[2012] UKPC 8
Privy Council Appeal No 0113 of 2009

JUDGMENT

Deenish Benjamin and Deochan Ganga (Appellant) *v* The State of Trinidad and Tobago (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Clarke
Lord Wilson
Dame Heather Hallett
Dame Janet Smith

JUDGMENT DELIVERED BY LORD KERR ON

13 March 2012

Heard on 9 November 2011

Appellant	*Respondent*
James Wood QC John Jones (Instructed by Simons Muirhead & Burton)	Howard Stevens (Instructed by Charles Russell LLP)

LORD KERR

Introduction

1. On 4 December 2006 Deenish Benjamin and Deochan Ganga were convicted of the murder of Sunil Ganga at San Fernando Assizes following a trial before Lalla J and a jury. The mandatory sentence of death was imposed on both. Appeals against their convictions were dismissed by the Court of Appeal for Trinidad and Tobago on 3 July 2008. They now appeal to this court against their conviction and sentence.

Facts

2. Sunil Ganga died on the night of 12 July 2003. He was a married man. His wife was Roseanne. She gave evidence against the appellants. Deenish Benjamin was the step-cousin of Sunil. Deochan Ganga was his cousin. They both lived next door to Sunil and Roseanne.

3. Mrs Ganga testified that she and her husband had returned home at about 10.30 pm on the night of 12 July. She had entered their home, while her husband went to a shed in the garden. She heard what she thought was a bottle breaking and her husband crying out, "Deenish boy, what you doing, meh?" and then, "Roseanne, run." According to her evidence, Mrs Ganga did not run. She stayed in the house, looking out through cracks in the door. She claimed that she saw and recognised the appellants. She had known and regularly seen Benjamin and Ganga over the previous seven years. According to her, they were striking her husband. She saw them pull him to the back of the shed. Then she heard loud sounds and groaning. She saw the shed, which was made of galvanised steel, shaking. After this she heard footsteps.

4. She said that an hour or thereabouts passed before the noises ceased. Mrs Ganga then left the house. She claimed that she found her husband, hanging from a rope which had been tied to a rafter in the shed. He was dead. A broken bottle was on the ground. There was blood on her husband's face and on the walls.

5. It was not until 4.30 am, some five hours later, that Roseanne Ganga went to the home of her father-in-law, Chadrabooj Ganga to tell him that his son was dead. There is a dispute between them as to what she told him. He gave evidence that she said, "Pappy, Sunil hang himself." Mrs Ganga claimed that she said to her father-in-law that his son was hanged. It is not in dispute, however, that at the time that she

told him of his son's death, Mrs Ganga did not mention the appellants' presence at the scene where he died.

6. After learning of his son's death, Chadrabooj Ganga accompanied his daughter-in-law to her home and there he found his son, hanging from the rope. The police were summoned. They arrived later that morning, at about 7.00 am. A Sergeant Flanders spoke to Roseanne Ganga. She took him to the shed where the deceased's body was still hanging. The sergeant noted stains resembling blood on the deceased's face and on the wall. He also noticed that there was a broken bottle on the floor. Both of the deceased's feet were touching the ground.

7. Sergeant Flanders interviewed Mrs Ganga at 7.10 am. She did not tell him about the two appellants at that time. But she did tell him that she had gone to bed on the night of 12 July and that when she got up at around 4.30 am she did not see the deceased in bed next to her. It was then that she went outside and saw him hanging in the shed. This account differed significantly from her evidence on trial. In her evidence she claimed that she had started to "bawl" when she saw the shed shaking and continued to "bawl" for some time. Then after the noises of groaning and footsteps ceased she went outside, calling out to the deceased. Getting no response she went to the back of the shed and saw the deceased hanging. She did not suggest that she had gone to bed at any time between her return to the house at 10.30 pm and the discovery of her husband's body.

8. On the afternoon of 13 July Mrs Ganga went to the police station and Sergeant Flanders there recorded a statement from her. In that statement she named the two appellants and gave an account of what they had done to her husband. As a result they were both arrested the same afternoon.

9. Inspector Phillip interviewed Deochan Ganga later that evening. After caution he said, "I was deh but is Deenish who kill Sunil." Between 8.17 and 9.30 pm a written statement from him was recorded. A justice of the peace was present. The statement was signed by Ganga. In it he recounted how he had been involved in a fight with the deceased some two weeks previously. On the night of Sunil's death he and Benjamin had gone to the deceased's home. According to Deochan, Sunil had thrown a bottle at Benjamin who threw it back. This struck Sunil and caused him to fall. It was at that point that the deceased cried out. Deochan claimed that Benjamin then dragged the deceased into the shed and tied the rope around his neck. Ganga helped him to lift him up. He asserted that he had left the scene as Benjamin started to hit the deceased.

