

ENGLAND AND WALES / JUDGMENT

R v ANL

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Neutral Citation Number:

[2025] EWCA Crim 969 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT Case No: 202501491 B4 Royal Courts of Justice Strand, London, WC2A 2LL Date: 23/07/2025 Before : LORD JUSTICE EDIS MR JUSTICE CALVER and HER HONOUR JUDGE MORRIS Honorary Recorder of Winchester, sitting as a judge of the Court of Appeal Criminal Division

- ----- Between : THE KING

- and - ANL Respondent Appellant

- -----

- ----- Lewis Power KC and Darryl Cherrett (assigned by the Registrar) for the Appellant Jane Osborne KC and Paul Casey (instructed by the CPS London Homicide Team) for the Respondent Hearing dates : 23 July 2023

- ----- Approved Judgment This is a case to which s.37 of the Criminal Procedure and Investigations Act 1996 applies. This appellant is anonymous in this judgment which has been written in such a form that it can be published and we direct that it may be published. Apart from this judgment, s.37 continues to apply to prevent reporting of these proceedings, including the appeal, until the conclusion of the trial, save for the facts specified in s.37(9) namely:-

- (a) the identity of the court and the name of the judge;
- (b) the names, ages, home addresses and occupations of the accused and witnesses;
- (c) the offence or offences, or a summary of them, with which the accused is or are charged;
- (d) the names of counsel and solicitors in the proceedings;
- (e) where the proceedings are adjourned, the date and place to which they are adjourned;
- (f) any arrangements as to bail;
- (g) whether, for the purposes of the proceedings, representation was provided to the accused or any of the accused under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 Lord Justice Edis: 1. 2. 3. 4. 5. 6. 7. This is an appeal by leave of the trial judge

against a decision he made in a preparatory hearing that it is lawful for the prosecution to be granted a retrial on an allegation of murder against ANL. The ruling was made after a trial where the jury convicted ANL of count 2, manslaughter, which had been added to the indictment as an alternative to murder, which was count 1. They were discharged from returning a verdict on count 1 following their inability to agree a verdict on it. The appeal is brought under section 35 of the Criminal Procedure and Investigations Act 1996. We have received helpful written and oral submissions from counsel on both sides, for which we are grateful. During the deliberations, the judge received a note from the jury. Although he was unable to reveal the content, he told the court that he had reason to believe that if the jury were unable to reach a verdict on count 1 in relation to the appellant, it was likely that they would be able to reach a verdict in relation to count 2 in his case. On the morning of 17th January 2025 he received a further note indicating that they were unable to reach a verdict in relation to murder but had proceeded to consider count 2 and had reached a verdict on that count. The matter was discussed in court and the judge subsequently discharged the jury from returning a verdict on count 1 in ANL's case, and invited them to consider count

2. They did so and subsequently returned a unanimous verdict of guilty in relation to manslaughter on the afternoon of 17th January 2025. As a result of the jury failing to agree in the first trial, a co-defendant also faces a retrial for manslaughter. On a later date, the prosecution informed the court that they intended to seek retrials in the two cases where the jury had been unable to agree verdicts, and an objection to this was made on behalf of ANL on the ground that the court might be precluded from doing so in light of the procedure that had been undertaken in relation to the taking of the verdicts. On 15th March 2025, the judge ordered that a preparatory hearing should be held so that the issues could be fully argued and determined. The hearing took place on Friday 28th March 2025 and the judge decided that it was lawful for a retrial against the appellant for murder to take place. In his ruling, the judge set out the facts of the case and the history of the proceedings. He referred to *R v McEvilly* [2008] EWCA Crim 162 and *R v Fernandez* [1997] 1 Cr App R 123. He said that those cases decided that where there were two charges in the alternative on an indictment arising from the same facts, the judge should not take a verdict on the less serious count until finality (for example a not guilty verdict or a decision to discharge the jury) had been reached in relation to the more serious charge. The judge recorded that he had been invited to discharge the jury from returning a verdict on the murder count and to take the manslaughter verdict. Nothing had been said by counsel as to what, if any, consequence might follow in relation to the future possibility of retrying the murder count. Had the question been raised, the judge would have sought to resolve that issue before agreeing to discharge the jury from returning a verdict on count 1. The judge considered that the verdicts suggested that the jury were sure that he participated in the attack which resulted in the death of Judgment Approved by the court for handing down *R v ANL* Reporting Restriction: see page 2 the deceased but fewer than 10 jurors were sure that he had an intention to kill or cause really serious injury. Contrary to their submissions at the time, counsel for the prosecution submitted that the taking of the manslaughter verdict for the

