Privy Council Appeal No. 36 of 1965

Director of Public Prosecutions - - - - - *Appellant*

v.

Patrick Nasralla - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL, JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20th January 1967

Present at the Hearing:

VISCOUNT DILHORNE
LORD GUEST
LORD DEVLIN
LORD UPJOHN
LORD PEARSON

[*Delivered by* LORD DEVLIN]

On 9th October 1962 the respondent shot and killed Gilbert Gillespie whom as an escaping felon he was attempting to arrest. On 4th February 1963 he was arraigned before Small, J. and a jury of twelve in the Kingston circuit court upon an indictment charging him with murder. By a well-established rule of the common law which the industry of counsel has shown to have originated in *R. v. Salisbury* (1554) 1 Plowden 100, it is open to a jury, if they are not satisfied of the prisoner's guilt on a charge of murder, to convict of manslaughter. The procedure to be followed in Jamaica on the application of this rule is laid down in the Jury Law s.44. This provides that a unanimous verdict is necessary for the conviction or acquittal of any person for murder; and that after the lapse of one hour from the retirement of the jury a verdict of a majority of not less than 9 to 3 of conviction or acquittal of manslaughter may be received.

Small, J. in his summing up left the two issues of murder and manslaughter to the jury and they retired at 2.27 p.m. on 11th February. Shortly before 3 p.m. they returned to court and after the foreman had stated that they had arrived at their verdict, he was asked the following questions:—

"*The registrar:* On the charge of murder, are you unanimous?

A. Yes, Sir.

Q. Do you find the accused guilty or not guilty of murder?

A. Not guilty of murder.

Q. On the charge of manslaughter, are you unanimous?

A. No."

The learned judge told the jury that a majority verdict could not be received under one hour and that they must retire again. They returned at 4.05 p.m. when they were asked the following questions:—

"*The registrar:* Mr. Foreman, please stand. On the charge of manslaughter, have you arrived at a verdict?

The foreman: Yes, sir.

Q. Is your verdict unanimous?

A. No, sir.

Q. How are you divided?

A. Four for acquittal.

Q. Just tell me how you are divided?

A. Eight to four."

The learned judge told the jury that he could not accept that verdict and asked them to retire again. They returned at 5.17 p.m. when the foreman said that they were still of the same mind. The learned judge, being satisfied that there was no reasonable probability that the jury would arrive at a verdict on manslaughter, discharged them in accordance with s.45 (1) of the Jury Law. The indictment was endorsed as follows:—

"Verdict: Not guilty of Murder. Not agreed on manslaughter—Divided 8 to 4."

S.45 (3) of the Jury Law provides that whenever a jury has been discharged the judge may adjourn the case for trial at the same or a future sitting of the circuit court. On 25th February the prosecution applied to Small, J. for an order adjourning the trial on the issue of manslaughter. The defence opposed the application on the ground that at any further trial the plea of *autrefois acquit* would be bound to succeed. The learned judge granted the application and made the following order:—

"In accordance with Section 45 (3) (A) Cap. 186 the Court adjourns the case for trial at the next sitting of the Circuit Court on the issue of manslaughter. Accused allowed bail in £500. Surety £500 to appear on 17th April 1963."

Small, J. made this order after hearing argument and after having apparently formed the view that the plea of *autrefois acquit* was bad or at any rate that it was not certain that it would succeed. This, of course, did not conclude the matter and it was open to the defence to enter and argue the plea at the further trial. They preferred, however, to seek relief from the Supreme Court under a provision of the Constitution of Jamaica which is part of Ch. III entitled "Fundamental Rights and Freedoms". The Chapter opens with an introductory section (s.13) reciting that "every person in Jamaica is entitled to the fundamental rights and freedoms of the individual"; and then, having specified them generally, goes on to provide that the subsequent provisions of the Chapter shall have effect for the purpose of protecting them. s.20, which bears the marginal note "Provisions to secure protection of law", provides by ss.8 as follows: "No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence." S.25 provides that any person alleging that any of the protective provisions has been, is being, or is likely to be contravened in relation to him may apply to the Supreme Court for redress.

