JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 220/01

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON J.A. (Ag.)

REGINA

v

ORVILLE FITZGERALD

Earl DeLisser for the Appellant.

Anthony Armstrong Crown Counsel for the Crown.

April 26, and July 30, 2004

HARRISON J.A. (Ag.)

The appellant, Orville Fitzgerald, was tried in the Home Circuit Court presided over by the Honourable Miss Justice Beckford, sitting with a jury. He was convicted of the offence of murder and sentenced to imprisonment for life on the 21st day of September 2001. It was further ordered that the appellant should serve a period of twenty (20) years before he becomes eligible for parole.

On the 26th April 2004, we granted leave to appeal in this matter and treated the hearing of the application as the hearing of the appeal which we allowed. The conviction of non-capital murder was quashed and the sentence set

aside. However, in the interests of justice, we ordered that there be a new trial to take place at the earliest opportunity. We promised at that time to reduce our reasons into writing at a later date. This is now a fulfillment of that promise.

The facts on the Crown's case are that on the 5th day of December 1999, at about 1:00 a:m, Lawrence Smith was in a house at 82A Waltham Park Road, Kingston, when he saw the appellant and Dean Salmon on those premises. Salmon called him, so, he left his room and went to where both men were standing. Salmon then pointed a gun at Smith and ordered him to open a septic pit that was on the premises. Smith complied and thereafter returned to his room.

Smith further testified that he stood in a passage and saw when the appellant pointed a gun at Marlon Brown ("the deceased") who was asleep on a cart in a cabinet shop and he heard an explosion. He heard a second explosion and at this stage the deceased left the cabinet shop and came into the yard. The deceased returned to the cabinet shop and Smith said he heard both the appellant and Salmon talking. He noticed that the appellant had the gun in his hand and Salmon was armed with a ratchet knife. The appellant then held the deceased in his pants waist, pulled him towards the uncovered pit and Salmon used the knife to stab him twice. They tried to push the deceased into the pit and when he resisted, Salmon used the knife to stab him in his throat. Salmon went for a shovel and he used it to hit the deceased on his head and on his fingers. Eventually, they pushed the deceased into the pit and Smith was ordered

by Salmon to assist him in replacing the concrete slab cover for the pit. Smith also washed away blood that was in a basin.

On the 17th December 1999, the police visited the murder scene and removed the decomposed body of the deceased from the pit. Lawrence Smith, had by this time left Kingston and went to reside in the Parish of Westmoreland. He was eventually located and questioned by the police. After further investigations both Salmon and the Appellant were subsequently arrested and charged jointly with the offence of murder. At the trial, Salmon pleaded guilty to murder and was sentenced. Smith was charged and convicted of being an accessory after the fact of murder.

A postmortem examination was performed by Dr. Ere Seshaiah on the body of Marlon Brown on the 17th December 1999, at 82A Waltham Park Road. The deceased was identified to the Doctor by Alberta Robinson and Aaron Bolton and in his opinion, death was due to a stab wound to the neck.

The appellant gave evidence at the trial. He testified that he did not know Dean Salmon and Lawrence Smith. His defence is one of an alibi and he stated that at the time of the incident, he was living with his girlfriend at Castle Street, St. Ann. She gave evidence on his behalf. He also called Dean Salmon as a witness. Salmon testified that it was he, who killed Marlon Brown and that Lawrence Smith, had assisted him.

Mr. DeLisser sought and obtained leave to argue a supplemental ground of appeal on behalf of the appellant. He argued that the learned trial judge

failed to direct the jury that Lawrence Smith was an accomplice and was in fact convicted at being an accessory after the fact of murder and as such the necessary warning on corroboration should have been given to the jury. We do not agree with this submission and are of the opinion, that the witness was one who had an interest to serve. He was the person who had removed the cover for the pit. He had rendered assistance to the appellant and Salmon had also washed away blood that was in a basin. In those circumstances, the learned trial judge ought to have warned the jury that they should examine his evidence with caution. The learned trial judge having failed to direct the jury on the need for caution was in error and this would have been fatal to the conviction. See **R v Beck** [1982] 1 All E.R. 807, **Tillet (Dean) v R** (1999) 55 W.I.R. 104, **R v Porter** [1960] 1 All E.R. 298.

We are also of the opinion that another material irregularity had occurred in the course of the trial. It arose in this way. The jury was recalled into Court by the learned trial judge after they had retired for approximately three hours. Page 262 of the transcript reveals the following dialogue:

"Registrar:	Madam Foreman, please stand.
	Madam Foreman and members of the jury have you arrived at a verdict?
Foreman:	No
Registrar:	Is your verdict unanimous?
Her Ladyship:	She didn't answer yet.

