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

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
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IN THE PRIVY COUNCIL No. 36 of 1965

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B E T W E E N

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

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RECORD OF PROCEEDINGS

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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

RECORD OF PROCEEDINGS

In the Circuit Court

No.1

Indictment and Backing with Endorsement 28th January 1963.

NO. 1

INDICTMENT AND BACKING WITH ENDORSEMENT

K51/63

The Queen v. Patrick Nasralla
In the Supreme Court for Jamaica
In the Circuit Court for the parish of Kingston

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen:

Patrick Nasralla is charged with the following offence:-

STATEMENT OF OFFENCE

Murder.

PARTICULARS OF OFFENCE

Patrick Nasralla on the 9th day of October, 1962 in the parish of Kingston murdered Gilbert Gillespie.

(Sgd.) C.H.L. Raymond
for Director of Public Prosecutions
28th January, 1963

In the Circuit Court

No. 1

Indictment and Backing with Endorsement 28th January 1963. (Continued)

Before the Honourable Mr. Justice Small.

Arraigned: 4th February, 1963. 16/9/63.

Plea: Not Guilty - £500 with Surety.

Tried: 4/2 - 8/2; 11/2/63.

Verdict: Not guilty of Murder. Not agreed on manslaughter - Divided 8 to 4.

Sentence:

25/63 (3rd)
No. 51/63 (KINGSTON) (Second Circuit)

In the Supreme Court for Jamaica

In the Circuit Court for the parish of Kingston.

Held at Kingston on the 7th day of January 1963.

Traversed

THE QUEEN

v.

PATRICK NASRALLA

For - Murder. The 25th February 1963.

In accordance with section 45(3) of Cap. 186 the Court adjourns this case for trial at the next sitting of the Circuit Court on the issue of manslaughter. Accused allowed bail in £500. Surety £500 to appear on 17th April, 1963.

R.H. Small
Judge.

WITNESSES:

1. Philip Jackson
2. Beverley Harrison
3. Gilford Brown
4. Hursell Tomlinson
5. Vincent Powell
6. Willie Campbell
7. Ralph Stephenson
8. Sturdy Harrison
9. Mavis Ellis
10. Frederick Hibbert
11. Vincent McKay
12. Redvers Chambers
13. N.O. Walsh

In the Circuit Court

No. 1

Indictment and Backing with Endorsement 28th January 1963. (Continued)

JURORS:

1. Egerton Leslie (6) foreman
2. Albert Manhert (34)
3. Vivian McDonald (32)
4. Eddie Mack (20)
5. Hemesley King (1)
6. Hawley McDonald (24)
7. Audley Russell (59)
8. Alison Rowley (45)
9. Wesley Matthews (28)
10. Coleen Chen (78)
11. Gilbert Lee (12)
12. Inez Murphey (23)

WITNESSES FOR DEFENCE:-

No. 2

Judgment 25th February 1963

NO. 2

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HOME CIRCUIT COURT

FOR THE PARISH OF KINGSTON.

R. v. PATRICK NASRALLA

Robotham and Barnett for the Crown
Blake, Q.C. and Coore, Q.C. for the Accused.

J U D G M E N T

The prosecution's case indicates 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 is one of manslaughter.

In addition to the above the prosecution produced evidence which, if accepted, was likely

In the Circuit Court

No. 2

Judgment 25th February 1963 (Continued)

to take the case as high as murder, and accordingly they presented an indictment charging murder. On such an indictment the jury are obliged to return a verdict one way or the other on the charge of murder while they may return one of manslaughter.

See Archbold 34th Edition, para. 576:

> "Upon an indictment for murder if the prosecutor fails in proving malice aforethought, the prisoner may be convicted of manslaughter."

also R. v. Mackalley, 9 Co. Rep. 61b.

In the instant case the jury have returned a verdict of not guilty in respect of murder and have failed to agree to the necessary majority in respect of a manslaughter verdict.

Accordingly, the Court exercising the powers granted under sec. 45(1) of the Jury Law, Cap. 186, discharged the jury.

The prosecution in the circumstances now invite the Court to order a new trial on the issue of manslaughter and in support of this application they refer to sec. 45(3) which provides -

> "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."

The defence on the other hand have urged that a plea of autrefois acquit could not be successfully resisted at such a retrial and so they invite the Court not to act in vain.

Exhaustive research and arguments have been indulged in by the learned counsel on both sides and the Court records its gratitude to the gentlemen at the bar for the assistance afforded on a question that is so barren of recorded local authority.

Hale in his Pleas of the Crown, Vol. 2 at p. 246 has this to say -

> "If a man be acquit generally upon an indictment of murder autrefois acquit is a good plea to an indictment of manslaughter of the same person or e converso if he be indicted of manslaughter and 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."

In R. v. Barron, 1914 2 K.B. 570 at p.574 Lord Reading, C.J. (A.J. Lawrence and Lush JJ. with him) in delivering the judgment of the Court is reported to have said:

> "We are of the opinion that the plea of autrefois acquit was rightly rejected. The principle upon which this plea depends have 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 offence 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."

In the Circuit Court

No. 2

Judgment 25th February 1963 (Continued)

It is particularly interesting to follow the thoughts of Lord Goddard C.J. (Hilbury and Omerod JJ. with him) as he delivered the judgment of the Court in re Shipton, 1957 1 A.E.R. p. 206. A good deal of it is obiter but there is authority to support a lot of what is said:-

> "In this case the jury have found the accused not guilty of manslaughter and have not agreed on a verdict of dangerous driving. There was no separate count for dangerous driving. I think with all respect to the learned judge, the recorder at Bournemouth took a proper view. He had no jurisdiction to try an indictment which was an indictment for manslaughter. It might be desirable if this matter was cleared up in some way by legislation. The learned judge more than once when an application was made to allow a voluntary bill for dangerous driving to be preferred, referred to the case of wounding with intent. We all know that on the charge of wounding with intent it is open to the jury to return a verdict of malicious wounding.
>
> In the opinion of the Court exactly the same position arises there as it does here. If a jury find a man not guilty of the offence charged in the indictment and do not go on to say 'but we find him guilty of malicious wounding' there is an end of the matter. Perhaps it is a pity that the learned judge did not give leave to prefer a voluntary bill. If a voluntary bill had been preferred, whether the accused would have been able to plead autrefois acquit or not I do not know".

A contrary view expressed in the Australian Law Journal, Vol. 26 1952-53 at p. 587 was brought to the attention of the Court. There the learned editor had this to say -

"R. v. Quinn, 1952-53 S.R. N.S.W. is one of a number of cases exhibiting the tendency to confine the plea of autrefois acquit within narrow limits. A jury acquitted the defendant of a charge of murder and then had been unable to agree whether he should be convicted of manslaughter. The jury was discharged and upon presentment before another jury on a charge of manslaughter, the defence of autrefois acquit was raised. 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 autrefois 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 that 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 autrefois 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 verdict."

In the Circuit Court

No. 2

Judgment 25th February 1963 (Continued)

It is unfortunate the report of this case is not available. It is unfortunate also that the learned editor does not attempt to support any of his reasoning with any judicial decision from any quarter whatsoever. Yet his "general acquittal" and his "mere acquittal" seem to correspond to Archbold's "general verdict" and "partial verdict". See Archbold, 34th Edition paras. 572, 575-6. Be it observed that Hale in his enunciation of the law above referred to, speaks specifically of a "general acquittal" while Kenney at para. 754 speaks of a "general verdict" as distinct from a "special verdict" and does not seem to address his mind to Archbold's "partial verdict".

It appears quite clear that Lord Reading in delivering the judgment of the Court in R. v. Barron (supra) was there referring to a "general acquittal" without considering a "partial acquittal". In the dicta of Lord Goddard in the Shipton case the question of a "partial verdict" came up for consideration although the learned Lord Chief Justice did not refer to it as such. He there made the pronouncement:

> "If a jury find a man not guilty of the offence charged in the indictment and do not go on to say, 'but we find him guilty of malicious wounding' there is an end of the matter."

Clearly he did not intend to make any categoric statement of the law as it stood because almost in the same breath he went on to express his uncertainty as to whether a plea of autrefois acquit could successfully be made in the circumstances.

Attention is drawn to the manner in which the various authorities have tried to define manslaughter.

> "It is an unfortunate fact that on the authorities as they now stand it is impossible to formulate a clear definition of the crime of manslaughter.

The definitions offered in the text books are of a negative character."

Russell

"Manslaughter is the unlawful and felonious killing of another without any malice expressed or implied."

Archbold

"The offence of manslaughter includes all felonious homicides not amounting to murder."

Harris

"Manslaughter consists in killing another person unlawfully yet under conditions not so heinous as to render the act a murder."

Kenney

"Up to the 19th century it was discussed as a residuary category of homicide into which fell all killings which were not justified, excusable or murder."

