1967/3

IN THE PRIVY COUNCIL No. 36 of 1965

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA

B E T W E E N :

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

- and -

PATRICK NASRALLA Respondent

CASE FOR THE RESPONDENT PATRICK NASRALLA

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10 1. This is an appeal brought by leave from the Judgment and Order of the Court of Appeal of Jamaica dated the 11th June, 1965 allowing the Respondent's appeal from the Judgment of the Supreme Court delivered on the 5th June, 1963 dismissing an application for relief sought under the provisions of Section 25 of Chapter III of the Constitution of Jamaica. p. 66 pp. 28 - 65 pp. 15 - 24 pp. 11 - 14

2. The Substantial question arising on this appeal is whether the Respondent, who was tried
20 before a Jury in the Home Circuit Court holden at Kingston on the 4th, 5th, 6th, 7th, 8th, and 11th of February 1963 on an indictment containing one count for murder of one Gilbert Gillespie and the Jury returned a verdict of not guilty of murder and indicated that they were divided 8 to 4 as to whether or not he was guilty of manslaughter, may be tried again before another Jury for manslaughter in respect of the death of the said Gilbert Gillespie.

30 3. Section 20 (8) of the Constitution of Jamaica provides:

> " 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

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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".

4. Other relevant provisions of the Constitution are as follows:-

"Section 1 (1) .....

"Law" includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly".

"Section 25:-

(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (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 subsection (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:

Provided that the Supreme Court shall not exercise its powers under this subsection 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 a appeal therefrom to the Court of Appeal.

(4) Parliament may make provision, or may authorise the making of provision, with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorise the conferment thereon of such powers, in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section".

"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 any of these provisions.

....."

5. The Jury Law - Cap. 186 of the Revised Laws - provides (inter alia) as follows:-

"Section 44:

(1) On trials on indictment for murder or treason, the ananimous 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.

....."

"Section 45:

(1) It shall be lawful for the Judge, on

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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) In cases of necessity such as when a juror is taken ill during any trial and the number of its members is reduced by more than one, or a prisoner is by illness or other sufficient cause incapable of remaining at the bar, or for other cause deemed sufficient by the Judge, the Judge may discharge the jury.

(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 jurors and the Judge may in his discretion excuse from such array any juror who took part in the previous trial.

6. The facts of the case are set out in the Originating Notice of Motion filed by the Respondent on the 20th March, 1963 and are as
p. 13 follows:-

(a) The Applicant was on the 4th 5th 6th 7th, 8th and 11th of February, 1963, tried in the Home Circuit Court holden at Kingston before his Lordship Mr. Justice R.H. Small and a Jury on an indictment containing one count and which charged him with the murder of one Gilbert Gillespie on the 9th October, 1962.

(b) On the 11th of February, 1963, the jury returned a verdict of acquittal of the offence of murder, but despite lengthy deliberations were unable to agree on a verdict as to manslaughter, and were accordingly discharged by the Learned Trial Judge.

(c) Prosecuting Counsel thereupon applied to the Learned Trial Judge for an order directing a re-trial of the Applicant on the issue of manslaughter either in the sessions of the

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Home Circuit Court then current or at future sitting of the said Court.

(d) The aforesaid application was argued by Counsel for the Crown and for the Defence before the Learned Trial Judge on the 13th and the 18th of February, 1963, when judgment was reserved.

(e) On the 25th of February, 1963, judgment was delivered ordering a re-trial of the Applicant on the issue of manslaughter in the Home Circuit Court commencing on the 17th of April, 1963.

7. The Respondent on the 20th March, 1963 filed an Originating Notice of Motion against the Appellant under and by virtue of the provisions of Section 25 of the Constitution of Jamaica and sought therein the following relief:- pp. 11 - 14

(a) A Declaration that:-

(i) The Order of his Lordship Mr. Justice R.H. Small dated the 25th of February 1963, and made in the case of Regina vs Patrick Nasralla for murder in the Home Circuit Court Kingston ordering that notwithstanding the acquittal of the Applicant on a charge of murder by a jury who did not go on to find him guilty of manslaughter, the Applicant be tried at the sessions of the Home Circuit Court commencing on the 17th of April 1963 on the issue of manslaughter, is ultra vires and/or in contravention of the fundamental rights and freedoms guaranteed to the individual by section 20 (8) of the Second Schedule of the Jamaica (Constitution) Order in Council 1962.

