1967/3

IN THE PRIVY COUNCIL No. 36 of 1965

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

THE DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

- and -

PATRICK NASRALLA Respondent

C A S E FOR THE APPELLANT

Record

1. This is an appeal from a judgment dated the 11th June, 1965, of the Court of Appeal of Jamaica (Duffus P, Lewis and Henriques JJ.A.) allowing an appeal from a judgment, dated the 5th June, 1963, of the Supreme Court of Jamaica (Cools-Lartigue, Douglas and Shelley JJ.) and declaring that an order made by Small J. in the Home Circuit Court on the 25th February, 1963, adjourning to the next sitting of the Court the trial of the Respondent for manslaughter, was ultra vires and void and contravened the fundamental rights and freedoms granted by Section 20(8) of the Constitution of Jamaica. pp.28-66 pp.15-24 pp.3-10

2. Between the 4th and 11th February, 1963 in the Home Circuit Court the Respondent stood trial before Small J. and a Jury of twelve on an indictment containing one count, namely, of murder, for that he on the 9th day of October 1962 in the Parish of Kingston murdered Gilbert Gillespie. On the 11th February, 1963 the Jury returned a unanimous verdict of not guilty of murder, but failed to agree on a verdict as to p.1

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manslaughter. Thereupon Small J. discharged the Jury. On the 25th February, 1963 the learned Judge, after hearing further argument, adjourned the case for trial at the next sitting of the Home Circuit Court on the issue of manslaughter, in accordance with Section 45(3) of the Jury Law (Chapter 186).

3. The relevant statutory provisions are:-

JURY LAW (CHAPTER 186)

Section 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.

(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.

(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.

(4) Whenever the verdict of the jury is not unanimous the Judge may direct the jury to retire for further consideration.

Section 45

(1) It shall be lawful for the Judge, on being satisfied that there is no reasonable probability that the jury will arrive at a verdict, to discharge the jury at any time after the lapse of one hour from the first retirement of the jury.

(2) .....

(3) Whenever a jury have been discharged, the Judge may adjourn the case for trial at the same sitting of the Circuit Court or at a future sitting of the Circuit Court, and at the subsequent trial the case shall be tried before another array of jurers and the Judge may in his discretion excuse from such array any jurer who took part in the previous trial.

THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 (1962 No. 1550)

Section 3

(1) ..... the Constitution of Jamaica set out in the Second Schedule to this Order (in this Order referred to as "the Constitution") shall come into force in Jamaica at the commencement of this Order. (i.e. immediately before the 6th August, 1962).

Section 4

(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, ... but such laws shall, subject to the provisions of this Section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

SECOND SCHEDULE

THE CONSTITUTION OF JAMAICA

Section 1

(1) In this Constitution unless it is otherwise provided or the context otherwise requires - .....

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"the appointed day" means the 6th day of August, 1962;
..... "law" includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly; .....

Section 20

(8) No person who shows that he has been tried by any competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence; .....

Section 25

(1) Subject to the provisions of sub-section (4) of this Section, if any person alleges that any of the provisions of Sections 14 to 28 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this Section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said Sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

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Provided that the Supreme Court shall not exercise its powers under this sub-section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) Any person aggrieved by any determination of the Supreme Court under this Section may appeal therefrom to the Court of Appeal.

(4) .....

Section 26

(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of these provisions.

4. Small J. in his judgment adjourning the case for trial at the next sitting of the Home Circuit Court on the issue of manslaughter said that the prosecutions case indicated a story involving the accused pursuing an escaping felon and shooting him fatally in the attempt to arrest him. For such an act simpliciter the only verdict the prosecution could expect against the accused was one of manslaughter. In addition to the above the prosecution had produced evidence which, if accepted, was likely to take the case as high as murder, and, accordingly, they had presented an indictment charging murder. On such an indictment the Jury were obliged to return a verdict one way or the other on the charge of murder while they might return one of manslaughter.

