CA. Criminal Law — Murder Trial — Summing up — Provocation — Verdict — Evidence — [illegible] whether direction [illegible] — Sec 6 Offences Against the Person Act — whether [illegible] — Verdict — [illegible] taking of verdict [illegible] Jury [illegible] — See Jury Act — Evidence — Doctor not called to prove death — whether cause of death [illegible] — Appeal allowed on ground of inadequacy of direction on provocation — Conviction [illegible] verdict of manslaughter substituted, sentence of 8 years hard labour. Cases referred to: R v Waldheim 36 Cr App R 167

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 123/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA v. DOUGLAS CHRISTIE

Criminal Practice

Ian Ramsay, Q.C. & Mrs. Valerie Neita-Wilson for appellant

Lloyd Hibbert, Deputy Director of Public Prosecutions for Crown.

April 17, 18 & 19 & June 16, 1989

CAREY, J.A.:

We now give our reasons for substituting a verdict of manslaughter in this application for leave to appeal a conviction for murder in the Westmoreland Circuit Court on 16th May, 1988 before Patterson, J., and a jury. We treated that hearing as the hearing of the appeal which we allowed with the result indicated. The appellant was sentenced to 8 years imprisonment at hard labour.

The grounds of appeal filed numbered 12 and ranged over a wide and variegated spectrum of issues which arose at the trial. Although the appeal succeeded on one of those grounds, we desire to express our opinion on some of the remainder as we think that may be of some use and benefit to those engaged in criminal trials.

The facts upon which the conviction was based may be summarized in this way: At the time of these events, the appellant was in charge of an apartment house situated in the district of Darliston in the parish of Westmoreland. This he let to various persons among whom was the slain man, Vincent Newman, also called "Japanese". On 1st December, 1986 at about 9:30 p.m., Patrick James, as a prosecution witness, related, he was present on those premises when he saw the appellant and the slain man wrestling. He separated the combatants and counselled the appellant against continuing the fight. The appellant complained to him that "Japanese" had, without provocation, struck him in his face making it bloody all over and breaking his dentures. The appellant appeared to be still in an angry mood because he took up a piece of cane but James relieved him of this. "Japanese" was himself in a similar mood; he was using threatening language accompanied by indecent words. Some 10-15 minutes later, the appellant observed to James that he had cooled down and intended going upstairs. The earlier event had taken place on the ground floor either in the hall or in the kitchen. As the appellant made his way towards the stairs, on a route which would take him in close proximity to the slain man, James took the appellant away as he feared another bout between the men. "Japanese", it is alleged, attempted to leave his room and approached James and the appellant but James directed him to return to his room which he did. He was also told to close his door but he only partially complied. Again James remonstrated with the appellant who assured him that he was fine. Despite the assurance, however, James remained by the door preventing the appellant from leaving the room. Eventually James allowed him to leave. The appellant then made another attempt to go up the stairs, the bottom of which was by the door of the room in which "Japanese" stood muttering "heated words" regarding the incidents. As the appellant passed the doorway, he kicked the door fully open, "Japanese" came out and another bout began.

By this time Mr. James had become quite disenchanted with their conduct and did nothing further to restrain them. Both men engaged in wrestling with each other until "Japanese" fell on the appellant. At this stage, according to Mr. James, he pushed off Japanese and discovered that both men had both hands on a knife. In pulling"Japanese" off, Mr. James said he placed his hands "around his neck and under his belly" and discovered that there was blood on them.

The prosecution called another witness Miss Olive Rodney who added details to the account given by Mr. James. She said that the appellant complained to no one in particular that "Japanese" had left on the bathroom light. Apparently, the appellant switched off the light. Then "Japanese" again switched on the light. Whereupon the appellant wondered aloud why "Japanese" had not told him he was using the bathroom. Words passed between the men and then "Japanese" hit the appellant in his face which resulted in a fight. She summoned Mr. James to make peace. He parted them. "Japanese" went to his room and the appellant to the kitchen. Eventually the appellant returned to the hall, threatened "Japanese" and kicked the door to "Japanese's" room twice. A lady (referred to as Miss Birdie) then came from the room and suggested that the appellant could not harm "Japanese". Upon this, the appellant stabbed at "Japanese" with a knife which he had in his hand. The witness was not able to say whether the knife caught "Japanese". But thereafter, she said, both men grappled with each other and eventually fell at the foot of the stairs. The wrestling continued and she then noticed blood coming from

