[2011] UKPC 14
Privy Council Appeal No 0037 of 2010

JUDGMENT

Nimrod Miguel (Appellant)
v
The State (Respondent)

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

before

Lord Rodger
Lord Brown
Lord Kerr
Lord Clarke
Lord Dyson

JUDGMENT DELIVERED BY
Lord Clarke
ON

15 June 2011

Heard on 8-9 March 2011

Appellant
James Dingemans QC
Daniel Tivadar
(Instructed by Simons Muirhead & Burton)

Respondent
Peter Knox QC

(Instructed by Charles Russell LLP)

LORD CLARKE:

Introduction

1. On 30 January 2008, before Brook J ('the judge') and a jury, the appellant was convicted of the murder of Ramesh Lalchan on 30 or 31 December 2003. He was sentenced to death. He appealed to the Court of Appeal of Trinidad and Tobago but on 27 February 2009 his appeal was dismissed by Hamel-Smith, John and Weekes JAA. The Judicial Committee of the Privy Council subsequently granted leave to appeal to the Privy Council against both conviction and sentence.

2. Four grounds of appeal have been advanced against conviction. They relate to: (1) the directions given by the judge on the issue of withdrawal; (2) the admission of evidence said to have been obtained in breach of the Judges' Rules 1965; (Trinidad and Tobago Ministry of Home Affairs Circular 1/1965); (3) the directions given by the judge with regard to written and oral statements made by the appellant; and (4) the approach to and the application of the proviso by the Court of Appeal. A single ground of appeal is advanced against the mandatory life sentence imposed on the appellant, namely that such a sentence for felony murder is unconstitutional. The Board will consider first the appeal against conviction.

The prosecution case

3. The prosecution case can be shortly summarised in this way. The deceased, Ramesh Lalchan, lived in Rio Claro. Some time after 10 pm on 30 December 2003 he left a friend's house by car. The following day at about 8 am his lifeless body was found on a track at Fairfield. When the police arrived, they observed that the deceased's hands and feet had been bound with shoelaces and his mouth tied with a red cloth. Next to his head they discovered three spent cartridges which appeared to have been discharged from a .32 calibre firearm. The post mortem examination showed that death was due to head injuries, although injuries had also been sustained to the neck of the deceased. During the autopsy two bullets were removed from his head.

4. At about 2 pm that afternoon, the wife of the deceased, Shaffina Lalchan, called his cell phone. A male voice, which she did not recognize, answered "kinda fumbling to talk". On 2 January 2004 the deceased's car was discovered by the police in Princess Town. The last digit on the number plate, which was 7, had been obliterated. When the car was inspected the next day, the boot proved impossible to

open from the outside but access was gained to it from inside. It contained a pair of registration plates. Fingerpint impressions were taken from them which on later examination turned out to be those of the appellant.

5. The appellant was arrested about 5 am on 24 January 2004 in an abandoned house. He identified himself as Brian Miguel. He was cautioned and informed of his rights but he made no requests. He was taken to the Princes Town Police Station and placed in a cell. About 10.40 or 10.50 that morning he was taken to the Homicide Office at San Fernando by Officer Renwick and placed in an enclosed air-conditioned room equipped with cushioned chairs. About 11.23 am Acting Sergeant Hamid identified himself to the appellant, told him what he was investigating, cautioned him and informed him of his legal rights. The appellant made no requests, denied having any knowledge of the crime and replied "I doh know about that, I was never there, I didn't kill nobody". Hamid began to interview him, but after five minutes he stopped when the appellant told him, on being asked, that he hadn't eaten. He was then given a meal of rice, chowmein and corned beef, and a glass of water.

6. The appellant was interviewed again at about 12.40 pm the same day by Officers Ramdeo and Renwick. Renwick drew the appellant's attention to a large print document entitled 'Notice to Persons in Custody' posted on the wall of that office and read it aloud to him. It gave information about a prisoner's legal rights and privileges under the Judges' Rules. Renwick asked him whether he understood what it meant and he said that he did. In this interview he denied any knowledge or involvement in the murder. He said "It was not me, I wasn't there, I doh really lime wid nobody in New Grant."

7. On the next day, 25 January 2004, at about 12.25 pm, while the appellant was being taken back to the Homicide Office at San Fernando, he told Hamid and Renwick "I just ready to talk to all ah yuh." So they again introduced themselves, told him the nature of their investigation, cautioned him and informed of his legal rights. He said: "I really ready to talk to all yuh". He then gave an account of the robbery of the deceased's car and the subsequent killing, at the end of which the police asked some further questions and also whether he would like to make a written statement. He said he was ready to do so, and was again cautioned and reminded of his rights. The police made a note of the interview, but they did not ask him to sign it.