appellant was an irregularity as this would never have been an acceptable disposal of the indictment in his case. Alternatively, it was submitted that the taking of the verdict did not preclude a retrial on the murder count. Counsel for the appellant submitted that there was no irregularity in the taking of the verdict and that it would be an abuse of the process of the court to permit a retrial. The judge considered *R v Saunders* [1987] 85 Cr App R 334 (“Saunders”) and concluded that the circumstances of that case were very different from those with which he was dealing. The judge noted that he had not asked whether a retrial might be sought and had not been asked to form a view or express a view as to whether a conviction for manslaughter would suffice to provide a just determination of the case. He would have done so if asked and would not have exercised any judicial discretion so as to preclude the possibility of a retrial. The judge also considered *R v Bayode*

[2013] EWCA Crim 356 (“Bayode”), *R v Skeete* [2002] EWCA Crim 1654, and *R v Yusuff and Others v The Governor of HMP Belmarsh* [2024] EWHC 692. He did not find that any of these decisions prevented the court from conducting a retrial of ANL on count 1. The prosecution had invited the judge to set aside the verdict on count 2 in order to allow section 6(2) of the Criminal Law Act 1968 to have full effect and for the verdict on the alternative count to follow an acquittal of the more serious count rather than the jury being unable to agree. The judge declined to take this course. He held that the retrial of the appellant for murder could be conducted fairly and any potential unfairness would be addressed by the court exercising its discretion in relation to the admissibility of evidence. If a new jury convicted the appellant of murder, his manslaughter conviction would fall away or could be quashed by order of the court so as not to offend the rule against contradictory convictions. 8. 9. The Grounds of Appeal 10. The appellant contends that the judge erred in i) Finding that it was lawful for the appellant to be retried for murder. The judge should have followed the decision in *Bayode* as the circumstances were more closely aligned to the facts of the present case. It is submitted that *R v McEvilly* can be distinguished as: a) b) The facts and circumstances of that case are completely different from the present case. In *McEvilly*, there had been no finality in the jury’s consideration of the more serious count. ii) Failing to find that the crown’s decision to retry the appellant in these circumstances amounted to an abuse of the court’s process. Respondent’s Grounds of Opposition Judgment Approved by the court for handing down *R v ANL* Reporting Restriction: see page 2 11. The prosecution contends that the judge did not err in his ruling. It remains the prosecution’s case that the cases of *Saunders* and *Bayode* were not only decided on substantially different facts but they do not definitively determine the issue of whether a re-trial in such circumstances would be an abuse of the court’s process. However, if the judge’s ruling is deemed to be incorrect or if the consequence of his ruling is that a retrial for the appellant on count 1 is deemed to be unfair, then the indictment should not be stayed as an abuse of process. It is submitted that the conviction on count 2 could simply be excluded from the jury’s consideration. Alternatively the court could quash the conviction on count 2 and allow a retrial to proceed on both counts as per *R v Fernandez*. Analysis and discussion 12. 13. Procedural rules exist in order to facilitate the

doing of justice. Although the criminal justice system in England and Wales has a procedural code, contained in the Criminal Procedure Rules, that code does not contain any rule which prevents a retrial being ordered in a case such as the present. The overriding objective of the code, it is said in Rule 1.1, “is that criminal cases be dealt with justly”. Rule 1.2 identifies 8 factors which are included within that objective to which regard should be had when making procedural decisions. These include “acquitting the innocent and convicting the guilty”. None of them is served by the suggested rule that a retrial for murder cannot be held in this case. That suggests that the origin and scope of this rule should be carefully examined before it should be held to deny the prosecution the opportunity to present its case on murder for decision by a new jury which may be able to agree on a verdict. The effect of the proposed rule is to treat ANL as if he had been acquitted of murder by the jury when he has not been. Justice requires a decision by a jury of the murder allegation. The proposed rule does not facilitate the doing of justice in that way; it prevents it. The rule which we are invited to apply (“the Rule”) provides that where a defendant is charged with two or more offences which are alternatives to each other in the strict legal sense, he or she cannot be convicted of both or all of them. If, therefore, there is a conviction for a lesser offence then a verdict of guilty cannot be returned on any more serious offence, either at the same trial which resulted in the conviction or at a retrial following that first trial. Any attempt to secure such a conviction at a retrial would be an abuse of the process of the court. The most common situation where such an attempt may be made is following the discharge of the jury which returned the guilty verdict of the lesser offence but which could not agree a verdict on the more serious offence. The Rule applies strictly whatever view the judge may take of the requirements of justice. 14. The Rule is said to apply to two types of alternative offences:-

