

C.A. Murder - V. Let. Provocation - whether provocation was a discharge
during hours returning a verdict after they had twice indicated they had not
arrived at a verdict - Provocation - whether words directed at an provoked
unduly. Anxious to know if. Offence aggravated by non-capital
Case referred to
Shuttleworth v The Queen (1961)
3 N.L.R. 1021.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 74, 75 & 76 of 1992

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
CLIVE BARRETT
IVAN REID
LINTON BARRETT

Enoch Blake and Miss Marion Rose-Green
for Clive Barrett and Linton Barrett

Paul Ashley for Ivan Reid

Carl McDonald for Crown

May 3 and 24, 1994

WOLFE, J.A.:

Arising out of the brutal slaying of Anthony Nicholson on the 27th day of April, 1991, at Dean Pen in the parish of St. Mary these applicants were tried before Paul Harrison, J., sitting with a jury, in the St. Mary Circuit Court for the offence of murder. After a trial which lasted three days they were convicted as charged and each sentenced to suffer death in the manner authorised by law.

The evidence which was adduced at the trial disclosed that on the morning of April 27, 1991, the deceased and the applicant Clive Barrett had an altercation which resulted in the applicant being wounded by the deceased. A report was made to the police.

Later the same day at about 3:00 p.m. the deceased was at the home of his brother, Christopher Poyser, when Janet Allen heard a voice from the back of her house saying, "See him yah."

The deceased was seen to run from a room chased by three men whom Miss Allen identified as the three applicants who had been known to her for five years. She followed behind the men who had disappeared into a gully. She then heard the voice of the deceased "bawling" in the gully. Along with a man known only as "Quack" she walked about a chain further up the road and saw the applicants standing on the road and one of the applicants was seen pouring water from a jug to allow the applicant Clive Barrett to wash his hands.

Miss Allen retraced her steps and saw the deceased lying in a gutter along the road which leads to the gully from which the "bawling" had been heard earlier on. She noticed that he had wounds to his head, hand and feet and his body was covered with blood. She made an alarm and persons came to her assistance. The deceased was taken away in a car to the Port Maria Hospital.

Christopher Poyser, a brother of the deceased and the husband of Janet Allen-Poyser, was returning home when he heard a "bawling bottom side his house" in the bush. He saw the applicants coming out of the bush each armed with a machete. A man known only as "Lex" said to Clive Barrett, "What onco do with him now?" Barrett replied, "We chop him up down in a the bush, might be him don't dead." At that point Ivan Reid went up the road, returned with "a orange water bottle throw it at Billy hand and Billy wash his hand and face." (The applicant Clive Barrett is called Billy). The other two applicants also used water from the said bottle to wash their hands and faces. All three then left the scene. Mr. Poyser went down to the bush where he saw his brother, the deceased, lying on the ground with wounds to his head, hand and feet. With the assistance of other persons he was placed in a car and whilst travelling towards the Port Maria Hospital the deceased, who was then alive, said, "Billy, Keithie and Karl run him down in a the bush and chop him up, sir." (The applicants Linton Barrett and Ivan Reid are known as Keithie and Karl respectively).

Dr. David Crawford performed the post mortem examination and found the following injuries:

- (i) a three inch incised wound of the left parietal area of the scalp with five sutures;
- (ii) a two and a half inch incised wound of the upper occipital area of the scalp with five sutures;
- (iii) a two inch incised wound of the right parietal area of the scalp with four sutures;
- (iv) a five inch curved incised wound from the right temporal area to the occipital area of the scalp with six sutures.
- (v) multiple incised wounds on the left ankle, below the left knee, dorsal of the right foot, the lateral aspect of the right leg, the left hand, the right forearm, the right elbow and the right upper arm.

He opined that the injuries were consistent with being inflicted by a machete and that death was due to brain damage and haemorrhage from multiple wounds. Death would have ensued within forty-five minutes to a little over an hour. Excessive force would have been required to inflict the injuries seen.