The respondent's application under s.25 of the Constitution was heard by the Supreme Court and dismissed on 5th January 1963. The respondent appealed to the Court of Appeal and on 11th June 1965 his appeal was allowed. On 1st November 1965 the Director of Public Prosecutions was granted leave to appeal to Her Majesty in Council and now asks as appellant that the judgment of the Supreme Court should be restored.

It is convenient to deal in the first instance with a point raised by the respondent that, whatever view be taken of the substance of the matter, the form of Small, J's. order is wrong. The respondent argues on the authority of *R. v. Shipton* [1957] 1 W.L.R. 259 that by the verdict of the jury proceedings on the indictment on which he had been tried were brought to an end. In *R. v. Shipton* the accused was tried at assizes on an indictment containing one count charging him with manslaughter. The jury acquitted him of manslaughter but were unable to agree about a possible alternative verdict of dangerous driving. The assize judge directed that the accused should be re-tried on the issue of dangerous driving before the next quarter sessions. A court of quarter sessions has jurisdiction to try the offence of dangerous driving but not the offence of manslaughter. The recorder at quarter sessions refused jurisdiction and the divisional court held that he was right to do so. There is no procedure in criminal law for the trial of an issue; an accused must be tried on indictment. As Goddard, C.J. said, the recorder had no jurisdiction to try an indictment for manslaughter. He thought it was a pity that the assize judge had not given leave to the prosecution to prefer a voluntary bill indicting the accused for dangerous driving, though he expressed no view as to whether on such a bill the accused would have been able to plead *autrefois acquit*.

If Small, J's. order is to be read as directing the trial of an issue apart from an indictment it is plainly wrong. But whereas in *R. v. Shipton* the court of quarter sessions had no jurisdiction to entertain an indictment for manslaughter, the Kingston circuit court had jurisdiction to try an indictment for murder and for manslaughter. *Autrefois acquit* is not a ground for quashing an indictment; and it can be argued that the circuit court on the further trial would be obliged to proceed on the indictment, leaving it to the defence to enter a plea of *autrefois acquit*. That plea would be bound to succeed to the extent that it would be a good answer to the charge of murder. Whether or not it would be a good answer to the charge of manslaughter raises the point of substance which is now before the Board. Alternatively, it might be argued that the circuit court on a further trial could properly have amended the indictment by adding a count for manslaughter and proceeding to trial on that count only.

Their Lordships think it unneccessary to pronounce on the validity of these arguments. To obtain redress under Chapter III of the Constitution the applicant has to show that his fundamental rights have been or are likely to be infringed and he cannot show this if his whole case rests on a procedural fault that could easily be put right. The respondent has appreciated this and accordingly in his claim for redress has asked not only that the order of Small, J. should be set aside but for a declaration that he cannot again be tried for the offence of manslaughter on a voluntary bill of indictment. This raises the substance of the matter. Their Lordships think that the most convenient, if not the only correct, way of dealing with this sort of situation is by a voluntary bill; and they will consider this case on the assumption that this is what would have been done.

Their Lordships must, however, notice briefly a point taken by the appellant which, if sound, would require them to deal with the validity of Small, J's. order. It is argued that the order was properly made under s.45 (3) of the Jury Law and that by virtue of s.26 (8) of the Constitution (which their Lordships will later consider more fully) an order so made cannot be treated as a contravention of the Constitution. This argument was rejected,—their Lordships think rightly,—in both courts below. As was said in the judgment of the Supreme Court, s.45 (3) is procedural only. An order made under it cannot diminish the substantive rights which the accused is given by the Constitution nor affect the efficacy of any plea that is open to him on a further trial.

Their Lordships can now leave procedural points and consider the terms of s.20 (8) of the Constitution. All the judges below have treated

it as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unneccessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s.2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III. This Chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the Chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. Accordingly s.26 (8) in Chapter III provides as follows:—

> " Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions ".

Notwithstanding that " law " is in s.1 (1) of the Constitution defined as " including any instrument having the force of law and any unwritten rule of law ", the respondent has argued that " law " in s.26 (8) is confined to enacted law and excludes the common law, so that if on its true construction s.20 (8) expresses the law on *autrefois* differently from the common law, s.20 (8) must prevail. In their Lordships' opinion this argument clearly fails and was rightly rejected by Lewis, J. A. in the Court of Appeal. Thus the question to be determined by the Board and which was in effect determined by both Courts below is whether at common law and at a second trial of the respondent on an indictment for manslaughter a plea of *autrefois acquit* would succeed.

