Privy Council Appeals Nos. 49 of 1983
and 26 of 1984

Lalchan Nanan *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Goff of Chieveley**]*

The appellant, Lalchan Nanan, was charged with the murder of his wife, Eileen Nanan, on 26th December 1974. On 4th July 1977, following a trial before Warner J. and a jury, he was convicted of murder and sentenced to death.

Under the law of Trinidad and Tobago, a person can only be convicted of the crimes of murder or treason by the unanimous verdict of a jury of twelve persons, whereas, in the case of other crimes, a person may be convicted by a majority verdict of a jury of nine persons, the required majority being seven out of a jury of nine (see sections 16 and 24 of the Jury Ordinance, which forms Chapter 4, No. 2 of the Laws of Trinidad and Tobago 1950). The appellant was tried by a jury of twelve. The learned trial judge did not, in the course of his summing up, refer to the necessity for a unanimous verdict. On 4th July, at the conclusion of the summing up, the jury withdrew at 2.17 p.m. to consider their verdict. They returned to the courtroom at 4.05 p.m. on the same afternoon. After the whole jury had returned to the courtroom, the clerk of the court asked the foreman to stand; the foreman did so. The clerk of the court

then, in the presence and hearing of the judge, of counsel, and of all the members of the jury, asked the foreman whether he and the other members of the jury had agreed upon a unanimous verdict in respect of the accused, to which the foreman replied in the affirmative, the reply being clear and unhesitating. The clerk of the court then asked the foreman whether the accused was guilty or not guilty as charged, to which the foreman replied, loudly and clearly, that the accused was guilty. There was no protest from any of the jurors, none of whom said anything. The judge then proceeded to pass sentence. Thereafter, on the same day, a notice of application was given for leave to appeal against conviction, though without any grounds being given at that stage.

On the following day, 5th July, the foreman of the jury, accompanied by another juror, called on the registrar of the Supreme Court and informed him that, when the clerk of the court asked him whether the jurors had arrived at a unanimous verdict, he thought that the clerk meant a majority verdict; and that although he answered the question in the affirmative, the jury were really divided 8 to 4 in favour of a conviction. He also said that he did not know the meaning of the word "unanimous". The other juror informed the Registrar that she was one of the four jurors who had some doubt and that she had given the benefit of the doubt to the accused. On 11th July the Registrar wrote to counsel who had appeared for the appellant at his trial, and informed him of what had passed. On 15th July the matter was brought to the attention of the trial judge, Warner J., on a motion that he should state a case for the opinion of the Court of Appeal as to whether the verdict was valid; but on 21st July he dismissed the motion, on the ground that the question was based on a report made to the registrar on the day after the trial had been concluded.

The appellant did not appeal from that decision; but on 23rd August 1977 an originating motion was filed on his behalf, seeking declarations under section 4 of the Constitution of the Republic of Trinidad and Tobago that (a) his constitutional right not to be deprived of his life except by due process of law guaranteed to him by section 4(a) of the Constitution had been, was being or was likely to be infringed, and (b) the verdict of the jury at his trial and his consequent conviction and sentence were all void and of no effect because the verdict was not unanimous. Affidavits were sworn in support of the application by the foreman of the jury and by three other jurors. They were all sworn on 18th August and were to all intent and purposes identical, each deponent stating that he or she was not aware that all of the twelve jurors had to be agreed upon the verdict, and that there was in fact a division of

eight in favour of one verdict and four in favour of another. No deponent stated how he or she had come to make such an error, nor that he or she did not understand the meaning of the word "unanimous" used by the clerk of the court when addressing the foreman of the jury. (Affidavits in similar terms had previously been placed before Warner J. on the hearing before him).

The originating motion came on for hearing before Braithwaite J. who, in a judgment delivered on 31st January 1978, dismissed the motion. The case was presented to him on the basis that the entire trial had been conducted according to the law of the land; as to that, there was no disagreement expressed by counsel for the applicant (the present appellant). Braithwaite J. also stated that he could not accept that anything in the question put by the clerk of the court to the foreman of the jury could by any stretch of imagination have misled or confused the jury. But in any event he concluded that, on the authorities, the evidence of the jurors as to their state of mind was inadmissible in evidence; and that, since it followed that there was no evidence to support the motion, it must fail.