Detective Corporal Kenroy Ogle received a report on Sunday April 28, 1991, as a result he went to Dean Pen where he saw the applicant Linton Barrett. Having cautioned him he informed him that he was investigating the death of Anthony Nicholson otherwise called "Culture" and that he had information that Karl and Billy chopped "Culture" to death whereupon the applicant said, "A mi brother him chop mek me chop him." He was taken into custody.

At the Port Maria Police Station he saw the applicant Ivan Reid otherwise called Karl. Having cautioned him he spoke to him in similar terms to which he had spoken to Linton Barrett whereupon the applicant said, "Me did only run him down in a the gully; me no chop him."

Both Linton Barrett and Ivan Reid were arrested on warrants on the 29th day of April, 1991. Upon being cautioned Linton Barrett

remained silent. Reid said, "We no chop him." Clive Barrett was arrested on the following day at the Richmond Police Station and having been cautioned said, "Look how him chop me and nek me put myself in a trouble."

As persons charged with serious crimes in this jurisdiction are wont to do, each applicant made an unsworn statement from the dock and proffered the usual defence of alibi.

The short unsworn statement of each applicant is set out below:

LINTON BARRETT:

"We never was there that night sir, I was at my home lay down. My grandfather was at home, kind a sickly, anything we have to do something to him, for him can't move, so me can't leave the yard because anything, me have to pass something to him. I don't live with my mother. Don't have anything more to say."

CLIVE BARRETT:

"M'Lord, indicative feeling they have against me M'Lord. I receive a chop in the morning a stone in my arm here, went to the police station report the matter, police give me paper to Port Maria Hospital where I was given an injection, tape in mi head, something to rub on my arm and my shoulder. Went home in pain My Lord, go to my bed, have nothing more to say My Lord."

IVAN REID:

"On the 27th of April, I leave my home 6 o'clock and go Port Maria, service the car a Port Maria and they call me fi go a funeral at Port Antonio. When me leave and go Port Antonio, take the body and go a Black Hill a gospel church, leaving from there I turn back and go a Hope Bay and turn up on the road a Hope Bay and go a the cemetery. On my way home back now, the hurst carry me part way up on the hill and leave me at a man name brother McKay and me walk from there to up to my home and as I reach the cross road fi turn to my road, I see Leslie Irons and him say, 'Carl mi a beg you go a station go report citizens chop up 'Culture'. And I turn back and go to the Police Station. I see a bluesean police station guard and I tell him that citizens chop up 'Culture'. So me ask when fi see how it go. Police never write down anything My Lord is a bluesean have no stripe. I walk from there

"My Lord and go up a my yard. I don't know how anything happen otherwise My Lord. When mi come to mi bed and sleep, I go back to mi bed. The Sunday morning when me 'keton' at work, me get a call fi go to Highgate Police Station say fi pick up a body a Vin yard; when me go a police station mi leave and go Vin yard and take up the body, take up the body mi go to Port Maria back down to the morgue. A the funeral parlour. Then when mi coming down, mi see Port Maria police driving, My Lord, me go in back a the jeep. As mi come out a the van mi see Mr. Bryce call me say Highgate police want you, mi a carry you down. Mi say: 'Mr. Bryce beg you do, neh mi gi this man mi beg fi send up a my yard.' Say hold on little bit, me just a gi this man mi beg fi keep and him carry mi go Port Maria station My Lord and have me down there until Highgate police come fi me. See a D.C. man coming with a handcuff, name 'Cadmapper', say 'why a youngsters like you go into chat.' Mi say, 'boss, mi no go into nothing; say 'boss, mi no go into nothing' and him put the handcuff and say Highgate police want you, me a carry you go look you up if mi no veil him anything fi mi boss mi no do nothing, why you do a thing like that and talk to me rough, when him come - Mr. Ogile handle mi rough and hold him gun a mi head, then carry mi go to a barber shop and four police in a the jeep trim and from them drive from there My Lord, them carry mi south, go let mi over right a upstairs and downstairs shop and red-seam police and D.C. and the driver carry mi go up a Richmond. The Monday morning when me down a Richmond My Lord, me see him come call out 'Fox' and say him charge mi brother fi murder and charge mi fi manslaughter and corporal man tell him no that can't work, you have fi charge the three a them fi murder if you a charge them. Say we have fi charge the three of them fi murder then, him talk to Leslie Irons and tell him hold him, him a go talk to the Detective Inspector from Port Maria fi let him go, then after mi in a the cell same way, mi no say nothing to him otherwise sir. That is all."