8. The appellant then dictated a statement which was recorded by Hamid in the presence of Renwick and a Justice of the Peace called Ezra Dube, who authenticated it. In both his written and his oral statements, the appellant admitted that he and four others (Miguel, Shane, Macca and Terry) had decided to find a car to rob. They drove along for a while until they came across the deceased in his car, at which point Shane and Miguel jumped out, got into the deceased's car, and drove it to Princes Town, while the appellant and the others followed behind. When they reached some cane

fields, they stopped. Miguel took the deceased into "the bush" and tied his hands and feet with a shoe lace, while the appellant and Shane searched the car and found some cocaine. Terry then drove off on his own. The statement continued:

> "Ah lil while after Miguel come back Shane ask him, if the man mouth tie and he say nah. I end up telling him I go go and tie the man, and I gone in the road and tie the man mouth, when ah done ah see Miguel come back with the gun and he tell me to buss one in the man head ah tell him ah not shooting nobody and I walk off and Miguel end up shooting the man. We end up coming up New Grant with the blue car, I drop off and gone home …"

In his written statement, the appellant, in describing the shooting, did not repeat that he "walk off" before the shooting. However, in answer to a subsequent question, he did say that he was "walking back" when the deceased was shot (see question and answer 11 below).

9. The appellant said that the next day he was present when Shane and another man went off to get some replacement number plates for the car. He helped them take off the old number plates and put them in the boot while they put on the new ones. He also said that the deceased's car had two cell phones in it, that he had answered one of them when it rang the day after the incident and that he had heard a woman's voice at the other end.

10. After taking the written statement, the officers asked the appellant some 20 questions and recorded the answers. They included the following questions and answers:

> "4. Q: When Shane say we going to get a car what did he mean?
>
> A. That was we going an put ah gun by ah man head an taking he car.
>
> 11. Q: What happened to the man when he got shot?
>
> A: I was done turn an walking back me eh see what happen with the man.
>
> 13. Q: Was anyone else armed?
>
> A: Nah nobody else me eh see no more gun.
>
> 17. Q: You spoke about a number plate they got for the car do you know where they got it?

A: Nah I eh know where they get it from, and I eh know the number".

11. After the police had taken the statement, the appellant was told that he could correct, alter or add anything, and Hamid read it aloud to him in the presence of the Renwick and the JP. When he had finished, the appellant said: "It was good so". It was then handed to him to read aloud, which he did, and he signed it at the bottom of each page and initialled the handwritten corrections "NM" on pages 1, 2 and 4. He also signed and dated the JP's certificate, which confirmed that the statement had been recorded in his presence, and that he (the appellant) had confirmed to him that no threats or promises had been made and that the statement had been made voluntarily. The appellant admitted that he signed this certificate, but he disputed that he had read the statement aloud. He said he could not even read at the time.

12. The next day, 26 January 2004, Renwick told the appellant that he would be charged with murder. He was again cautioned (this time under rule III of the Judges' Rules, the previous cautions having been under rule II), and informed of his legal rights and privileges. He replied: "I just want to say I didn't kill nobody". He was then charged. Once again he was cautioned and reminded of his legal rights and privileges, but he remained silent and made no requests. Renwick then took his fingerprints, which were passed on to Sergeant Noel, who concluded that the left thumb impression matched the fingerprint on the registration plates.

13. It was accepted that it was not the appellant who shot and killed the deceased but, on the basis of the facts set out above, the prosecution case was that the appellant was guilty of murder on one or other of two bases. The first was what is known as the felony murder rule and the second was joint enterprise. The Board will return to the ingredients of those offences in the context of its discussion of the individual grounds of appeal below.

The defence case

14. The appellant, who was aged 24 at the time of the trial and of previous good character, gave sworn evidence, which can be summarised as follows. He had not been at Fairfield on 30 or 31 December 2003. He had been arrested at his girlfriend's house about 6.30 am on 24 January 24 2004, not at an abandoned house as the police claimed. At about 7.00 am he was removed from his cell by Officer Haynes and questioned by him. When the appellant said that he did not know what Haynes was talking about, Haynes struck him with three or four slaps in the ribs. This was denied by Haynes. The appellant's evidence was that he was never at any stage cautioned or informed of his legal rights. He was not fed substantial meals as claimed by the police and he slept on a concrete bunk. He did not dictate any statement to Hamid and the JP

did not speak to him in the absence of the police officers. He was asked by Renwick to sign three or four pages of notes, at which point he asked if he could make a telephone call to get in contact with his mother, but Renwick told him that there was no need for this. He then signed the notes, but only because he had been told by Renwick that if he did so he would be allowed to go home. The first time he was aware of the statement was in court. When he was asked to read it out loud in court, he read it in a "staccato" rendition, which took about 12½ minutes.

15. The defence case was therefore that the appellant was not present at the scene of the crime. However, it was also that, if he was present as alleged by the prosecution, he withdrew from any relevant criminal activity and was not guilty of murder on either of the alleged bases.

Voir dire

16. The judge held a voir dire in order to determine the admissibility of the written statement the police said they had taken from the appellant on 25 January 2004. The appellant opposed its admission on a large number of grounds, including mistreatment, wrongful inducement to sign, failure to warn of his constitutional rights and privileges and a general and unspecified complaint of "breach of the Judges Rules by both Renwick and Hamid".