10. Later that evening Benjamin was interviewed by Inspector Phillip. After being cautioned he said, "I only help hang up Sunil". He also made a written statement in

the presence of a justice of the peace. In it he admitted going to the deceased's house and, when he encountered Sunil, he placed him in a headlock. Benjamin claimed that Ganga struck Sunil on the head and placed a rope around his neck. He said that Deochan then dragged Sunil into the shed. Benjamin repeated in his written confession the admission that he had helped Ganga to hang Sunil.

11. On their trial the appellants applied to have their confession statements excluded and a voire dire hearing was held. They gave evidence, denying that they had made the oral and written confessions attributed to them. Benjamin, who can neither read nor write, claimed that Inspector Phillip had obtained his signature to the statement by beating him and burning his left ear, and by telling him that his parents had been locked up and would only be released if he signed the statement. Ganga also claimed that he had been forced into signing his statement by beatings. He said that he had been given nothing to eat and that he had not been cautioned at any time. Both denied that a justice of the peace was present when they signed their statements.

12. The judge heard evidence from Sergeant Flanders that he had been present with Inspector Phillip during the interviews of the appellants; that the appropriate cautions had been given; and that food provided by Ganga's sister had been given to the appellants at the police station. Inspector Phillip testified that he had not beaten the appellants. Two other police officers stated that they had been present while Benjamin and Ganga dictated their statements. The two justices of the peace gave evidence that they witnessed the statements being signed by the appellants. The judge ruled that they had not been coerced in any way and had made the admissions contained in their oral and written statements. The statements were admitted in evidence.

The issues

13. No fewer than nine issues were raised on the appeal before the Board. They can be summarised as follows:

> i) Did the trial judge fail to give appropriate directions on the matter of the appellants' confessions? In particular, should a *Mushtaq* (*R v Mushtaq* [2005] 1 WLR 1513) direction have been given?
>
> ii) What was the effect of the judge's direction to the jury on the question of "special knowledge"?
>
> iii) Did the trial judge fail to give appropriate directions to the jury in relation to the oral admission alleged to have been made by Benjamin?

iv) Were the trial judge's directions concerning the evidence of Roseanne Benjamin deficient? Did her evidence call for a "care" warning?

v) Should the appeals against conviction and sentence be considered by the Board or ought they to be the subject of petition to the President under section 64(2) of the Supreme Court of Judicature Act?

vi) Should the appellants be permitted to raise for the first time on the hearing before the Board, the question of their fitness to plead?

vii) Should the case be remitted to the Court of Appeal to consider the fresh evidence and the related grounds of appeal?

viii) In the event that it was concluded that there had been a material misdirection, should the proviso be applied?

ix) Is the imposition of the death penalty cruel and unusual punishment and contrary to section 5 of the Constitution of Trinidad and Tobago?

A Mushtaq direction

14. A *Mushtaq* direction is one which instructs the jury that if they consider that written or oral statements were, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In *Barry Wizzard v The Queen* [2007] UKPC 21, Lord Phillips, giving the judgment of the Board, said this about a *Mushtaq* direction at paras 35 and 36:

> "35. A *Mushtaq* direction is only required where there is a possibility that the jury may conclude (i) that a statement was made by the defendant, (ii) the statement was true but (iii) the statement was, or may have been, induced by oppression. In the present case there was no basis upon which the jury could have reached these conclusions. The issue raised by the appellant's statement from the dock was not whether his statement under caution had been induced by violence but whether he had *ever* made that statement at all. The statement bore his signature. His evidence was that his signature was obtained by violence. This raised an issue that was secondary, albeit highly relevant, to the primary issue of whether he had made the statement. His case was that he had not made the statement, nor even known what was in the document to

> which he was forced to put his signature. In these circumstances there was no need for the judge to give the jury a direction that presupposed that the jury might conclude that the appellant had made the statement but had been induced to do so by violence.
>
> 36. Mr Knowles argued that, despite the terms of the appellant's statement from the dock, it would have been open to the jury to conclude that his statement under caution had been forced out of him by violence and that it was correct for the judge to give a direction that catered for that possibility. Their Lordships do not agree…"

15. On this appeal the respondent argues that the position in *Wizzard* is replicated by the circumstances of the present case. Both appellants had denied that they had made statements. Applying the reasoning in *Wizzard*, therefore, no *Mushtaq* direction was needed. The Board does not accept this submission. It was clearly open to the jury to conclude that the appellants had made the statements attributed to them. After all, it was emphatically the prosecution's case that they had done so – indeed, had made the statements in the presence of justices of the peace. Likewise, it was open to the jury to find that the statements were true; this was again the prosecution's categorical case. Finally there was evidence on which the jury could have concluded that the appellants' signatures were appended to the statements as a result of oppression. All three conditions necessary to activate a *Mushtaq* direction were therefore present.

