COMMONWEALTH OF THE BAHAMAS

IN THE COURT OFAPPEAL

SCCrApp. No. 194 of 2016

B E T W E E N

THE ATTORNEY GENERAL

Appellant

AND

SHAWN KNOWLES

Respondent

SCCrApp. No. 221 of 2016

B E T W E E N

SHAWN DION KNOWLES

Appellant

AND

REGINA

Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Vernal Collie, Counsel for the Appellant in 194 of 2016 and Counsel for Respondent in 221 of 2016**
Ms. Christina Galanos, Counsel for the Respondent in 194 of 2016 and Counsel for Appellant in 221 of 2016

DATES: **1 September 2020; 2 November 2020**

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Criminal Appeal – Criminal Law - Appeal against conviction – Crown appeal against sentence – Manslaughter – Possession of Firearms - Proper verdict - Fundamental flaw in conviction - Whether the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed

On 30 July, 2011, Edward Braynen, Erica Ward and Chackara Rahming were murdered. The following day the appellant was found in possession of two Maverick guns and seven rounds of 12 gauge ammunition. One of the guns was found to be that which was used in the triple murders. He and another were charged with the murders and he was charged for possession of the guns and ammunition. The jury was not unanimous on the guilty verdict for murder and gave a verdict of guilty for manslaughter instead. He was also found guilty for the firearm offences. He appeals his convictions on numerous grounds inter alia, that the trial judge erred in rejecting the no case submission and permitting the case to go to the jury. The crown has appealed the sentence imposed.

Held: the appeal is allowed; the convictions and sentences quashed. The appeal by the Crown against sentence is dismissed.

The jury's "verdict" of 8 to 4 guilty of murder is not a verdict. It is the law that a jury is not entitled to consider the alternative verdict of manslaughter unless and until it had arrived at a proper verdict of acquittal on the murder charge. As there was no verdict on the murder charge, the judge could not have accepted a verdict on the alternative offence of manslaughter.

If the jury could not arrive at a true verdict on the murder charge the jury should have been discharged a new trial should have taken place. The jury could not consider a manslaughter charge unless it had found the appellant not guilty of murder. This they did not do. As the judge said a "verdict" of 8-4 guilty of murder is not a verdict. A guilty verdict must be unanimous. A not guilty verdict of murder may be 8 to 4 but a verdict of 8 to 4 guilty of murder is not a verdict that can be accepted.

No reasonable jury could without more be satisfied beyond reasonable doubt that the possession on the following day of one weapon from which bullets were fired at the scene of the murder meant that the person in possession of the gun was the person who committed the murder.

As to the issue as to whether the court should order a retrial on the murder charge, this is not a case which it is proper to order a retrial. To use the language in **Reid** "the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused."

As to the offences under the Firearms Act for which this appellant was charged, they fall within category (ii) offences as defined in **The Attorney General v Hall** decision of the Privy Council and in the circumstances the Attorney General had no power to prefer a voluntary bill in relation to them. The Supreme Court therefore had no jurisdiction to hear those charges under the Firearms Act.

Chevaneese Sasha Gaye Hall v Attorney General SCCrApp & CAIS No. 179 of 2014 mentioned
Kevin Hart v Regina SCCrApp. & CAIS No. 127 of 2010 applied

McGreevy v DPP [1973] 1 WLR 276 considered
R v Duffy (1949) 1 All E.R. 932 applied
Regina v Glen Michael Hall No. 92/2101/y3 considered
Reid v The Queen [1980] AC 343 followed
The Attorney General v Hall [2016] UKPC 28 followed
Xavient Taylor v R SCCrApp. No. 259 of 2017 mentioned

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an appeal by the appellant against his convictions for murder and against offences under the Firearms Act.

2. On the 20 January, 2016 the appellant along with a co-accused, Timothy Saunders, was arraigned on three counts of murder. The appellant was also arraigned on two counts of possession of an unlicensed firearm and one count of possession of ammunition.

3. The case for the Crown was that on 30 July, 2011, the appellant along with his co accused being concerned together did murder Edward Braynen, Erica Ward and Chackara Rahming. As to the firearm offences the particulars were that on the following day, 31 July, 2011, the appellant was found in possession of two Maverick guns and seven rounds of 12 gauge ammunition.

4. There were no eyewitnesses and the evidence against the appellant was the fact that he was found in possession of the murder weapon the following day. There was evidence that one Serrano Adderley shot the appellant's uncle and a friend of the uncle and attempted to kill the appellant about two weeks earlier. Erica Ward was a girlfriend of Serrano Adderley and was pregnant with his baby.

5. Following the taking of evidence the jury returned with a verdict of 8 to 4 guilty on the charges of murder and a verdict of 8-4 guilty on the charges of manslaughter. The appellant was also found guilty of the firearms and ammunition offences, also on a verdict of 8-4.