17. The Judge dismissed the challenge to the statement. He held that it had been given in the circumstances described by the prosecution witnesses. He was satisfied that the appellant had been repeatedly cautioned and informed of his constitutional right to a lawyer and that he had not been mistreated in any way. He was further satisfied that the appellant had given his statement voluntarily and that he had not been given any inducement to make it. The judge also held that, even after the oral admission on 25 January in which the appellant confessed to participation in the robbery, the police did not yet have enough evidence to prefer a charge against him, so as to require them, under principle (d) of Appendix A of the Judges' Rules, to cause him to be charged or informed that he might be prosecuted. This was because the appellant had not signed a record of the interview and (at least at the time) it was usual for an accused to invite the jury to reject evidence of such oral admissions where the note of interview had not been signed.

18. Finally, the judge held that the questions asked by the police at the end of his written statement were asked in breach of rule V(d), which provides:

> "Wherever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement

> coherent, intelligible and relevant to the material matters: he shall not prompt him."

19. The judge nevertheless exercised his discretion in favour of admitting the statement. He did so for two reasons. The first was because the appellant had been reminded over and over again of the rule II caution and of his right, both to an attorney, relative or friend and to a phone call and the second was because the Notices to Persons in Custody were displayed and read out to him, which he said he understood. In short, the appellant had chosen to speak when, as had been made plain to him, he was under no obligation to do so. Although he was only nineteen, he had started work at fifteen and had been responsible for himself, financially, since then, and was not wholly dependent on his parents. For the same reasons, the judge would have admitted the statement even if (contrary to his ruling) there had been a breach of principle (d) of Appendix A and rule III.

Ground 1 – directions on withdrawal

20. Although it might be more logical to consider ground 2 first because it relates to the admission of evidence, the Board will consider the grounds in the order in which they were presented by the parties. In doing so it will refer, so far as necessary, to the reasoning of the Court of Appeal.

21. In order to consider this ground it is necessary to identify the two ways in which the prosecution put its case. The first was based upon the felony murder rule, which is contained in section 2A(1) of the Criminal Law Act, which was inserted into that Act by section 2 of the Criminal Law (Amendment) Act 1997. It provides:

> "Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder, even if the killing was done without intent to kill or to cause grievous bodily harm."

22. The side note to the section reads "Saving for Constructive malice". This rule has been much criticised because its effect is to convict of murder even where death is caused by accident: see eg *Khan v State of Trinidad and Tobago* [2003] UKPC 79, [2005] 1 AC 374, per Lord Bingham at para 6. However, in the present case there is no doubt that the killing was intentional, albeit by someone other than the appellant. The critical questions for the jury under this section were whether the appellant embarked upon the commission of an arrestable offence involving violence, namely

aggravated robbery, whether the deceased was killed in the course or furtherance of that offence and whether the appellant was engaged in the course or furtherance of the commission of the robbery when the deceased was killed. It is not (and could not be) suggested that the judge misdirected the jury as to the ingredients of the murder felony rule.

23. The second basis upon which the prosecution case was put was that the appellant was part of a joint enterprise. Again it is not (and could not be) suggested that the judge misdirected the jury on the ingredients of joint enterprise in the context of this case. The judge directed the jury that before they could convict on this basis they must be sure:

> "One, that he knew that the man who ultimately shot the deceased, whom I am going to refer as 'the shooter', had a gun, and, two, that he, the accused, took part in the robbery with the shooter with that knowledge, and, three, that when he did so he either shared the shooter's intention to kill or cause really serious bodily harm, or realised that the shooter might use the gun, either intending to kill or to cause really serious injury, and nevertheless he joined the shooter in the robbery. Four, the shooter went on to kill the deceased with either of those intentions."

24. The issue in this appeal is not whether the judge correctly directed the jury as to the basic ingredients of these offences but whether he directed them on the question whether the appellant withdrew from the joint enterprise before the killing. Although the prosecution had put felony murder as their primary case, the judge invited the jury to consider first the case of joint enterprise and then, if they were not sure of guilt on that basis, to consider the case of felony murder.

25. The judge then said this with regard to withdrawal.

> "I now turn to a topic called 'withdrawal'. If you are sure that the accused gave the interview and the statement and that they are true, then you should then consider whether or not he had withdrawn from the common enterprise prior to the associate shooting the deceased. In the interview the accused described how, after he had tied the man's mouth Miguel told him to 'buss' one in the man head, and he told him that he was not shooting 'nobody' and he walked off, whereupon Miguel ended up shooting the man, thereafter they went up to New Grant and the accused dropped off and went home. In the statement he described how when he had tied the man's mouth Miguel came with the gun and told him to shoot the man in his head and the accused said he was not

shooting the man in his head, and Miguel shot him. Later, in the eleventh question asked of him, namely, "What happened to the man when he got shot", he replied, "I was done turn and walking back me ent see what happened with the man". Accordingly, it is for you to say, considering all the evidence whether the accused had withdrawn from the common enterprise by the time when the associate Miguel shot him or not. I direct you that what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility must depend on the circumstances of each case, but where practicable and reasonable, there must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it.