On the face of it it would appear that such a plea is bound to fail. Obviously what is fundamental to *autrefois acquit* is a verdict of acquittal of the offence charged. In the verdict returned by the jury in this case there is no acquittal of manslaughter. Moreover, it is conceded, as it must be, that if there had been two counts in the indictment and a disagreement on the second count for manslaughter, there would be nothing on which to found a plea of *autrefois acquit* to another indictment for manslaughter. The argument for the respondent is based on high technicalities, most skilfully developed by Mr. Coore, and its success depends upon the nature and effect of a verdict when as in this case two offences, a greater and a lesser, are comprised in one count.

There are three categories of verdict in a criminal case. The first is the general verdict which is of conviction or acquittal upon the whole count. The second is the partial verdict. When at common law or by statute a jury is empowered to convict of a lesser or different crime to that charged in the count, they can be asked to return partial verdicts specifying the crime to which each verdict refers. The third category, which is not suggested as being applicable in the present case, is the special verdict, where the jury, as Blackstone (Commentaries Vol. III, p. 377) puts it " state the naked facts, as they find them to be proved, and pray the advice of the court thereon ".

The argument for the respondent is put in two ways. First, it is said that the common law of *autrefois acquit* is such that any verdict of acquittal, whether it be general or partial, is sufficient to found the plea. Reliance is placed upon two statements of the law. One is by Reading, C. J. in *R. v. Barron* [1914] 2 K.B. 570 which, as Lewis, J. A. said in the Court of Appeal " may well be considered as explanatory of s.20 (8) of the Constitution ". Lord Reading said at 574:—

> " . . . the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, *i.e.*, found to be not guilty of the offence, by a court competent to

> try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment ".

Again in *Connelly v. D.P.P.* [1964] A.C. 1254 Lord Morris of Borth-y-Gest at 1305 stated the rule in nine propositions, the second being " that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted ".

Neither in *R. v. Barron* nor in *Connelly v. D.P.P.* was there any question of a disagreement. In the Court of Appeal Duffus, P. considered this to be immaterial. He said: " The fact that they did not agree on a verdict in respect of manslaughter does not mean that the applicant was not in peril of conviction for manslaughter ". The learned President was there evidently using the word " peril " in its natural and ordinary sense. But if the rule against double jeopardy and the principles of *autrefois* are to produce the same result, the word " peril " must be given a more restricted meaning. It is true that the object of the plea of *autrefois* is to ensure that a man is not placed in double jeopardy. It is true also that as a general rule, *i.e.*, whenever the trial of an offence is concluded as it usually is, it is right to say that the accused must not be put in jeopardy again. But what is essential to the plea of *autrefois* is proof of a verdict of acquittal of the offence alleged,—not proof that the accused was in peril of conviction for that offence. In so far as a verdict on any count by its terms specifies an offence, it speaks for itself. In so far as it does not, its effect may be ascertained by enquiring of what offences comprised in that count the accused stood in peril of conviction. This is the only relevance of the existence of peril in the popular sense of the word; it is a means of interpreting the verdict.

There are certainly statements of the law which equate the plea of *autrefois acquit* with the rule against double jeopardy, notably in Blackstone and other ancient and learned writers quoted in the speech of Lord Morris in *Connelly v. D.P.P.* at 1306. They are accurate and complete on the basis, then generally accepted, that a trial once begun must end in a verdict. It was not until after *R. v. Charlesworth* (1861) 9 Cox C.C. 44 that it was clearly established that the discharge of the jury before they have given a verdict does not operate as an acquittal and also that a jury can properly be discharged because of inability to agree. Thus if the statements of the rule against double jeopardy and of the rule of *autrefois* are to be completely reconciled so as to fit the case of a discharge without verdict given, whether because of disagreement or otherwise, it can be done only by placing a somewhat artificial meaning on the word " jeopardy ",—what Crompton, J. in *R. v. Charlesworth* at 57 described as " jeopardy in the legal sense of the word ". In the popular sense a man is in jeopardy of conviction from the moment he is put in charge of a jury; and if that jury is discharged and he is put in charge of another, he is in jeopardy again. Cockburn, C.J. in *R. v. Charlesworth* makes it plain that the rule against double jeopardy cannot operate in that way. He says at 53:—

> " It appears to me, when you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict: that when you speak of a man being twice put in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass, because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time. . . ."