- i) Offences which are truly alternatives in that guilt of one precludes guilt of the other. Theft and handling stolen goods is a commonly encountered example. Handling can only be committed “otherwise than in the course of the stealing”, see section 22(1) of the Theft Act 1968. A handler of goods cannot be guilty of “the stealing” which caused them to become stolen goods. Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 15. 16. ii) Offences which are alternatives in that they arise out of the same conduct, but result in different legal classification of that conduct. Murder and manslaughter is one such case, and the offences under section 18 and section 20 of the Offences Against the Person Act 1861 is another. The Rule does not apply in cases where offences appear on an indictment and are presented as alternatives during the trial by the prosecution but they are not alternatives in either of the senses just identified. These have been called “forensic alternatives”, see R v Akhtar [2015] EWCA Crim 176; [2015] 1 WLR 3046 (“Akhtar”). Section 6(2) and (3) of the Criminal Law Act 1967 provides a statutory code for the ability of a jury to convict of an offence not identified in a count in the indictment when finding a person not guilty of an offence specifically charged in the indictment. These provisions do not, however, address a case where a jury cannot agree on that specific count and have to be discharged. Neither do they deal with a case, such as the present, where the lesser offence is specifically charged in the indictment in a separate

count. They provide a lawful basis for conviction by a jury of an offence which is not charged in the indictment but which is comprehended within an offence which is, and provide a method of determining which offences are in play before the jury by this route.

17. The Rule is, therefore, if it exists, a creature of the common law. The origin of the Rule

18. The origin of the Rule is Saunders, at least according to Akhtar at [30]: “Turning to the principle that once an accused has been convicted of the lesser of two alternatives, a further trial is an abuse of process, the starting point is the decision of the House of Lords in *R v Saunders* [1988] AC 148.”

19. In fact, Saunders is not authority for the Rule. It holds that where the jury cannot agree on murder, but are able to agree a guilty verdict on manslaughter, the judge can discharge the jury from returning a verdict on murder. It was a case where the judge considered that the manslaughter conviction was an appropriate disposal of the case in the interests of justice. After reviewing some of the old cases, Lord Ackner said, at 160-161: “Given that the judge has the judicial discretion to discharge a jury from giving a verdict, there would appear to be no good reason either in law or in common sense why on a charge of murder the trial judge should not, in the judicial exercise of his discretion, discharge the jury from giving a verdict of murder where they are agreed on a verdict of manslaughter and the judge considers that justice is properly satisfied by such a verdict. The industry of counsel has discovered no case which clearly so decides.”

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20. Saunders decides that (1) the judge has power, in an appropriate case, to bring proceedings to an end by discharging the jury from returning a verdict on murder in these circumstances and (2) this power arises even when the prosecution does not agree, and wishes to pursue the murder allegation further. Saunders is authority for these propositions. Lord Ackner said this, at 161-162:- “In a trial on an indictment for murder, where manslaughter is a possible verdict, the jury’s task is first to consider whether or not they are satisfied that the accused is guilty of murder. It is only when they have made the positive determination that the accused is not guilty of murder that they should then proceed to consider the lesser offence of manslaughter. However, there is no legal principle which prevents this impediment to considering the lesser offence being removed by judicial intervention, namely by discharging the jury from the obligation of returning a verdict on the major offence, if the justice of the case so requires. This appeal provides a very good example. This was a case where, as previously stated, the prosecution would have accepted a plea to manslaughter, if Mr. Townend’s instructions had permitted his offering that plea. Before the judge took the course that he suggested, he invited the views of the prosecution and the defence. The course he proposed had their joint support. He concluded that it would be a just determination of the trial to accept a verdict of guilty on the alternative offence of manslaughter, avoiding as it would the burden of a retrial with all the anxiety which this would entail. I shall perhaps add that if, having invited the prosecution’s submissions, these proved hostile to the course contemplated by the judge, he in the proper exercise of his judicial discretion would be fully entitled, having considered those submissions, to adhere to the course he proposed. In such circumstances there could be no question of the prosecution re-indicting the