What is timely communication must be determined by the facts of each case, but where practicable and reasonable, it ought to be such communication, verbal or otherwise, that it will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it, he does so without the further aid and assistance of those who withdraw. Ask yourself the question. Did the accused effect such a communication to the man who shot the deceased, said to be Miguel, and perhaps less importantly, to the others? The State relies on the interview and the statement to prove that the accused had not withdrawn from the common enterprise. According to the interview and the statement, the accused went home, did he not, in the stolen car with the others, save for the one who had left already in the other vehicle. The next day, according to the interview, he met Shane and Poomba. Shane said he was going to get new plates and the accused helped him take off the existing number plates, threw it in the trunk and they put on the new ones. The account in the statement is slightly different in so far as there, he said he saw Shane and Poomba at New Grant Junction. They brought two plates, but they didn't have the tools to take off the old ones and put the new ones on, so the accused held it and threw it into the trunk.

If you accept that the accused left the cane field area in the stolen car with the others and joined Shane and Poomba the next day to change the plates of the stolen car, ask yourselves the question, does that demonstrate that he had not withdrawn from the common venture? Could he not have walked off when Miguel said to him what he is said to have said, 'Shoot the man'? Could he not have walked off and made his own way home and more importantly, could he have washed his hands of that robbery totally, as opposed to being present the next morning and involved in the manner admitted to in the changing of the number plates?

These are the questions you may care to ask yourselves in considering whether the accused had withdrawn from the joint enterprise to rob, by

> the time Miguel shot the man. It is for the Prosecution to prove that the accused had not withdrawn from the common venture and not for the accused to prove that he had."

The judge later repeated a significant part of his summing up, including the parts quoted above, in almost identical terms in response to questions from the jury on the issues of felony murder, joint enterprise and withdrawal. The judge also gave the jury a copy of his directions.

26. In the opinion of the Board it is plain that in considering withdrawal the judge was considering both joint enterprise and felony murder. After all they both involve an element of common enterprise. At the end of his summing up the judge concluded as follows:

> "The approach, the final chapter. If you believe the accused's evidence or even if it may be true he is entitled to a not guilty verdict there and then. However, if you do not believe the accused's evidence, that does not entitle you to convict him of Murder. If you were to find yourselves in that position where you did not believe the accused's evidence, you would then consider the Prosecution case. It is only if you are sure of the defendant's guilt on a careful consideration of the evidence on the Prosecution case that you would be entitled and it would be your duty to convict him. What should your approach be if you do not believe the accused? You should turn to the Prosecution case and ask yourselves the question whether you are sure the accused gave the interview and the statement in the manner and in the terms testified to by the Prosecution witnesses. If you answer that question in the affirmative that you are sure, you would then go on to construe what is contained in the interview and the statement in the light of all my legal directions and to consider that alongside the unchallenged fingerprint evidence taken together with the evidence of the wife. You will then go on to consider my direction on withdrawal. If he did or may have withdrawn from the enterprise, applying the directions that I have given you, then you will find him not guilty. If you are sure that the accused did not withdraw from the enterprise then you will go on to construe the admissions which you find, as a fact, that he made. Firstly, you will consider them in the context of the legal framework which I directed you upon, which I referred to as 'Joint Enterprise Foresight'. If you were sure of the elements of Murder on that basis, then it would be your duty to convict him of Murder. The relevant questions you should ask yourselves when considering this basis are these: (1) Did the accused take part in an offence with others, an Aggravated Robbery – with knowledge that one of them had a gun? (2) If that question is answered in the affirmative – then you ask yourselves, when doing so, did he realize that the man who

ultimately shot the deceased might use the gun either intending to kill or cause really serious injury? (3) If that question is answered in the affirmative, then go on to ask yourselves, did the man shoot the deceased intending to kill him or to cause him really serious injury? (4) If that question is answered in the affirmative then ask yourselves this question. Did the deceased die as a result of being so shot? If all of those four questions are answered in the affirmative so that you are sure, then the accused is guilty of Murder. If you are not sure of his guilt on that basis then you will go on to consider the Felony Murder Rule.

If you were sure of the elements of Murder on that basis, it will be your duty to convict him of the offence of Murder. The relevant questions you should ask yourselves when considering that basis are these: (1) Did the accused embark upon the commission of an arrestable offence involving violence with others? Bearing in mind that I have directed you that as a matter of law, the relevant offence, here, Aggravated Robbery, is an arrestable offence; (2) Was the deceased killed in the course of furtherance of that offence by one of them, not necessarily the accused? (3) Was the accused a person who was engaged in the course of furtherance of the commission of that arrestable offence; Aggravated Robbery, when the [deceased] was killed?

If you answered those three questions in the affirmative, so that you are sure, then he is guilty of Murder. "

27. It is noteworthy that in the case of felony murder the judge made it clear that the appellant must be engaged in the course or furtherance of the robbery when the deceased was killed. It is clear from that direction, read together with what preceded it, that before the jury could convict of felony murder, they must be sure the appellant did not withdraw from the robbery before the shooting occurred. The judge made that equally clear in the case of joint enterprise.