An appeal against the decision of Braithwaite J. was filed on 12th April 1978. In his grounds of appeal, the appellant no longer contended that the verdict of the jury was void and of no effect. On 27th April 1978, the Court of Appeal heard the appellant's appeal against his conviction. On that appeal, which will be referred to as "the criminal appeal", no complaint was made about the circumstances in which the jury came to give their verdict. The grounds of appeal consisted of allegations that the judge had erred in failing to accede to a submission by counsel for the appellant at the close of the prosecution case; that he misdirected the jury on identification, on alibi and on circumstantial evidence; and that he failed to put the defence case adequately to the jury. At the close of the argument on the criminal appeal, counsel informed the court that the other appeal (which will be referred to as "the constitutional appeal") was being pursued, and the Court of Appeal thereupon reserved their judgment on the criminal appeal pending the outcome of the constitutional appeal.

Judgment was given by the Court of Appeal on the constitutional appeal on 22nd June 1979. The court unanimously dismissed the appeal from Braithwaite J. Sir Isaac Hyatali C.J. considered that two issues were raised by the appeal: first, whether the High Court had jurisdiction to entertain the appellant's application, and second, whether, if there was such jurisdiction, the judge was right to refuse to admit the affidavit evidence of the four jurors. Since

however the debate before Braithwaite J. had centred upon the admissibility of the affidavit evidence, he considered that issue first. He expressed considerable scepticism about that evidence, drawing attention to a number of factors which cast doubt upon its credibility - notably that the question put to the foreman was not whether the jury had arrived at a verdict as suggested in the affidavits, but whether he and the other members of the jury had agreed upon a unanimous verdict; and that no member of the jury dissented from the verdict announced by the foreman in the presence and hearing of all the jurors when, according to the four deponents, it was a verdict on which the foreman and the other members were not in fact agreed. Having regard to these matters, Sir Isaac Hyatali C.J. said that "it is difficult to resist the conclusion that the *bona fides* of the four jurors herein are open to question". However, he went on to consider the admissability of the affidavits. Having reviewed the authorities with great care, he concluded, in agreement with Braithwaite J., that, in so far as the affidavits alleged that the jury were divided eight to four on their verdict, the affidavits were inadmissible on the ground that they sought to invade the privacy of the discussions in the jury box and the retiring room; and in so far as they alleged misunderstanding of the kind contended for, the authorities militated against their reception to rebut the presumption of assent.

Sir Isaac Hyatali C.J. then turned to the first of the two questions which he had identified, viz. the question of jurisdiction; and he concluded that it was tolerably clear that the High Court had no jurisdiction to entertain the motion, first because no complaint was made therein of an infringement of a fundamental rule of natural justice, and second because the error alleged was one of substantive law arising out of a judgment or order of the trial court which was liable to be, or capable of being, set aside on appeal on the ground that there was a miscarriage of justice.

Kelsick J.A. also concluded that the motion should be dismissed on the ground that the matter complained of was not a contravention of one of the rules of natural justice. He went on however to hold that the question of the validity of the verdict could have been, but was not, taken on the appellant's appeal against his conviction. For that reason, he did not feel it necessary to deal with the question whether the affidavit evidence of the jurors was admissible; but he went on to consider the point, out of deference to the argument addressed to the Court. He concluded that evidence of what had occurred in the jury box or in the retiring room was inadmissible; but that evidence that the four jurors were not

aware, when the foreman announced his verdict, that each of the twelve jurors had to be agreed upon a verdict and that they believed that the verdict could be a majority verdict was admissible. However he went on to point out that in none of the affidavits was it stated that the word "unanimous" was used by the clerk of the court, or that the deponent was incompetent through insufficient knowledge of the English language in consequence of which he misunderstood the meaning of the word "unanimous": indeed, in his opinion no valid reasons were stated by any of the deponents for having been unaware of the requirement of unanimity to the verdict. In these circumstances, notwithstanding that the evidence was in his opinion admissible in part, his conclusion was that there was no admissible evidence which rebutted the presumption of competence or assent of any of the jurors.

Hassanali J.A. considered that, even assuming that there was such an error as was alleged in the affidavits, the error did not constitute an infringement of any of the appellant's rights guaranteed under section 4(a) of the Constitution, and the remedy for the alleged error was by way of appeal to the Court of Appeal from the appellant's conviction. For that reason alone, in his opinion, Braithwaite J. ought to have dismissed the motion. With respect to the admissibility of the affidavit evidence, he considered that there were two principles well established by the authorities:

(a) When a verdict is delivered in the sight and hearing of all the jury without protest, a rebuttable presumption arises that all the jurors had assented to it, and

(b) for the purpose of setting aside the verdict of a jury evidence is not admissible from jurors to prove what discussions took place in the jury room.

After reviewing the authorities, he said:-

> "Here it is not in dispute that the trial judge ascertained the jury's 'unanimous verdict' by the time-honoured practice of addressing two questions through the clerk of the court to the foreman in the presence and hearing of all the jurors and that the answers given by the foreman unequivocably indicated that he and the other members of the jury had agreed upon such a verdict."

