[2012] UKPC 2
Privy Council Appeal No 0107 of 2010

JUDGMENT

Nigel Brown (Appellant) *v* The State (Respondent)

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

before

Lord Brown
Lord Kerr
Lord Clarke
Lord Dyson
Sir Declan Morgan

JUDGMENT DELIVERED BY LORD KERR ON

7 FEBRUARY 2012

Heard on 20 October 2011

Appellant	*Respondent*
Julian Knowles QC Mark Summers	Peter Knox QC
(Instructed by Simons Muirhead & Burton)	(Instructed by Charles Russell LLP)

LORD KERR:

1. On the morning of 28 October 2004, a 76 year old man called Lloyd Bailey was with his wife, Evelyn, in their home in Second Caledonia, Trinidad. An intruder to their home attacked Mr Bailey that day and inflicted dreadful injuries on him from which he subsequently died. The intruder also attacked Mrs Bailey when she intervened in an attempt to protect her husband. Mrs Bailey was then aged 77 years.

2. Between 3 January 2007 and 7 February 2007, the appellant was tried, before Charles J. and a jury, at the High Court of Trinidad and Tobago, for the murder of Mr Bailey. On 7 February 2007, he was convicted and was sentenced to death (that being the mandatory punishment for murder in Trinidad). On 8 February 2008, the Court of Appeal of Trinidad and Tobago (Archie C.J., John J.A & Weekes JA*)* dismissed the appellant's appeal against that conviction.

3. The appellant sought leave to appeal against the Court of Appeal's decision. The Board listed his application for leave as an oral hearing, with the appeal to proceed if the application for leave was successful. In the event, leave was granted and the appeal proceeded.

Facts

4. Mrs Bailey had been seated in a part of the house known as the gallery around 8.30am on the morning of the attack. At that time she heard her husband cry out, "*boy! boy!*". She made her way to the corridor whence the cry had come and there she saw a man holding a knife to the head of her husband. Blood was streaming from Mr Bailey. Mrs. Bailey ran to her husband's aid and pulled the attacker, trying to get him away from Mr Bailey. The man stabbed her in the forehead. With great fortitude she continued to struggle with him and he struck her with a bench whereupon Mrs. Bailey fell to the ground landing in a seated position. The attacker stood over her and in front of her. She began to scream for help. Her screams were heard by neighbours. Two of these, Marilyn Pierre and Sean Brown, came to the gate of the property and found it locked. Sean Brown climbed over the fence and approached the house. He looked through a window and saw Mrs Bailey on the floor covered in blood.

5. The prosecution case was that the attacker was still in the house at this time. Sean Brown attempted to gain access to the house but found all the doors that he tried to be locked. He returned to the front of the house and heard an unidentified

neighbour shout that someone was running from the house. Mr Brown then observed a man running from the house, wearing a white T-shirt. The man jumped over a fence and fled.

6. Sean Brown went back to the house and gained entry. He saw Mr and Mrs Bailey. Both were on the floor and they were covered in blood. He then went outside and broke the lock of the gate, allowing Marilyn Pierre to enter. She also entered the house and she saw prints of 'sneakers' in the blood leading through the kitchen and bedroom and blood on the steps outside the house. Since Sean Brown had been wearing work shoes, these prints must have been made by the attacker.

7. The attacker, according to Mrs Bailey, was dressed in a dark coverall and was carrying a backpack. She claimed that she recognised him. He was, she said, the son of her god-daughter. He had visited her home many times. Indeed, Mrs Bailey said, he had been at the house some two weeks before the attack. On that occasion, he had spoken to her husband. It appeared to Mrs Bailey that he wanted to enter the house but her husband refused him admittance. He had left the curtilage of the house then but had remained in the vicinity for some time afterwards. Mrs Bailey subsequently identified the appellant as this person and as the man who had attacked and killed her husband.

8. At 9am on the same date police officers were summoned to a place called Morvant. This was not far from the Baileys' home. There they found a crowd of people. Some of the crowd were holding a man. This was the appellant, Nigel Brown. He had been apprehended by some of those present. He appeared to be exhausted and was breathing heavily. He was wearing what were described as "a black jersey and jeans". He was carrying a backpack but no coverall was found.

9. The prosecution's case on trial was that the appellant had gone to the Baileys' home with clothes in his backpack and that he changed into these after killing Mr Bailey and disposed of the dark coverall which Mrs Bailey had seen him wearing at the time of the attack. Indeed, the prosecution suggested to the jury that the coverall was being disposed of at the time that Sean Brown observed the man in the white T-shirt. When the appellant was subsequently detained he was found to be wearing a white T-shirt under a dark outer garment. On removing the coverall after the killing, the prosecution claimed, the white T-shirt was revealed.

10. A minuscule amount of blood was found on the white T-shirt and the dark outer garment worn by the appellant. (These were referred to during the trial as 'jerseys'.) The deputy director of the Trinidad and Tobago Forensic Science Centre, Emmanuel Walker, gave evidence that the blood found on the jerseys was insufficient for analysis. Under cross examination he agreed that it was impossible to say whether

this was human blood or animal blood. No trace of blood was found on the trousers or sneakers which the appellant was wearing when arrested.

