The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 15 & 16 of 2014

Between:

JAHKEO LESHORE & DARRION SIMONS

Appellants

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Richard Horseman, Wakefield Quin, for the 1st Appellant
Mrs. Simone Smith-Bean, Smith Bean & Co., for the 2nd Appellant
Mr. Carrington Mahoney and Ms. Takiyah Burgess Simpson, Department of Public Prosecutions, for the Respondent

Date of Hearing: **7, 8, & 9 November 2016**

Date of Judgment: **25 November 2016**

JUDGMENT

Jury – long retirement late into evening – whether undue pressure – analysis of CCTV footage – when admissible

PRESIDENT

1. On 17 April 2011 around 10:15pm David Clarke, the deceased, was shot in the head soon after he left the Mid-Atlantic Boat Club. He died soon afterwards in King Edward VII Memorial Hospital. On 11 September 2014 after a lengthy trial the two appellants, Jahkeo Leshore and Darrion Simons, were convicted of his premeditated murder and using a firearm to commit an indictable offence. They

were later sentenced to life imprisonment for the murder, in each case with a minimum period of 25 years before consideration for parole and 10 years concurrent for the firearms offence. They appeal against conviction on a number of grounds.

2. The Crown's case was that there was a gang related background and motive for the killing. The appellants were both members of the 42nd gang. The deceased was not a member of a gang but his brother D'Angelo Clarke was a member of the Parkside gang. There was an ongoing feud between the two gangs and on 1 March 2011 Leshore's brother, Jahmiko Leshore, who was also a member of the 42nd gang had been shot dead. There was evidence that the murder of David Clarke was in retaliation for this.

3. On the evening of 17 April 2011 the deceased attended the Mid-Atlantic Boat Club. So too did the appellants who were associating with a number of other members of the 42nd gang including Damiko Dublin and Christopher Parris. The deceased left on his motorcycle at 10:14pm. At the same time Dublin can be seen on the CCTV footage making a call on his cell phone. Minutes later two motorcycles were seen close together on North Shore Road. The rider of the cycle on the left tried to push away the cycle on the right with his right hand. There were then three shots and the rider of the cycle on the left fell to the ground while the other cycle sped off. There were witnesses. Undray Lightbourne recognised the deceased. Neither appellant was identified by any eye witness.

4. Denyelle Dublin-Swan lived at 122 North Shore Road. She heard gunshots and looked out and later saw two people scale the boundary wall between No. 2 and No. 4 Mission Lane. One wore a yellow mustard type long sleeved t-shirt and the other a similar red mustard coloured t-shirt. Both wore helmets and disappeared towards 3 Crane Lane where Simons lived.

5. Police officers arrived at the scene at 10:23pm. They later found a set of keys that appeared to have been dropped near the boundary wall that Ms. Dublin-Swan

had seen the two individuals getting over. The keys tested positive for Simons' DNA. They also fitted the front and kitchen doors of his residence.

6. In the early hours of the following morning, 18 April 2011, a black Honda Scoopy motorcycle BS 459 was found hidden behind a white truck in the front yard of 17 Crane Lane. The occupants of the property knew nothing about it and it had not been there at 9:00pm the previous evening. The motorcycle was registered to Rodney Grimes, a member of the 42nd gang who was disqualified from driving. He left it parked behind the prefabs in St. Monica's Mission for use by any 42nd gang who wanted to use it. DNA matching that of Leshore was found on the handlebar grips and there was evidence that he had previously ridden the bike.

7. Leshore was arrested on 27 April 2011. His cell phone was seized and examined. It contained the following messages from him to his girlfriend on 23 March 2011:

> "8.51.17 Jus want somebody dead
> 8.51.20 Seriously
> 8.51.52 I know you prolly don't want me get in all this but I'm sorry Keishaye
> 8.53.35 Only thing that's gonna make me feel a lil better is by me killing one or two of them personally."

