Date: 19970625

C.A.C. No. 128325

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Bateman, JJ.A.

Cite as: R. v. Reddick, 1997 NSCA 126

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - JOHNATHAN SYDNEY REDDICK Respondent	)	Stephanie Cleary for the appellant Ronald Pizzo Joshua M. Arnold for the respondent Appeal Heard: May 27, 1997 Judgment Delivered: June 25,1997

THE COURT: The appeal is allowed and a new trial ordered, per reasons of Bateman, J.A.; Freeman and Roscoe, JJ.A., concurring.

BATEMAN, J.A.:

This is an appeal by the Crown from a jury verdict, finding Mr. Reddick, not guilty of manslaughter, but guilty of the included offence of assault.

BACKGROUND:

The victim, Justin Reddick, was the brother of the respondent, Johnathan Reddick. The events resulting in Justin Reddick's death occurred on May 22, 1995 in New Glasgow at the respondent's home on MacDonald Street, where he lived in an upstairs apartment.

On that date, the victim was at the home of his brother, along with David Snyder, Leslie Jackson, and the respondent. Carrie Munroe, the respondent's girlfriend, who had been staying at the MacDonald St. apartment, arrived home around 9:30 p.m. The others were socializing and drinking. The respondent and Ms. Munroe argued as a result of which the respondent injured his fist hitting a door. The respondent, thinking his hand might be broken, went to the Aberdeen hospital in New Glasgow for treatment accompanied by Ms. Munroe. While Ms. Munroe and the respondent were at the hospital two other friends arrived at the apartment.

The respondent and Carrie Munroe, tired of waiting for treatment at the hospital, returned home around 11:45 p.m., having obtained an ice pack for his hand.

Justin Reddick and David Snyder taunted the respondent about his injury, kicking and hitting his injured hand. The respondent was upset and in pain. Eventually, he took a sheathed knife from the kitchen and told his friends that they should leave him alone. He testified that he had the knife to scare the others. There was evidence that the respondent verbally threatened Mr. Jackson and his bother while brandishing the knife, unsheathed. The teasing continued.

The respondent testified that at some point one of the other guests took the knife from him. Eventually, however, he left the apartment carrying the knife in his hand, with the sheath in his belt. The others were preparing to leave at the same time. According to the respondent's evidence, he took the knife with him for protection. As he left the apartment, the respondent threw a bicycle that Justin Reddick had borrowed down the stairs. Justin Reddick, upon exiting the apartment, and upset that his brother had thrown the bicycle down the stairs, came down the stairway behind the respondent. David Snyder and Les Jackson were behind him.

Les Jackson saw Justin Reddick kick in the direction of the respondent's head and right shoulder. He saw the respondent turn toward his brother, then turn back and head down the stairs, exiting the building.

David Snyder and Les Jackson heard Justin say words to the effect of "Johnny, man, you're an asshole. What the fuck did you do that for man?" Justin Reddick was bleeding profusely from a stab wound which had severed his femoral artery. Justin Reddick had been stabbed by the respondent when he turned around after being kicked.

Justin Reddick quickly collapsed from blood loss. The respondent, who had not gone too far from the apartment, returned in response to calls from the others. After calling an ambulance, he and Les Jackson made futile attempts to stop the bleeding.

Justin Reddick was taken by ambulance to the hospital, where he was revived. He had lost a large volume of blood and suffered from severe haemorrhagic shock. Surgery was performed to repair the femoral vessels which had been damaged. He was later transferred to the Victoria General Hospital in Halifax. His leg was amputated after unsuccessful attempts to restore the circulation. After transfer back to the Aberdeen Hospital in New Glasgow, he was put on a ventilator and developed severe lung problems. His brain was damaged as a result of the severe haemorrhagic shock, and

most of the time he was in a semi-comatose state. Justin Reddick died of respiratory failure on July 25, 1995 as a direct result of the injuries he suffered on May 22, 1995.

