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BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No.17 of 2005

BETWEEN:

NEVERLAINE ROHAN O'NEAL SPRINGER ***Appellant***

AND

THE QUEEN (No.2) ***Respondent***

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Peter Williams, Justice of Appeal and the Hon. John Connell, Justice of Appeal

2006: 28 and 29 March and 12 June

Mr. Hal Gollop and Mr. Steve Gollop for the Appellant
Mr. Roy Hurley and Mr. Elwood Watts for the Respondent

DECISION

Introduction

SIMMONS CJ: On 31 May 2005, following a retrial before ***Chandler J*** and a jury, the appellant was convicted of the murder of Wilmark Rudder (the deceased) on 24 May 2002 and sentenced to death. His appeal against conviction raises two issues. First, did the trial judge err in law in rejecting a submission of no case to answer at the close of the prosecution case? Secondly, what is the effect of the trial judge's failure to elicit from the jury the point of clarification on which they sought his assistance?

The Prosecution Case as outlined by Counsel

[2] For reasons which will become apparent on our consideration of the first issue, we think it important to highlight a part of the opening speech of prosecuting counsel before examining the evidence in order that the case for the prosecution and the first issue may be understood in their context. During the course of his opening address, Mr. Eli Edwards told the jury that the prosecution must prove:

> "(1) that the act which caused the death of the deceased was a conscious act on the part of the accused;
>
> (2) that the act of the accused was deliberate, that is, that it was not accidental;
>
> (3) that the act was intentional, that is, at the time of doing it, the accused intended either to kill or to cause some serious bodily harm;
>
> (4) that at the time of the killing, the accused was not acting under provocation;
>
> (5) that the killing was done without lawful justification or excuse, that is to say, self-defence." – p.5

He then said that it was the prosecution case that when the deceased met his death "it was not as the result of any accident, neither was it

self-defence. We, the prosecution, are saying that on the day Wilmark Rudder met his death, he was shot intentionally by the accused man with a gun that the accused was carrying, and that the death was not accidental, neither was it self-defence." (p.6). At p.12 of the record, prosecuting counsel also made it clear to the jury that "the prosecution will also bring evidence to satisfy you or to prove to you that when Wilmark Rudder was killed on that fateful day, Wilmark Rudder was accompanied, walking on the streets en route to a particular destination…".

Summary of Prosecution's Evidence

[3] The case for the prosecution, so far as material to the issues on this appeal, rested upon the evidence of two civilian witnesses who saw the deceased and the appellant shortly before the deceased was killed; the evidence of S/Sgt. Sylvester Louis (now Inspector) to whom the appellant gave a statement in his own handwriting and made certain oral statements; the evidence of a forensic firearms expert, Sgt. Graham Husbands; and a lie told to S/Sgt Louis about the disposal of the gun which caused the fatal injury to the deceased.

[4] There were no eyewitnesses to the incident which led to the deceased's death; no direct evidence of the facts in issue apart from the appellant's written statement.

[5] On 24 May 2002, about 5.00 p.m., Kathleen Stewart was at home in Woodstock Road, Spooner's Hill, looking through her bedroom window. The deceased visited her and "went up the road" with two videotapes in his hand. After the deceased left her, Stewart saw the appellant who "went up the road" and sat down under an abandoned bungalow known as "Flat Bush". Stewart said that after the deceased left her she moved from the window. Then she heard "pax". She looked and saw the deceased lying on his face. Angela Thorne said that she saw the appellant and two other men pass beside her house and go to Flat Bush where they sat down. About half an hour later she heard an explosion. She went outside, looked up the gap and saw the deceased on the ground. The deceased was her son-in-law. She saw the appellant and other men running from the area.

[6] The police were called and carried out investigations. On the next day (25 May 2002), about 12.25 p.m., the appellant, accompanied by his uncle, P.C. 1201 Springer, reported to the District 'A' police station where S/Sgt. Louis allowed him to consult with an attorney-at-law. About 5.40 p.m. S/Sgt. Louis told the appellant that he wished to interview him in connection with the death of the deceased and cautioned him. The appellant said, "that man bore me and I defend myself". He proceeded to write a statement which we

reproduce below at para. [9]. About 6.40 p.m. that evening, S/Sgt. Louis, Sgt. Reid and the appellant went to Thorne's Gap, Spooner's Hill, where the appellant pointed to an area and said: "That is where he bore me, but Louis I ain't really drop the gun there. I gave the gun to my cousin Franco". S/Sgt. Louis asked him why he had lied and the appellant said, "I did not know that you would check it out". The appellant then directed the police officers to 3rd Avenue, Long Gap, where Franco lived. Franco retrieved the gun from behind a rock. It was wrapped in a plastic bag.

