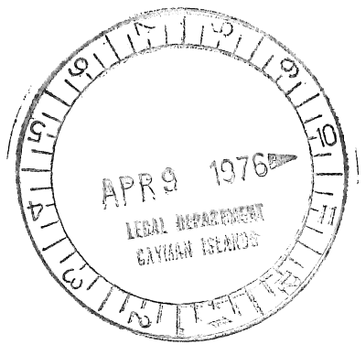

JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 191/74

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.(Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

REGINA v. CLIFTON STEELE - Indecent Assault
Robbery with Violence
Robbery with Aggravation

Mr. L.T. Playfair for the Appellant.

Mr. G. Andrade for the Crown.

3rd July, 1975 and
24th October, 1975

WATKINS, J.A.(Ag.):

On October 3, 1974, the appellant was convicted before Parnell J. and a jury in the Manchester Circuit Court held at Mandeville on counts one, two, six and seven of an indictment containing seven counts charging him with acts of indecent assault and robbery committed on various dates. On counts three, four and five the jury were instructed to return verdicts of not guilty. On May 2, 1975 Zacca J.A.(Ag.) gave leave to appeal against the convictions on counts one and two, but refused leave in respect of counts six and seven. On July 3, 1975 this Court allowed the appeals on all four counts, quashed the convictions and ordered a new trial on count one only, and we now proceed to give our reasons therefor.

THE EVIDENCE led by the prosecution in relation to counts one and two sought to establish that at about 10.30 a.m. on July 5, 1974 as Beulah Andrews, a teacher at West Indies College, Manchester, was proceeding home on foot from the College by way of a short cut through a thicket, she was suddenly pounced upon by an assailant, who threw her to the ground, squeezed her neck, intimated his desire to have sexual intercourse and forcibly took from her money, a pair of sunglasses, a magazine and a basket of vegetarian food. These items of personal property, save the money, were shortly thereafter on that very day found in the thicket by a Mr. Francis to whom Andrews had made a complaint. One week later Andrews identified the appellant at an identification

parade as her assailant.

Touching counts six and seven, the evidence adduced by the prosecution was to the effect that on July 10, 1974 at about 1.40 p.m. Mrs. Kottle who had but very recently given birth to a child was surprised in her home by an assailant who held her, told her that he wanted sexual intercourse with her and at knife-point demanded and took away money totalling twenty cents. At the identification parade held two days later, Mrs. Kottle after walking once up and then down the line of men on parade, touched the appellant who thereupon remarked - "Then wey you have to go there so and then come down before you touch me".

The arrest of the appellant took place on the day following the assault upon Mrs. Kottle. Acting Corporal Mitchell testified that as he drove a police jeep along Greenvale Road in Mandeville, the appellant on seeing the jeep took to his heels, whereupon the Police gave chase, caught and took him to the Mandeville Police Station. There was no evidence that any money or ganja or other article was found on the appellant on his arrest.

In an unsworn statement, the appellant stated that whilst walking along the road on July 11, the Police accosted him, shouted: "Don't move boy, what you dash away", and carried him off to the Police Station, where they proceeded to beat him. As touching the indictment his statement was: "I know nothing about the case".

The issues: On the totality of the evidence the major issue in the case was one of identity. Was the appellant the man who had attacked Miss Andrews and Mrs. Kottle?

Before us the appellant raised three grounds of appeal of which the third, namely that he did not have a fair trial, in substance challenged the directions to the jury of the learned trial judge on the all-important issue of identity and questioned the legality of the refusal by the trial judge of the first verdict of not guilty on counts two, six and seven returned by the jury.

The summing-up: To fully appreciate the nature of the first part of this ground of appeal, it is necessary to quote in extenso from the judge's summing-up on the matter of identification.

"Now, Mr. Foreman and members of the jury, it is sometimes said that a man's conduct can give himself, make him give himself away because every man is supposed to have a conscience, you know, however good or bad he is, and a guilty conscience can sometimes make a man do some foolish things, some questionable things.

