BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 2005

BETWEEN:

TERRY SMITH

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Joseph S. Archibald, QC with Mr. Richard Rowe and Ms. Michelle Worrell
Mr. Terrence Williams, Director of Public Prosecutions with Ms. Charmaine Rosan Bunbury for the Crown

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2005: September 19;
November 28

JUDGMENT

[1] BARROW, J.A.: At the conclusion of the hearing we allowed the appeal against the conviction for burglary and ordered a retrial. These are the reasons for decision that we promised to deliver.

The forced entry

[2] Around 11 o'clock one night two masked men lay in wait in the apartment building where the virtual complainant lived. They seized another tenant of the building and instructed him

to knock on the door of the virtual complainant and gain entry into the apartment. After the virtual complainant had admitted the decoy into the apartment the intruders forced their way in. There was a brief skirmish. The virtual complainant repelled the attackers with a .177 calibre gun that he had been holding concealed under a towel. The intruders fled. The virtual complainant reported the matter to the police and the two accused were later charged with attempted robbery and burglary.

[3] The decoy was the prosecution's eyewitness and he identified the appellant who he had known. The eyewitness testified that the intruders had told him that they wanted to recover some "keys" from the virtual complainant. He also testified that the appellant had revealed his face to him. The defences were mistaken identity and alibi. The appellant was unrepresented at the trial.

The jury's expression of their verdict

[4] At the conclusion of the trial, when the jury returned to deliver a verdict the clerk asked the foreman if the jury had agreed upon a verdict in relation to the count of attempted robbery and the foreman answered yes. The clerk asked if they were unanimous in their findings and the answer was yes. In relation to the count of attempted robbery the foreman returned a verdict of not guilty. Then the clerk asked if the jury had agreed upon a verdict on the count of burglary. The foreman answered yes. The clerk asked if they were unanimous. The foreman said yes. The verdict was guilty.

[5] After the verdict was returned the trial judge and the appellant spoke on the matter of the sentencing that the judge indicated that she proposed to do the following day. The exchange between the judge and the appellant covered six pages of transcript and, in my estimation, could not have lasted as long as five minutes. After the judge indicated what she proposed to do the foreman of the jury, which had apparently remained in the jury box during the exchange between the judge and the appellant, intervened to say that they "just realize" that unanimous meant that all jurors had to agree. The sense that one gets of the

foreman's response to the judge's inquiry is that the jury thought that unanimous referred to the verdict of "the most". The exchange went as follows:

> "The Court: "We were unanimous." You know what unanimous means, that all of you have to agree?
>
> The Foreperson: No, that's what we just realise now.
>
> The Court: In the first one or the second one?
>
> The Foreperson: The second one
>
> The Court: When you were asked unanimous –
>
> The Foreperson: We thought once you said the most that was the way it was supposed to go."

The foreman then told the judge that they had been divided 6 to 3 in favour of a guilty verdict.[1] The judge rose and then returned and had the clerk take the verdict on both charges again. The jury returned a unanimous verdict of not guilty of attempted robbery. In relation to the charge of burglary the jury responded that they were not unanimous. In answer to the judge the foreman stated that the jury was divided with six saying guilty and three saying not guilty. The judge said that the court could not accept that verdict and she would have to send in the jury to deliberate for another hour. The jury thereupon retired again.

[6] Before the hour was past the jury returned, apparently summoned by the judge. The judge told them that they did not need to deliberate any further because as they were deliberating she had been "looking up the law as to the correctness of verdict." The judge then proceeded to state as follows:

> "You will well imagine situations like this have hardly happened or never happened where a jury gives a verdict, and when the judge is in the process of sentencing and has discharged the jury, changed and said they did not mean this, they meant something else. So I have looked at our leading books on correcting the verdict which states here that if a jury has heard anything since returning the original verdict that might have affected their earlier thinking, that would preclude any alteration. Meaning here, it is a long paragraph, but I chose the relevant part, meaning that the judge has a discretion in this situation. I have a discretion either

[1] Section XX of the XXXXXX Act permits the jury to return a majority verdict of 8 to 1 or 7 to 2 in favour of conviction or acquittal. A jury is not permitted to return a verdict with a lesser majority. If the jury cannot agree in the permitted proportion the law treats them as not having reached a verdict and the defendant may then be retried by a different jury.

to discharge you and to have a new jury empanelled to hear this case or to do as I think justice demands. And it seems here from what I'm reading that the original verdict you had given, guilty of burglary, whatever wording you heard, whatever you said your foreperson said, unanimous, that you have all agreed. The law says after that if you heard anything that may have affected your earlier thinking, then that will preclude the Court from making any alteration. The mere fact that the sentencing phase went through, you have heard the accused making comments about his plea for leniency and the fact that I was going to impose a custodial sentence will preclude you from changing your original verdict.