11. Two days after the killing, on 30 October 2004, Christopher Lewis, a police inspector in the Trinidad and Tobago police force, conducted what is known as a verification procedure involving the appellant and Mrs Bailey. She was taken to a room in Barataria police station where the appellant was seated. Pointing to the appellant, Inspector Lewis asked Mrs Bailey whether the appellant was the man known to her as the son of her goddaughter Margaret Charles. Mrs Bailey looked at the appellant and said, "Nigel, you come in my house and kill my husband". According to Inspector Lewis, the appellant replied, "I only come in to help". Mrs Bailey then left the room. Police Corporal Vidale then cautioned the appellant and, according to the officer, the appellant replied, "I only went to help".

The trial

12. The appellant did not give evidence on his trial. Through cross examination, he denied having been present at the Baileys' house on the date of the attack. He asserted that Mrs Bailey's identification of him as the attacker had been mistaken. He challenged her ability to recognise him, claiming that he had stopped visiting the Baileys' home when he was 11 years' old. He disputed the location of his arrest. He also denied having been present at the Baileys' house on 18 October 2004. And he denied having uttered the words attributed to him at the 'verification' procedure on 30 October 2004.

13. No challenge was raised to the admissibility of the evidence concerning the bloodstains found on the appellant's jerseys. Indeed, his counsel required the attendance of Mr Walker, whose evidence had been tendered, in order to cross-examine him. The questioning of this witness by the defence unsurprisingly focused on the absence of blood on various parts of the clothing and footwear of the appellant and on the impossibility of identification of such blood as was found on the jerseys.

14. In the course of her closing address to the jury, counsel for the prosecution said this about the issue of blood:

> "… there was blood on the black T-shirt and the white T-shirt. The analyst could not say whether it was animal blood or human blood but it was blood. The analyst never said that it was ketchup; the analyst never said it was red colouring, he said blood. So what we have from the certificate of analysis, blood on the black T-shirt, blood on the white T-shirt. Pure coincidence? Are these coincidences, members of the jury, or is it otherwise? The State is saying that these are so interwoven one

> into the other that, when taken together, they can lead to the sure conclusion that this accused killed Lloyd Bailey, as Mrs Bailey said he did."

15. When the trial judge came to deal with the significance of the blood on the jerseys in the course of her summing up she said this to the jury:

> "It is entirely a matter for you whether you accept what the defence is saying, through suggestions of counsel in the course of cross examination, or whether you accept what the prosecution say, that is, that there was blood on him. It was insufficient for analysis but there was blood on him".

16. Although the appellant had no relevant previous convictions, his character was not put in issue by his counsel during the trial. In consequence, a good character direction was not given to the jury.

The judgment of the Court of Appeal

17. The prosecution argued before the Court of Appeal that the evidence about the blood staining was in fact beneficial to the appellant in that it enabled the defence on trial to challenge Mrs Bailey on her evidence that the attacker was wearing a coverall. Defence counsel had suggested to her that this was a manufactured account designed to counteract the lack of any evidence of blood staining on the accused's clothing or footwear. The Court of Appeal was not impressed by this argument. At para 13 of its judgment it said:

> "Notwithstanding any possible benefit that may have accrued to the appellant from the admission of this blood evidence, we are of the view that its probative force would have been outweighed by its prejudicial value. Forensically, there was no basis on the blood evidence to link the appellant to the scene of the crime. In addition, the prejudicial value of the blood evidence was more so compounded by the lack of a special direction on the part of the judge to the jury that reliance on this evidence could not be considered as supporting the correctness of Mrs Bailey's identification of the appellant as the assailant."

18. The Court of Appeal concluded, therefore, that the trial judge had erred in admitting the evidence about the blood on the appellant's clothing. It decided, however, that this did not compromise the fairness of the trial. The strength of Mrs Bailey's identification evidence was considered to be so overwhelming that the

fairness of the trial and the safety of the appellant's conviction could not be questioned. The court duly applied the proviso under section 44 (1) of the Supreme Court of Judicature Act of Trinidad and Tobago.

19. On the issue of a character direction, the Court of Appeal held that, because the appellant had not given evidence, the credibility limb of such a direction did not arise. It held, however, that the appellant was entitled to a modified character direction. If his character had been put in issue, the judge would have been required to give a direction to the jury as to the significance of the lack of evidence of propensity on the part of the appellant to commit the crimes with which he had been charged. But the Court of Appeal was in no doubt that the question of propensity was in no sense crucial to a decision as to the appellant's guilt. The absence of a good character direction by the judge, because of counsel's failure to raise the issue, was not fatal to the fairness of the trial or the safety of the conviction.

20. On the verification procedure the Court of Appeal held that an identification parade should not have been held, firstly, because this would have been futile, given that Mrs Bailey claimed to have recognised the appellant and to have based that recognition of many years of acquaintance with him and, secondly, on the basis that this could well have been prejudicial to the appellant in that it might have been seen as bolstering the case against him.

The appeal to the Judicial Committee

21. On the hearing of the appeal to this court, Mr Knowles QC for the appellant pursued all the grounds advanced before the Court of Appeal. Some minor discrete arguments were also presented and two further substantial grounds were advanced. The first of these was a claim that the trial judge had wrongly permitted evidence to be given of the statements that the appellant was alleged to have made (a) in reaction to Mrs Bailey's accusation that he had come into her house and killed her husband and (b) in response to Police Corporal Vidale's caution. Secondly, Mr Knowles invited the Committee to receive fresh evidence in the form of medical reports from Dr Richard Latham, consultant psychiatrist, and Dr Tim Green, clinical psychologist, on the issue of whether the appellant had been fit to plead. The effect of these reports, Mr Knowles claimed, was to raise serious doubts about the capacity of the appellant to sufficiently participate in his trial. Those doubts, it was suggested, created substantial uncertainty as to the safety of the appellant's conviction.