Now, this piece of evidence from this police officer, when he saw the accused run, you will have to consider this: Did the accused run or tried to escape from the police on the 11th of July because he was contravening the law in some other respect than in this one? In other words, that he had something like the weed or ganja on him. Because if that is so, that conduct of his running away on the approach of the police would have no relation whatever to this charge. It wouldn't be a question of the guilty fleeth where no man pursueth, as far as this case is concerned, because he was trying to escape from the police for something else which had nothing to do with this case. Suppose however, it was a case where the accused had something on him which he wanted to hide or to throw away but he is conscious of guilt, and seeing the guilt and realising that the police would be searching for him in connection with these matters, the complaint of these two ladies, and he is running from the police. Now, well, that is something you can take into account in judging his conduct. And if this is in relation to the complaints of these ladies it would go toward his identification, he would be giving himself away on his own identification, but it would be an identification on what they have complained about. It is all a matter for you.

So I repeat. If it is a question of having ganja on him the police enquiring about, his running away or trying to escape from the police would have nothing to do with this case. On the other hand, if you think, take the view it was not a question of his trying to hide something from the police but a question of his trying to escape, his being conscious of the police wanting him in connection with these matters, then his conduct would be evidence going to his own identification on this charge."

Reverting later on to this same subject, the learned trial judge had this to say -

"However, as far as identification is concerned, there is circumstantial evidence, depending on what you heard coming from Acting Corporal Mitchell with regard to the conduct

> of the accused on the 11th of July when he attempted to run when he saw the police, and that would depend on whether or not you take the view that he was running because being conscious of what he has done to these women he was trying to escape. If you take that view, then that is the circumstantial evidence to support them. If, however, he had dashed or tried to make his escape as a result of his having some prohibitive matter in his possession, that would not be evidence against him, but it would still leave open to you the question of whether or not you can rely on him that he is speaking the truth with regard to the question of non-consent; because the jury look for some evidence to support two points: the identification of the assailant and the question of non-consent."

One of the clear suggestions emerging from these passages is that if they, the jury, were to accept that the appellant had run from the Police when he saw them, it was open to them on that evidence simpliciter to infer that it was the appellant who was guilty of the assaults upon the women. We resile from such a proposition the invalidity of which becomes manifest when one enquires whether a like inference would not be equally irresistible in all other cases in which on that or any later date other accused parties had run from the police when similarly approached. The mere act of running away, from the Police, unsupported as it was by other evidence linking the appellant in a material way with the commission of the crimes of which he was indicted is incapable in our view of giving rise to any inference whatever, whether of innocence or of guilt. Such an act may arouse suspicion, but it still remains a cardinal principle of our criminal justice that no man is to be condemned on suspicion. Evidence must prove, and not merely furnish suspicion of, guilt. This direction, therefore, was quite unfortunate, mischievous in its possible consequences and altogether, we think, a very fatal misdirection.

The Verdict: Turning now to the verdicts as originally and finally returned these must also be set out in full.

REGISTRAR: Mr. Foreman, please stand.
Members of the jury, have you arrived at your verdict?

FOREMAN: Yes, we have.

HIS LORDSHIP: All seven of you agreed, unanimous.

A: Yes, sir.

Q: Now, how say you, do you find the prisoner Clifton Steele guilty or not guilty on count 1 of this indictment which charges him with indecent assault upon a female.

A: Guilty.

Q: How say you, do you find the accused guilty or not guilty on Count 2 of the indictment which charges him with robbery with violence.

A: Not guilty, sir.

Q: How say you, do you find the prisoner guilty or not guilty on Count 3 of the indictment which charges him with assault to rob with aggravation?

A: Not guilty.

Q: How say you, do you find the prisoner guilty or not guilty on Count 4 which charges him with robbery with aggravation?

A: Not guilty.

Q: How say you, do you find the prisoner guilty or not guilty on Count 5 which charges him with indecent assault upon a female?

A: Not guilty.

REGISTRAR: How say you, do you find the prisoner guilty or not guilty on Count 6 which charges him with robbery with aggravation?

A: Not guilty.

HIS LORDSHIP: Do you find him not guilty with regard to Kathleen Kottle?

A: Not guilty.

REGISTRAR: How say you, do you find the prisoner guilty or not guilty on Count 7 which charges him with indecent assault upon a female?

A: Not guilty.

