[2011] UKPC 18
Privy Council Appeal No 0033 of 2010

JUDGMENT

Rajendra Krishna (Appellant)
v
The State (Respondent)

From the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Mance
Lord Clarke
Lord Hamilton (Scotland)
Sir Henry Brooke

JUDGMENT DELIVERED BY
Sir Henry Brooke
ON

6 July 2011

Heard on 13 April 2011

Appellant	*Respondent*
Edward Fitzgerald QC Helen Law (Instructed by Simons Muirhead & Burton)	Tom Poole (Instructed by Charles Russell LLP)

SIR HENRY BROOKE:

Introduction

1. On the evening of 26 May 1984 Mycee Jagmohan was shot dead at her home in La Fortune, Woodland during the course of an attempted burglary. On 12 January 1988 the appellant was convicted of her murder at a trial conducted in the High Court of Justice by Douglin J and a jury. He was sentenced to death, but his sentence was later commuted to one of life imprisonment. A co-accused Fazal Hosein ("Hosein") was acquitted, and a third man Krishandeth Bissoon ("Bissoon") who had accompanied them to the victim's house was the principal witness for the prosecution. On 5 October 1995 the Court of Appeal of Trinidad and Tobago (Sharma, Gopeesingh and Hosein JJA) dismissed the appellant's application for leave to appeal against conviction. He now appeals to the Board by special leave as a poor person granted on 23 June 2010.

2. Four issues arise for decision on this appeal:

> (1) Whether the way in which the judge told the jury about the reasons why he had admitted an alleged confession statement following a voire dire amounted to a material irregularity;
>
> (2) Whether the judge failed to direct the jury properly as to the status of Bissoon as an accomplice;
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> (3) Whether the failure by the judge to direct the jury as to the effect of the appellant's good character was a material irregularity;
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> (4) Whether in all the circumstances it would be appropriate to apply the proviso contained in section 44(1) of the Supreme Court of Judicature Act on the basis that the jury would have inevitably convicted the appellant even if the irregularities had not occurred.

It was common ground that the outcome of the appeal largely centred on the cogency or otherwise of the first two grounds.

3. It has not been possible to obtain a copy of the judgment of the Court of Appeal, if indeed they ever delivered a reasoned judgment. The Record contains a transcript of the proceedings in that court on 4 and 5 October 1995, at the end of which Sharma JA said that the application for leave was refused and the conviction

and sentence affirmed and that "we will give our reasons a little later, but shortly." It is clear from the transcript, however, that it was not in issue before that court that the trial judge should have given an "accomplice direction" but that the court was willing to apply the proviso when upholding the conviction. Different counsel were instructed to appear for the appellant on that appeal, and it has not now been possible to contact counsel who appeared for him at the trial. Indeed, it seems likely that he is now dead. As to the other issues, the Court of Appeal does not appear to have been impressed with the first, and the "good character" issue was not raised before that court at all.

The first issue: the judge's references to his ruling on the voire dire

4. The first ground of appeal arose in this way. At the trial the appellant did not give evidence, but he made a short unsworn statement from the dock, the main thrust of which was to the effect that he had been asleep at home at the time the alleged murder had taken place. However, he did give evidence about what happened at the police station, both during a voire dire which was ordered when an issue arose as to the admissibility of his statements to the police, and then, after the judge had ruled that the statements were admissible, much more briefly during his unsworn statement from the dock. A great deal turned on the way the judge directed the jury about these statements during his summing up.

5. The evidence about what happened at the police station ran along the following lines. On the day after the murder, 27 May 1984, Hosein attended the police station and made an untrue statement about the events of the previous day. Sgt Phillip, who was in charge of the police investigation, then visited Hosein's home at about 8 pm that night, when he arrested and cautioned him and took him to the police station in San Fernando for questioning. At 3.30 am the next morning, 28 May, Bissoon was also taken to the police station for questioning. At 4.30 am the appellant was arrested and taken to the police station for questioning. His house was also searched for guns and ammunition.

