IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCC 173/06 (3)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 55 OF THE CRIMNAL JUSTICE (ADMINISTRATION) ACT

REGINA V. KEVIN BRYAN

Mr. Chester Crooks, Crown Counsel

Mrs. Tamika Harris for Accused

March 6, 7, 8, 9 and 30, 2007

SINCLAIR-HAYNES J

The Case

The accused was tried before me on an indictment for the offence of rape. The complainant is a girl under the age of 16. Consequently, besides being directed with regards the offence of rape, there were further directions on carnal abuse of a girl underage. The jury returned approximately one hour after. Upon being asked by the Registrar whether they arrived at a verdict with regards to rape and whether that verdict was unanimous, the foreman responded in the affirmative. The foreman stated that they found the defendant not guilty of rape. She then sat.

Crown Counsel indicated to the Registrar that he needed to enquire what the verdict was with regards to the offence of carnal abuse of a girl under age. The foreman was asked to stand. She was asked whether they had arrived at a verdict as to the offence of carnal abuse. She appeared diffident and responded in a somewhat low tone, "Yes." She stated that the jury had found the accused guilty of carnal abuse. Upon being asked the following question by the Registrar, "And so say all of you." She answered in the affirmative. The jurors were then addressed by me. I thanked them for their service and they were discharged.

Shortly afterwards, whilst I was attending to another matter I was informed that a juror wished to return to the court because the foreman had erred in stating that the accused was guilty of carnal abuse. Eventually, the juror was invited to sit in court but was soon asked to leave as the court was unsure as to whether that was the view of the other members and also the fear of the details of their deliberations being divulged to the court.

The court was subsequently informed that other jurors were on the outside and that they were all of the view that the verdict of guilty was erroneously stated by the foreman. The court then requested that the Registrar, Counsel for both crown and defendant and police should speak to the members of the jury who were outside the courtroom to ascertain whether they were of the opinion that the verdict was erroneous without soliciting any information as to their deliberations. Upon the return of these persons, the court was informed that that was indeed so. However, at that time, the foreman had left the precincts. Instructions were given to assemble all the jurors and have them returned to court. The court completed the matter it was attending to and took

a short adjournment for the foreman to be contacted. The court was reconvened at approximately 2:00 p.m. The foreman attended but one juror was absent.

The jurors present were assembled in the jury box and under oath the foreman declared in their presence that she had mistakenly told the court that the accused was guilty of carnal abuse because they had not arrived at a verdict with respect to carnal abuse. She was supported by the other members of the jury individually.

The question is whether the verdict of guilty of carnal abuse originally entered should stand in light of the subsequent statement by the jury.

It is settled law that except in the case of extraneous influences of the jury, evidence about the deliberations in the jury room may never be admitted.

In the instant case, there is no evidence of extraneous influence. **The question is whether the court in the circumstances is attempting to uncover the deliberations of the jury in the jury room.** In the conjoined appeals of **R v Conner and Another and R v Mirza** [2004] UKHL 2 Lord Hobhouse of Woodborough enunciated as follows at page 53:

> "After verdict and discharge and dispersal of the jury, the jury's role in the case has come to an end and cannot be resurrected. Any matter arising thereafter will be for the Court of Appeal."

Lord Hobhouse recognised and referred with approval to Hume, in his **Commentaries on the Laws of Scotland Respecting Crime** which stated:

> "If a plea of this sort, in impeachment of the substance of a verdict, can at all be listened to, one thing at least seems to be clear, that it can only be in those cases, comparatively but few in number, where the jury re-enter the Court straightway on breaking up their private sitting. For if they disperse, and disclose their verdict (as sometime happens,) then are they exposed to all those temptations, from the

> opinions and commentaries of the world, against which it is the very object of our law to guard, when it orders them to be inclosed; and they may thus be prevailed with to disavow their genuine verdict, on false and affected grounds. Nay, though they conceal even, as they ought to do, the result of their deliberations, yet still they learn the sentiments of others concerning the case and the evidence, and are liable to be influenced, less or more, by what they thus hear passing in the world."

In the instant case the verdict was given and the jury discharged, however, they had not all dispersed. The foreman after waiting had left and returned. One member had left. The majority upon their return agreed that the verdict was an error.

In the Privy Council case of **Lalchan Nanan v The State** (1986) AC 860, the Board refused to admit affidavits of four members of the jury including the foreman that they were not aware of the need for unanimity in their verdict. The Board recognized that the fact that a verdict had been produced in the sight and hearing of all the jury without protest, did not lead to an irrebuttable presumption of assent. They expressed the view that they did not exclude altogether the possibility that other cases might arise in the future where the presumption might be rebutted.