Two grounds of appeal were argued on behalf of the applicants. The first ground concerned all the applicants and the complaint was that the learned judge ought to have discharged the jury from returning a verdict after the jury had returned to court on two occasions and intimated that they had not arrived at a verdict.

We must point out at the outset that this ground does not accurately represent what took place. After retiring for eighteen minutes the jury returned to court and the records indicate at pages 207 to 209 the following:

"REGISTRAR: Mr. Foreman, please stand. Mr. Foreman and members of the jury, have you arrived at a verdict?

FOREMAN: Eleven say...

REGISTRAR: Have you arrived at a verdict?

HIS LORDSHIP: Listen to the question. Have you arrived at a verdict?

REGISTRAR: Is your verdict unanimous, that is, are you all agreed?

FOREMAN: No answer.

HIS LORDSHIP: You are not all agreed?

FOREMAN: One...

HIS LORDSHIP: Sit down awhile, please Mr. Foreman. All twelve of you must try to agree on the verdict. Is there any area of the law that you need any assistance on that I can help you with in order to come to your final verdict?

FOREMAN: Yes, M'Lord.

HIS LORDSHIP: What is the area?

FOREMAN: The problem is they say all three but if they want to agree, one, the smallest one...

HIS LORDSHIP: Just repeat that again?

FOREMAN: They say is all three, eleven say guilty.

HIS LORDSHIP: Don't tell us anything, no details yet.. You say they all say is all three but what?

FOREMAN: But they would free the smaller one.

HIS LORDSHIP: Sit down awhile. Is that the problem, is that the entire problem? You don't need

any more assistance in any other area? Mr. Foreman, see if there are any other area besides that that I can help you with to give you further directions on? Mr. Foreman what I want to know, is there any area of law that you don't understand properly or is there any area of the facts that you want me to tell you how to handle in applying the law? If there is nothing more from what you told me just now, I will just deal with that. Is there anything else?

FOREMAN: Nothing else.

HIS LORDSHIP: When I gave you directions about trying to come to a common verdict, I told you that you should all discuss it openly among yourselves. I expressed the view when I gave you directions, about not allowing anything to come into your consideration by way of sympathy. What I mean is that you must just use the evidence you heard in this court.

Now none of you have the right there to decide on whether a man goes free or not unless you are saying that he did not commit the offence. The fact is that you are only asked to deal with the evidence you have heard in this court and you find the facts from it, you just apply it to the law and come to your verdict. You are not asked to do anything else. You are not to use any sympathy, you are not to use anything you have heard outside of this court in considering your verdict. You have sworn a solemn oath to try this case and that solemn oath means that whatever is the evidence you accept, you have to say truthfully and honestly how you find it. You are not required to do anything else by way of sympathy and we do not expect you to be any-

anything but honest.

NOW MR. FOREMAN, you have told me that one of you is of a view and you have used the word, "they" in respect of letting go the smaller one. Now the only way in which a person is to be letting go is if you do not find the evidence led by the prosecution satisfies you of the person's guilt or if you are in doubt. You have to be resolute and you have to be strong. You have a duty to do and you have an oath that you have taken and all you are asked to do is to be true to your oath. Whatever happens afterwards is not your responsibility. We all have our duties and we have to do it no matter how hard it is.

So what I am going to ask you to do is return to the jury room. Remember the oath you took and remember the directions I gave you. Any other factor, anything else that happens is not within your hands. Please return to the jury room and consider your verdict."

The jury again retired for a period of thirteen minutes and upon return to Court the records reveal at pages 210 to 214:

"REGISTRAR:

Mr. Foreman, please stand. Mr. Foreman and members of the jury, have you arrived at a verdict?

FOREMAN:

Two giving trouble sir.

HIS LORDSHIP:

We don't want the details about what happens inside, you have not arrived at a verdict in respect of all of the accused? Listen to the question, you have not arrived at a verdict of all of the accused?

