Criminal Law — Murder — Appellant convicted of manslaughter — Verdict "Guilty of manslaughter by reason of defence" — Later guilty of manslaughter — Whether verdict of acquittal — duty of judge — Conviction quashed — Verdict of acquittal entered.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 2/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. KINGSLEY BIGBY

John Moodie for the Crown.

Appellant unrepresented.

February 16 & 20, 1987

ROWE, P.:

The appellant was charged with the murder of Horace Minto on August 7, 1984, and at a two day trial in St. James Circuit Court before Gordon J. and a jury, he was convicted of manslaughter and sentenced to serve a term of imprisonment for seven years at hard labour. Leave to appeal against the conviction was granted on January 6, 1987, and when the appeal came on for hearing, although the appellant was unrepresented, the Court considered the grounds of appeal as filed and after hearing the Crown, allowed the appeal, quashed the conviction set aside the sentence, entered a verdict of acquittal and these are the reasons for so doing which were then promised.

At trial, the Crown's case was that the appellant owned a taxi which he permitted the deceased to operate. Differences developed between the two men and the appellant recovered the taxi and caused repairs to be done to it. He was at the garage awaiting the completion of the work when the deceased arrived. Up to this point there was no difference between the prosecution and the defence. The prosecution witnesses said that after a few innocuous words passed between the appellant and the deceased, the appellant picked up a plank, 2" x 4", and with it he chased the deceased who ran across the road. The appellant, said these witnesses, not being able to catch up with the deceased, flung the piece of wood at him. It caught the deceased in his back and he bent forward under the force of the blow. Then, these witnesses said, the appellant ran, picked up the plank, and used it to hit the deceased in his forehead causing an injury from which death resulted.

The defence account as given by the appellant on oath, was that the deceased who was across the road from where the appellant stood, picked up a stone from a stone-wall and flung it at him. This stone did not make contact with him. Then the deceased picked up another stone, ran across the road to him, that he the appellant became fearful that the deceased would hit him with the stone, that he bent down, picked up the piece of wood that was lying there and swung it at the deceased to prevent an injury to himself.

In a long and detailed summing-up the learned trial judge directed the jury on the law relating to self-defence, provocation and the lack of intent to kill or to cause serious bodily harm. He juxtaposed the two accounts of the homicide and told the jury that:

> "The two cases are poles apart. It is for you to resolve, having regard to how you view the evidence."

Later on he gave the jury this important direction:

> "If you accept what the accused said that he was acting in self-defence when he struck the blow, because the complainant ran down on him by the gate - according to him - threw one stone, then he picked up another and ran across the road to him at the gate and at that point he was so frightened he picked up the stick and struck him. If you accept that, then you must find him not guilty. If you are in doubt whether to accept or reject, then you acquit him and find him not guilty on the basis that he was defending himself."

Finally, the jury were directed that they could find manslaughter on the twin basis of provocation and lack of intent. They retired at 11.15 a.m., on January 10, 1986, and returned at 11.49 a.m.; a very short retirement, indeed. On enquiry from the Registrar, the foreman of the jury said they had arrived at their verdict. When asked if the jury was unanimous, he said, "It was eleven to one." The learned trial judge gave some directions as to the necessity for unanimity and as to the manner in which the jurors could usefully conduct their deliberations and they again retired. Six minutes later the jury returned with a unanimous verdict of not guilty of murder. The question was put as to manslaughter and the foreman replied:

"FOREMAN: We have found him not guilty of murder.

REGISTRAR: Do you find the accused Kingsley Bigby guilty or not guilty of manslaughter?

FOREMAN: We found him guilty of manslaughter.

REGISTRAR: Members of the jury, do you say you find the accused Kingsley Bigby not guilty of murder and guilty of manslaughter? That is your verdict and so say all of you?

FOREMAN: Yes. We found him guilty of manslaughter by self-defence. He was defending himself.

HIS LORDSHIP: Pardon me?

FOREMAN: We found him guilty of manslaughter at self-defence.

HIS LORDSHIP: I really don't understand you, Mr. Foreman, It's either you find him guilty of manslaughter or you don't find him guilty of manslaughter.

FOREMAN: I am sorry; we found him guilty in self-defence. Although he committed the act we found that he was .....

HIS LORDSHIP: I have heard a lot in my time but I have never heard this.

FOREMAN: Let me understand .....