Kenney

So therefore on an indictment for murder if there is a mere acquittal of murder there remains the residual question of manslaughter and if there is to be a general acquittal then the verdict of the jury must be had on the question of manslaughter.

So it does appear that the concept of a "partial" as distinct from a "general" verdict is real.

Reference was made by learned counsel Mr. David Coore, Q.C. to the safeguards of human rights entrenched in sec. 20(8) of the Jamaica (Constitution) Order in Council 1962 but with due respect to learned counsel's conception of the law the principles enunciated in respect of a partial verdict does not in any way whatsoever offend the

In the Circuit Court

No. 2

Judgment 25th February 1963 (Continued)

provisions or the spirit of the constitution. The force of the argument is that as to the offence of manslaughter there is only a disagreement which is no legal verdict and unless there is a legal verdict the defence of autrefois acquit is not available.

It appears to this Court that the Common Law rule as enunciated by Hale and reiterated in R v. Barron and enshrined in the Constitution clearly refers to a general verdict and a general verdict alone. It does not refer to a partial verdict as was given in this case where the issues of murder and manslaughter are so distinct and apart. In the 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. If the prosecution wish to press for a verdict on a manslaughter issue they must specifically prefer an indictment charging manslaughter. It is not the law that an indictment for murder is tantamount to a count for murder and a second count for manslaughter. The provision in the law is permissive and not obligatory and since the jury did not effectively make use of this power it is open to the prosecution to proceed against the accused in respect of the manslaughter issue if the Court exercises its discretion as provided in sec. 45 of the Jury Law.

This Court finds that this is a fit and proper case for so ordering and in accordance with sec. 45(3) of the Jury Law, Chapter 186, adjourns the case for trial at the next sitting of the Home Circuit Court on the issue of manslaughter.

(sgd) R.H. Small
J.

25th February, 1963

In the Full Court

No. 3

Originating Notice of Motion 20th March 1963.

NO. 3

ORIGINATING NOTICE OF MOTION

SUIT No. C.L.668-63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

IN THE MATTER of the Jamaica (Constitution) Order in Council 1962

AND

IN THE MATTER of 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 in the Home Circuit Court holden at Kingston

B E T W E E N:

PATRICK NASRALLA Applicant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

TAKE NOTICE that the Supreme Court of Judicature of Jamaica, at the Supreme Court, Public Buildings East, Kingston, will be moved on the 3rd day of April 1963, or so soon thereafter as Counsel can be heard, by Counsel on behalf of the above named Applicant for the following relief namely:-

(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

In the Full Court

No. 3

Originating Notice of Motion 20th March 1963. (CONTINUED)

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 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.

AND FURTHER TAKE NOTICE that the grounds of this application are:-

(1) 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.

(2) 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.

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

(4) 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.

(5) 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.

(6) The Applicant avers that the said Order constitutes a contravention of his rights as an individual as set out in Section 20(8) of the Second Schedule

In the Full Court

No. 3

Originating Notice of Motion 20th March 1963 (Continued)

of the Jamaica (Constitution) Order in Council 1962, and further that as a consequence thereof the same are likely to be contravened by the Respondent preferring a voluntary Indictment for manslaughter against him at the sessions of the Home Circuit Court commencing on the 17th of April 1963, and he seeks redress in respect of the said contravention, and/or likely contravention of his rights pursuant to the provisions contained in Section 25(1) and (2) of the Second Schedule of the Jamaica (Constitution) Order in Council 1962.

DATED this 20th day of March 1963

Settled
V.O. Blake Q.C.
28/2/63

.....
J.H.N. FORREST

Solicitor for the above named Applicant.

TO: The above named Director of Public Prosecutions, Supreme Court Buildings, Kingston.

FILED BY J.H.N. FORREST: Solicitor of No: 71 Duke Street, Kingston, on behalf of the Applicant Patrick Nasralla whose address for service is in care of his said Solicitor.

NO. 4
JUDGMENT.

In the Full Court

No. 4

Judgment 5th June 1963.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

COMMON LAW

SUIT No. C.L. 668 of 1963.

IN THE MATTER of the Jamaica (Constitution) Order in Council, 1962

AND

IN THE MATTER of 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 in the Home Circuit Court holden at Kingston.

Vivian Blake, Q.C. and David Coore, Q.C. for Applicant

William Swaby, D.P.P. and L. Robotham for Respondent

V.B. Grant, Q.C. Attorney General, (E. Watkins with him), as amicus curiae

J U D G M E N T

This is an application in which the applicant seeks the following relief, namely:-

(a) A declaration that -

(i) The Order made by Small, J. on the 25th February, 1963, 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

In the Full Court

No. 4

Judgment 5th June 1963 (Continued)

charge of murder by a Jury which 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 April, 1963, on the issue of manslaughter, is ultra vires and/or void, 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 out of the same facts on indictment voluntarily preferred by the respondent.

(b) An Order that -

(i) the Order of Small, J. made on the 25th 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 day of April, 1963, be set aside;

(ii) and, the applicant be unconditionally discharged.

(c) An Order that the costs of this application may be paid by the Respondent, or that such 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.

The applicant was on the 4th, 5th, 6th, 7th, 8th and 11th days of February, 1963, tried in the

Home Circuit Court holden at Kingston before Snall, J. and jury on an indictment which charged him with the murder of Gilbert Gillespie on the 9th October, 1962. The indictment contained no other count.

On the 11th February, 1963, the Jury returned a verdict of not guilty of the offence of murder, but despite subsequent lengthy deliberation were unable to agree on a verdict of manslaughter and were accordingly discharged by the learned Trial Judge.

Counsel for the Crown thereupon applied to the learned Trial Judge for an Order directing a re-trial of the applicant on the issue of manslaughter either during the sitting of the then current Home Circuit Court or at a subsequent sitting of the said Court.

The aforesaid application was argued by Counsel for the Crown and for the applicant before the learned Trial Judge on the 13th and 18th February, 1963, when judgment was reserved.

On the 25th February, 1963, an order was made by Snall, J. adjourning the case for trial at the next sitting of the Circuit Court on the issue of manslaughter; the order purporting to be made under section 45(3) of the Jury Law, Cap. 186.

It is against this Order that the applicant seeks the relief above set out averring that it constitutes a contravention of his rights as an individual as set out in section 20(8) of the Second Schedule of the Jamaica (Constitution) Order in Council, 1962 (hereinafter referred to as "the Constitution") and further that as a consequence thereof the same are likely to be contravened by the respondent preferring a voluntary Indictment for manslaughter against him at the current session of the Home Circuit Court. This application is made pursuant to the provisions of section 25(1) & (2) of the Constitution.

Sub-sections (1) and (2) of Section 25 provide -

In the Full Court

No. 4

Judgment 5th June 1963 (Continued)

(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."

It must be borne in mind that section 13 of the Constitution after stating that every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, goes on to declare that the subsequent sections of Chapter III, that is to say, sections 14 to 26 (inclusive), are to have effect for the purpose of affording protection to the aforesaid rights and freedoms.

The Attorney General contends that Chapter III of the Constitution should be looked at against its jurisprudential background, taking into consideration the sociological implications of the case. He cited Edwards v. Attorney

General for Canada (1930) A.C. 124 as authority for the proposition that a constitution should not be given a narrow meaning, but a broad interpretation. For the applicant it is urged that the Constitution must be interpreted in the same way as any other statute, or, if it is to be construed broadly and liberally, it must be construed liberally in favour of the citizen, not in favour of the state, since the declared purpose of Chapter III of the Constitution is to vest in the citizen certain rights in respect of life, liberty, security of the person, enjoyment of property and the protection of the law, amongst other things. We think the true rule is that where the language of a constitutional provision is clear and unambiguous, then it should be construed according to the plain, ordinary meaning of the words. If however, the words are not clear and unambiguous, then the provision should be construed so that it should be given meaning consonant with the declared objects of the Legislature as contained in Chapter III of the Constitution.

Section 20(8) of the Constitution 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 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."

In our view, section 20(8) 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.

As we hold that section 20(8) declares the Common Law and neither enlarges nor abridges the common law rights of the citizen, section 26(8)

In the Full Court

No. 4

Judgment 5th June 1963 (Continued)

of the Constitution, which enacts that nothing contained in any law in force shall be held to be inconsistent with any of the provisions of Chapter III, is inapplicable, there being no inconsistency upon which it may operate.

It is contended for the Respondent that the order of the learned trial judge having been made under the authority of section 45 of the Jury Law, Chap. 186, then that order cannot be deemed to be a contravention of section 20(8) of the Constitution. Section 26(8) is advanced as authority for that view. Our opinion is that this is not an end of the matter because section 45(3) of the Jury Law under which the trial judge acted is procedural only and does not authorise the making of an order, should such order not accord with Section 20(8) of the Constitution.