In their Lordships' opinion this reasoning was correctly applied in the Supreme Court and in *R. v. Quinn* (1953) State Reports (N.S.W.) 21, a decision of the Court of Criminal Appeal of New South Wales which the Supreme Court followed. The Supreme Court applied also the

statement of the law in Hale's Pleas of the Crown Vol. II page 246: "If a man be acquit generally upon an indictment of murder, *autrefois acquit* is a good plea to an indictment of manslaughter of the same person". Neither Lord Reading nor Lord Morris in the dicta relied upon were addressing their minds to the distinction between a general and a partial verdict and it was unnecessary for the purposes of these dicta that they should. The passage in Hale was before both of them and indeed Lord Morris in his speech at 1307 quoted it in full.

In their Lordships' opinion the law on this point is as stated in Hale and in that statement the word "generally" is of vital import. If on a plea of *autrefois acquit* the accused proves a general acquittal on a previous indictment, the plea is good for every crime for which he could on that indictment have been convicted. If he proves a partial acquittal, the plea is undoubtedly good for the crime specified in the verdict of acquittal. Whether or not it is good for any other crime must depend on the circumstances in which it is given. Their Lordships do not intend to deal exhaustively with all the consequences of partial verdicts. It may well be that if on any count a jury have delivered partial verdicts, whether of conviction or acquittal, on all the crimes which they have been told to consider, the verdicts taken together will support a plea of *autrefois acquit* on any other crime of which the accused could have been found guilty on that count. It must depend upon what inference can in the circumstances of a particular case properly be drawn from the verdict. It is sufficient in this case to say that a partial verdict cannot be held to cover by inference a crime about which the jury disagreed.

So it is necessary for the respondent, if he is to succeed in the plea of *autrefois acquit,* to bring himself within the law as stated by Hale by establishing that a verdict of acquittal of murder coupled with a disagreement on the issue of manslaughter is not a partial but a general verdict. This leads to the second part of the argument and to a point which was not developed in *R. v. Quinn* or in the Supreme Court, but which was very fully considered in the closely reasoned and careful judgments in the Court of Appeal. The foundation for this part of the argument is the proposition that on an indictment for murder, while the jury are permitted at common law to return a verdict of manslaughter if satisfied of the accused's guilt of the lesser offence, they cannot be compelled to do so. They have the right to deliver a general verdict of not guilty on the indictment. If, as in the present case, they fail to deliver a verdict on manslaughter, then, so it is argued, there is only one verdict on the indictment and it must therefore be a general verdict. The reason for the failure, it is submitted, is immaterial. A jury may fail to reach a verdict because they do not consider the matter at all or because, considering it, they cannot agree. It does not matter, so it is argued, which it is. Since they are acting within their rights in returning only one verdict, they are not obliged to state their reason for choosing to take that course; and if they do state it, the reason is no more a part of the verdict than a rider is. Thus the respondent argues that the verdict in his case is a general verdict to which the law as laid down by Hale applies.

Their Lordships do not doubt that it was once the law that a jury could not be compelled to return any verdict other than a general verdict. The law is so stated in Hawkins' "Pleas of the Crown" Vol. II p. 619.

> "*Fourthly,* that it hath been adjudged, that where the jury find a man not guilty of an indictment or appeal of murder, they are not bound to make any inquiry, whether he be guilty of manslaughter, etc.; but that if they will they may, according to the nature of the evidence, find him guilty of manslaughter or homicide *se defendendo,* or *per infortunium; . . . .*"

The passage is quoted by Herron, J. in *R. v. Quinn* at 25.