The blood stain evidence

22. As we have observed (at para 13 above) counsel for the appellant required the attendance of Mr Walker, the scientist who gave evidence about the bloodstains.

Clearly, a significant issue in the trial was whether the appellant could have been Mr Bailey's killer when he and his clothing were almost entirely free from any contamination of blood. This was a substantial evidential question on which, at first sight at least, the testimony of Mr Walker strongly supported the appellant's case that he could not have been the person who attacked Mr and Mrs Bailey. Evidence about the blood staining (and, more particularly, the absence of blood staining) was therefore not intrinsically prejudicial to the appellant. In the Board's view, the decision not to exclude that evidence cannot be said to be legally erroneous. No application to have the evidence excluded was made and it appears to the Board that an unsolicited judicial decision to refuse to admit the evidence might well have prompted objection by the defence, which, if it materialised, would have been impossible to reject.

23. The admission of the evidence was therefore not wrong but what was objectionable was the way in which it was dealt with by the prosecution and the apparent endorsement of that approach by the judge. Prosecuting counsel implied that the presence of blood could in some way strengthen the case against the appellant. It could not. As the Court of Appeal pointed out, blood flecks which could not be analysed, which could not even be identified as human blood, could not link the appellant to the scene of the killing. The judge should have so directed the jury. She ought to have told the jury that they could only consider the evidence about the blood stains in the context of the appellant's claim that the virtually complete absence of any sign of blood on his person, clothing or footwear meant that he could not have been Mr Bailey's killer. In fairness to the judge, it should be noted that she did refer to the defence claim that the absence of blood meant precisely that. But leaving it to the jury to decide between competing cases: on the one hand, the defence claim that the absence of blood on the deceased could only mean that he was not the killer and on the other, the presence of minute, unanalysable quantities of blood indicated that he was, was not permissible.

24. The propriety of applying the proviso therefore falls to be considered in a somewhat different set of circumstances from those in which the Court of Appeal decided the issue. The error lay not in the admission of the evidence but in the failure to give appropriate directions as to how the evidence should be evaluated by the jury. It should be noted, however, that the Court of Appeal had regard to the lack of "a special direction" by the judge to the effect that the blood evidence could not support Mrs Bailey's identification of the appellant, as well as concluding that the evidence should not be admitted. The issue of the adequacy of the judge's directions to the jury therefore played a part in the Court of Appeal's assessment of whether the proviso should be applied. Since the application of the proviso must be considered in light of all alleged defects in the trial procedure which might have an impact on the trial's fairness and the safety of the appellant's conviction, we shall deal with this after our review of the other claimed imperfections in the trial on which the appellant has relied.

The character direction

25. The appellant did not have an unblemished record. He had been convicted of malicious damage of a car in 2000. It appears that he had set the car alight after an argument. He was fined $12000 and, in default of payment of the fine, ordered to serve eight days' imprisonment. There was a further conviction for possession of marijuana. Notwithstanding these convictions, the Court of Appeal held (in the Board's view, correctly) that he was entitled to a modified character direction. As was held in *R v Gray* [2004] 2 Cr.App.R 30 at para 57, "where a previous conviction can only be regarded as irrelevant or of no significance in relation to the offence charged, [the judge's] discretion [to treat him as being of effective good character] ought to be exercised in favour of … the defendant …". See also *Teeluck v State of Trinidad and Tobago* [2005] 1WLR 2421, para 33.

26. Although the appellant's written submissions accepted that the Court of Appeal was right in concluding that the appellant was not entitled to the 'credibility' limb of the good character direction, an argument was developed in the written case that this conclusion had led the court into the error of supposing that Mrs Bailey's credibility was not challenged in the trial. Wisely, Mr Knowles did not develop that argument to any extent on the hearing of the appeal before the Board. In any event, it can be disposed of shortly. The Court of Appeal's statement that "there was no weighing of the truthfulness of Mrs Bailey's evidence against the appellant's" (para 46) did no more than reflect the manner in which the trial was conducted on behalf of the defence. The challenge to Mrs Bailey was not advanced as an attack on her honesty; it centred on the claim that her evidence could not be regarded as reliable.

27. The context in which the Court of Appeal considered the absence of a weighing of the truthfulness of Mrs Bailey as opposed to that of the appellant was in its assessment whether the decision in *Sealey and Headley v The State* (2002) 61 WIR 491, PC should affect the impact of the failure to give a direction on the appellant's lack of propensity on the fairness of the trial – see para 46 of the Court of Appeal's judgment. In *Sealey* there was a direct clash as to the truthfulness of the main prosecution witness's testimony *vis-à-vis* that of the appellants. In those circumstances, the absence of any criminal record for the appellants was of critical importance since they were pitted against a police officer with no obvious motive to fabricate a case against them. As the Court of Appeal in the present case said, what was at stake in *Sealey* was whether the jury could accept the evidence of the police officer and reject as untrue the evidence of the two appellants; the issue was whether he was truthful or deliberately lying – para 43 of the Court of Appeal's judgment. In those circumstances, a propensity direction was crucial. In the present case because there was no such direct clash, it was considered not to be.

28. It is therefore wrong to suggest that the Court of Appeal concluded that there was no challenge to Mrs Bailey's credibility in so far as that related to the reliability of her evidence. On the contrary, in para 18 of its judgment the Court of Appeal directly addressed the question of reliability and painstakingly reviewed the various aspects of her evidence against the backdrop of *Turnbull* (*R v Turnbull* [1977] QB 224. Its conclusion that it was entirely reliable, allied to the lack of any challenge to Mrs Bailey's honesty, was pivotal to its decision that the failure to give a propensity direction was not fatal to the fairness of the trial and that the appellant's conviction was safe.