[7] The deceased died from a single gunshot wound to his chest. Sgt. Husbands testified that the bullet which killed the deceased had been fired from the gun retrieved by Franco. The gun was defective. Sgt. Husbands said that he found that he could not check its trigger pressure because a spring was broken and the magazine floor plate was also broken. His opinion was that the gun could not be 'cocked' manually. To load the gun, it was necessary to insert cartridges in the magazine. Under cross-examination, Sgt. Husbands agreed that he could not be certain that the gun, defective and malfunctioning as it was, would not fire accidentally. S/Sgt. Louis had given evidence that he made several attempts to make the gun safe but he was unable to do so.

[8] The expert medical evidence of Dr. Stephen Jones, consultant pathologist, did not assist the prosecution. His evidence explained the path of the bullet and that it lodged in an area of the body behind the armpit. No evidence was led of the pathologist's opinion as to whether the injury might have been inflicted from close range or indeed to support a prosecution theory that the deceased was not shot accidentally in a struggle.

The Appellant's Written Statement

[9] The appellant's written statement was admitted in the prosecution case without objection. It forms the only direct evidence of the incident on 24 May 2002. It is as follows:

> "I was on my way home from work hungry and exhausted. I walked from the stop lights in Codrington Hill where my drop had left me. I was on my way to the shop due to the fact that work was so hectic that I didn't have time to stop and eat. When I got there I acknowledge that the best thing for me was my grandmother's hot food. So I by passed the shop. Whilst on my way home, I saw Mark Rudder approaching me. When he got closer to me, he drew a gun from his waist, then cocked it, but it jammed.
>
> Seeing that this was not the first time he had done this, and he had also previously bursted my head before, in all of my frustration and anger, also being scared, I charged him. We then struggled for the gun. As soon I got a firm grip on it, it went off. Then I saw him fall to the ground. I was scared and stood there for a while, then I dropped the gun and ran away. It was never my intention to kill anyone, as I didn't know what to do or where to go. So I

> ran and got on a van and tried to get as far away as possible from the scene. When the van got down town, I got off and then boarded a taxi and headed on my way to Ellerton, St. George, where a friend of mine lives. When I go there, he was getting dressed for work. I didn't mention to him what had happened because I felt like I could trust no one, but I had mentioned the fact that I had come so far for no reason. He replied in the presence of his sister, 'You could come and go to work with me.' So I began to think that that would be perfect because that would be the last place anyone would look for me so I went. When I got there he gave me a tour of the place and showed me what his job was all about. Then we both relaxed the rest of the night. When morning broke we were there for a while. When we left we returned to his house. When we got there I stood there for a while, then I decided it was time to stop running and face the facts so I then got in a van and returned home. When I returned home I was told by my cousin that the police had been there and asked me to turn in myself, so at that point I called my cousin and asked him for a lift to the station and he came." – p.112A.

The Defence

[10] The appellant elected to give unsworn evidence from the dock. He merely said that he stood by his written statement and he could not say exactly what happened during the course of the struggle.

The Grounds of Appeal

Ground 3

[11] For the purposes of this appeal, we need to consider only two grounds of appeal, viz. grounds 3 and 5. On ground 3 the appellant contends that the trial judge erred in not upholding a submission of

no case to answer (no case submission) at the close of the prosecution case. Counsel's arguments at the trial and on the appeal in support of his submission were that: *(i)* On the evidence led by the prosecution, it was not proven that the appellant killed the deceased with the intent necessary to support a charge of murder. Further, there was no satisfactory evidence that the appellant killed the deceased. *(ii)* In his opening speech, counsel for the prosecution had asserted that the appellant shot the deceased intentionally with a gun which he was carrying and there was no evidence to support this assertion. *(iii)* The burden of proof was on the prosecution to prove the requisite elements of the offence and prosecuting counsel had explained to the jury in his opening address that he had to prove the five elements mentioned at para. [2] *supra*. *(iv)* After all of the evidence for the prosecution had been admitted and, having regard to the onus of proof on the prosecution, the prosecution had failed to prove to a satisfactory standard the very matters which were required to be proved.