Hawkins wrote in 1824, but the authorities he cites for his statement of the law are not later than the 16th century. In *Wroth v. Wiggs* Cro. Eliz. 276 the jury found that the defendant was not guilty of murder

"and being demanded if he was guilty of manslaughter, they answered they had nothing to do to enquire of it", and this notwithstanding that "the evidence was pregnant that he was guilty of manslaughter". The court held after consultation "that by the law the jury are not compellable to enquire of the manslaughter, and thereupon they gave their verdict as before, and the prisoner was discharged". This ruling was approved in *Penryn v. Corbet* Cro. Eliz. 464 where it was said to have been founded upon the advice of all the Justices of both Benches. In the latter case the jury found the defendant not guilty of murder but guilty of homicide. It was held that this by the advice of the court they might well do. But it was said also that "they might if they would (if they thought him not guilty of the murder) have found him not guilty generally, and not have spoken of the homicide; and it is at their election in this case how they will give their verdict".

At the time these cases were decided the jury could have been punished for refusing to consider the issue of manslaughter if by the law they were required to do so. That is the sense of the word "compellable" in *Wroth v. Wiggs.* Since the celebrated decision in *Bushell's Case* (1670) 6 St. Tr. 999 a jury cannot in this sense be compelled to do anything. The law is now as stated by Mansfield, C. J. in *R. v. Shipley* (1784) 4 Doug 171 at 176: "it is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in *their power* to do wrong, which is a matter entirely between God and their own consciences". But the point remains in substance the same. Can a conscientious jury in a case such as this ignore, without doing wrong, a judicial direction to consider the issue of manslaughter?

If the rules of practice relating to the jury had not changed since Tudor times, the jury would function very differently from the way in which it does to-day. For that matter, if the jury had not by Tudor times grown out of its mediaeval origins, it would still have been only a jury of inquest. The jury has been shaped over the centuries to meet the needs of criminal justice and the development has been made by the practice of judges, often different practices by different judges, until eventually a rule emerges. *Bushell's Case,* which their Lordships have just cited, is one example of a great change. It is a far cry back from the dictum of Lord Mansfield in *R. v. Shipley* to the statute 26 Hen. 8 c.4 250 years before authorising the punishment of jurors for giving "an untrue verdict against the King, contrary to good and pregnant evidence ministered to them" and to the days when the Star Chamber or the judges themselves regularly inflicted such punishment.

A case already cited, *R. v. Charlesworth,* affords another striking example of change. This case is now regarded as clearly settling that a jury which cannot agree can properly be discharged. But Lord Coke had stated in the most positive and unqualified terms, as Cockburn, C. J. said at 46, that a jury once sworn and charged in the case of life or member could not be discharged by the court or any other, but must give a verdict. Blackstone said that the jury could not be discharged, unless in cases of evident necessity, until they had given in their verdict. Cockburn, C. J. dealt with those dicta by saying that the law laid down by Lord Coke was not in accordance with modern practice and that Blackstone's statement was not "a true or correct exposition of the law as practised in our day". He said also that a statement of the law as laid down by Lord Holt was "not in conformity with modern views upon the subject". In the same spirit he condemned the practice sanctioned by Lord Hale of permitting a juror to be withdrawn if the prosecution's case was incomplete so that they could have another opportunity of presenting it. He said that since Lord Hale's time a practice to the contrary had grown up and that "whether it be positive law, or whether merely a regulation of the practice made by the judges in the time of Lord Holt, is to me a matter of comparative indifference: it has been a uniform practice of the judicial authorities of this country from that time to the present, and I take it that a *rata praxis* like that becomes substantially a part of the law".

It is therefore unwise to treat a case like *Wroth v. Wiggs* as having settled the law for all time and it is necessary to look at how the practice has developed. It will be found that whereas the jury's right to deliver a general verdict as against a special has been maintained, their right to deliver a general verdict as against a partial has, their Lordships think, fallen into disuse. It is worth glancing at one or two modern authorities on the special verdict so as to point the contrast in this respect with the partial verdict and so as to show also in what manner the jury's right to return a general verdict has been exercised. For if it be held that in the present case the jury had a right to return a general verdict, it will become necessary to consider whether in fact they exercised that right.