So as it stands now, the court will have to accept your verdict, guilty of burglary. Unanimous decision, guilty of burglary. I had already discharged and dispersed you with the hope that I'll be sentencing this accused tomorrow morning, and I will continue to do the same."

When the jury will be allowed to alter their verdict

[7] The law that the judge had been looking up was apparently a passage in Archbold XXX at 4-450 which reads as follows:

> "In R. v. Andrews (P.), 82 Cr.App.R.148, CA, the court said that as a matter of general principle, where the jury seeks to alter a verdict pronounced by the foreman, the judge has a discretion whether to allow the alteration to be made. Important considerations would be: the length of time which had elapsed between the original verdict and the moment the jury expressed their wish to alter it (in Andrews the period was about 10 minutes); the probable reason for the initial mistake; the necessity to ensure that justice was done, not only to the defendant, but also to the prosecution. The fact that the defendant had been discharged from custody was also a factor, but not a fatal factor. If the jury had been discharged and a fortiori if they had been dispersed, it might well be impossible for the judge to allow the alteration to be made: see also ante, para 4-262, 4-447, and see R.v.Maloney [1996] 2 CrAppR.303,CA, ante, para 4-433. Further, if there was any question of the verdict being altered as a result of anything that the jury heard after returning the initial verdict, there could be no question of allowing a fresh verdict to be entered. An unexplained change of verdict after hearing of the defendant's previous convictions was, therefore, quashed in R. v. Bills [1995] 2Cr.App.R.643, CA. See also R.v.Alowi [1995] 5 Archbold News 2, CA (97 08493 W3)."

[8] Although this passage speaks about the alteration of a verdict it is clear from a reading of the case of Paul Andrews[2], from which the statements of principle in that passage are taken, that alteration which will be allowed is the correction of a mistaken expression of a

[2] (1985) 82 Cr. App. R. 148.

verdict rather than the alteration of a true verdict of the jury which the jury subsequently decides it wishes to change. In Andrews the jury had returned a not guilty verdict and while the judge was in the process of dealing with a co-accused who the jury had found guilty on a related charge the jury, which had been present in court for the 10 minutes that elapsed while the co-accused was being dealt with, intervened to communicate to the judge that they had intended to return a verdict of guilty of a lesser charge against the appellant.[3] The judge then sought the verdict of the jury on the lesser charge and they returned a verdict of guilty. It was held to be entirely right in those circumstances for the judge to allow "the verdict to be altered so as to rectify the jury's plain initial mistake and do justice in the case."[4] That case, therefore, supports the proposition that a judge is entitled in proper circumstances to allow a jury to correct a plain mistake in the expression of their decision.

[9] In the instant case the judge clearly accepted that the jury had never reached a unanimous decision and had been divided 6 to 3. This is why she sent them back to deliberate further. What made the judge resile from that course was her misapprehension that even though it was the fact that the jury had not been unanimous, in law she could not permit them to change their verdict. In truth the jury was not seeking to change their verdict; they were seeking to correct the false expression that they had reached a verdict. It was a situation no different in principle from Andrews in that the jury were seeking to correct a plain mistake. The judge had a discretion to allow them to do so and fell into error when she subsequently concluded that she could not permit them to correct the mistake.

[10] The Director of Public Prosecutions relied upon the statement of principle in Andrews that a jury will not be allowed to alter their verdict as a result of anything they heard after returning their initial verdict. He argued that the jury had heard, after their verdict, of the previous conviction of the appellant and may have been prompted by this to wish to change their guilty verdict. This is pure argument and it is illogical because if hearing of a previous conviction would affect a jury it would be to persuade them to change from a not-

[3] It appears that the jury had been expecting to be asked, after they returned a not guilty verdict on one charge, for their verdict on the lesser charge and this was not done; see 82 Cr. App. R. 148 at p. 155
[4] At p. 155.

guilty verdict to a guilty verdict and not the other way around;[5] and it cannot prevail over the specific statement of the jury that they had never agreed on a verdict. The argument is also defeated by the judge's clear acceptance of the jury's statement that they had never gone beyond a 6 to 3 division.