Then on 8 April 2011, just over a week before the murder the following message on his phone:

> "We got put dog on his family member so he feel the pain 2 >:>=)"

"Dog" in gang culture means gun. The telephone analyst called by the Crown thought that the characters following the "pain 2" could possibly represent a smiley face.

8. The Crown's case was that this material on Leshore's phone, the most recent being not long before the murder, showed a clear motive for him to kill the deceased.

9. Leshore and Simons are seen on CCTV footage at about 9:05pm leaving through the main entrance of the Mid-Atlantic Boat Club. A few minutes later Simons is seen to return to the bar and speak to Damiko Dublin but returns to the car park at 9:12pm. Neither Leshore nor Simons is seen in the bar again that evening, the inference being that they are lying in wait for the deceased to leave.

10. Within minutes of the shooting the cell phones of the 42nd gang members including Parris and Dublin activate and this is followed by hugging, dancing and hand movements depicting shooting, apparently in celebration.

11. Leshore was arrested on 27 April 2011 and Simons on 6 May 2011. Both were bailed and made no comment interviews. They were charged with the premeditated murder of David Clarke on 27 December 2012.

12. In summary, the Crown's case was that this was a gang retaliation killing by two members of the 42nd gang and that the deceased was the brother of a Parkside member. The messages on Leshore's phone described clearly the motive and his DNA was found on the handlebars of the motorcycle. The pillion passenger who fired the shots was identified as Simons by his keys that were dropped as they made their escape climbing over a wall. Shortly before the shooting both appellants had been at the Mid-Atlantic Boat Club with other members of the 42nd gang.

13. Before I turn to the grounds of appeal it is necessary to deal briefly with application to adduce fresh evidence. Leshore sought to adduce an affidavit from Ryan Gaglio, a court clerk to whom one of the jurors spoke after the verdict complaining about the quality of the food. Such evidence provides no basis for concluding the verdict was not safe. Furthermore there is real doubt whether the witness was referring to the present case as certain facts in his affidavit were apparently incorrect. Next there was an affidavit from Troy Woods who said that in November 2015 when travelling from Westgate Correctional Facility to Court Mr. Hewey told him that he and one of his boys, not the appellants, killed the

deceased. This evidence is hearsay and plainly inadmissible. Mr. Mahoney for the Crown told the Court that Hewey and his co-defendant Dill had used a similar strategy in their murder trial and tried to blame Simons.

14. Simons sought to adduce an affidavit from Antanisha Davis sworn on 19 October 2016. In it she sought to clarify various matter in her witness statement on 1 March 2013 which had been read to the jury. It transpired that certain passages in her statement had been edited out before the statement was read to the jury. Most of her points were related to those passages and in the result her affidavit takes the case no further. It is also to be observed that she signed each page of her statement as true and correct and had the opportunity to make any corrections had she so wished. Simons also invited the Court to admit in evidence a printout dated 28 September 2016 purporting to show a booking of a flight from Bermuda to New York on 14 October 2011 with the return on 25 October 2011. There was no supporting affidavit and nothing to indicate whether he in fact travelled on either flight. As we understood it the printout was for the purpose of supporting his evidence at the trial relating to the photograph that had been adduced in evidence by the prosecution, showing him in possession of a gun. The printout, if admissible, could have been adduced at the trial. Accordingly both appellants' applications to adduce fresh evidence were refused.

15. Mr. Horseman helpfully set out at the commencement of his submissions those amended grounds of the appeal that he intended to argue as numbers 2, 3, 4, 6, 11 and 14. In the event he directed most of his attention to grounds 11, no case, and 14, undue pressure on the jury. The other grounds were rather subsumed in the submission that the judge should have stopped the case at the close of the prosecution.

No Case to Answer

16. The main thrust of this submission was that far from any witness identifying Leshore and Simons on the bike at the time of the shooting, descriptions of the bike and the persons on it were inconsistent with a Honda Scoopy and the

appellants. Thus the evidence demonstrated that it must have been two others. The cornerstone of Mr. Horseman's submission is the evidence of Iejah Caines. He was sitting on a bench using his phone. He recognised the deceased riding slowly and saw another bike come up from behind heard three shots and saw the bike speed off. There were two on it and it was a Nouvo or a Click. He was unsure of the colour. They had black helmets and visors, one had all black clothing and the other a long sleeved red shirt. The person on the back was higher than the rider. In cross-examination he agreed the bike was not a black Honda Scoopy. Leshore, submitted Mr. Horseman, is plainly taller than Simons.