In his statement to the police, the respondent said that Justin Reddick had kicked his hand which held the knife and the next thing he knew the victim was bleeding. In testifying at the trial he said that the victim kicked him in the back of the head, causing him to stumble into the railing. He said he then turned and Justin Reddick attempted to kick him again but fell into his chest. The respondent testified that he pushed his brother off with the hand holding the sheath of the knife, then turned and exited the building. It was his evidence that he did not know at that point that his brother had been stabbed. He maintained that the stabbing was accidental. Les Jackson was standing behind Justin Reddick on the stairs. He did not have a clear view of the brothers, however, his evidence of what occurred on the staircase differed from that of the respondent.

During the preliminary inquiry, held on November 24 1995, the respondent was committed to stand trial on consent of his counsel, pursuant to s. 549 of the **Criminal Code**. He was charged with manslaughter in a single count indictment.

The trial was held before the Honourable Justice Douglas L. MacLellan, sitting with a jury at Pictou. The jury found Mr. Reddick not guilty of manslaughter but guilty of the "included offence" of assault.

GROUNDS OF APPEAL:

1. THAT the trial Judge erred in law in misdirecting the jury on the position of the Crown in relation to the offence charged.

2. THAT the trial Judge erred in law in the manner in which he exhorted the jury to attempt to reach a verdict.

3. THAT the trial Judge erred in law in instructing the jury the offence of assault was included in the offence charged in the indictment.

STANDARD OF REVIEW:

There is a heavy onus upon the Crown seeking to obtain a new trial on an appeal from an acquittal. In **R. v. Evans**, [1993] 2 S.C.R. 629, Cory, J. wrote at page 645:

> In **Vézeau v. The Queen**, [1977] 2 S.C.R. 277, the basis upon which a Crown can appeal an acquittal pursuant to s.686(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, was set out. There it was stated at p. 292, that "it was the duty of the Crown, in order to obtain a new trial, to satisfy the Court that the verdict would not necessarily have been the same if the trial judge had properly directed the jury." This test was re-affirmed in **R. v. Morin, supra**, at p. 374. There, it was emphasized that the onus resting upon the Crown was a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty that the verdict would not necessarily have been the same. This is a very heavy onus and it is fitting that it should be.
>
> . . .

> Among appellate courts there has always been a great deal of healthy respect for and deference to a jury verdict of acquittal. This deferential approach is appropriate and correct. The special significance of a verdict of acquittal by a jury has also been recognized by this Court in **R. v. Kirkness**, [1990] 3 S.C.R. 74. There on behalf of the majority it was said at p. 83:
>
> > The verdict of the jury constitutes, in a very real way, the verdict of the community. Trial by jury in criminal cases is a process that functions exceedingly well and constitutes a fundamentally important aspect of our democratic society. It is not members of the judiciary, but rather the members of the jury, sitting as members of the community, who make decision as to guilt or innocence which is so vitally important both to the individual accused and the community.
> >
> > . . .
> >
> > It follows that only if there was a significant error made by the trial judge in the course of the charge should the jury's verdict of acquittal be set aside.[Emphasis added]

ANALYSIS:

(i) Instruction to the Jury on the Crown's Position:

The trial judge must fairly put before the jury the theory of the Crown and the defence. It has become the practice in this province for judges to ask each counsel to provide the theory in written form to ensure that the judge does not misrepresent the position of either (**R. v. O.B.**, (1995), 146 N.S.R. (2d) 265 (N.S.C.A.)). Some judges read these submissions to the jury after ensuring that they do not contain any incorrect or improper material and identifying each as coming from the Crown or defence. Alternatively, the submissions are condensed and put into the judge's own words. Here, the

judge, finding the submission of the defence too lengthy, gave his own version of the theories.

In the written theory provided by the Crown to the trial judge, the Crown said in relevant part:

> . . . Jackson observes, at the halfway point of the staircase, the victim kick at the right head and shoulder area of the accused with his right leg. Almost immediately, the accused turns quickly to his left and stabs the victim in the exposed inner thigh area of his leg. The accused continues out of the building and up the street.
>
> . . .
>
> The accused, by stabbing his brother in the leg, committed an intentional unlawful act which resulted in the victim's death and, therefore, is guilty of manslaughter.