As regards section 26(8), we think that its effect is, so far as section 45(3) of the Jury Law is concerned, to preserve the procedure therein set out. We also hold that its provisions embrace both statute law and common law, so that the procedure laid down at common law for the plea of autrefois acquit and of autrefois convict continues to have force and effect.

The plea of autrefois acquit, which is a plea in bar, is founded on the principle that no man should be placed in peril of legal penalties more than once upon the same accusation. The plea must set forth the acquittal on which it is based. It was suggested by Mr. Coore at one stage that the plea has nothing to do with res judicata but the better view seems to be that the plea is founded on that doctrine which is as much applicable to criminal as to civil proceedings. As was said by Byles J. in R. v. Morris (1867) L.R. 1 C.C.R. 90 at page 94 -

> "The form and intention of the common law pleas of autrefois convict and autrefois acquit shew that they apply only where there has been a former judicial decision on the same accusation

in substance, and where the question in dispute has been already decided."

The rule is stated by Lord Reading, C.J. in R. v. Barron (1914) 2 K.B. 570 in these terms at page 574 -

"The principle on 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 offence 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."

As it has been stated above, there must be an acquittal. Where, therefore, there is no verdict at all, for whatever reason, the plea is not good. That is laid down in R. v. Charlesworth (1861) 9 Cox 44, and in Winsor v. R (1866) L.R. 1 Q.B. 289.

In R. v. Grinwood, 60 J.P. 809, the prisoner had been convicted on one count of an indictment, all of which were clearly alternative. Where, therefore, the jury having disagreed on the remaining three counts, it was sought to re-try him on those counts, the plea of autrefois convict was held to be good.

Learned Counsel for the applicant relied heavily on R. v. Shipton (1957) 1 W.L.R. 259. In that case the defendant had been indicted on a charge of manslaughter. The jury acquitted of manslaughter and were unable to agree on the issue of dangerous driving. The judge directed that this latter issue be tried at quarter sessions. The recorder refused to try the

In the Full Court

No. 4

Judgment 5th June 1963 (Continued)

defendant for dangerous driving on an indictment for manslaughter because he had no jurisdiction. The Divisional Court refused leave to move for mandamus, the Court taking the view that the recorder was right in holding that he had no jurisdiction to try the indictment before him. The question as to whether, if a voluntary bill had been preferred, the defendant could have successfully pleaded autrefois acquit, is there left unresolved. All that the Court decided was that the Recorder had no jurisdiction to try the indictment before him.

For the Respondent, the Court was referred to the case of R. v. Quinn 53 State Reports (N.S.W.) 21. That the point that arose in that case is identical with that for decision by this Court, there can be no doubt. Counsel for the applicant ask us to say that Quinn's case is wrongly decided, that the decision of the Court of Criminal Appeal of New South Wales is based on fallacious reasoning and on a misinterpretation of the rule in Barron's case. It is true, as was pointed out, that this Court is not bound by the decision in Quinn's case supra, but it is the only case cited to us which is directly in point and we do feel that it is of strong persuasive authority. We are satisfied on the authorities that the acquittal referred to by Lord Reading, C.J. in Barron's case supra when he says "Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter" means a general acquittal and not, as in the instant case, where there was a disagreement on the issue of manslaughter.

It is not disputed that the onus of proving that the plea lies is on the applicant. Where according to Mr. Coore, the New South Wales Court erred was in assuming that in a charge of murder, there is, in addition to the charge of murder, an issue of manslaughter joined between the Crown and the accused. Indeed, says Mr. Coore, the jury cannot be compelled to consider manslaughter at all and in support of this contention, he cited the case of Wroth v. Wiggs (1653) Cro.

Eliz. 276. This latter case does not appear to support Mr. Coore's proposition because as was explained in the case of Penryn v. Corbet at page 464 of the same report, the jury in Wroth v. Wiggs found the prisoner not guilty generally, a verdict which effectively disposed of all the issues in the case in their entirety, leaving nothing upon which they could be compelled to make a finding.

We think that the true legal position is that so succinctly stated by Owen J. in Quinn's case at page 23 where he says -

> "..... to establish [the plea of autrefois acquit] it would have been necessary to prove that on the first trial [the applicant] stood in peril of a conviction for manslaughter, and that he was delivered from that peril by a verdict of acquittal".

Was the applicant in peril of being convicted of the offence of manslaughter? On this issue we consider the reasoning of Cockburn C.J. in Reg. v. Charlesworth (1861) 9 Cox C.C. 44 to be in point. At page 53 the learned Chief Justice said -

> "It appears to me, when you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass, because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time..."

In our view, a person is not put in peril merely by being put in charge of the jury; at the applicant's trial, he was not in peril of conviction of manslaughter, because there was no verdict on the issue of manslaughter, and there was no general acquittal. In our judgment, section 20(8) of the Constitution requires the applicant to establish that he was in peril of

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Judgment 5th June 1963 (Continued)

conviction of the offence of manslaughter. This he has not been able to show.

In the circumstances, the application is refused, with costs.

DATED this 5th day of June, 1963.

(Sgd.) A.R. Cools-Lartigue
W.R. Douglas
H.J. Shelley

JUDGES OF THE SUPREME COURT.

In the Court of Appeal

No. 5

Notice of Appeal 19th June 1963

NO. 5

NOTICE OF APPEAL

IN THE COURT OF APPEAL

NOTICE OF APPEAL

C.L. 668 of 1963
C.A. No. 13 of 1963

B E T W E E N:

PATRICK NASRALLA
Applicant-Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent-Respondent

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Applicant-Appellant on Appeal from the whole of the judgment herein of the Supreme Court given at the hearing of this Application made pursuant to the provisions of Section 25 of the Constitution, on the 5th of June 1963, whereby the Applicant-Appellant's Application for the relief claimed in his Originating Notice of Motion dated the 20th of March 1963, in Common Law suit

No. 668/63, was dismissed with costs to the Respondent-Respondent.

For an Order that the said judgment be set aside and judgment entered for the Applicant-Appellant for the relief claimed in his said Originating Notice of Motion with costs, AND for an Order that the Respondent-Respondent do pay to the Applicant-Appellant the costs of and incident to this appeal.

AND FURTHER TAKE NOTICE that the grounds of this appeal are:-

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

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No. 5

Notice of Appeal 19th June 1963 (Continued)

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 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 - 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 the said Order was consequently bad in Law.

DATED the 19th day of June, 1963.

(Sgd.) J.H.N. Forrest

SOLICITOR FOR THE ABOVE NAMED APPELLANT

SETTLED:

(Sgd.) V.O. Blake Q.C.
V.O. Blake, Q.C.
12th June 1963

To: The above named Respondent

The Director of Public Prosecutions, Public Buildings, King Street, Kingston.

FILED by J.H.N. Forrest of No.: 71 Duke Street, Kingston, Solicitor for the Applicant-Appellant.

In the Court of Appeal

No. 6

Judgment 11th June 1965

NO. 6

JUDGMENT

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL
No. 13 of 1963

PATRICK NASRALLA Applicant/Appellant

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent/Respondent

BEFORE: The Hon. The President
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Henriques

5th, 6th, 7th, 8th, 9th,
13th, 14th October, 1964
and 11th June, 1965.

For the appellant Coore, Q.C. with him Mahfood

For the respondent Swaby, D.P.P. with him L.G. Barnett and I.X. Forte

(a) Duffus, P.

Duffus, P.

This is an appeal from the judgment of the Supreme Court (Cools-Lartigue, Douglas and Shelley, JJ) delivered on the 5th June 1963 dismissing an application for relief sought under the provisions of Section 25 of Chapter III ("Fundamental Rights and Freedoms") of the Constitution of Jamaica. The relevant facts are as follows:-

The appellant Patrick Nasralla was charged on an indictment containing a single count for murder. The trial took place in the Home Circuit Court before Small, J. and lasted five days. The jury brought in an unanimous verdict of not guilty of murder, but were unable to agree on manslaughter. The endorsement on the indictment reads:

"Not guilty of murder/Not agreed on manslaughter divided 8-4".

The learned trial Judge thereupon discharged the jury. Counsel for the Crown then applied to the Judge for an order directing re-trial of the appellant on the issue of manslaughter either during the current sitting of the circuit court or at a subsequent sitting thereof. This application was opposed by counsel for the appellant and after hearing arguments, the learned Judge, on the 25th February 1963, made the following order:

> "In accordance with Section 45(3)(A) Cap. 186 the Court adjourns the case for trial at the next sitting of the Circuit Court on the issue of manslaughter. Accused allowed bail in £500. Surety £500 to appear on 17th April 1963".