6. The appellant appeals all of the convictions.

7. There are several grounds of appeal with respect to the manslaughter conviction and one primary ground to the convictions under the Firearms Act. However, having regard to a fundamental flaw in the convictions we shall address only the fundamental flaw.

The Manslaughter Conviction

8. In his direction to the jury the judge said:

"You may conclude that there wasn't a joint enterprise to kill, and if you believe the evidence, if you accept the evidence that the prosecution presented, you may think that only Shawn had an intention to kill because the closest thing that you have to evidence of Shawn doing anything is the statement by Timmy, which he said he didn't make.

Timmy could only be convicted if you are sure of, one, that Shawn killed the people with intent to kill and that Timmy had the same intention.

If you think that Shawn, in this case, was provoked by the actions of Serano, and you can't come to a conclusion on murder because to find a person guilty of murder, the count has to be 12 zero, nothing else.

If you can't find anyone guilty of murder, if you think that Shawn was provoked sufficiently to do what he did, if you think he did anything, then you would have to consider manslaughter. That applies to both Shawn and to Timmy.

And when you consider manslaughter, in order to convict, at least eight of you have to vote guilty, that's eight, four; nine, three; 10, two; 11, one; 12 zero. All those are guilty.

To acquit of manslaughter, the converse is true. You have to vote eight, four; nine, three; 10, two; 11, one; or 12, zero, not guilty.

Six, six and five, seven are not verdicts, but if you get stuck at that point, you will get further directions."

9. Not surprisingly the jury felt that it could consider a manslaughter verdict as well as a murder verdict at the time of its deliberation. They were not concerned about the technicalities as to what was a proper verdict. Based on the direction the jury must have felt that once they were not unanimous on a guilty verdict for murder they were entitled to consider the offence of manslaughter.

10. After deliberating for just over two hours the jury returned.

11. I set out verbatim the exchange:

THE CLERK: Mr. Foreman, ladies and gentlemen of the jury. Mr. Foreman, would you stand, please. Have you arrived at a verdict?

THE FOREMAN: Yes, your Worship, we have reached our verdict.

THE CLERK: Have you arrived at a verdict that you all agree?

THE FOREMAN: Yes, we have.

THE CLERK: On the charge on the first count of murder, how do you find the defendant, Shawn Knowles? Guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: What's the count, please?

THE FOREMAN: Eight to four.

THE COURT: That's not guilty of murder. You said murder?

THE CLERK: Yes.

THE COURT: Murder is 12, zero.

THE CLERK: Yes. On the charge of manslaughter, how do you find the defendant, Shawn Knowles? Guilty or not guilty?

THE FOREMAN: Eight to four, manslaughter

THE CLERK: Guilty or not guilty?

THE FOREMAN: Guilty."

12. The "verdict" of 8 to 4 guilty of murder is not a verdict. It is the law that a jury is not entitled to consider the alternative verdict of manslaughter unless and until it had arrived at a proper verdict of acquittal on the murder charge.

13. As there was no verdict on the murder charge, the judge could not have accepted a verdict on the alternative offence of manslaughter.

14. If the jury could not arrive at a true verdict on the murder charge the jury should have been discharged a new trial should have taken place. The jury could not consider a manslaughter charge unless it had found the appellant not guilty of murder. This they did not do. As the judge said a "verdict" of 8-4 guilty of murder is not a verdict. A guilty verdict must be

unanimous. A not guilty verdict of murder may be 8 to 4 but a verdict of 8 to 4 guilty of murder is not a verdict that can be accepted.

15. This was precisely the issue that faced this court in **Kevin Hart v R** SCCrApp No. 127 of 2010.

16. In that case the jury returned a 'verdict' of 11 to 1 guilty of murder and the trial judge then directed the jury to consider the alternative charge of manslaughter. The appellant was found guilty of manslaughter on a count of 11 to 1. On appeal the Court allowed the appeal and set aside the conviction for manslaughter and ordered a retrial on the charge of murder. The Court said:

> **"Inasmuch as the court finds that there was an irregularity in the trial by the failure of the judge to order a new trial or discharge the jury from returning a verdict on the charge of murder and directing them to consider manslaughter when the verdict was returned in relation to the charge of murder, we allow the appeal and order a retrial on the offence of murder. The appellant is remanded in custody, pending the retrial on the charge of murder."**

This position was confirmed in **Xavient Taylor v Regina** SCCrApp. No. 259 of 2017.

17. The conviction for manslaughter must be set aside.

18. The issue therefore is whether the court should order a retrial on the murder charge.

19. In **Reid v The Queen** [1980] AC 343, the Privy Council gave directions as to the factors which the court should consider when ordering in a retrial. The well-known passage is in the following terms:

> **"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as**

administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.