accused for murder. To attempt to do so would clearly be an abuse of the process of the court and the indictment would be stayed: see *Connelly v. Director of Public Prosecutions* [1964] A. C. 1254.” 21. 22. These propositions from *Saunders* do not apply in this case. The judge was not exercising a power to bring the proceedings to an end when he decided to take a verdict on count 2 and to discharge the jury from returning a verdict on count 1. He intended that the option to pursue a retrial on count 1 would be available to the prosecution if they sought to do so. It is a condition precedent to the exercise of the power in *Saunders* that the judge decides that the conviction for manslaughter sufficiently addresses the interests of justice on the facts of the particular case. This never happened in the present case. On analysis, *Saunders* decides something which is really quite obvious. Where the prosecution is disposed to accept a verdict of manslaughter and does not wish to pursue the allegation of murder the judge can give effect to that by taking a verdict on manslaughter, discharging the jury from returning a verdict on murder and not Judgment Approved by the court for handing down *R v ANL* Reporting Restriction: see page 2 ordering a retrial having decided that the course favoured by the prosecutor is in the interests of justice. Where the prosecution resists that course, says *Saunders*, the judge has power to take this course anyway if the court decides that this is in the interests of justice. That second proposition from *Saunders* appears to be obiter, is not explained in the judgment, and is a significant and perhaps anomalous extension of the limited powers of a trial judge to stay a prosecution which is evidentially sound. At all events, it does not arise in the present case because both the judge and the prosecution considered that the interests of justice in this case required a retrial for murder. 23. *Saunders* records a rather outdated practice which Lord Ackner describes in relation to adding a second count of manslaughter in cases where count 1 alleges murder arising out of the same killing. He said: “Not only would this be contrary to long established practice, but I wholly agree with the observation of Lawton L. J. when giving the judgment of the court in the instant appeal that this would tend to confuse the jury. Moreover, such a course would not deal with the case, which is not uncommon, in which the possibility of a verdict of manslaughter only becomes apparent during the course of the trial. There is the further important point that there are cases in which the prosecution, on the basis of the evidence which they propose to present, consider that the only true verdict is that of murder. To include a separate count of manslaughter could well lead to the suggestion by the defence that since the prosecution have charged manslaughter, manslaughter must on the facts be an acceptable alternative.” 24. 25. 26. This reflects a practice which has long fallen into disuse. A second count of manslaughter frequently appears on an indictment for murder. This would only remain for consideration by the jury if manslaughter was an alternative which the judge intended to leave to the jury. The effect of the explicit count 2 of manslaughter, together with an appropriate route to verdict and written directions, would be to simplify the jury’s task as against having to listen to oral directions on the subject, in the absence of a specific count, and then to try to remember and apply them. In such circumstances the prosecution has to deal with manslaughter anyway, and the suggested forensic disadvantage of a manslaughter count is not a substantial factor. *Saunders* does not say

what should happen when the judge is forced to discharge the jury from returning a verdict on count 1, because they are unable to do so, but where they have indicated that they have reached a perfectly lawful and valid verdict on count 2, manslaughter, and where the judge considers that the manslaughter conviction does not meet the justice of the case. The Rule requires that the manslaughter verdict should not be taken because it prevents any further prosecution for murder whatever the interests of justice may require. The Rule, therefore, does not arise from Saunders. It is found in Bayode. In one sense this is surprising because Bayode was another case where the judge decided (on a later date) that the conviction for manslaughter was a sufficient reflection of the evidence in the case, and that, therefore, the interests of justice did not require a retrial on murder. It was, therefore, enough for the Court of Appeal to dismiss the prosecution's appeal by a simple application of the second proposition in Saunders (because the Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 prosecution did not agree that manslaughter was enough). It was perhaps necessary to address the six questions posed by the ingenuity of counsel resisting the prosecutor's appeal, but the decision required only an application of Saunders. The issues considered in Bayode were put in this way by Hughes LJ, giving the judgment of the court: "The issues raised in argument