"Japanese's" chest. "Japanese" was placed in a van by a police officer and others. Sergeant Silas Adams testified that on his arrival at the premises he noticed "Japanese" bleeding from a wound in the region of his left breast, which he indicated to the jury. He spoke with the injured man telling him to stand but he collapsed when he attempted to comply. The appellant himself was bleeding from the third and fourth fingers of his right hand. The officer took both men to the hospital where the appellant was taken to the out-patients' department. "Japanese" was not removed from the van. A doctor came out to the van, examined him and made a pronouncement with respect to "Japanese". The object of the pronouncement appeared dead to the police officer. The knife which was used by the appellant was acknowledged by him to be his. After he was arrested and cautioned, he stated to the officer that "Japanese" had attacked him; he had tried to defend himself. "Japanese" had died and he was sorry about it.

For completion, we think it right to point out that a post-mortem examination was performed on the body by a Dr. Parker who, however, did not testify at the trial nor was his deposition tendered.

The appellant gave evidence on oath before the learned judge and the jury. On the night in question, he recounted, he arrived home at about midnight having attended a Harvest Supper, to find that a light in a bathroom had been left on. He commented aloud about his discovery and switched off the light. He was engaged in washing up the dog's dish when he was unceremoniously grabbed from behind and heard a voice - "I gwine discipline you". The words were accompanied by a rain of blows all over his face. His assailant was "Japanese". His dentures were damaged and his mouth was bleeding. Mr. James came to his rescue by pulling off "Japanese".

After this, "Japanese" was uttering threats and taunting him. He himself picked up a piece of cane but replaced it when Mr. James advised him to do so. Mr. James also placed "Japanese" in his room. He then decided to go upstairs, and in order to get there, he would have to go by the room which "Japanese" occupied. But Mr. James prevented him. He reassured Mr. James that he was not angry and delayed another five minutes in the kitchen. He then made another attempt. As he placed one foot on the stair, "Japanese" pulled him back and both of them grappled. In the course of their wrestling, he realized that "Japanese" had a knife and accordingly, he was making efforts to wrest the knife from him. In doing so, he fell on his back with "Japanese" on top of him. He then realized that the blade was closing on his fingers: it was being forced down by "Japanese". He felt blood; his own. Mr. James did try to lift "Japanese" off him. He knew nothing thereafter. He explained that the knife was part of the stock of cutlery in the house. He was subsequently taken to hospital with "Japanese" where he received treatment.

The ground which we thought meritorious and indeed which learned counsel leading for the Crown conceded he could not successfully challenge, was stated in this way:

Ground 10(a)

> "That the Learned Trial Judge erred in his directions on Provocation in -
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> That the direction was inadequate/insufficient as the factual basis was confined to one incident only where the deceased attacked the accused: Whereas there were other factual bases, namely (i) the words used by the deceased thereafter and his shaping at the accused (ii) the course of the struggle or wrestling in which the knife was involved, and which the accused maintained the deceased initiated."

The learned trial judge in leaving to the jury the issue of provocation which fairly arose on the Crown's case, expressed himself in this way at pages 205-206:

> "......... and Mr. Foreman and members of the jury, in this case you will have to consider the question of provocation, because it does .... you will have to consider this question of provocation."

Having identified the evidential basis capable of constituting provocation, the learned trial judge then gave a perfectly correct, clear and adequate direction as to what in law was provocation. He used two telling phrases, viz., "It arises in this way" and "It is in that" which unmistakably conveyed to the jury that the attack by the slain man upon the appellant when he blooded the appellant's mouth and also the appellant's use of threatening and indecent words constituted the sum total of the factual material to be considered. On the Crown's case there were at least two fights and a series of continuing incidents between the men. But the learned trial judge omitted to call attention to those facts as well. It was not that he had forgotten those incidents because he set out in their entirety the concatenation of events involving the appellant and the slain man and which we have rehearsed earlier in this judgment. However, he recounted those events in the context that they were relevant to the issue of whether sufficient time had elapsed for the appellant's anger to have cooled. It is possible that he formed the view that the appellant's continued reassurance to the witness Patrick James that "he was cool" meant only that he was wholly unaffected by them. If that be true, then the learned trial judge was usurping the jury's role. It was for them and them alone to make up their minds what the words meant in the context of the case. The law is clear that the act or series of acts done by the slain man or the words spoken by him should be left, for section 6 of the Offences Against The Person Act provides that -

