Privy Council Appeal No 104 of 2006

Richard Dale Maye *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 1st July 2008

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

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*[Delivered by **Lord Brown of Eaton-under-Heywood**]*

1. About 4 pm in the afternoon of 3 May 1998 Andrew Grant (known as Mackie) was stabbed to death by the appellant (Richard Dale Maye) out of doors at Shooters Hill in the parish of St Andrews, Jamaica. On 10 May 2000 the appellant was convicted of Mackie's murder before D MacIntosh J and a jury at the Circuit Court in Kingston and was sentenced to life imprisonment with a recommendation that he serve at least fifteen years. On 11 June 2001 the Court of Appeal dismissed his application for leave to appeal. He now appeals to the Board as a poor person by special leave granted on 6 December 2006.

2. Until some two years prior to his death Mackie had lived with the appellant's sister, Sharon Brown, as man and wife. Theirs had been a stormy relationship and after they broke up it got worse still. Sharon frequently complained to the police about Mackie's violence towards her and she made some eight official reports of it. Sometimes in response the police would come and warn him about his behaviour.

3. Sharon was closely involved in the fatal events of 3 May 1998. The violence, indeed, began between her and Mackie before ever the appellant came on the scene. She herself sustained some injuries during the incident (most notably a wound to her head probably caused by a stone). Mackie, however, was far worse injured. In all he received four stab wounds and five incised wounds, some at least inflicted by a machete which Sharon had got hold of. It seems clear, however, that the two fatal stab wounds, deep wounds penetrating to the lungs, heart and other internal organs, were knife blows inflicted by the appellant himself.

4. The appellant's case in brief was that he had chanced upon this violent incident between Mackie and his sister. Mackie had been carrying a 'dagger knife' and appeared intent on attacking her. She was shouting for help. He, the appellant, attempted to interpose himself to protect her. Mackie kept trying to get him out of the way and eventually threatened to kill him too. Fearful for his life, the appellant stabbed Mackie.

5. The Prosecution's case was very different. Essentially it was that, so far from Mackie having a knife and trying to attack Sharon, Sharon and the appellant had together been acting in concert to chase, stab and finally kill Mackie.

6. The main evidence for the Crown was given by two eye- witnesses, Kemoya Brown, the deceased's cousin, then a 13 year old high school student, and Kemoya's grandmother, Rema Beckford, the deceased's aunt. Kemoya said that whilst she was on the veranda at her grandmother's house she saw Sharon chasing the deceased with a machete and saw her chop the deceased in his back. Shortly afterwards she saw the appellant, who lived nearby, come upon the scene. She herself then ran from the veranda down to the garden gate and saw the appellant "push the knife in Andrew Grant's belly . . . stab Andrew in his belly . . . then draw out the knife and wipe it on his pants". She was cross-examined as to whether the deceased himself had a knife and said "I did not see one, sir, so I couldn't know". Her grandmother, Rema Beckford, said that, having heard a call, she reached the fence around her house "just in time to see when [the appellant] pulled a knife from

Andrew's side." She said that at this time Sharon was standing behind the appellant with a machete in her hand and at that point she too then struck the deceased. She denied that the deceased had been attacking Sharon or that he had had a knife.

7. The central evidence for the defence was simply and solely the appellant's own unsworn statement made from the dock as follows:

> "The day the incident take place, my Lord, I was coming from a house. I hear somebody shouting for murder. When I reached up there I see my sister back turned to me and I see Mackie facing her with a dagger knife in his hand. I get in the middle to shield him off, shield him from my sister. He said I must move out the way, so I said to him: 'Mackie, all the while you beat up my sister' and he keep on coming at my sister to get her. Still I keep him off that him don't get her. Him still coming. Him said if him don't get her him going to kill the two of us. He put back the dagger knife in his waist. He give me a big shub and I drop on the ground. Him get at my sister now and I get up so frightened and chuck him. Him eased out back the dagger knife and attacked me with it. Him have him hand up in the air with the dagger knife. Him attacked me like him want to kill me. I was have a knife and I shub it to him and he keep on coming same way, ignorant, and I see my sister with a lot of blood on her face. Tell somebody carry her to the doctor."

8. The judge told the jury that:

> "in a nutshell what the prosecution is saying is that two persons chased, stabbed, chopped the deceased and he died shortly thereafter." (Record p 134) "The prosecution is saying that at no time was the deceased attacking anybody, at no time was the deceased seen with any instrument that would be used to inflict harm on anybody in particular, the deceased had no knife." (Record p 143)
> "The defence is saying that when [the appellant] shubbed a knife into [the deceased] on 3 May 1998 he did so because he was defending himself from [the deceased] who he says had a dagger and that he had the dagger intending to kill his sister Miss Brown and himself". (Record p 142).