6. An incident, the facts of which were in dispute, took place soon after the appellant's arrival at the police station. According to the prosecution evidence Sgt Phillip had left him sitting in handcuffs on a chair at the back of the main CID office while he went to the front office. He then heard a crashing sound, and on his return to the main office he found two police officers picking the appellant off the floor, bleeding slightly from his neck. One of the officers told him that the appellant had said that he was not going back to jail and that he was going to kill himself. He had then thrown himself through the louvred windows and tried to cut his neck with a piece of broken glass. Sgt Phillip arranged for him to be taken to hospital to be treated for his injuries.

7. Later that day Sgt Phillip said that the appellant had asked him for a drink of water and that when he had finished it he had volunteered to describe what had happened. He then explained that they had gone to the victim's house to steal money and jewellery, but a lady had come out with a cutlass. He had fired a shot to frighten her, and had then given the gun to Hosein who had also fired a shot with it. They had then run off to the lagoon at the back of the house. When he had finished this account of the incident, he had agreed to put it in writing. Another police officer, Cpl Maharaj,

had witnessed the taking of the statement. This was to the effect that when the woman saw them, Bissoon had stuffed her mouth with a handkerchief, and he had then fired the shot to frighten her. Then:

> "I give [Hosein] the gun, [Hosein] the going in the house and me eh I knew who he see and [Hosein] shot and he tell me to run and eh run in the lagoon."

The statement ended with the assertion:

> "I have read the above statement and I have been told that I can correct alter or add anything I wish this statement is true I have made it of my own free will."

The statement was then signed by the appellant and counter-signed by the two police officers. About an hour later a justice of the peace attended the police station at Sgt Phillip's request, and he signed an endorsement to the statement which reads:

> "I read the above statement to Rajendra Krishna and I ask him [whether] the statement was correct and he said Yes. I ask him if any threats, promises and/or violence was used on him in obtaining the statement and he said No. I further asked him if the statement was a voluntary one and he said yes."

This magistrate had died before the trial took place, but Sgt Phillip attested to what had happened.

8. The judge directed a voire dire before he permitted the jury to hear evidence about the appellant's statements. During the voire dire the appellant said that when he was taken into the CID office Sgt Phillip and Cpl Joseph had tried to make him sign a piece of paper on the basis that if he did so he would be free to go. He read the paper and saw that it involved him in the murder and he therefore refused to sign it. Both officers then beat him in order to make him sign the paper. He tried to run away but was pushed through the louvres by Cpl Joseph. He did not say *"I am not going to jail again, I am going to kill myself."* Cpl Joseph then picked up a piece of glass and began cutting his throat: he could not have cut it himself because he was handcuffed.

9. At the hospital he had told the doctor that Cpl Joseph had cut his neck. When he was taken back to the station, Sgt Phillip said "*we ain't finish with you yet"*. After asking him whether he had made up his mind to sign the paper, Sgt Phillip forced his thumb into the appellant's left eye. The appellant then signed the paper, but he did not do so voluntarily. He only signed it because he had been beaten on two occasions. No one asked him about the bandage on his neck when he was signing the document. When shown the statement at the trial, the appellant said that his signature did not appear on it and that he had signed a white piece of paper (which described how he had killed a woman), not the yellow piece which had been produced. In his statement

from the dock he dealt with this incident more briefly, but along the same lines. He said that Sgt Phillip had pushed his thumb into his eye for about half an hour.

10. It was common ground that the appellant was taken to the hospital again the following day, 29 May. He had complained to another police officer (also called Cpl Joseph) about pain in his left eye. Cpl Joseph told the jury that the eye was inflamed but not swollen. On this occasion a doctor at the hospital signed a certificate to the effect that he had found the appellant to be suffering from a sub-conjunctival haematoma on the left eye, and that the injuries were consistent with blunt trauma. There was an issue at the trial as to whether this injury had been caused by the incident involving the louvred windows in the morning, or Sgt Phillip's allegedly rough treatment of him in the afternoon.

11. At the end of the voire dire the judge ruled that in his opinion the written statement had been made voluntarily and that it could therefore be admitted into evidence. In his summing-up to the jury he made reference to this ruling on more than one occasion, and it is from this part of his summing up that the first ground of appeal arises.