In *Devizes Corporation v. Clark* (1835) 3 Ad. & E. 507 the corporation as plaintiffs sought relief against the defendant who had sold meat outside the market. The plaintiffs claimed that they were possessed of a market on Thursday and that the defendant had infringed their right by selling meat on Thursdays from his own house instead of from a stall in the market place for which he would have had to pay the plaintiffs. The judge, Williams, B., thought it was doubtful as a matter of law whether the right to a market was sufficient *per se* to preclude the sale of meat otherwise than from the plaintiffs' stalls. If there existed an immemorial usage to that effect, he would have had no doubt. He therefore invited the jury to find specially whether there was or was not such a usage. The jury found a verdict for the plaintiffs generally; and the following colloquy then ensued: —

Williams, B.: " Then, gentlemen, you find that in your judgment there has been an immemorial usage for the corporation to demand and receive this stallage and that there was no right on the part of individuals to sell in a house or shop out of the market."

Foreman: " That is not our verdict; our verdict is for the plaintiffs; the right to the market is acknowledged on all hands: of course, our verdict is to say that the defendant had not a right to do what he is charged with doing."

Williams, B.: " Then you further find that the defendant had no right? "

Foreman: " I would rather not add any words."

The judge then said that an express finding might prevent further litigation. The foreman replied that the jury had been guided by the remarks of his Lordship; but that they desired to add nothing to their verdict. In the King's Bench a rule to show cause why the verdict should not be set aside was discharged, all the judges saying that the jury had a right to give a general verdict only.

In the case which arose out of the Jameson Raid, *R. v. Jameson* (1896) 12 TLR 551, the bench, obviously fearing that in a general verdict the jury might be tempted to express their sympathy with the accused, asked for a special verdict, putting questions designed to establish the facts which would lead conclusively to guilt. But the presiding judge, Russell of Killowen, C. J. told the jury at 594: " If you choose in opposition to the request which I and my brethren make to you to refuse to answer those questions, nobody can make you answer them ". In *R. v. Bourne* (1952) 36 Cr. App. R. 125 the trial judge put four questions to the jury, two on each of two counts. Goddard, C. J. in the Court of Criminal Appeal said at 127: " Special verdicts ought to be found only in the most exceptional cases, and in this case no member of the court has been able to find that there is any exceptional question of criminal law involved."

So there is ample authority in modern times to establish that the jury is not bound to return a special verdict. In contrast to this no case since the 16th century has been cited to the Board in which a jury has asserted a right to refuse to return a partial verdict. On the contrary, the practice has been developed in a way which can be explained only on the footing that a jury are expected to accept a direction to consider lesser or different

offences arising out of a count in the indictment in the same way as they accept the direction to consider the offence stated in the count. The common law rule which permits a conviction of the lesser offence has been amplified in the last 100 years by statutes too numerous to mention permitting the conviction of lesser and sometimes quite different offences. In *R. v. Thomas* (1949) 23 Cr. App. R. 200 Humphreys, J. at 210 spoke of the cases in which the common law allowed an alternative verdict as being " very rare " compared with statute. The practice of rolling up into one count a number of different offences based on the same facts has been found a convenient way of shortening indictments. If it meant that a jury could for any reason that seemed good to them refuse to consider an alternative verdict with the result that the accused would be acquitted without trial or if it meant that where the jury did consider it and disagreed the result would be an acquittal, the practice would never have been formed. The parody of justice which it would have produced would have been avoided by setting out all the offences in alternative counts. But the practice has flourished and is now ingrained in our system and it is impossible to reconcile with it a principle formulated when the rule allowing an alternative verdict was in its infancy, when a jury was not allowed to disagree and when acquittals resulting from the shape or content of the indictment were more readily acceptable than they are to-day. There are in fact very few cases to-day in which a jury are not, or could not be if the facts permitted it, directed to consider an alternative verdict. Their Lordships are unaware of any case in which it has been suggested that such a direction has any less force than any other. They are unaware of any case in which the judge has told the jury, as Russell, C. J. did in *R. v. Jameson* that it was only a request which they could disregard if they chose. If the respondent's argument is right, counsel for the defence would always be alert to the chance of a technical acquittal legitimately obtained and would be failing in his duty to his client if he did not remind the jury that they were not obliged to consider an alternative verdict. Their Lordships are unaware of any case in which counsel has taken that course and they will note below a case in which it certainly would have been taken if it had been thought to be open.