pp.3-10

p.2

5. The learned Judge referred to Section 45 of The Jury Law and to the submission made by the defence that a plea of autre fois acquit could not successfully be resisted at such a retrial and quoted from Hale's Pleas of the Crown Volume II at page 246:

pp.4-5

p.5 l.7

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"If a man be acquit generally upon an indictment of murder autre fois acquit is a good plea to an indictment of manslaughter of the same person or e converso if he shall be indicted of manslaughter and shall be acquit, he shall not be indicted for the same death as murder for they differ only in degree and the fact is the same."

p.5 l.18 Small J. then quoted from the judgment of Lord Reading C.J. in R. v Barron 1914 2 K.B. 570 at page 574 :

"We are of the opinion that the plea of autre fois acquit was rightly rejected. The principle upon which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. If therefore he has been acquitted i.e. found to be not guilty of the offence by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offences actually charged in the first indictment but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter as the jury could have convicted of manslaughter ..... the rule of law now affirmed by this Court has never been doubted or qualified, though it has not always been found easy to apply the rule to the facts of particular cases under discussion."

p.6 ll.1-43 The learned Judge then referred to in Re Shipton 1957 1 A.E.R. p.206 and to the point left open by Lord Goddard C.J. as to whether, the jury having acquitted of manslaughter, being the sole charge in the indictment, and having not agreed on a verdict of dangerous driving, being an alternative verdict open to them on that indictment, the accused would have been able to plead autre fois acquit had the prosecution obtained leave to prefer a voluntary bill on the latter charge.

The learned Judge then referred to an article in the Australian Law Journal Vol. 26 1952-1953 at p.587 discussing R. v Quinn [1952] 53 S.R. N.S.W. p.21., the article recounter that in the case of S. v Quinn a jury had acquitted the defendant on a charge of murder and then had been unable to agree whether he should be convicted of manslaughter. That the jury had been discharged and upon presentment before another jury on a charge of manslaughter, thedefence of autre fois acquit has been raised. The article continued:

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p.6 l.44-
p.8 l.2

> "The Defendant had been in peril of a conviction of manslaughter on his first trial and the argument was that the acquittal on the charge of murder supported a plea of autre fois acquit to a subsequent charge of manslaughter. The argument is fallacious. Where there are a number of different crimes containing common features acquittal on the charge A B C does not necessarily import that A B do not exist. The matter has been complicated by the provision for alternative verdicts so that the verdict need not follow the indictment. A general acquittal on the charge A B C does import the A B does not exist but a mere acquittal does not. A general acquittal is an acquittal on the charge of all alternative verdicts. In this case, however, there was no general acquittal but only an acquittal on one of the possible charges of which the accused might be convicted. In order to support a plea of autre fois acquit there must be a legal verdict, and where for any reason there is no legal verdict the plea is not available. Where the jury cannot agree there is no legal verdict".

p.7 ll.12-44

6. The learned Judge concluded his judgment by saying that the common law rule enunciated by Hale and re-iterated in R. v Barron and enshrined in the Constitution referred to a general verdict and a general verdict alone. It did not refer to a partial verdict as was given in the present case where the issues of murder and manslaughter were so distinct and apart. In the

p.10 l.7

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present circumstances it could never be said that the verdict of not guilty of murder was calculated or intended or did embrace the question of the guilt or otherwise of the accused in respect of manslaughter. It was open to the prosectuion to proceed against the accused in respect of the manslaughter issue if the Court were to exercise its discretion as provided in Section 45 of the Jury Law. The

p.10 l.36 learned Judge found that it was a fit and proper case for making an order in accordance with Section 45(3) of the Jury Law for the case to be adjourned for trial at the next sitting of the Home Circuit Court on the issue of manslaughter.

pp.11-14 7. By notice of motion dated the 20th March, 1963 the Respondent applied to the Supreme Court for a declaration that the Order of Small J. ordering that the Respondent be tried at a future session of the Home Circuit Court on the issue of manslaughter was ultra vires and/or in contravention of the fundamental rights and freedoms guaranteed to the individual by Section 20(8) of the Constitution of Jamaica and for a declaration that the Respondent having been acquitted of the charge of murder and no verdict having been returned by the Jury on the offence of manslaughter the Respondent could not by reason of Section 20(8) of the Constitution be again tried for the offence of manslaughter on a voluntary indictment; and for an order that the said Order of Small J. be set aside and that the Respondent be unconditionally discharged.