[12] At the trial, Mr. Edwards submitted *(i)* that the appellant was motivated by a desire for revenge because he said in his written statement that the deceased "had previously bursted my head before, in all my frustration and anger, also being scared, I charged him".

Counsel also submitted *(ii)* that on the authority of ***R. v. Stephanie Storey and R. v. Rashid Anwar (1968) 52 Cr.App.R. 334***, a statement made voluntarily by an accused person to the police is not in itself evidence of the truth of the facts stated. It is, however, evidence at the trial because it shows the reaction of the accused when first taxed with the incriminating fact. He invited the trial judge to draw the inference that because the appellant had lied to S/Sgt. Louis, he had also lied about other matters. Mr. Edwards submitted *(iii)* that it was the appellant's firearm which was used and there was no struggle between the appellant and the deceased. He invited the trial judge to find that because the appellant said that the deceased had the gun did not necessarily mean that the appellant was speaking the truth.

The Ruling of the Trial Judge

[13] In his ruling upon the submission of no case to answer, the trial judge identified three issues. First, whether the shooting was accidental or done in self-defence. Account had to be taken of the expert evidence as to whether the gun could fire accidentally; similarly the accused's issue of self-defence required proof of certain facts. All these were matters of fact for the jury. Secondly, the trial judge saw the issue of lies as a jury matter and, thirdly, the meaning

of the word "bore" was again a jury matter. In the circumstances, the trial judge declined to withdraw the case from the jury.

[14] During the argument on the appeal, the respective submissions were canvassed before us together with citation of legal authorities.

The Law and its application to this appeal

[15] As long ago as 1955 in ***R. v. Abbott [1955] 2 All E.R. 899, Lord Goddard CJ*** expressed the view that "it cannot be right for a judge to leave a case to the jury where the whole of the structure on which the prosecution has been built up to that moment collapses and falls." However, in 1962, ***Lord Parker CJ*** issued a ***Practice Note [1962] 1 All E.R. 448*** to *magistrates* in which he stated that

> "A submission that there is no case to answer may properly be made and upheld: *(a)* when there has been no evidence to prove an essential element in the alleged offence; *(b)* when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or so manifestly unreliable that no reasonable tribunal could safely convict on it."

This ***Practice Note*** was revoked in 2002 and, according to *Blackstone's Criminal Practice 2006* at p.1727, "nothing was put in its place".

[16] However that may be, in ***R. v. Barker (1977) 65 Cr.App.R. 287 at 288, Lord Widgery CJ*** dealt with the duty of a trial judge in respect of a no case submission made *in indictable trials*:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily *with those cases where the necessary minimum evidence to establish the facts of the crime has not been called.* It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury....."

[17] It seemed, however, that some doubt continued to exist as to the proper approach to be adopted by a judge at the close of the Crown's case on a submission of no case to answer. There were apparently "two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence on which a jury properly directed could properly convict." – see ***Lord Lane CJ*** in ***R. v. Galbraith [1981] 2 All E.R. 1060 at 1061.***

[18] The Lord Chief Justice removed any residual uncertainty in the law by issuing the following guidelines at p.1062:

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2)

> The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.
>
> (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.....".

[19] ***Lord Lane*** disapproved of any practice that judges should stop cases if they were of opinion that it would be unsafe or unsatisfactory for the jury to convict. This would amount to a usurpation of the function of the jury. In the Commonwealth Caribbean the ***Galbraith*** guidelines have been followed and applied – see, for example, ***The State v. Alvin Mitchell (1984) 39 WIR 185*** where ***Massiah C,*** reviewing the historical development of the applicable legal

principles, found a consistent application of the ***Galbraith*** test in this region and in Canada and Australia – see p.190.

[20] The Privy Council endorsed the ***Galbraith*** approach in an appeal from Jamaica, ***Daley v. R. [1993] 4 All ER 86*** and in 1996 in ***Taibo v. R. (1996) 48 WIR 74***, an appeal from Belize. It is worth mentioning that in ***Taibo, Lord Mustill***, who also delivered the advice of the Board in ***Daley***, observed that "the evidence given at the trial did not measure up to the brief opening address" (p.82). In our judgment a similar comment applies to the instant appeal. The evidence adduced by the prosecution fell far short of the confident prognostications of counsel in his opening address.