29. On the appellant's trial, his counsel did not put his character in issue. In a letter of 18 March 2010 to the appellant's present solicitors, counsel who appeared for him on his trial, Mr Welch, addressed the question of why the appellant was not called to give evidence and in the course of the letter, touched on the question of putting the defendant's character in issue. He stated, "I did not specifically in legal terms explain to him the issue of a credibility limb good character direction being triggered by him testifying". Mr Welch did not deal directly with the issue of raising the defendant's good character in cross examination of the prosecution's witnesses.

30. It is clear that it is counsel's duty to raise the issue of his client's good character where it is likely to be to the defendant's advantage. In *Teeluck* [2005] 1 WLR 2421, para 33 (v) Lord Carswell, delivering the judgment of the Board, said this:

> "The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen*, at p 844."

31. The observation that the judge has no duty to raise the question of the defendant's good character must be qualified in light of statements made in the subsequent case of *Gilbert v The Queen (Practice Note)* [2006] 1 WLR 2108 where Lord Woolf said (at para 17) that in a case where the defendant was obviously a person of good character the judge would be well advised to ask counsel whether he intended to put his character in issue in order to clarify the situation. But this is not relevant for present purposes because, as the Court of Appeal in this case held, the *fact* that a direction was not given, as opposed to the reasons for that failure, is sufficient to

justify an examination of the effect that this may have on the safety of the conviction. And in *Smith v The Queen* [2008] UKPC 34 at para 30, Lord Carswell said:

> "... It is the duty of defence counsel to ensure that the defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe: *Sealey and Headley v The State* (2002) 61 WIR 491; *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421..."

32. The failure of counsel can therefore bring about an unsafe verdict. But it should not be automatically assumed that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel. As Mr Knox QC for the respondent pointed out, there might well be reasons that defence counsel in the present case decided against that course. In the absence of an explanation from counsel, however, as to why he did not raise the issue of the defendant's good character, the Board considers that it is necessary to examine whether the lack of a propensity direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction should have been given.

33. It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction - *Jagdeo Singh's* case [2006] 1 WLR 146 para 25 and *Bhola v The State* [2006] UKPC 9, paras 14-17. As Lord Bingham of Cornhill said in *Jagdeo Singh's* case, "Much may turn on the nature of and issues in a case, and on the other available evidence." (para 25) Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case. Thus, in *Balson v The State* [2005] UKPC 2, a case which turned on the circumstantial evidence against the appellant, the Board considered that such was the strength and cogency of that evidence the question of a good character direction was of no significance. At para 38 the Board said this:

> "… a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are

> wholly outweighed by the nature and coherence of the circumstantial evidence."

34. It is true that in *Teeluck* at [2005] 1 WLR 2421, para 33(iv) Lord Carswell, giving the judgment of the Board, said that "where credibility is in issue, a good character direction is always relevant". And in para 33(ii) he said that the direction "will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial." In *Bholah* the Board considered these remarks. After reviewing the cases of *Balson*, *Jagdeo Singh* and *Brown (Uriah) v The Queen* [2006] 1 AC 1, Lord Brown of Eaton-under-Heywood, delivering the judgment of the Board, said at para 17 that the statement in para 33(ii) of *Teeluck* required to be applied with some caution. He continued:

> "In *Teeluck's* case itself, of course, the appellant's credibility was said to be "a crucial issue" to the extent that the Board was unable to conclude "that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given" (paragraph 40). So too in *Jagdeo Singh's* case [2006] 1 WLR 146. But the Board reached a different conclusion in *Balson's* case [2005] UKPC 6 and in *Brown's* case [2006] 1 AC 1 and their Lordships have no doubt that the Court of Appeal were right to have done so in the present case too. The cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so "rare"."

35. The Board considers that the approach in *Bholah*, if and in so far as it differs from that in *Teeluck*, is to be preferred. There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* are obvious examples. But there will also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence. It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial. As Lord Bingham observed in *Jagdeo Singh* [2006] 1 WLR 146, para 25, hard, inflexible rules are best avoided in this area.

36. It will be necessary in due course to examine the strength of the evidence against the appellant and the nature of the issues in the trial as they bear on the question of the significance of a good character direction. That examination should take place, however, later in this judgment when the Board comes to consider the application of the proviso.

The verification procedure

37. The appellant has accepted that an identification parade would not have been appropriate in this case. It would have served no useful purpose. It has been further accepted that the holding of a verification procedure is not in itself objectionable. It is claimed, however, that this procedure was arranged so as to provide evidence of identification in substitution for a parade and was relied on at the trial as having evidential value.

38. In *Brown and Isaac v The State* [2003] UKPC 10, the Board held that arranging a confrontation where the identifying witness had already identified the accused was not objectionable if it had "not been arranged to provide evidence of identification in substitution for a parade but simply to reassure the police that they had not arrested the wrong people" and provided it "was not relied upon at the trial as having any evidential value" (para 18).

39. When Inspector Lewis gave evidence about the verification procedure, the judge intervened to give a number of directions to the jury. These included the following:

> "The effect of that procedure simply is that the police had Mrs Bailey come to say whether this person was the Nigel Brown that she referred to in her report. The issue as to whether the identification is correct is one that you will have to determine at the end of the day after you have heard all the evidence in the case."