16. The Board in *Wizzard* considered that the fact that the appellant in that case had made an unsworn statement from the dock, denying that he had made the confession which the police claimed he did, meant that a *Mushtaq* direction was not required. It is, with respect, somewhat difficult to understand why this should be so. Simply because the appellant had denied making the statement, it does not follow that the jury could not find that he had done so.

17. Mr Stevens for the respondent suggested that the issue raised by the evidence given by each of the appellants (and the cross-examination of the prosecution witnesses) was not whether his statement under caution had been induced by violence (or oppression or other improper means) but whether he had ever made the statement at all. But both issues (*viz* whether the appellants made the statements and whether they were induced by oppression) remained live before the jury. The claim that the statements had not been made does not extinguish as an issue which the jury had to decide, whether, if they had been made and were true, they had been procured by violence. A *Mushtaq* direction was therefore required. The question is whether the judge's charge to the jury contained the elements of such a direction.

18. The judge gave the following instruction to the jury:

> "The question for you to ask is whether you believe that either of the accused was forced in any way to dictate any statement or to sign any statement. If you believe that they were forced, or you think that they may have been forced in some way to sign the statement then you would have to disregard the statement. It is only if you are sure that the statement was given in the circumstances as related by the witnesses for the State, then you are to accept that the statement was made and then proceed to consider whether the statement was true."

19. This direction effectively removed from the range of options available to the jury that they could act on the statements if they considered that they had been signed (or might have been signed) as a result of improper conduct on the part of the police, even if they believed the statements to be true. These instructions to the jury therefore contained all the necessary elements of a *Mushtaq* direction. The appellants' argument on this ground fails.

Special knowledge

20. The judge gave the jury the following direction about the sequence of the post mortem examination of the deceased's body and the admissions alleged to have been made by the appellants in their confession statements:

> "And at 12 midday on the 14th [July 2003] Dr. Burris performed a post mortem on the body of the deceased. So, this you may consider to be interesting in that the statements on the State's case were taken from the accused persons on the 13th, it was only on the 14th that the post mortem was conducted, and it was only on the 14th that it was certified that the deceased died from homicidal hanging. You will make of that whatever you wish. But it would seem that the police could not have known for sure that the deceased had died of a homicidal hanging until the 14th, around midday of the 14th."

21. The Court of Appeal held that this observation was not warranted. During the appellants' interviews the police were already treating the case as a homicidal hanging because of the account that they had received from Roseanne Ganga. The respondent has, therefore, accepted that the judge should not have given this direction. This is a wise concession. Plainly, the judge was wrong to imply that the sequence of the admissions and the results of the post mortem examination indicated special knowledge on the appellants' part.

22. While accepting that an error was made, the respondent nevertheless suggests that no miscarriage of justice has been caused because of the wealth and strength of the other evidence against the appellants. The Board accepts this submission. The somewhat elliptical reference by the judge to this potentially adverse interpretation of the evidence is of trifling significance when viewed in the overall context of the case. The burden of the evidence against the appellants rested on the twin pillars of Roseanne Ganga's testimony and their own admissions. If the jury was entitled to accept the veracity of those items of evidence (and for reasons which will appear, the Board considers that it was) it is fanciful to suggest that the observations of the judge on the question of special knowledge would have played any significant part in the finding of guilt.

Benjamin's oral admission

23. The appellant, Benjamin, complains that the trial judge failed to warn the jury of the dangers of convicting him on the basis of an unsupported oral admission, namely the statement, "I only help hang up Sunil". What the judge said about that is this:

> "The oral statement of Accused No.1, however, where he purportedly says, 'I only help hang up Sunil', that statement even by itself is sufficient for a finding of guilt since it puts him on the scene of the crime assisting in the hanging. So, again, you will therefore give to each of those statements whatever weight you wish to, which is consistent with the truth in this trial, as you find them. That is a matter solely for you. The statements are before you, you will decide whether each statement is true in whole or in part. You accept the part you find true and you reject the parts you find not true."