17. Mr. Mahoney pointed out that Mr. Caines was not the only eye witness and it was important to consider the evidence of all of them. Lisa Murray was approaching Bandroom Lane in her parents' BMW when she saw two bikes weaving. The rider on one flailed his arm to try and get the other away. She heard shots and one bike crashed. She wasn't able to describe the bikes or the riders.

18. Mr. Calderon lived at 4 Mission Lane. He was watching the football on television when he heard shots and went out to investigate. It was very dark. He saw two people on a bike going very fast. It looked like the person on the back was falling off but he didn't. He thought the person on the back had a light jacket which could have been yellow. The bike passed him on Mission Lane but he couldn't see where it went.

19. Undray Lightbourne was a friend of the deceased. He saw the two bikes and heard the three shots. The deceased had a white Nouvo. He thought the other bike was red but it could have been the brake light as it turned up Mission Lane after the shooting.

20. Earlston Caines lives at 2 Mission Lane and is the father of Iejah Caines. He heard three bangs and looked out of the window. He heard a scraping sound of a bike or a stand scraping the road. It was travelling fast and there were two people on it. The passenger gestured the direction it should go and it stayed on Mission

Lane over the hill towards St. Monica's Road. The rider seemed to be wearing a dark jacket and the passenger a more colourful one, but he wasn't certain which one wore the more colourful jacket.

21. The final witness to whom it is necessary to refer in this context is Ms. Dublin-Swan. She lived at 122 North Shore Road. The house directly behind her belonged to the Caines and she could also see the appellant Simons' house, 3 Crane Lane, and the Calderons. She also heard the shots. Not long afterward she was looking out the window and saw two men appear at the level of the Calderon's home and scale down or jump over the wall. They rested their helmets on the wall as they were helping each other down. Her description of them was that one wore a reddish, maroonish long t-shirt type shirt and the other had a mustard yellow top and both had dark bottoms. She shouted out "who's that" but they did not answer. They disappeared in the direction of Simons' house. Although she knew Simons she did not identify either of the two climbing down the wall as Simons. When cross-examined she said she couldn't say it was or wasn't him as she only had them in her view for a few seconds.

22. Craig Belton is an experienced police officer who recovered the CCTV footage at the Boat Club. He identified both Leshore and Simons as at the Boat Club that evening. He says they both appear to have left the Club at about the same time. The Crown's case was that they left half an hour before the deceased on a bike with ample time to change bikes. Mr. Belton identified Simons as wearing a dark outer jacket with a hooded red orange top. The quality of the CCTV footage was not good. The jury was shown it and we were shown some of it during the appeal.

23. The appellants rely strongly on the evidence of Iejah Caines submitting that his evidence positively eliminate both appellants because of (1) the description of the bike and (2) the description of the riders both as to clothing and that the passenger was taller than the rider whereas Simons is shorter than Leshore. Mr. Mahoney's response is that this was a fleeting glance case by all the witnesses. It is true that no one positively identified either appellant but all the evidence was

that the passenger was more colourfully attired then the rider and that fits the CCTV pictures at the Boat Club.