40. It was therefore made abundantly clear to the jury that this was a procedure of verification of identification *after* Mrs Bailey had already identified the appellant. It was also explained that whether that *earlier* identification was correct was a matter to be determined by them after hearing all the evidence germane to that issue.

41. Mr Knowles referred to passages from the judge's charge in which, he claimed, she had suggested that the verification procedure was supportive of Mrs Bailey's identification evidence. These were the passages:

"Corporal Vidale then gave evidence of taking the accused to a verification procedure, what he described as a verification procedure at the Barataria Police Station on the 30th and on this occasion he said he took him there so that Mrs. Bailey could indicate whether he was the person that she referred to in her statement as the son of Margaret Brown-Charles', the person that was referred to in the statement as the assailant who attacked her husband and killed him on 28 October. ...The officer indicated that it was not an identification procedure per se. They, the investigators, needed to ascertain whether the person that she referred to in her statement is, in fact, this man whom they held. It is a matter for you. You have heard the evidence, you have seen the witnesses and you will come to your conclusion. But you bear in mind that this is a case of identification by recognition. I have given you the directions as to how you are to approach it, but this is not the situation where it is someone seeing an assailant for the first time. The police would have had a witness who said, I know this man, I have known him for 15 years, I have known him since he was a child, I know his mother. So in the circumstances, the police were well within their rights to take Mrs. Bailey to say whether that is the man ..."

"... [Inspector Lewis] was cross-examined about the whole procedure as to whether this was the appropriate procedure as to what the Standing Orders provide for, and you would recall, as I told you before, that given the nature of what Mrs. Bailey said in her statement that she knew this person, she could recognise him, she knew him for 15 years, this was the procedure the police adopted as opposed to an identification parade which really is to test the ability of the witness to identify someone in the case where they are seeing them for the first time, or in the case where it is a mere glimpse. On the evidence of Mrs. Bailey, it is open to you to find there this was no glimpse, that she saw him for a period of time. ... So that took care of the evidence of Inspector Lewis ..."

42. It is perhaps unfortunate that directions about the reliability of the evidence of identification are juxtaposed in these passages with a description of the verification procedure, but the Board is satisfied that the judge did not suggest to the jury that the verification procedure supplemented the identification evidence. It is also clear, from an examination of the judge's charge as a whole, that these passages were designed principally to deal with the suggestion that counsel for the appellant had made that an identification parade should have been held and to explain why the verification procedure had been arranged instead. There is therefore no substance in this ground of appeal.

Dock identification

43. The appellant's written case suggested that Mrs Bailey should not have been allowed to make a dock identification of the appellant. This was not pursued on the oral presentation of the appeal. Again it can be dealt with shortly. As the Board has recently stated in *Tido v The Queen* [2012] 1 WLR 115, para 17, dock identifications are not, of themselves and automatically, inadmissible. Here the witness merely pointed out in court the man whom she had identified in her initial report to the police as having been her husband's killer. The judge gave the jury detailed directions as to how they should assess the reliability of Mrs Bailey's evidence about having identified Nigel Brown as the person who had entered her home on 28 October 2004. There is no reason to believe that the jury's assessment of that issue was in any way affected by their having observed the witness point to the man who she said was the person that she had earlier identified.

The utterances at and following the verification procedure

44. Before the verification procedure took place, Police Corporal Vidale cautioned the appellant. He was informed that he had the right to consult an attorney, a friend or a member of his family. He was also informed that he was entitled to make a telephone call. At this time he was also told that the police corporal would be bringing Mrs Bailey to the room where the appellant was in order to have her verify whether or not he was the person she had referred to in her report of 28 October 2004 as the son of her god-daughter, Margaret Brown-Charles. The appellant did not make any request for the attendance of any person or for legal advice. Nor did he ask to make a telephone call. None of this evidence was challenged by the appellant on trial.

45. The judge accepted that the appellant had been cautioned and advised of his rights. She also found it significant that he had been visited at the police station by his grandfather (a retired police superintendent) and his mother (a serving police officer) two days before the confrontation took place. She considered that the exchange between Mrs Bailey and the appellant was spontaneous and that there was no reason to exclude the evidence.

46. The appellant advanced three bases on which, it was suggested, the exchange at the verification procedure should not have been admitted in evidence – (a) the absence of a lawyer; (b) the absence of a contemporaneous record of the "questioning"; and (c) the absence of any independent verification of voluntariness. All of these are predicated on the claim that what passed between Mrs Bailey and the appellant and what he said after she had left the room amounted to an interview. In the Board's view this is plainly a false premise. There is nothing to suggest that the statement of Mrs Bailey was planned or anticipated by the police officers. The judge

was not only entitled to conclude that the exchange was entirely spontaneous, she was right to do so.

47. Given that the appellant had been advised of his right to have someone present at the verification procedure, that this was an entirely spontaneous and unexpected statement by Mrs Bailey which elicited an equally spontaneous response, the Board is satisfied that the judge was right to admit it in evidence. The police officers made entries of the appellant's responses in their pocket diaries and in the station diary. In the circumstances, this was all that could reasonably be required of them. They had not expected that this exchange would take place. There was therefore no reason for them to anticipate that a system of contemporaneous recording would be required. Likewise there was nothing about the circumstances in which the need for independent verification of voluntariness could be foreseen. While the safeguards which the appellant claims should have been in place are important where an interview is planned and admissions are sought, it cannot be right that the absence of such safeguards where no questioning of the suspect is either planned or anticipated will render automatically inadmissible what is plainly highly relevant evidence. The appellant's arguments on this ground must also be rejected.