In addressing the jury the Crown said in part:

> . . .I'm not standing here today telling you that Johnathan Sydney Reddick intentionally killed his brother. I'm not suggesting that, not for a minute. What I am suggesting and asking you to believe, based on the evidence, is that he intentionally stabbed him, and he did so because he was angry and upset over all the circumstances that led up to it.
>
> . . .
>
> . . . **The stab itself, I suggest, was not intended to kill, but it was intended to injure and to send a very specific pointed message, "Don't mess with me." The massive blood loss which occurred, I suggest , could have occurred from an injury in other places on the body**. My Friend says, "Well, if he wanted to kill him or hurt him, he would have stabbed him in the stomach or stabbed him in the body." It doesn't matter. You heard from the doctors, a jugular vein, a wrist, a stomach wound there's all sorts of places that a stab wound could have resulted in death. All sorts of place [sic]. It's that dangerous act. And **I suggest to you that it was not intentional to kill but intentional to cut, to wound**. **That's what he intended to do**. **And I mean you only have to look - and you will have with you in the jury room - you only have to look at that knife to realize the damage that that could do to the human body anywhere on your person.** It doesn't matter where that point comes in contact with you. It's going to hurt. [Emphasis added]

In this regard, in the course of instructing the jury on self-defence, the trial judge said:

> You heard evidence in this trial to the effect that Johnathan Reddick acted in self-defence on the morning of May 22, 1995. **The Crown here concedes that at the relevant time, the accused did not intend to cause death or grievous bodily harm to Justin Reddick**, therefore, Section 34 of the *Criminal Code* applies. [Emphasis added]

Upon the jury retiring at the conclusion of the charge Crown counsel advised the judge that the Crown's position had been misstated. While the Crown had agreed from the outset that the respondent had not intended to cause the death of his brother, the Crown maintained that, in stabbing his brother, the respondent intended to inflict serious bodily harm. His request for a clarifying recharge on this point was denied. The trial judge took the position that the Crown had agreed that the respondent, although stabbing his brother, did not intend to cause grievous bodily harm to him. Crown counsel raised this issue again in the course of discussing the recharge in response to the jury's questions. Again the judge declined to clarify the Crown's position.

The theory of the defence was that the stabbing was accidental. There is no indication on the record that the Crown had agreed that the respondent did not intend to cause "grievous" bodily harm.

Section 34 of the **Criminal Code** states:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or **grievous bodily harm** and is no more than is necessary to enable him to defend himself. [Emphasis added]

Crown counsel had objected during the pre-charge conference to the judge's plan to instruct the jury on self-defence. The term "grievous bodily harm" arises only from the s. 34 instruction. It was clearly the Crown's position that the stabbing was intentional, a disproportionate response to any assault by his brother and intended to cause harm. In instructing the jury otherwise, the judge was mistaken. If there was confusion on this point before charging the jury, the issue was clarified on the Crown's request for a recharge. The Crown attorney said:

> **Mr. MacKay:**
> My Lord, I do have a few comments. One, and in particular, I -- I strongly disagree with Your Lordship's direction that the Crown, ah, did -- or conceded that there was no intentional application of force that would apply -- result in grievous bodily harm. I said specifically to the jury we are not saying that there was intent to kill. There was never any concession that there was not intent to cause bodily harm. At no point, throughout this trial, did the Crown concede that point.
>
> **The Court**:
> Ah, certainly that would -- I understood the position of the Crown at the pre-trial was that that was the case, otherwise 34(1) would not apply.
>
> **Mr. MacKay:**
> No. No, My Lord. And I'm sorry if Your Lordship is left with that misapprehension, but throughout this trial it's always been the Crown's position that there was an intent to cause bodily harm. That nick, the turning and stabbing in the leg was definitely intent to cause . . .
>
> **The Court**:
> To cause death -- death or grievous bodily harm.
>
> **Mr. MacKay**:

> To cause bodily harm. They -- they can be divided, My Lord. I would suggest that it doesn't have to be both.
>
> **The Court:**
> It's grievous bodily harm, it's not bodily harm.
>
> **Mr. MacKay**:
> Grievous bodily harm. But I think grievous -- grievous has been taken out of that definition, but I could be wrong in that.
>
> **The Court**:
> It's in the *Code*.
>
> **Mr. MacKay**:
> Well there's things in the *Code* that haven't yet been deleted. In any event, what I am saying is that there was intent to cause grievous bodily harm, not death, and I -- I thought I made that very clear.

This was not a simple factual situation upon which to charge a jury. The concepts of manslaughter, assault and self-defence were closely interwoven in the jury instruction. That Justin Reddick's death was caused by the stabbing was not in issue. The only substantial issue before the jury was whether the respondent, in stabbing his brother, had committed an unlawful act, in this case, an assault. The defence took the position that the stabbing was accidental. An assault requires an intentional application of force. The instruction by the trial judge that the Crown had conceded that, in stabbing his brother, the respondent did not intend to cause him grievous bodily harm could only have confused the jury's attempt to conduct an effective analysis of the elements of the manslaughter charge. This was not a harmless error.

(ii) The Exhortation:

The evidence was called on April 22, 23, 24, and 25. Counsel addressed the jury on April 29. The jury was charged on April 30, 1996. The jury returned with the verdict the afternoon of the following day, shortly after receiving an exhortation from the trial judge.

The Crown appeal on this issue relates to both the timing and the wording of the exhortation. The trial judge used the following language:

> I will confirm that the jury are all back with us. Madame Foreperson, and members of the jury, I asked the Sheriff to call you back for a moment because I gather you are having some difficulty reaching a verdict one way or the other.
>
> **I wish to indicate to you that you should appreciate that if you cannot reach a unanimous agreement a new trial will have to be ordered and the process repeated again with twelve different jurors.**
>
> I suggest to you that you are just as able to reach a verdict as any other group of men and women that might be called to sit on a jury for a new trial. With this in mind, I would ask that you reconsider your own points of view once again. **For instance, if you are an individual, or a group of individuals, find yourself, or selves, in the position of being a small minority, you ought to listen once again to the views of the substantial majority. If you can in good conscience agree with the views of the substantial majority, obviously there is a good sense in doing so.**
>
> I do not know whether there is a substantial majority one way or the other, nor do I want to know. **I must also emphasize that the minority do not have to agree with the majority. All I want to remind you of is the fact that you as reasonable people might reconsider your position again and decide whether in good conscience you can change your mind so that a verdict can be given in this trial of guilty or not guilty or guilty of the included offence.**
>
> On the other hand, **if consistent with your oath, you cannot honestly alter your view or views to confirm with that of the majority and you cannot bring the other jurors around to your point of view,** then it is your duty to differ and for want of unanimity there will be no verdict at that point and I will order that this matter be retried.
>
> On that basis, members of the jury, I would ask that you retire to deliberate for a bit longer.

[Emphasis added]

With respect to the wording, the Crown submits that the exhortation was erroneous in two respects:

1. In telling the jury that if they could not reach a unanimous verdict the process would have to be repeated.

2. In suggesting that the minority listen to the majority.

Subsequent to this trial, the Supreme Court of Canada, in **R. v. R.M.G.**, (1996), 202 N.R. 1, addressed the principles respecting jury exhortations. Cory, J., writing for the majority, said at paragraphs 16 and 24:

> The instructions given to the jury at this stage have been referred to as the exhortation. According to the Concise Oxford Dictionary (7th ed. 1989), "exhort" means to "admonish earnestly; urge (person to do, to a course of action)". What an exhortation must do is encourage the jurors to endeavour to reach a verdict by reasoning together. The task of the jury is to determine guilt or innocence on the basis of the evidence which they have heard. Irrelevant and extraneous circumstances should not be introduced into a task which is already fraught with difficulties. **To suggest that a deadlocked jury take into account factors such as the expense, and the inconvenience occasioned by a new trial, or the hardship caused to the participants when a trial is left unresolved, or to consider carefully only the position of the majority and not the minority, introduces pressures and factors which are completely irrelevant to their duties as jurors and are therefore inappropriate in an exhortation**. [Emphasis added]
>
> . . .
>
> Canadian courts have also struggled with the problem of the appropriate direction which ought to be given to a jury which appears to be deadlocked. In **Littlejohn, supra**, Martin J.A., on behalf of the Ontario Court of Appeal, observed that in exhorting a jury, "the trial Judge must avoid language which is coercive, and which constitutes an interference with the right of the jury to deliberate in complete freedom uninfluenced by extraneous pressures".

Justice Cory continued at paragraph 26:

> The following principles can, I believe, be derived from these cases. (1) Pursuant to their oath, jurors must endeavour to render a verdict based upon the evidence which has been adduced before them. (2) The strength and genius of trial by jury is that members of the community reason together to reach a verdict based solely upon the evidence. (3) It follows from the last principle that **it is important to allow a jury to deliberate without imposing any form of pressure upon them**. (4) **If a jury has apparently reached an impasse, any exhortation given should avoid introducing factors which are extraneous and irrelevant to the task of reaching a verdict**, and should not encourage a juror, by reference to extraneous considerations or by exerting unwarranted pressures, to abandon an honestly held view of the evidence. The exhortation must not interfere with the right of jurors to deliberate in complete freedom uninfluenced by extraneous pressure. (5) It follows that a juror should not be encouraged or exhorted to change his or her mind simply for the sake of conformity. (6) A deadline for reaching a verdict should not be imposed and **a jury should never be rushed into returning a verdict.** [Emphasis added]

The exhortation by the trial judge here closely models that endorsed in *Canadian Criminal Jury Instructions*, Ferguson and Bouck, Continuing Legal Education Society of British Columbia. The trial here took place in May of 1996, before the decision in **R. v. R.M.G.,** accordingly, the trial judge did not have the benefit of this recent direction from the Supreme Court.

In my view the exhortation, in these circumstances, offends the principles outlined in **R.M.G**. While the trial judge did not directly refer to the expense and inconvenience of another trial, should the jury not reach a verdict, that is the only implication that can arise from the reference to "repeating the process". This is an extraneous factor. Additionally, the only reasonable inference from the wording of the exhortation was encouragement that the minority consider converting to the majority view. That direction is erroneous as well. In my view, it was not corrected by the judge's subsequent admonition that the jurors remain true to their oath. On this latter issue, Cory, J. wrote in **R.M.G., supra**, at paragraph 40:

> In my view, it would be preferable for a trial judge to avoid putting the situation in confrontational terms of opposing sides. Rather the exhortation should appeal to the individual jurors to once again reason together. **At the very least, if such a suggestion is made, it must state that both sides should listen to each other and consider the opinions of others.** If that is not done, the jury may quite rightly assume that the trial judge is directing them that the majority opinion is right simply because it is the view of the majority and that the minority should no longer try to convert the majority to their point of view.
>
> [Emphasis added]

While these errors alone might not fatally taint the exhortation, I am equally concerned with its timing. Cory, J. directs that the impact of an exhortation is to be measured in the context of "the entire sequence of events leading up to the direction". He stated, commencing at paragraph 50:

> Not every improper reference in an exhortation will lead to a new trial. Instead, the exhortation must be viewed as a whole and in the context of the proceedings. The length of the deliberations, the nature of the question asked by the jury, and the length of the deliberations following the exhortation are all relevant. In considering all of these factors, an appellate court must determine whether there is a reasonable possibility that the impugned statements either coerced the jury or interfered with its right to deliberate in complete freedom from extraneous considerations or pressures, or caused a juror to concur with a view that he or she did not truly hold.