24. On a no case submission the Court has to consider the whole of the evidence then before it and decide whether on the basis of that evidence alone the jury properly directed could convict. The Court must be careful not to usurp the jury's function in acceptance or rejection of individual witness' evidence or part thereof. It seems to me that the fallacy in Mr. Horseman's submission is his assumption that Iejah Caines' evidence is correct that the bike was not a Honda Scoopy and that the rider and passenger could not have been the appellants. The weight to be attached to his evidence was pre-eminently a matter for the jury, particularly as there were inferences to be drawn from other aspects of the evidence that, if correct, demonstrate that Iejah Caines must be mistaken. It is also important that the inference to be drawn from a particular piece or pieces of evidence may be different after the jury has heard from the defendant. For example the keys that were found, apparently freshly dropped, at the point where the two men were seen by Ms. Dublin-Swan scaling the wall had Simons DNA on them and included keys to his house. The plain inference, in the absence of any explanation from Simons, is that he was one of the two who scaled the wall and were trying to make their escape from the scene of the killing. Likewise Leshore's DNA on the Honda Scoopy led to the inference that he had been the rider. The appellants' explanations for these apparently damaging pieces of evidence came only when they themselves gave evidence.

25. In my judgment the judge's ruling appropriately demonstrates that there was a case to go to the jury. She pointed out that the messages on Leshore's phone were an indication of his state of mind at the time and were consistent with 'gang' motive. That the appellants had the opportunity to shoot the deceased was apparent from their presence at the Boat Club and their departure half an hour before the deceased. Then there were the keys, the inference being that Simons dropped them when scaling down the wall. Everyone else, pointed out the judge, was heading towards the shooting whereas the two scaling down the wall were

not. Then there was the Honda Scoopy, freshly abandoned and containing Leshore's DNA and the evidence that he had used the bike before. The judge did give careful attention to Iejah Caines' evidence but noted there were aspects of his evidence that indicated he might not be a reliable witness. She rightly said that his evidence should be left to the jury to sort out. She concluded that both appellants had a case to answer, a conclusion that in my judgment cannot be faulted. One aspect of the evidence, not referred to by the judge, which would appear to support the judge's conclusion is the volume of telephone activity between the phones of Simons, Leshore, Damiko Dublin and another on the morning after the murder.

Craig Belton's Evidence

26. Mr. Horseman submitted that Mr. Belton was not an expert and should not have been allowed to give evidence. Further, there was much debate during the hearing as to what the CCTV, which was admittedly of poor quality, actually showed. The judge heard argument and considered a number of authorities. She concluded (vol 3 p519):

> "The evidence is admissible and its submission, warts and all, will not amount to unfairness to the Defendants.
>
> The commentary of the witness will assist the jury in circumstances where it would be impracticable for them to see all of the relevant footages or to see any particular footage more than once."

27. In my judgment his evidence was correctly admitted. In *A-G's Ref* (No 2 of 2002) [2003] 1 Cr App R 321 Rose LJ summarised at p19 the correct approach to the case of photographic and video image at trial. The present case falls into his third of four categories of case where, subject to the trial judge's discretion to exclude, the evidence is admissible:

> "Where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on comparison between those images and a reasonable

> contemporary photograph of the defendant, provided that the image and the photograph are available to the jury (Clare [1995] 2 Cr App R 333)."

***Turnbull* Direction**

28. Although this ground was not pursued on the appeal, neither was it abandoned. In my judgment a *Turnbull* direction in respect of Mr. Belton's evidence was inappropriate and unnecessary. He was concerned with events at the Boat Club. The appellants did not dispute that they were there. The jury had the CCTV and photographs. What was disputed was the appellants' presence at and participation in the shooting which occurred later. A *Turnbull* direction would have added nothing. See *R v Giga* [2007] Crim LR 571.

The Gun

29. This ground was relied on by both appellants although it was argued by Mrs. Smith-Bean on behalf of Simons whom it more directly affected. The judge admitted evidence of a photograph of Simons holding a gun. This was not the murder weapon and the photograph had been taken six months after the offence. The argument is that the evidence had no probative value and serious prejudicial effect both directly to Simons himself and indirectly to Leshore.

30. The photograph of the gun was one of several photographs downloaded from Simons' phone. The judge said in her ruling:

> "I'm satisfied that the Defendant is in a position to attack, if necessary, the provenance of the pictures, including their date of origin, so no unfair prejudice would arise. And the pictures are relevant to motive, they show -– or to establish membership, association, territory, all of which makes the gang evidence itself relevant.
>
> The picture of the gun is not, in my view, of any higher prejudicial effect than the other photographs. The Defendant can attack the depiction to show that the gun portrayed is not the murder weapon. But in any event the Court has a duty, will be called upon to point out to the jury that the picture is not before the jury to establish it as the murder weapon and would indeed

> have to warn the jury of the impermissible path of reasoning that it is the murder weapon."