24. The Court of Appeal considered that the judge's direction on this issue was inadequate. That conclusion was based on a consideration of Caribbean jurisprudence on the subject. In *Belcon v R* (1963) 5 WIR 526 Wooding C.J. stated, "we accept that in some cases juries need to be warned to be cautious in acting upon alleged confessions, especially if they are not in writing." In *Frankie Boodram v The State* Cr App No 17 of 2003 Sharma CJ stated *obiter* that where the prosecution case depended wholly or substantially on an alleged oral confession, it would be prudent for police officers to make a contemporaneous note of it in their station diaries, and validate it by obtaining the maker's signature in accordance with the Judges' Rules and Police Standing Orders. Later in the judgment he observed:

> "In our view, when the question of oral admission arises, judges must give a robust direction pointing out the heavy burden that is cast on the

> State, in order to secure a conviction on oral admission alone and directing their attention to the inherent dangers of such evidence and how difficult it is to disprove."

25. Consideration of these authorities in this case led the Court of Appeal to comment that the trial judge's direction on this issue was inadequate. But it concluded that this was not fatal to the safety of his conviction. The Court of Appeal pointed out that, in contradistinction to the case of *Boodram*, the oral statement was not critical to the case for the state.

26. It appears to the Board that the question whether a warning is required about the dangers of relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the accused. But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains. It would be wholly inapt, for instance, to tell a jury that they had to be very careful in attributing weight to an oral confession where an elaborate written statement (whose veracity was unchallenged) had been made by the accused.

27. In the present case, the judge had admitted the written statements of the appellants. These, together with the evidence of Roseanne Ganga, formed the essential case against them. To single out the oral statement as deserving of especial care would have been – at least potentially – misleading. The function of a judge's charge to the jury is to enlighten, not to mislead. In the overall scheme of this case, the alleged oral statement of Benjamin was of little importance. If the judge had conveyed to the jury the impression that particular care was required in relation to this particular item of evidence, this might well have distorted the proper balance of the charge. The Board is disinclined to agree with the Court of Appeal's assessment that the judge's charge was inadequate but is, in any event, emphatically in concord with that court's view that, even if it was, this made no difference whatever to the safety of the conviction.

The necessary direction in relation to Roseanne Ganga's evidence

28. About the proposition that there were many glaring anomalies in the evidence of Roseanne Ganga there can be little debate. It was five hours after she says that she saw the dead body of her husband that she went to seek help from her father-in-law. Beyond saying that she thought someone would hear her "bawling", she offered no explanation for the delay in going to her parents-in-law's home. Mrs Ganga gave flatly contradictory accounts as to whether she had gone to bed on the night of 12

July. On her father-in-law's account, she did not tell him that she had seen that Sunil had been hanged; on the contrary, according to him, she had said that Sunil had hanged himself. It is common case that she did not mention to her father-in-law that the appellants had carried out the attack on her husband. According to Sergeant Flanders she did not say, when first interviewed by the police, that the appellants were involved.

29. All of these irregularities in her evidence raise considerable questions as to Mrs Ganga's veracity and reliability but do they, as the appellants contend, warrant the giving of a specific warning to the jury of the need for caution in their evaluation of her evidence? Before addressing that question, it is useful to recall what the judge actually said to the jury about the matter. The following appear to be the relevant extracts from her charge:

> "… you may conclude that when Roseanne first spoke to her father-in-law and Sgt. Flanders, she did not say that she saw the accused persons. So those are what you may consider to be weaknesses in her identification evidence …
>
> "Now in relation to that particular statement where she is saying that she heard the deceased say, 'Deenish boy, what you doing meh.'…You must be satisfied that Roseanne did not concoct or distort this statement to the State's advantage or to the Accused No. 1's disadvantage, and that she did not give this statement in evidence out of any malice or ill-will towards him …
>
> It was put to her by Mr Alleyne-Forte that she did not tell Officer Flanders when she first spoke to him in the morning that it was Deochan, and she said, 'Yes' she did. She said that when she got to her father's-in-law house it (*sic*) about 4.30 am and it was put to her by Mr Alleyne-Forte that: 'You told your father-in-law, "Pappy, Sunil heng himself'. And she said that that is not true, she told her father-in-law that she saw Sunil hanging.
>
> Now, you will recall that Mr Chadrabooj Ganga said in evidence that when Roseanne came to his home at about 5 o'clock in the morning of the 13th, she told him, 'Pappy, Sunil heng himself." Also, you would recall that Sgt. Flanders stated that when he spoke to her at 7.00 am. that morning she told him she had gone to bed and when she awoke she saw the deceased hanging. If you accept the evidence of Mr Ganga or Sgt. Flanders, then you may consider that such evidence reflects negatively on Roseanne's credibility. One would reasonably have expected her –

> it's a matter for you, but one would reasonably have expected her, that when she first spoke to them to have told them, the truth. At the end of the day, taking those things into consideration, you will give to her evidence whatever weight you see fit."