9. Although at one point in the summing up the judge said "Defence Attorney has suggested that the accused did not really bring about the

death of the deceased and there is no evidence before you that he did, and he has suggested to you that the person who should have been charged is none other than the sister who is Sharon Brown" (Record p110), he finally directed the jury that only three possible verdicts were open to them: not guilty if they found that the accused was acting in self-defence; guilty of manslaughter if they thought he might have been provoked so as to lose temporary control of himself, or guilty of murder. The appellant was, as stated, convicted of murder.

10. Nothing that their Lordships have said thus far will have raised so much as an eyebrow. This case, however, has had a most curious procedural history. There were in total three trials arising out of this killing. First, the appellant and Sharon Brown stood trial together before Reid J and a jury in February 1999 jointly charged with the deceased's murder. On that occasion the jury had disagreed (8:4) as to whether the appellant was guilty of murder, had unanimously acquitted Sharon of murder, and had disagreed (8:4) as to whether Sharon was guilty of manslaughter.

11. The second trial (at which the appellant was convicted of murder) began on 8 May 2000 when, astonishingly, both the appellant and Sharon were again jointly arraigned for murder, after which a jury was sworn in to try them. They were, as they had been at the first trial, jointly represented, although by different counsel from the first trial. The Court adjourned that day at 12.25 pm with a view to starting the case 'quickly tomorrow morning'. It is plain that by the next morning someone had realised the error made. Since Sharon had been acquitted of murder at the first trial, obviously she could not be tried for it again. Nor, however, could she be tried for manslaughter at the same hearing as the appellant was to be retried for murder: section 31 of the Jury Act provides that in Jamaica (in common with most other Caribbean countries) trials for murder and treason are by 12 jurors, trials of other criminal charges are by 7. It is settled law that these provisions are mandatory and their constitutionality is not challenged on this appeal. In the result, on the morning of 9 May 2000 (a quarter of an hour later than intended because of defence counsel's delay through attendance at another court) the appellant alone was re-arraigned for murder and his trial was begun. It remains unclear when defence counsel himself first learned about the mistake, although there is some evidence before the Board to suggest that he only discovered it on his late arrival at court that very morning. Manifestly, however, at the start of the hearing on 8 May he cannot have known that this was a retrial (or at any rate the result of the earlier trial)—assuming, of course, that he did not commit the elementary error of supposing that Sharon could properly be tried again for an offence of which she had already been acquitted.

12. There was, as stated, a third trial. This was of Sharon alone on a count of manslaughter, the allegation on this occasion being that she was party to a joint enterprise merely to assault the deceased. This third trial took place before Marva McIntosh J and a jury of seven between 24-26 April 2001 and it resulted in Sharon's acquittal by the jury's unanimous verdict reached in less than an hour.

13. Critical to this appeal is the fact that at the first and third trial Sharon gave evidence whereas at the second trial she did not. She was, she says, at court throughout the appellant's trial, kept in a separate room, unaware of what was taking place but expecting and willing to be called.

14. Transcripts of Sharon's evidence at both the first and the third trials—evidence given, of course, on each occasion in her own defence—are before the Board and it is clear that they supported not only her case but also the appellant's. Had it been otherwise, indeed, they could not have been jointly represented as they were at the first trial and as initially had been intended at the second. Sharon gave clear evidence of a history of violence by the deceased towards her, of his anger at her refusing to resume their relationship following her reluctantly providing him with a meal on the day of the killing, of his threatening her, then chasing her with a knife, of his throwing a stone at her head, of her finding a machete and picking it up in an attempt to defend herself, of the appellant then arriving on the scene and trying to shield her from the deceased with his body, of the deceased being taller and stronger than the appellant and continuing to threaten her with his knife, and eventually of her stumbling to the ground and being unaware of the final fatal stabbing.

15. Right or wrong, truth or lies, Sharon's evidence was in all essential respects consistent both on the two occasions she gave it and also with the appellant's unsworn statements from the dock (which again were more or less identical on the two occasions he made them).

16. It seems to their Lordships incomprehensible that Sharon was not called to give evidence on the appellant's behalf at the crucial second trial. According to a recent affidavit from his solicitor, who has on several occasions spoken by telephone to Sharon:

> "Immediately after [the appellant's] conviction on 10 May 2000, Sharon confronted [counsel] as to why she and [the appellant] were not tried together and why she was not given the opportunity to give evidence at [the appellant's] trial. He

was unable or unwilling to give an answer. [Counsel] is now deceased."