HIS LORDSHIP: Just wait a second, let me see if I can follow what you are saying. Mr. Foreman and members of the jury, I directed you to find a verdict of "Not Guilty" on Counts 3, 4 and 5 because there was no evidence tendered by the Crown to support them. With regard to the first two counts, what appears to me has happened is a kind of compromise

and it is an inconsistent verdict. You find a man guilty on Count 1 and on the same incident dealing with the same time with the witness you find him "Not Guilty" on Count 2, and the same thing applies to Counts 6 and 7. I am not going to accept the verdict. I am going to send you out to consider. It is one story told as far as each complaint is concerned, standing on one leg as far as the witness is concerned. I am going to send you back.

(FOREMAN AND MEMBERS OF THE JURY CONFER)

FOREMAN: Do we have to retire?

HIS LORDSHIP: Are you all agreed now?

FOREMAN: Yes, sir.

HIS LORDSHIP: Take the verdict again regarding Counts 1, 2, 6 and 7.

REGISTRAR: How say you, do you find the prisoner Clifton Steele guilty or not guilty on Count 1 of the indictment which charges him with indecent assault upon a female?

A: Guilty.

Q: How, say you, do you find the prisoner guilty or not guilty on Count 2 of the indictment which charges him with robbery with aggravation?

A: Guilty.

Q: How say you, do you find the prisoner guilty or not guilty on Count 6 of the indictment which charges him with robbery with aggravation?

A: Guilty.

Q: How say you, do you find the prisoner guilty or not guilty on Count 7 of the indictment which charges him with indecent assault upon a female?

A: Guilty.

REGISTRAR: Members of the jury, you say the accused is guilty on Counts 1, 2, 6 and 7 of this indictment. That is your verdict and so say you all?

A: Yes, sir.

The change on the part of the jury of their verdicts of not guilty on counts two, six and seven to verdicts of guilty was the direct result of the intervention of the learned trial judge. The attorney for the Crown, when pressed by the Court for some justification in law for this intervention, referred to what he described as the well-known rule that a judge is not bound to receive the first verdict of a jury, but may direct them to reconsider same. He mentioned Archbolds, intending

doubtlessly, for example, the 37th edition, paragraph 598. Viewing the matter from the stand-point of principle merely, it would have been surpassing strange indeed if any such unqualified rule had formed a part of our criminal jurisprudence. Almost certainly trial by jury, still one of the main defences of personal liberty, would hardly have survived in the face of such a rule. The authorities demonstrate, however, that the proposition has been too widely stated and so we take the opportunity to state somewhat extensively what we had thought that this Court had already, in R. v. Wilbourne Walters et al (1971) 17 W.I.R. 91, clearly laid down. In R. v. Smith (1804) 1 Russ. Cr. 12th edition, 434, perhaps the earliest authority, the appellant had gone by night with a loaded gun to shoot a ghost which supposedly had been terrorising the neighbourhood of Hammersmith, London. Meeting a stranger dressed in white, he shot and killed him. The jury at first returned a verdict of guilty of manslaughter which the court rejected. Fresh directions were given to the jury. They were told that if they believed the evidence they must find the prisoner guilty of murder, and if they did not, they must acquit him. MacDonald L.C.B. and the judges who charged the jury appeared to have formed the view that the prisoner had at the outset intended to kill a person who was a practical joker. The facts of the case seemed, therefore, incapable in law of sustaining a charge or verdict of manslaughter, and the case is, therefore, authority for the proposition that where a verdict is inconsistent with the evidence a judge has a right, and perhaps a duty, to ask a jury to reconsider same. Some half a century or more later the rule came under scrutiny once more in R. v. Meany (1862) 26 J.P. 822. The prisoner had been charged on several counts of obtaining goods by false pretences. The defence was that the transaction was a simple debt on one side and a simple credit on the other, that there was an intention to pay for the goods, but no means were suggested by which this was to be done. There was no burden on the prosecution to prove any intent to defraud any particular person. It was sufficient to prove that the prisoner did the act charged with an intent to defraud. The facts having been left to the jury, after some consideration the foreman said:-

> "We feel the prisoner is guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters had been used, but we think that he meant to pay for them."

