JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/ 2000

BEFORE: THE HON. MR. JUSTICE HARRISON, J. A.
THE HON. MR. JUSTICE LANGRIN, J. A.
THE HON. MR. JUSTICE PANTON, J. A.

REGINA V. TOMMY WALKER

Leonard Green for the appellant

Miss Kathy Pyke, Assistant Director of Public Prosecutions, and Miss Suzette Rogers for the Crown

October 16 and 17 and December 20, 2001.

PANTON, J.A.

On May 25, 2000, the appellant was convicted of murder in the Westmoreland Circuit Court. As required by law, his trial took place before a Judge of the Supreme Court and a jury of twelve. He was sentenced to life imprisonment. The learned judge then proceeded to "recommend" that he be not eligible for parole until he has served twenty years imprisonment and the sentence should commence at the expiration of a term of imprisonment that the appellant was serving at that date. Although the learned judge purported to make a recommendation in respect of the length of the imprisonment, it should be noted that section 3A (2)of the Offences against the Person Act provides for the Court to "specify" the period. It is not a recommendation that the Court is to make.

On October 17, 2001, we allowed the appeal herein, quashed the conviction, set aside the sentence and ordered that a new trial be held at the next session of the Westmoreland Circuit Court.

The original grounds of appeal were abandoned, but we gave leave to the appellant to argue two supplemental grounds. The first of the latter grounds challenged the reasonableness of the verdict on the basis of the existence of discrepancies between the evidence of the sole eyewitness and the doctor who performed the post mortem examination. In our view, this ground was without merit as adequate directions had been given by the learned trial judge.

The same cannot be said of the second ground which, verbatim, reads:

> " The statement of the learned trial judge during the course of their deliberation, in advising the jury as he did, made statements which could have had the effect of pressurizing the jury into arriving at a verdict which was adverse to the accused."

This complaint by the appellant was based on what the learned trial judge said to the jury a few moments before they had retired to consider their verdict, and also on each of the two occasions on which they had returned for further directions. The record of appeal shows at page 66, that in his final charge to the jury, the judge said:

> " Mr. Foreman and members of the jury, it is getting late in the evening but it does not exclude you from giving due consideration to the charge which this man faces, which is murder. I hope that you all can agree. So when we say knock heads together, I don't mean literally, right. You exchange ideas and where there are different views you talk about them and look at the evidence and see whether one can win over the others, to that side and in due course arrive at a verdict. You try to come back well before midnight, you see."

With these words ringing in their ears, the jurors retired at 4.55 p.m. They returned to the courtroom at 5.40 p.m. They were not unanimous; they were divided eight to four in favour of a conviction. The learned judge then said to them:

> " On a charge of murder you all have to agree one way or the other. If after a certain time you cannot agree then we have to discharge you, but we haven't reached that time."

They retired again at 5.42 p.m. but returned to the courtroom at 6.15 p.m. and advised the judge that there had been no change in the situation so far as a verdict was concerned. The foreman put it this way when the judge inquired as to the cause of the problem:

> "Some decide, some undecided", and later: "Everybody discuss it to one another, but they can't come to, can't decide."

The learned judge then said:

> "Don't tell me that it going happen for the second time, because where the jury can't agree on a charge of murder, the jury must all agree on the same verdict one way or the other...." (page 70).

The foreman said to the judge:

> "I understand, Your Honour, but to how I see it..."

He was interrupted by the judge who is recorded as saying:

> "How the others see it? This has never happened in any parish..."

After a further exchange between the foreman and the judge, the foreman said:

> "We have a big problem. Some agree and some disagree."

The judge then said:

> "That is how it start out. You take a vote and you say to those who say yes on that bench, and those who say no on the other bench, and you find out from each of them why they say what they are saying. You have to find out one by one what is causing the problem, why they hold to the view.
> I did tell you before you retire that you have to try and all of you agree because it's not a charge where you can take majority verdict. That is not part of the system.

> So if you start out with that in mind that you all have to agree, the weaker side might win or vice versa, I don't know."(pages 72 and 73).

The jurors retired for the third time at 6. 29 p.m., and within 12 minutes they returned to the courtroom with a verdict that the foreman said was unanimous.

Mr. Green submitted that the effect of the learned judge's comments was the return of a verdict adverse to the appellant. He relied on the case ***Regina v. Watson and others*** [1988] 1 Q.B. 691 as well as paragraphs D16.32 and D16.33 on pages 1450 and 1451 of ***Blackstone's Criminal Practice*** (2000).

In ***Watson,*** a decision of the English Court of Appeal, it was held that, since a jury had to be free to deliberate without any form of pressure being imposed on them, they should, at the judge's discretion, be directed in terms that made it clear that no pressure was being exerted.

In ***R. v. McKenna*** [1960] 1 All ER 326, a case cited in argument in ***Watson***, the earlier English Court of Criminal Appeal held:

> "It is a cardinal principle of English criminal law that a jury in considering their verdict shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat: they still stand between the Crown and the subject, and they are still one of the main defences of personal liberty."