At the other extreme, where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso to s 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining

> **from the course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery'. This was said by the Full Court of Hong Kong 1 when ordering a new trial in Ng Yuk Kin v Regina ((1955) 39 HKLR 49)."**

20. A major consideration in determining the issue of a retrial in this case is "whether the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed."

21. At the trial of this matter the trial judge rejected a submission of no case made on behalf of the appellant at the close of the prosecution case. One of the grounds of the appeal is that the trial judge erred in rejecting that submission and permitting the case to go to the jury.

22. In his ruling after the no case submission, He said:

> **"With regard to Shawn Knowles, the first limb of Galbraith does not assist Shawn Knowles. As submitted, I accept that the statement given by Timothy Saunders is not evidence against Shawn Knowles, <u>but absent the statement there is evidence that he was found with the murder weapon the day after the murder. There doesn't appear to be evidence of an alibi, but merely a statement that he and others were hiding the gun for a third party.</u>"** [Emphasis added]

23. It is to be noted that there was nothing in his ruling that refers to the shooting by Serrano Adderley which was said to be the motive for the killings. The reason for that no doubt is because that evidence was not adduced in the prosecution case. It was not adduced until the cross examination of the appellant after the no case submission was rejected.

24. In the cross examination of the appellant after he elected to give evidence, the Crown elicited the evidence that two weeks before this murder the appellant was angry that one Serrano Adderley had killed the appellant's uncle and had attempted to kill the appellant himself but he escaped injury. It was suggested to the appellant that he killed the deceased Braynen who is related to Adderley in response to the killing of the appellant's uncle and the attempt to kill the appellant.

25. In his direction to the jury the judge acknowledged:

> **"The only evidence that even connects him to the murders is a statement that is not evidence against him, made by Timmy Saunders. And the prosecution is asking you to draw an inference that if you believe the evidence that they found Shawn with these guns, and if the guns are the murder weapons, then you could infer that Shawn committed the murders. But that's a matter for you to decide, <u>because it doesn't always follow that the person who has a murder weapon in his possession committed a crime with it.</u>"** [Emphasis added]

26. He also acknowledged that there were no results from DNA testing or fingerprints taken at the scene linking the appellant to the murders.

27. The appellant's co accused had given a statement to the police implicating the appellant in the homicide, but of course that was not admissible evidence against the appellant.

28. Was that evidence which a jury properly directed could convict of either murder or manslaughter?

29. In my judgment the answer must be 'no'.

30. In **McGreevy v DPP** [1973] 1 WLR 276, Lord Morris said:-

> **"In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury is satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand. So also can readily be made to understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand <u>if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the other suggestion</u>. "** [Emphasis added]

31. In **Regina v Glen Michael Hall** No. 92/2101/y3 Steyn LJ (as he then was) referred to the above statement of Lord Morris in the context of a no case submission. He said:

> **"…the approach enunciated by Lord Morris is one which may be helpful for a judge to adopt when he considers, in a case**

> **dependent on circumstantial evidence only, whether a submission of no case ought to be allowed. It may be helpful for the Judge to address specifically the question whether the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn by the prosecution. <u>If the proved facts do not exclude all other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.</u> If the judge had approached the matter in this way, we believe that the judge would have ruled that there was no evidence on which a jury properly directed could convict."** [Emphasis added]

32. No reasonable jury could without more be satisfied beyond reasonable doubt that the possession on the following day of one weapon from which bullets were fired at the scene of the murder meant that the person in possession of the gun was the person who committed the murder. It must be recalled that this was the evidence at the close of the prosecution's case. The judge himself acknowledged that "it doesn't always follow that the person who has a murder weapon in his possession committed a crime with it".

33. In his statement to the police which was adduced in the prosecution's case the appellant said he was hiding the gun for another person.

34. It is also an inference that the person in possession of guns and ammunition may simply be a dealer in illegal firearms. Dealers in illegal firearms are known to rent weapons to other persons. That person may have committed a homicide, but that would not make the dealer guilty of murder.

35. The appellant ought not to have been called upon to make a defence.

36. The issue of manslaughter simply does not arise in this case. Even on the prosecution's case. This homicide was an act of revenge or retaliation for a murder committed by someone else two weeks earlier. That murder was not even committed by the victims in this case. In his classic direction to a jury on an issue of manslaughter referred to in **R v Duffy (1949) 1 All E.R. 932** Devlin J (as he then was) said:

> **"Similarly as counsel for the prosecution has told you circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had the time to think, to reflect, and that would negative a sudden temporary loss of self control which is the very essence of provocation".**

37. Manslaughter should never have been given to the jury as an alternative verdict in this case.

38. With all due respect to the valiant efforts by counsel for the Crown it is our judgment that notwithstanding the gravity of the offence of murder this is not a case which it is proper to order a retrial. To use the language in **Reid** "the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused." On the evidence presented at the trial, four jurors were not satisfied that the evidence lead showed that the appellant committed the homicides. This court is concerned that the other members of the jury may have unconsciously been influenced by the material in the statement of Saunders to the police implicating the appellant, notwithstanding the direction by the judge that the statement was not evidence against the appellant.

