Hilary Term
[2024] UKPC 6
Privy Council Appeal No 0049 of 2022

JUDGMENT

(1) Shawn Campbell (2) Adidja Palmer (3) Kahira Jones and (4) Andre St John (Appellants) *v* The King (Respondent) No 2 (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Reed
Lord Lloyd-Jones
Lord Briggs
Lord Burrows
Lady Simler

JUDGMENT GIVEN ON
14 March 2024

Heard on 14 and 15 February 2024

1st Appellant
Julian Malins KC
Bert Samuels
Thalia Maragh
Linda Hudson
Bianca Samuels
Isat Buchanan
(Instructed by Simons Muirhead & Burton LLP)

2nd Appellant
David Hislop KC
Isat Buchanan
Alessandra LaBeach
(Instructed by Simons Muirhead & Burton LLP)

3rd and 4th Appellants
Hugh Southey KC
John Clarke
James Robottom
Anirudh Mathur
(Instructed by Simons Muirhead & Burton LLP)

Respondent
Peter Knox KC
Paula Llewellyn KC
Jeremy Taylor KC
Rory Turnbull
(Instructed by Charles Russell Speechlys LLP (London))

LORD LLOYD-JONES:

1. On 13 March 2014, after a trial lasting 64 days before Campbell J and a jury in the Home Circuit Court, the appellants, Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John were convicted by a majority of 10:1 of the murder of Clive "Lizard" Williams ("the deceased"). A fifth defendant, Shane Williams, was acquitted. On 3 April 2014 the judge sentenced the appellants to imprisonment for life with hard labour, specifying minimum terms before becoming eligible for parole of 25 years (Campbell and Jones), 30 years (St John) and 35 years (Palmer).

2. The prosecution case was that the deceased and Lamar Chow had been given two unlicensed firearms belonging to Palmer for safekeeping. It alleged that Palmer gave Chow and the deceased a deadline of 8.00 pm on 14 August 2011 to return them, with which they failed to comply. It alleged that, as a consequence, Chow and the deceased were summoned by Campbell to Palmer's house at Swallowfield Avenue, Havendale ("the Swallowfield premises"). They went there by taxi on 16 August 2011 accompanied by Campbell and, on arrival, were met by Palmer, Jones and St John. Palmer asked what plans Chow and the deceased had for replacing the firearms, to which the deceased replied that he would replace them. They were then both attacked after which Chow saw the deceased lying motionless on the ground, with Jones bending over him. Chow escaped but the deceased was never seen again and calls to his mobile phone went unanswered.

3. On 22 August 2011 a team of police officers went to Palmer's house to investigate an alleged homicide. They noticed that the house smelled of disinfectant. On 24 August 2011 Chow provided a witness statement to the police. A police team accompanied him to Havendale, where he pointed out Palmer's house. Chow was the sole eyewitness relied on by the prosecution. On 25 August 2011 the police cordoned off the perimeter wall of the Swallowfield premises, treating the premises as a crime scene. When they returned on 27 August 2011 they found that the entire interior of the house had been destroyed by fire. On 29 August 2011 a police forensics team conducted an investigation. They reported a foul odour emanating from the living room of the house. On a further police visit on 30 September 2011 it was discovered that the rear of the house had been demolished. The police dug at the premises but did not find a body.

4. The appellants were arrested on 30 September 2011.

5. The police seized mobile phones from Palmer, St John and Williams which were delivered to the Communications Forensics and Cybercrimes Unit (CFCU) of the Jamaica Constabulary Force. The evidence derived from the mobile phones included text messages, Blackberry messages, voice notes and a video. A Blackberry Torch phone taken from Palmer and its cards were put in evidence at trial as Exhibit 14C.

Among the text messages from other phones were those between the deceased and his girlfriend, Ms Jackson, on 16 August 2011.

6. At trial, a CD Rom with telecommunications data ("JS2") was put in evidence by the prosecution. This had been brought into existence in this way. By notice, issued purportedly under section 16(2) of the Interception of Communications Act ("ICA"), Corporal Shawn Brown of the Jamaica Constabulary Force asked Digicel, a communications provider, to provide the communication data of various persons. Mr Joseph Simmonds, a Digicel employee, then extracted the relevant data from Digicel's computer and downloaded it to onto two CDs marked JS1 (the master copy) and JS2 (the working copy) which he delivered to Corporal Brown. JS1 and JS2 were said to be identical. Only JS2 was available at trial, JS1 having been lost after it had been delivered to one of the prosecutors in the case who had died before the trial took place. Corporal Brown said that he used the data from JS2 to create a spreadsheet attributing names and aliases to the various persons sending and receiving communications.