The court refused to receive that as a verdict and after reminding the jury of the facts of the case and directing them that if in their opinion the prisoner had a fraudulent intention, then they were bound to return a verdict of guilty, but that if they found no such intention existing, then equally they were bound to acquit him, the jury, after a short consultation, found the prisoner guilty. The matter was submitted to the Court for Crown Cases Reserved, where the conviction was affirmed. Meany affords illustration of an ambiguous verdict, or to be more exact, a first verdict ambiguously stated which a trial judge, in reason no less than in principle, was entitled and perhaps bound to decline with such further amplification of the evidence and proper directions in law as are calculated to assist a jury finally to return a true verdict. See also R. v. Crisp (1912) 76 JP 304. In R. v. Harris (1964) Crim. L.R. p.54, H was charged with aiding and abetting causing death by dangerous driving and aiding and abetting dangerous driving, the charges arising out of the same facts. H was tried with F who was indicted as the principal on both counts. H was supervisor for F who held a provisional driving licence. F drove dangerously fast and collided with a pedestrian who was killed. H said to the Police that he told F that he was driving too fast, but F took no notice. The jury found F guilty of causing death by dangerous driving and H not guilty of aiding and abetting. The foreman was asked if that were the verdict of them all, and said "Yes. May we add a rider in the case of H? Guilty of aiding and abetting dangerous driving, but not aiding and abetting dangerous driving causing death." The judge asked them to reconsider their verdict and gave them a further direction on the offence. The jury returned a verdict against H of aiding and abetting causing death by dangerous driving. In confirming the propriety of the judge's action the Court of Criminal Appeal held that the verdict which the jury originally sought to return was not one which they could properly arrive at. Either H was not guilty at all or he was guilty of aiding and abetting the offence of which they had convicted F.

Turning to cases on the other side of the line Regina v. Yeadon et al (1861) 25 JP 756 is instructive. Yeadon and Birch at about half past eleven at night had burst open the house door of one Sarah Clayton where Hiram Roberts was sitting with her and her son. On entering, they both attacked Roberts; he was twice knocked down, was kicked about the face and body, and his chin cut open, and his lip cut through, two teeth knocked out and was saved from further injury by the entrance of neighbours. On behalf of the defence, it was alleged by way of justification that Yeadon and Birch did not open the door, but that Roberts opened it from inside and struck the first blow with a fire poker. The amount of injury sustained by Roberts and the fact that it was done by the defendants were never denied. The jury were told by the chairman in his summing-up that the defendants were charged with an aggravated assault under a statute specially framed to meet such cases as were not sufficiently punishable under the Common Assault Act. The indictment did not contain any count for a common assault merely. The jury retired and found a verdict of a common assault. Before the verdict was entered the chairman told the jury that they had found the defendants guilty of an offence with which they were not charged in the indictment and that they must reconsider their verdict. They were told, in addition, that if they thought the defendants had unlawfully assaulted Roberts and thereby occasioned to him actual bodily harm, they must find the defendants guilty, but must acquit him if there was any doubt. They then found the defendants guilty and a verdict was entered of guilty of an assault occasioning actual bodily harm. On a reference of the case to the Court of Crown Cases Reserved that Court said -

> "This was a mis-trial. The judge had no right to refuse to take the first verdict. The second verdict was wrongly received and ought not to stand and the prisoner ought not to undergo the sentence."

In R. v. Lester (1940) 27 Cr. App. R. p.8 the appellant was charged on an indictment containing counts for larceny and receiving. The judge, considering that the evidence pointed to stealing rather than receiving, directed the jury with regard to the charge of larceny alone. The jury, however, returned a verdict of not guilty of larceny but guilty

of receiving. The judge accepted the verdict on the first count, but refused to accept the verdict on the second count on the ground that he had not directed the jury on the law with regard to receiving, and ordered that the appellant should be properly tried on the charge of receiving at the following sessions. At the following sessions the appellant appeared before another judge and a plea of autrefois convict filed on the appellant's behalf succeeded. The judge, however, did not forthwith discharge the appellant, but taking the view that no sentence had been passed on the appellant at the preceding sessions in respect of the conviction of receiving, proceeded to sentence him therefor. It was held inter alia on appeal that the judge at the first trial had no power to refuse the verdict of the jury or to order what was in effect a new trial. Finally, there is the very recent case of R. v. Wilbourne Walters et al already briefly adverted to, in which two brothers Wilbourne and Edward Walters were jointly charged with murder. The first verdict of the jury was not guilty of murder, but guilty of manslaughter against both defendants. This verdict, the trial judge refused to accept. He told them that he did not think that they had followed his directions that it was not open to them on any view of the evidence to find Edward guilty of manslaughter. He appeared to think that the verdict first returned may have proceeded by reason of a compromise. As he saw the matter it was only if the jury accepted the Crown's case that a verdict adverse to Edward could at all be returned. If the Crown's case were accepted the verdict in respect of each appellant should in the judge's view be guilty of murder. The jury, thereafter, returned unanimous verdicts of guilty of murder against both defendants. Finding that the issue of provocation ought to have been left to the jury, the learned trial judge, it was held, could not in the circumstances of the case lawfully refuse to accept the first verdict of guilty of manslaughter and that when he did so he was in error. These authorities show that the rule as enunciated in Archbolds and as contended for with some assurance by Crown Attorney in the instant case that a judge is entitled to refuse the first verdict of a jury is not at all as wide and uncontrolled as the statement of the rule suggests. Expressed affirmatively as was done in the Court of Criminal Appeal in England in