> "......... the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

In our judgment, in focussing the jury's consideration on the limited material he provided, the learned trial judge effectively deprived the appellant of a chance of an acquittal of murder. We think this was a serious misdirection which resulted in a substantial miscarriage of justice and led us to substitute a verdict of manslaughter, having quashed the conviction for murder.

We can now consider some other of the grounds argued before us. In this next ground, counsel complains of an irregularity in the taking of the verdict which he said contravened the provisions of the Jury Act and arose in this way: The jury retired at 4:08 p.m., and having returned at 5:02 p.m., the following exchange took place:

"REGISTRAR: Mr. Foreman, please stand. Members of the jury, have you arrived at your verdict?

FOREMAN: No.

HIS LORDSHIP: What's that? I didn't hear that.

FOREMAN: No.

HIS LORDSHIP: You haven't. I'm afraid I can't hear you at this time, Mr. Foreman and members of the jury. I will have to ask you to go back and try and arrive at a unanimous verdict. I am not going to ask any of you to subvert your honest view of the facts in favour of any other person but calmly discuss the issues, iron out your difficulty and try and arrive at a unanimous verdict. I can't accept any divided verdict at this time. Yes, kindly retire.

JURY RETIRES AT 5:05 P.M."

The jury returned at 5:10 p.m., and when asked if they had arrived at their verdict, responded in the affirmative.

It was argued that there was no power to require a jury to retire for further consideration under Section 44(4) of the Jury Act where it was clear that the jury had not arrived at a verdict as distinct from having arrived at a divided verdict. Further the learned trial judge failed to ascertain from them the nature of the problem so as to be able to render them further assistance by way of directions on law or fact.

We were to understand from all of this that the appellant was somehow denied the benefit and full protection of the law. The extract of the proceedings which we have quoted shows, in our view, that the jury had not yet arrived at any verdict on the indictment. The trial judge left to the jury the following verdicts - not guilty of murder; guilty of manslaughter on the basis of provocation, or guilty of murder. In this country, before the jury can consider manslaughter, there has to be a unanimous verdict as to murder. The question of a majority verdict only arises in respect of manslaughter. Section 44(1) and (2) of the Jury Act are relevant. It is therein enacted as follows:

> "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.
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> (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."

In the circumstances of this case, when the question was put to the jury, their response was not one that disposed of the question of murder: they returned neither a unanimous verdict of guilt nor a unanimous verdict of acquittal. It mattered not whether they were all undecided or not: the trial judge was constrained to direct their return to the jury room for further consideration to satisfy Section 44(1) of the Act. Every intelligent juror knows perfectly well that the verdict required is a unanimous one. What they might not know is that divided verdicts are acceptable after a certain time has elapsed and depending on the ratio of the division.

The need for further directions must depend on whether in the first place, the jury seeks further assistance or the judge, having regard to perhaps the length of time which has passed since their deliberations started, or at the instigation or prompting of counsel, considers it necessary. In that event, the directions sanctioned by the Court of Criminal Appeal in the United Kingdom in R. v. Walheim 36 Cr. App. R. 167 would be appropriate.

To the certain knowledge of each member of this panel, it has never been the practice to give directions on the need for unanimity before a jury retires to consider their verdict. Directions such as those approved in Walheim (supra) are given only when difficulties have arisen. There is, in our view, much to be said for maintaining the present practice. We are not aware that it causes any difficulties nor do we think a change would necessarily make for any improvement. Statistically, there is not a high proportion of disagreement among jurors islandwide. The current situation in the United Kingdom is altogether different. A judge, whether in the High Court or the Crown Court is empowered by virtue of Section 17 of the Juries Act 1974 to accept a verdict that is not unanimous. The Practice Directions which have been issued by their Court of Criminal Appeal have been brought about by the change in the law there. By one such direction published on 31st July, 1967 pursuant to the Criminal Justice Act 1967 which allowed majority verdicts, the Court sanctioned certain directions, viz. -

> "As you may know, the law permits me in certain circumstances to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

In this country, as we have already stated, majority verdicts are not permissible on an indictment for murder. We are inclined to think that the present practice of dealing with disagreements by an appropriate direction when they arise, is to be preferred than to approve a practice of directing on unanimity as a matter of course.