31. The judge did indeed direct the jury appropriately during her summation. Mrs. Smith-Bean argued that we should follow the line taken by this Court in *Wolda Gardner* [2014] Crim App No 12 where evidence of possession of a gun was ruled inadmissible. The difference however is that in that case the Court concluded the evidence had no probative value whereas in the present case the photograph, along with other photographs, was probative of Simons' membership of the 42nd gang.

Gang Evidence

32. Although Mrs. Smith-Bean on behalf of Simons initially argued that the evidence that both appellants were members of the 42nd gang should not have been admitted she later withdrew this submission. She was in my judgment right to do so. The evidence in this case went far beyond mere propensity, it was plainly probative and the test in *Myers, Cox and Brangman v R* [2015] UKPC 40 was clearly met.

Michael Jones

33. Mr. Horseman complains that the judge instructed the jury to disregard a suggestion by the defence that Michael Jones might have had a motive to kill the deceased because there had been a recent dispute between Jones and the deceased which related to a female Kenneita Wade, who happened to be close to the scene of the murder and had been in contact with the deceased that evening. Mr. Horseman has a related complaint about the judge's direction in relation to a comment by counsel about Kenneita Wade. This ground of appeal was not pursued with any vigour on the part of Mr. Horseman. The judge was correct to direct the jury as she did. From time to time it is necessary for a judge to warn the jury to stick to the evidence and not to descend into the realms of speculation. She rightly directed the jury with regard to Ms. Wade: "Her evidence is what it is."

Lack of Evidence to Support the Verdict

34. Mrs. Smith-Bean's final ground of appeal, other than the ground relating to the jury deliberations, with which I shall deal with at the end of this judgment, is that the verdict is unsafe because it is based on circumstantial and prejudicial evidence that cannot support the conviction.

35. Both appellants gave evidence and the jury had the opportunity of assessing their credibility. Having given evidence, the evidence of each appellant was part of the evidence in the case relating to the other. Each denies he was a member of the 42nd gang, despite overwhelming evidence to the contrary. Simons says he went to the Boat Club but he had gone home and was laying on his bed when he heard the gunshots. His mother told him to stay inside and he only learned the details of the shooting later. He had lost his keys two weeks before the murder but he had two sets. He claimed the gun photograph was taken when he was abroad at a gun range with a cousin. Leshore said he left the Boat Club shortly after arriving to collect Simons as he wanted Simons to put some movies on a USB stick for his daughter. He left the Boat Club before Simons and went to his mother's house. He said he'd never heard anyone refer to a gun as a dog.

36. The jury therefore heard each appellant's account of the night in question and their explanations for aspects of the Crown's case that on the face of it were compelling evidence against them. There was in my judgment ample evidence to support the convictions.

Jury Pressure

37. The trial began on 21 July 2014 but there were several days thereafter on which, for various reasons, the Court did not sit. The summation began on the afternoon of Wednesday, 10 September 2014 and ended the following day at 1:55pm when the jury retired to consider their verdicts. Various matters were ventilated in the absence of the jury. At 2:33pm the jury was called back and several matters corrected. At 2:42pm the jury retired to continue their deliberations. At 6:38pm they sent a note asking to see certain parts of the CCTV footage, which they saw.

The judge raised the question with counsel of a majority direction. It was decided the best course was to give the jury time to consider any implications from looking at the footage before giving a majority direction. At 6:48pm they retired to continue their deliberations.