12. The passages in the summing-up of which complaint is made were as follows:

> "[The statement] was tendered into evidence, but [Counsel] objected on the grounds of threats, violence and oppression. At that stage, members of the Jury, I asked you to withdraw and when you withdrew, a legal point was considered and I ruled that the statement was given voluntarily and it was admissible in evidence, and it was read to you…" [The statement was read again]
>
> "Members of the jury, you will recall that I asked you to withdraw from the Court at a certain stage while a legal point was being argued, where Defence Attorney objected to a statement which Sgt Phillip said was made to him by [the appellant] being admitted into evidence on the grounds of threats, violence and oppression. After you left the Court room I conducted what is called a voire dire – a trial within a trial – to determine whether the statement was made voluntarily. After hearing evidence, I ruled that the statement was made voluntarily and directed, after you were recalled, that the statement be read to you, which was done.
>
> I must direct you, members of the jury, as a matter of law that the voluntariness is a matter for the judge and not the jury. The truth of a statement is not directly relevant when a judge is ruling on admissibility; though if the judge admits the statement, the truth of it would be a crucial question for the jury. The only question for the jury to consider is the probative value of the statement. The statement is part of the evidence because of my decision as to its voluntariness; but its weight and value is a matter of fact for you as judges of the facts in the case. That is the only question

you have ultimately to determine, since I have determined the other – namely, admissibility.

You will recall, members of the jury, that I informed Attorney for [the appellant] that he had the right to cross-examine the witness for the Prosecution all over again on the question of the circumstances surrounding the giving of that statement; because, while the question of the admissibility of the statement being a matter of law is for me, it having been admitted into evidence, you are the ones to decide what weight or importance you would attach to the statement. And therefore it is relevant that the Attorney for [the appellant] should be allowed an opportunity to exercise his right of cross-examining the witness for the State again – this time in your presence - to satisfy you as to the circumstances surrounding the taking of the statement as the accused said, so that he would be in a position to tell you, if you accept what the accused said, as to how the statement was given or if there was any doubt, then you may attach no importance to it. That is the reason I invited him to cross-examine at the appropriate time and to lead evidence, if he chose to, in support of his allegation.

You have heard the statement read. It was admitted by me in evidence as a matter of law as being a voluntary statement. The only question for you to consider, members of the jury, on this issue is its probative value and the effect of that is what weight and what value you would attach to it. You may attach no weight to it. You may choose to say it is a document. It is evidence which carries great weight in your minds …"

[Paragraph omitted]

"At this stage, I think it appropriate to make reference to what was submitted by the Attorney for the State, when he pointed out that in the statement of [the appellant] given to Sgt Phillip, he said among other things that it was [Hosein] who shot the lady; but in his statement from the dock, he said he was at home sleeping. He was either present at the scene or not. Which was it? This is a matter for your consideration.

Furthermore, [Hosein] admitted giving a voluntary statement to Sgt Phillip, certified by … the justice of the peace. [Hosein] was not man-handled, beaten or a thumb pressed in his eye; but [the appellant] made those allegations against Sgt Phillip and Cpl Joseph, whom he accused of trying to murder him with a piece of broken louvre glass.

> Do you believe [the appellant]? Did he sign the statement about three or four times... and initialled the same voluntarily; or was he forced to sign by the violence or especially the alleged presence of Sgt Phillip's thumb in his left eye for half an hour? If you believe the statement was extracted from him by the use of force and threats, you should reject it out of hand. But you must consider the other evidence adduced by the State. If you are in doubt you will not be sure; so also you will reject the said statement. It is only if you are sure that the statement was true that you will consider it along with the other evidence adduced by the State."

Discussion of the first issue

13. It appears that the judge's references in his summing up to his ruling on the voire dire followed an approach commonly adopted in the Caribbean both at the time of the trial (1988) and at the time of the appeal in this case (1995). In *Mitchell v The Queen* [1998] UKPC 1; [1998] AC 695, however, the Board held that the judge's decision on the voire dire to determine the admissibility of a confession should not be revealed to the jury since it might cause unfair prejudice to the defendant by conveying the impression that the judge had reached a concluded view on the credibility of the relevant witnesses and of the defendant. Lord Steyn said at p 703H:

> "The vice is that the knowledge by the jury that the judge has believed the police and disbelieved the defendant creates the potentiality of prejudice."