(ii) The Applicant having been acquitted of the charge of murder and no verdict having been returned by the jury on the offence of manslaughter for which he could have been convicted at his trial for murder, cannot by reason of Section 20 (8) of the said Order in Council be again tried for the offence of manslaughter arising

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out of the same facts on indictment voluntarily preferred by the Respondent.

(b) An Order that :-

(i) The order of His Lordship Mr. Justice R.H. Small dated the 25th of February 1963, directing that the Applicant be re-tried on the issue of manslaughter at the sessions of the Home Circuit Court commencing on the 17th of April 1963, be set aside AND

(ii) The Applicant be unconditionally discharged

(c) An Order that the costs of this application may be paid by the Respondent or that such other order as to costs may be made as the Court shall think fit

(d) Further and other relief as to the Court may seem just.

8. The Notice of Motion was heard by the Supreme Court (Cools-Lartigue, Douglas and Shelley, J.J.J.) and on the 5th June, 1963 the Supreme Court in a written Judgment dismissed the

pp. 15 - 24 application

9. The Supreme Court held:-

p. 19 l . 40 (a) That Section 20 (8) of the Constitution of Jamaica is declaratory of the Common Law and enshrines in the Constitution the Common Law rights upon which the pleas of autrefois acquit and autrefois convict are based

p. 20 l. 28 (b) That the plea of autrefois acquit is founded on the principle that no man should be placed in peril of legal penalties more than once upon the same accusation and that the

p. 23 l.38 appellant was not in peril of conviction of manslaughter because there was no verdict on the issue of manslaughter and there was no general acquittal.

pp. 24 - 27 10. By Notice of Appeal dated the 19th June, 1963

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the Respondent appealed to the Court of Appeal against the decision of the Supreme Court on the following grounds:-

1. The Supreme Court having correctly found that the proper rule of construction to be applied was that clear and unambiguous language should be construed according to its plain ordinary meaning:-

   (a) Proceeded to violate this rule by holding that Section 20 (8) of the Constitution was merely declaratory of the common law notwithstanding the fact that the common law meaning ascribed by the Court to the said words necessitated additions to and/or qualifications of the plain language of Section 20 (8).

   (b) Failed to appreciate that there was nothing to indicate that the language of Section 20(8) was a term of art descriptive of the common law principles applicable to the pleas of autrefois acquit and convict, as the Court found them to be.

2. In arriving at its conclusion that Section 20 (8) was declaratory of the common law, the Court failed to address its mind adequately or at all to the rule of construction that the Legislature is deemed to have knowledge of the existing state of the Law, and is presumed by the use of language not appropriate to express the Law as it existed immediately before the enactment in question, to have intended either a change in the Law or a settlement once and for all of pre-existing doubts and conflicts, in the manner indicated. Even if the Court was right in concluding that Section 20 (8) was declaratory of the common law, the Court was wrong in Law in holding that at common law:-

   (i) A verdict of not guilty of murder on an Indictment charging the offence of murder was not a general verdict of acquittal if the Jury disagreed on the

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issue of manslaughter, and that the accused could not in such circumstances plead autrefois acquit to a subsequent Indictment for manslaughter arising out of the same facts.

(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 because the Jury were unable to arrive at a verdict on that issue.

4. The Supreme Court further erred in Law by:-

(a) Failing to appreciate that the observations of Cockburn C.J. in R. vs Charlesworth - 1861 - 9 Cox C.C. 44 on which they relied for holding that the Appellant was never in peril of conviction of manslaughter were in their proper context limited to situations in which a Jury had been discharged either without giving a verdict on the offence charged in the Indictment, or had returned a defective verdict, and could not therefore apply to a case in which a good verdict had been returned on the only offence charged in the Indictment, the Jury not being compellable to find manslaughter.