30. The need in this context for a special caution about the approach to a witness's evidence derives from the possibility that she or he has a possible motive, which may be entirely extraneous to the directly relevant issues in the trial, for giving a less than truthful account. So, for instance, in the case of a cellmate's testimony about the admission made to him by the defendant, the need for caution stems from the possibility that the witness hopes to obtain (or has already obtained) some personal advantage as a result of the evidence that he gives about the accused's confession. In *Pringle v The Queen* [2003] UKPC 9, the Board dealt with this issue in the following way at para 25:

> "The problem as to how to deal with evidence of a cell confession is not new. There has long been an obligation on judges to warn a jury about the special need for caution in cases which are analogous to those of accomplices. These include cases where the witness's evidence may have been tainted by an improper motive: *R v Spenser* [1987] AC 128, 134E per Lord Hailsham LC; Archbold 2002, paras 4-404m, 4-404o. It has been held by the Supreme Court of Canada that a warning was necessary in a case where evidence was given by two prison informants who had a strong motivation to lie and who had approached the police when they perceived that some benefit could be exchanged for their testimony: *Bevan and Griffith* v *The Queen* (1993) 82 CCC (3d) 310. The High Court of Australia has held that it would only be in exceptional cases that a prison informer would not fall into the category of witnesses about whom a warning should be given by the trial judge of the dangers of convicting on evidence which is potentially unreliable: *R v Pollitt* (1992) 174 CLR 558 …"

31. Central to the reasoning in *Pringle* and the cases considered in this passage was the existence of a motive which taints the evidence of the witness. That was also recognised by Ackner LJ in *R v Beck* [1982] I WLR 461, 469A where he said that there was an "obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive …".

32. The improper motive that is said may have tainted Mrs Ganga's evidence was never fully articulated. It was suggested to the Court of Appeal that Mrs Ganga had a motive to kill or engineer the killing of her husband. The Court of Appeal gave that argument short shrift, stating that counsel who represented the appellants had not

made "very much of it". Indeed, counsel did not make anything at all of the suggestion on trial. It was never put to Mrs Ganga that she had a motive for killing her husband.

33. Mrs Ganga agreed under cross examination that she had been abused by her husband and also his brother but this was never linked to a possible reason for her killing him or having another kill him, much less that it prompted her to give false testimony against the two accused so as to cover up her own part in his death. The trial judge referred to the evidence of abuse in her charge but she did not relate this to any suggestion that it may have motivated the witness to kill her husband and seek to put the blame on others. The Board finds it entirely unsurprising that this should be so. If the appellants did not make the explicit case that the witness's evidence was tainted by an improper motive; and if the witness had never been given the opportunity to deal with such a grave suggestion that she was motivated to give false evidence because in fact she was responsible for the killing, it would be, at the very least, highly questionable as to whether the judge could properly have raised it. The Board is therefore satisfied that a specific warning of the need for caution was not required. It is further satisfied that the directions which the judge gave about the possible frailties in the witness's evidence were sufficient to alert the jury of the need for care in considering Mrs Ganga's testimony.

Section 64(2) of the Supreme Court of Judicature Act 1964

34. Section 64(2) of the Supreme Court of Judicature Act 1964 provides:

> "The President on the advice of the Minister on the consideration of any petition for the exercise of the President's power of pardon having reference to the conviction of a person on indictment or to the sentence, other than sentence of death, passed on a person so convicted, may at any time –
>
> (a) refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the President with their opinion thereon accordingly."

35. It was suggested by the respondent in its written case that this power was frequently exercised and that it was analogous to the power that the Home Secretary exercised in England and Wales before the Criminal Cases Review Commission was established. The argument was not pursued by Mr Stevens to any significant extent in his oral presentation, however, and we consider that he was prudent not to do so. The circumstances in which the President might be disposed to exercise the power have not been explored. Whether the factors that would influence the Board to remit the case to the Court of Appeal are likely to influence the President to have recourse to the power remains imponderable. Where, as in this case, the Board concludes that remittal to the Court of Appeal is appropriate, it would be wrong, as a matter of principle, to decline to follow that course against the mere possibility that it might reach that court by another route.

Should the appellants be permitted to raise the question of their fitness to plead and, if so, should the case be remitted to the Court of Appeal for consideration of this and related issues?

36. Grounds (vi) and (vii) can be taken together because, on the hearing of the appeal, the respondent accepted that the appeals should be remitted to the Court of Appeal because there is evidence that both appellants are of low intelligence which may have affected their fitness to plead. Implicit in this correctly made concession was that the fresh evidence, in the form of reports from Dr Richard Latham and Dr Tim Green, should be admitted in evidence.