He continued:-

> "It seems necessary however only to observe that the verdict having been given in the presence and hearing of all the jurors, without protest, and

accepted by the judge, and the jury discharged, the jurors are not at liberty afterwards to say that they did not mean a 'unanimous' verdict.

Counsel for the appellant remarked in the course of his submissions that the word 'unanimous' was not used in the course of the summing-up to the jury nor was its meaning explained to them.

It is however immaterial that the learned trial judge did not refer, or that the record does not show that he referred, in his summing-up or at anytime during the trial, to the word 'unanimous'. No rule of law or of practice required him to do so. On the other hand, there is nothing on the record to show that the trial was, up to the time that sentence was passed upon the appellant, conducted otherwise than in accordance with the procedure prescribed to be followed and which ought to have been followed in his case in compliance with all statutory and other provisions of the relevant law.

The appellant does not allege that any one of the jurors did not understand the English Language, or was otherwise for physical or other reasons not competent to follow the proceedings. What the appellant alleges in effect is that the foreman might have thought the word 'unanimous' meant 'majority'; that four jurors were under the misapprehension that the jury were free to return a majority verdict at the time that they gave their verdict in the case; and further that the jury had in fact earlier reached a majority verdict in the jury room. As has already been noted, there is no indication as to what was the source of the misapprehension. However, the consequence (i.e. the majority verdict) which allegedly flowed from the misapprehension may be evidenced only by reference to what transpired in the jury room.

In my judgment the affidavits of the jurors are not receivable in evidence..."

For these reasons, the Court of Appeal dismissed the constitutional appeal, but gave leave to appeal to the Privy Council.

A few days later, on 29th June 1979, the Court of Appeal also dismissed the criminal appeal, in which no question had been raised regarding the unanimity of the jury's verdict. Subsequently, the Privy Council granted leave to appeal in the criminal appeal, and directed that the two appeals be consolidated.

In presenting the appeal before their Lordships, Mr. Turner-Samuels had to face the fact that there is indeed a well-established general principle that "the court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be": see *Ellis v. Deheer* [1922] 2 K.B. 113 at p. 121, per Atkin L.J. The same principle applies to discussions between jurymen in the jury box itself. If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf, he should express his dissent forthwith; if he does not do so, there is a presumption that he assented to it. If follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with the verdict resulted from a misapprehension on his part.

This principle can be traced back at least as far as the decision of the Court of Queen's Bench in *R. v. Wooler* (1817) 6 M. & S. 366; but it has been confirmed on numerous occasions, for example in *Raphael & Another v. Bank of England* (1855) 139 E.R. 1030, *Nesbitt v. Parrett* (1902) 18 T.L.R. 510, *Ellis v. Deheer (supra) Ras Behari Lal v. The King Emperor* (1933) 50 T.L.R. 1, *Boston v. W.S. Bagshaw & Sons* [1966] 1 W.L.R. 1135 and *R. v. Roads* (1967) 51 Cr.App.R. 297. So the court has refused to receive evidence from a juror that he did not understand the effect of an answer given by the foreman of the jury to a question put by the trial judge (*Raphael v. Bank of England*), or that he did not in fact agree with the verdict as announced (*Nesbitt v. Parrett*), or that he was suffering from a misapprehension when he agreed to answers given by the foreman of the jury (*Boston v. Bagshaw*), or that he disagreed with the verdict but was too frightened to stand up and say so (*R. v. Roads*).

Two reasons of policy have been given as underlying the principle. The first is the need to ensure that decisions of juries are final; the second is the need to protect jurymen from inducement or pressure either to reveal what has passed in the juryroom, or to alter their view: see *Ellis v. Deheer* at p. 121, per Atkin L.J.. Lord Denning expressed the principle very clearly in *Boston v. Bagshaw* when he said, at p. 1136, that:-

> "To my mind it is settled as well as anything can be that it is not open to the court to receive any such evidence as this. Once a jury have given their verdict, and it has been accepted by the judge, and they have been discharged, they

> are not at liberty to say they meant something different."

In the same case, Harman L.J. said, at p. 1137, that:-

> "It would be destructive of all trials by jury if we were to accede to this application. There would be no end to it. You would always find one juryman who said: 'That is not what I meant' and you would have to start the whole thing anew. *Interest reipublicae ut sit finis litium*."

