JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 37 of 1971

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA v. PERCIVAL MOORE

H. Hamilton for the applicant.

Martin Wright, Q.C., and Courtney Orr for the Crown.

March 15, April 14, 1972

LUCKHOO, Ag.P.

It is not necessary for me to recite in detail the evidence adduced in this case. The first count relates to the charge that the applicant shot at Ronald Fearon on September 10, 1970 with intent to do him grievous bodily harm. The second and third counts relate to an incident which is alleged to have occurred some 16 days later when the applicant was apprehended. The second count charged the applicant with shooting at Lloyd Morant with intent to do him grievous bodily harm and the third count charged him with the illegal possession of a firearm. The evidence adduced on the part of the prosecution on the second and third counts through Lloyd Morant and Ira McGibbon, both detective constables, sought to show that a .38 calibre revolver was recovered from the hand of the applicant after the applicant had discharged one round of ammunition from it at Lloyd Morant at a range of about $\frac{3}{4}$ chain and had been felled by a return of fire from Morant's service revolver. The defence was a complete denial of these allegations and instead alleged that the applicant was speaking to a friend when Morant "stabbed" him in the chest causing him to fall to the ground. Thereupon Morant held him, shot him in the leg and beat him up.

On the first count Fearon had testified as to the circumstances in which he said the applicant had shot at him and evidence was adduced to show that some time after the applicant's arrest a spent bullet was recovered from the vicinity where Fearon said he was shot at by the applicant

and that this bullet was discharged from the revolver which it is alleged was taken from the hand of the applicant on September 26, 1970.

In the course of his summing-up the trial judge told the jury -

> "Remember Mr. Cunningham" (counsel for the defence) "yesterday in his address to you reminded you, and quite rightly, that there are three separate offences, and he used language 'they are grouped together for convenience'. And the point that he made which is quite right and part of my directions, is that each count will have to be examined separately. You are not to say if you come to the conclusion that he did not shoot at Ronald Fearon, therefore he shot at Morant. You have to treat each count on its own because there is evidence brought by the Prosecution purporting to support each count, but the facts are for you. You are to say if you are satisfied to the extent that you feel sure from the evidence by the Prosecution that the charge has been made out."

The jury indicated that they wished to retire to consider their verdict and were out for 52 minutes. They returned <u>unanimous</u> verdicts of not guilty on counts 1 and 2 (which charged the shootings with intent to do grievous bodily harm) and of guilty on count 3 (which charged the illegal possession of a firearm). Thereupon the trial judge said -

> "I am not going to accept this. It is an inconsistent verdict. Now will you go back - go back and consider this case. I don't want any compromise in this case. The second count charged the accused man that on the 26th day of November, 1970, he shot at Lloyd Morant with intent to do him grievous bodily harm and the evidence is that on that very day Lloyd Morant found him with the gun, fired a shot on him, took the gun from him, which is an inconsistent verdict to talk about he is not guilty of that and the other one, now will you go back please and consider your verdict, stand strong and tell me what the position is. As far as the first Count is concerned I will not quarrel on that. I am prepared to accept that, but as far as the 2nd and 3rd counts are concerned, it seems to be a compromise. Now, will you go back and consider the case."

The jury retired again for a period of 36 minutes and this time returned <u>majority</u> verdicts in respect of all three counts. On the first count instead of the unanimous verdict of not guilty, the verdict was the same but now by a majority of 6 to 1. On the second count instead of the original unanimous verdict of not guilty it was now a verdict of guilty by a majority of 6 to 1. On the third count instead of the original

unanimous verdict of guilty, the verdict was the same but now by a majority of 6 to 1.

Counsel for the prisoner complained to the trial judge that the terms in which he had directed the jury when refusing to accept the original verdicts amounted to a mandate to the jury to change their verdicts to which the trial judge replied that his directions were prefaced "It is an inconsistent verdict, go back and reconsider the case." Thereupon counsel for the prisoner said -

> "M'Lud, I accept without doubt at all that the verdict was inconsistent"

and reiterated this when the judge enquired

> "you accept that it was inconsistent?"

The applicant was sentenced to imprisonment for 10 years at hard labour on the second count and to imprisonment for 5 years at hard labour on the third count.