28. In the judgment of the Board there can be no doubt that the jury must have been sure that the appellant had not withdrawn from the robbery at the time of the killing. It is wholly unable to accept the submission that the jury might have convicted of felony murder on the basis that he was party to a plan to rob, which was of course an arrestable offence, that he did not foresee that a gun might be used and that when a gun was produced he made it plain that he was not a party to the use of the gun and walked away, but that he was involved with the proceeds of the robbery the next day.

29. In particular, the Board cannot accept the submission that the judge assumed that involvement after the robbery in the removal of the number plates would be involvement in the course or furtherance of the robbery. The judge made it clear that the jury had to be sure that the appellant was engaged in the course or furtherance of

the robbery at the time of the murder. In answering that question, it was plainly relevant for the jury to consider, not only what he said but what he did. It was thus relevant for them to consider the evidence that after the murder he went home in the stolen car with the others and, indeed, the events of the next day. This is not a case in which the events of the next day stood alone. It was open to the jury to conclude that the act of going home in the car with the others was an act in the course or furtherance of the commission of the robbery. Indeed, once they were sure that the appellant did that, it was the natural inference for the jury to draw. If the act of going home with the others was an act in the course or furtherance of the robbery, there was (and is) no scope for a conclusion that any previous act of the appellant was not.

30. In all the circumstances the Board concludes that there was no misdirection as to joint enterprise or felony murder in general or as to withdrawal in particular. Ground 1 accordingly fails for similar but not identical reasons to those given by the Court of Appeal in relation to what were then grounds 3 and 4.

Ground 2 – the admission of evidence

31. This ground relates to the decision of the judge to admit 20 written questions and answers after the appellant had made both an oral and a written statement. At para 10 above the Board has set out four of the questions and answers, namely nos 4, 11, 13 and 17. It was the admission of those four questions and answers to which particular objection was taken. On the voir dire the judge held that to proceed in this way was contrary to Rule V(d) of the Judges' Rules, which is quoted in para 18 above. However, it is not in dispute that the judge had a discretion whether to admit the evidence notwithstanding the breach.

32. The principles relevant to the exercise of that discretion are summarised as "four brief propositions" by Lord Carswell, giving the judgment of the Board, in *Peart v The Queen* [2006] UKPC 5, [2006] 1 WLR 970 at para 24 as follows:

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.
>
> (iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such

> questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.
>
> (iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

33. The question for the judge was thus whether it was fair to admit the evidence even if the evidence was obtained in breach of the Judges' Rules. He decided to exercise that discretion by admitting the evidence. He did so after carefully directing himself as to the balance to be struck. The reasons he gave are summarised at para 19 above.

34. The question is whether the judge erred in principle in exercising his discretion in that way. In the opinion of the Board he did not err in principle in reaching his conclusion that it would be fair and just to admit the evidence for the reasons he gave. Nor was his decision plainly wrong. In these circumstances the Board concludes that the judge was entitled to admit the evidence and that it was not open to the Court of Appeal to hold otherwise. It follows that no question of the exercise of the proviso arises. This ground of appeal therefore fails, but for a different reason from that given by the Court of Appeal, who rejected it but on the basis of the proviso.

Ground 3 – Directions on the correct approach to the written and oral statements

35. The judge described in detail the evidence relating to the statements made by the appellant as described above. He then gave some general directions (at page 304 of the Record) relating to what he called confessions of guilt. They included the statement that a truly voluntary confession may be cogent evidence of guilt. The judge added:

> "Confessions can always be tested and examined by a jury in court, and the first question when you ask, when you are examining the confession of a man is: Is there anything outside it to show it is true? Is it corroborated? Are the statements made in it of fact, so far as you can test them true? Was the accused a man who had the opportunity of committing the crime? Is his confession possible?

> Is it consistent with other facts which have been ascertained and which have been proved before you? Before you can act on an admission you must feel sure that the interview and statement were made as alleged. It's for you to say how you construe what is alleged to have been said, as, for example, whether or not it amounts to admissions in the first place. If you so find, you must ask yourselves the question, whether you are satisfied so that you are sure that the admissions are true?"

36. The judge then carried out a further analysis of the evidence and at page 330 said this:

> "The central burning issue in this case is whether you are sure that the accused gave the interview and the statement under caution on 25 January 2004 that followed it and, if you are, how you construe it, what you make of it, what does it say, how do you interpret it? Or whether he did not give that interview at all, but merely signed the prepared statement, ignorant as to its contents, after being given meals that weren't up to scratch and being forced to sleep on a concrete bunker, or may have done, when he was told that if he did so, he would go home."

A few lines later at page 331 he added:

> "… is it true or may it be, did he sign a prepared document, ignorant as to its contents when told if he did, he would go home, or did he, or may he not have given that interview. If you are sure that he did give the interview and the statement in the manner and in the terms of how those witnesses told you, then it is simply a question, is it not, of your construing what you may find to be admissions contained therein and considering all that in the light of the legal directions I have given you earlier on today."

As the Board reads the summing up, the reference to the legal directions given earlier was a reference to the part of the summing up quoted above where he was dealing with what the judge called general confessions of guilt.

37. Three aspects of this part of the case require consideration. The first relates to alleged physical oppression, the second to the principle in *R v Mushtaq* [2005] UKHL 25, [2005] 1 WLR 1513 and the third to inadequacy of the summing up identified by the court of Appeal.