14. In *Thompson v The Queen* [1998] UKPC 6; [1998] AC 811, Lord Hutton discussed this matter rather more fully. He said at p 843F-G:

> "It appears that it has been a common practice in the courts in the Caribbean for a trial judge to tell a jury that he or she has held that confessions are voluntary statements. However in England it is recognised that this practice should not be followed and that it constitutes an irregularity for the judge to inform the jury, which has been absent during the voire dire, that he or she has ruled that a confession is admissible. The reason why such a statement by the judge to the jury should not be made is because of the danger that the jury might be influenced by the judge's view on admissibility in deciding the questions which are for them alone, namely, whether the confession had been made and, if so, whether it was truthful and reliable. Therefore their Lordships are of opinion that the practice should also cease in the Caribbean: see the judgment of the Board in *Mitchell v The Queen* [1998] UKPC 1; [1998] AC 695."

15. In *Thompson's* case, however, the Board took the view that the judge's statement to the jury that she had ruled that the confessions were voluntary statements

was a brief observation in a lengthy summing up: she did not elaborate on the statement or say that she believed that the appellant had not been ill treated by the police and disbelieved the appellant. Furthermore, after saying that she had held that the confessions were voluntary statements, she had immediately gone on to emphasise that "it is for you to look into all the circumstances in which the statement was taken" and that "it is for you to assess and to put what weight and value on both statements - the oral and the written statements and to attach such weight as you deem fit to the statements that had been put in evidence". In addition the judge had very fairly and in detail reminded the jury of the appellant's evidence that he had not made the confessions and of how he had been very seriously ill treated by the police. For these reasons the Board was satisfied in that case that, when viewed in the context of the whole summing up, the judge's statement did not in the event constitute a material irregularity.

16. It is not surprising that on the appeal in 1995 the Court of Appeal was not troubled by this aspect of the present case, because the judge was following a practice that was commonly followed in Trinidad at the relevant time and had not yet been disapproved. However, if what happened constituted a material irregularity which significantly affected the fairness of this murder trial, the Board has a duty to say so.

17. This was not a case like *Thompson*, in which the judge had made a single reference to her ruling. In the passage of which complaint is made on the present appeal, the judge referred to his ruling that the statement was made voluntarily at least four times in the five paragraphs at the beginning of the citation in para 12 above. While it is true that the judge later told the jury that they were the ones to decide what weight or importance they would attach to the statement, and that they were entitled, if they saw fit, to attach no weight to it at all, they could hardly have been unaffected by the news that the judge had considered that this was a voluntary statement. Given that the judge said four times that he had ruled as a matter of law that the statement was indeed made voluntarily, the jury could have been understandably confused by the final paragraph of the passage under challenge in which he told them that it was a matter for them to decide whether he had signed the statement three or four times and initialled it voluntarily or whether he had been forced to sign it by the violence of the police.

18. For these reasons the Board is of the opinion that there is no reason not to follow the general rule enunciated in *Mitchell* and *Thompson* and that the way in which the judge repeatedly referred to his ruling on the voire dire constituted a material irregularity.

The second issue: whether there should have been an "accomplice direction"

19. It was not in issue on appeal, either in the Court of Appeal or before the Board, that the question whether Bissoon should have been treated as an accomplice ought to have been left to the jury. It was argued, however, that the judge's failure in this regard did not amount to a material irregularity: alternatively, that it would be appropriate, as the Court of Appeal clearly did, to apply the proviso. It is therefore necessary to consider the evidence which tended to show that Bissoon should have been treated as an accomplice.

20. Bissoon, for his part, said that he had gone to a farewell in Woodland that evening with the appellant and Hosein. After they had been there a while, they went out for a walk down the hill, and when they came across a car with a young couple in it the appellant took out a gun from his pocket and shot the young man in the car. Bissoon said he had no idea that the appellant had a gun with him. After the shooting, they all ran down the hill and on to a track. The appellant pointed the gun at the other two and said: "*anyone of you try to double cross him, I will shoot all you mother cunt down. I know where all you family living I will wipe out your whole family.*" He then said to Hosein "*here nah man I work 2 bullets already and I aint get nothing as yet*" and asked him whether he knew anybody who had money and jewels in the Woodland area. Hosein said he did and led the three of them to the back of the deceased's house.