On the following day March 17, 1971, the applicant escaped from custody. On March 29, 1971 counsel who appeared for the applicant at the trial filed what purported to be a notice of appeal against conviction and sentence. This notice was not and could not be signed by the applicant because he had escaped from custody before the notice could be prepared. Instead counsel signed the notice in his stead and indicated thereon that he had been instructed by the applicant immediately after conviction to lodge an appeal.

The grounds stated in that notice were as follows -

> "(1) The Learned Trial Judge erred in Law in rejecting the original verdicts of the jury which were not guilty Count 1 not guilty Count 2 guilty Count 3: The learned trial judge erred in ruling that the original verdicts were inconsistent and therefore were not acceptable thereby cohered the jury of jury on ambigous verdit.(sic).
>
> (2) The sentence of 15 years are excessive having regard the appellant's age and hitherto good character."

The notice was not a valid notice for it was not signed by the applicant as required by rule 45(1) of the Court of Appeal Rules, 1962 and so a single judge ruled on August 19, 1971. And so the matter rested until the month of October, 1971. On September 28, 1971, the applicant was recaptured and was lodged in the General Penitentiary on October 7, 1971.

On October 20, 1971, the applicant signed a notice of application for extension of time within which to appeal and gave the following as his grounds in support thereof -

> "I paid the policeman to let me go on the 17th March, 1971, from the custody of the police at Montego Bay. In so doing I was unable to prosecute my appeal within the prescribed time allotted."

He also filed an application for leave to appeal against "conviction and sentence" specifying as his grounds -

> "(1) Conviction and Sentenee.
> (2) Verdict and Conviction were unreasonable with regard to the evidence presented by the Crown".

Both of these applications were referred by a single judge for the consideration of the Court.

The matter was called for consideration by the Court on December 14, 1971. The Court desired to have the assistance of counsel and directed that legal aid be granted the applicant in respect of both applications. Mr. H. Hamilton was duly assigned as Attorney-at-Law for the applicant and on February 17, 1972, he caused the following grounds to be filed in support of the applications -

> "1. The applicant was severely prejudiced in having both counts 1 and 2 of the indictments being tried together.
> 2. The learned trial judge erred in refusing to accept the original verdicts of not guilty returned by the jury."

At the hearing before us on March 15, 1972, Mr. Hamilton abandoned the first of these grounds and argued the second ground. That this ground is an arguable one can hardly be denied. The question to be determined is - should this Court in the particular circumstances of this case exercise its discretion in extending the time within which the applicant might appeal against conviction and sentence in relation to the offence charged in the second count of the indictment?

Mr. Hamilton for the applicant submitted that the applications should be granted -

> (a) because the case raises a point of fundamental legal importance in that the right of a judge to interfere with the verdict of a jury is one which must be exercised very carefully and only in very extreme circumstances and the right of a jury to return their verdict is one which must never be whittled away;

(b) because the fact that gave rise to the necessity of an application for extension of time within which to appeal was a direct consequence of the non-acceptance of the jury's verdict by the court.

Dealing first with the second reason advanced by Mr. Hamilton it will be observed that the applicant does not himself offer this as a reason for escaping from custody. Indeed he does not seek to challenge the validity of the conviction or sentence on count 3 in respect of which he was ordered to be imprisoned for 5 years. He merely stated in his application that he was unable to prosecute his appeal within the prescribed time because he escaped from custody after paying a policeman to let him do so.

As to the second reason advanced by Mr. Hamilton the judge refused to accept the final verdict returned (except in the case of count 1) on the ground that verdicts of not guilty of count 2 and guilty on count 3 were inconsistent with the evidence adduced in the case. A judge is at liberty to decline to accept a first verdict on such a ground. I can not see that any point of fundamental legal importance arises in this regard. Of course a judge may be shown to be wrong in his conclusion that the verdicts are inconsistent having regard to the evidence when the evidence is scrutinised. Whether he is right or wrong depends upon the evidence not upon a breach of any fundamental legal principle. In this case the learned trial judge's reference to compromise on the part of the jury in respect of their verdicts seems to have been borne out by the verdicts subsequently returned in that what were originally unanimous verdicts of guilty and not guilty respectively in relation to counts 1 and 3 became majority verdicts of not guilty and guilty in respect of those same counts. It seems to me that this change can only be explained on the ground that the original verdicts reached were by way of a compromise for the sake of unanimity. Again verdicts of not guilty on the counts which each charged a shooting at with intent might fairly lead to an inference that, compromise apart, the jury did not accept the evidence of "shooting at" the virtual complainant in each case - rather than an inference that in the case of count 2 they may have concluded that the applicant shot at constable Morant with intent to resist lawful apprehension and not with an intention to do him grievous bodily harm at a range of but three-quarter chain. No similar inference as to intent could have been made in respect of count 1 for there the virtual complainant Fearon was not a peace officer. In such