The Appellant then applied to the Supreme Court for redress under the provisions of Section 25 of the Constitution in the terms of a notice of motion seeking the following relief:

> "(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 v. 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 void, 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

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11th June 1965
(a) Duffus, P.
(Continued)

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 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".

The motion was fully argued before a Court of three Judges. The Honourable The Attorney General took part in the proceedings as amious curiae. The Supreme Court in a written judgment delivered on the 5th June 1963, refused the application and it is against that refusal that this appeal now lies. The matter involved consideration of what is the true and correct meaning of Section 20(8) of the Constitution which provides as follows:-

"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."

The Supreme Court held that Section 20(8) 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". The Court proceeded to a careful examination of the principles of autrefois and res judicata and held that it was necessary for the applicant "to prove that on the first trial he stood in peril of a conviction for manslaughter and that he was delivered from that peril by a verdict of acquittal" and this he had not been able to show as "there was no general acquittal." It will be convenient at this stage to set out briefly the submissions made to us by learned counsel for the appellant and for the respondent.

Learned counsel for the appellant grouped his submissions under three main heads:

(1) Assuming that the Supreme Court was correct in saying that Section 20(8) merely enshrined, without addition, the common law principles of autrefois then the Court was wrong in concluding that at common law the appellant could not have successfully pleaded in bar at a subsequent trial for manslaughter.

(2) If this Court should be of the view that the common law doctrine of autrefois was in some respect subject to ambiguity or absurdity and there were decisions and dicta which are difficult to reconcile with each other, then the effect of Section 20(8) of the Constitution was to clarify the principles once and for all in so far as Jamaica was concerned and that once the citizen can bring himself within the plain meaning of Section 20(8) he is entitled to its protection and

(3) If this Court should be of the view that the common law doctrine of autrefois was clearly settled and that the appellant did not come within it that the effect of Section 20(8)was to give additional

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Judgment 11th June 1965 (a) Duffus, P. (Continued)

protection to any person who could show that he came within the plain meaning of the section which gave him a constitutional right not to be tried again for the same offence or on the same facts of any other criminal offence of which he could have been convicted at the trial for that offence which may formerly have depended on the discretion of the Judge to order a retrial or the discretion of the prosecution to apply for a retrial or if a retrial was ordered, a discretion to enter a nolle prosequi.

Learned counsel for the respondent submitted that the questions which arose for consideration were:

(1) What were the relevant common law principles governing autrefois acquit prior to the 6th August, 1962 when the Constitution came into operation?

(2) What effect, if any, did Section 20(8) of the Constitution have on the common law principles of autrefois acquit?

(3) If Section 20(8) altered the common law principles in any way then what was the effect thereof?

(4) What was the effect of Section 26(8) of the Constitution when read in relation to the provisions of the Jury Law Cap. 186?

It will be appreciated that these questions involve the consideration of the common law doctrine of autrefois as well as the interpretation of the relevant sections of the Constitution and of the Jury Law Cap. 186, under which Small J. made the order for a retrial on the issue of manslaughter.

We are grateful to learned counsel for the clarity of their arguments and for the large number of cases cited which indicate the zeal and industry they bestowed on difficult and involved matters of law.

There can be no doubt that the doctrine of autrefois is of great age and is firmly established in the common law but as the authorities show is not easy of consistent application. The principle is enshrined in the latin maxim "nemo debet bis puniri pro uno delicto". In Hawkins Pleas of the Crown (8th Edn. 1824) Vol. 2 at p. 515 it is expressed thus:-

> "The plea of autrefois acquit is grounded on the maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found 'not guilty' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime".

Hawkins also says - (p. 518) -

> "It seems a general rule, that a bar in action of an inferior nature will not bar another superior, yet it seems, that an acquittal in an indictment of murder will be a good bar of an indictment of petit treason, because both offences are in substance the same. But it is clear, that an acquittal of one felony is no manner of bar to a prosecution for another in substance different, whether committed before or at the same time with that of which he is acquitted".

The task for this Court, fortunately, has been made considerably easier as in the recent case of Connelly v. D.P.P. (1964) 2 All E.R. 401, the House of Lords considered the doctrine of autrefois and examined carefully a great number of cases, 30 some of which were relied on by the Supreme Court in the instant case. Lord Morris of Borth-y-Gest in his speech stated what he thought were the governing principles

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and this is what he said at p. 412 -

"In my view both principle and authority establish -

(i) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

(ii) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(iii) that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted;

(iv) that one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

(v) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus, if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies;

(vi) that on a plea of autrefois acquit or autrefois convict a man is not

restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(vii) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(viii) that apart from circumstances under which there may be a plea of autrefois acquit a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies;

(ix) that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principle applies that a man is not to be prosecuted twice for the same crime".

The learned and noble Lord then referred to statements of the doctrine in Coke's Institutes, Blackstone's Commentaries (1769) Hale's Pleas of the Crown (1778 Edn.) and Hawkin's Pleas of the Crown (1824) and at p. 413 at G, he said:-

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"Hale proceeded to point out (at p. 246) that, if a man is acquitted generally on an indictment of murder, autrefois acquit would be a good plea to an indictment of manslaughter of the same person. It would be the same death: the fact would be the same. The charges of murder and manslaughter only differ in degree. The principle seems clearly to have been recognised that if someone had been either convicted or acquitted of an offence he could not later be charged with the same offence or with what was in effect the same offence. In determining whether or not he was being so charged the court was not confined to an examination of the record. The reality of the matter was to be ascertained. That however, did not mean that if two separate offences were committed at the same time a conviction or an acquittal in respect of one would be any bar to a subsequent prosecution in respect of the other. It was the offence or offences that had to be considered. Was there in substance one offence - or had someone committed two or more offences?"

and at p. 414 at I -

"My Lords, the law of England was, therefore, clearly stated. It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence of an offence for which on the first charge there could be a conviction".

and at p. 416 at A -

"My Lords, the authorities to which I have

referred show that the plea of autrefois acquit has availed if the charge contained in a later indictment is one of which a man could have been convicted on the trial of an earlier indictment. It was recognised for example by HALE that an acquittal of murder involved that there could be no later charge of manslaughter in respect of the same death."

Hale's Pleas of the Crown (1778 Edn) Vol. 2, at p. 246.

and at p. 461 at E, where he quoted from Broom's Legal Maxims (2nd Edn) -

"The fundamental principle of the plea of autrefois acquit as laid down by the judges of England in 1796 and as stated by writers earlier than that date, has been consistently followed. It was thus stated in 1848 in Broom's Legal Maxims (2nd Edn) p.257, "and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation - nemo debet bis puniri pro uno delicto. Thus, an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter and an acquittal upon indictment for burglary and larceny may be pleaded to an indictment for the larceny of the same goods, because in either of these cases, the prisoner might, on the former trial, have been convicted of the offence charged against him in the second indictment .....".

On this statement of Lord Morris of Borth-y-Gest of the principles and test applicable to the plea of autrefois acquit it would appear to be beyond question that a person acquitted of of murder will be able to rely on a plea of autrefois 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

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the first indictment for murder on which he could have been convicted of manslaughter. The Supreme Court, however, drew a distinction 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. The court held that a general acquittal would include an acquittal of manslaughter but as manslaughter had been put to the jury as a separate issue their disagreement and failure to arrive at a verdict meant that the appellant would not be able to show that he was in peril of conviction for manslaughter. The court relied on the reasoning of Cockburn, C.J., in Regina v. Charlesworth [1861] 9 Cox C.C. 44 at p. 53 where the learned C.J. said -

> "It appears to me, when you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass, because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time....."

In its judgment the Supreme Court after citing this judgment proceeded thus -

> "In our view a person is not put in peril merely by being put in charge of the jury; at the applicant's trial he was not in peril of conviction for manslaughter because there was no verdict on the issue of manslaughter, and there was no general acquittal".

In my view, with every respect to the learned Judges of the Supreme Court, their opinion appears to have been based on a misconception of Charlesworth's case.

In Charlesworth's case the jury were discharged from giving any verdict whatever and the trial of Charlesworth had not proceeded to its "lawful conclusion by verdict". As Cockburn C.J. said about eight lines further on in the passage quoted -

> "As at present advised, I cannot come to the conclusion that there has been in this case a trial, that the accused has been put in jeopardy, or that he is at all in a position, either in point of law or in point of fact, of a man who has been once acquitted and who having been once acquitted, cannot a second time be put on his trial".

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.

It was quite wrong to say that "the applicant was not in peril of conviction for manslaughter as there was no verdict on the issue of manslaughter". He was certainly in peril of conviction for manslaughter as it was open to the jury to have brought in a verdict of guilty of manslaughter had they so decided. The fact that they did not agree on a verdict in respect of manslaughter does not mean that the applicant was not in peril of conviction for manslaughter.