7. The prosecution case was that the correspondence and communication media, taken as a whole with Chow's evidence, proved the fact of the killing, the reason for the killing, the method of disposal of the deceased's body and the identity of at least one of the killers, namely Palmer.

8. The appellants' counsel maintained that the request to Digicel and Digicel's provision to the police of the data in JS2 was in breach of the ICA because Corporal Brown was not authorised to request or receive the data and because the police failed to issue a notice to Digicel in the correct form. They submitted, inter alia, that the data on JS2 was inadmissible on the ground that it had been obtained in breach of the fundamental right to the protection of privacy of communications guaranteed by the Charter of Fundamental Rights and Freedoms (enacted by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (No 12 of 2011) ("the Charter") contained in the Jamaican Constitution.

9. Following a voir dire, the judge ruled that the data in JS2 was admissible in evidence even if it had been obtained in breach of the Charter or statute. He also ruled that the other telecommunications data relied on by the prosecution, including Exhibit 14C, was admissible.

10. The case for the defendants was that they denied murdering the deceased. None of the defendants gave evidence but each gave an unsworn statement from the dock.

(1) Palmer said he was not at the Swallowfield premises at the material time.

(2) Campbell accepted that he had driven ahead of Chow and the deceased in another car on 16 August, but said that the deceased had got out before getting to the Swallowfield premises. Chow had gone to the house but he had left him there. When Chow came to see him later that night, the only incident he mentioned was that Palmer had received a dog bite and had to be taken to hospital.

(3) Jones said that he had known Palmer for years as he was his next door neighbour. The police and Chow were telling lies.

(4) St John said that just as Chow entered the Swallowfield premises he left it to go to his barber shop. However, he saw Palmer being bitten by a dog as he tried to protect Chow, so he took the dog and tied it to the back of the house when Palmer and the others were not in the yard.

11. Following their convictions on 13 March 2014, the defendants appealed to the Court of Appeal with leave granted by the single judge on 15 March 2017. Of the grounds of appeal advanced before the Court of Appeal only the following are material on this further appeal to the Judicial Committee of the Privy Council.

(1) The trial judge erred in admitting the copy CD Rom JS2 into evidence because it had been obtained in breach of the ICA and the Constitution.

(2) The trial judge failed properly to enquire into allegations of juror misconduct.

(3) The trial judge departed from standard practice in inviting the jury to retire to consider their verdict so late in the day, putting undue pressure on them to reach a verdict.

12. The appeal was heard by Morrison P, Brooks JA and Williams JA on 9, 16-20, 23 and 24 July 2018. On 3 April 2020 the Court of Appeal dismissed the appeals against conviction. On 17 April 2020 the Court of Appeal allowed the appeals against sentence to the extent of taking account of time spent in custody awaiting trial. The period of imprisonment to be served by each appellant before becoming eligible for parole was reduced by two years and six months.

13. On 25 September 2020 the Court of Appeal (Brooks JA, McDonald Bishop JA and Straw JA) granted the appellants conditional leave to appeal to the Judicial Committee of the Privy Council. On 7 March 2022 the Court of Appeal (Edwards JA,

David Fraser JA and Georgina Fraser JA (Ag)) granted final leave to appeal to the Judicial Committee of the Privy Council on three issues.

14. On 20 November 2020 all four appellants applied to the Judicial Committee of the Privy Council for permission to appeal on three further grounds. On 12 November 2021 Palmer filed a further application for permission to appeal on further grounds. On 15 February 2023 the Board dismissed these applications.

15. The appeal was heard by the Privy Council on 14 and 15 February 2024.

Jury issues

16. It is convenient to address first the issues relating to the jury. On behalf of the appellants it is alleged that the judge failed to investigate sufficiently allegations of juror misconduct which should have led to the discharge of the jury. It is further alleged that the jury should not have been invited to retire to consider its verdict so late in the day on 13 March 2014, with the result that the jury may have felt under pressure to arrive at a verdict. These issues will be considered in turn.