The facts of this case are clearly distinguishable from the facts of the **Lalchan Nanan** case. In the instant case it was shortly after the jury was discharged whilst still in the precincts of the court that the majority indicated that there was an error, whereas in the **Lalchan Nanan** case it was the day after the foreman and another member claimed that there was a misunderstanding. In the circumstances those jurors had dispersed and could have been subject to external influence.

The question therefore is whether this case falls within the ambit of the exception expressed by the board.

In **R v Milward**, (1999) Criminal Appeal Report 61, the day after the verdict was delivered, the foreman wrote to the judge stating that she was mistaken when she told the court that the verdict was unanimous. Chief Justice Lord Bingham of Cornhill said:

> "It would in our judgment set a very dangerous precedent if, save in quite extraordinary circumstances, an apparently unanimous verdict of a jury delivered in open court and not then and there challenged by a juror were to be reopened and subjected to scrutiny."

That case is also distinguishable from the instant. **The question is whether this case falls within the ambit of the extraordinary circumstances contemplated by Lord Bingham.**

It is quite clear from the decision of the majority in the conjoined appeals of **R v Connor and Another** and **R v Mirza** that allegations by jurors cannot be decided simply on the say so of one juror after verdict. Lord Slynn's of Hadley statement is helpful. He said:

> "If a case arose when all jurors agreed that something occurred which in effect meant that the jury abrogated its function e.g. decided on the toss of a coin, the case might be and in my opinion would be different."

Could the present case be considered differently in that the jury inadvertently abrogated its responsibility by its failure to deliberate on the issue of carnal abuse? The facts of this case are also distinguishable from the case of **Connor and Rollock**. In that case it was five days after verdict but before sentence that a member of the jury wrote a letter which criticized the manner in which the deliberations were carried out by the other members of the jury. It is also distinguishable from the case of **R v Mirza** in which there was an allegation by one juror by way of letter which was

received six days after the verdict that the jurors were motivated by racism. The court will not as a general rule investigate or receive evidence about anything said in the course of the jury's deliberation while they are considering their verdict in the retiring room.

The following statement of Lord Hope of Craighead at page 143 is pertinent:

> "A trial which results in a verdict by lot or toss of coin, or was reached by consulting an Ouija board in the jury room, is not a trial at all. If that was what happened, the jurors have no need to be protected as the verdict was not reached by deliberations, i.e. by discussing and debating the issues in the case and arriving at a decision collectively in the light of that discussion. The law would be unduly hampered if the court was to be unable to intervene in such a case and order a new trial, but that is not the situation which is before us in these appeals."

In the instant case there were no deliberations as to whether the accused was guilty of carnal abuse. How then should the court deal with the matter? Carey's JA enunciation in the case of **R v Cecil Nugent** reported at 29 JLR provides guidance. At page 320 he stated:

> "Having regard to the trial judge's doubt, we think that he would have been well advised at least to defer sentence. He has also has the power to arrest judgment on his own motion. See Archbold Criminal Pleading Evidence and Practice 37th edition paragraph 11:
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> "..Even if the prisoner himself omits to make any motion in arrest of judgment, the court, if on a review of the case it be satisfied that the prisoner has not been found guilty of any offence in law, will of itself arrest the judgment. **R v Waddington**, 1 East 143, 146...."
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> "If he were unaware of his powers or in doubt about the situation in this regard, he was at liberty to defer sentence and take advice or do some research of his own. Seeing that he did not consider this power, he might have minded, even after imposing sentence, to certify a point of law for the consideration of the Court of Appeal. (See section 55 of the Criminal Justice (Administration) Act which ordains as follows:

> "When any person shall have been convicted of any treason, felony or misdemeanour before any Circuit or Resident Magistrate's Court, the Judge or Resident Magistrate before whom the case shall have been tried, may, in his directions reserve any questions of law which shall have arisen on the trial for the consideration of the Court of Appeal, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such questions shall have been considered and decided as he may think fit; and in either case the Judge or Resident Magistrate in his discretion, shall commit the person convicted to prison, or shall take a recognizance of bail, with one or more sufficient sureties, and in such sum as the Judge or Resident Magistrate shall think fit, conditioned that the person convicted shall appear at such time or times as the Judge or Resident Magistrate shall direct, and receive judgment, or render himself in execution, as the case may be."

The Application

This is a matter for consideration by the Court of Appeal. In the circumstances I hereby apply pursuant to Section 55 of the Criminal Justice (Administration) Act for the Court of Appeal to consider the following question:

"Where the foreman stated in answer to the Registrar that the accused was guilty of carnal abuse but the jury by a majority including the foreman almost immediately after their discharge indicated that they did not deliberate on the question of carnal abuse, should the verdict be allowed to stand or should there be a retrial?"