He must go on and inquire what is the nature of the problem. In this appeal the judge did ask the foreman "to indicate where I can be of assistance…" That seems to us to suggest a willingness on the part of the judge "to find out what the problem was".

[67] We are unable to say that the judge's unsuccessful efforts to elicit from the foreman the precise nature of the problem constituted, on the particular facts of this case, a material irregularity such as would [22] lead us to quash the conviction. We do not believe that any prejudice or unfairness was occasioned to the appellant.

[68] Indeed the fact that the jury returned within half an hour with an unanimous verdict of Guilty of murder suggests to us that, at the time of their recall, they merely needed more time as the Foreman indicated, to "convince", perhaps, those of their members who had not completely made up their minds.

[69] In the circumstances, this ground of appeal is also rejected. The appeal is accordingly dismissed. Conviction and sentence are affirmed. [23]

Chief Justice

Justice of Appeal Justice of Appeal