Harris the proposition more accurately stated is that where a single verdict is ambiguous (e.g. Meany, Crisp), or two verdicts are inconsistent (e.g. Harris), or the verdict is one which cannot on the indictment or in the circumstances be lawfully returned (e.g. Smith), the judge is entitled, unless the jury insist, to refuse to accept the first verdict and ask the jury to reconsider the matter and if they change their verdict to record only the second verdict. Expressed negatively, it may be stated, as was done by this Court in Walters et al, that where a verdict may lawfully be returned upon the indictment and the evidence is unambiguous (e.g. Yeadon et al) and is not inconsistent with any other verdict (e.g. Lester) it can only be in exceptional circumstances, if at all, that a trial judge may refuse to accept it and ask the jury to reconsider it. Other constraints upon the power of a judge over a jury may here be noticed. Thus, he may exhort a jury to reach a verdict (Shoukatallie v. The Queen (1962) AC p.81), but neither by words nor by action must he coerce or intimidate them into returning a verdict (R. v. Mills (1939) 2 All E.R. p.299. R. v. McKenna (1960) 1 All E.R. p.326). Where a jury returns a consistent verdict which is plain and unambiguous, the judge should not ask them questions as to the meaning of such verdict, nor ought he to suggest to them the preferment of a recommendation for mercy (R. v. Larkin (1943) 1 All E.R. p.217. The jury, too, is subject to law and those authorities heretofore referred to which either circumscribe the power of a trial judge to refuse the first verdict of a jury or limit what he may otherwise say or do in the presence of the jury, by that very token define the scope, character and bounds of a jury's constitutional role in a criminal trial. Counsel, too, appearing in a criminal case is not outside the constraints of law, and the admonition of Lord Goddard in R. v. Neal (1949) 2 All E.R. p.438 in a somewhat different set of circumstances (at p.441) may yet serve as a timely reminder.

> "If some irregularity comes to the knowledge of counsel before the verdict is returned, he should bring it to the attention of the court at the earliest possible moment so that the presiding judge may consider whether or not to discharge the jury without giving a verdict. Matters of this sort ought not to be held in reserve

> with a view to taking them before the court, when it may be as here, too late to remedy the mistake ..... If an irregularity arises in a trial which can be cured and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction."

All, therefore, judge, jury and counsel, are under law, and in a matter so fundamental to the proper administration of criminal justice as due observance of the respective roles under law of judge and jury, the principle at stake may often be more important than the particular case.

The vital question then for determination by this Court, is as to whether the refusal by the learned trial judge of the first verdict of the jury on counts two, six and seven is sustainable in law in the light of the authorities already referred to. It appears that he considered that a verdict of guilty on count one and a verdict of not guilty on count 2 were on the facts of the case necessarily inconsistent the one with the other. He observed - "You find a man guilty on count one and on the same incident dealing with the same time with the witness you find him not guilty on count two". But was the second verdict necessarily so inconsistent with the first? The evidence was that all the objects of the alleged robbery, save the money, that is to say, the dark glasses, the magazine and the basket of vegetarian food, were found in the area where the struggle between prosecutrix and assailant took place. There was no evidence that the assailant was surprised by the approach of any third party during the struggle, as a consequence of which he might have run from the scene leaving everything behind. Indeed, it was raised in cross-examination whether the complainant, who could have been separated from her belongings during and because of the struggle, had been voluntarily released by her assailant or had succeeded in making good her escape. It was, therefore, open to the jury to entertain some reasonable doubt as to whether, her assailant so far from having forcibly robbed the complainant of her goods, the complainant had, in fact, abandoned them in the course of her struggle with, and hasty escape from, her assailant whose only object pernaps was to ravish her. It was open,

