J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 136/74

BEFORE: The Hon. Mr. Justice Edun (Presiding)
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. LEROY CAMPBELL

Mr. Howard Hamilton for the applicant.

Miss J. Bennett and Mr. M. Reckord for the Crown.

30th, 31st January; 8th April
& June, 1975

ROBINSON, J.A.:

The applicant was convicted at the Home Circuit Court on the 2nd July, 1974 of the offence of robbery with aggravation and sentenced to seven years hard labour and to receive five lashes. Application for leave to appeal against conviction and sentence was considered by a single judge of the Court and refused; a further application was made to the full Court when judgment was reserved.

The indictment dated 15th November, 1972 upon which the applicant was charged and convicted read as follows:

> " Aston Smith, Leroy Campbell and Charles Hill on the 22nd day of November, 1971, in the parish of St. Andrew, being armed with a gun and a knife, together robbed Georgia Pinnock of money, approximately $66.00."

In 1973 Charles Hill and Aston Smith were tried. The result of that trial was that Hill was acquitted and Smith convicted. When the applicant's trial took place in 1974, the names of all three men were in the indictment.

It is in the above context that counsel for the applicant contended:

> "That in July, 1974, when applicant's trial took place the alleged co-accused Charles Hill had already been acquitted of the instant charge. It was therefore, totally improper for the learned trial judge to repeatedly refer to Charles Hill in his summation as a participant in this offence."

For the purposes of this judgment, we do not consider it necessary to detail the evidence but in the context of this case we cannot see how the narrative of events leading up to the robbery of this post office at Mount James could be recounted and the facts understood by the jury without disclosing the name "Charles Hill"; indeed the applicant gave a statement to the police which was put in evidence. In that statement, the applicant confessed his association with both Charles Hill and Aston Smith in the robbery:

> "Hill give me a little .22 automatic and me and Smith go up de post office. Smith only had a rachet knife ..... We stick them up..... Smith did tek up de money off a little table in de post office ..... We run back to the taxi and tell the man fe drive, but on de way we meet the police car..... and dem tek away what money we get from the post office."

In his defence, the applicant gave evidence on oath. He made frequent references to Hill and Smith and, according to him, the part which each played; they (Smith, Hill and himself) had all gone there in a taxi from Kingston. Throughout the case, references has been made in the evidence of the applicant's association with Smith but then, Smith was convicted.

We have no doubt, the effect of the evidence as to the applicant's association with Charles Hill was led in order to explain and relate the facts and circumstances of the case.

The evidence in the case establish that the applicant and Smith were identified as being the robbers at the post office.

It cannot be disputed that in his summing-up, the learned trial judge dealt with the case against the applicant and his association with Charles Hill as particeps criminis in the robbery. Our view is, however, that in the circumstances of this case, the conduct of it, and in particular, having regard to the facts related by the defence there has been no prejudicial effect worthy of consideration. We find no merit in this ground of appeal.

We now come to what we consider the more important point raised on behalf of the applicant and it is this:

> "The trial was a nullity in view of the fact that a divided verdict was taken less than one hour after the case was finally left to the jury."

The conviction was based on a majority verdict of six to one. What happened was this:

> "THE FOREMAN: We wish to retire, my lord.
>
> Jury retire: 2:31 p.m.
>
> Jury returned under sworn guard at 2:58 p.m.
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> JURY ROLL CALL ANSWERED.
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> REGISTRAR: Mr. Foreman please stand. Mr. Foreman and Members of the Jury have you arrived at your verdict?
>
> FOREMAN: Yes.
>
> REGISTRAR: Is your verdict unanimous, that is are you all agreed?
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> FOREMAN; It is not unanimous.
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> HIS LORDSHIP: Mr. Foreman, it looks like we will have to send you out again, we cannot accept verdict which is not unanimous at this stage. What is the problem, is there anything we can help you with Mr. Foreman.
>
> FOREMAN: It is the question about the gun.
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> HIS LORDSHIP: Mr. Foreman, Members of the Jury, you are responsible persons, because the gun is not in evidence?
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> FOREMAN: Yes.
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> HIS LORDSHIP: You will have to decide how you are going to treat it, but you are responsible persons. An explanatio-

has been given why the gun has not been presented, if you reasonably say that that goes the root of the crown's case, then let him go. If you think that it doesn't affect the crown case one bit; if you accept that the gun was found; if you accept the evidence of the man Nugent that he saw the police find the gun; if you accept the evidence of Sergeant Hohn that he found the gun on the instructions of the accused, well you have some evidence there that a gun was involved, especially if you bear in mind what the other witnesses said. But if you feel that no gun was used at all, from the absence of the gun and all the other things you have heard, if you can reasonably come to the conclusion that no gun was used and this man wasn't involved, let him go. I don't think I can help you any more, that is a question of fact which if it is giving you problems and you think it is at the core of the case, you can reasonably, honestly think it is at the core of the case let him go because you will be in a state of doubt. I cannot tell you anything more Mr. Foreman, that is a question of fact which you must assess, you are responsible people and you are judges of facts. Do you wish any further direction about anything else Mr. Foreman?

FOREMAN: No M'Lord.

HIS LORDSHIP: Well, I have to ask you to go back.