HIS LORDSHIP: All you have to do is say whether he is guilty of murder or guilty of manslaughter. We don't ask you the basis on which you find ..... I have given directions which I assumed you understand. I have told you - I told you that manslaughter arises only if you reject self-defence. Then you find that he may have been provoked or he may not have intended to kill. I do not .....

FOREMAN: I think I could answer that.

HIS LORDSHIP: You say you find him not guilty of murder but guilty of manslaughter and then you add 'in self-defence' or something to the effect - by self-defence - which I am afraid I don't understand. Because I never asked you to qualify a verdict. I asked you to give a verdict. Why

HIS LORDSHIP cont"d....

you took it upon yourself to give qualification? It's not necessary to find why you find, how you find, you just give a verdict. Is it that you require further directions because this is a verdict which I don't understand.

FOREMAN: It was decided by us ...

HIS LORDSHIP: I don't want to hear your deliberations, it's just your verdict I want to know.

FOREMAN: I can put the verdict. We found him not guilty. The act was in the form of self-defence.

HIS LORDSHIP: You are taking it upon yourself to put the verdict; not guilty in the form of self-defence and you have eleven other persons to consult?

FOREMAN: But that was the decision that we come by.

HIS LORDSHIP: You see, we ask the jury to select the most intelligent person to speak for them on their behalf and what I am getting here does not savour of intelligence.

FOREMAN: Can I retire?

HIS LORDSHIP: What I would ask you to do is to retire and return. You have said not guilty of murder. There seem to be no contest on that. That is accepted. On manslaughter, go back, go back, because you have said guilty of manslaughter and start qualifying it.

FOREMAN: Okay, sir.

JURY RETIRES AGAIN: 12:17 p.m.

JURY RETURNS: 12:22 p.m.

JURY ROLL CALL - All present.

REGISTRAR: Mr. Foreman, please stand; Members of the jury, do you find the accused ....

HIS LORDSHIP: Have you arrived at a verdict on manslaughter?

FOREMAN: Yes, sir.

HIS LORDSHIP: Is your verdict unanimous, that is to say, are you all agreed?

FOREMAN: Yes.

" HIS LORDSHIP: How say you, is the prisoner Kingsley Bigby guilty or not guilty of manslaughter?

FOREMAN: He is guilty.

HIS LORDSHIP: Guilty. Mr. Foreman and members of the jury, you say the accused is not guilty of murder.

FOREMAN: Not guilty of murder.

HIS LORDSHIP: Guilty of manslaughter. That is your verdict.....

FOREMAN: Yes.

HIS LORDSHIP: ... and so say all of you?

FOREMAN: Yes."

After passing sentence the trial judge told the jury that they took time in the deliberations and came up with a verdict which the Court found acceptable. He added:

"When I say Court I mean I find acceptable."

Two grounds of appeal filed were:

(1) That the verdict of the jury "Guilty of murder, by virtue of self-defence" was in fact a verdict of acquittal.

(2) That the verdict is unreasonable having regard to the evidence.

These grounds were drafted in prison and it must be inferred that the reference to murder in ground one ought to be a reference to manslaughter.

It is accepted law that where a single verdict is ambiguous or two verdicts are inconsistent or the verdict is one which cannot on the indictment or in the circumstances be lawfully returned, the judge is entitled, unless the jury insist, to refuse to accept the first verdict and to ask the jury to reconsider the matter and, if they change their verdict, to record only the second verdict. See Archbold 41st Edition at para. 4-455.

The judge's discretion to refuse to accept a verdict of the jury was circumscribed in this way by Luckhoo, J.A. in R. v. Walters and Walters [1971] 12 J.L.R. 448 at 456:

> "Where a verdict may lawfully be returned upon the indictment and the evidence, is unambiguous and is not inconsistent with any other verdict, it can only be in exceptional circumstances, if at all, that a trial judge may refuse to accept it and ask the jury to reconsider it."

In the instant case the verdict in relation to manslaughter was clearly ambiguous. It is to be remembered that the taking of the verdict of a jury is in two distinct parts. First the foreman, as spokesman for the jury, delivers the verdict of the group. Then he is distinctly asked whether the verdict as given is that of all the jurors. That question is important as it gives the individual jurors an opportunity to then and there declare their dissent, if any. It is only after the second question has been asked and has been satisfactorily answered that a proper verdict can be recorded. In some jurisdictions the individual jurors are polled to put it beyond doubt that each one agree with the verdict announced by the foreman.