pp.15-24 8. In dismissing this application the learned Judges of the Supreme Court (Cools-

p.19 l.26 Lartigue, Douglas and Shelley JJ.) in a joint judgment said after quoting Section 20(8) of the Constitution, that in their view Section

p.19 l.40 20(8) was declaratory of the common law and enshrined in the Constitution the common law rights upon which the pleas of autre fois acquit and autre fois convict were based. Accordingly, Section 26 (8) of the Constitution was inapplicable, there being no inconsistency

upon which that provision might operate. Record

The Court referred to a contention put forward on behalf of the Crown that Small J.'s Order had been made under the authority of Section 45 of Jury Law and accordingly that his Order could not be deemed to be a contravention of Section 20(8) of the Constitution by reason of the provisions of Section 26(8) thereof. The Court expressed the view that Section 45(3) of the Jury Law was procedural only and did not authorise the making of an order should such order not accord with Section 20(8) of the Constitution. p.20 l.6 p.20 l.13

9. The Court then considered the case of R. v Quinn 53 S.R. N.S.W. 21, stating that the point which arose in Quinn's case was identical with that for decision by the Court. Though the Court were not bound by the decision in Quinn's case it was of strong persuasive authority. The Court was satisfied on the authorities that an acquittal on a charge of murder was only a bar to a subsequent indictment for manslaughter where there had been a general acquittal and not as in the present case where there had been a disagreement on the issue of manslaughter. It was not disputed that the onus of proving that the plea lay was on the Respondent. The Court considered the true legal position to be that succinctly stated by Owen J. in Quinn's case at page 25 : p.22 l.14 p.22 l.25 p.22 l.39 p.23 l.10

> "..... to establish (the plea of autre fois acquit) it would have been necessary to prove that on the first trial (the Respondent) stood in peril of a conviction for manslaughter, and that he was delivered from that peril by a verdict of acquittal."

Applying the reasoning of Cockburn C.J. in Regina v Charlesworth 1861 9 Cox C.C.P.44 the Court expressed the view that a person was not put in peril merely by being put in charge of the jury; at the applicants trial he had not been in peril of a conviction for manslaughter because there had been no verdict on the issue of manslaughter and there had been no general acquittal. The Respondent had been unable to show that pursuant to Section 20(8) of The p.23.l.20 p.23.l.42

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Constitution he had been in peril of a conviction of the offence of manslaughter and refused the application with costs.

pp.24-27

10. By a Notice of Appeal dated the 19th June, 1963 the Respondent appealed to the Court of Appeal. The grounds stated in the Notice may be summarised as follows :

p.25 l.19

1) that the Supreme Court had erred in holding that Section 20(8) of the Constitution was merely declaratory of the common law;

p.26 l.6

2) that even if the Supreme Court had been right in its construction of Section 20(8) the Court had erred in holding that at common law -

p.26 l.10

i) a verdict of not guilty of murder on an indictment charging that offence was not a general verdict of acquittal;

p.26 l.10

ii) a person charged with the offence of murder was, notwithstanding a verdict of acquittal on that offence, and a deliberation by the Jury on the issue of manslaughter, never in peril of being convicted of manslaughter;

p.26 l.29

iii) that the Supreme Court had erred in law by failing correctly to apply the observations of Cockburn C.J. in R. v Charlesworth 1861 9 Cox C.C. 44 or the decision in R. v Barron 1914 2 K.B. 570 and in relying on the erroneous reasoning contained in R.v Quinn 53 S.R. N.S.W. 21.

p.27 l.9

iv) that the Supreme Court had failed to give due weight to the decision in R. v Shipton 1957 1 W.L.R. 259 being a decision which supported the Respondent's contention that a Jury of seven had no jurisdiction to try an indictment which charged the offence of murder.