FOREMAN:

Yes your honour, please.

HIS LORDSHIP:

Let's put it this way. Have you arrived at a verdict in respect of each of the accused?

"FOREMAN: We found..."

HIS LORDSHIP: listen to the question, have you all agreed in respect of each of the accused?

FOREMAN: Yes your honour, please.

HIS LORDSHIP: You are all agreed in respect of each of the accused. A while ago you said two are giving you problems, so you are not agreed, all twelve of you not agreed in respect of the case of each accused?

FOREMAN: No your honour.

HIS LORDSHIP: Are you agreed in respect of the case against Linton Barrett, are you all agreed in respect of the case of Linton Barrett?

FOREMAN: Yes your honour.

HIS LORDSHIP: Do you find him guilty or not guilty?

FOREMAN: Guilty your honour.

HIS LORDSHIP: And all of you agreed in respect of Linton Barrett?

FOREMAN: He is guilty.

HIS LORDSHIP: Are all of you agreed in respect of the case against Clive Barrett.

FOREMAN: Yes your honour.

HIS LORDSHIP: Take that verdict.

REGISTRAR: Now say you, is he guilty or not guilty?

FOREMAN: I say they are guilty.

HIS LORDSHIP: All of you agreed in respect of the case against Clive Barrett?

FOREMAN: Yes, sir.

HIS LORDSHIP: Now say all of you, all of you say Clive Barrett is guilty or not guilty?

FOREMAN: One lady...

HIS LORDSHIP: So you all are not agreed in respect of the case against Clive Barrett.

FOREMAN: Yes, sir.

HIS LORDSHIP: All of you don't agree?

FOREMAN: Yes your honour.

HIS LORDSHIP: In respect of Clive Barrett, all of you say the same thing?

FOREMAN: Yes your honour.

HIS LORDSHIP: In respect of Clive Barrett then, do you find the accused man Clive Barrett guilty or not guilty as charged?

FOREMAN: He is charged guilty your honour, we found him guilty.

HIS LORDSHIP: In respect of the accused Ivan Reid, do you find - all of you agreed in respect of Ivan Reid?

FOREMAN: Yes your honour.

HIS LORDSHIP: All of you are agreed in respect of the accused Ivan Reid?

FOREMAN: Yes your honour.

HIS LORDSHIP: How say you, do you find the accused, all of you find the accused, that is Ivan Reid, guilty or not guilty as charged?

FOREMAN: They are guilty your honour.

HIS LORDSHIP: Mr. Foreman, we need to clarify something here, because when you told me two of you, you have trouble with two of you, it means that I am not quite clear exactly what you are saying yet. Sit down awhile. I can't take your verdict, unless I am satisfied that all of you are agreed on the verdict, I cannot take a verdict unless I am satisfied that you are clear, all of you are clear as to what you wish to decide.

Now, I have given you directions as to how you must do your duty. Now, none of you up

there have the right to, as I said, use any sympathy in the consideration of this case, none of you have any right up there to use personal feelings to consider your verdict, you have to examine your evidence and say on the evidence what you find as you heard in this Court. Now, it is true that each of you have your individual mind, it is true that each of you have a right to examine the evidence as you heard in this Court. It is also true that you have a duty to listen to what your fellow jurors says in your discussion and you express your views and you have a right to say why you find certain view, but you must do it honestly and must do it in good conscience. You don't have a right to take a view because you have a personal feelings about it, you have a duty to take a view, as long as the evidence is something based on the law that I gave you, is the thing that makes you decide in a certain way. Until I am satisfied that you are doing your duty in that way, without any sympathy, without any personal feelings, and you are doing it honestly and in good conscience, until then I cannot accept a verdict. I must be satisfied that the verdict is the verdict of the entire jury and the jury verdict is honest and it is true.

Now if there is any problem about deciding on the verdict, anything that I can assist you with, I am willing to assist you, but you have to do your duty.