The sequence of events, commencing with the charge to the jury, is as follows:

Day 1
09:30 Charge commences
10:53 Charge concludes - jury retires.
10:59 Judge discussed charge with counsel.
15:35 Jury asks to hear testimony of Les Jackson again.
16:30 Rehearing of testimony concludes - jury retires.
18:00 Jury sequestered, to resume deliberations at 10 a.m.

Day 2

10:00 Deliberations resume.
10:30 Note from jury: "*Is it possible to get the Judge's address or do we have to hear it? We would prefer to read it.*" Judge and counsel agree to tell jury that the charge isn't typed but they can hear a portion again if they wish.
10:33 Jury advised by judge that the charge is not available in writing. Invited to request instruction, if necessary, on a specific point in the charge.
10:46 Note from jury: "*Could we hear only the portions that deal with the legal definition of manslaughter, included offence assault, self defence, and the Judge's interpretation. And not guilty, i.e. its definition and interpretation*."
11:12 The jury is asked to clarify their questions.
11:30 Further note received from Jury: "*Re: Manslaughter. The Judge's interpretation of the law. What constitutes it, not the verdict of the verdict sheet. Re: Included offence of assault. The Judge's interpretation of the law with regard to included offence of assault, not the verdict. Re: Assault. What constitutes an assault. Re: Not guilty. Please address the presumption of innocence, reasonable doubt and the concept of not guilty*."
13:16 Recharge to the jury commences.
13:55 Jury retires.
15:30 Exhortation to jury.
15:35 Jury retires.
15:48 Jury return with verdict.

The jury had an opportunity to deliberate for about six hours on the first day, exclusive of the time spent listening to evidence. Almost immediately upon resuming deliberations the following morning the jury requested a substantial recharge. They were not recharged until 1:16 that afternoon, recommencing deliberations at 1:55 p.m. Within a further ninety-five minutes, and not having indicated that they were having difficulty reaching a verdict, they were exhorted, albeit with the consent of both counsel. It is fair to say that their deliberations on the second day were limited to the ninety-five minutes following the recharge. Given the nature of this matter that was not an excessive length of time. Complex issues of accident and self-defence were involved. Cory, J. in **R.M.G.** emphasizes that it is crucial to our jury system that jurors be permitted to reach a verdict, free from pressure. He wrote at paragraph 15:

> If the process is subjected to unwarranted pressures, or to unnecessary distractions, the delicate reasoning process may be thwarted. The sole task of a jury is to reach a verdict based exclusively on the evidence presented. The sturdy independence of jurors may be overcome and unanimity compelled by a judge's suggestion that irrelevant factors be considered or by the judge exerting unwarranted pressure. In those circumstances, the verdict may no longer be based on a reasoned approach to the evidence. It follows that the instructions given to an apparently deadlocked jury must be delicately balanced and carefully crafted. If they are not, the jury system as a bulwark of democracy will all too easily be breached. The importance and significance of the instructions or exhortation to an apparently deadlocked jury cannot be overemphasized. The jurors at this stage are tired, probably frustrated and certainly disgruntled. They have given so much of their time and laboured so hard with the difficult issues that they are entitled to a careful and balanced instruction.

In my view, that pressure can arise not only from the wording of the exhortation but its timing. Here, in view of the comprehensive nature of the recharge, the jury were hurried along, without being given adequate time to apply the supplemental instructions to the facts. The jury had not indicated that they were having difficulty reaching a verdict. It was not appropriate in these circumstances to assume that was the case. While the length of time that the jury is out is a factor that may indicate deadlock, where, as here, they had not been deliberating continuously but had requested a recharge on the significant elements in issue and had not advised the court of a difficulty reaching a verdict, it was premature to exhort. In these circumstances, it is unlikely that the jurors had resolved their confusion about the elements of the offence in the time before the exhortation. They should have been permitted more time to deliberate subsequent to the recharge.