a case and in the state of the evidence adduced in relation to counts 2 and 3 (the defence was a denial that the applicant had a revolver and that he was shot down while speaking with a friend) it is difficult to see how a verdict of guilty on count 3 could be reconciled with a verdict of not guilty on count 2. It would have been a difficult task to sustain a verdict of guilty on count 3 if the original verdicts had been accepted. However, I do not think that it is necessary for the purposes of these applications to give any concluded view on these matters. Suffice it to say that the point is arguable either way.

In this case as counsel who appeared for the applicant at the trial indicated in the notice of appeal which bears his signature the applicant immediately after the conclusion of the trial instructed him to appeal against conviction and sentence. The applicant, therefore, set in motion the machinery for appealing. The next step was that he bribed a policeman to enable his escape from lawful custody and made good his escape. Several months later he was recaptured and then sought to invoke the aid of the Court to enable him to do what he had earlier deliberately and unlawfully prevented himself from doing. Should this Court in the light of all these matters grant the applications? I am unable to agree that in the circumstances of this case we should exercise our discretion in favour of the applicant and grant him an extension of time within which to appeal.

I would refuse the applications.

FOX, J.A.

The applicant was convicted in the Saint James Circuit Court on March 16, 1971 before Parnell J. and a jury on three counts of an indictment charging him with shooting with intent on two separate occasions and with illegal possession of a firearm. Immediately after his conviction, the applicant instructed Mr. Cunningham of counsel who had represented him at the trial to appeal. On 29th March 1971, counsel filed a notice of application for leave to appeal against conviction and sentence which notice he himself had signed. The notice did not comply with rule 45(1) of the court of appeal rules, 1962 in that, as required by the rule, it was not "signed by the applicant himself." Counsel explained the irregularity by stating in the notice that the applicant had instructed him to appeal immediately after conviction, but that he had escaped from custody before he signed the notice of appeal and his address was not known. This notice had been filed "within fourteen days of the date of conviction", and in this respect it complied with the provisions of section 15(1) of the Judicature (Appellate Jurisdiction) Law, 1962. But, of course, as indicated above, it did not comply with the further provisions of the sub-section requiring the convicted person to "give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by the rules of court." The notice signed by counsel was therefore invalid. When it came before a single judge in Chambers in accordance with the usual procedure, he so ruled. The ruling is correct and has not been challenged.

The applicant was recaptured on September 28 and was lodged in the General Penitentiary on October 7, 1971. On October 20 he signed an application for leave to appeal against conviction and sentence and a notice of application for extension of time within which to appeal. These notices were filed in the registry of this Court on October 21, 1971. They came before the same judge who had ruled the former notice invalid. He referred them to this court for consideration.

Under the provisions of section 15(3) of the Judicature (Appellate Jurisdiction) Law, 1962 "the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the court". This power is discretionary and must be judicially exercised.

It is not fettered within precise confines by principle, but its exercise is not a matter of mere whim, and must be in accordance with the procedure laid down in the court of appeal rules, 1962. Rule 43 provides:

> "A person desiring to appeal to the Court against conviction or sentence shall commence his appeal by submitting to the Registrar a notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given, as the case may be, in the form of such notices set forth in Forms 1 or 2 in Appendix C, and in the notice or notices so sent, shall answer the questions and comply with the requirements set forth thereon, subject to the provisions of rule 11. ....."

Form 2 is the one to be used when the notice is of an application for extension of time within which to appeal. At three places on this form, the applicant is required to state specific details in accordance with directions at the margin thereof. In the third place he is required to state the grounds of his application for an extension of time. The marginal direction is to this effect:

> "(3) Here set out clearly and concisely the reasons for the delay in giving such notice, and the grounds on which you submit the court should extend the time."

The application for extension of time in this case was made on the correct form 2. The applicant stated the grounds of his application thus:

> "I paid the policeman to let me go on the 17th March, 1971 from the custody of the police at Montego Bay. In so doing I was unable to prosecute my appeal within the prescribe time allotted."