14. The arguments before the judge in January and before us have ranged considerably wider than those advanced in the aftermath of the verdicts. Not all those advanced to the judge have been developed in this appeal. Those which we have to address are these:-
 - i) does the defendant have available to him the plea in bar of autrefois convict as a result of the jury verdict of guilty of manslaughter, which for that reason prevents a further trial on the issue of murder? ii) if not, is a re-trial prevented by the principle derived from the line of cases of which R v Elrington (1861) 1 B & S 688 is an early example? iii) whether (i) or (ii) apply or not, is it possible to pursue a re-trial upon one alternative allegation where there is an extant verdict of guilty upon the other alternative? iv) what is the import of the judge's ruling on 28 January 2013 that if he had applied his mind to the question in October, he would have 'adhered to the course which I now take', viz prevented a re-trial?
 - v) is a re-trial prevented by the fact that the jury considered manslaughter at a time when it had not reached a concluded view about murder? vi) apart from above, were there grounds for staying any re-trial on the issue of murder as an abuse of the process of the court?" 27. 28. Only issue (iv) is necessary for the decision and the court was bound by Saunders to answer it in the way that it did, unless it held that the second proposition in Saunders was obiter, wrong, and not to be followed because it was inconsistent with the way the abuse of process jurisdiction has developed subsequently. This does not appear to have been argued. In fact the court dismissed the prosecution's appeal on issues (iii) and (iv). (i), (ii), (v) and (vi) did not produce that result for the reasons given. It is the court's resolution of issue (iii) which is the strongest ground on which the Rule may stand, and an issue arises whether it is obiter. In Barking & Dagenham LBC v Argos Limited [2022] EWHC 1398 (Admin) Edis LJ, with

whom McGowan J agreed, said, at [40]:- Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 “It is true that where a judge gives two reasons for arriving at a decision they will generally both be regarded as part of the ratio. However, as Lord Simonds in *Jacobs* [1950] AC 361 makes clear (at p 370), the establishment of the ratio is “not always easy”. Some of the problems were identified by Leggatt LJ in *Youngsam* [2020] QB 387.” 29. The majority in *Youngsam* said (at[31]) that the law on establishing the ratio of a decision was sufficiently stated in the statement of Professor Cross in *Cross & Harris*, *Precedent in English Law*, 4th ed (1991), p 72, namely: “The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him ...”

30. Much of the reasoning in *Bayode* on issue (iii), on which the Rule depends, is concerned with rejecting an argument advanced by the prosecution that the guilty verdict on manslaughter was not a conviction because *Bayode* had not yet been sentenced. That argument was necessary because the prosecution accepted that a person could not validly be convicted of both murder and manslaughter in respect of the same killing. The court accepted that the word “conviction” was commonly used in two senses, namely (1) a finding of guilt such that a sentence may lawfully be imposed; and (2) the final determination of criminal proceedings, including sentence. The court decided that for the purposes of the admissibility of convictions (section 74 of the Police and Criminal Evidence Act 1984) and of appealing against conviction (the Criminal Appeal Act 1968) the meaning of conviction was (1) rather than (2) and that for the purposes of the common law in relation to alternative verdicts the word should be given the same meaning. 31. The court in *Bayode* said this at [33] about the situation which arises where murder and manslaughter are charged in separate counts on this indictment: “If, however, there are two counts, it is not necessary to vacate the plea to the lesser count (although this may well be permitted in some cases). But whether there is one count or two, there cannot be convictions for both of two offences which are properly mutually exclusive alternatives. If there were two counts, and no plea of guilty, the jury would try the defendant on both, but would not be permitted to return verdicts of guilty on more than one. In our view, the course now proposed by the Crown in this case would offend against this fundamental concept of alternative charges.” 32. Importantly, the court considered the potential for the conviction for manslaughter to cause difficulties for the defendant at the trial, but would not have dismissed the prosecution’s appeal because of them. The trial judge has ample discretion to exclude evidence where necessary to ensure the fairness of the trial. Two difficulties were considered, first the evidential problem for a defendant whose denial of any involvement in the killing is negated by the conviction for manslaughter and secondly the legal consequences of that conviction being admitted into evidence so far as the Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 burden of proof is concerned. Hughes LJ said, at [34], after explaining why these were not grounds to dismiss the appeal: “Both matters, however, serve to underline the reasons why the principle should be maintained that there can be one conviction only in the case of alternative charges.”