17. Without Sharon's evidence, and with only his own unsworn statement from the dock, the appellant's case was threadbare in the extreme. No one else spoke of the deceased having a knife. The two eye-witnesses denied it and certainly no knife was ever produced. Whether or not the deceased was carrying a knife was an issue at the very core of this case. Important too was the deceased's history of violence towards Sharon and the likelihood, therefore, of her needing protection from him. Except for the appellant's dock statement that he told the deceased, "Mackie, all the while you beat up my sister", there was no evidence at all of the deceased's previous violence towards Sharon. Indeed Rema Beckford had said that the appellant and the deceased were good friends, evidence which prompted the judge to comment in his summing up: "Would he have been friends with a man who was always beating up his sister?" (Record p 115).

18. Their Lordships are accordingly much troubled by the failure to call Sharon Brown as a defence witness. Mr Birnbaum QC for the appellant has sought to ascribe this to the impossibility under Jamaican law of having Sharon and the appellant jointly retried following the original trial. He submits that "the appellant was gravely prejudiced by the operation of the law". Their Lordships, however, see it rather differently. There was nothing to stop Sharon being called as a witness for the defence. For whatever reason, however, perhaps because of the extraordinary course of events at the beginning of the second trial, there appears to have been no proper discussion or consideration of this obvious possibility when clearly there should have been. It is difficult to resist the conclusion that defence counsel was seriously in error in this respect, reluctant though their Lordships have been to make any positive finding to this effect given the lateness of the complaint (which nowhere appeared in the original grounds for appeal) and the impossibility of investigating it fully, now that counsel is dead.

19. There is just one other, amongst Mr Birnbaum's very many other, grounds of appeal which causes their Lordships some concern in this case, namely the omission of any good character direction to the jury. As is well known, this has proved a perennial problem in the Caribbean and there are now innumerable authorities touching upon it. Plainly the judge here cannot be faulted for not having given the direction: counsel had failed to raise the matter in evidence. That the appellant *was* of good character, however, is not in doubt. It emerged in mitigation and is not now disputed. Indeed it goes rather further than that. Before the Board now are recent affidavits from two wholly respectable middle-aged

women, both of whom have known the appellant from childhood and both of whom speak eloquently of his many excellent qualities and his essential good character. Now it is true, as Mr Guthrie QC for the Crown submits, that the impact of each limb of the good character direction would to some extent have been weakened in the particular circumstances of this case: the credibility limb by virtue of the appellant's having chosen not to give sworn evidence (consider in this regard Lord Salmon's opinion for the Board in *DPP v Walker* [1974] 1 WLR 1090, 1096); the propensity limb because of the appellant's undoubted possession of a knife for which he offered no explanation whatever. But these considerations notwithstanding, the Board still think that evidence of the appellant's good character could and should have been adduced and the direction accordingly given and their Lordships conclude that this could have materially advantaged the appellant in his defence, whether of provocation or of self-defence. That was the conclusion reached by the Board in *Langton v The State* (Privy Council Appeal No. 35 of 1999) and *Paria v The State* ([2003] UKPC 36)—both cases where, as here, the prosecution were alleging that the accused was guilty of entirely unprovoked extreme violence and where the appeals succeeded principally because of the judges' failure to give, in Langton's case any, in Paria's case any propensity, character direction to the jury.

20. Mr Guthrie quite properly reminds the Board of a series of recent cases such as *Bhola v The State* [2006] UKPC 9; (2006) 68 WIR 449, *Gilbert v The Queen* [2006] UKPC 15; [2006] 1 WLR 2108 and *Simmons and Green v The Queen* [2006] UKPC 19; (2006) 68 WIR 37, which make it plain that the lack of a proper good character direction will not avail the appellant where the court is satisfied that the jury would in any event have convicted. In all those cases, however, the evidence against the accused had been overwhelming.

21. Had the absence of a good character direction been the sole or main ground of complaint here their Lordships would not have thought it a sufficient basis on which to allow this appeal. Coupled, however, with the principal ground, the failure to call Sharon as a witness for the defence, the balance is tipped. With Sharon's evidence and a good character direction, the Board cannot say that the jury would inevitably have convicted this appellant, at any rate of the full offence of murder. It must be remembered that at the first trial, when Sharon had given evidence, the jury disagreed. And at the third trial, when again she gave evidence, she was herself acquitted.

22. In the result their Lordships would allow this appeal and remit the matter to the Court of Appeal for them to quash the appellant's conviction for murder and to consider whether or not to order a retrial. The appellant

will remain in custody meanwhile. The Board, as agreed, make no order for costs.