37. Dr Latham is a consultant in forensic psychiatry, working in the National Health Service in London. He is a member of the Royal College of Psychiatrists and is on the forensic psychiatry specialist register of the General Medical Council. He has been approved under section 12(2) of the Mental Health Act 1983 (England & Wales) as having special experience in the diagnosis or treatment of mental disorder. Dr Green is a Chartered Clinical Psychologist employed as Head of Psychological and Talking Therapies in Forensic Services of the South London and Maudsley NHS Foundation Trust. He holds the post of Honorary Researcher in the Psychology Department at the Institute of Psychiatry in London.

38. The salient parts of Dr Latham's report on Benjamin are as follows:

> "The primary psychiatric disorder is mild learning disability. This is also referred to in diagnostic terms as mental retardation. It is only possible to make this diagnosis by considering the psychiatric, social and developmental history in conjunction with the psychological findings of Dr Green. The learning disability, in diagnostic terms is mild but this

terminology refers to comparison with other people with learning disability.

Mr Benjamin has convincing evidence of cognitive impairment on psychological testing. The diagnosis is supported by the history of him needing significant support with all but the simple activities of daily living, his description of only really undertaking work that was simple and with a high degree of instruction and supervision. His capacity to use normal, everyday speech and manage his own self-care in basic terms is entirely compatible with the diagnosis of mild learning disability and explains why the impairment would not be obviously apparent.

When dealing with a diagnostic category that is defined in part by a cut-off on a psychological test there can be situations where the diagnosis is contentious. In my view the impairment described in the history, observed at interview and results of psychological testing mean that this diagnosis can be made with relative certainty.

…

Mr Benjamin's fitness to plead and stand trial at the time of the alleged offence is an issue that can be relatively easily considered as learning disability is a stable state and his learning disability or intellectual impairment will be unaffected by the time that has passed since the original trial. I have considered separate criteria relating to fitness to plead and stand trial:

[Dr Latham then considered each of these criteria *viz*. (i) Understanding the charges; (ii) Deciding whether to plead guilty or not; (iii) Exercising his right to challenge jurors; (iv) Instructing solicitors and counsel; (vi) Giving evidence in his own defence. He then expressed his view on the appellant's fitness to plead.]

In summary, when considering these criteria as a whole it is unlikely that Mr Benjamin is and was fit to plead and stand trial."

39. Dr Latham was also asked to consider other possible defences that might be available to the appellant and in the final section of his report stated that "the diagnosis of learning disability would almost certainly constitute an abnormality of mind within the definition of diminished responsibility". He suggested that there were

several ways in which the learning disability in his case could have impacted on his actions to the extent that his responsibility for his actions would be diminished.

40. The question of the reliability of Benjamin's alleged confession was also considered by Dr Latham and he said this about it:

> "… the level of understanding he had of the contents of the statement is likely to be very limited. Again, there is dispute as to whether Mr Benjamin dictated the confession or whether he was merely asked to approve a statement written by someone else. Irrespective of whether Mr Benjamin was capable of producing the statement of his own volition it is very unlikely that he was able to understand it in detail or even if he could whether he can be assumed to have made a decision to sign the statement in an informed way. In other words, his intellectual impairment means that he was extremely vulnerable to misunderstanding the process of making a statement and that statement is therefore of questionable reliability. In place of the usual intellectual and cognitive processes for making decisions about this kind of issue, Mr Benjamin may be more influenced by fear, by suggestions from other people and a willingness to do what is being suggested or encouraged. In other words the statement cannot be truly his."

41. Dr Green's opinion on Benjamin's fitness to plead was also forthright. He took a history from him that he heard voices upon waking in what he thought was his own voice but coming from outside his head rather than being a homogenous experience. Benjamin also said that he believed that other people in the prison were speaking about him but he did not know what they were saying.

42. Dr Green administered the Wechsler Adult Intelligence Scale III (WAIS-III) and found that Benjamin's performance on this measure fell in the "extremely low" category of intellectual functioning. This suggested that fewer than 2% of the population of general adults would score as low as Mr Benjamin. This indicated that he had a learning disability.

43. The clinical psychologist's opinion on Benjamin's fitness to plead was expressed in the following paragraph of his report:

> "Whilst Mr Benjamin describes some rudimentary understanding of the Court process, I am not convinced that he has an ability to fully comprehend the nature of the trial against him and would have significant difficulty in instructing his legal team as to his defence, not

least because Mr Benjamin has significant difficulties in reading and writing."