This is a manifestly inadequate ground for invoking the discretion of the Court The discretion is wide and unfettered, but at the same time, it is subject to the guidance of those considerations of common sense and justice which are detectable in every situation. Where failure to give notice of appeal in time is the result of the wilful act of the applicant himself an extremely strong consideration of common sense exists for withholding the discretion. The validity of the approach is recognized in the first part of rule 11 which provides:

> "(11) Non-compliance on the part of the appellant in any criminal cause or matter with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court considers

that such non-compliance was not wilful and that it is in the interests of justice that non-compliance be waived. ....."

In this matter, the failure to appeal in time was the direct result of the wilful act of the applicant in escaping from custody at a time when he knew that the final word upon the justice of his case had not been spoken by the law. He had given instructions to invoke that final word but was not prepared to await its utterance. He was unwilling to rely upon the procedures prescribed by law. Instead he sought to ensure his liberty by action entirely outside the law. As a consequence, an essential step required by the law for the perfecting of his appeal was frustrated. It would require the most weighty considerations of justice to overbalance those considerations against the exercise of the discretion which arise out of the deliberate act of escaping from the custody of the police.

Mr. Hamilton contended that such weighty considerations were discernible in the circumstances under which the judge refused to accept the verdicts which were at first returned by the jury. These circumstances have been fully and accurately stated, and exhaustively discussed in the judgment of Luckhoo Ag. P. They need not be repeated. The complaint falls within the category of misdirection of the jury by the judge. By way of the use of appropriate words, the judge could have properly invited the jury to embark upon a further and deeper analysis of the evidence. If this had been done and the jury had thereafter returned the verdicts which were in fact finally returned, it is highly debatable whether they would be open to objection. Mr. Hamilton was prepared to concede that following upon such appropriate directions, they would not be so open. In any assessment of the weight of the consideration which is based upon the complaint on appeal, it is therefore important to appreciate that although the point might be decided in favour of the appellant, the court might also be in a position to consider that the appeal should be dismissed on the basis that no substantial miscarriage of justice had actually occurred.

But let it be assumed that as a result of these further directions by the judge, an arguable point of substantial merit has accrued in favour of the applicant. This is a valid consideration favouring the exercise of the discretion. In Evans v. Bartlam [1937] A.C. 473 - a civil case concerned with the exercise of the court's discretion to set aside a judgment obtained

by default - Lord Wright said at p.489;

> "The primary consideration is whether (the applicant) has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

In a criminal case, where the liberty of the citizen is imperilled, the probability of an erroneous adjudication takes on added significance and weight. Giving such significance and weight to the point of merit which has been assumed above, it nevertheless remains my view that a favourable exercise of the court's discretion should not be extended to the applicant. In arriving at this conclusion, I have thought it of the first importance to appreciate that the applicant does not have any right of appeal except as provided by law. (vide section 12 of the Judicature (Appellate Jurisdiction) Law, 1962). The further provisions of that law and of the rules made thereunder which regulate this statutory right of appeal must be strictly followed. Where non-compliance with these provisions is the result of an act of an applicant which is not only wilful, but also is as reprehensible as in the instant case, and, in addition, is a crime, a point of merit such as that assumed above, is completely outweighed, and altogether incapable of exciting a favourable exercise of the discretion of the court.

For these reasons, I agreed that the application for extension of time within which to appeal should be refused, and that the application for leave to appeal should be dismissed.

GRAHAM-PERKINS, J.A.

On the 16th of March, 1971 the applicant was found guilty on the second and third counts of an indictment which respectively charged him with shooting with intent and the illegal possession of a firearm. He was found not guilty on the first count which, like the second, charged the offence of shooting with intent. He now applies to this Court for leave to appeal out of time and for leave to appeal. It is necessary to set out in some detail the history of events culminating in the present applications.

The applicant's trial took place before Parnell, J. and a jury at the St. James Circuit Court held at Montego Bay. He was represented by Mr. H. Cunningham of counsel. At the conclusion of his summing up the trial judge invited the jury to retire in order to consider their verdict. They did so and returned to court in just under one hour. Having regard to the fact that the evidence in the case was concluded in a day the jury's retirement for nearly an hour would tend to suggest that they approached their deliberations with some measure of careful reflection. The judge had told them:

> "Remember Mr. Cunningham yesterday in his address to you reminded you, and quite rightly, that there are three separate offences ... grouped together for convenience. And the point that he made which is quite right and part of my directions, is that each count will have to be examined separately. You are not to say if you come to the conclusion that he did shoot at Fearon, therefore he shot at Morant. You have to treat each count on its own because there is evidence brought by the prosecution purporting to support each count; but the facts

are for you. You are to say if you are satisfied to the extent that you feel sure from the evidence by the prosecution that the charge has been made out."