It is, of course, entirely consistent with this principle that evidence may be given that the verdict was not pronounced in the sight and hearing of one or more members of the jury, who did not in fact agree with that verdict, or who may not have done so (see *R. v. Wooler* and *Ellis v. Deheer*). In such a case, the confidence of the juryroom can be breached in so far as a juryman, outside whose sight and hearing the verdict was pronounced, may give evidence whether he did or did not agree with that verdict.

It is also consistent with the above principle that evidence may be given that a juryman was not competent to understand the proceedings in which event, if such evidence is accepted, the ordinary course would be to award a *venire de novo*: see *Ras Behari Lal v. The King Emperor*, in which tribute was paid to an earlier discussion on the subject by Lord Campbell C.J. in *Mansell v. R.* (1857) 8 E. & B. 54 at p. 80. In such a case, as Lord Atkin pointed out in *Ras Behari Lal v. The King Emperor* at p. 2, "The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent". That case shows however that the mere fact that a verdict had been pronounced in the sight and hearing of all the jury without protest, does not lead to an irrebuttable presumption of assent. As Atkin L.J. said in *Ellis v. Deheer* (at p. 120), there will in such circumstances be "a *prima facie* presumption that all assented to it, but that presumption may be rebutted. Circumstances may arise in connection with the delivery of the verdict showing that they did not all assent". The case of *Ras Behari Lal v. The King Emperor* provides an example of a case where the presumption may be rebutted. Their Lordships do not wish to be thought to exclude altogether the possibility that other cases may arise in future where the presumption may be rebutted. But they consider that, having regard to the general principle which they have stated, evidence will not be admitted simply to assert that a juror did not in fact agree with the verdict, or that his apparent agreement resulted from a misapprehension on his part.

The affidavit evidence which Braithwaite J. was invited to admit in the present case was, in the opinion of their Lordships, no more than evidence which, if accepted, showed that (for some unexplained reason) four members of the jury, including the foreman, were acting under a misapprehension in agreeing to a verdict of guilty. In agreement with Braithwaite J. and with Sir Isaac Hyatali C.J. and Hassanali J.A. in the Court of Appeal, their Lordships are of the opinion that none of the evidence was admissible, in that to admit it would have been contrary to the principle stated above. It may be said that the alleged misapprehension in the present case, if it existed, was of a fundamental kind; but the same may be said of other misapprehensions, for example as to the facts of the case or as to the applicable law, which can likewise lead to an erroneous verdict. In such cases, however, evidence of the misapprehension is equally inadmissible.

Mr. Turner-Samuels sought to escape from this conclusion by adumbrating a possible exception to the principle. He submitted that, in all cases where a unanimous verdict is required of a jury before the accused can be convicted, it is necessary to ask the jury, after the foreman has given the verdict of the jury, whether the verdict is one on which all the members of the jury are agreed; and that, if that question is not asked at that stage, evidence can be given by a juror that he did not in fact agree to the verdict. The submission was that, only by asking such a question of the jury after the verdict has been given, can the court be certain that members of the jury have expressed their agreement to the verdict so given. Their Lordships can however see no basis for any such qualification to the principle.

Mr. Turner-Samuels next submitted that it was necessary for the court to direct the jury on the need for unanimity, where unanimity is required by law. In England, before majority verdicts were introduced, it was not considered necessary for the judge to give any such direction; all that was required was that, when the verdict of the jury was taken, it should be ensured that the verdict, if one of guilty, was one on which all the members of the jury were agreed. However, the present case can be distinguished in that, under the law of Trinidad and Tobago, unanimous verdicts are required in certain cases (murder and treason), whereas majority verdicts (of a smaller jury) are accepted in others. Even so, Mr. Turner-Samuels, in advancing this submission, suffered under the handicap that no such submission was advanced below; and further that it was stated by Braithwaite J. that counsel for the appellant did not disagree with the proposition that the entire trial had been conducted in accordance with the law of the

land, and by Hassanali J.A. that the trial judge ascertained the jury's unanimous verdict by "the time-honoured practice of addressing two questions through the clerk of the court to the foreman in the presence and hearing of all the jurors" and that no rule of law or practice required the judge to refer to the need for unanimity.

Their Lordships find themselves unable to accept Mr. Turner-Samuels' submission, advanced for the first time before the Board, that this time-honoured practice is defective. The crucial requirement is that the verdict should be taken from the jury by questions which are so designed as to ensure, beyond all reasonable doubt, that the verdict of the jury is a unanimous verdict. Here, the question put to the jury by the clerk of the court - whether the foreman and the other members of the jury had agreed upon a unanimous verdict - not only reflected the words of section 16 of the Jury Ordinance but was so clear as to admit of no ambiguity. That was certainly the view of the judges involved in the case in Trinidad and Tobago. Braithwaite J. said that "it is difficult, if not impossible, for me to see that there was any ambiguity or equivocability about the clerk's question". With that statement, Sir Isaac Hyatali C.J. agreed, and it is clear that Hassanali J.A. took the same view. In these circumstances, it would be quite wrong for their Lordships, who are not so familiar with conditions prevailing in Trinidad and Tobago, to form the opinion that the words used by the clerk of the court, which are clear on their face, were open to misunderstanding by members of the public in that country.