44. In Deochan Ganga's case Dr Latham gave the following opinion:

> "The primary psychiatric disorder is mild learning disability. This term is preferred to the diagnostic category of mental retardation. The diagnosis is made with a combination of the findings of Dr Green, the description of school performance, subsequent academic achievements and the degree of social impairment. The degree of learning disability in diagnostic terms would be mild. The clinical picture is that Mr Ganga, whilst having a general ability to use everyday speech and to provide his own self-care has intellectual impairment becoming most pronounced or apparent in academic or work settings.
>
> The difficulties with emotional regulation and behavioural control are similar in nature to those that would be seen in the general population but are more pronounced."

45. On the question whether his intellectual difficulties were likely to bear on the reliability of any confession which Ganga might make, Dr Latham said this:

> "What is clear however is that whilst the intellectual impairment on its own cannot be said to make the confession unreliable it is a psychiatric risk factor for this and the confession being made in the absence of any advocate increases the risk of this being unreliable. If Mr Ganga was subject to particularly oppressive interviewing styles including threats then his vulnerability to making unreliable statements would have been magnified."

46. The issue of fitness to plead was considered by Dr Latham by reference to the same criteria that had been reviewed in Benjamin's case (see para 38 above). He expressed the same opinion as he had given in that case, namely, that it was unlikely that Mr Ganga was fit to plead and stand trial. He was moreover of the clear view that the diagnosis of learning disability would "almost certainly constitute an abnormality of mind within the definition of diminished responsibility".

47. Dr Green administered the WAIS-III test on Deochan Ganga and he also fell into the "extremely low" category of intellectual functioning. On the basis of these results and his examination of Ganga, Dr Green expressed this opinion:

> "It is my opinion that Mr Ganga's damage to his cognitive functioning, along with his low IQ and almost certain learning disability, will have made it very difficult for him to understand the process of a trial and to properly instruct his legal representatives. The fact that Mr Ganga can neither read nor write will also have compromised his ability in these regards."

48. Dr Latham's and Dr Green's reports were obtained after the appellants' appeals to the Court of Appeal had been dismissed. They were presented to a court for the first time at the hearing of their appeals to the Judicial Committee of the Privy Council. The Board has recently had occasion (in *Nigel Brown v The State* [2012] UKPC 2) to voice its grave concern about the production of reports such as these at such a late stage and we consider it appropriate to repeat what was said in that case to the following effect:

> "Production of fresh evidence in these circumstances and an application that it be received will always call for the closest and most careful scrutiny. The Board is anxious to make clear that it should not be assumed that even highly persuasive evidence produced for the first time at the final appeal stage will be admitted."

49. But, as the Board also observed in that case, Dr Latham and Dr Green are obviously distinguished in their field and their opinions that the appellants may have been unfit to plead raise a substantial issue about the fairness of their trial and the safety of their convictions. Dr Latham's further opinions that the reliability of the appellants' confessions may have been affected by their intellectual impairment and that a defence of diminished responsibility might have been successfully raised impel only one course. The appeals must be remitted to the Court of Appeal to determine the safety of the convictions in light of the fresh evidence, together with any rebutting evidence which they may decide to admit.

50. It will be for the Court of Appeal to decide which issues require to be reviewed (in order to test the safety of the convictions) in light of the fresh evidence and any further evidence to challenge the reports of Dr Latham and Dr Green. The respondent, nevertheless, invited the Board to "spell out" on which of the so-called *Pitman* (*Pitman v The State* [2008] UKPC 16) grounds the matter is to be remitted. In para 30 of the judgment in that case the Board adumbrated a number of possible issues on which the fresh evidence might have a bearing. It should be noted that the Board in *Pitman* scrupulously refrained from pre-empting the determination of the Court of Appeal as to which of the possible issues would fall to be considered. We consider it proper to maintain a similar level of reticence. Subject to that caveat, the Board considers that the evidence of the two experts, *as it currently stands*, would appear to warrant consideration of fitness to plead, the reliability of the appellants' confessions

and the availability of a defence of diminished responsibility on the question of whether the convictions are safe and do not constitute a miscarriage of justice. We shall have something further to say on the possible relevance of the evidence to the sentencing of the appellants later in this judgment.

The proviso

51. Section 44(1) of the Supreme Court of Judicature Act 1962 provides:

> "44. (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

52. In *Stafford v The State (Note)* [1999] 1 WLR 2026, 2029-2030 Lord Hope set out the principles that govern the application of the proviso:

> "The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v Director of Public Prosecutions* [1935] AC 462, 482-483, *per* Viscount Sankey LC. In *Stirland v Director of Public Prosecutions* [1944] AC 315, 321 Viscount Simon LC said that the provision assumed: 'a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.' As he explained later on the same page, where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence."