38. As to the first point, the only allegation of physical oppression was the behaviour of Haynes soon after the appellant was arrested on 24 January. The appellant said that he Haynes struck him with three or four slaps in the ribs. However, the appellant at no time said that he was induced to make a statement as a result of that behaviour. There was therefore no need for the judge to sum the case up to the jury on the basis that it might have had that effect.

39. As to the second point, namely the relevance of *Mushtaq*, the Court of Appeal held that there was no need to give what has been called a *Mushtaq* direction. However, some reliance was placed on *Mushtaq* before the Board. A *Mushtaq* direction is a direction to the jury which is to be given if there is evidence upon which a jury could find that a confession has been obtained by oppression or in consequence of anything said or done which is likely to render it unreliable. The direction is that if the jury consider that the confession was or might have been so obtained they must disregard it. See the extracts from the judgment of Lord Rodger at paras 36 and 47.

40. However *Mushtaq* was subsequently explained in *Wizzard v The Queen* [2007] UKPC 21, where the judgment of the Board was given by Lord Phillips. As Lord Phillips noted at paras 28 and 29, in *Mushtaq* the appellant was convicted of conspiracy to defraud. He had made a statement to the police containing damaging admissions and had unsuccessfully sought to exclude it on a voir dire on the ground that it had been induced by oppression. The alleged oppression was not physical violence or the threat of it, but a refusal to permit him to visit his wife, who was seriously ill in hospital, unless he made the admissions. These allegations were put to the police when they gave evidence before the jury and they denied them. The defendant did not give evidence. In summing up to the jury, the judge first observed that the fact that the defendant had made the admissions was not challenged. He then referred to the allegations of oppression that had been put to, and denied by, the police officers and to the fact that no evidence had been called to support those allegations. He then continued:

> "If you are not sure, for whatever reason, that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it, even if it was, or may have been, made as a result of oppression or other improper circumstances." (See [2005] 1 WLR 1513, para 34).

It was that direction that was held to be a misdirection by the House of Lords.

41. In *Wizzard* the judge gave the same direction, which was again challenged, but the facts were different. Lord Phillips explained the position thus at para 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."

42. So on the facts here the complaint was not that the written statement was induced by oppression. It was that it was not the appellant's written statement. He said that he did not dictate any statement and that the first he knew of a statement was in court. As in *Wizzard*, the issue for the jury was whether he made the statement in the sense of having dictated it to the police. In these circumstances, as in *Wizzard*, there was no need for a *Mushtaq* direction. It would only be likely to confuse the jury. The Court of Appeal was correct so to hold.

43. The appellant succeeded on the third point in the Court of Appeal, although the appeal failed because it applied the proviso. It was submitted on behalf of the appellant to both the Court of Appeal and the Board that the judge erred in the course of his summing up by not giving the jury sufficient or adequate assistance in identifying the matters that they needed to consider in connection with the alleged confession. It was submitted that it appears that the jury might have felt entitled to act on the statement even if satisfied that it had been taken in the oppressive circumstances about which the appellant had given evidence.

44. The Court of Appeal held that the judge erred in not emphasising to the jury that they were to attach whatever weight they deemed necessary to the Appellant's interview and statement. It said at para 46:

> "The statement was a pivotal item of evidence in the case for the prosecution. The trial judge conveyed in clear and unambiguous terms to the members of the jury that it was for them to determine whether they accepted the account of the witnesses for the prosecution or the appellant's version. But at this critical point of his direction on the

> statement the trial judge did not explain that if they leaned in favour of the appellant's version [of] what transpired in the interview that they could reject the statements in it. Rather the gist of what he said was that after they deliberated on whether the admission was true or not they should bear in mind his earlier direction. This aspect of the direction was extremely vague and we do not feel that the jury would have necessarily linked it to his instruction much earlier at p 14 of the summation that they should attach whatever weight they deemed fit."

45. It is submitted on behalf of the appellant that the Court of Appeal was correct so to hold. The Board does not agree. The directions given by the judge at page 304 were not vague. The judge set out a number of highly relevant questions and stressed that before they could act on an admission they must be sure that "the interview and statement were made as alleged". He then said that it was for them to decide whether, if they were, they amounted to admissions and he concluded that, if they so found, they must ask themselves whether they were satisfied so that they were sure that the admissions were true. There is no reason to think that the jury did not have those earlier directions in mind when the judge gave the directions at pages 330 and 331 quoted above. The jury could not possibly have been in any doubt that, if they thought that the appellant's account of the way the statement came into existence might be true, they must acquit the appellant.

46. In these circumstances the Board respectfully disagrees with this part of the Court of Appeal's analysis of what was ground 2 of the appeal before it. It follows that it is not necessary for the Board to consider the application of the proviso and that the appeal on this ground must fail.