33. With the greatest of respect to the court, it seems to us that the opposite is true. The fact that the consequences of the manslaughter conviction can be fairly managed within a retrial for murder is a reason in favour of permitting that retrial notwithstanding that the conviction for manslaughter subsists. 34. The editors of Archbold at 4-526 have this comment on Bayode at 4-256: “A verdict of guilty cannot be returned under s.6(3) of the 1967 Act unless the jury have found the defendant not guilty of the offence specifically charged: Collison (1980) 71 Cr. App. R. 249, CA; and see Griffiths [1998] Crim. L. R. 348, CA (a decision to like effect in relation to the similarly worded provision in s.24 of the RTOA 1988 (§ 32-224)). Where this gives rise to difficulty, because the jury are unable to agree in respect of the offence charged, an alternative count may be added to the indictment if it causes no injustice to the defendant: Collison, above. See also Saunders, § 4-529. Where such a course is adopted, there can be no retrial on the more serious alternative if the two alternatives are mutually exclusive, as with murder and manslaughter: Bayode [2013] EWCA Crim 356 (but this must be open to doubt; whilst the court said that pursuit of a retrial would offend against what it described as “a fundamental concept of alternative charges” which, according to the court, precludes convictions on each of two true alternatives, this overlooks long-standing practice involving trials of more serious offences taking place following pleas of guilty being entered to less serious (included) offences, and retrials of more serious offences taking place following convictions for less serious (included) offences; the true principle is, it is submitted, that nobody should be sentenced (“conviction” in the true sense depending on “judgment”) for both a more serious offence and a less serious included offence).” 35. 36. The editors of Blackstone at D19.67 and 68, comment that it would be an “absurd result” if a trial ended with a jury being “discharged from giving any verdict whatsoever when they are agreed that the accused is guilty of something”. They say that the solution to the problem reached by the case is far from satisfactory and that Saunders should be confined to its own facts. This must mean it should be regarded only as authority for the “obvious” proposition identified at [22] above. In our judgment, there is a significant difficulty for the proposition advanced by the court in Bayode in answering issue (iii) which is the basis of the Rule. If a conviction (as defined) for manslaughter is a bar to a trial for murder arising from the same Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 killing, what happens when the defendant pleads guilty to manslaughter and the prosecution do not accept it? They are not denying that he is actually guilty of, at least, manslaughter but are asserting that they can prove that he is actually guilty of murder. According to R v Hazeltine [1967] 2 QB 857 the position is different depending on whether the plea was entered on the count alleging the more serious offence or on a separate count alleging the less serious alternative count. In the former case, if it is not accepted the plea is treated as withdrawn and no conviction results except by verdict of the jury. In the latter case sentence may be passed if the jury acquits of the more serious offence. The distinction on a “novel point” decided under the long-repealed section 39(1) the Criminal Justice Administration Act 1914 may no longer be sound, but we are concerned in this case with the second situation where the decision is not based on the 1914 Act. “A case such as this is quite different from a case such as R v Cole 1965] 2 Q. B. 388; [1965] 3 W. L. R.

263 where there were two counts in the indictment, one charging a serious offence, one a lesser offence. That case lays down the correct procedure to be followed where a prisoner pleads guilty to the count charging the lesser offence and not guilty to the count charging the more serious offence. If the plea to the less serious offence is not accepted, the prisoner will then be put in the charge of the jury only on the more serious count. If he is acquitted on that count he will then be sentenced on the count to which he has pleaded guilty. If, on the other hand, he is convicted on the more serious count, the proper course is for the judge to allow the count to which he has pleaded guilty to remain on the file and not to proceed to sentence him on that count. In the present case, however, there was but one count which is indivisible and the only effective plea to that count in respect of which the appellant was put in charge of the jury was the plea of not guilty.” 37. 38. If Bayode is right on issue (iii) and the Rule subsists, how does the trial there described take place? Hazeltine was cited in Bayode but this problem was not identified. In Akhtar the court was unenthusiastic about a hard edged rule that different charges could not be brought against a person arising from the same facts, and pointed out that where there was duplication between offences of which a person was convicted, no separate penalty could be imposed in respect of any which were otiose, see [38] and [41]. This is not always appropriate as a sentencing technique, see R v WAG [2025] EWCA Crim 968, but the overall sentence for any series of offences will always be proportionate to the criminality involved, as required by the Sentencing Council’s guideline on Totality, effective from July 2023. It is an unnecessary complication, in many cases, for the same conduct to be charged as different criminal offences but it ought not to operate to increase the sentence at all.