[21] Mr. Edwards had led the jury to expect that there was evidence that the deceased "was shot intentionally" by the appellant carrying a gun and death was not accidental and not by way of self-defence. We are constrained to ask: Where is the evidence that the deceased was shot intentionally by the appellant? On the only evidence before the jury as to how the deceased was shot there is nothing to prove that the shooting was intentional. Couched in the vocabulary of the *mens rea* for murder, there is no evidence that the appellant deliberately intended to kill the deceased or cause him serious bodily harm. Quite simply, there was no satisfactory proof of an essential element

in the offence of murder. To sustain the charge of murder the prosecution had to adduce evidence to show that the killing of the deceased was intentional i.e. deliberate. Intention was therefore a fact in issue. The evidence led was not probative of that fact in issue. On the other hand, such evidence as there was, raised issues of accident and self-defence.

[22] But, bearing in mind that the burden of proof remained from beginning to end on the prosecution to negative both issues, and reminding ourselves that these issues formed part of the prosecution case, it seems to us quite clear that, at the close of the prosecution case, no satisfactory evidence had been adduced to negative the issues of self-defence and accident. It follows that the prosecution had not discharged the burden of proof to the criminal standard. The prosecution case was patently weak. It became confused when Mr. Edwards suggested to the trial judge that he could draw inferences from the evidence. Inferences can be drawn only from proven facts and, moreover, where the inferences from proven facts are equivocal, the inference more favourable to an accused person must be drawn as a matter of law. The proven facts in this case pointed to the issues of accident and self-defence. Plainly, any inferential findings would have had to have been resolved in favour

of the appellant. To give one example, Sgt. Husbands, a prosecution witness, accepted that the gun was defective and could have fired accidentally. If there was a doubt about the integrity of the gun, it necessarily had to be resolved in the appellant's favour.

The Lie told by the Appellant

[23] In reviewing this ground of appeal we must also advert to the law relating a situation where the prosecution seeks to rely on a lie told by an accused out of court as part of the proof of guilt. Mr. Edwards had sought at the trial to weave a chain of inferences out of the appellant's lie to S/Sgt. Louis. But such efforts were tenuous and contrary to established legal principle. Indeed, Mr. Hal Gollop cited a passage from the judgment of ***Massiah C*** in ***The State v. Mitchell*** (p.1192) to show that a lie, standing on its own, is insufficient to sustain a conviction.

> "A jury would be acting unreasonably and wrongly if they drew such an inference [of guilt] from a lie standing alone. The authorities are legion that emphasise that a lie, by itself, cannot form a proper basis for conviction."

[24] In Mr. Edwards' address to the trial judge, he said (p.280):

> "The prosecution still contends that the fact is that the accused man lied to the police about one thing, the inference can be drawn that he lied about other things and therefore Your Lordship has to give directions in relation to *lying witnesses*." (Emphasis supplied).

[25] He had earlier suggested to the trial judge that he would "have to give a direction in relation to lies in respect of the ***Lucas*** directions". We assume that counsel was referring to ***R. v. Lucas [1981] 2 All ER 1008*** in which ***Lord Lane CJ*** was dealing with the capability of lies to amount to corroboration. At p.1011, the Lord Chief Justice explained:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

[26] ***Lucas*** turned on the issue of the danger of convicting on the uncorroborated evidence of an accomplice and the duty on a trial judge to point out corroborative facts. In this appeal there is no accomplice and corroboration, strictly so called, is irrelevant. The appellant's lie to S/Sgt. Louis was not contested and in his statement he said that he was scared after the gun 'went off'.

[27] In our opinion, on the evidence adduced, the lie cannot be relied on as a link in the chain of proof. In the Court of Appeal of New

Zealand, the headnote of ***R. v. Toia [1982] 1 NZLR 555*** illuminates this area of criminal evidence. The Court held:

> "Lies should not be too readily relied on as links in a chain of proof. It is only when a lie is more consistent with guilt than innocence that it can strengthen the case against an accused.
>
> If a lie is of this type the Judge will need to give a detailed direction to make it clear to the jury that before using it in that way they must be satisfied of two things: first, that it has been proved to be a lie (and in corroboration cases the proof cannot come from the complainant alone); and second, that it is the sort of lie which naturally indicates guilt rather than innocence. However most lies are not in this category. More commonly, proved lies by an accused, whether in evidence or in statements out of Court, may be relevant to credibility. But whenever lies by an accused figure in a case it is customary and advisable to give a warning to the jury on the lines that people may have various motives for lying and that a lie does not necessarily mean guilt. A summing up must always be adapted to the particular case and no specific formula is automatically suitable in dealing with lies.
>
> But generally a more elaborate direction is needed only where it is suggested that the alleged lie adds to the prosecution case."

