

NmLS.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 153/95

**COR: THE HON. MR. JUSTICE RATTRAY - P
 THE HON. MR. JUSTICE DOWNER, J.A.
 THE HON. MR. JUSTICE BINGHAM, J.A.**

R V PAUL MCKENZIE

Miss Janet Nosworthy for Appellant

Miss Vivene Hall & Miss Lorna Shelly for Crown

14th April & 24th November 1997

RATTRAY, P

The appellant Paul McKenzie was convicted for manslaughter in the Portland Circuit Court having been charged with one Richard Lewis for non-capital murder of Fitzroy Dawkins. Richard Lewis was found not guilty of any offence by the jury.

All three men were prisoners in a cell at the police station in Port Antonio. The facts in relation to what took place in the cell and upon which the charge of non-capital murder was based rested on the evidence of a witness Irvine Smith, another prisoner in the cell at the relevant time. There were six men in all in the cell and Smith's evidence as narrated by the trial judge, was not very straightforward. He was in the cell when the deceased Dawkins was brought in by the police on the afternoon of the 20th of March, 1994. Dawkins appeared to him to be ill, hardly able to help himself. A quarrel developed between Dawkins and McKenzie which led to McKenzie and Lewis attacking Dawkins, hitting him with their fists in his chest and wrestling with him. Dawkins fell to the ground hitting the back of his head. His evidence contained contradictions in that, at one time he said, Dawkins did not kick anyone, at another time that Dawkins kicked

Lewis and was kicking throughout the night "like a mule". He had told the police when they came that nobody touched Dawkins but explained that was what McKenzie had told him to say and "I was in de cell and could not get no release."

The medical evidence disclosed that the deceased had certain abrasions on his body which were not recent and could have been inflicted two to three days before the deceased died.

The doctor found superficial abrasions, fractures of the 5th, 6th and 7th ribs of the right chest wall which caused a collapse of the lung. There was a deep laceration of the liver just below the right lung. The injury to the liver was more than likely caused by a blunt instrument like a stick or a chair. Two persons pounding that area with their fists could cause injury. It was hardly likely that one fist could have caused the injury. There was no evidence of any object being used to hit the deceased except the fists of McKenzie and Lewis. Death was caused by the collapse of the lung and the injury to the liver. There was no injury to the back of Dawkins' head.

The deceased was clearly mentally ill. He was undergoing psychiatric treatment and he wandered the streets and ate from garbage containers.

The case for the Crown was put to the jury on the basis of common design. The two accused had pounded the deceased in his chest with their fists causing the injuries found by the doctor which resulted in his death.

However, the jury although finding both accused not guilty of non-capital murder, found the appellant McKenzie guilty of manslaughter. There was no evidence which distinguished the acts and participation of the appellant from those of his co-accused who was acquitted. Structured as this case was, on the active participation of both persons charged and the common design binding them both together, the acquittal of one and the conviction of the other was an inconsistency tainting the verdict of the appellant who was convicted.

As Eveleigh J stated in delivering the judgment of the Court of Appeal in **Andrews - Weatherfoil Ltd & Others** [1972] 56 Cr. App. Rep. 31 at page 40 -

"As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses. ... When inconsistent verdicts are returned by the same jury, the position is usually more simple. If the inconsistency shows that the single jury was confused, or self-contradictory its conclusions are unsatisfactory or unsafe and neither verdict is reliable."

The verdict of the jury in this case in relation to the appellant McKenzie is clearly self-contradictory and counsel for the Crown did not attempt to argue otherwise.

For this reason we allowed the appeal, quashed the conviction set aside the sentence and entered a verdict of not guilty.