11. The Respondent's appeal against the Order of

the Supreme Court was argued before Duffus P and Lewis and Henriques JJ.A. on the 5th, 6th, 7th, 8th, 9th, 13th and 14th October 1964 and the Court gave judgment on the 11th June, 1965. In his judgment Duffus P. referred to Section 20(8) of the Constitution, outlined the submissions made before the Supreme Court by the Appellant and the Respondent respectively, quoted from Hawkins Pleas of the Crown (8th Ed. 1824) Vol. 2 at pp.515 and 518 and quoted extensively from the judgment of Lord Morris of Borth-y-Gest delivered in the case of Connelly v D.P.P. 1964 A.C. 1254. The learned President continued by saying that on the principles enunciated by Lord Morris it appeared beyond question that a person acquitted of murder would be able to rely on a plea of autre fois in bar to a second trial for manslaughter as the proof necessary to establish manslaughter on an indictment for manslaughter would be the same as that led on the first indictment for murder on which he could have been convicted of manslaughter. The distinction which the Supreme Court had drawn between a verdict of acquittal generally and a verdict of not guilty of murder coupled with a disagreement as to manslaughter was based on a misconception of Charlesworth's case. In the present case the Jury had proceeded to verdict and had found a good verdict of not guilty of the offence of murder as charged and it would be quite wrong to say that "the applicant was not in peril of conviction for manslaughter as there was no general verdict on the issue of manslaughter".

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pp.28-66
pp.28-49
p.30 l.29
pp.31 l.20-32 l.30
p.33 ll.7-37
pp.33 l.45-37 l.39
p.38 l.42
p.39 l.16

12. The learned President then referred to the case of R. v Quinn 1952 53 S.R. N.S.W. 21 and said that he considered there to be two fallacies underlying the reasoning of the New South Wales Court. The first fallacy was the assumption that on an indictment for murder the jury having found the prisoner not guilty of murder were in duty bound to consider manslaughter if it arose. The second fallacy was to treat manslaughter as if it were charged in the indictment as a separate offence under a separate count thereby requiring a separate verdict. The power conferred by common law and by Section 44 (2) of the Jury Law was a permissive one and the Jury were not compellable to enquire into manslaughter on the

pp.39 l.31-43 l.32
p.41 l.11
p.44 ll.27-32

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authority of Wroth v Wiggs 1653 Cro. Eliz. 276 and Penryn v Corbett Cro. Eliz. 465.

13. The learned President then quoted from the judgment of Lord Goddard C.J. in Shipton's case and from the judgment of Gomez J. in the Trinidad case of R. v Sealy 1950 10 T.L.R. 61 and referred to Section 44 (2) of the Jamaican Jury Law and continued by saying that the Court was permitted or enabled to receive a verdict on manslaughter but that this permission did not confer on the Crown a corresponding right to enable it to insist on the Jury returning a verdict on manslaughter where the indictment charged murder only. Where therefore the jury had found a good verdict of not guilty on the charge of murder that was an end of the matter. The plain fact was that the Respondent had been in jeopardy of a finding of guilty of manslaughter and therefore that he would come within Lord Morris' second rule "that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted."

p.45 l.9
p.46 l.1
p.46 l.41
p.47 l.1
p.47 l.19
p.47 l.24

14. The learned President then quoted from the judgment of Humphreys J. in R. v Thomas 1949 23 C.A.R. 200 at p.210 and concluded by saying that in his view the Respondent would be able to plead successfully autre fois acquit to a subsequent indictment for manslaughter and would likewise be able to bring himself within the provisions of Section 20(8) of the Constitution. It was not necessary to consider the implications of Section 26(8) of the Constitution as this would not arise.

p.48 ll.10-20
p.48 l.23
p.48 l.35

15. In his concurring judgment Lewis J.A. said that in view of the provisions of Section 26(8) of the Constitution the Court should have regard to the existing law, whether statute or common law, governing the plea of autre fois acquit and the power of the Court to order a new trial, for the purposes of interpreting Section 20(8) of the Constitution. He referred to the speech of Lord Morris in Connellys case and to the judgment of Huddlestone B. in R. v Gilmore 15 Cox c.c. at page 87 and criticized the views expressed by Small J. and the judges of the Supreme Court namely that, the Jury having been

pp.49-65
p.51 ll.26-36
pp.52 l.11-55 l.6
p.55 l.7
pp.56 l.11-65 l.30

unable to agree about manslaughter their verdict of not guilty of murder was only a partial verdict and not an acquittal within the meaning of Section 20(8); the learned Judge's criticisms were substantially similar to those stated by the learned President.