As expressed by Cory, J. in **R.M.G**., where, as here, the jurors return a verdict so soon after the exhortation, in this case in less than thirteen minutes, we may reasonably infer that something was said which caused the jury to render a verdict not on the basis of reasoning together, but as a result of some of the jurors abandoning their honestly held view. If the exhortation is improper it is not saved by the fact that both counsel agreed that the jury be exhorted.

The respondent submits that because there is no indication that the jury was deadlocked, there is less risk that they were unduly pressured by the exhortation. The jurors may have been close to a verdict in any event. That is an unlikely scenario given the apparent confusion of the jurors demonstrated by their request for the comprehensive recharge. That reasoning cannot prevail. An exhortation is only to be given where the court concludes that the jury is having difficulty reaching a consensus - if so they are particularly sensitive to undue pressure. If they are not having difficulty reaching a verdict, they should not be exhorted.

In my view the jury was inappropriately pressured to reach a verdict through a combination of the timing and the wording of the exhortation. This constitutes a clear error of law.

(iii) The Included Offence of Assault:

In view of my conclusion that the Crown succeeds on the first two grounds it is unnecessary to determine the third ground. The circumstances giving rise to the this ground of appeal are unusual, however, and for clarification, I will briefly summarize them.

The respondent was charged on a single count indictment which conformed to the Information and provided:

> THAT HE on or about the 25th day of July, 1995, at or near New Glasgow, in the County of Pictou, Province of Nova Scotia, did unlawfully cause the death of Justin Melvin Reddick and thereby commit manslaughter, contrary to Section 234 of the **Criminal Code** of Canada.

During the preliminary inquiry, after examination of the informant, defence counsel consented to the committal pursuant to s. 549 of the **Code**. In this regard he advised the Court that the respondent would consent "to be committed on the offence of manslaughter by the unlawful act of assault".

While the indictment did not specify the manner in which the manslaughter had been committed, defence counsel took the view that the charge had been particularized and that the jury should be instructed that they might convict on assault as an included offence. The trial judge accepted the defence position and the jury was so instructed, ultimately bringing in a verdict of not guilty of manslaughter but guilty of assault.

In a factual situation such as this, where the unlawful act is admittedly the cause of death, it is difficult to imagine a jury finding the accused guilty of the assault which caused the death, yet not guilty of manslaughter. In **R. v. Creighton** (1993), 83 C.C.C. (3d) 346 (S.C.C.), however, the majority held that the test for unlawful act manslaughter was "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of the dangerous act". (per McLachlin, J.)

It was the evidence before the jury that Justin Reddick's femoral artery was severed as a result of a small laceration to his thigh. The trial judge had instructed the jury that they must determine whether the respondent had committed an unlawful act of assault and, if so, whether non-trivial bodily harm was an objectively foreseeable consequence of that act. Defence counsel submitted to this panel that it was possible for the jury, in these circumstances, to have concluded that the respondent had committed an assault, but that non-trivial bodily harm was not objectively foreseeable.

Defence counsel submitted, as well, that the jury might have determined that the respondent committed an assault in threatening Justin Reddick with the knife, but that the stabbing was accidental. This latter submission cannot prevail. The respondent was not charged with a separate offence of assault, only the unlawful act (assault) which caused his brother's death. It was not

open to the jury to convict Mr. Reddick of an assault unrelated to the unlawful act causing death.

As indicated above since I have concluded that the Crown has met the burden on the first two grounds of appeal, it is unnecessary to determine whether, in these circumstances, the jury should have been left with the option of convicting on assault.

DISPOSITION:

In my view, the cumulative effect of the error in instruction on the position of the Crown and that related to the exhortation are sufficient to meet the onerous burden upon the Crown in these circumstances. I am satisfied that the verdict would not necessarily have been the same had the judge properly instructed the jury on these matters. I would allow the appeal and order a new trial.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.

C.A.C. No.128325

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHNATHAN SYDNEY REDDICK

Respondent

REASONS FOR JUDGMENT BY:

BATEMAN, J.A.