In that case, at the beginning of a criminal trial of three accused on a Monday, the judge told the jury that the court could not sit after 1 p.m. on the following Wednesday. The trial proceeded and the court sat until 5 p.m. on Monday and until 6.30 p.m. on Tuesday. The jury retired at 12.20 p.m. on Wednesday. At 2.38 p.m. the judge recalled the jury and told them that if they had not reached a conclusion in ten minutes they would be kept all night and the case would be resumed on the next day. The jury retired and returned six minutes later with verdicts of guilty against all accused.

The actual words of that learned judge, Stable, J. were:

> "I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at 11.45 a.m. tomorrow. I do not know, and I am not entitled to ask--- and I shall not ask--- why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourself with legal quibbles. That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury."

Cassells, J., in delivering the judgment of the Court said at page 330 F:

> "...it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement."

In the instant case, an examination of the transcript reveals that Crown Counsel opened the case to the jury between 12.24 and 12.27 p.m. This was followed by evidence from 12.28 to 1.10 p.m. Following the luncheon adjournment, further evidence was led by the prosecution between 2.31 and 3.31 p.m. That completed the prosecution's case. The appellant made the traditional unsworn statement which consisted of four lines in which he proclaimed his innocence. Crown Counsel addressed the jury for ten minutes while the appellant's attorney-at-law addressed for fifteen minutes. The summing-up commenced at 4.10 and lasted for just under forty-five minutes. The trial had up to that point lasted for less than three hours. The proceedings had been moving with commendable dispatch. On the face of it, there would have been no reason for the jury to be given the impression that there was any constraint in relation to the time within which they were expected to arrive at a verdict. However, the learned judge's statement that they were to return before midnight would have done just that.

This statement cannot be viewed in isolation as the learned judge had, at the beginning of the summation, said this to the jury:

> "Mr. Foreman and members of the jury, this case started sometime about mid morning and we are nearly at the end. I made a certain decision prior to today, and **after consultation with counsel on both sides decided that it is better to finish the case today.** You don't have to come until Monday".

The case was tried on a Thursday. The judge and counsel had decided that there would have been no sitting of the Court on the Friday. We understand the need for a judge on Circuit to regulate the sittings of the Court, taking into consideration the interests of the jurors and counsel who sometimes have appointments that cannot be changed without much difficulty being experienced. In regulating the sittings of the Court, the judge, with the assistance of counsel, will of course determine the order in which the cases will be tried. There is no doubt, however, that the right to determine when the trial of a case with a jury should commence does not extend to a determination of when a verdict is to be returned. It was unfortunate, therefore, that the learned judge told the jury that he and counsel had decided that it was better to finish the case that day. The impracticability of so doing should have become obvious when it was noted that the empanelling of the jury was not completed until shortly before the usual time for the luncheon adjournment. In any event, it seems unreasonably optimistic to commence a summing-up in a murder case after 4 p.m. and expect that a true verdict will be returned in time for the jurors to journey over hazardous country roads to their homes in good time and in safety.

In view of the decision taken by the learned judge not to sit on the following day (Friday), it seems that the appropriate time for the commencement of the trial would have been on the Monday. That would have given the judge the opportunity to so structure the proceedings that the jury would have had ample time on the Tuesday or

any other succeeding day to consider all the issues in a leisurely way and to return a verdict on the basis of the evidence.

In this country, it is a notorious fact that our Courts are usually contemplating the taking of the adjournment so soon as 4 p.m. approaches. So, under normal circumstances, it is unwise to commence a summing-up at 4.10 p.m. in a murder case unless the jury will have the option of considering their verdict on another day. The position at common law is that the jury is not permitted to separate while they are considering their verdict. Hence, once the summing-up has been completed and they are instructed by the judge to consider their verdict, they have to remain together until they arrive at a verdict or until they have been discharged having failed to arrive at a verdict. This no doubt would have been in the mind of the learned judge when he was urging them to return before midnight. The common law position seems to have received some form of statutory recognition in that the Jury Act gives the Court the power to "... permit the jury to separate and go at large" ... "before (they) consider their verdict" (see section 47(1). There is no provision permitting separation after retirement to consider their verdict. Indeed, section 47(3) reads:

> "Whenever the jury have not been permitted to separate and go at large, or have retired to consider their verdict, the Judge may give such directions as he may think fit with respect to their accommodation, custody, and refreshment".

In the particular circumstances of this case, there is the added factor of what the learned judge said to the jury. We are satisfied that the circumstances amounted to nothing short of the administering of pressure on the jury to arrive at a verdict. No doubt, the learned judge had as his commendable aim the speedy dispatch of the case, given the heavy workload that faces our Courts on a daily basis. Regrettably, his zeal resulted in a situation which cannot be described as fair or just to the appellant. For the aforementioned reasons, we quashed the conviction and ordered a new trial.