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16. The learned Judge concluded by saying that Section 44(2) of the Jury Law authorised the Judge, on the trial of an indictment for murder, to accept a majority verdict of nine members of the Jury of conviction or acquittal of manslaughter. This certainly altered the common law, but he did not think it in any way affected the question raised in the appeal. Section 44(2) seemed to him to be intended to confer a benefit upon an accused person and not to deprive him of his rights at common law.

p.65 ll.31-45

17. Henriques J.A. concurred in the judgments of the learned President and Lewis J.A.

p.66

18. The Appellant respectfully submits that, by virtue of s.26(8) of the Constitution, no proceeding authorized by any law (whether common law or statute) in force in Jamaica immediately before the 6th August, 1962, and still in force at the time of the proceeding in question, can be held to contravene s.20(8). It is not suggested that there has been any alteration of the law relevant to this appeal since the 6th August, 1962. Accordingly, s.20(8) does not confer upon the Respondent any rights different from those which he would have possessed immediately before the 6th August, 1962; and for the purposes of this appeal the law contained in the common law and the statutes of Jamaica is not modified in any way by the Constitution.

At common law, the order made by Small J. on the 25th February, 1963, adjourning the Respondent's case for trial on the issue of manslaughter, was, in the respectful submission of the Appellant, proper and valid. At the adjourned trial, the Respondent could not have pleaded autre fois acquit, because at the original trial he had not been generally acquitted of the indictment of murder. The verdict of the Jury was partial only,

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and shewed by its terms that the Jury had not been able to reach any verdict upon the issue of manslaughter. On this issue, therefore, the plea of autre fois acquit could not have been established.

The Appellant respectfully submits that this submission is in accordance with principle, whether the plea of autre fois acquit be regarded as based upon estoppel or upon the maxim, Nemo debet bis vexari pro eadem causa. As to the former, the record of the original trial does not shew any acquittal of manslaughter, so there is nothing by which the Crown could at the adjourned trial be estopped. As to the latter, the Jury at the original trial having failed to return any verdict upon the issue of manslaughter, the Respondent's peril continues, and will continue until a verdict is given on that issue. The peril of the Respondent at the adjourned trial would not, therefore, be a second peril, but the continuation of his peril at the original trial.

By the rule of divisibility of averments, the indictment for murder must be regarded as containing the averments necessary to establish manslaughter, and also the additional averments necessary to establish murder. By their verdict, the Jury at the original trial disposed of the latter averments, but they were unable to reach any verdict such as would have disposed of the former averments. Upon those former averments, therefore, in the Appellant's respectful submission, the Respondent can lawfully be tried before another jury.

Alternatively, the Appellant respectfully submits that Small, J.'s order of the 25th February, 1963 is justified by ss.44 and 45 of the Jury Law. The terms of s.44, especially the provisions of sub-section (2) empowering the Jury either to convict or to acquit of manslaughter, shew that a person indicted for, and acquitted of, murder remains liable to be re-tried for manslaughter if the jury at the original trial are unable either to convict or to acquit him of that charge.

The Appellant respectfully submits that the Order of the 25th February, 1963, being justified at common law or alternatively by statute, did not infringe the rights of the Respondent under s.20(8) of the Constituion.

19. The Appellant respectfully submits that the judgment of the Court of Appeal of Jamaica is wrong and ought to be reversed, and this appeal ought to be allowed with costs, for the following (among other)

R E A S O N S

1. BECAUSE s.20(8) of the Constitution of Jamaica does not enlarge the rights of the Respondent existing at common law or by statute.

2. BECAUSE at common law the Respondent remains liable to be tried for the manslaughter of Gilbert Gillespie.

3. BECAUSE the Order made by Small, J. on the 25th February, 1963 was justified by the Jury Law.

4. BECAUSE of other reasons stated in the judgments of Small, J. and the Supreme Court.

J.G. LE QUESNE.

CHRISTOPHER FRENCH.

No. 36 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL
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BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

- and -

PATRICK NASRALLA — Respondent

C A S E

FOR THE APPELLANT

CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2.

Solicitors for the Appellant.