The principle of finality of decision

[11] The Director also opposed the appeal by reliance on the principle that a jury's decision must be treated as final. This principle was very clearly adumbrated in a decision of the Privy Council on an appeal from Trinidad and Tobago in Lalchan Nanan v The State[6] in which a similar situation arose. On a charge of murder the foreman answered that the jury were unanimous on a verdict of guilty. The following day the foreman and one other juror visited the Registrar of the High Court and informed him that when the clerk asked if they had reached a unanimous verdict he thought the clerk meant a majority verdict; and that the jury had been divided 8 to 4 in favour of a conviction. The appellant subsequently alleged that he had been denied his constitutional right to due process of law. The foreman and three other jurors deposed that they were not aware that all 12 jurors had to be agreed on a verdict and that they were divided eight to four.

[12] The Privy Council upheld the decision of the trial judge that the affidavits were inadmissible. It was stated[7] to be a well-established principle that:

> "the court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be. The same principle applies to discussions between jurymen in the jury box itself. If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf he should express his dissent forthwith; if he does not do so there is a presumption that he assented to it. It follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with

[5] See for example **Bills** [1995] 2 Cr. App. R. 643 in which the jury sought to alter their verdict and to substitute for their verdict of guilty of one offence a verdict of guilty of a more serious offence after they had heard of the appellant's previous convictions.
[6] (1986) 83 Cr. App. R. 292
[7] at p. 298

> the verdict resulted from a misapprehension on his part. … Two reasons of policy have been given as underlying the principle. The first is the need to ensure that decisions of juries are final; the second is the need to protect jurymen from inducement or pressure either to reveal what has passed in the juryroom, or to alter their view; …"[8]

[13] There are critical differences between the facts in Lalchan Nanan and the facts in the instant case. Foremost is that after giving the verdict the jury in the instant case remained at all times in the jury box and in court and there was no disconnect between verdict and correction; in contrast, in the Privy Council appeal the jurors had gone home and it was not until the following day that the assertion was made that there had not been unanimity. A second difference is that the correction that the foreman sought to make in the instant case was done in the presence of all the jurors and it is safe to take them as all agreeing to what she said. The correction that the foreman made to the judge was therefore the correction of all the jurors; in Lalchan Nanan there is no indication that the other 8 jurors were ever heard from. A third difference is that there was no question of the judge in the instant case receiving evidence from one or more jurors (in the absence of the others) as to what had taken place; what the foreman stated to the judge, in court, formed part of the court proceedings in exactly the same way as did the original verdict. A fourth difference is that in these circumstances, where there was no contact between any juror and any person other than fellow jurors, there can be no suspicion whatsoever as to the bona fides of the jury.

[14] The Lalchan Nanan case is clearly distinguishable because of the differences mentioned and the decision in that case does nothing to detract from the proposition that it was appropriate, in the particular circumstances of this case, for the judge to have permitted the jury to correct the mistake in returning a guilty verdict against the appellant.

[15] The Director cited a number of other cases in his well-researched skeleton argument including Bills,[9] R v Follen,[10] Maloney,[11] Igwemma v Chief Constable[12] and Russell.[13]

[8] In relation to the second reason it is significant that the Privy Council referred, at p. 296, to the observation of Sir Isaac Hyatali C.J. in the court of appeal that "it was difficult to resist the conclusion that the bona fides of the four jurors herein are open to question".
[9] [1995] 2 Cr. App. R. 443

These were all decisions that turned on their particular facts and merely illustrate the application of the principles discussed in Andrews and Lalchan Nanan. These decisions do not call for individual analysis.

When to interfere with the judge's discretion

[16] The Director ultimately relied on the principle that the judge had a discretion whether or not to accept an altered verdict and that an appellate court ought not to interfere with the exercise of that discretion unless it is shown that the decision was perverse by being unreasonable in the sense used in Wednesbury.[14] As that very decision shows that statement of the law is far too restricted to be accurate. An appellate court will also interfere with the exercise of discretion when a judge has misdirected herself in law.[15] In the instant case by misdirecting herself that the jury could not be permitted to correct the verdict that they had mistakenly returned the judge wrongly exercised her discretion.

[17] It is on that basis that this court was obliged to interfere.

Denys Barrow, SC
Justice of Appeal

[10] [1994] Crim. L.R. 225
[11] [1996] 2 Cr. App. R. 303
[12] [2001] EWCA Civ. 953
[13] [1984] Crim. L.R. 425
[14] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680. The principle in Wednesbury is that a decision is bad which is so unreasonable that no reasonable tribunal could ever have come to it; see p. 683 and p. 685.
[15] **Wednesbury** at p. 682.