Mr. Foreman I am going to send you back again. You have to discuss it among yourselves. I have to be satisfied that you understand my directions. You cannot use a personal feeling

or sympathy to decide this verdict, and then when I am sure I am getting a clear verdict from you, whether it is guilty or not guilty, a clear verdict, that your conscience is the thing that is guiding you, then I will take that verdict. Please return and do your duty."

At 4:36 p.m. the jury retired for 4 minutes and returned to Court at 4:42 p.m. The following transpired:

"REGISTRAR: Mr. Foreman, please stand.

HIS LORDSHIP: Let me take it. Mr. Foreman in respect of the first accused Linton Barrett, are you agreed on your verdict, that is are all of you saying the same thing?

FOREMAN: Yes your honour, please.

HIS LORDSHIP: Take that one.

REGISTRAR: How say...

HIS LORDSHIP: How say you, do you find the accused guilty or not guilty?

FOREMAN: Guilty your honour, please.

HIS LORDSHIP: In respect of the second accused, Clive Barrett, are all twelve of you saying the same thing in respect of Clive Barrett?

FOREMAN: Yes your honour, please.

HIS LORDSHIP: How do you find the accused man Clive Barrett, guilty or not guilty?

FOREMAN: Guilty your honour, please.

HIS LORDSHIP: In respect of the third accused Ivan Reid, are all twelve of you saying the same thing in respect of Ivan Reid?

FOREMAN: Yes your honour.

HIS LORDSHIP: How do you find the accused man Ivan Reid, guilty or not guilty?

FOREMAN: Guilty your honour, please.

"REGISTRAR: You say all three accused are guilty of this indictment, that is your verdict and so say all of you?"

FOREMAN: Yes your honour, please."

This complaint could only succeed if it could be shown that the learned judge had coerced the jury to arrive at a verdict. The extracts set out herein do not so demonstrate. What the extracts clearly demonstrate, however, was that the learned judge was endeavouring to ensure that whatever verdict was returned was a true verdict according to the evidence and the verdict of all the jurors, whatever that verdict may be. In our view, the trial judge did nothing which could be remotely considered as improper. By the patience which he demonstrated he clearly avoided what would have been a perverse verdict as it seemed that although all of the jurors were satisfied of the guilt of Ivan Reid they were prepared to give him a chance, no doubt because whilst admitting to Detective Corporal Ogle that he was present he denied that he had participated in the chopping of the deceased.

Unless a jury indicates that there is no hope of arriving at a verdict a trial judge is well within the proper discharge of his duties to endeavour to assist the jury in arriving at a verdict. One of the primary objectives of a trial is to ensure that a decision is arrived at if possible without the parties having to go through the ordeal of a retrial.

In our view, all the learned judge did in this case was to remind the jury of their responsibility in keeping with their oath. We refer to Shontatalle v. The Queen [1961] 3 W.L.R. 1021 where, after a jury had retired for a period of three hours and ten minutes, in what the judge considered to be a simple case, they were unable to arrive at a verdict, the judge seemed to have thought that some one or more members of the jury were not mindful of their duty and in terms much stronger than Paul Harrison, J. he reminded them of their duty. Lord Denning,

delivering the opinion of the Board, while expressing the view that the directions may have been too strong, concluded that the directions did not contain such a measure of coercion as to invalidate the verdict. The instant case, as have already been pointed out, was not a case of disagreement or inability to arrive at a verdict. It was a desire of one or two jurors to be lenient to the applicant Reid. In the circumstances, the learned judge quite properly reminded them of their functions.

We are of the view that this ground lacks merit and, therefore, fails.

The second ground complains that the learned judge's directions on provocation were inadequate. We preface our remarks by saying that in our view the learned judge took a very charitable view of the evidence. He was extremely generous in leaving the question of provocation for the consideration of the jury.

We need only say that the directions of the learned judge on the issue of provocation were full, fair and must have been readily understood by the jury. We can find absolutely no defects in his directions. This ground also lacks merit.

On the question of sentence, we adjudged the offence to be non-capital murder in accordance with section 2(3) of the Offences against the Person Act. As a result we entered a verdict of non-capital murder, set aside the sentences of death and substituted a sentence of life imprisonment in respect of each applicant and specified that each of the applicants be not considered for parole until each had served a period of fifteen years.