JURY RETIRED UNDER SWORN GUARD AT 3.05 p.m.

JURY RETURNED UNDER SWORN GUARD AT 3.24 p.m.

JURY ROLL CALL ANSWERED.

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

FOREMAN: No. sir,

HIS LORDSHIP: Mr. Foreman, Members of the Jury, I am going to send you out again. Mr. Foreman, what is the problem, is it still the problem of the non-production of the gun?

FOREMAN: Well M'Lord, apparently I was led to believe that was the case but apparently there are jurors among us who it would appear because of religious grounds, they don't seem to be able to convince themselves.

HIS LORDSHIP: They cannot say ....

FOREMAN: Whether the accused is guilty or not guilty."

The learned judge then dealt with the question of religion vis-a-vis their approach to the facts in the case. He said inter alia:

> "Mr. Foreman, let me put it straight that this is not a question of religious doctrine, this is a question of acting according to the evidence that you have heard ..... you know what truth is, you know what lies are. I am not asking anybody to go against their better judgment; what cannot be required of you is that you should go against the oath you have taken or the affirmation which you made and certainly that must count for something in the scheme of things.
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> Mr. Foreman and Members of the Jury, may I remind you that the court and the whole proceedings of this trial are designed for you to discover whether the accused is guilty or not guilty. You are not here to convict an innocent man or the corollary, you are not there, if you find that the evidence shows that the accused is guilty to say that you are going to act against your oath and your finding and deliver a verdict against that ..... I am not trying to pressure anybody; you are a body of seven persons, each of you have taken an oath to return a true verdict according to the evidence but of course you have a duty not only as indivivuals but collectively."
>
> "Jury retired under sworn guard at 3.40 p.m.
>
> Jury returns 3.46."

Section 44 (3) of the Jury Law Cap. 186 enacts as follows:

> "(3) On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the lapse of one hour from the retirement of the jury, be received by the Court as the verdict of the jury."

The question posed here is, from what time should the beginning of that hour be computed - from the time when the jury first retired or from their second or third retirement having voluntarily returned on each occasion.

We have carefully considered the judgments in R. v. Winston McDonald and Clover Haye (1969) 14 W.I.R. p. 11 and R. v. Raymond Failey S.C.C.A. No. 206/73. We have come to the conclusion that unless new and material directions are given on return of the jury, time begins to run when the jury first retire and runs even when the jurors are sitting in the jury box awaiting the entry of the judge into the courthouse right up to the time when the verdict is requested of them.

In the McDonald's case (supra) the judge brought back the jury because he had forgotten to give them directions about one aspect of the case which he considered important and material enough to cause him to take this course of action. It was held that the statutory period recommenced on the second retirement which was the time when the case was finally and definitely left to the jury. Henriques P. in giving the reasons for judgment of the Court of Appeal said at page 16, thus -

> "In our view, to arrive at a just verdict, it was necessary for the jury to reconsider all the deliberations which had preceded the giving of these further directions in the light of what had been pointed out to them on the second occasion.
>
> The time when the case was finally and definitely left to the jury was on the second occasion, and in our view the statutory period should have recommenced from then."

That judgment has been cited with approval in R. v. Raymond Failey (supra).

In England, section 13(3) of the Criminal Justice Act, 1967, provides: "A Court shall not accept a majority verdict unless it appears to the Court that the jury have not had less than two hours deliberation or such longer period as the Court thinks reasonable having regard to the nature and complexity of the case." In R. v. Adams (1968) 3 A.E.R. 437, the Court of Appeal were invited to say that three minutes when the Jury were back in Court should not count. The jury had returned to Court for those three minutes to ask a question and retired again to the jury room. If the three minutes were not taken into account the statutory requirement

that the jury should have not less than two hours for deliberation would not have been fulfilled. The Court of Appeal held that in computing the two hours for deliberation no period of time should be substracted for the three minutes return to Court or for the interval between the jury arriving at their verdict and their final return to Court.

In the instant case from the record of proceedings, the position is as follows:

The jury retired at 2.31 p.m. and returned at 2.58 p.m. that is 27 minutes lapse of time. When the judge was informed that the verdict was not unanimous, he asked if there was anything he could help them with. The foreman replied it is a question of the gun. The gun was not produced in evidence, the judge reminded them that it was a question of fact which they must resolve. The jury were sent back at 3.05 p.m. and they returned at 3.24 p.m. that is 19 minutes lapse of time. The verdict was yet not unanimous. The trial judge then asked the jury if it was still the problem of the non-production of the gun. The foreman replied that he was led to believe that that was so but the truth was that jurors among them were having different views, not because of the evidence but because of religious grounds. The jury were sent back at 3.40 p.m., and returned at 3.46 p.m.

We are of the view that from the facts of the instant case it is undisputed that during the period when the jury returned to Court the trial judge in law or upon the facts gave "no further directions" to them. That being so, it follows that the time when the case was finally and definitely left to the jury commenced from the very first moment the jury retired that is at 2.31 p.m., and ended at 3.46 p.m., that is one hour and fifteen minutes deliberations. There has then been a compliance with S.44(3) of the Jury Law Ch. 186.

We find no merit in this further ground of appeal. For the reasons given the application for leave to appeal against conviction is refused.