JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 232/78

BEFORE: The Hon. Mr. Justice Henry J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

R. v. GEORGE McLEISH

Mr. Horace Edwards Q.C., and Mr. Lloyd Shackleford for the Applicant.

Miss Hyacinth Walker for the Crown

March 20, April 28, 1980

HENRY J.A.

The applicant was convicted in the St. Elizabeth Circuit Court on both counts of an indictment charging him with murder and wounding with intent to murder. The charges arose out of an incident in which the applicant is alleged to have used a machete to inflict some 11 wounds on his concubine Pansy Miller and 2 on their infant daughter, killing Miss Miller.

Counsel for the appellant very properly conceded that while it may have been possible to put forward complaints in respect of certain portions of the summing up, the facts were such that, as he put it, any Court of Appeal would have applied the proviso and dismissed the appeal. The questions which have engaged our attention in this matter however are the propriety of joining a captial and a non-captial charge in one indictment and the consequences which flow if the joinder was irregular.

Sections 31 and 44 of the Jury Act read as follows:

S. 31 "(1) On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of subsection (3) the trial shall proceed before such jurors.

(2) On trials on indictment before the Circuit Court for any criminal case, other than murder or treason, seven jurors shall form the array.

(3) (a) Where in the course of a criminal trial any member of the jury dies or is discharged by the Court through illness or other sufficient cause, the jury shall nevertheless, so long as the number of its members is not reduced by more than one, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

(b) Where one juror has died or has been discharged as provided for in this subsection, the verdict of eleven jurors in a trial for murder or treason or of six jurors in a trial for any other offence, shall be deemed to be a unanimous verdict of the jury, and the case of a trial —

(i) for murder, a verdict of not less than nine jurors of manslaughter; or

(ii) for any offence other than murder or treason, a verdict of not less than five jurors,

may in accordance with the provisions of section 44, be received and entered as a verdict of the jury."

Section 44

(1) "On trials on indictment for murder or treason, the unanimous verdict of the jury shall be necessary for the conviction or acquittal of any person for murder or treason.

(2) On a trial on indictment for murder, after the lapse of one hour from the retirement of the jury a verdict of a majority of not less than nine to three of conviction of manslaughter, or of acquittal of manslaughter, may be received by the Court as the verdict of the jury.

(3) On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the lapse of one hour from the retirement of the jury, be received by the Court as the verdict of the jury.

(4) Whenever the verdict of the jury is not unanimous the Judge may direct the jury to retire for further consideration.

It is clear from these sections that different modes of trial of trial by jury for captial and non-capital offences are provided, and that a non-captial offence cannot be tried by a twelve man jury. Consequently an inlictment charging both types of offences and a trial on that indictment are irregular. A similar situtation arose in Cottle v. The Queen (1976) 3 W.L.R. 209. There however the charges arose out of separate incidents about an hour apart. The appellant had been convicted on count 1 of the indictment for murder arising out of the first incident and on count 3 for shooting with intent arising out of the second. In the subsequent appeal to the Court of Appeal West Indies Associated States Appeal Court (Saint Vincent) that court quashed the conviction on count 3 only. On appeal to the Privy Council the conviction on count 1 was also quashed. Lord Diplock in delivering reasons for the judgment of the Privy Council said:-

> "They (the Court of Appeal) held, correctly in their Lordship's view, that the trial of the appellants by a jury of twelve on the non-capital counts was contrary to the provisions of the Jury Ordinance. They accordingly quashed the convictions of the appellants on count 3. They did not, however, treat the whole trial as a nullity or interfere with the conviction on count 1 for the capital offence of murder. No argument had been addressed to them by counsel, as it has to their Lordships Board, about the effect that their ruling that the trial upon counts 2 and 3 was a nullity should have upon the trial for murder upon count 1. At the conclusion of their judgment, they dealt briefly with the question whether the appellants had been prejudiced in their defences to the charge of murder by the admission of evidence relating to the charge of wounding Mr. Gaymes in a trial which ought to have been restricted to the charge of murdering Mr. Rawle. They pointed out that the judge in

> his summing-up had made it clear to the jury that they were to consider the evidence relating to each count separately. In the view of the Court of Appeal this removed any risk 'that the jury when considering one count may have been unable to disregard the evidence relating to the others.' Evidence tending to show that the appellants had committed another offence of violence with firearms would be highly prejudicial to them as suggesting to the jury that they were the sort of men who were likely to commit a murder. Unless there were grounds on which this evidence would have been admissible on the charge for murder of Mr. Rawle if it had stood alone, its admission would constitute a material irregularity in the course of the trial and the prejudice thereby inexcusably created would, in their Lordships' view, involve a serious risk that the jury's verdict would be unsafe or unsatisfactory."

Following on this decision counsel for the applicant submitted that evidence in relation to the injuries to the applicant's child was similarly prejudicial and his conviction on both counts of the indictment ought to be quashed. We do not agree with this submission. As we have indicated, the counts arose out of a single incident and even if the indictment and been properly confined to a single count for murder, evidence in relation to the injuries to the applicant's child would have been admissible as part of the res gestae. There was consequently no improper prejudice created against the applicant by that evidence so as to "involve a serious risk that the jury's verdict would be unsafe or unsatisfactory" in so far as the charge of murder was concerned.

There remains however the irregularity arising from the joinder of the counts in the indictment. In our view the consequence of this irregularity is that, as in Cottle v. The Queen (supra), the conviction on count 2 of the indictment for wounding with intent to murder cannot stand.

Accordingly on March 20 the application for leave to appeal was treated as an appeal. The appeal in relation to the first count was dismissed and the conviction and sentence on that count affirmed. The appeal in relation to the second count was allowed and the conviction and sentence on that count set aside.