BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 23 of 2019

BETWEEN:

PEDRO DEROY ELLIS
also known as
PEDRO DERAY ELLIS **Appellant**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Before: The Hon. Sir Marston C. D. Gibson, K.A, Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. William J. Chandler, Justice of Appeal, (Acting)

2019: November 12
2020: February 5

Mr. Larry Smith QC, Mr. Kashka Hemans, Ms. Safiya Moore, Ms. Desiree Browne and Ms. Jamila Smith for the Appellant
Mr. Alliston Seale and Mr. Oliver Thomas for the Respondent

REASONS FOR DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 12 November 2019, this Court heard an appeal which had been filed with a certificate of urgency. The appeal challenged the refusal of the trial judge

to release the appellant or grant him bail after the conclusion of a trial in the High Court.

[2] At the conclusion of the hearing, we allowed the appeal and indicated that we would give our reasons for so doing at a later date. We also ordered counsel to file written submissions on the issue of costs on or before 26 November 2019, if there was no agreement between the parties. These are our reasons.

THE HIGH COURT PROCEEDINGS

[3] On 8 October 2019, the appellant was arraigned on an indictment that on 5 May 2013, he murdered Antonio Harewood. He pleaded not guilty of murder and trial commenced.

[4] On 25 October 2019, the jury retired to consider their verdict. On their return, Madam Foreman informed the court that they had reached a unanimous verdict of not guilty of murder. She however indicated that they had been unable to reach a majority verdict on manslaughter. The jury was then discharged by the trial judge.

[5] Shortly thereafter, Mr. Larry Smith QC, counsel for the appellant, made an oral application for the grant of bail to the appellant. The judge then invited Mr. Oliver Thomas, counsel for the prosecution, to indicate whether the Crown was "going to seek a retrial on the issue of manslaughter or not".

Mr. Thomas informed the judge that the Crown did not see any justice in retrying the matter, given the amount of time which had already passed.

[6] Thereupon, there was an exchange between the judge and Mr. Thomas as to whether he had consulted with the Director of Public Prosecutions (DPP) on this course of action. Mr. Thomas replied in the negative, and after certain comments were made by the judge, he requested a short adjournment in order to do so and suggested that $150,000.00 would be a reasonable sum in respect of bail. The judge determined that it was not appropriate to grant the appellant bail at that time and expressed the view that the case could be retried within 3 months, if necessary. He remanded the appellant into custody until 30 October 2019.

[7] When the matter resumed on 30 October 2019, Mr. Alliston Seale appeared for the Crown and sought a further adjournment in order to consider the matter of a retrial. The judge expressed the opinion that "He is before this court now on manslaughter" and "He is here on a charge of manslaughter for stabbing a man to death. That is what the charge says". The judge then remanded the appellant in custody until 13 November 2019.

THE APPEAL

[8] By notice of appeal filed on 30 October 2019, the appellant set out 9 grounds of appeal in which the judge's decision was challenged on the basis that the

judge erred in findings of fact and holdings of law when he made his decision to refuse the appellant bail. We do not consider it necessary to set out those grounds in detail. In essence, the appellant alleged that the judge erred in law by failing to give due consideration to **section 4(1)** and erred in the exercise of his discretion pursuant to **section 5(1)** of the **Bail Act**, **Cap. 122B (Cap. 122 B)**.

[9] At ground (i), the appellant argued that the judge "failed to have any or any regard to the fact that the appellant was acquitted of the most serious charge of murder and/or failed to have any regard to the implication to be gleaned from the jury being unable to reach a majority verdict in favour of manslaughter."

[10] The appellant sought the following orders:

> "(a) The decision of the Judge made on the 30th day of October, 2019 be set aside and the Appellant be admitted to bail;
> (b) The Respondent to pay the Appellant the costs of the Appeal and in the High Court application; and
> (c) Such further or other relief as this Honourable Court may deem just."