48. In rejecting these arguments, the Board has taken account of the medical evidence as to the level of the appellant's ability to understand the procedures at trial. That medical evidence is discussed in detail below. The Board is satisfied that the medical evidence does not cast doubt on the appellant's capacity to understand what Mrs Bailey was saying to him and the significance of the reply that he made.

Discharge of the jury

49. Another argument not advanced before the Court of Appeal but presented to the Board was that the jury should have been discharged by the judge following an inadvertent statement by Police Constable Ali under direct examination by Ms Raphael for the prosecution. Constable Ali was one of the officers who detained the appellant at Morvant. It appears that one or more members of the crowd which surrounded the appellant at that time told Constable Ali that the appellant had said that he had stabbed two old people and that one of them was dead. Constable Ali then asked the appellant whether he had heard what was said and cautioned him. The appellant is alleged to have replied, "Is family".

50. Since no statements were taken from members of the crowd it was impossible to prove the alleged confession of the appellant at the place where he had been detained. The prosecution rightly accepted that the statement attributed to the appellant in response to the police officer's caution at the scene was not admissible.

The trial judge approved this concession and ruled that Constable Ali should not give evidence about the statement that the appellant was alleged to have made.

51. During his direct examination Constable Ali gave evidence that the appellant had told him that his name was Nigel Brown and that he had then cautioned him. Asked by Ms Raphael to continue, Constable Ali said that the appellant had replied, "Is family". The judge immediately intervened. She said:

> "Mr Foreman, members of the jury, please disregard the last answer as given by the witness. It is expunged from the record. It is not evidence before you that you are to consider at all."

52. Mr Welch applied to the judge to discharge the jury. She refused. In the first ruling that the trial should continue (given on 15 January 2007) the judge said this:

> "… the Court, in examining what was said by the officer in the context of the case as a whole, finds that there is no real danger of the kind of prejudice to the accused such as to render the trial unfair. The matter has been dealt with by an immediate warning being issued to the jury and the matter would be returned to at the time of the summing-up.
>
> The Court would just like to note very briefly that in the context of the case, the statement 'is family' does not bear the kind of overwhelming prejudice which would necessitate the trial being aborted. It is to be noted that the officer did not, in his evidence, tell the accused the reason why he was arrested. There was nothing that the officer said to link his arrest to the recent attack on the deceased and Mrs Bailey.
>
> In the circumstances, the statement 'is family' being open to other interpretations and, as I said before, given the warnings, the Court doesn't consider that it is so prejudicial as to render the trial unfair. In the circumstances the trial will continue."

53. Unaccountably, the judge returned to this issue the following day. It appears that she may have forgotten that she had already ruled on the matter for she began by saying that "there was a ruling that was outstanding in relation to the application to abort the trial and I will deal with that now". In the course of the ruling that the judge then gave she said:

> "… the issue is whether the response, as given by the accused, would inevitably be used by the jury to say that he was the assailant, in other words, whether the account of the accused's response 'is family' would inevitably lead them to the conclusion that he was admitting to his involvement in the matter."

54. Mr Knowles submitted that this applied a wrong test. Rather than determining whether there existed a real danger of prejudice, the trial judge was determining whether prejudice was inevitable. This argument must fail. In the first place, what the judge said was in reaction to Mr Welch's submission to her that "the jury would inevitably make the link between what was said on that occasion and accused's response, and come to the conclusion that, in fact, the accused is the one who actually killed the deceased and attacked his wife, Mrs Bailey." In the passage from her ruling quoted in the previous paragraph, the judge was clearly providing a response to that argument. Secondly, and more importantly, in a later passage in the ruling the judge articulated the test entirely correctly. She said in the final part of the ruling:

> "In all the circumstances, the Court having looked at the authorities and looked at the context in which the statement was made, the Court comes to the conclusion that there is no real danger of the sort of prejudice which will render this trial unfair…"

55. Further arguments were advanced to the Board concerning the likelihood of the jury treating the statement as an admission and the possibility of the jury being misled. The Board does not believe it necessary to rehearse those arguments. Having considered them, the Board has concluded that, although somewhat differently expressed, the gist of these arguments was presented to the judge. It is clear that she considered them and rejected them, as in the exercise of her discretion she was entitled to do.

The proviso

56. Section 44(1) of the Supreme Court of Judicature Act 1964 provides:

> "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."

57. In *Stafford v The State (Note)* [1999] 1 WLR 2026, 2029-2030 Lord Hope of Craighead 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"

58. In the present appeal is it inevitable that, if the jury had received proper directions on the blood staining and a 'propensity limb' good character direction, they would have come to the same conclusion? The Board has unhesitatingly concluded that an affirmative answer must be given to that question. Mrs Bailey's recognition of the appellant was strong. She had ample opportunity by reason of her proximity to him, the length of time over which she observed, indeed grappled, with him and her long acquaintance with him to make a firm identification of the appellant. She was unswerving in her evidence and unshaken by persistent cross examination.

59. Quite apart from the force of Mrs Bailey's testimony, however, there existed a set of circumstances which made the case against the appellant simply unanswerable. He did not live in the area of the Baileys' home, yet offered no explanation for his presence in Morvant. He was detained by a crowd within a very short time of the attack on the Baileys taking place and a short distance from their home. He had been identified as the killer by Mrs Bailey before she saw him in custody on 30 October 2004. Not only therefore was he caught within a very short

distance of where the attack took place, one of his victims told the police that it was her god-daughter's son who had committed the attack and Nigel Brown was indeed that person. The spontaneous reply that the appellant made to Mrs Bailey's accusation that he had killed her husband gave the lie to the only defence that he proffered. The application of the proviso in this case by the Court of Appeal was inevitable.