[28] ***Cooke J*** (as he then was) noted that the law stated in ***Lucas*** was substantially the same as stated by the Court of Appeal of New Zealand 5 years earlier ***in R. v. Collings [1976] 2 NZLR 104***. The learned judge explained at p.559 that there are two main ways in

which lies by an accused may be important evidence in a criminal trial.

> "First, occasionally they are capable of adding something to the Crown case, whether as corroboration or simply as strengthening evidence. But, as pointed out by this Court in ***R v Collings [1976] 2 NZLR 104***, 116-117, most lies are not in that category. For example a false denial of being at the scene of the crime often does nothing to help prove that the accused committed the crime; he may simply want to avert unjust suspicion. It is only when a lie is more consistent with guilt than with innocence, as when it suggests that the accused *cannot* give an innocent explanation, that it can add anything to the case against him. We think that not enough heed may have been paid to the warning given in ***Collings*** against too readily relying on lies as links in a chain of proof. We are fortified in repeating that warning when we note that the Court of Appeal in England in a judgment delivered by ***Lord Lane CJ*** has recently stated the law substantially as it was stated in ***Collings***. The case is ***R. v. Lucas [1981] QB 720; [1981] 2 All ER 1008***.
>
> Secondly, and more commonly, proved lies by an accused, whether in evidence or in statements out of Court, may be relevant to credibility. This is no more than a matter of common sense. They may help the jury to decide whether the evidence for the prosecution should be preferred to an account put forward by the accused.
>
> To jump to the conclusion that an accused who has lied must be guilty is a human tendency that has to be guarded against. So, whenever lies by an accused figure in a case, it is customary and desirable to give a warning to the jury, as the Judge did here, on the lines that people may have various motives for lying and that a lie does not necessarily mean guilt."

[29] In this appeal, the trial judge ruled in dismissing the no case submission that, on 'the totality of the evidence' he felt bound to dismiss the submission. The totality of the evidence in this case and its substantial basis were the oral and written statements of the appellant which clearly contained uncontradicted evidence of accident and self-defence. Of course, issues of self-defence and accident are essentially issues of fact for the jury's determination. In a case where there are several witnesses whose evidence touches and concerns those issues, a trial judge should properly leave them for the jury's decision. But where, as here, the only evidence raising those issues comes from the defendant and forms part of the prosecution case, in our view a judge would be entitled to stop the case. We cannot speculate outside the evidence as adduced. Speculation is not evidence; evidence consists of facts; speculation is guesswork. In this regard, we must bear in mind an observation of ***Lord Wright*** in ***Caswell v. Powell Duffryn Associated Collieries Ltd [1939] 3 All E.R. 722*** at 733:

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish....But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[30] This was not a case where the strength or weakness of the prosecution's case depended on a view taken of the reliability of various witnesses. Such matters are, as ***Lord Lane*** said in ***Galbraith***, "generally speaking within the province of the jury…" In ***Galbraith*** there were three witnesses to the issue but none of them was satisfactory. In such a situation of more than one witness to the issue, the judge would be weighing the evidence in a manner that was properly the function of the jury. He would be assessing the credibility and consistency of the evidence of various witnesses. That is a jury's function. Here the only direct evidence of the facts in issue were the oral and written statements of the appellant uncontradicted except in respect of the lie told to S/Sgt. Louis.

Conclusion on the No Case Submission

[31] In our judgment the trial judge erred in rejecting the no case submission because *(i)* the evidence adduced by the prosecution did not prove that the appellant had the necessary *mens rea* to support the charge of murder; *(ii)* such evidence as was led in the prosecution case included clear evidence to raise the issues of accident and self-defence and the prosecution had produced no evidence contradicting these issues. In the result, the prosecution had failed to discharge the burden of proof; *(iii)* the proven facts could not

produce unequivocal inferences flowing logically from the proven facts and, if two or more inferences could have been drawn from the proven facts, the jury were obliged to draw the inferences more favourable to the appellant; *(iv)* there was no affirmative evidence that at the time the deceased was shot the appellant had exclusive possession of the gun and deliberately shot the deceased; there was evidence of a struggle by both men over the gun which the deceased had when he approached the appellant; *(v)* such evidence as there was, was of such a nature and quality that, taken at its highest, it was all in favour of the appellant. In our view, this appeal sits comfortably within the first sentence of the *dictum* of ***Lord Widgery*** in ***Barker*** quoted at para.[16] *supra* and we hold that the learned trial judge erred in law in not upholding the submission of no case to answer.