Juror misconduct

The first jury incident

17. On 7 January 2014 the judge received a report of an encounter between a member of the jury and one of the counsel appearing for the defence. The judge carried out an inquiry, but it was not recorded in the transcript. After discussion with counsel the judge recalled the jury and informed them that he had received a report of a member of the jury meeting a member of the defence team and that an inquiry had taken place. He reminded the jury of the vital importance that they conduct themselves as judges. The judge said that, having spoken with the juror and the counsel involved in the presence of counsel, he was firmly of the view that what transpired was an innocent interaction, occurring out of inadvertence, and that it was most unlikely to affect the members of the jury in the performance of their duty. He instructed the jury to use their best efforts to avoid interacting with anyone. The trial then resumed. No objection to this course was made by the prosecution or the defendants.

18. Nothing turns on this first jury incident for present purposes. The appellants do not rely on it in support of their appeals.

The second jury incident

19. On 6 February 2014, by which time the trial had been running for almost eight weeks, a member of the jury (to whom we will refer as "Juror 11") made a report to the registrar who, in turn, reported it to the judge. The judge invited counsel to join him in chambers. The meeting was recorded. The defendants were not present. Juror 11 told the judge that after the trial had begun she had visited her son who was detained in custody at Horizon Adult Correctional Centre. While she was waiting in the lobby for her son's arrival, the defendant Andre St John came into the area. He had seen her with her son. He appeared to be surprised to see her. When she spoke to her son on a subsequent occasion, he told her that the defendant Palmer mentioned to him that St John had told him that he had seen his mother but that Palmer had not told the other defendants about it. On hearing this, Juror 11 had become concerned for her son's safety. She gave as the reason for her fear the fact that the defendants now knew that her son was at Horizon Adult Correctional Centre and that he and Mr St John were housed on the same block. Juror 11 became distressed when giving her account and she was not questioned further.

20. After some discussion, the judge indicated, with the apparent agreement of all counsel present, that he would discharge Juror 11. Counsel then raised with the judge whether the other members of the jury were aware of what had happened. The registrar stated that Juror 11 and the forewoman had spoken to him. He had enquired if anybody else was aware of the situation and he had been told that they were not.

21. The judge then invited the forewoman of the jury, to whom Juror 11 had also spoken, to attend the meeting in chambers. The forewoman gave an account of how Juror 11 had spoken to her. The forewoman explained that the other members of the jury were not aware of what Juror 11 had said. She assured the judge that she felt able to continue with her duties as a juror, although she intended to say something to the other jurors "to soothe everybody's mind". The judge suggested that the forewoman might want to tell the other jurors, so far as Juror 11 was concerned, something along the lines that "the court feels that her personal situation will not allow her to continue and you don't know what was said to us". On the resumption of the trial in open court, the judge discharged Juror 11, explaining that she had a "personal difficulty which will cause her not to be able to serve on the panel further."

22. It was not suggested by Juror 11 that any threat was made by any of the defendants. Rather, Juror 11 was in fear for her son, in the event that the defendants were convicted.

23. Mr Hugh Southey KC, on behalf of the appellants, makes a number of criticisms of the judge's handling of this situation. In the Board's view the criticisms lack substance.

24. First, the judge was correct to deal with the matter in chambers in the presence of counsel but in the absence of the defendants. Two of the defendants were implicated in what was said to have occurred. (See, so far as practice in England and Wales is concerned, *Practice Direction (Crown Court: Jury Irregularities)* [2013] 1 WLR 486, para 7.) The defendants were represented by their counsel who were able to make submissions to the judge. The fact that counsel were not invited to make submissions before the questioning of Juror 11 is of little if any significance. There were no objections from counsel to the course decided upon by the judge. The hearing in chambers finished at 2.50 pm. The hearing in court resumed at 3.16 pm. There was ample time for counsel to inform clients of what had occurred.

25. Secondly, it is said on behalf of the appellants that the judge should have questioned Juror 11 more extensively so as to become aware of the full extent of the matters alleged and to ascertain whether other members of the jury were aware of what was alleged. So far as the first matter is concerned, the Board agrees that the judge might have gone further in his questioning. However, Juror 11 had become distressed. The judge had heard sufficient to identify the problem and could assess at first hand the state of mind of Juror 11 and whether she could continue to serve on the jury. So far as the second matter is concerned, the judge had the assurance of the forewoman and the registrar that the other members of the jury were not aware of what had occurred. The judge has a very wide discretion as to how to deal fairly with the situation (*Taylor (Bonnett) v The Queen* [2013] 1 WLR 1144 per Lord Hope at para 23). Here, his failure to make further inquiry did not lead to any miscarriage of justice.

26. The judge was correct to discharge Juror 11. The event did not require and would not have justified the discharge of the entire jury.