The word "charge" in the last line of the above quoted passage was very probably intended to be "charges". On their return to court the jury, through their foreman, announced that they were unanimously agreed that the applicant was not guilty on the first and second counts but that he was guilty on the third count. The record discloses that thereafter the following exchanges took place:

"HIS LORDSHIP: You say you find him guilty on the third count of having a firearm in his possession?

MR. FOREMAN: It was unanimous, my Lord.

HIS LORDSHIP: Yes, but you say that he is not guilty on the second count which charges him that on that day he fired the shot -- you find him not guilty on that?

MR. FOREMAN: Yes, my Lord.

HIS LORDSHIP: I am not going to accept this. It is an inconsistent verdict. Now, will you go back -- go back and consider this case. I don't want any compromise in this case. The second count charged the accused man that on the 26th day of November, 1970, he shot at Lloyd Morant with intent to do him grievous bodily harm, and the evidence is that on that very day Lloyd Morant found him with the gun, fired a shot on him, took the gun from him, which is an inconsistent verdict to talk about he is not guilty on that and the other

one, now will you go back please and consider your verdict, stand strong and tell me what the position is. As far as the first count is concerned I will not quarrel on that. I am prepared to accept that, but as far as the 2nd and 3rd counts are concerned, it seems to be a compromise. Now, will you go back and consider the case.

DEFENCE COUNSEL: (Mr. Cunningham) Do you wish to hear me on this case?

HIS LORDSHIP: No, I don't wish to hear you. (To jurors) Please go back. "

In compliance with these very positive directions the jury retired a second time. They returned after some 36 minutes and announced through their foreman, that they were now divided six to one in respect of each of the three counts. On the first count their majority verdict was "not guilty". On the second and third counts their verdict was "guilty". There was, therefore, an almost complete volte face in respect of the second count. That the trial judge should have regarded as inconsistent the original verdict on the second and third counts defies comprehension.

The evidence led by the prosecution in relation to these counts revealed the following broad picture as indicated by the summing up. Detectives Morant and McGibbon were on mobile patrol on St. James Street when they saw the applicant, whom they had known before, at the intersection of St. James Street and South Street. McGibbon, the driver, stopped the vehicle and they both got out. The applicant "looked in their direction and started to run" pursued by Morant along South Street and Strand Street. On Strand Street the applicant, according to

Morant, "suddenly turned around and pulled a revolver from his waist". Some three-quarters of a chain separated the two men at that point. The applicant "fired at" Morant who ducked and fired a shot which hit the applicant causing him to fall. McGibbon, who had given chase in another direction, and Morant approached the applicant and took from him a .38 revolver. In his defence the applicant denied that he had shot at Morant and that he had a gun. Morant it was who had shot him without the least justification, the applicant stated.

To establish the charge laid in the second count the prosecution was required to satisfy the jury that the applicant shot at Morant, and that when he did so there was present in his mind an intention to cause grievous bodily harm. The jury had seen and heard Morant and McGibbon give their evidence. They would have formed particular impressions of these witnesses. They had also seen and heard the applicant of whom they would also have formed a particular impression. They had been given precise directions as to the manner in which they should approach the question of proof of a man's intention. They had been told that they were required to examine each count separately and that a verdict adverse to the applicant in respect of one count did not necessarily involve an adverse verdict on another count. They had been told that in respect of each count they could return a verdict of guilty only if they were satisfied so that they felt sure that the prosecution had established all the material ingredients constituting the offence charged. Pursuant to these directions they returned a verdict of "not guilty" on the second count and a verdict of "guilty" on the third, and this, notwithstanding that the trial judge, dealing somewhat summarily with the applicant's defence said:

" So what he is saying now bears out the suggestion of learned counsel that it took place in the market, and the shot in the market, and apparently, this shooting being illegal, not justified, the story is to cook to cover it up. Well, if that is so where this revolver come from? Where the police get it? The police must have got hold of this revolver at some time. Where he got it from, and how is it that that very revolver, if the police had it at some time, is supposed to have fired a shot - a bullet, lodging near to some boarding-up at Church Street? Who fired that shot? How comes? Well, in all these things, when jurors are called to try a case,...they are required to use their good sense, because that is the very reason why they are selected to try a case, and to reflect the commonsense of the community."