Ground 5

[32] This ground pleaded that there was a material irregularity in the trial in that the trial judge failed to elicit from the jury the point of clarification which they sought after learning from them that they did in fact need clarification. We quote p.395 of the record. The jury retired at 12.37 p.m. and returned at 2.16 p.m. Thereafter the following dialogue is recorded.

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

Madam Foreman: No.

The Court: **Madam Foreman and your members, is there any point on which you would wish me to make any clarification?**

Madam Foreman: **Yes, Sir.**

The Court: **And what is the point?**

Madam Foreman: I am asking, My Lord…..

The Court: **Hold, hold. All right, Madam Foreman and members, I am going to ask you to retire again and seek to arrive at a unanimous verdict on the charge of murder, whether it be guilty or not guilty, but if you cannot reach a unanimous verdict, I can now accept a majority verdict on manslaughter, provided that that is a verdict upon which at least nine of you are agreed. You understand me, Madam Foreman and members?**

Madam Foreman: **Yes, Sir.**

The Court: **So I am going to ask you to retire once again and seek to arrive at an unanimous verdict on murder, whether it be guilty or not guilty, but if you cannot, then I will be able to accept a verdict in respect of manslaughter,** provided it is a verdict on which at least nine of you are agreed……

(Jury retired further: 2.20 p.m.)

(Court adjourns: 2.20 p.m.)

(Court resumes: 2.55 p.m.)

(Jury returns: 2.56 p.m.)

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

Madam Foreman: Yes, ma'am.

The Clerk: What is your verdict?

Madam Foreman: Guilty.

The Clerk: Guilty of what?

Madam Foreman: Murder." (Emphasis supplied)

[33] Our reaction to the above dialogue is that we do not know the point on which the jury needed clarification. Was it a matter of law or of fact? In what we feel must have been a lapse in concentration, the trial judge failed to answer for the jury the very question which he had put to them. Perhaps his mind was distracted because the time had been reached when he could have given them directions on a majority verdict.

[34] Counsel cited the Privy Council authority of ***Linton Berry v. R. [1992] 2 AC 364; Michael Huggins v. R. (2004) 64 WIR 26;*** and ***Jerome Bovell v. R. (Criminal Appeal No.23 of 2000 unreported decision of 23 April 2002)***. In ***Linton Berry, Lord Lowry*** 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."

[35] This Court's resolution of a similar problem in ***Huggins*** was not challenged when that case went to the Privy Council and in view of the recent decisions of this Court in ***Huggins*** and ***Bovell***, we do not think it necessary to examine the circumstances of those cases. The law is well settled in ***Linton Berry*** by what was then our highest

court. This Court distinguished ***Linton Berry*** in ***Huggins*** and ***Bovell*** on their particular facts. Plainly, the trial judge did not explore the point on which the jury needed his help. It may have been a legal point or some aspect of the facts. We cannot be sure whether some misconception or irrelevance played a part in the jury's verdict. We do not know, we cannot speculate. This was a capital case. In any case a trial judge is always under a duty to clarify a matter on which the jury seeks clarification. The trial judge failed in his duty and we are obliged to uphold the validity of this ground of appeal. The trial judge's error was a material irregularity in the trial.

[36] If the jury signal during retirement that they wish further directions, they should be brought back to court and inquiry made about the nature of the problem. Having ascertained what the problem is, an appropriate direction should be given. To avoid the possibility of prejudice, the foreman of the jury should be invited to write down the problem and pass the note to the judge. Thereafter the trial judge should show counsel the note and then give such directions as are warranted.

Conclusion and Disposal

[37] Since the appellant succeeds on the two grounds discussed, the appeal is allowed and the conviction will be quashed. In the

circumstances we shall not order a retrial. The appellant has been tried twice for the offence; on two occasions his appeals against conviction have been allowed. As we have said in this judgment, on the evidence adduced the prosecution case is very weak and tenuous. Four years have passed since the date of the offence. Accordingly, it would be wrong to order a third trial. The interests of justice require that there be no further trials in this matter.

[38] Finally, we wish to express our appreciation to ***Connell JA*** who assisted greatly in the preparation of this judgment.

Chief Justice

Justice of Appeal

Justice of Appeal