21. Bissoon maintained that he remained behind the bathroom. The appellant for his part approached the back of the house, placed a scrubbing board on top of some barrels underneath a window, climbed up and tried to open the window. A dog then began to bark and a light came on at the front of the house, which caused the appellant to jump down and go round to the front of the house. The deceased came out of the house on to the gallery and the appellant said to her "*pass the money and jewel*". The deceased refused and the appellant fired two shots. The deceased ran down the steps from the gallery and into the front yard where she fell over, face down, just before the almond tree. The appellant started to go up the steps into the house, but somebody was coming up the road so he ran back down. All three of them then ran off, with the appellant leading the way. Bissoon maintained that he and Hosein did nothing at the house.

22. Hosein's account of the matter was rather different. He spoke about the visit to the farewell, how they had all decided to leave together and go to the rum bar down the hill, and how the appellant had shot both the man and the woman in the car when the man had been reluctant to give him his car keys. Hosein, too, said he had not realised until then that the appellant had a gun with him. After they had all run down the hill Bissoon told him that the appellant had made threats to him, whereupon the appellant pointed the gun at them both and told them "*anyone try to double cross him he will have to fock we up and our family*", by which he made it clear he would shoot them and their families. The appellant then pointed the gun at Hosein and asked if he knew anyone who had money and jewels. Hosein said 'yes' in order to please the appellant. He said he intended to point out a house to get away from the appellant and Bissoon. All three of them ran and walked until Hosein pointed out the deceased's house.

23. On arriving there Bissoon went to the bathroom at the back of the house, Hosein was under the wares stand and the appellant was in the front behind a tank. In cross-examination, Hosein said that the appellant had initially gone to the back of the house and, with the assistance of both the other two men he had moved a barrel up to a window in order to try and open it. Hosein said that Bissoon was helping the appellant more than he did. It was only after the barrel was about to fall, and when lights went on inside the house, that the appellant jumped down and went round to the front. Hosein saw the deceased come out of the house onto the gallery, and the appellant walk up to the deceased and shoot her twice. Hosein said that he had been too afraid to run away before this happened because he thought that the appellant would shoot him, and that whilst the appellant was walking up to the deceased to shoot her, he was also watching Hosein and Bissoon.

24. Immediately after the shooting, all three of them ran away from the house to the lagoon area. In cross-examination, however, Hosein said that the appellant had told both him and Bissoon to go into the house after the shooting, and as a result he had walked toward the house and Bissoon had made an attempt to go in. Hosein then saw a person walking toward the house and he decided to run away at that point. Hosein said to Bissoon, *"run, run the lady husband"*. The appellant, who had stayed in the lagoon area, asked him what had happened, and Hosein told him that the deceased's husband had come back.

25. The appellant did not give evidence at the trial. In his statement from the dock he said that he had been asleep at the home at the time, from which it would follow, if the jury accepted this, that both Bissoon and Hosein had been more closely implicated in the murder than they had been willing to admit. However in his disputed confession statement to the police he said that Bissoon had pulled out a knife during the incident involving the couple in the motor car, and that when the lady came out of the house Bissoon had taken a handkerchief and stuffed her mouth with it.

26. The effect of all this evidence, if the jury accepted it, was that Bissoon had threatened the man in the car with a knife earlier in the evening. He had gone willingly with the other two men to the victim's house when on his own admission he knew that the appellant had a gun with him which he had used a little earlier. He knew that they intended to break in and commit a robbery in the house. He had played a greater role than Hosein in helping the appellant climb onto the barrel from which he might gain access to the house through a window. He had stuffed a handkerchief in the victim's mouth, and had tried to enter the victim's house after the shooting. If the appellant was not there at all, he and Hosein, who both admitted they were at the house, would have been much more heavily implicated in what took place there.