The Supreme Court also relied on the Australian case of Regina v. Quinn /1952/ 53 State Reports (N.S.W.) 21 where the same state of affairs existed as in the instant case. The learned judges in Quinn's case had also relied on Charlesworth's case. It is noteworthy that Charlesworth's case and Quinn's case were not referred to in Connelly's case. As the Supreme Court of Jamaica followed Quinn, it will be necessary to refer to it in some detail.

In Quinn's case the respondent to the appeal was indicted for murder before a circuit court. The jury acquitted him of murder but were unable to agree whether he was or was not guilty of manslaughter. The trial Judge accepted the

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verdict of acquittal on the charge of murder and discharged the jury from giving a verdict on manslaughter and remanded the prisoner to stand his trial on that charge at such court as the Attorney General might direct. The Attorney General directed that the respondent be tried at the Newcastle Quarter Sessions and on the day of the trial the Crown Prosecutor signed and presented an indictment for manslaughter. Counsel for the defence thereupon submitted that the indictment should be quashed. This submission was based on two grounds. The first was that the acquittal on the charge of murder was a bar to further proceedings on the charge of manslaughter. The second was that in the circumstances the Crown Prosecutor had no power to sign the indictment, and that the only person with authority to do so was the Attorney General. Both these points were upheld by the learned Chairman of Quarter Sessions, who ordered that the indictment be quashed.

In his report to the Court of Criminal Appeal for New South Wales the Chairman of Quarter Sessions stated that he had erred in respect of the second point as to the power of the Crown Prosecutor to sign the indictment and the respondent did not contest this therefore the appeal was argued and decided in respect of the first ground only. The Court of Criminal Appeal treated the matter as if a formal plea of autrefois acquit had been pleaded before the Chairman of Quarter Sessions. The court held that the issue between the Crown and the prisoner of a felonious killing falling short of murder had not been concluded and there being no verdict of acquittal in respect of manslaughter the plea of autrefois acquit entered at the second trial had not been established. The order quashing the indictment was set aside and the respondent ordered to take his trial on the indictment for manslaughter. It is useful to examine the reasoning of the judges. In the

judgment of Owen, J., which was concurred with by Street, C.J., the learned judge at pp. 22-23 said -

"The question for decision does, however, become more clear if it is borne in mind that a plea of autrefois acquit is the only appropriate method of raising the point on which counsel for the respondent relied. The onus of proving such a plea would lie on the defence, and to establish it 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. Since the jury at the trial was unable to agree whether the respondent was guilty or not guilty of manslaughter, and was thereupon discharged without giving a verdict on that issue, the respondent could not, by producing the record of that trial, have proved an element essential to establish the plea, since the fact that the jury was discharged from giving a verdict on manslaughter is, in my opinion, as much a part of the record of the trial as is the fact that a verdict of acquittal on the charge of murder was recorded.

The argument for the respondent is based upon the statements which are to be found in the works of almost every well known writer on the criminal law, that on an indictment for murder the prisoner may be acquitted of murder and found guilty of manslaughter - a rule which is as old as the common law itself. The next step in the argument is a contention that a verdict of acquittal on an indictment for murder supports a plea of autrefois acquit to a later indictment for manslaughter arising out of the same killing. But the argument is put in too broad a fashion. The rule is that a

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'general acquittal of murder is a discharge upon an indictment of manslaughter upon the same person, because the latter charge was included in the former'. (Chitty's Criminal Law, Vol. 1, p. 455). 'If a person is acquit generally upon an indictment of murder, autrefois acquit is a good plea to an indictment of manslaughter of the same person'. (Hale's Pleas of the Crown, Vol. 2, p. 246). Where, however, there has been no general acquittal on an indictment and the record shows that while the jury acquitted the prisoner of murder they were then discharged of the prisoner without giving a verdict on manslaughter because of their inability to agree on such a verdict, there is no rule of law of which I am aware which says that the issue between the Crown and the prisoner of a felonious killing falling short of murder has been concluded. The respondent here undoubtedly stood in peril of a conviction for manslaughter on his first trial, but the jury did not deliver him. There is no doubt that the discharge of a jury without giving a verdict on a particular issue does not prevent the parties from relitigating that issue, and this is so whether the discharge of jury was justified by law or not (Regina v. Charlesworth (supra); Winsor v. Regina 1866 L.R. I, Q.B. 289 and 390). See also the dissenting judgment of Crampton J. in Conway and Lynch v. The Queen (1845) 7 1 L.R. 149. The principle of law which is expressed in the maxim "res judicata pro veritate accipitur" is as much applicable in the sphere of the criminal law as it is in any other branch of the law.

The answer to the respondent's contention in the present case is to be found in the common law rule, which in more modern times has been recognised and indeed reinforced by statute, that subject to some limitations the averments in an indictment are divisible. For example, an indictment for murder alleges a felonious and malicious slaying. The gravest form of felonious slaying is

murder, but if the jury fails to find the element of malice which need not necessarily mean actual malice, they may nevertheless find a felonious slaying without malice, namely, manslaughter. A plea of not guilty to such an indictment is a plea of the general issue to every allegation of fact necessary to make the killing a felony, whether it be the felony of murder or the less grave felony of manslaughter, and a general verdict of not guilty on such an indictment is a finding in favour of the prisoner on the issue of a felonious as well as a malicious slaying".

The learned judge then referred to the opinion of a number of writers in well known text books and proceeded -

"But the significance of the statements of the text writers which I have quoted is that they all emphasize the divisibility of averments and point to the conclusion, which accords with commonsense, that on the undisputed facts in the present case the respondent could not have supported a plea of autrefois acquit".

Heron, J. gave a separate judgment and he too held that in the first rial there had not been a general verdict of not guilty and that the plea of autrefois acquit was not established.

Learned counsel for the respondent relied strongly on this case and submitted that in every case where autrefois was pleaded it was the duty of the court to enquire into the reality of the matter. Learned counsel for the appellant submitted that Quinn's case had been wrongly decided and ought not to be followed and with that submission I find myself compelled to agree.

The learned judges of the Court of Criminal Appeal for New South Wales held that Quinn "undoubtedly stood in peril of a conviction

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for manslaughter on his first trial, but the jury did not deliver him" (supra p. 11). They also decided that there was no "general verdict of acquittal" and decided that since the jury were unable to agree whether Quinn was guilty or not guilty of manslaughter and had been discharged without giving a verdict on that issue, he would be unable to show by production of the record that he had been acquitted of manslaughter.

It seems to me that there are two fallacies behind this reasoning - The first fallacy is the assumption that on an indictment for murder the jury having found the prisoner not guilty of murder are in duty bound to consider manslaughter, if it arises. The second fallacy is to treat manslaughter as if it were charged in the indictment as a separate offence under a separate count thereby requiring a separate verdict.

It is clearly established at common law and by statute (in Jamaica by the Jury Law Cap. 186, Sec. 44 (2)) that on an indictment for murder the jury may bring in a verdict of guilty of manslaughter but this power is a permissive one and the jury are not compellable to enquire into manslaughter; see Wroth v. Wiggs (1653) Cro. Eliz. 276; 78 E.R. 531 and Penryn v. Corbet Cro. Eliz. 465; 78 E.R. 702.

It appears that in Quinn's case as in the instant case, the jury did enquire into manslaughter but were unable to agree to a verdict thereon. There being no separate count for manslaughter the jury could not be compelled to give a verdict thereon and this should have been the end of the matter. Support for this view is to be had from the dicta of Lord Goddard C.J. in Regina v. Shipton, ex parte D.P.P. [1957] 1 All E.R. 206. This case was concerned with the English Road Traffic Act 1934, S. 34 of which provided that upon the trial of a person

for manslaughter in connection with the driving of a motor vehicle "it shall be lawful for the jury" to find him guilty of an offence under S. 11 of the Road Traffic Act of 1930 (which relates to reckless or dangerous driving). At p. 207 the learned C.J. after quoting the relevant section said this -

> "That is entirely a permissive section. It says that when the jury have a man in charge of manslaughter, if they come to the conclusion that he is not guilty of manslaughter they may return a verdict of dangerous driving... In this case the jury have found the accused not guilty of manslaughter and have not agreed on a verdict of dangerous driving. There was no separate count for dangerous driving. I think with all respect to the learned judge, the recorder - took a proper view. He had no jurisdiction to try an indictment which was an indictment for manslaughter .....

> The learned judge more than once when an application was made to allow a voluntary bill for dangerous driving to be preferred, referred to the case of wounding with intent. We all know that on the charge of wounding with intent it is open to a jury to return a verdict of malicious wounding. In the opinion of the court exactly the same position arises there as it does here. If a jury find a man not guilty of the offence charged in the indictment and do not go on to say "but we find him guilty of malicious wounding" there is an end of the matter."