(b) Interpreting the decision in R. vs Barron 1914 - 2 K.B. 570 in a manner not justified by the authorities, and relying on the decision in R. vs. Quinn - 53 State Reports N.S.W. 21, despite the erroneous reasoning therein contained.

5. In so far as the decision herein appealed against implies that the Appellant may be tried on the issue of manslaughter pursuant to the Order of Small J. dated the 25th of February 1963, the Supreme Court failed to appreciate that the decision in Reg. vs Shipton - 1957 - 1 W.L.R. 259 supported the Appellant's contention that a Jury of seven had no jurisdiction to try an Indictment which charged the offence of murder, and that

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the said Order was consequently bad in Law.

11. The Appeal was heard by the Court of Appeal (Mr. Justice Duffus (President), Lewis, J. and Henriques, J.) on the 5th, 6th, 7th, 8th 9th, 13th, and 14th of October, 1964. The Court of Appeal delivered its Judgment on the 11th June, 1965 unanimously allowing the appeal, setting aside the Judgment of the Supreme Court and directing that Judgment be entered in favour of the Respondent declaring as follows:- pp. 48-49

1. That the order of Small J. Adjourning the case for trial on the issue of manslaughter was ultra vires and void and in contravention of the fundamental rights and freedoms guaranteed by Section 20 (8) of the Constitution.

2. The appellant, having been acquitted of the charge of murder of Gilbert Gillespie and no verdict having been returned by the Jury for the offence of manslaughter of which he could have been convicted at his trial for murder cannot be again tried for the offence of manslaughter arising out of the killing of Gilbert Gillespie.

and ordering that the Respondent be unconditionally discharged.

12. In the Court of Appeal written Judgments were delivered by Mr. Justice Duffus (President) and Mr. Justice Lewis. Mr. Justice Henriques concurred.

The Learned President after setting out the facts and summarizing the submissions of Counsel then proceeded to examine the Authorities on the doctrine of autrefois and in particular the decision of the House of Lords in the case of Connelly v. D.P.P. (1964) A.C. 1280 and the speeches delivered therein. He came to the conclusion that it was beyond question, on the authorities, that a person acquitted of murder will be able to rely on a plea of autrefois in bar to a second trial for manslaughter because he could have been convicted of manslaughter on the first trial. The Learned President then went on to consider the distinction drawn in the Judgment

p. 33

p. 37 l.40

p.38 l. 3

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of the Supreme Court between a verdict of acquittal generally and a verdict of not guilty of murder coupled with a disagreement as to whether or not the prisoner was guilty of manslaughter.

He proceeded to analyse the decision in Regina v. Charlesworth 9 Cox C.C. 44 on which the Supreme Court had relied for its conclusion that the Respondent could not show that he was in peril of conviction for manslaughter. The Learned President came to the view that the opinion of the Judges of the Supreme Courthad been based on a misconception of Regina v. Charlesworth (supra).

p. 38 l.42 In that case the Jury were discharged from giving any verdict whatsoever whereas in the instant case the jury had proceeded to verdict and had found a good verdict of not guilty of the offence of murder as charged. He further proceeded to a

p. 39 l.41 detailed consideration of the Australian case of R. v. Quinn (1952) 53 State Reports (N.S.W.) 21 where the same state of affairs existed as in the

p.44 l.11 instant case. He came to the conclusion that the Judgments in that case were based on two fallacies. 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 arises. The second fallacy was to treat manslaughter as if it were a separate offence under a separate count thereby requiring a separate verdict.

The Learned President referred to the cases of Wroth v. Wiggs (1953) Cro. Eliz. 276; Penryn v. Corbett 78 E.R. 702; Regina v. Sealy 10 Trinidad Law Reports; Regina v. Shipton (1957) 1 A.E.R. 206.

p. 48 l. 23 He came to the conclusion that the Appellant would be able to plead successfully autrefois acquit to a subsequent indictment for manslaughter, if preferred, and was within the clear provisions of Section 20 (8) of the Constitution.