Let it be supposed that the jury although concluding, as they must have done, that the applicant did have a revolver in his possession, and further, that the applicant had fired a shot at or "in the direction of" Morant (the words quoted are taken from the last paragraph of the summing up), would they not have been completely justified in finding a verdict in favour of the applicant if they felt unable to resolve the question of his intention adversely to him? The jury may well have thought: "We have not the least doubt that he fired this shot as the detectives swear, but we have a real doubt whether he intended to inflict grievous bodily harm. He may have intended to scare the man pursuing him so that he could make good his escape. He may have fired 'in the direction of Morant' but not at him." On this eminently reasonable hypothesis a verdict in favour of the applicant

was inevitable. This would have involved no reflection on the veracity of the two constables. Wherein, therefore, the supposed inconsistency? I repudiate as totally invalid the suggestion apparent in the exchanges quoted above that because the jury returned a verdict of guilty in respect of the third count a verdict of guilty, on the totality of the evidence, necessarily had to follow in respect of the second count. The original verdict was, ex facie, perfectly intelligible and legitimate. It would, in my view, be a highly dangerous exercise for a trial judge to reject a jury's verdict whenever he took the view that it should have gone the other way because of some imagined inconsistency.

"Trial by jury", said Blackstone, "ever has been, and I trust ever will be, looked upon as the glory of English law ... The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate ..." (Blackstone's Commentaries, Iii 379, iv 350). England is, without doubt, the foster-mother of the jury. It has been copied or inherited by other countries, including Jamaica. Applied to this country Blackstone's words may very profitably be re-echoed to-day. Their validity has in no sense been impugned by the passage of time since he wrote. If a judge is to be permitted to dictate that a particular verdict must be returned by a jury because his personal views of the evidence are in conflict with those of the jury the result must clearly be to destroy trial by jury in fact even if not in name. Such a step would, in my view, entail the most disastrous consequences, not the least of which would be the undermining of public confidence in the jury.

A trial judge undoubtedly has, and must have, the right to direct a jury to re-consider their verdict in certain well-defined circumstances. Both on authority

and on principle it is clear at the present time, I think, that this may only be done where the verdict is patently inconsistent or ambiguous. See, for example, R. v Crisp, 7 C.A.R. 173, R. v. Larkin, (1943) K.B. 174, R. v White, (1961) Crim. L. R. 59. As I have attempted to show the verdict on the second count was neither ambiguous nor inconsistent. That the trial judge thought it to be inconsistent is nothing to the point. We have come a very long way since R. v. Meany, 169 E.R. 1368. The report of that case in 9 Cox 231 quotes Pollock C.B. as saying: "He (the judge) may send them back any number of times to reconsider their finding. The judge is not bound to record the first verdict unless the jury insist on it being recorded." Unhappily, Pollock C.B. gave no indication how the jury would know of their right to insist on their verdict being recorded unless they were so advised by the frial judge in very clear terms. In any event it is perfectly clear that the first verdict returned in R. v Meany was demonstrably ambiguous. In one sense it amounted neither to a verdict of guilty not to one of not guilty. The trial judge was, in the circumstances, perfectly entitled to demand, as he did, that the jury return a verdict of guilty or not guilty. If the learned Chief Baron meant that a judge could send a jury back "any number of times to reconsider their findings" in a case in which their verdict was neither inconsistent nor ambiguous he clearly was not, and is not, supported by authority. The only case on which Pollock C.B. appears to have relied as supporting his view was the case of the "Hammersmith Ghost", a case in which one Francis Smith was tried for the murder of Thomas Milward, of Hammersmith, at the Old Bailey, in January 1804. The jury returned a verdict of manslaughter but Macdonald, L.C.B., refused to accept it on the ground that the verdict had to be either guilty of murder or one of complete acquittal.