We have said that the verdict in relation to manslaughter was clearly ambiguous and that is so because in the full answer to the question whether all the jurors had agreed to the guilty verdict of manslaughter, the foreman exposed the basis upon which they had arrived at that verdict. It became immediately clear that the jury were suffering from a fundamental misunderstanding as to the consequence of self-defence in a case of murder, notwithstanding the careful directions already given by the learned trial judge. The exchanges between the foreman and the judge quoted above disclose with clarity that the jury accepted the account of the defence, accepted that in acting as he

did the appellant was defending himself, but they were confused as to the consequence of his so acting.

Understandably, the learned trial judge was disappointed that he did not receive an unambiguous verdict after his painstaking summing-up, but what was required of him was not an annoyed response. The jury ought to have been given further directions pin-pointing their error in associating self-defence with manslaughter and reminding them that once they were of the view that the appellant was acting in self-defence, their only verdict should be one of not guilty, and there was no room for a verdict of guilty of manslaughter.

R. v. Gray [1891] 17 Cox 299 or [1891] 7 T.L.R. 477, provides an almost parallel to this case. There a bank clerk was found guilty of obtaining food and money by false pretences but the jury added that they were unsure whether there was any intent to defraud. The conviction was quashed in the Court for Crown Cases Reserved, Denman J. saying:

> "If the verdict had been guilty merely, no question could have arisen. But when the jury go beyond the mere verdict of guilty and add words, they at once give rise to the question whether their verdict is sufficient. The jury have added to the verdict of guilty here the words: 'But whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend mercy.' Mr. Vachell has very ingeniously endeavoured to extract that from the verdict altogether. He says that practically it was not part of the verdict, but was merely the reason for the recommendation to mercy. But I think it was part of the verdict, and it seems to me that it is impossible to reject it. If then it is part of the verdict, it is clear that it must be taken as negativing one of the most material allegations contained in the indictment, namely, the intent to defraud. That being so, it appears to me impossible to make out that this is a verdict of guilty."

The present case went beyond that of R. v. Gray, supra, in that in one of the exchanges between the Bench and the foreman, the foreman asserted:

> "I can put the verdict. We found him not guilty. The act was in the form of self-defence."

This answer was not satisfactory to the learned trial judge who thought that the foreman was speaking without the authority of the other members of the jury and when the trial judge reproached the foreman for so behaving, the foreman answered:

> "But that was the decision we come by."

It appears that to the learned trial judge's way of thinking, this verdict was against the weight of the evidence, and so he admonished the foreman and sent out the jury for the third time. We are of the opinion that the assertions of the foreman in giving the verdict ought not to have been so summarily rejected.

In Rex v. Wooller [1816-19] 2 Starkie's Report, N.P. 111, the foreman and three of the jurymen appeared in the Court while the other jurors were in a small room behind the judge's seat. The foreman said that they found the accused guilty but that three of the jurors wanted to say something. Abbott J. said he could not hear any statement by part of the jury, that the verdict must be unanimous but if they all wished to give a qualified verdict he would receive it. In an inaudible voice the judge asked if they were all agreed upon their verdict to which the foreman answered in the affirmative, saying that the accused was guilty. No dissent was expressed by any of the jurymen and the verdict of guilty was recorded. Before sentence it was brought to the trial judge's attention that three of the jurors had not concurred in the verdict. The trial judge thought he could not then interfere with the verdict but referred the matter to the Judges of the King's Bench

stating that since all the jury were not in Court at the time when the verdict was delivered, it was possible that all the jury might not have heard what passed. In setting aside the verdict Lord Ellenborough said in part:

> "Where every individual of the jury hears what is said, and has it in his power to dissent, the evidence is complete that he knew what passed, and his not dissenting is conclusive to show his approbation of the verdict."

That statement of the law is generally accepted as correct and in the absence of any indication from any of the jurors that they dissented from the statements made by the foreman, especially when he said that he was conveying to the Court the findings of the jury and not just his own view, it is our opinion that the trial judge ought to have paid due respect to what the foreman said.

There was certainly enough in the several statements made by the foreman to indicate that the Crown had not negatived self-defence. In those circumstances one would have expected the learned trial judge, as is submitted in ground one, to direct a verdict of acquittal of manslaughter.

The question of ordering a new trial did not really arise but in any event the Court, taking cognizance of the fact that the trial before Gordon J. was the third trial for the appellant, would not have ordered that the appellant do stand trial on a fourth occasion for this offence.