38. At 7:34pm the judge brought the jury back and gave them a majority direction. Ms. Mulligan, who appeared for the prosecution, then raised the question whether any arrangements had been made to feed the jury as they'd had nothing to eat since 2:00 or 2:30pm. Mr. Mussenden on behalf of Simons expressed concern about this too. Arrangements were duly made. At 8:51pm the judge raised with counsel whether she should give a *Watson* direction. The following exchange took place:

> "The Court: Oh, yes. Well, it's getting late. They have had some refreshment. I made sure of that.
> I'm just wondering now if I should give the *Watson* direction.
>
> What's your feeling? What are your thoughts on it? That's the give and take direction.
>
> Mr. Richardson: Give and take, yeah.
>
> Mr. Mussenden: That probably is about the appropriate thing to do, which will, I believe, assist them. But I think we're prepared to let it go as long as they're prepared to carry on. So, it's been an eight or nine-week trial. To try and squeeze it all into the last six hours, or seven hours, whatever is has been, might be a bit of a push and a stretch, but it might be in the interests of justice to let them stay out a little while longer, until they come to a verdict.
>
> The Court: Without the *Watson*, you're saying.
>
> Mr. Mussenden: At this point probably without, but I'll see what my learned friends have to say.
>
> The Court: All right. Okay.
>
> Mr. Mussenden: But I think that might help.
> The Court: Yes, Mr. Richardson.

> Mr. Richardson: I'm just trying to find the relevant law, my Lady.
>
> The Court: The relevant direction?
>
> Mr. Mussenden: We have it, my Lady, at --"

39. The judge then read out the *Watson* direction and it was agreed that the *Watson* direction should be given. The prosecution pointed out that there had been no indication from the jury that they were having any particular problem. The judge said she would have the jury asked in respect of each count and each defendant to see whether they had reached a verdict and where they had not she would give them a *Watson* direction However, at 8:56pm a note was received from the jury asking for a few minutes.

40. At 9:05pm the judge said:

> "The Court: I understand from the Jury Officer that what they were in fact doing was taking a vote, but they have now taken the vote, so they wanted to know if they were being called in for another direction, so I think at this stage we'll have to have them in."

41. The jury returned at 9:07pm and it was clear they had not reached a majority verdict on any count. The judge gave an impeccable *Watson* direction. The jury retired again at 9:10pm.

42. At 10:02pm the Court resumed in the absence of the jury and there was a discussion as to what should happen next. Mr. Richardson for Leshore suggested that if the jury was forced to continue that night it would be putting pressure on them. However, before any conclusion was reached there was a message that the jury had reached verdicts.

43. At 10:12pm the jury returned verdicts of guilty against each appellant on both counts. In the case of Leshore by a majority of 10 to 2 and in the case of Simons by a majority of 11 to 1.

44. The issue for this Court is whether pressure was placed on the jury to deliver verdicts so that the verdicts were not free and consequently not true verdicts and thus the convictions are unsafe, see *R v McKenna* [1960] 1 QB 411, 418, and 422. In Bermuda, unlike in the United Kingdom, once a jury has retired to consider its verdict the jurors are not permitted to separate until they have reached a verdict (section 532 of the Criminal Code Act 1907). This is entirely understandable in a small island like Bermuda where there is a real risk of pressure being put on individual jurors. Accordingly, in cases where a long retirement is necessary, the only option is to make arrangements for all the jurors to stay in an hotel overnight. This has occasionally been necessary in Bermuda as it has in some Caribbean countries.

45. After a trial lasting for eight or nine weeks with more than one defendant such as the present one there is strong argument for a jury being sent out early in the day and thus having a full day ahead of them for their deliberations. This was not done in the present case and, more importantly, the judge does not appear to have considered what should be done if the jury required more time to reach a verdict within ordinary working hours or a reasonable time thereafter. In the light of s532 of the Code the only course open to the judge was to send the jury to an hotel overnight to resume their deliberations the next morning, Friday, 12 September. Such a course requires advance planning to ensure that, if necessary, an hotel is available that can accommodate all the members of the jury and the jury officers. It is also desirable that the jury should be alerted in advance to the possibility so that they can make any relevant arrangements to be away from home overnight should the need arise. It is most unfortunate that these steps were not taken in the present case with the result that the jury was left to deliberate late into the evening in the hope that, as eventually they did, they would reach verdicts.