He went on to direct the jury that if they believed the facts tendered in evidence they could not in view of the law applicable to those facts acquit the prisoner. This case certainly lends not the least support to the proposition advanced by Pollock C.B. in R. v. Meany. (supra)

This brings me to a consideration of the proper approach to be followed by this Court in dealing with the important question whether leave should be granted to the applicant to appeal out of time. Immediately following upon his conviction and sentence the applicant advised his counsel of his intention to appeal and instructed him to "appeal". It is not known what, if anything, Mr. Cunningham told the applicant with regard to the steps required to be taken to enable the applicant to prosecute his appeal. On the 29th March, 1971, Mr. Cunningham, purporting to act on behalf of the applicant, submitted to the registrar of this Court a notice of application for leave to appeal. This application was dated 28th March, 1971 and signed by Mr. Cunningham. This notice was quite clearly not a valid notice since it offended against the provisions of Rule 45 (1) of the Court of Appeal Rules 1962, the relevant part of which reads:

> "Every ... notice of application for leave to appeal ... shall be signed by the appellant himself ..."

This notice was signed by Mr. Cunningham because the applicant had been allowed to escape from custody some time on or shortly after the 17th March, 1971. In his notice of application for an extension of time within which to appeal, dated 12th October, 1971, and filed on the 21st of the same month, the applicant states, as his reason for the delay in submitting an application for

leave to appeal, that "I paid the policeman to let me go on the 17th March, 1971 from the custody of the police at Montego Bay. In so doing I was unable to prosecute my appeal within the prescribed time allotted" If it be the fact that the applicant paid some policeman to enable him to escape from custody he would have committed a very grave wrong and would have exposed himself to the consequences of the criminal law. In my view, this would be the concern of the Director of Public Prosecutions. If, after a thorough investigation into the applicant's allegation, it is thought desirable to institute proceedings against him (and anyone else) he would, no doubt, be dealt with appropriately if found guilty. The immediate concern of this Court, however, is whether the fact of the applicant's escape with the consequence that he deprived himself by his own act of the opportunity to submit a valid application for leave to appeal within the time prescribed by s. 15 (1) of the Judicature (Appellate Jurisdiction) Law 1962, should be held to be decisive of the question whether he should be allowed an extension of time within which to seek leave to appeal. I think not. Section 15 (3) (ibid) provides:

> "Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of application for leave to appeal may be given, may be extended at any time by the Court."

This section vests in this Court a discretion which is in terms absolute. It prescribes no fetters, nor does it seek to offer any guidance as to the matters to be considered in the exercise of that discretion. It is clear, I think, that in causes involving the liberty of the subject the legislature must have contemplated that the judges of this Court should be the sole arbiters in

determing the manner of the exercise of its discretionary power to extend time. It is perhaps trite to observe that that discretion must, nevertheless, be exercised judicially. As far as I am aware this Court has, since its inception, dealt with each application for extension of time on the basis of its own particular circumstances. It has not as yet sought to lay down any fixed practice as to the exercise of its discretion. It would no doubt be quite undesirable, if not impossible, to do so. This Court has, until now, apparently been content to be guided by the practice of the English Court of Appeal.

On behalf of the applicant Mr. Hamilton argued, in effect, that the fact of the applicant's escape should not be held against him in the particular circumstances of this case. The applicant had heard a jury return a verdict in his favour. He had heard the trial judge refuse to accept that verdict and direct the jury to reconsider the matter in terms which clearly suggested that their verdict (on the second count) should be one adverse to him. This was contrary to his preconceived notions of what he was entitled to expect from a court of justice. On this background the applicant must have been moved to abject and bitter frustration and disappointment, and more particularly so when that verdict of "not guilty" had very dramatically been changed into a verdict of "guilty" followed by a sentence of ten years. This, the applicant thought, was not fair play, and his one idea was to flee the system that he thought had abandoned him. So to think is perhaps to be very human. It may be that the simple answer to these arguments is that having given instructions to his counsel to set the machinery in motion whereby he felt he could right the injustice he thought had been meted out to him, the applicant should have awaited the result of his appeal. It is, however, clear, I think, that this Court must seek

to balance competing considerations. The applicant's behaviour and the motives which may have dictated it are matters which may be dealt with elsewhere. For my part I do not attempt to condone the fact of the applicant's escape from custody. But I am of the firm view that the applicant has a perfectly valid ground of appeal in respect of his conviction on the second count which he has framed as follows:

> "The learned trial judge erred in refusing to accept the original verdict of not guilty returned by the jury".