27. It seems that the judge approved of the forewoman's suggestion that she should reassure the jury. In the Board's view this delegation was inappropriate. It was the responsibility of the judge to direct the jury in relation to what had occurred. However, he told the forewoman that she might tell the other jurors something to the effect that the court felt that Juror 11's personal situation would not allow her to continue but that she did not know what had been said. Furthermore, the judge did then explain to the jury in open court that one of the jurors was unable to continue for personal reasons. In all the circumstances, the Board is satisfied that this did not give rise to any prejudice to the defendants.

The third jury incident

28. The third jury incident was brought to the trial judge's attention on 13 March 2014, the last day of his summing up. The judge convened a hearing in chambers which was attended by counsel for the prosecution, including Miss Paula Llewellyn QC, the Director of Public Prosecutions, and counsel for the defendants. The defendants were not present. The judge told counsel that it had been brought to his attention that a member of the jury had attempted to bribe other members of the jury; as the judge expressed it, he had attempted to "persuade another member of the jury by offering a $500,000 to do a particular thing … to go which way … I don't know what it is, but whatever way". The juror who had made these offers, to whom we will refer as Juror X, was said to be the same juror who had the encounter with defence counsel which gave rise to the first jury incident.

29. The forewoman was invited into the judge's chambers. She was questioned at length by the judge as to the circumstances in which the offers were made. The forewoman had recorded an exchange between herself and Juror X. The recording was played in chambers but was of poor sound quality. On the forewoman's account to the judge, although the direct contact with her was made on 13 March when a bribe was offered, contact had been made by Juror X "over a period of time with other jurors and they confessed it to me". She had been told by another juror that he wanted to talk to her and that is how she knew to record the conversation on 13 March. She said that she had been suspicious of Juror X from the outset of the trial and had been watching him. Over time he had started going to jurors and telling them what "we need to do". She would ask if he was listening to the evidence and he would say, "No - wi jus need to leggo di man dem". When asked by the DPP how many jurors Juror X had spoken with, the forewoman answered, "Eleven of us. He spoke to nine persons first."

30. Once the forewoman had retired, the judge asked rhetorically, "Can we possibly continue or we have to bring it to an end? That is the decision I have to make." He clearly had in mind that, one juror having already been discharged, section 31 of the Jury Act prohibited the trial from continuing with only ten jurors.

31. After a ten minute break, during which the prosecution and defence teams conferred separately, Miss Llewellyn indicated that the prosecution was prepared to proceed, but suggested that the judge should "[j]ust warn [the jury] again about their oath". The judge replied, "Because this is how I reason it. If it were not so, a person could always taint the trial". However, the members of the defence teams who spoke at this point expressed serious reservations about proceeding under these circumstances. After hearing counsel for the prosecution and the defence the judge indicated that he would be "handing the case to the jury this evening". Counsel for Jones then expressed concern that the jurors, being aware of the alleged attempt at bribery, might overcompensate against that threat by ensuring that a guilty verdict was returned. The judge replied that he was "going to be proceeding to finality this afternoon".

32. The trial judge resumed his summing up at 3.22 pm and concluded at 3.42 pm when the jury retired to consider its verdict. At the resumption of the summing up he immediately directed the jury as follows:

> "Madam Foreman and your members, may I remind you that when we started this case, I told you, you must keep before you the oath or the affirmation that you took that you are going to hear the case, try the case, based on the evidence that you hear within this Court. You must remind yourselves of that oath, that affirmation that you took. That is your function; that is why you are here; that's why you have been here right throughout this trial."

33. The jury returned at 5.35 pm when the forewoman informed the court that they had not reached a unanimous verdict and were divided 10:1. The judge told the jury that the time at which he could accept a majority verdict had not yet arrived and he sent them out to resume their deliberations. At 6.08, they returned and by a majority of 10:1 they convicted all four appellants of murder. It appears that no majority direction had been given. They acquitted Shane Williams by a unanimous verdict.

34. Juror X was immediately arrested in the precincts of the court. He was prosecuted for attempting to pervert the course of justice and convicted on 24 March 2015.

35. The Board notes that there was no evidence to connect any of the defendants with the activities of Juror X.

36. The Board also notes that if, as the forewoman claimed, Juror X had attempted to bribe all eleven other members of the jury, this must have begun prior to the discharge of Juror 11 on 6 February 2014. It follows that the attempts to bribe jurors had been going on for well over a month before they were drawn to the judge's attention on the last day of the summing up.