27. The judge gave the jury an impeccable direction about the way they should approach the evidence of Hosein, the appellant's co-accused, but although counsel for both the appellant and Hosein invited the judge to give an "accomplice vel non" direction to the jury in relation to Bissoon's evidence he declined to do so. He appears to have made a ruling during the course of an earlier discussion with counsel which has not been transcribed. At the very end of his summing up, he told the jury:

> "Members of the jury, Attorney for [the appellant] submitted in this Court that the witness Bissoon should be treated as an accomplice vel non. That is, that he participated in the actual crime, and that his evidence would be suspect; and that an appropriate warning should be given to you on how to treat his evidence.
>
> I have considered all the evidence in this case and I have come to the conclusion and ruled, as a matter of law, that Bissoon did not actively participate in this crime, and should not be treated as an accomplice vel non; and no warning is necessary."

28. It is common ground that the judge's ruling was wrong, and that he should have reminded the jury of the evidence that tended to show that Bissoon was an accomplice. He should then have directed them in accordance with Lord Simonds

LC's guidance in *Davies v Director of Public Prosecutions* [1954] AC 378 at p 402 to the effect that if they considered on the evidence Bissoon was an accomplice, it would be dangerous for them to act on his evidence unless it was corroborated, although it was competent for them to do so after that warning, if they still thought it proper to do so.

29. The judge did not follow that course. Instead, complaint is made that far from warning the jury that if they found Bissoon to be an accomplice it would be dangerous to rely on his evidence unless it was corroborated, the judge used the expression "star witness" when speaking of him (which he defined as meaning "the major witness" or the "crucial witness".) When Bissoon said that he saw that the appellant was a madman shooting at the people in the car, the judge said he thought he was justified in coming to that conclusion, even though it was in issue at the trial whether the appellant had acted in the way Bissoon alleged. He ended his summary of Bissoon's evidence by saying:

> "…So, members of the jury, I would like you to keep uppermost in your minds that Bissoon is a witness for the state and he is giving quite favourable evidence on behalf of the accused, Fazal Hosein."

The judge did direct the jury, however, to be very careful about Bissoon's evidence, to examine it thoroughly, to consider whether at any time he was prevaricating or hesitating to answer:

> "Look at it with a fine tooth comb and ask yourselves whether you consider him as a witness you can put your trust in; or whether you found him unsatisfactory. It is a matter entirely for you."

30. Complaint is also made of the fact that just before the judge directed the jury that they need not consider whether Bissoon was an accomplice, he had spoken favourably of Hosein (thereby, it was said, making the appellant's conviction inevitable). The judge told the jury;

> "You have heard and seen Fazal Hosein testify and submit himself to cross-examination. You saw his demeanour in the witness-box. Did he impress you as a truthful witness? It seems to me that he was not seriously challenged, but that is a matter entirely for you to decide."

31. The appellant's case, in short, is that if the judge told the jury to put out of their minds the possibility that Bissoon was involved in the crime, he was in essence telling them that he believed that the only reason for his presence on the scene was because of the threats he had received from the appellant. If in the judge's view Bissoon was a reliable witness, and Hosein's evidence had not in his opinion been seriously challenged, this was tantamount to his expressing the opinion that the appellant was guilty of murder. In addition, the judge is said, with some justification, to have failed

to remind the jury of some material inconsistencies between Bissoon's and Hosein's evidence on certain important issues.

32. That the judge should have given an accomplice direction is not in issue. In the opinion of the Board, the warning the judge did give to the jury about the need to examine Bissoon's evidence thoroughly did not go far enough to cure this defect in the light of the other things the judge said about his evidence. This, too, was a material irregularity

The third issue: the absence of a "good character direction"

33. The third issue on the appeal arises in this way. It was common ground before the Board that the appellant had no previous convictions. Evidence to this effect was not adduced before the trial judge, and no complaint was made about the absence of a "good character" direction before the Court of Appeal. It has not been possible for those now representing the appellant to discover why the jury was not told about his good character. There were two advocates practising at the Bar of Trinidad and Tobago who bore the name of counsel acting for the appellant at the trial. One of them, who has now retired, has no memory of having represented the defendant, and the other has died since the trial.