46. We were referred to a number of authorities. These must be considered with some caution because the law in England has for many years allowed jurors to separate after they have commenced their deliberations. It is rare nowadays for

them to be sent to an hotel. Rather they can go home and recommence their deliberations the following morning. Nevertheless, the underlying principle remains the same. A jury has to deliver a true verdict or verdicts according to the evidence. If, for whatever reason, there is a perception that they have been put under pressure to deliver their verdict, the verdict cannot be regarded as a true verdict and the conviction must be set aside.

47. *Shoukatallie v R* (Privy Council Appeal No 70 of 1960) was an appeal from the Federal Supreme Court of the West Indies. Lord Denning gave the reasons of the Committee. It was a murder appeal based on the conduct of the judge at the trial. The jury took their places at 8:40am on 2 June 1960. The judge sat at 9:00am and Crown counsel concluded his final speech at 10:00am. The judge summed up from 10:14am until 4:50pm with a break of one hour and ten minutes for lunch. The jury then retired and at 5:30pm were served with some food. At 8:40pm they returned having not reached a verdict. The judge asked the foreman if they needed further directions to which he replied in the negative. He then gave them a further direction in somewhat stronger terms that the currently approved direction in *Watson*. The jury retired again and returned at 10pm for a further direction on a point of law which the judge gave them. They retired once more and returned guilty verdicts at 1:35am on 3 June.

48. Lord Denning said in the course of the Board's reasons:

> "It is everyday practice for a judge thus to exhort a jury to reach a verdict. There is nothing wrong in it, indeed it may be very proper he should do, so long as he does not use phrases which import a measure of coercion such as was held to have been exercised in *Rex v Mills* [1939] 2 KB 90."

At the conclusion of his reasons, Lord Denning said:

> "Their Lordships notice, as did the Federal Supreme Court, the heavy strain on the jury listening and deliberating over so many hours. It was unfortunate and unforeseen: but it is no ground for upsetting the verdict. And, as their Lordships have said, despite the

> strain, the jury came to a verdict that can readily be understood."

This authority illustrates that a long retirement and deliberation without more does not necessarily lead to the conclusion that the jury has been subjected to pressure to deliver its verdict.

49. There are, however, a number of other cases in which it was concluded that in the particular circumstances there was undue pressure. In *R v Duffin* [2003] EWCA Crim 3064 the jury was sent out at 3:45pm on a Friday which was the last day of their scheduled sitting and returned with majority verdicts at 7:31pm. At 6:07pm the jury had been told they had the option of continuing to deliberate that night or returning the next day, Saturday. It was the height of the holiday season. No inquiries were made whether any of the jurors had unavoidable commitments on the Saturday. The Court held that in the circumstances that unfolded the jury had little choice but to continue to a conclusion that evening. *R v Shepherd* [2016] EWCA Crim 1022 raised a similar problem. Lindblom LJ, in allowing the appeal, noted at para 38 that every case that raised the issue of undue pressure on a jury to reach a verdict depended on its own particular facts and circumstances.

50. *R v Mitchell* [2004] EWCA Crim 1665 concerned a court martial. The Board produced its verdict at 8:00pm on Saturday, the sixth day of a case that had been supposed to conclude on the Friday. The hearing took place in Germany and the following Monday was a bank holiday in the United Kingdom and four members of the Board were due to return home to the UK to be with their families over the weekend. Flights were arranged and had to be re-arranged. Neither the Judge Advocate nor anyone else involved in the trial said or did anything which constituted pressure on the Board, but Judge LJ pointed out citing Sir Patrick Russell in *De Four v State* [1999] 1 WLW 1731, "the seeds of pressure may arise without direct judicial intervention at all." He said at para 23:

> "Juries sometimes sit late, although, now that they can go home each evening, with much less frequency than before. As a general rule, verdicts are not

> regarded as unsafe merely because they are produced later, or even very much later than usual. However, when a jury sits late, the trial judge will have personally taken steps to satisfy himself that it is reasonable and fair for the deliberations to continue. The issue therefore is not whether the Board's verdict was produced too late in the day, or after too long a day, but whether, reasonable examination of the events of the day, in their overall context including the length of the sitting, leads to the conclusion that unacceptable pressures were or may have been created."

