JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 50/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. FITZROY GREENLAND

Mr. Horace Edwards, Q.C., Mr. Howard Hamilton, Q.C. & Miss Charmaine Rhoden for the applicant

Mr. Bryan Sykes for the Crown

17th, 18th December, 1990

CAREY, J.A.

On the 23rd of March, 1990 in the St. Mary Circuit Court before Theobalds J, and a jury, the applicant was convicted of manslaughter and sentenced to a term of 5 years at hard labour. The facts in this case are altogether of a distressing nature.

On the 19th of February, 1987 a young girl, Julia Palmer her age was was not disclosed and all that we were told, was that she was Mrs. Merlene McKay's granddaughter, was in company with some other persons both children and adults walking along a property belonging to a Mr. Silvera at Barclays Town a remote district in the parish of St. Mary, when the little girl came in contact with a live electric wire and was electrocuted. That wire had been connected illegally to a Jamaica Public Service pole and ran across a path and a stream up to a house belonging to this applicant. When efforts were made to rescue the unfortunate girl from her predicament, another child, who was using a piece of stick, received a shock. The mother, who also endeavoured to render assistance, became unconscious for sometime. As a result of their efforts that live wire became de-energized because it was broken. When the police went to the premises they found there

electrical appliances plugged into wall-sockets.

Insofar as the defence was concerned, the applicant denied running any wire from the Jamaica Public Service pole to his property.

Before us, a number of grounds have been taken. Mr. Edwards argued ground No. 6 which may be stated in this way -

> "6. The learned trial judge's directions on manslaughter were inadequate, an incorrect statement of the law and failed to correlate his directions to the evidence in the case."

What Mr. Edwards was endeavouring to say was that the learned trial judge had not spoken about gross negligence and punishment. What the learned trial judge said, which appears at p. 5 of the summation was this -

> " Now, Mr. Foreman and members of the jury, the charge on this indictment is manslaughter. Where a person commits or is engaged in committing or performing an act which is unlawful, then if at the same time it is a dangerous act, that is an act which is likely to injure another person and quite inadvertently the doer of the act causes the death of that other person by the act that he or she has done, then that person is guilty of manslaughter."

In our view, those directions were entirely adequate for the facts and circumstances in this case. We think that **The Director of Public Prosecutions v. Newberry** [1976] 62 Cr. App. R. 291 in which the House of Lords approved of directions in **R. v. Larkin** [1943] 1 All E.R. 217 at p. 219 supports that view. What was said there, is this -

> "Where the act which a person is engaged in performing is unlawful then if at the same time it is a dangerous act that is an act which is likely to injure another person and quite inadvertently he causes the death of the other person by that act then he is guilty of manslaughter."

It is unnecessary to prove that the accused knew that the act was unlawful or dangerous. In judging whether the act was dangerous, the test is not, did the accused recognize that it was dangerous but would all sober and reasonable people recognize its danger. The directions given by the learned trial judge was therefore in accordance with the law. So that ground, in our view, must fail.

Mr. Hamilton then went to bat, and argued a number of grounds. The first of which was that the learned trial judge ought properly to have accepted a no case submission. It is enough to say that having regard to certain exchanges at the bar, Mr. Hamilton did not press the matter. In our view, there was more than adequate evidence fit to be left to the jury. There was evidence that the premises were owned by the applicant, that the wire went to those premises, that in those premises were electrical appliances and the electrical appliances were plugged into sockets. There was evidence that at the material time current was in that wire, that that wire was illegally strung in the way we have stated and further, there was evidence that immediately after this mishap, the applicant was seen to be rolling up the wire expeditiously. There was evidence that the little girl was electrocuted. That was, in our view, sufficient evidence fit to be left to a jury. That ground really was without any merit.

There was another ground which is in the following form -

> "7. The learned trial judge at page 12 of the summing up failed to hold the scales evenly when he directed the Jury at page 12 that: 'The prosecution is inviting you to infer that the accused man was rolling up the wire; that if you find that the accused man was rolling up the wire then he was doing so because he was aware that he was responsible for the death of this little girl and he wanted to remove the evidence.'"

It is not necessary to read the rest of the ground because although it refers to other failures in this respect, counsel did not vouchsafe those defects to us. Insofar as the particular allegation containing the ground is concerned, it was in our view, devoid of merit. Plainly, what the learned trial judge was endeavouring to do in that passage was to tell the jury that so far as the prosecution went, the jury were being invited to draw a possible inference from a fact and that inference which they were invited to draw was one which was a reasonable one and one that was inevitable in the circumstances of the case. Learned counsel conceded that the learned trial judge had in his directions properly alerted them to their function in regard to drawing inferences. In any event, we cannot see how pointing out what is a fact can be regarded as not holding the scales evenly. So this attempt to impugn the judge's conduct of the case, we think, cannot succeed.