Mr. Justice Lewis first addressed himself to the interpretation of Section 20 (8) of the Constitution and came to the conclusion that it was declaratory of the Common Law governing

p. 55 l.20 "autrefois acquit". He then considered whether Small, J. who had presided at Respondent's trial for murder had the discretion under Section 45(3) of the Jury Law, which he had purported to

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exercise, to adjourn the case for trial on the issue of manslaughter. He came to the conclusion that in the circumstances the trial Judge had no such power and the order was ultra vires and invalid. p. 55 l.41 p. 58 l.32

Mr. Justice Lewis next considered the question of whether the Jury's verdict was an acquittal within the meaning of Section 20 (8) of the Constitution so as to entitle the Respondent to the relief sought in his Originating Summons p. 58 l.44

He was of the view that the decision in R. v Quinn (supra.) is based upon an inference drawn from the doctrine of divisibility of averments and upon the further conclusion that where on an indictment for murder the Jury acquit of the major offence they must go on to return a verdict on the lesser offence. He was of the opinion that a verdict of not guilty of the offence charged is a verdict as to the whole offence and not merely as to an averment, unless the Jury choose to exercise their power to return a good verdict on the lesser offence. This power is permissive not compellable. Hence if the Jury return a verdict of not guilty of the offence charged and do not go on voluntarily to convict of the lesser offence then this is a general verdict of acquittal. p. 59 l.27 p. 61

After referring to the cases of Connelly v. D.P.P (supra) and R. v. Barron (1914) 2 K.B. 470 he stated his conclusion that this branch of the doctrine of autrefois acquit does not depend upon the principle of res judicata strictly applied, but upon the rule that a person is not to be twice put in peril for the same offence. The Respondent in this case was in peril of being convicted of manslaughter, the moment of peril being the moment when the Jury deliver their verdict. If the Jury acquit of murder and do not go on to convict of manslaughter he has been delivered of the peril and cannot be tried again for manslaughter p. 62 l.39 p. 62 l.45 p. 63 l.2

13. An order granting the Appellant leave to appeal from the decision of the Court of Appeal was made on the 1st November 1965. p. 66

14. The Respondent humbly submits that the words of Section 20 (8) of the Constitution are plain and unambiguous and ought to be given their full effect. Even if these words do no more than

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enshrine the Common Law doctrine of autrefois that doctrine clearly covers the facts of the instant case. The contention of the Appellant and the decision in the case of R. v. Quinn (supra) derive from an assumption that the doctrine of autrefois is identical with the doctrine of res judicata or "issue estoppel". This is fallacious. These doctrines may overlap to some extent but they are not identical. The analysis of these doctrines in Connelly v. D.P.P (supra) shows the different spheres in which they operate. Since the facts of the instant case would have enabled the Respondent to plead successfully autrefois acquit on a charge of manslaughter it is quite irrelevant to consider whether he could rely on res judicata or "issue estoppel". The question of whether the Jury decided the issue of manslaughter is only germane to the plea of res judicata or "issue estoppel": hence the fact that the Jury indicated that they were not agreed on the question of manslaughter cannot affect the operation of the rule of autrefois acquit.

15. The Respondent humbly submits that the decision of the Court of Appeal is correct and that this appeal ought to be dismissed with costs here and below for the following among other reasons:-

(a) Because the words of Section 20 (8) of the Constitution are plain and unambiguous and cover the facts of the instant case.

(b) Because the Respondent would at Common Law have been able successfully to plead autrefois acquit on a second trial for manslaughter and Section 20 (8) is, at the lowest, equivalent to the Common Law rule of autrefois acquit.

(c) Because the indictment had only one count, to wit - a count for Murder. Since the Jury acquitted of Murder and did not go on to find the Respondent guilty of Manslaughter there has been a general acquittal.

(d) Because the Judgments given by the President and Mr. Justice Lewis are right

and ought to be confirmed

DAVID H. COORE, Q.C.

M.R. HICKMAN

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- and -

PATRICK NASRALLA Respondent

CASE FOR THE RESPONDENT

PATRICK NASRALLA

ALBAN GOULD BAKER & CO.,
17, Northampton Square,
London, E.C.1.