In the Trinidad case of Regina v. Sealy (1950) 10 T.L.R. 61, a similar situation arose to that in Quinn's case and the matter of a partial verdict on separate issues, was dealt with by Gomes, J (as he then was). In the concluding paragraph of his judgment he says -

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".....this court has no authority or jurisdiction to entertain this trial. In coming to this conclusion, I have not overlooked any possibility of suggestion in argument that where there is what I might describe as a "partial verdict" it might be possible for the judge to accept that part of the verdict which determines one issue and discharges the jury on the second issue which is undetermined, but while such a procedure might (and I say no more than might) be possible in the case of an indictment containing more than one count, on the ground that each count is a separate indictment, it is quite impossible to contend that such a course is permissible in an indictment containing only one count. As far as I have been able to ascertain there is no reported case where such a course has been attempted even in an indictment containing more than one count".

This view is in direct conflict with that expressed by Owen J. in Quinn's case and followed by the Supreme Court in the instant case. No case has been cited to this court, which supports Quinn. With every respect to the learned judges who decided Quinn's case and the learned judges of our Supreme Court, I think that the correct legal position is as stated by Gomes, J. (as he then was).

On an indictment for murder the prisoner is put in charge of the jury on that charge only. The jury are permitted however to consider manslaughter and to say that he is not guilty of murder but guilty of the lesser crime of manslaughter, and under the particular wording of Sec. 44 (2) of the Jamaican Jury Law, the jury may also acquit of manslaughter. The section reads as follows -

"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 or three to conviction of manslaughter or of acquittal of manslaughter, may be received by the court as the verdict of the jury".

The court is permitted or enabled to receive a verdict on manslaughter but this permission to a jury to give such a verdict does not confer on the crown a corresponding right to enable it to insist on the jury returning a verdict on manslaughter, where the indictment charges murder only. Where, therefore, the jury have found a good verdict of not guilty on the charge of murder that is in the words of Lord Goddard in Shipton's case, "an end of the matter". The fact that the jury are unable to agree on a verdict of manslaughter does not mean that manslaughter will remain a live issue to be tried on a subsequent indictment.

The jury in whose charge the prisoner is placed are empowered to find manslaughter if they so wish. If that jury however does not decide on a verdict in respect of manslaughter, whether for conviction or acquittal, that is the end of the matter, and it would be wrong for another jury to be asked to decide on this. The plain fact is that the prisoner was in jeopardy of a finding of guilty of manslaughter and he would come therefore 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". It is correct to say that a person who had been acquitted of murder but who had not been acquitted of manslaughter would not be able to show by production of the record that he had been acquitted of manslaughter but for all practical purposes this would be quite immaterial as all that he would have to do was to show the acquittal of murder on the previous indictment, on which he could have been convicted of manslaughter and this would support a plea of autrefois acquit.

It would be quite wrong to treat the failure to arrive at a verdict in respect of manslaughter as though it were an abortive trial. There was a good trial and the verdict

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of not guilty of murder was in fact a valid general verdict of acquittal of murder and I cannot agree with the view taken by the Supreme Court founded on Quinn's case that there was no general acquittal. The duty of a jury in a criminal case is succintly set out by Humphreys, J in Regina v. Thomas (1949) 23 Cr. App. R. 200 at p. 210 where he says -

> "The ordinary rule is well known and unquestionable. The jury is bound to find the verdict, if they agree, upon the indictment. They are not allowed to find any other than a verdict of guilty or not guilty unless some statute or in very rare cases the common law, permits them to find some lesser or different crime while acquitting upon the actual charge in the indictment. That is the rule".

This passage was relied on by Gomes J. in Regina v. Sealy (supra).

It is my view, therefore, that the Appellant would be able to plead successfully autrefois acquit to a subsequent indictment for manslaughter, if preferred, and he would be able, likewise, to bring himself within the clear provisions of Section 20(8) of the Constitution, and he could not therefore be tried subsequently for manslaughter, this being a criminal offence of which he could have been convicted at his trial for the murder of Gilbert Gillespie of which latter offence he had been acquitted.

It is not necessary to consider the implications of Section 26(8) of the Constitution as this will not arise.

I would allow the appeal and setting aside the judgment of the Supreme Court direct that judgment be entered in favour of the appellant declaring as follows -

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 order that the appellant be unconditionally discharged.

The appellant to have the costs of the appeal and the costs of the action in the Supreme Court.

/sgd/ H.G.H. Duffus
President.

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On the 25th February, 1963, Small, J. on the application of the Crown at the close of a trial of the appellant for murder in which the jury returned a verdict of 'not guilty' of murder but was unable to agree as to manslaughter, made an order adjourning the case for trial at the next sitting of the Home Circuit Court on the issue of manslaughter.

Thereupon the appellant moved the Supreme Court under section 25 of the Constitution for (1) a declaration that Small J's order is ultra vires and/or void, and/or in contravention of the fundamental rights and freedoms guaranteed to the individual by section 20(8) of the Constitution, and that by virtue of that section he is not liable to

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be tried for manslaughter and (2) an order setting aside Small J's order and unconditionally discharging the appellant.

On the 5th June, 1963, the Supreme Court refused the application, and this appeal is taken against that decision.

The relevant portion of section 20(8) of the Constitution, upon which the motion is founded, is as follows :-

> "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:"

This is one of a number of provisions designed to secure to the individual his fundamental right to the protection of the law. It falls within Chapter III (Fundamental Rights and Freedoms) which contains a special interpretation section, section 26, and of this subsection (8) is relevant -

> "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".

The question which this court has to decide is whether the circumstances of the appellant's case entitle him to the protection of section 20(8).

There was much argument at the Bar as to the meaning and effect of section 26(8). In particular, learned counsel for the appellant submitted that the word "law" therein does not include the common law. I do not agree with this. I think that in its context it must include unwritten rules of law as prescribed in section 1(1). Chapter III seeks in some measure to codify those "golden" principles of freedom, generally referred to as the rule of law, which form part of the great heritage of Jamaica and are to be found both in statutes and in great judgments delivered over the centuries. The general rule for interpreting such a code is "to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law" resorting to the previous state of the law only on some special ground, e.g. in cases of doubtful import or where words have by judicial interpretation acquired a special meaning. See Bank of England v. Vagliano (1892) A.C. 107, 144, 145. In my opinion, Section 26(8) modifies this general rule, indicates that the provisions of Chapter III are not intended to alter the existing law, and in terms prohibits the Court from holding that there is any inconsistency between them. For the interpretation of Section 20(8) we must therefore have regard to the existing law, whether statute or common law governing the plea of autrefois acquit and the power of a court to order a new trial.

All earlier decisions as to the principles governing the plea of autrefois acquit must now be read in the light of the authoritative opinions delivered in the House of Lords in Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401, and in particular the opinion of Lord Morris of Borth-y-Gest. The basis of the plea is therein clearly established by reference to the earlier authorities and a long line of cases. It is, as stated in Blackstone's Commentaries (1769, Book 4 at p. 329):

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> "grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence",

or as stated in Broom's Maxims (1848, Second Edition) p. 267:

> "That no man shall be placed in peril of legal penalties more than once upon the same accusation".

Lord Morris undertakes a close examination of the authorities which illustrate what is meant by the "same offence" or the "same accusation", and the tests by which it is to be determined. He accepts the "fundamental principle" laid down in R. v. Vandercomb and Abbott (1796) 2 Leach 708, at p. 720, "as stated by writers earlier than that date" and "consistently followed", and says, at p. 414, 415:

> "It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction".

and later at p. 416:

> "My Lords, the authorities to which I have referred show that the plea of autrefois acquit has availed if the charge contained in a later indictment is one of which a man could have been convicted on the trial of an earlier indictment. It was recognised for example by HALE that an acquittal

of murder involved that there could be no later charge of manslaughter in respect of the same death. (Hale's Pleas of the Crown (1778 Edn.) Vol. 2, at p. 246). It was shown in 1611 in Mackalley's case that on an indictment for murder there could at common law be a conviction for manslaughter. The circumstances are today numerous in which on a trial for one offence there may be a conviction of an offence of less gravity. At common law on an indictment for an offence of a compound nature there might be a conviction of one of the criminal elements of which the offence was composed. There could be such a conviction if the words of the indictment were wide enough, as was said in R. v. Hollingberry (1825), 4 B. & C. 329 at p. 330:

> 'In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law'".

R. v. Barron (1914) 2 K.B. 570 is a modern illustration of the limited application which the Courts have sometimes given to the principle of "autrefois acquit". There were two indictments against the prisoner, one charging sodomy, the other charging gross indecency, in respect of the same boy. The prisoner was tried and convicted on the sodomy charge but his conviction was quashed on appeal on the ground that certain evidence had been wrongfully admitted. On his trial for gross indecency he pleaded autrefois acquit, based on the statutory acquittal entered by the Court of Criminal Appeal. His plea was rejected, and its rejection was upheld by the Court of Criminal Appeal. Lord Reading's classic statement of the principle on which the plea of autrefois acquit is based may well be considered as explanatory of the wording of

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section 20(8) of the Constitution. -

> "... 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 offence 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".