The ground which occupied some attention, related to what counsel suggested was an irregularity at the trial. What occurred was this. After the jury had been out some twenty-five minutes, they returned and the foreman, when asked if they had arrived at a verdict, gave what we would consider a somewhat enigmatic response which was -"I must say partially." The Registrar was having none of this because he was only concerned with whether they had agreed or not. So he said "Are you all agreed?" and they said no. Whereupon the learned trial judge gave the following directions - about which complaint has been most forcibly made by Mr. Hamilton. The learned trial judge said this -

> "Well, I cannot take a divided verdict at this stage. It is desirable that you should go back and further deliberate. What I would tell you, however, at this stage, is that none of you must refuse to listen to the views or arguments of the others.

> "Although each of you have taken an oath to return a true verdict according to the evidence none of you must close your ears to the arguments and views of the other jurors. You are to talk it out, deliberate, discuss the matter amongst yourselves and arrive at a unanimous verdict. You have to bear in mind that these trials invariably involve a considerable amount of judicial and public time and with that in mind none of you should refuse to listen to the views of the others. Talk it out and discuss it amongst yourselves and arrive at a verdict. So would you go back out and do just that."

Mr. Hamilton who appeared below, made the following comment after these directions -

> "MR. HAMILTON: Maybe they can be advised if there is any assistance they need from you.
>
> HIS LORDSHIP: Well, I have not been advised of any."

As we apprehend the arguments of Mr. Hamilton in this regard, he could only be saying that what the learned trial judge was doing was coercing them to the prejudice of the applicant to return a verdict which they might not otherwise have returned. He said further that if that was the effect of those words, then plainly there was irregularity which must result in a new trial.

The first observation we desire to make is that when the jury returned, and were asked whether they had arrived at a verdict, their response that they had arrived at a partial verdict did not necessitate any sort of direction. All that should have occurred was that they should have been told to go back and to deliberate further. So that there was no call for the direction which the learned trial judge chose to give. Having said that one must nevertheless look to see what possible effect it could have had on the jury. In our view, the learned trial judge was endeavouring to point out to them that at that particular time at which they had returned to the jury box, he was not able to take a divided verdict. To reasonable intelligent jurors that

must mean that there may come a time when he could take a divided verdict. That must mean that some would agree on one verdict and others on another. If then they are told to go back and deliberate in an endeavour to arrive at unanimity, we are quite unable to see how it can be stated that the learned trial judge was endeavouring to coerce them to arrive at a verdict. A jury is normally, at the end of the case, well aware that they are to go out and strive for a unanimous verdict. There can be nothing wrong in principle in directing them in terms of unanimity at the time the directions were given.

Mr. Sykes called to our attention the case of **R. v. Noel Phipps & Ors.** (unreported) S.C.C.A. Nos. 21, 22 &23/87 delivered on July 11, 1988. In that case the learned trial judge chose to give the unanimity directions prior to the jury retiring to consider their verdict. In our view that case is not dissimilar to what we have before us, in that the need for such a direction was wholly unnecessary. In that case the court said at p.22 -

> " It was submitted in the instant case that the judge failed to direct the jury that it was the duty of a dissenting voice to act according to his oath and that the juror had a duty in such circumstances to differ from the majority view."

This is the precise point that Mr. Hamilton is making here but to continue with the judgment of the court -

> "It was said that Malcolm J.'s direction on unanimity may have left the jury with the impression that although they are not forced to accept the majority view, they ought to take a democratic view and go in with the majority. There was no indication of dissent amongst the jury when Malcolm J. delivered his benign academic flourish about unanimity."

Again we point out that here there was no indication of dissent amongst the jury but to continue the quote -

> "Indeed the jury had not commenced the task of deliberating and there was no way of knowing whether they would encounter difficulty in arriving at a unanimous verdict."

again in this case no problem had yet arisen -

> "What he said was a pure statement of fact, a reminder to the jury that they should be true to their oath to return a true verdict according to the evidence. There was no element of exhortation or coercion in the mild passage read out to the jury and they could never have been left with the impression that a dissenting voice was obliged to join the majority against his own conscientious view.
>
> In the same way that in practice a judge ought not to give a direction on majority verdict until the necessity for such a direction arises due to the passage of time and in intimation that the jury are hopelessly divided, it seems desirable that a direction on unanimity can be most effectively given when a problem arises in the return of a verdict."

In our view, as we have stated before, no problem had arisen in this case calling for any directions as to unanimity or otherwise. So that what the learned trial judge said might well be described in the felicitous language of the judgment as "a benign academic flourish" about unanimity. We also would characterize this direction of the judge, in those terms. In our view, that is enough to dispose of that ground of appeal, which accordingly fails.

Mr. Hamilton argued before us the question of sentence and we think that there is merit in his submission. The sentence imposed was one of 5 years imprisonment at hard labour and we think that what this applicant did was deserving of serious punishment, because what he did was really a reckless act - he was reckless as to the safety of persons who might come in the area

where this electric wire was illegally strung, nevertheless, we think justice would be served by a sentence of 3 years imprisonment at hard labour. Therefore we substitute that sentence for the one imposed.

In the circumstances, therefore, the application for leave to appeal against conviction is refused and as far as the sentence is concerned, it is varied in the manner we have stated and to commence on 23rd June, 1990.