SUBMISSIONS OF COUNSEL

[11] Mr. Smith QC, counsel for the appellant, submitted that the appellant was tried on indictment for the offence of murder. On 25 October 2019, he was found not guilty of that offence by the jury who were unable to reach a majority verdict of manslaughter. Since that date, the appellant has not been arrested

or charged with any offence. Counsel also submitted that the issue of manslaughter which arose on the evidence is not presently a charge for the offence of manslaughter. Mr. Smith QC contended that, in these circumstances, the appellant should not be kept in custody and should be released.

[12] Mr. Smith QC's further argument was that the appellant, not having been charged or indicted with anything after his acquittal, the question of bail could not arise in these circumstances. Bail would only arise if the appellant was properly detained.

[13] Counsel's alternative submission was that the judge, in dealing with the application for bail, did not give sufficient consideration to the matters outlined in **Cap. 122B**. He argued that the prosecution did not present any evidence in support of their objection to bail. Consequently, there was no basis on which the judge should have denied the application.

[14] In response, Mr. Seale submitted that in every indictment for murder, there is that element of manslaughter and the possibility that a jury could return a verdict of manslaughter, notwithstanding that the indictment does not specifically mention manslaughter. Counsel however conceded that in a situation where a trial has ended and the jury has returned a verdict of not guilty of murder and is unable to agree on the alternative verdict of

manslaughter, it is for the DPP to proffer another indictment in respect of manslaughter.

[15] Mr. Seale acknowledged that at the conclusion of the trial and having regard to the jury's decision, the question of bail could not arise. Further, the issue of whether the DPP would proffer a new indictment was not properly for the court at that stage.

DISCUSSION

[16] We must state at the outset that our discussion is not concerned with the matter of the judge's exercise of the discretion relating to the grant of bail as we do not consider that this is required for us to dispose of this appeal. It relates solely to the first submission made by Mr. Smith QC.

[17] The undisputed facts are that the appellant was arraigned on an indictment containing one count, that of murder. **Section 38** of the **Juries Act**, **Cap. 115B** (**Cap. 115B**) provides that in a trial on indictment for murder, the verdict of the jury, whether of conviction or of acquittal in respect of that offence, shall be unanimous.

[18] The jury returned a unanimous verdict of not guilty of murder. Having been given the appropriate direction in relation to manslaughter by the judge, it was open to them to return a majority verdict of manslaughter in accordance with

section 39(a) of **Cap. 115B**. There was no agreement on the alternative verdict of manslaughter. The jury were discharged.

[19] Clearly, the issue of manslaughter was properly raised and considered. The question which arises is whether in the circumstances of this case, the appellant could be detained in custody in the absence of an indictment alleging manslaughter.

[20] According to **Mee v Cruickshank (1902) 20 Cox 210**, the continued detention of an acquitted defendant is illegal, unless he is lawfully held in connection with some other matter. We would therefore answer that question in the negative. For, as was stated by **Lord Devlin** in **Director of Public Prosecutions v Nasralla [1967] AC 238**, "There is no procedure in criminal law for the trial of an issue; an accused must be tried on indictment."

[21] We accept that the appellant was not acquitted of manslaughter by way of a verdict returned by the jury. The jury, having been unable to agree and having been discharged, it was perfectly permissible for a new indictment for manslaughter to be proffered against the appellant and for him to be put in charge of a jury in that respect. However, no such action was taken by the DPP and thus the legality of the appellant's continued detention assumed critical importance.

[22] A further question which we must consider is whether the judge, in light of the conclusion of the trial and the discharge of the jury, was entitled to exercise further jurisdiction over the appellant and remand him in custody pending a decision being made by the DPP. Again, we must answer in the negative. In our opinion, the judge's jurisdiction is invoked when the accused is properly arraigned on an indictment before him or her. Therefore, the prudent course open to the judge was to order the release of the appellant. Thereafter, it was a matter for the DPP to decide whether any further action was required. We are not convinced that the appellant's continued detention could be justified in the circumstances.

[23] We wish only to observe that the issue of whether or not the DPP would retry the appellant was a matter for the sole discretion of the DPP.

DISPOSAL

[24] For the foregoing reasons, we allowed the appeal and ordered the immediate release of the appellant.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)