47. It follows that the appeal against conviction fails.

Sentence

48. The issue is whether the mandatory sentence of death for an offence under section 2A(1) of the Criminal Law Act, as inserted by section 2 of the Criminal Law (Amendment) Act 1997 ("the 1997 Act") quoted above, is unconstitutional on the ground that it is contrary to the Constitution of the Republic of Trinidad and Tobago, which was enacted on the creation of the Republic by the Constitution of the Republic of Trinidad and Tobago Act 1976 on 29 March 1976. It is common ground that, if it is unconstitutional, the mandatory sentence of death must be set aside. That is because, although the judge left to the jury two bases on which they should consider whether the appellant was guilty of murder, the jury were not asked to say on which basis they convicted him. It follows that they might have convicted him of felony

murder and, in these circumstances, it is common ground that it should be assumed that that was indeed the basis of the conviction.

49. The offence is described above as felony murder but it is more accurate to call it violent arrestable offence murder because, although in respect of some offences the 1997 Act reintroduced the felony murder rule at common law, some violent arrestable offences were not felonies at common law, and in these circumstances section 2A is in some respects wider than the felony murder rule at common law.

50. The relevant Constitution ("the Constitution") is the first Constitution of the Republic of Trinidad and Tobago, which was enacted by the Constitution of the Republic of Trinidad and Tobago Act 1976 on 29 March 1976. Sections 4 and 5 of the Constitution provided, so far as relevant:

> "Section 4
>
> It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: -"
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; ...
>
> Section 5
>
> (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.
>
> (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not - ….
>
> (b) Impose or authorise the imposition of cruel and unusual treatment or punishment; ..."

51. It is common ground that the mandatory death sentence is cruel and unusual punishment: see *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, especially per Lord Hoffmann at para 12. The mandatory death sentence for murder was held to be unconstitutional by the Board in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328, but *Roodal* was overruled in *Matthew* by a five to four majority. In *Matthew* it was held that the mandatory death penalty was cruel and unusual punishment and therefore inconsistent with sections 4(a) and 5(2)(b) of the Constitution. However the mandatory death penalty was constitutional as section 4 of

the Offences Against the Person Act 1925 was an "existing law" within section 6 of the Constitution, and therefore not “invalidated” by sections 4 and 5 of the Constitution. .

52. The resolution of the issue in the instant appeal depends upon the true construction of section 6 of the Constitution and its application to the 1997 Act. Section 6 provides:

> “(1) Nothing in sections 4 and 5 shall invalidate -
>
> (a) an existing law;
>
> (b) an enactment that repeals and re-enacts an existing law without alteration; or
>
> (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.
>
> (2) Where an enactment repeals and re-enacts with modifications an existing law …
>
> (3) In this section-
>
> "alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;
>
> "existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution and includes any enactment referred to in subsection (1);
>
> "right" includes freedom.”

By section 3 of the Constitution “law” includes any unwritten rule of law. It thus includes a common law rule.

53. The Board considers first the position when the Constitution was enacted in 1976. At that time the felony murder rule at common law had formed part of the law of Trinidad and Tobago for many years. By section 2 of the Criminal Offences Ordinance (No 11 of 1844)

> “[e]very offence which, if done or committed in England, would amount to a felony or misdemeanour at common law shall, if done or committed in [Trinidad and Tobago], be taken to be a felony or misdemeanour, as the case may be …”

Further, section 4 of Offences Against the Person Act 1925 provided that every person convicted of murder "shall suffer death as a felon". Those were both "existing laws" within the meaning of section 6 of the Constitution.

54. However, in 1979 Trinidad and Tobago abolished the distinction between felonies and misdemeanours by enacting section 2A of the Criminal Offences Ordinance as substituted by section 2(1)(a) of and Schedule 1 to the Law Revision (Miscellaneous Amendments) (No 1) Act 1979 ("the 1979 Act"). It was not appreciated that this had the effect that the felony murder rule ceased to apply until the decision of the Board in 1996 in *Moses v The State* [1997] AC 53.

55. The position was explained in detail by Lord Mustill giving the judgment of the Board at pp 60-65. The felony murder rule was abolished in England in 1957 by section 1(1) of the Homicide Act 1957, although the distinction between felonies and misdemeanours was not abolished until the Criminal Law Act 1967. In 1979 the distinction was abolished in Trinidad and Tobago by inserting a provision in these terms:

> "2A(1) All distinctions between felony and misdemeanour are hereby abolished.
>
> (2)(a) Subject to this Act, on all matters on which a distinction has previously been made between felony and misdemeanour including … the law and practice in relation to all offences cognisable under the law of Trinidad and Tobago … shall be the law and practice on the appointed day in relation to misdemeanour. …"

56. The Board held that the unintended effect of that provision was that the felony murder rule ceased to apply in 1979. It followed that no-one could be convicted of felony murder and therefore that no-one could be sentenced to death for any such offence. However, on 29 July 1997, a year after the decision in *Moses*, assent was given to the Criminal Law (Amendment) Act 1997, which by section 2 inserted a new section 2A into the Criminal Law Act as explained above. It is submitted on behalf of the respondent that section 2A is an "existing law" within the meaning of section 6 of the Constitution and that it is not therefore unconstitutional.