To refuse the applicant an extension of time within which to seek leave to appeal would, in my view, be a clear denial of his right to have a demonstrably serious wrong committed by the trial judge put right. Such refusal would necessarily involve an approach predicated on the following kind of reasoning. 'This Court recognises that your conviction on the second count and the sentence thereon were manifestly wrong. But because you escaped, or were allowed to escape (whatever be the fact) this Court will close its eyes to the wrong committed against you because you yourself committed a wrong'. Any such reasoning would manifestly involve the most unjust consequences. It would, also, I think, involve punishing the applicant for an offence (his escape) committed by him when such punishment is more properly within the province of some other tribunal capable of a far more thorough investigation of all the relevant circumstances than is open to this Court.

In R. v Jones (1971) 2 W.L.R. 1485, an accused absconded during his trial and the question arose whether his legal representative were properly seized with instructions to prosecute an appeal on his behalf. The Court of Appeal held that they were not. The court went

on to express the view that the accused could, if and when he surrendered, approach the court for leave to appeal out of time though any such application would be the subject of vigorous scrutiny. The court did not in any way indicate that the fact of the accused's escape might be a bar to the exercise of its discretion. In R. v Marsh and others (1935) 25 C.A.R. 49, Avory, J. said, at p.52,

> "In these circumstances, it being the rule and practice of this Court not to grant any considerable extension of time unless we are satisfied upon the application that there are such merits that the appeal would probably succeed, we are quite unable to say in this case that there was no evidence upon which these applicants could properly be convicted ... "

In R. v. Jennion, (1962) 46 C.A.R. 212, the applicant was convicted on December 3, 1958, of non-capital murder and sentenced to imprisonment for life. Three years after her conviction she applied fof an extension of time for leave to appeal. In her application for extension of time she said that she had been suffering from mental apathy since before her conviction, that she was then in no state to put up any defence, and that she had only lately realized the significance of her sentence. Delivering the judgment of the Court Edmund Davies, J., at p. 214, said:

> "This court also considered it necessary to investigate the suggestion which had been made in a certain quarter (though not by the applicant) that the overwhelming and unchallenged medical evidence called showed clearly that the applicant was suffering at the time of the crime from abnormality of mind and

that her mental responsibility was thereby substantially impaired. Were this the case, this court might conceivably have granted an extension of time, notwithstanding the lapse of three years since the trial ....."

In R. v Williams, (1962) 46 C.A.R. 463, the appellant had pleaded guilty to certain offences and had asked that a number of other offences be taken into consideration, including offences of taking and driving away cars without the owners' consent. He was sentenced to two years imprisonment and ordered to be disqualified from driving for five years. More than two years after his conviction and sentence (and after he had served the sentence of imprisonment) the court extended the time for appealing " in order that a point of law could be considered...." namely, whether there was any power to disqualify in the circumstances of the case.

In R. v Cottrell (1956) 40 C.A.R. 46, a similar approach was adopted, the court granting an extension of time within which to appeal notwithstanding a long lapse of time due to a misapprehension on the part of the trial court.

If any principle is to be extracted from the judgments in these and several other cases to the like effect it certainly must be that the probable success of an appeal is a consideration of the first importance in determining the exercise of the court's discretion. My researches have failed to reveal a single case where this Court or the English Court of Appeal has refused an application for extension of time within which to seek leave to appeal, or to appeal, where it is satisfied as to the merits and probable success of the appeal. Such cases as R. v Lesser (1939) 27 C.A.R. 69, and R. v

Cullum (1942) 28 C.A.R. 150, on which great reliance was placed by the learned attorney for the crown, do not, in my view, afford the least assistance in resolving the present applications. Those cases do no more than to assert that "an extension of time within which to appeal will not be granted unless some special reason is shown why the rules governing the procedure of the Court should be relaxed". See the headnote to R. v Cullum (supra). I should have thought that no authority was needed for a proposition so self-evident. Neither in R. v Cullum, nor in R. v. Lesser and R. v Marsh was any reason advanced which could possibly have justified the court in exercising its discretion in favour of the applicant. It is significant and worthy of note that in none of the cases to which I have referred and in which the court either granted an extension of time or indicated its willingness so to do if the justice of the case so demanded, did the applicant himself advance any reason for his delay in appealing. What was advanced was the obvious justice, merit and probable success of the appeal. In each case the court reacted to "the demands of the justice of the case". This Court clearly should do no less.

In the circumstances of this case I would accede to the application for leave to appeal out of time. I would treat the hearing of the application for leave to appeal as the hearing of the appeal. I would allow the appeal against conviction on the second count and set aside the conviction and sentence.