Firearms Offences

39. On the issue of the appeal against conviction for the firearms and ammunition offences, this is really an academic issue as at the hearing of this appeal the appellant had already served the three year sentences imposed by the court. The primary challenge to this conviction is that the Court had no jurisdiction to hear the offences. The facts giving rise to these submission are that the charges were first laid in the Magistrates Court and the appellant elected a summary trial. In the middle of the trial the Attorney General discontinued the proceedings under section 230 of the Criminal Procedure Code. The charges were then laid against him in the Supreme Court under a Voluntary Bill of Indictment. The Appellant's case is that at the time of the trial in 2016 these charges under the Firearms Act were not indictable offences nor were they offences found in the Third Schedule of the CPC.

40. Relying on the decision of this Court in **Chevaneese Sasha Gaye Hall v Attorney General** SCCrApp & CAIS No. 179 of 2014, the appellant submits that unless they are charges triable only in the Supreme Court or electable charges listed in the Third Schedule of CPC they cannot be heard in the Supreme Court by way of a VBI.

41. In our view the jurisprudence governing this issue is found in T**he Attorney General v Hall** [2016] UKPC 28, the decision of the Privy Council to which the Attorney General had appealed this Court's decision. That decision is helpful as the Board considered offences under the Firearms Act as well as offences under the Trafficking in Persons Act, which was the offences that were in fact the subject of that appeal. The Board in paragraphs 17, 24, 25 and 27 of its judgment made it clear that the provisions under the Firearms Act were to be treated in the same way as offences under the TIP statute. At the end of in judgment the board made clear its holding. It said:

> **"[46] For these several reasons, the conclusions of the Board are these.**

(a) The effect of the Criminal Procedure Code is not to limit offences for mode of trial purposes to the three categories postulated by the Court of Appeal.

(b) For the purposes of mode of trial, offences in the Bahamas may be categorised in four groups: (i) offences which are triable *only* by judge and jury in the Supreme Court, (ii) offences which are triable either way without the accused having any right to elect trial by jury, (iii) offences which are triable either way but in relation to which the accused has a right to elect trial by jury pursuant to s 214 and Sch 3 of the Criminal Procedure Code and (iv) offences which are triable only summarily.

(c) Where an offence falls into category (ii) the prosecution may invite the magistrate to proceed either by way of summary trial or by way of preliminary inquiry with a view to committal to the Supreme Court for trial by judge and jury on information. The accused has no right to elect trial by jury. But the prosecution does not have unfettered power to decide the mode of trial. That power belongs to the magistrate, who may determine either that a case which the prosecution would be content to be tried summarily ought to be sent to the Supreme Court, or that an offence which the prosecution would prefer to go to the Supreme Court ought to be tried summarily. The magistrate will no doubt hear both parties before arriving at a decision as to mode of trial.

(d) The Attorney General's power to prefer a voluntary bill of indictment is now the subject of statutory definition in s 258 of the Criminal Procedure Code. That section requires the offence to be 'an indictable offence' as defined in s 2. The consequence of the definition in s 2 is that a voluntary bill can only be preferred in relation to categories (i) and (iii) set out in conclusion (b) above.

(e) The offences created by ss 3 and 4 of TIPA are category (ii) offences.

(f) It follows that there was no power to prefer a voluntary bill in relation to them.

(g) Whether the Attorney General ought to have power to prefer a voluntary bill in the case of category (ii) offences, thus

removing the necessity for a preliminary inquiry before the magistrate, is a matter of policy for Parliament; a comparatively simple legislative amendment can achieve that result if Parliament so decides.

[47] The Board will accordingly humbly advise Her Majesty that the appeal of the Attorney General ought to be dismissed."

42. The offences under the Firearms Act for which this appellant was charged fall within category (ii) offences as defined within **Attorney General v. Hall**. In the circumstances the Attorney General had no power to prefer a voluntary bill in relation to them. The Supreme Court therefore had no jurisdiction to hear those charges under the Firearms Act.

43. In the result, the appeal against the convictions under the Firearm Act must be allowed and the convictions and sentences quashed.

44. As the sentences have already be served, the issue of a retrial does not arise.

45. The appeal by the appellant is allowed and the convictions and sentences quashed. The appeal by the Crown against sentence is dismissed.

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The Honourable Sir Michael Barnett, P

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The Honourable Mr. Justice Jones, JA

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The Honourable Mr. Justice Evans, JA