Their Lordships' conclusion on this point is consistent with that reached by the High Court of Australia in *Milgate v. The Queen* (1964) 38 A.L.J.R. 162. They find it helpful, moreover, to refer to the judgment of Barwick C.J. in that case. He said:-

> "The applicant also submitted that the failure of the trial judge expressly to tell the jury that their verdict must be unanimous was a ground for a new trial. In my opinion this is not so. There is in Queensland neither a rule of law nor a rule of practice that a jury in a criminal trial must be told by the trial judge that their verdict must be unanimous. The law and practice of England is the same. The interrogation of the jury by the Clerk of Arraigns upon the return of their verdict by their foreman is the traditional method of ensuring unanimity on the part of the jury, coupled to some extent with the form of the oath individually administered to each juror. Whilst the trial judge should not leave the jury to think that a general consensus, as distinct from unanimity, will suffice (see *R. v. Davey*

> (1960) 45 Cr.App.R. 11) there is no imperative need for him in the summing-up to tell them that their verdict must be unanimous. But several factors leave me to think that great care should be exercised by the Clerk of Arraigns and by the presiding judge as to the manner in which the Clerk of Arraigns expresses to the jury the traditional formula: 'Are you agreed on your verdict?' ... 'So says your foreman, so say you all?'. Today probably more so than in earlier times, many decisions are taken in corporate and social life by majority or even by the expression of a broad consensus of opinion without actual counting of heads. In Australia some States allow of a majority verdict in criminal cases at least in some circumstances ... Substantial numbers of people move from one State to another. Also we have an increasing number of migrants who, although they become naturalised, may not be as familiar with the traditional requirements of our jury system as we expect our Australian-born citizens to be. Therefore the Clerk of Arraigns' formula on the taking of a verdict should not be expressed in a perfunctory way nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury. Indeed, some thought might well be given to the modernization of its terms to remove any possibility of misunderstanding or inadvertence.
>
> In addition, the presiding judge, depending on the circumstances of the trial, may feel that these precautions should be fortified by an express direction in the course of the summing-up."

That statement of the law, their Lordships consider, is equally applicable in Trinidad and Tobago, in those cases where a unanimous verdict is required. It may be that, like Barwick C.J., the courts in Trinidad and Tobago may think (though it is a matter for them) that some thought might be given to the modernisation of the formula at present in use, to remove any possibility of misunderstanding or inadvertence, such as for example by requiring the clerk of the court to conclude his questions by enquiring whether the verdict which has been given is a verdict upon which all members of the jury are agreed, possibly fortified by an express direction by the trial judge in the course of the summing up.

Their Lordships turn to the constitutional appeal. The relevant provision of the Constitution of Trinidad and Tobago, which is to be found in section 4(a) of Chapter 1 of the Constitution, provides as follows:-

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms:-

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law. ..."

The submission of Mr. Turner-Samuels, on behalf of the appellant, was that the verdict of the jury was not in fact unanimous, and that therefore his constitutional rights had been infringed and he was likely to be deprived of his life other than by due process of law. This submission therefore depended, as did his appeal against conviction in the criminal appeal, on the admissibility of the affidavit evidence of the four jurors. Mr. Turner-Samuels submitted that, even if that evidence was inadmissible in the criminal appeal, nevertheless it should have been held to be admissible in the constitutional appeal, on the ground that that appeal raised a question of fundamental rights. For, if the jurors' verdict was not in fact unanimous, there had been a failure of due process of law; and it would be quite wrong if no protection was given by the Constitution where there had been a failure of communication and understanding resulting in a verdict which did not express the view of a juryman.

Their Lordships are however unable to accept this submission. They can see no reason why the principle they have set out above should not be equally apt to render a juryman's evidence inadmissible, whether the relevant preceedings take the form of an appeal against conviction, or the form of a declaration that a person's rights under the Constitution have been infringed. Indeed, if Mr. Turner-Samuels' submission were to be accepted, it would result in the principle being disregarded in any case where the complainant had been sentenced to imprisonment, and so would to a very substantial extent undermine the principle and the policy of the law on which it is founded.

For these reasons, their Lordships dismiss the consolidated appeals.