Lord Morris shows that three considerations are involved in the decision in R. v. Barron (supra). He says, at p. 423:

> "Lord Reading pointed out that the test was not whether the facts relied on were the same in the two trials but whether the acquittal on the charge of sodomy necessarily involved an acquittal on the charge of gross indecency. Clearly it did not. Furthermore, it had not been open to the jury at the first trial to convict of gross indecency. Nor were the two offences the "same or substantially the same as each other".

The second consideration is relevant to the instant case.

Lord Morris makes a similar comment in stating his reasons for thinking that the decision in R. v. Miles (1909) 3 C.A.R. 13, was correct. The first indictment was for larceny: the prisoner was acquitted. The second was for being found in a public place with intent to commit a felony, to wit, larceny: his appeal against conviction on the second indictment on the ground of autrefois acquit was dismissed. He says at p. 425:

"The offences were different. On the first indictment there could not have been a conviction for the second offence. On the second indictment the necessary proof did not involve guilt of the first offence".

In 1882 Huddleston, B., in R. v. Gilmore, 15 Cox, C.C. at p. 87, had made the same distinction between these aspects of the plea of autrefois acquit -

"the authorities clearly show that an accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offence which was charged in the second indictment".

In my opinion these authorities justify the view that section 20(8) is declaratory of the common law governing "autrefois acquit" and that that plea, in the words of Lord Morris, "has availed if the charge contained in a later indictment is one of which a man could have been convicted on the trial of an earlier indictment".

Has the appellant been able to show that he was acquitted on the trial of the indictment charging him with murder? Both Small J. and the Supreme Court were of opinion that as the jury were 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). This, in the view of Small J. entitled him to exercise a discretion under section 45(3) of the Jury Law to adjourn the case for trial on the issue of manslaughter. I shall first examine this proposition.

The power of a trial judge to discharge a jury who are unable to agree upon a verdict is derived from the common law (see 4 Blackstone's Commentaries 360; Winsor v. R.

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L.R. 1 Q.B. 289, 390), but has now been made statutory. Section 45(1) authorises the judge, "on being satisfied that there is no reasonable probability that the jury will arrive at a verdict," to discharge them after one hour from their first retirement. By section 45(3) when the jury have been discharged the judge may adjourn the case for trial at the same or a future sitting of the Circuit Court.

Small J. held that -

> "on an indictment for murder if there is a mere acquittal of murder there remains the residual question of manslaughter and if there is to be a general acquittal then the verdict of the jury must be had on the question of manslaughter".

But he also stated:

> "If the prosecution wish to press for a verdict on a manslaughter issue they must specifically prefer an indictment charging manslaughter. It is not the law that an indictment for murder is tantamount to a count for murder and a second count for manslaughter ....."

Thus, Small J. recognised, in my view correctly, that the jury's verdict of not guilty of murder was a good verdict upon the indictment, which had the effect of putting an end to that indictment and preventing it from being again presented for trial. Upon an indictment for murder, it is open to a jury, if they are not satisfied that the evidence establishes the offence of murder but are satisfied that it warrants the conclusion that the killing is unlawful and felonious, to return a verdict of guilty of manslaughter. Murder being a compound offence the jury can only return a verdict of guilty if every element of the offence is proved to their satisfaction. If any element is not so

proved the prisoner is entitled to a verdict of not guilty. It is open to the jury to consider whether the prisoner is guilty of manslaughter, but they are not bound to return a verdict as to this offence. This was laid down in Wroth v. Wiggs Cro. Eliz. 277 and reaffirmed in Penryn v. Corbet Cro. Eliz. 464. In the latter case it is stated that the verdict in Wroth v. Wiggs "was good by the advice of all the justices of both Benches", yet there the jury had found the prisoner not guilty of murder and refused to enquire of the manslaughter "although the evidence was pregnant". That this is a power, of a permissive nature, and not a duty, appears never to have been doubted, and has been recognised in decisions based upon statutes which authorise the jury to convict of a different offence from that charged in the indictment. See for example, R. v. Annie Tonks (1915) 11 C.A.R. 284 per Lord Reading, L.C.J. at p. 286, R. v. Thomas (1949) 33 C.A.R. 200, per Humphreys J. at p. 213, R. v. Shipton (1957) 1 All E.R. 206. In the last mentioned case on an indictment charging manslaughter alone the jury found the prisoner not guilty of manslaughter but were unable to agree on an alternative verdict of dangerous driving which they might have given pursuant to section 34 of the Road Traffic Act, 1934. The trial judge made an order directing a retrial before Quarter Sessions on the issue of dangerous driving. On an application for leave to move for mandamus directing the Recorder to try the issue the decision turned on the question of the jurisdiction of quarter sessions. But Lord Goddard, referring to section 34 said that it was entirely permissive; the position was the same as in the case of a charge of wounding with intent, on which it is open to a jury to return a verdict of malicious wounding.

He said:

> "If a jury find a man not guilty of the offence charged in the indictment and

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do not go on to say 'but we find him guilty of malicious wounding', there is an end of the matter".

Lord Goddard evidently meant that that was an end of the indictment for wounding with intent, for he expressly reserved his opinion as to whether Shipton would be able to plead autrefois acquit to a new indictment charging him with dangerous driving.

In my opinion, section 45(1) of the Jury Law does not apply to a case where the jury has reached and returned a good verdict on the offence actually charged in the count. It applies only to the inability of the jury to arrive at a verdict where by law they are bound and can be compelled to return one and can therefore be kept together until they do so. In the instant case the jury were not bound to return a verdict as to manslaughter. They were bound to return a verdict as to murder and having done so they stated that there was no likelihood of their reaching agreement as to manslaughter. That, in my view, brought the trial of the indictment to an end since their verdict on the murder charge was legally effective to dispose of the indictment. The trial judge then had no discretion to detain them, and it was therefore not within his competence to make an order under section 45 of the Jury Law.

In my judgment the order adjourning the case for trial on the issue of manslaughter was ultra vires and invalid.

This is the ratio decidendi of R. v. Sealy (1950) 10 T'dad L.R. 61 in which Gomes J., interpreting a similar section of the Jury Ordinance of that Island, held that a trial judge had no power to order a new trial on the issue of manslaughter in similar circumstances, and that the Supreme Court had no power to entertain a trial founded upon such an order.

I shall now consider the question whether the jury's verdict was an acquittal

within the meaning of section 20(8) of the Constitution so as to entitle the appellant to a declaration that he cannot be tried again for the offence of manslaughter in respect of the same death.

The Supreme Court, following and adopting the reasoning of the Court of Criminal Appeal for New South Wales in R. v. Quinn (1952) 53 State Reps. (N.S.W.) 21, held that it was not a "general" acquittal at common law and therefore not an acquittal within section 20(8). They approved the statement of Owen J. at p. 23 of that report, that -

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

They held that the appellant on his trial "was not in peril of conviction for manslaughter, because there was no verdict on the issue of manslaughter, and there was no general acquittal".

The decision in Quinn's case is based upon an inference drawn from the doctrine of divisibility of averments that "an indictment operates so as to charge the accused, not only with the major charge specified in it, but with any lesser offence for which on such charge he becomes liable to conviction", (per Herron J. at p. 27), and upon the further conclusion that where on such an indictment the jury acquit of the major charge they must go on to return a verdict of guilty or not guilty of the minor offence: if the jury are discharged from so doing, then there is no verdict upon the minor offence which can be pleaded in bar on a subsequent trial for that offence - there is no res judicata: it is only where the jury has returned verdicts of not guilty as to both murder and manslaughter that there

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is a general acquittal upon which to found a plea of autrefois acquit.

The judgment of the Supreme Court proceeded upon similar reasoning.

I am unable to agree with these conclusions. The doctrine of divisible averments is thus stated in the Encyclopaedia of the Laws of England, vol. 4., p. 676:

> "Where an indictment contains in the same count a number of averments, some of which can, and the other cannot, be proved, the question arises whether the averments are divisible or essential. Where the averments proved are sufficient to constitute a felony or misdemeanour, and the averments not proved, coupled with those proved, would constitute another felony or misdemeanour of the same kind but a more serious character, the averment not proved is held divisible from the rest, and a verdict and judgment on the rest of the averments is valid".