The fresh evidence

60. Court ordered reports on the appellant from a consultant psychiatrist, Dr Ghany, and a clinical psychologist, Dr Maharaj, were obtained on 8 November 2004. Dr Ghany's opinion was that the appellant did not suffer from any formal psychiatric illness. He found no evidence of psychosis or mood disorder. There was evidence that the appellant used marijuana and Dr Ghany considered that "he may be of dull normal intelligence". The appellant was, in Dr Ghany's estimation, fit to stand trial. Dr Maharaj administered the Wechsler Adult Intelligence Scale (WAIS) and the Minnesota Multiphasic Personality Inventory – 2 (MMPI-2) tests. The results obtained for the appellant on the WAIS test placed him in the range of dull normal intelligence. The MMPI-2 test is a personality test which seeks to identify psychopathology. The results of the appellant's performance on this test were not specifically stated. Rather Dr Maharaj spoke in general terms about psychopaths, describing them as "angry, resentful argumentative individuals" who are usually able to control the acting out of their hostility but do have violent outbursts on occasion. The final paragraph of Dr Maharaj's report was in these terms:

> "Clients may sometimes have a long history of severe social maladjustment with poor work histories. Poor interpersonal relationships are common. They are difficult to interact with because of their hostile attitudes and behaviours. They are therefore poor candidates for any type of psychological intervention. The prognosis for psychological intervention is not encouraging."

61. Because, no doubt, of the way this paragraph was expressed, with no specific reference to the appellant, inquiry was made of Dr Maharaj about his report and on 12 January 2007 he wrote to Charles J and said this about the final paragraph of that report:

> "This is a general description of the kinds of problem behaviours and attitudes that clients like Nigel would experience. It is not specifically for him but a description of clients generally who fall in this category, would perform similarly on this test. Clients like Nigel scoring as he did on this test would therefore received (*sic*) the same description of diagnosis, in terms of thinking, feelings and behaviour. Therefore it is

more of a general description rather than specifically for this individual client.

…

Furthermore, on a scale of 1-10, I would estimate Nigel's problem to be rated at 7, this of moderate severity in terms of problems."

62. The test results achieved by the appellant were still not given and Dr Maharaj did not relate his placing of the appellant on what appears to be a somewhat informal scale of 1-10 to his actual performance on the test. Failure to state the results inevitably makes an assessment of the validity of Dr Maharaj's opinion more difficult.

63. On 29 July 2010 Dr Richard Latham prepared a report based on an examination of the appellant carried out on 15 June 2010. This had been commissioned by the solicitors who now appear on his behalf. 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. On the basis of his examination and a consideration of various reports on the appellant, including that of Dr Green, Dr Latham concluded that the appellant was suffering from a mild learning disability – that is a mental disorder in the form of significantly impaired cognitive functioning and impairment in functional skills. He acknowledged that this diagnosis could not be sustained if Dr Maharaj's opinion was preferred but stated that he made the diagnosis on the basis of supporting evidence regarding the appellant's educational and social functioning. This suggested a degree of impairment consistent with someone who had a measurable degree of intellectual impairment in the learning disability range. In the opinion of Dr Latham, the appellant was, at the time of his examination, "learning disabled now and was learning disabled at the time of the offence."

64. The most significant part of Dr Latham's report appears in para 7 and it is necessary to set this out in full:

"The issue of fitness to plead and stand trial at the material time is relatively straightforward to consider as the mental disorder I have described (mild learning disability) is a stable state and would have been as relevant at the time of the offence as now. I have considered separate criteria in assessing Mr Brown's fitness to plead and stand trial:

i. Understanding the charges.

Mr Brown has a rudimentary and basic understanding of the nature of the charge and subsequent conviction. He understands that murder involves killing someone. He does not have the capacity to understand the concept of intent and the relationship between intention to cause grievous bodily harm and murder. If the threshold for understanding the charge is set at a relatively low level then in basic terms Mr Brown understands the charge.

ii. Deciding whether to plead guilty or not.

Mr Brown understands that guilty means that he committed the act. In my view his understanding is relatively superficial and his cognitive impairment means that he struggles to understand more complex matters like *beyond reasonable doubt* but in the most limited terms he understands the distinction between guilty and not guilty. I do not believe he has the intellectual capacity to apply his mind to the decision to any great extent, in other words he may not be able to weigh up all competing factors that go towards making a decision on how to plead.

iii. Exercising his right to challenge jurors.

This particular criterion is difficult to assess. There is no reason why Mr Brown could not recognise someone and identify them in court if they were on a jury. It is however more questionable that he can be assumed to understand the reason for this right and therefore whether he was sufficiently aware that he should exercise this right if appropriate.

iv. Instructing solicitors and counsel.