39. What then is the vice which the Rule seeks to cure? Decision Judgment Approved by the court for handing down R v ANL Reporting Restriction: see page 2 40. It seems to us that there are at least four outcomes which we should deal with. We leave out of account the submission that we should allow the appeal because the retrial cannot be fair. A similar submission was made in Bayode without success. If the retrial cannot be fair, then it should be stayed by the trial judge. If he wrongly fails to take that step, then an appeal lies to this court after any conviction even if the ruling is not made within a preparatory hearing to enable an appeal to be brought before trial. Before staying the retrial the judge would explore all options to ensure that prejudicial evidence is not wrongly admitted, against ANL and those options, in this case, might include severing the trial from that of the other person who faces a retrial. The judge was clearly right to take this view. 41. These four outcomes to the submission that no retrial can lawfully take place, even if it is a fair trial:- i) ii) We might dismiss the appeal, holding that the decision on issue (iii) in Bayode was obiter, and based on an obiter observation in Saunders, and not follow it. In that case, ANL remains convicted of manslaughter and is retried for murder. We might express concerns about whether Bayode was rightly decided on issue (iii), but hold that it is binding on us and we must follow it. This would result in the appeal being allowed and no retrial of ANL for murder. iii) We might hold that Saunders should be confined to its own facts and that, except in precisely the same situation at Saunders, a jury can only return a verdict of guilty to manslaughter if

they have acquitted of murder, by reason of section 6(2) of the 1967 Act. Since that did not happen, the conviction for manslaughter was irregular, must be quashed and a retrial on murder and manslaughter can take place. iv) We might allow appeal, following the decision on issue (iii) in Bayode because it is right.

42. We do not consider that either (iii) or (iv) in paragraph 41 are appropriate outcomes. The judge considered that he may have had a power to quash or in some other way dispose of the jury's verdict convicting ANL of manslaughter. We do not agree. Equally, neither party has sought to appeal against that conviction, attacking the decision (with which both agreed) that the verdict should be taken in the circumstances which prevailed. The appeal is brought against the ruling in the preparatory hearing that a retrial for murder should take place notwithstanding the conviction for manslaughter. That is the decision with which ANL is unhappy. Under section 35(3) of the Criminal Procedure and Investigations Act 1996 on hearing this kind of appeal, we may confirm, reverse or vary the decision appealed against. There is nothing there to suggest that we have any greater powers in relation to the decision than the judge had. 43. For the reasons identified above, we do not consider that the decision in Bayode was right on issue (iii). We therefore turn to the question of whether we are bound by it.
44. We have explained above at [22] something about the ambit of the decision in Saunders. We have also explained above how the prosecution argued the case in Bayode. As we have pointed out at [27] above, the prosecution did not seek to argue Judgment Approved by the court for handing down *R v ANL* Reporting Restriction: see page 2 that there is no rule that a person cannot be convicted of both manslaughter and murder in respect of the same killing. The jury cannot convict of both, by reason of the Criminal Law Act, and the circumstances where both convictions might co-exist are very rare, probably limited to the case where a plea to manslaughter has been entered but rejected and the present situation where a jury has convicted of manslaughter and failed to agree on murder. There is no authority cited for the proposition advanced at paragraph 33 of Bayode. Although Hazeltine was mentioned by the court, the important passage cited above does not seem to have been relied upon by the prosecution. Moreover, the prosecution did not point out that the assertion of a power in the court to prevent a retrial where the prosecution was hostile to that course was obiter and inconsistent with the subsequent development of the law of abuse of process in *R (ex Bennett) v. Horseferry Road Magistrates' Court* [1994] 1 AC 42. It asserts a species of abuse which does not fit in the classification adopted in this case and now firmly established in the criminal law. Had that argument been made successfully, that court's approach may have been affected. 45. The prosecution drew our attention to the common case where, after a person is convicted of an offence of causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861, the victim dies. This has never been held to bar a prosecution for murder. It is a further indication that the Rule is not soundly based which was not fully addressed in Bayode.

46. We have pointed out above that the exercise of identifying the ratio of a decision which rested on more than one ground is not always straightforward, and the case of Bayode on issue (iii) is a good example of this. In our judgment, having regard to the matters set out above it is open to this court to hold that it should be treated as not essential to the decision dismissing that prosecution appeal which was justified by another ground. For the reasons given we hold that we are not bound to follow it, and decline to do so. 47. That being so, we hold that there is no authority which justifies the Rule, and a finding that the mere existence of a conviction for manslaughter is a bar to a trial, or retrial, for murder arising out of the same killing. Result 48. For these reasons we hold that the judge's order was correct and dismiss the appeal.

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Prepared on 27 October 2026 · Esheria