34. It is accepted that there is no general duty on a judge to inquire into the issue of the accused's character if this has not been raised by the defence: see *Barrow v The State* [1998] AC 846, 852, following *Thompson v The State* [1998] AC 811, 844. In the ordinary way the only way of challenging the appellant's conviction on this ground would be to establish that the failure to raise the issue was due to the incompetence of counsel who appeared at the trial, and the Board will not generally entertain such a ground of appeal if it is being raised for the first time on the appeal to the Board (*Bethel (Christopher) v The State* (1988) 55 WIR 394; *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14; [2005] 1 WLR 2421; *Ramdhanie v State of Trinidad and Tobago (Practice Note)* [2005] UKPC 47; [2006] 1 WLR 796, 803). A fortiori when the trial took place such a long time ago that it is now impossible to recreate with precision what happened or did not happen at the trial, and why. It is argued for the appellant, however, that there were circumstances that took this case out of the general rule.

35. So far as the evidence at the trial is concerned, Bissoon told the jury that at the police station the appellant had told Cpl Joseph that he did not want to go back to jail again, and the judge dealt with this part of the evidence in the following way during his directions to the jury:

> "Now, members of the jury, you will recall that I had warned you that this talk about jail, the reason why I intervened at that stage is whenever anybody speaks about jail or having gone to jail or come from jail, it might give a wrong impression that because a person is in jail or come from or has gone to jail that that person is likely or has a tendency to commit crime, and I again would direct you to disabuse your minds about that. Not because he is alleged to have said that he does not want to go back to jail that he is a confirmed jail-bird or a confirmed criminal. Disabuse your minds of that, because it might very well have been, and I

> am sure it is, that that is the first time he went to jail. It may very well be that: so you cannot conclude that because he said he does not want to go back to jail that he is a criminal and that he has a propensity to commit crime."

36. Complaint is made that this falls very far short of the good character direction to which the appellant was entitled if he was to have a fair trial. It is said that the judge entered the arena of character directions the wrong way round. Instead of directing the jury to disabuse their minds of any idea that the appellant had a bad character, the judge should have been in a position to give them positive directions about the importance of his good character. A defendant's good character may be relevant to his credibility as a witness (a person who is of good character is more likely to be truthful than one who is not) and also to his propensity to commit the crime in question, especially a crime as serious as the crime of murder. Although the alibi defence absolved the jury of having to weigh up the credibility of the defendant's evidence of what went on at the scene of the crime against the evidence of Bissoon and Hosein, it was very important, it is said, that the jury should have been told he had a good character and therefore no propensity to perform the serious criminal acts imputed to him.

37. In fairness to the trial judge, it should be said that the importance of good character directions did not become manifest until after the decisions of the House of Lords in *R v Aziz* [1996] AC 41 and of the Board in the cases mentioned in paragraph 26 above. These cases long post-dated this trial, which took place in 1988, and indeed the 1995 appeal.

38. The Board is not convinced that this ground of appeal would have been sufficient to shake the safety of the appellant's conviction if it had stood alone. It is now much too late to obtain a clear understanding of what happened or did not happen at the trial or the reasons why the appellant's counsel did not adduce evidence of good character. It appears that this should have happened, but the absence of the appropriate direction did not have the same effect as it would have had if the appellant's case had been "Yes, I was there, but things happened in a different way from that described by Bissoon and Hosein." For these reasons the Board is not disposed to take this omission into effect when assessing the overall safety of the appellant's conviction, and if this ground of appeal had stood alone it would have been disposed to apply the proviso.

Conclusion

39. It follows that the judge ought not to have told the jury about his ruling on the voire dire and that he ought to have given the jury an appropriate "accomplice direction" in relation to the evidence of the main witness for the prosecution. These were significant irregularities, and this was a trial which culminated in a death sentence. Strong though the evidence against the appellant was, the Board is unable to conclude that the jury would have inevitably convicted the appellant if these irregularities had not occurred.

40. In the ordinary way the Board would remit the case to the Court of Appeal of Trinidad and Tobago to enable it to decide whether or not to order a new trial. In this

exceptional case, where the crime was committed 27 years ago and the appellant has already spent 23 years in custody as a sentenced prisoner, part of this time being spent on death row, the Board does not consider that it is in the interests of justice that a new trial should take place. The appeal is therefore allowed, and because this is not a case where a retrial should be considered, the appellant should be immediately released.