too, to the jury to entertain some doubt concerning the circumstances of the alleged loss of the money. These doubts would have posed no necessary inconsistency with the jury's acceptance of the complainant's testimony as to the struggle inasmuch as there was independent and credible evidence to the effect that shortly after the struggle the complainant was seen in a dishevelled and tearful condition with facial bruises and the like. As in Shoukatallie and in Walters et al, so in the instant case, the jury might have shown greater appreciation than the trial judge of the nuances of the evidence.

Turning to counts six and seven on which original verdicts of not guilty were uniformly returned, it is clear that such verdicts were not and could not be inconsistent with one another. In fact, they could not possibly be more consistent the one with the other. Nor were they inconsistent with the evidence. The sole question on the facts relating to the counts was identity. Mrs. Kottle had said that she had had fifteen to twenty minutes in which to see, observe and scrutinise her assailant. At the identification parade, she had walked up and down the line of men, presumably observing them with great care, before finally identifying the appellant, who thereupon said: "Then wey you have to go there so and then come down before you touch me". Concerning these words the learned trial judge gave the following directions:-

> "Well I don't know if you find that he used these words how you are going to look at it - "Wey you have to go up there and come down before you touch me?" You may say it is an enquiry the accused is making: if you are so sure, why you have to go down and come up? And if the accused is only making an enquiry, then this wouldn't be anything against him. However, if it was a case where the accused was not making an enquiry but he said, well, I didn't know you would find me out, but all the same why you had to take a walk up there, then this would be a piece of evidence to support her evidence on his identification. Because where identification is made against a person in his presence and hearing, it is not evidence against him except he so far as in his conduct indicates that it is true."

This scene at the parade was capable of two constructions, as the learned trial judge indicated even if not too clearly. Firstly,

it was open to the jury to say that Mrs. Kottle could hardly have been as positive in her identification of the appellant as she tried to make out in the witness stand, if after such an opportunity to observe her assailant as she had had in her house on the day of the assault, she nevertheless acted with such hesitation and delay as she did on the parade in identifying the appellant. Secondly, the jury were free to feel that Mrs. Kottle, conscious of the possible grave consequences for anyone whom she might have identified on the parade as her assailant, exercised commendable caution in carrying out her civic duty. The original verdicts, therefore, meant neither more nor less than that the jury, in accordance with the judge's own directions, were not satisfied so that they felt sure that the appellant was Mrs. Kottle's assailant either on Count six or on Count seven. The not guilty verdicts on Counts six and seven were, therefore, not inconsistent with one another or with the evidence. Next, the learned trial judge seemed to have thought that in some way or another the jury by their verdicts on counts two, six and seven were acting in a compromising manner, presumably, desirous either of abdicating their responsibility or of somewhat letting off the appellant. If, as we hold, these verdicts are neither inconsistent one with the other or with the evidence, any such view of the judge must be untenable, and in any event is not a lawful ground on which a first verdict may be refused. Finally, Crown Attorney argued that the original verdicts of not guilty on counts two, six and seven were the product of confusion in the minds of the jury occasioned in connection with the judge's directions that they should return similar verdicts on counts three, four and five. Nothing on the record before us, however, lend credence to this argument. Certainly, the learned trial judge seemed not to have thought so, for if he did, we are certain that he would, consistent with universal practice, have enquired of the jury whether they were troubled by anything he had said, and would have offered by way of further directions such amplification of the evidence and of the law as would have assisted them to return a true and proper verdict.

The conclusion: As there was no legal basis for the rejection by the learned trial judge of the jury's first verdict on counts two, six and seven, that rejection was without lawful authority. The jury were, therefore, functus officio upon the delivery thereof, and the second verdicts of guilty on these counts were wrongly received and cannot stand. By reason of the misdirection on the issue of identity in relation to count one, the conviction and sentence thereon cannot stand and are set aside. This is not in our view a case in which the proviso to section 14(i) of the Judicature (Appellate Jurisdiction) Act could lawfully be applied.

For the above reasons, therefore, we allowed the appeals of the appellant, set aside his convictions, and ordered a new trial on count one only.