57. Because of the definition of "existing law" in section 6(3) there is an element of circularity in the definition. However, before considering subsection (3), it is appropriate to consider paragraphs (a), (b) and (c) of subsection (1) in relation to three periods of time: first, the period from the enactment of the Constitution in 1976 until the 1979 Act came into force; second, the period from that time until the 1997 Act came into force; and third the period since then.

58. In the first period, as already indicated, the felony murder rule was in existence and was an "existing law" within the meaning of section 6(1)(a). In the second period, as shown by *Moses*, the felony murder rule was not in existence by reason of the 1979 Act. There was thus no "existing law" within subsection (1)(a) and there was no "enactment that repeals and re-enacts an existing law without alteration" within subsection (1)(b). Nor was there either "an enactment that alters an existing law" within paragraph (c) or a repeal and re-enactment with modifications of an existing law within section 6(2). It follows that there was no relevant existing law at the beginning of the third period.

59. As to the third period, the question is whether section 2A of the Criminal Law Act inserted in 1997 is within section 6. Lord Steyn and Lord Millett thought not in *Khan*. In that case the question was whether the new offence under section 2A created by the 1997 Act was consistent with the Constitution. The majority of the Board held that the creation of the offence in the inserted section 2A was constitutional and the minority, namely Lord Steyn and Lord Millett, dissented. The case was decided on the same day as *Roodal* and thus before the decision in *Matthew*. However the whole Board agreed that the mandatory sentence of death was not constitutional. The majority followed *Roodal* which had not then been overruled by *Matthew*. In these circumstances the majority did not need to consider whether the 1997 Act was an existing law.

60. By contrast, the minority, having concluded that the 1997 Act did infringe constitutional protections, went on to consider whether it was saved by section 6. In this regard Lord Steyn said at para 27:

> "Given that the abolition of the distinction between felonies and misdemeanours ended the existence of the felony/murder rule in 1979, section 2A of the 1997 Act (sic) is plainly not an existing law nor is it an enactment that repeals and re-enacts an existing law without alteration. That much is conceded. But counsel [for the State] argued that section 2A is an enactment within the scope of paragraph (c). That involved the contorted argument that 'an existing law' in the opening words of paragraph (c) and 'the existing law' towards the end of paragraph (c) refer to different laws, ie the former referred to the common law and the latter to the 1979 statute. Paragraph (c) cannot cover an enactment which alters a law that existed before the Constitution came into force but has since been abolished. The exception contained in paragraph (c) is plainly inapplicable."

61. Lord Millett reached the same conclusion by a somewhat different route, which may not be consistent with that of the majority. Suffice it to say that the Board agrees with Lord Steyn. The reference to "an existing law" at the beginning of paragraph (c)

must be to a law which existed at the date of the Constitution referred to in (a) or to a law which repeals and re-enacts such a law within (b). As a matter of language the reference to "the existing law" at the end of (c) must be to the same law as referred to at the beginning of paragraph (c). The Board agrees with Lord Steyn that the exception contained in paragraph (c) is plainly inapplicable.

62. The Board is unable to accept the submission made on behalf of the respondent that the submission to the contrary is supported by the definition of "alters" in section 6(3). The definition requires that the law which "alters" an existing law must repeal it and then either re-enact it with modifications or make different provisions in place of it or modify it. The 1997 Act did not repeal the common law rule because it had already been repealed. Nor did it repeal the 1979 Act. It simply enacted a new provision which was no doubt intended to reproduce something very similar to the common law rule. The Board recognises that the definition of "alters" in section 6(3) is not exclusive but is of the opinion that the 1997 Act does not "alter" an existing law, either within the meaning of the definition or within any other sensible meaning. In particular, the Board does not accept the submission that a law can alter an existing law even if that law was repealed in the past. It can only do so if the repealed existing law is replaced by an existing law within para (b) or (c). That is not this case.

63. Some reliance was placed on the definition of "existing law" in section 6(3). It first provides that it means the law that had effect in 1976, which in this case was the common law murder felony rule. However, for the reasons given above, the 1997 Act did not alter that rule because it had already been repealed in 1979. Section 6(3) then provides that "existing law" includes any enactment referred to in subsection (1). For the reasons the Board has given the 1997 Act is not an enactment within section 6(1). It is plainly not within (a) or (b) and it is not within (c) for the reasons given by Lord Steyn. Nor is it within section 6(2).

64. By way of final comment the Board reflects that, on the respondent's contended for construction of section 6, Parliament could legislate to repeal a law (perhaps intentionally, recognising that it provides for cruel and unusual punishment) and then later, perhaps many years later, by a simple majority reinstate it, even indeed, as here, by a new law yet wider and so more objectionable than the original – although in that event it is conceded that the new law will be valid only to the extent that it mirrors the repealed earlier enactment. Their Lordships are satisfied that any such later reinstatement of a repealed law which is inconsistent with sections 4 and 5 can only be achieved pursuant to section 13 of the Constitution, namely by the votes of not less than three-fifths of all the members of each House of Parliament.

Conclusion

65. For these reasons the Board dismisses the appeal against conviction but allows the appeal against sentence. It follows that the mandatory sentence of death must be quashed. It was common ground that in these circumstances the court should remit the question of sentence to the appropriate court in Trinidad and Tobago.