53. The only material misdirection which the Board has found to have been given was in relation to the question of special knowledge. For the reasons stated in para 22 above the Board is of the unequivocal opinion that the jury would have convicted whether or not that direction was given. As we have said, the essential prosecution case rested on two principal items of evidence – that of Roseanne Ganga and the appellants' admissions. We have already given our assessment of Roseanne Ganga's evidence. We turn, therefore, to consider briefly the matter of the confession evidence.

54. The Court of Appeal applied the proviso. For the purposes of examining whether it was right to do so, the Board must, of course, approach the matter without reference to the opinion of Dr Latham on the reliability of the appellants' confessions. The evidence in support of the admissibility of the confessions on trial was considerable. The statements were both taken by Inspector Phillip but were witnessed by different officers: in the case of Benjamin by Constable Badree; and in the case of Ganga by Sergeant Gay. The statements were recorded in the presence of different justices of the peace, Urban Baptiste and Seebachan Ramsook Maharaj. As Mr Stevens pointed out, if the statements were fabricated, and the appellants had been forced to sign them, no fewer than five people (including two justices of the peace) would have been involved in the conspiracy to produce this false evidence.

55. On Ganga's case, the conspiracy must also have involved the investigating officer, Sergeant Flanders. According to Flanders, when he arrested Ganga he noticed an injury on his left thumb, about which he inquired and was told it was the result of a bite from a fish. In evidence Ganga claimed that the injury had been sustained when Inspector Phillip pushed or shut his hand into a drawer. This was, Ganga claimed, one of a number of acts of violence that were inflicted on him in order to coerce him to sign the statement. If this were true, it would follow that Flanders must have been lying about seeing an injury when he arrested Ganga. Flanders would therefore be part of the conspiracy.

56. But Sergeant Flanders had given evidence which was (at least potentially) of considerable assistance to the appellants in relation to Roseanne Ganga's testimony. He said that she had told him that she had gone to bed on the night of 12 July (contrary to her evidence on trial) and that when she arose at around 4.30 am she did not see the deceased in bed next to her and only then went outside to find him hanging in the shed. This account was flatly contradictory of her evidence implicating the appellants and the question arises why a police officer who was prepared to testify in a way that might seriously undermine one of the prosecution's vital witnesses, would join a conspiracy.

57. Not only were the alleged confessions said to have been made in the presence of two justices of the peace, they were recorded in rooms which had windows through

which the activities of police officers could be observed. The respondent contends that it is inherently unlikely that police officers would openly engage in brutal treatment of suspects when they could be seen.

58. All of these circumstances and considerations were before the trial judge on the voire dire hearing and before the jury when they came to consider whether they should accept that the statements were made and were reliable. The Board finds it impossible to say that, on the basis of the evidence available at the trial, the statements were wrongly admitted or that the jury was wrong to find that they provided clear evidence of the appellants' guilt. The proviso was properly applied.

Is the imposition of the death penalty cruel and unusual punishment and contrary to section 5 of the Constitution of Trinidad and Tobago?

59. This point was not argued before the Court of Appeal. The appellants contend that there is a common law rule that a sentence of death should not be imposed on a mentally impaired person. They rely variously on Blackstone's *Commentaries on the Laws of England*, Lord Hale's *Pleas of the Crown*, *R v Pritchard* (1836) 7 C & P 303 and the majority opinion in *Atkins v Virginia* 536 (2002) US 304.

60. Section 5(2)(b) of the Constitution of Trinidad and Tobago provides that Parliament "may not ... impose or authorise the imposition of cruel and unusual punishment". There is no decided case in any of the appellate jurisdictions of the Caribbean which considers whether a sentence of death, if passed on a mentally impaired person, would constitute cruel and unusual punishment whether as contrary to a constitutional provision or in breach of a common law rule.

61. The Board considers that it would be wholly inappropriate for it to embark on consideration of this question without the opinion of the Court of Appeal in Trinidad and Tobago. Many issues of fundamental societal significance will require to be examined in order to inform the correct approach to this far-reaching submission. That examination has not yet taken place. The location for its first consideration must be the jurisdiction in which the death penalty remains the mandatory sentence for those convicted of murder. The Court of Appeal will, in any event, be well placed to judge the extent of the mental impairments of the appellants, following cross examination of the experts whose reports comprise the fresh evidence and having considered any rebutting evidence that may be tendered. The Board therefore declines to express any opinion on this argument at present. It recognises, however, that the evidence of Dr Latham and Dr Green, together with any evidence that may be presented to challenge it, could well contribute to that debate. Whether it does or not is a matter (in the first instance, at least) for the Court of Appeal.

Conclusion

62. The Board will allow the appeal and remit the matter to the Court of Appeal of Trinidad and Tobago for further hearing in accordance with the opinion of the Board.