Registrar: She did, she said no.

Her Ladyship: Alright, are you having a difficulty with the law – in relation to the law?

Foreman: No, I am not.

Her Ladyship: Is there any possibility that you will come to a consensus that you will arrive at a verdict?

Foreman: Yes, there is a possibility.

Her Ladyship: How long do you think it will take you to make this possibility a reality? You have been out there for three hours, normally I would send for you in an hour, so how much longer you think you will need to make this possibility a reality?

Foreman: Could we have one hour more?

Her Ladyship: One hour!

Foreman: Half an hour?

Her Ladyship: Very well who took them out? Alright, just take them back, half an hour and no more. Please go with the police officers. The oath that you took remains the same."(emphasis supplied)

The jury retired again at 2:00 p:m and returned to the courtroom at 2:15 p:m when the verdict was taken. They arrived at a unanimous decision and the appellant was found guilty of murder.

Now, the facts of the instant case are not too dissimilar to those in **De Four v. The State** (P.C.) (1999) 1 WLR 1731. In that case after three hours of deliberations, the jury was recalled and the trial judge asked the foreman if they would be able to reach a verdict if given more time. The foreman said that they would, so, the judge gave them an additional 30 minutes. Within 20 minutes, the jury returned a guilty verdict. The Court of Appeal of Trinidad and Tobago dismissed the applicant's appeal but he obtained special leave to appeal to the Judicial Committee of the Privy Council on the ground, inter alia, that the jury had been put under pressure to reach a verdict. The Board held that a time limit of 30 minutes was a material irregularity which could have led some jurors to agree to a verdict which they would not have subscribed to if more time had been allowed to them; and accordingly, the conviction was unsafe and could not stand. Sir Patrick Russell who delivered the judgment of the court stated:

> "It is a cardinal rule of criminal procedure that a trial judge must avoid any hint of pressure on a jury to reach a verdict: **Reg v. Watson** [1988] Q.B. 690, 700B . . ."

In **R. v. McKenna** [1960] 1 All ER 326, a case cited in argument in **Watson,** (supra) the earlier English Court of Criminal Appeal held:

> "It is a cardinal principle of English criminal law that a jury in considering their verdict shall deliberate in complete freedom, uninfluenced by any promise, un-intimidated by any threat: they still stand between the Crown and the subject, and they are still one of the main defences of personal liberty."

At the beginning of the McKenna trial on a Monday, the judge told the jury that the court could not sit after 1 p.m. on the following Wednesday. The trial proceeded and the court sat until 5 p.m. on Monday and until 6.30 p.m. on Tuesday. The jury retired at 12.20 p.m. on Wednesday. At 2.38 p.m. the judge recalled the jury and told them that if they had not reached a conclusion in ten minutes they would be kept all night and the case would be resumed on the next day. The jury retired and returned six minutes later with verdicts of guilty against all accused. Cassells, J., in delivering the judgment of the Court said at page 330F:

> "... it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement."

In **R. v. Michael (David)** (1975) 27 W.I.R. 307, the jury was given an additional 30 minutes to reach a verdict. Phillips J.A, considered that the course taken by the learned trial judge appeared to be unprecedented and the conviction was quashed. In **R. v Tommy Walker** S.C.C.A. 105/00 (unreported) delivered 20th December, 2001, the learned trial judge in his final charge to the jury said:

> "Mr. Foreman and members of the jury, it is getting late in the evening but it does not exclude you from giving due consideration to the charge which this man faces, which is murder. I hope that you all can agree. So when we say knock heads together, I don't mean literally, right. You exchange ideas and where there are different views you talk about them and look at the evidence and see whether one can win over the

> others to that side and in due course arrive at a verdict. You try to come back before midnight, you see."

The Court in **Walker's** case (supra) held that the learned trial judge had administered pressure on the jury to arrive at a verdict. The conviction was quashed and a new trial ordered.

We have bourne in mind the relevant authorities and are satisfied that the procedure adopted by the learned trial judge in the instant case was incorrect and could have deprived the appellant of a fair trial. In our view, the time limit of thirty minutes set by the learned trial judge amounted to nothing short of administering pressure on the jury to arrive at a verdict. This approach by the learned trial judge cannot be described as fair or just to the appellant. For the aforementioned reasons, we quashed the conviction and ordered a new trial.