51. It does not appear that any thought was given, either by the judge or counsel, prior to 10:00pm to what should be done if the jury required more time to consider their verdicts. Should they be allowed to continue deliberating and if so for how long or should arrangements be made to send them to an hotel overnight? Earlier in his judgment in *Mitchell*, at para 21 Judge LJ had cited Watkins LJ in *R v Akano & anor* [1992] Times 3 April:

> "There is no doubt that long retirements, stretching into late evening, by a jury in a single day, should, if possible, be avoided. They used almost to be a common feature at sittings at Quarter Sessions and Assizes, but it has long since been recognised that an overnight rest for a jury in an hotel is preferable to a continuous sitting well into an evening, when a jury, for reasons wholly unconnected with the evidence and the essential issues in the case, tiredness, irritation with one another, anxiety to get home and so forth, will or might reach a verdict which otherwise, with fresh minds, they might not have done. Any suspicion, in difficult cases or those with many defendants or other like cases, that there is a possibility of that happening or is likely to happen, should cause a judge to make provision for a jury to rest for a night before continuing their deliberations. Making provision obviously involves taking a decision to make arrangements for overnight accommodations no later than 5pm…It cannot be right to say, as we seem to be invited to, that a seven and a half hour sitting leads inevitably to an injustice…It is not the length alone of that kind of sitting which is regarded as possibly productive of injustice. It is that part of the sitting going into the late evening which may give cause for concern."

52. It was perhaps fortunate that the jury returned verdicts when they did. Had they said that they were hopelessly divided they would no doubt have been discharged from giving verdicts. If, on the other hand, they required more time the judge would have been faced with the alternatives of either having them deliberate further into the evening and night or sending them to an hotel. Either course would have been open to the complaint of undue pressure on the jury or some jurors. In respect of an hotel, quite apart from the possible difficulties of finding sufficient accommodation in one hotel for all the jurors and the jury officers, it could present real difficulties for individual jurors to be absent from their homes without prior warning.

53. The question we have to consider is whether, in the circumstances that did occur in the present case, the jury's verdicts may have been obtained following undue pressure such that they were not true verdicts. It is argued that the jury had a very long day. The Court sat at 9:49am; there were two short breaks of 25 and 30 minutes and the jury retired at 1:56pm. They had been engaged on the case, subject to those short breaks for some 12 hours when they produced their verdicts. They should have been canvassed, submitted counsel, at the very latest at 9:10pm whether they wished to continue. It is, however, in my judgment significant that at no point prior to 10pm did any counsel suggest to the judge that continuing to deliberate was putting undue pressure on the jury. All were experienced counsel. Further, there was no such suggestion from the jury itself and, shortly before 9:00pm, they asked for more time and Mr. Mussenden said it might be in the interest of justice to let them stay out a little while longer to reach a verdict. Immediately before they retired the judge had directed the foreman (p190 line 18) that his role included conveying any questions *or concerns* to her in writing via the jury officer.

54. This is not a case in which there were other features such as jurors having possible other pressures such as commitments the following day or being pressed to reach a verdict by a particular time. The sole question is whether the length of

their deliberations, late into the evening in the context of having been at Court since early in the day by itself caused undue pressure. Each case depends on its own facts. There was in my judgment compelling circumstantial evidence entitling the jury to come to the verdicts that they did. Furthermore, the jury had the advantage of hearing evidence from each of the appellants. Neither appellant was convicted by the bare majority required by law of 9 to 3. In Leshore's case it was 10 to 2 and in Simons' case 11 to 1. I am satisfied that the verdicts are safe and would dismiss the appeals.

Signed

Baker, P

I agree

Signed

Bell, JA

I agree

Signed

Bernard, JA