Mr Brown could give basic instructions in that he is able to communicate. If, however the process of giving instructions is broken down into whether Mr Brown would first be able to understand lawyers' questions, second be able to apply his mind to answering them and third whether he could convey intelligibly to lawyers the answers or instructions he wishes to give then there is significant cause for concern. Mr Brown can understand basic questions and he may apparently understand more complex questions by recognizing themes or components of questions and responding in an apparently reasonable way. It is however much more likely, given his intellectual impairment that he does not understand complex questions posed by his lawyers. His apparent reluctance to answer some questions may be related to his limited understanding. He may be able to think about the question he

has been asked but without a clear understanding of the nature of the question he will not be able to apply his mind appropriately and his answers are likely to be over simplified and limited by his intellectual capacity. In summary, given the complexity of the legal situation it is unlikely that he could satisfactorily instruct solicitors and counsel.

v. Following the course of proceedings.

This is perhaps the most complex requirement and given that proceedings may be confusing for any person attempting to follow them, it is necessary to consider this capacity in relative terms. Proceedings obviously vary depending on a number of factors including the nature of the plea - it is likely that in this case it would be easier to follow proceedings in the event of a guilty plea when compared to the evidence that will be heard if there is a full trial. In my opinion Mr Brown can only follow matters of this complexity in a limited way.

He can probably understand direct questions and direct answers but once complexity and multiple themes are introduced then it is unlikely that he is able to follow things to an extent that allows his participation in the process. This opinion is based on the degree of intellectual impairment but supplemented by the experience of him at interview and the transcriptions of his evidence.

vi. Giving evidence in his own defence.

Mr Brown can give oral evidence in a strict sense but his ability to weigh up how he answers questions is limited. I recognise that this criterion may not strictly apply when considering the legal issue.

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

65. Dr Tim Green provided the appellant's solicitors with a report dated 3 March 2010. Dr Green is a Chartered Clinical Psychologist employed as Lead for 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.

66. Dr Green interviewed the appellant over a period of four hours. On the basis of the history that the appellant gave, Dr Green formed the view that his level of functioning was that of someone who had a learning disability. That opinion was supported by psychometric testing. The Wechsler Adult Intelligence Scale III (WAIS-III) test was administered to Mr Brown. His verbal IQ was found to be 75, his performance IQ 65, giving a full scale IQ of 68. On this basis Dr Green concluded that the appellant's performance fell in the extremely low category of intellectual functioning. Less than 2% of the population would be expected to achieve a result lower than that of the appellant.

67. Dr Green was also very concerned about the appellant's functioning during interview. In the absence of any history of a traumatic head injury, Dr Green considered that the appellant's long term abuse of narcotic substances may have had neurological sequelae which impaired his functioning. He believed that a brain scan of the appellant was required and that an opinion from a consultant neurologist was appropriate. In conclusion he stated:

> "I do not believe that Mr Brown currently has the ability to properly instruct counsel or follow the proceedings of a trial as I believe he has a learning disability."

68. The reports of Dr Latham and Dr Green were not obtained until fully three years after the appellant's conviction. A substantial issue immediately arises as to whether this fresh evidence should be received. During the trial Mr Welch had cross examined Police Corporal Vidale about the appellant's demeanour and, of course, the reports of Dr Ghany and Dr Maharaj were then available. There is no doubt that the appellant's legal advisers should have been alert to the question of his fitness to plead. Yet no medical evidence was adduced on his behalf nor was this issue canvassed either on the trial or before the Court of Appeal. This is a matter of obvious and grave concern. The Board has been greatly exercised by the fact that these reports have been produced *ex post facto* and without any explanation as to why medical evidence on the issue of fitness to plead has not been produced before now.

69. It must be said that the appellant's current legal representatives have tried to discover why this issue was not explored earlier. In a letter of 1 April 2010 the appellant's solicitors asked Mr Welch why "the apparent cognitive and other difficulties of Mr Brown were not raised either at the trial or on appeal". No reply to that letter was received and a further letter dated 21 October 2010, renewing the inquiry, was sent to Mr Welch. Unfortunately, this second letter did not elicit a response.

70. The net position is that the Board is faced with a complete absence of explanation as to why this issue was not ventilated in the courts below. 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. But the Board is conscious that section 47 of the Supreme Court of Judicature Act of Trinidad and Tobago gives the Court of Appeal power in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice". Of this power the Board said in *Pitman v The State* [2008] UKPC 16 at para 31:

> "Section 47 of the Supreme Court of Judicature Act of Trinidad and Tobago gives the Court of Appeal power in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice". It was made clear by de la Bastide CJ in *Solomon* v *The State* (1999) 57 WIR 432 that the breadth and generality of this power do not remove the long accepted requirements of the law that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial. These factors are not, however, conclusive of the issue of admission of fresh evidence, and an appellate court has the overriding statutory power to admit it if it is in the interest of justice: see *Benedetto* v *The Queen* [2003] UKPC 27, [2003] 1 WLR 1545, and cf *Smalling* v *The Queen* [2001] UKPC 12"

71. Dr Latham and Dr Green are obviously distinguished in their field and, notwithstanding the disagreement between Dr Latham and Dr Maharaj and the failure of Dr Green to refer to the latter's report, their opinions that the appellant was unfit to plead raises a substantial issue about the fairness of his trial and the safety of his conviction. The ultimate penalty, a sentence of death, was imposed on the appellant. Where a doubt remains about the correctness of the verdict which led to that penalty, any court would be bound to ensure that it should be, if it can be, removed or, if it cannot, that it should prevail against the carrying out of that sentence. The Board has decided that the fresh evidence must therefore be admitted.

72. In light of the evidence of Dr Latham and Dr Green, the conviction of the appellant is potentially unsafe and requires to be reviewed. The case will therefore be remitted to the Court of Appeal, who should determine the safety of the conviction in light of the fresh evidence, together with any rebutting evidence which they may decide to admit.