37. It also appears from the forewoman's account that, instead of reporting this to the judge as soon as it came to her attention, she had set about investigating the matter herself, involving other jurors in her investigations. This had persisted for some time until each juror had been contacted. The forewoman had discussed this with the other members of the jury and had told them not to be swayed. This was unfortunate. It was the duty of the forewoman to draw these matters to the attention of the judge as soon as she became aware of them so that he could take the necessary steps to protect the integrity of the trial.

38. Once the matter was drawn to the attention of the judge, he was required to focus his attention on whether a fair trial remained achievable. To this end, it was necessary for him to investigate what had occurred and to establish the relevant facts as best he could. It was necessary to establish the extent to which the contamination had spread. Once the facts had been established, the judge would be in a better position to exercise his powers in order to secure that the trial remained fair.

39. Contrary to the submission on behalf of the appellants, in the Board's view the judge is not to be criticised for dealing with this matter in chambers in the presence of counsel, as opposed to hearing it in open court in the presence of the defendants. Given that it was possible that one or more of the defendants might be implicated in the alleged misconduct, it would not be appropriate to conduct the investigation in open court. (See, so far as practice in England and Wales is concerned, *Practice Direction (Crown Court: Jury Irregularities)*, para 7.) The defendants' counsel were present during the investigation and were able to make submissions and did object to the course ultimately followed by the judge. There was ample time, between the completion of the chambers hearing and the resumption of the summing up, for them to report to their clients.

40. The judge should, however, have done more to investigate what had occurred. He needed to establish as best he could how wide the contamination had spread and over what period. Only then could he decide what, if any, remedial action was required or possible. He should have interviewed each juror individually – with the exception of Juror X – as opposed to relying on the account of the forewoman. Had he done so he would have been better placed to assess the situation and to decide which course to take. In this regard the Board draws attention to the views expressed by the Court of Appeal (at para 238). The Court of Appeal stated that the judge had before him enough information on which to base his discretion to continue with the trial with warnings or directions to the jury, as he ultimately did. The Court of Appeal then stated:

> "There was nothing that could have been gained (at best a denial by the accused juror), and a great deal that would have been lost (the possibility of having to discharge the jury), by questioning the accused juror. We can see no basis to interfere with the exercise of that discretion."

The Board agrees that it would not have been appropriate for the judge to question Juror X. In any event, had he done so, he would have had to give a warning against self-incrimination. However, he should not have simply relied on the forewoman's account but should have questioned the other jurors in order to establish the accuracy of the forewoman's account and the extent of the contamination. That the questioning of the other jurors might have disclosed further information which would have necessitated the

discharge of the jury would not be a good reason for failing to pursue these necessary enquiries.

41. What did emerge from the forewoman's account, however, was the allegation that offers of bribes had been made by one juror to all of the other jurors over a period of some weeks. The judge was placed in an unenviable position. This had come to light only on the sixty fourth and final day of a long and complex trial. He had already lost one juror. He could not discharge Juror X and continue with ten jurors because section 31 of the Jury Act provided that a murder trial could not proceed with fewer than eleven jurors. He had either to continue with those eleven jurors or to discharge the jury. He decided to continue with the eleven jurors and to give them a further direction as to their function in the trial.

42. While the Board has considerable sympathy with the judge's dilemma, it considers that the course followed by the judge was a material irregularity in the course of the trial giving rise to a miscarriage of justice within section 14(1) of the Judicature (Appellate Jurisdiction) Act.

43. First, the direction to the jury was inadequate to save the situation. Judges faced with allegations of juror misconduct have a wide discretion as to how to proceed once they have attempted to establish the basic facts of what has occurred. In many circumstances it will clearly not be necessary to discharge the jury. It may, for example, be appropriate simply to give the members of the jury a direction fashioned to meet the events which have occurred and to remind them very firmly of their duty to act impartially. In other circumstances, it may be appropriate to isolate an offending juror from the other members of the jury and, following a full investigation into what has occurred, to discharge the offending juror and to continue with the remaining jurors after an appropriate direction. In such cases, the judge would have to be satisfied that the remaining jurors could be relied upon to return verdicts in accordance with their oaths or affirmations. Furthermore, the direction to the jury would have to be clear, apposite and emphatic and sufficient to neutralise the possibility of any prejudice which may have arisen. (See, generally, *Taylor (Bonnet) v The Queen* at paras 23-25.)