It follows from what we have said that the learned trial judge acted entirely correctly when he directed the jury to return and arrive at a unanimous verdict. Until they had done so, and removed a verdict of murder, manslaughter could not be accepted even by a majority of their number. This ground therefore failed.

In another ground of appeal, learned counsel for the appellant argued that the trial judge in remanding the appellant into custody in the presence of the jury, prejudiced the fair trial of his client. The prejudice, it was submitted, lay in the fact that the jury might infer something adverse to the appellant who had been remanded on bail prior to that time, either as to his character or as to the evidence so far adduced.

Just before the luncheon adjournment was taken on the first day of trial, the trial judge, having given the jury the usual directions about keeping their counsel, then said (p. 23):

"The accused is remanded in custody."

The Court then rose. We are quite unable to appreciate how that bald terse order of the trial judge could have had the slightest effect on the jury. There was no discussion from which the jury could have derived any material from which an inference adverse to the appellant as affecting either his character or reflecting on the evidence adduced, could be drawn. It was suggested that the trial judge ought to have given some explanation for his action in withdrawing bail. We cannot agree. Any explanation could well result in the prejudice feared by counsel. Counsel at trial would have been well advised to apply in Chambers to the judge on the matter of bail. In the present case, the Court rose, and the jury went off to lunch with the customary admonition of the judge the last thing in their ears. We have not the least doubt that no prejudice resulted or could have resulted from the judge's laconic utterance. This ground was, we think, without merit.

It was also submitted that no medical testimony of any description was presented to the Court by a live witness or by deposition to prove the cause of death. There was evidence led about the deceased being taken to the hospital and the holding of a post mortem examination. Accordingly, it was said that a vital link in the chain of proof was omitted and the appellant was entitled to be acquitted. Moreover, the trial judge failed to draw this omission to the jury's attention and gave no directions whatever as to the cause of death. In the presentation of its case, the prosecution did not call the doctor who performed the post-mortem examination nor was his deposition tendered as is allowed by Section 34, Justices of the Peace Jurisdiction Act. The record shows only that he was off the Island and we have no information why the basis for tendering his deposition was not laid. It may have been intended originally to call him because the name was on the back of the indictment, but from the first day of trial, it was known that he would not be called. Counsel for the Crown intimated that two witnesses on the back of the indictment would not be called.

Howsoever this might be, the real question for this Court is whether there was in fact, a lacuna in the Crown's case. The Crown was obliged to prove the death of "Japanese" and that his death was caused by the appellant. The evidence adduced was clear that after the fracas between the appellant and the slain man in which a knife was used by the appellant on the latter, he received an injury to his left chest. It was a serious injury because he could not stand up afterwards, but collapsed when invited to stand up. Thereafter, he was taken to the hospital where a doctor examined him. He appeared dead. A post-mortem examination was held on his body. In our view, there was ample evidence from which the jury were entitled to come to the conclusion that (a) "Japanese" was dead; and (b) he met his death from a stab wound inflicted by the appellant.

The absence of medical evidence is not necessarily fatal to a prosecution for murder where there is other credible evidence from which the cause of death can reasonably be inferred. In our judgment, this was such a case. The issue of cause of death was not really a live issue before the jury. There was no doubt whatever at trial that "Japanese" had died as a result of a knife wound: the only question was whether the injury was inflicted by the appellant. The point really, had no substance.

There were other complaints made as to the failure to call witnesses on the back of the indictment by the prosecution and the failure to provide any explanation therefor but having regard to the decision at which we arrived, we consider it a sleeveless errand to deal with submissions which can only be of academic interest.

It was for these reasons that we came to the decision announced at the end of submissions made on 19th April.