See also Earl Jowitt's Dictionary of English Law:-

> "Divisible averments. Where an indictment contains in the one count a number of distinct averments, of which some can and others cannot be proved, the averments which cannot be proved are said to be divisible if the averments which can be proved constitute a felony or misdemeanour of a character less serious than the felony or misdemeanour which would be constituted if all the averments were proved. Thus, on an indictment for murder, the jury may find that all the averments except that as to malice aforethought are true; such a finding is a verdict of manslaughter; and the averment as to malice aforethought is therefore a divisible averment."

In my opinion the question of divisibility of averments on a charge for a compound offence only arises when the jury are satisfied that the averments necessary to establish the minor offence have been proved, although the additional averments have not, when they may, if they will, treat those additional averments as divisible and convict of the minor offence. Where they do this the result is, in practice, the same as if the two offences had been separately charged. The condition of the exercise of this power is, at common law, their unanimous agreement, or by statute (section 44 of the Jury Law) the agreement of nine of their members. If all, or nine of them, as the case may be, are not so satisfied then the divisibility of averments is irrelevant and it is improper to say that two or more offences have been charged. Where in such circumstances they return a verdict of not guilty of the offence charged this is a verdict as to the whole offence and not merely as to an averment.

While authorities from the earliest times establish that a jury have the power - permissive, not compellable - to return a verdict of guilty of a lesser offence on a charge of a compound offence, it does not appear that the common law ever required a jury to state expressly whether, in acquitting a prisoner of the compound offence they also acquitted him of any minor offence. The decisions in Wroth v. Wiggs (supra) and R. v. Penryn (supra) show that if the jury do not voluntarily go on to convict of a minor offence that is the end of the trial and their verdict of "not guilty" of the compound offence is a good verdict. This is a general verdict of acquittal, as contrasted with a partial verdict where they convict of a minor offence. The decision in Wroth v. Wiggs (supra) is, in my view, incompatible with the proposition that a charge of a compound offence is in law also a charge of each minor offence contained within it and in respect of which the jury can be required to return

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a verdict of "guilty" or "not guilty".

Connelly's case (supra) has established beyond doubt that an acquittal of an offence actually charged in an indictment is a valid plea in bar on the trial of any other offence for which the accused could lawfully have been convicted on his trial for the first offence. This legal consequence appears to follow whether or not the jury has in fact had under consideration the possibility of convicting for the alternative offence. Thus, an acquittal on a charge of murder will bar a subsequent indictment for attempt to murder, although on the trial for murder where such a direction would have been appropriate the jury may not have been directed that by statute it was open to them to convict of an attempt. Such an acquittal, it seems to me, would also bar a subsequent indictment for manslaughter though the trial judge had through an error of law withdrawn from the jury consideration of a verdict of manslaughter. It seems also clear from Connelly's case and earlier cases (e.g. R. v. Barron) that where the Court of Criminal Appeal has quashed a conviction for murder on the ground of a misdirection and entered judgment of acquittal, this statutory acquittal is a bar to a subsequent indictment for manslaughter, and this seems to be so even though the appellate court has expressed no view as to the facts or no different view from that implied in the jury's verdict. Had it been open to the jury to convict of robbery on the indictment for murder the decision in Connelly's case would have been different.

These considerations lead me to the 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. Upon a charge of murder the prisoner is in peril of convictions for manslaughter, the moment of peril being

the moment when the jury deliver their verdict. If they acquit him of murder and do not go on to convict him of manslaughter he has been delivered and cannot again be put in peril of conviction for that offence. The fact that the jury were divided as to manslaughter does not in my opinion affect the application of this rule.

The fact that the jury expressly stated their disagreement as to manslaughter may be important if the appellant were subsequently charged with, say, malicious wounding, and pleaded autrefois acquit. For then the appellant would be unable to show that the offences were the same, or that on his trial for murder he could have been convicted of malicious wounding, nor could he pray in aid issue estoppel for he would be unable to show that the question of unlawful killing (involving the fact of malicious wounding) had been decided in his favour. This is the kind of undecided issue that I think Lord Hodson had in mind when he said, in Connelly's case, at p. 432:

> "After all, the cases, although they may not all be consistent and may be difficult to justify on the basis of autrefois acquit or autrefois convict, seem to me to cling at least to the central principle that a second trial is permissible on a charge other than that dealt with at the first trial, arising out of the same facts and involving an issue not disposed of at the first trial:
>
> See R. v. Kendrick and Smith (1931) All E.R. 851 for a recent illustration of the principle".

And as Lord Devlin pointed out, at p. 436:

> "The difference between issue estoppel

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Judgment 11th June 1965 (b) Lewis, J.A. (Continued)

and the autrefois principle is that while the latter prevents the prosecution from impugning the validity of the verdict as a whole, the former prevents it from raising again any of the separate issues of fact which the jury have decided, or are presumed to have decided, in reaching their verdict in the accused favour".

The rule so clearly re-affirmed in Connelly's case had already been made statutory for Jamaica by section 20(8) of the Constitution. If the judgment of the Supreme Court is right that in order that a person may avail himself of that subsection he must be able to show that on his trial for a compound offence he was actually acquitted of the minor offence subsequently charged, it is difficult to see what meaning is to be given to the words "or for any other criminal offence of which he could have been convicted at the trial for that offence". For if in law the count for the compound offence charges two offences and the jury has acquitted of both, there is no need to depend upon those words for protection: ex hypothesi he has been tried for the minor offence, has been acquitted and shall not "again be tried for that offence": he pleads his acquittal of the minor offence for which he has been tried and not his acquittal of the compound offence upon his trial for which he could have been convicted of the minor offence.

The Supreme Court found support for its decision in R. v. Charlesworth (1861) 9 Cox C.C. 44. If the count for murder in law charges two offences, in respect of each of which the jury is bound to deliver a verdict then Charlesworth's case applies. Otherwise I respectfully think that it is inapplicable, for it is concerned with a situation in which the jury has been discharged without having returned any verdict whatever upon the indictment, or a verdict which disposes of the indictment.

The respondent also relied upon R. v. Salvi (1851) 10 Cox C.C. 481n, and the dictum of Pollock C.J. (at p. 483n) therein:

> "The acquittal of the whole offence is not an acquittal of every part of it, it is only an acquittal of the whole".

In that case the accused was indicted for murder. He had previously, before the death of his victim, been acquitted of wounding with intent to murder the same person. It was held that his plea of autrefois acquit could not succeed. The question of res judicata was involved. The decision may be supported on two grounds: (1) Murder does not necessarily involve an intention to murder; (2) the fact of the death occurred subsequently to his acquittal and in such circumstances autrefois acquit cannot be pleaded to a charge of murder or manslaughter. See R. v. Morris (1867) L.R. 1 C.C.R. 90; R. v. Thomas (1949) 2 All E.R. 662.

For the reasons I have already stated Pollock C.J's dictum would be relevant if the present appellant were subsequently charged with malicious wounding, but in my view it has no relevance on a subsequent charge of manslaughter.

During the course of the argument, reference was made to section 44(2) of the Jury Law. This sub-section authorises a 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 alters the common law, but I do not think it in any way affects the question raised in this appeal. I will say no more about it than that it seems to be intended to confer a benefit upon an accused person and not to deprive him of his rights at common law.

For these reasons I agree with the order proposed.

/sgd/ A.M. Lewis
Judge of Appeal.

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Judgment 11th June 1965 (c) Henriques J.A.

Henriques, J.A.:

I have had an opportunity of reading the judgments that have just been delivered. I agree with them and with the proposed order. There is nothing further that I can usefully add.

/sgd/ C.G.X. Henriques
Judge of Appeal

No. 7

Order Granting Final Leave to Appeal to Her Majesty in Council 1st November 1965.

NO. 7

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 of 1963

ORDER ON APPLICATION FOR FINAL LEAVE TO APPEAL

B E T W E E N:

PATRICK NASRALLA

Respondent

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

The 1st of November, 1965.

Upon this Application by the Applicant for Final Leave to appeal from the Judgment of the Court of Appeal dated the 11th day of June 1965 to Her Majesty in Council coming on for hearing this day before the Honourable Mr. Justice Duffus President and the Honourable Mr. Justice Henriques and the Honourable Mr. Justice Moody and after hearing Mr. E.H. Watkins

of Counsel on behalf of the Applicant, the Respondent not being represented by Counsel, and upon referring to the Affidavit of Mr. L.A. Gayle Crown Solicitor in support of this application

IT IS HEREBY Ordered as follows:

Final Leave granted to appeal to Her Majesty in Council.

By the Court

/sgd/ R.A. Sinclair
Deputy Registrar

Filed by the Crown Solicitor, Crown Solicitor's Office, Public Buildings East, Kingston, Solicitor for and on behalf of the above-named Applicant whose address for service is that of his said Solicitor.

In the Court of Appeal

No. 7

Order Granting Final Leave to Appeal to Her Majesty in Council 1st November 1965. (Continued)

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

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