44. In the present case the direction given by the judge (set out at para 32 above) was not sufficient to rectify the situation. The judge simply reminded the jury that they had sworn or affirmed that they would return verdicts in accordance with the evidence they had heard in court. That was the repetition of a direction which the jury had received at several points during the trial. There was nothing to relate it to the particular mischief which was alleged to have arisen – the tainting of the proceedings by the apparent offering of bribes – of which, if the allegations were true, the jurors were already aware. In any event, a direction, however focussed and firm, could not rectify the damage to the integrity of the trial which had been caused here.

45. Secondly, the trial continued with the allegedly corrupt juror, Juror X, serving as one of its eleven members. It is not clear whether he had been segregated from the other members of the jury while the judge undertook his investigation, as he should have been, but he was obviously with the other members of the jury as the judge completed his summing up and as the jury deliberated and returned its verdicts. In the Board's view, there should have been no question of allowing Juror X to continue to serve on the jury. There was a need to isolate the other members of the jury from the source of contamination. In the Board's view, allowing Juror X to continue to serve on the jury is fatal to the safety of the convictions which followed. This was an infringement of the defendants' fundamental right to a fair hearing by an independent and impartial court in accordance with section 16 of Chapter III of the Jamaican Constitution.

46. In other circumstances, it might have been possible simply to discharge a miscreant juror and to allow the remaining members of the jury to return verdicts where the judge could be confident that they would do so in accordance with their oaths or affirmations. However, that was not possible here. First, the requirement to discharge Juror X led inevitably to the discharge of the jury because the trial could not continue with a jury of ten members. Secondly, the judge had not examined the jurors other than the forewoman and was not, therefore, in a position to form an informed view as to whether they could still return impartial verdicts. Thirdly, as explained below, in any event the contamination had spread too far.

47. In this regard, it is necessary to say something about a submission made by Mr Peter Knox KC on behalf of the Crown. Mr Knox submitted that, since Juror X could be expected to argue for and to vote for the acquittal of the defendants, it was the prosecution and not the defendants who were likely to be prejudiced as a result of allowing the miscreant juror to continue to serve. However, the prosecution had approved of the course which the judge followed. At the hearing in chambers, the Director of Public Prosecutions had expressly agreed that that course should be adopted. In those circumstances, Mr Knox submitted, the prosecution may be regarded as having waived the irregularity and the judge was entitled to allow the trial to continue. The Board is unable to accept this submission. Even on its own terms, it fails to take account of the wider implications of the mischief which had arisen, which are considered below. More fundamentally, however, it fails to appreciate what is at stake here. We are not concerned solely with the rights of the prosecution but also with the right of the defendants to a fair hearing before an independent and impartial court. The fact that the prosecution might be prepared to waive an irregularity does not absolve the court from its responsibility to ensure a fair trial. In order to maintain public confidence in the administration of justice it is necessary to do justice to both prosecution and defence so that the guilty may be convicted and the innocent acquitted.

48. Thirdly, the judge should have considered whether there was a real risk that the surviving jurors, other than Juror X, might as a result of the approach and whether consciously or unconsciously have become prejudiced for or against one or more of the

defendants. This formulation is taken from the judgment of Bingham LJ in *R v Putnam* (1991) 93 Cr App R 281. There, three defendants had been convicted of fraudulent trading after a long trial during which one juror had been discharged on grounds of ill health. During the trial a second juror had been assaulted twice and on the second occasion he was admitted to hospital. This matter was reported to the trial judge who discharged that juror and, after conferring with counsel, arranged police protection for the rest of the jury. The judge warned the jury not to hold any of the then defendants responsible for the assaults. After the trial had ended, the authorities were alerted to the fact that another juror, W, had been improperly approached and the Attorney General authorised a police investigation. W said that she had been approached by a juror in waiting, M, who had offered her £100 a week to sway the jury to bring in not guilty verdicts. W had replied that she was not interested but the next day W found that M had placed £100 in her pocket. W was frightened but returned the £100 to M the next day. When M was questioned she denied offering W money. Eight other jurors were questioned. None admitted any similar approach but two of those questioned declined to make any statement at all. During the trial, the judge and counsel were unaware of the attempted bribe. The Criminal Division of the Court of Appeal ("CACD") allowed the appeals against conviction. It considered that there was a real danger that the appellants might have been prejudiced.

49. Bingham LJ delivering the judgment of the court stated that, for the purposes of the appeal, the court felt bound to accept that W's account may be true but need not be the whole truth. He identified the options available to the judge, had the approach been duly reported to him when it occurred, as follows:

(a) The judge might have discharged the whole jury and ordered a retrial; or

(b) He might have discharged W and allowed the trial to continue; or

(c) He might have allowed W to continue as a member of the jury and the trial to continue.