It is usually difficult to find specific authority marking the stages in a change in practice. A practice that is in keeping with current ideas of justice and convenience rapidly acquires such strength that it is unlikely to be challenged. So such authority as there is on this point is oblique. The respondent relied on a statement taken from the judgment of Goddard, C. J. in *R. v. Shipton.* The Lord Chief Justice, after reading the section of the Road Traffic Act, 1934 which makes it lawful for the jury on an indictment for manslaughter to find the accused guilty of dangerous driving, said: " That is entirely a permissive section." In their Lordships' opinion Lord Goddard by that sentence was saying no more than that the jury were not obliged to convict of dangerous driving; he was certainly not saying that they were not obliged to consider it if properly directed to do so.

The appellant on the other hand relied on *R. v. Baxter* (1913) 9 Cr. App. R. 60. This was a case in which on an indictment for murder the jury convicted the accused of manslaughter and recommended her to mercy. The defence complained that the judge ought not to have left manslaughter to the jury. In the Court of Criminal Appeal Darling, J. at 62 said: " Mr. Marshall Hall complains that the judge in his summing up told the jury that they might find her guilty of manslaughter and indeed suggested that they should do so. It is plain that as an advocate Mr. Marshall Hall might well complain of this. The jury might have thought that the deceased was a man of whom the world was well rid and so have sympathised with the appellant and Mr. Marshall Hall may have hoped for an acquittal which he ought not to have got." Later Darling, J. said: " The jury were asked if they found the prisoner guilty of murder; they said: ' Not guilty '. Then they were asked if they found her guilty of manslaughter. It seems to us that it was right to put this question to them, for the judge finished his summing up with a reference

to manslaughter; it is plain that, when they said she was not guilty of murder, they had not exhausted the questions they had to decide." This was a case in which the defence had everything to gain by telling the jury that they need not consider manslaughter unless they wished to do so. Obviously it did not occur to Sir Edward Marshall Hall, an advocate of the greatest experience at the criminal bar, that this course was open to him. Likewise the point could not have occurred to the judges in the Court of Criminal Appeal as an arguable one or they would not have said without qualification that the jury had not after the acquittal of murder exhausted the questions they had to decide.

Their Lordships conclude that the rule that a jury cannot be directed to give a partial verdict is inconsistent with modern practice and obsolete. This conclusion destroys the foundation of the respondent's case and of the judgments in the Court of Appeal. Their Lordships have dealt with the point at length not only out of respect to the Court of Appeal but also because of its practical importance. The respondent's argument, if sound, would have led either to remedial legislation or to an alteration throughout the Commonwealth of the form in which bills of indictment are presented.

But their Lordships must add that even if they had concluded that there was no obligation on a jury to deliver a partial verdict, they would still have advised Her Majesty to allow the appeal. If *Wroth v. Wiggs* and *Penryn v. Corbet* are still the law, then, as was said in the latter case, it is at the election of the jury how they will give their verdict. In the present case they were directed by the judge to consider both murder and manslaughter and they evidently did so. When asked for their verdict on manslaughter they did not answer, as the jury did in *Wroth v. Wiggs*, that " they had nothing to do to enquire of it "; nor did they politely stand on their rights as the jury did in *Devizes v. Clark*. They said that they or the necessary majority of them were unable to agree. If a jury are permitted to say that they will not enquire into an alternative offence, they must also, at least since the middle of the last century, be permitted to say that they have enquired into it and cannot agree about it. The two things are not the same. If they say the first, they are asserting their right to return a general verdict and so the verdict which they do return must be treated accordingly. If they say the second, they are returning, as they were requested to do, a partial verdict on murder and stating their inability to deliver a second partial verdict on manslaughter. There is no justification for treating the first verdict of the jury in this case, which on the face of it is partial (being " not guilty of murder ") as general when they themselves have made it plain that they do not intend it so to be. What is required for the plea of *autrefois acquit* is proof of acquittal of manslaughter, not proof of a situation in which the jury, if they had elected otherwise than they did, might have acquitted of manslaughter although divided 8 to 4.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal. Their Lordships consider that in all the circumstances each party should pay its own costs of this appeal and of the proceedings below and they will humbly advise Her Majesty to vary accordingly the order of the Court of Appeal.

In the Privy Council

DIRECTOR OF PUBLIC PROSECUTIONS

v.

PATRICK NASRALLA

DELIVERED BY

LORD DEVLIN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1967