In deciding how he should exercise his discretion, the judge's concern should have been to ensure that there was no real danger that the position of any defendant might be prejudiced (*R v Sawyer* (1980) 71 Cr App R 283, 285; *R v Spencer* [1987] AC 128).

50. In considering the options available to the judge, Bingham LJ observed (at p 286):

> "It seems very unlikely that he would have thought it right to follow course (c), given that W had shown herself so inalert to

> her duty as to have left this criminal and highly improper approach unrevealed for so long. The judge would not, we think, have felt able to eliminate the real risk that W might as a result of the approach and whether consciously or unconsciously have become prejudiced for or against one or some defendants. No doubt the judge would have been guided in the exercise of his discretion by what his investigation revealed. Had he felt able to adopt course (b), he would no doubt have given the jury a very emphatic direction."

51. The appellants in *Putnam* submitted that they were entitled to a fair trial by an untainted jury and that in the circumstances they did not receive it. Allowing the appeal, Bingham LJ observed (at pp 286-287):

> "We cannot know whether M's approach swayed W for or against the appellants nor whether the bare majority which convicted the appellants Putnam and Lyons would have existed without it. We should not make our own, necessarily superficial, assessment of the merits. A jury tampered with, as (we assume) this one was, is liable to give an uncertain sound. The high regard in which juries are held depends on their collective integrity and on the individual integrity of their members. If a source of poison is identified in time it may be (and often is) possible for the poison to be isolated and neutralised. But we cannot view without grave unease verdicts reached by a jury when we know that there was a source of poison which (because its presence was unknown) could not be isolated and neutralised, when we do not know how far the poison may have spread and when we do not know what effect it may have had. There is in our judgment a real danger that the appellants may have been prejudiced and we cannot regard the verdicts as other than unsafe and unsatisfactory. It was not suggested that we should apply the proviso to section 2(1) of the Criminal Appeal Act 1968, and this would in our view be plainly inappropriate. We accordingly feel bound to allow these appeals and quash the appellants' convictions."

52. Two points emerge with great clarity from this judgment. The first is that an improper approach to a juror may influence that juror for or against a defendant. In the present case, on the forewoman's account which was the only account before the judge, an improper approach had been made to ten members of the jury by the eleventh, Juror X. In the circumstances of this case, there was a danger that the attempted bribe might operate, consciously or unconsciously on the mind of the other jurors so that they would overcompensate, for example by assuming that the offer must have emanated from one

or more of the defendants and that they must therefore be guilty. The judge took no account of this risk of overcompensation by jurors who had been offered bribes. Similarly, the Court of Appeal, while recognising (at para 234) the existence of a risk that "the jurors, being aware of the attempt at bribery, might have overcompensated against that threat by ensuring that a guilty verdict was returned, regardless of the evidence", failed to address it. In the Board's view, there was here a real danger that jurors may have been influenced, consciously or unconsciously, against the defendants by the knowledge that someone was willing to bribe jurors to secure the defendants' acquittal.

53. The other matter emerging from the judgment of Bingham LJ in *Putnam* is that the efficacy and fairness of trial by jury depend upon the collective integrity of juries and the individual integrity of their members. In the present case, quite apart from the objectionable continued presence of Juror X as a member of the jury, there was a real risk that the contamination emanating from his improper approaches had spread and had influenced the other jurors.

54. In coming to this conclusion, the Board is mindful of the very serious consequences which may flow from having to discharge a jury shortly before the end of a long and complex criminal trial. It is also very conscious of the danger of deliberate attempts to derail criminal trials, in particular in their closing stages, by engineering situations in which it becomes necessary to discharge the jury. In England and Wales legislation now provides that, in certain circumstances it is permitted to discharge a jury because of jury tampering and to continue the trial without a jury but by judge alone (section 46(3) of the Criminal Justice Act 2003). However, in the absence of such a provision - and there is no such provision in Jamaica - there will be occasions on which, as in the present case, a court will have no alternative but to discharge a jury and end the trial in order to protect the integrity of the system of trial by jury.

55. On behalf of the Crown, Mr Knox submits that, if the Board concludes that a serious irregularity has occurred in the course of the trial, this would nevertheless be an appropriate case in which to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act and to dismiss the appeals on the ground that no substantial miscarriage of justice has actually occurred. However, in the light of our conclusion that the verdicts were returned by a jury which was not a fair and impartial tribunal of fact, there is no room here for the application of the proviso.

<u>The jury retirement issue</u>

56. It is convenient to restate the relevant events in a little more detail. The judge's summing up occupied some six days. He finished his summing up at 3.42 pm on 13 March 2014 at which time he sent the jury out to consider their verdicts. The jury

returned at 5.35 pm and the forewoman informed the court that they had not reached a unanimous verdict. After an enquiry, which should not have been made, she stated that they were divided 10-1. Counsel for the prosecution then pointed out that the statutory minimum period of two hours after which the court could accept a majority verdict had not yet expired. The judge then simply told the jury that the time at which he could accept a majority verdict had not yet arrived and sent them out to resume their deliberations. At 6.08 pm the jury returned and by a majority of 10-1 they convicted all four appellants of murder. The fifth defendant, Shane Williams, was acquitted by a unanimous verdict. It appears that no direction as to the circumstances in which the court could accept a majority verdict was ever given.

57. Section 47 of the Jury Act gives a circuit court the power to permit a jury "to separate and go at large" until the point at which they retire to consider their verdicts. The implication is that once they have retired to consider their verdict they cannot separate until they have completed their deliberations and returned verdicts or have been discharged from doing so. The Board was informed during the hearing of the appeal that no provision is made in Jamaica for a jury, once retired, to be sent to a hotel overnight and to resume its deliberations the next day.

58. On behalf of the appellants, it is submitted that what occurred placed unacceptable pressure on the jury and that there was a real possibility that as a result the jury failed to consider the evidence with the attention it required.

59. In the light of the conclusion that the appeals against conviction must be allowed on the ground of juror misconduct, the Board does not propose to address this ground in any detail. We would emphasise that a jury must be permitted to deliberate and to return its verdicts free from any pressure. This is admirably expressed in the Supreme Court of Judicature of Jamaica Criminal Bench Book (2017) which states at section 25-2, para 5:

> "The jury should not be placed under any pressure to arrive at a verdict. It is for that reason that the summation should not be concluded close to the end of the court day; the jurors should not have any anxiety, for example, about getting home etc, affecting their deliberations. For that reason a 3.00 pm benchmark has been adopted. Only in the simplest of cases would it be not unreasonable to send the jury to deliberate after that time. But the time is not an inflexible one. In more complex cases, it may well be unreasonable to conclude the summation during the afternoon session. In such cases, it is best to delay concluding the summation until early the following day in order to give the jury adequate time to consider all the issues before it."

60. It does appear that there was an unfortunate departure from best practice on this occasion. However, we note that the Court of Appeal took the view that this departure was justified in the unusual circumstances of this case. In the view of the Court of Appeal the allegations against Juror X required the earliest deliberation and this justified the late retirement. The Board would usually defer to the view of the Court of Appeal on an issue where its superior understanding of local practice and conditions is relevant. However, in the light of the Board's conclusion on the jury misconduct issue, it is not necessary to express a concluded view on this ground of appeal.

Evidence obtained in breach of the Charter

61. On behalf of the appellants, it is submitted that their convictions were obtained in breach of the Charter. It is said that the means by which the evidence contained in Exhibit JS2 was obtained did not meet the requirements of the ICA and that that evidence was therefore inadmissible because it was obtained in breach of the fundamental right to the protection of privacy and of other communication guaranteed by section 13(3)(j)(iii) of the Charter.

62. On this appeal the Board has been presented with elaborate submissions both orally and in writing as to the correct approach to constitutional issues surrounding the admissibility of illegally obtained evidence. The Board has been invited to lay down new principles and extensive reference has been made to comparative jurisprudence in a number of jurisdictions. It is unfortunate that these submissions were not canvassed before the Jamaican courts in the proceedings below. Rather, before the Court of Appeal these issues were argued and decided on the basis of conventional Privy Council jurisprudence from which we are now invited to depart. As a result, the Board does not have the benefit of the views of the Jamaican courts on these important matters. In circumstances where the convictions are to be quashed on other grounds, the Board takes the view that consideration of these constitutional issues should be deferred to another occasion on which the Board may be assisted by the views of the Jamaican judiciary.

Retrial

63. Section 14(2) of the Judicature (Appellate Jurisdiction) Act permits a retrial where a conviction is quashed if that is in the interests of justice. The Board proposes to follow in this case its usual practice of remitting to the local courts the question whether a retrial should be ordered.

Conclusion

64. For the reasons set out above, the Board will humbly advise His Majesty that the appellants' convictions should be quashed and that the question whether there should be a retrial should be remitted to the Court of Appeal of Jamaica.