[2013] UKPC 8
Privy Council Appeal No 0039 of 2011

JUDGMENT

Bonnett Taylor (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Kerr
Lord Reed
Lord Carnwath
Sir John Chadwick

JUDGMENT DELIVERED BY LORD HOPE

giving the majority judgment

ON

14 March 2013

Heard on 11 December 2012

Appellant
Michael Birnbaum QC
John McLinden QC
Malcolm Birdling

(Instructed by Herbert Smith Freehills LLP)

Respondent
Howard Stevens QC

(Instructed by Charles Russell LLP)

LORD HOPE:

1. At about 9.30 pm on 10 September 1998 Anthony Williams ("Grassy") was shot dead at his home at Stanton in the Parish of Portland. The appellant Bonnett Taylor ("Beppo") was arrested on 23 September 1998 and charged with his murder. He went to trial at the Portland Circuit Court, Port Antonio on 3 and 4 December 1998, but the jury failed to arrive at a verdict. He went to trial there for a second time on 2 March 1999. On 4 March 1999 he was found guilty of the murder and sentenced to life imprisonment. The trial judge, Clarke J, ordered that he must serve 25 years before becoming eligible for parole.

2. The appellant appealed against his conviction and sentence. But his seven grounds were "home-made", and senior counsel who appeared on his behalf at the hearing in the Court of Appeal on 30 November 1999 said that he could find no arguable grounds for an appeal. The appeal was dismissed, and the conviction and sentence were affirmed. It was ordered that the sentence was to run from 15 April 1999, eighteen months after the appellant was taken into custody. On 14 December 2011 he was given permission to appeal to the Board. For the reasons that were discussed in *Hamilton v The Queen* [2012] UKPC 31, [2012] 1 WLR 2875, paras 5-9 no point has been taken about the delay in his application for permission to appeal.

3. The case for the prosecution depended almost entirely on the eye witness evidence of Aubin Grey ("Skinner"). He said that on the evening of 10 September 1998 he went with the deceased from a neighbour's yard to the deceased's house. They got up onto the verandah and he was at the door of the house when the appellant appeared. He had known the appellant for many years, and he could see his face from the street light. The appellant said to the deceased, who was still on the verandah and had weed in his hand to make a cigar, "Gi mi whey you have bwoy". The deceased pushed the appellant, who then shot him. The deceased fell from the verandah and dropped to the ground, whereupon the appellant shot him again while he was lying down. Grey then ran away to the home of his neighbours, Mr Lascelles Hartley ("Bigga") and his wife Valda ("Betty"). He said that he told them what had happened. The incident had lasted for about two minutes. About two days after the incident he saw the appellant again as he was walking with a friend from his girlfriend's house. The appellant told Grey's friend to go on, as he wanted to talk to Grey. He then told Grey that he never meant to shoot Grassy. He had done so only because Grassy had pushed him. Grey's cross-examination was limited to the reliability of his identification of the accused as the person who shot the deceased because it was dark.

4. The prosecution called four other witnesses: Dr Robert Taylor, who had carried out a post mortem examination of the deceased; Detective Sergeant Derrick Hart, the

investigating officer, who said that he found the deceased's body at about 7.30 am on 11 September lying on its back at the front of the house and that there was vegetable matter resembling ganja in one hand; Lascelles Hartley; and Marshall Francis, the deceased's brother, who identified him to Dr Taylor. Lascelles Hartley had given an undated statement to the police. He did not give evidence at the first trial, but was the subject of a notice of additional evidence which was served on the defence on the second day of the second trial. He said that he had known the deceased, who used to come to his house, for about a year and six months. The deceased's house was about five chains (about 110 yards) away from his own house, where he lived with his wife and children. At about 9.45 pm on 10 September 1998 he was at home when he heard two gun shots. They sounded as if they were coming from the direction of the deceased's house. He went onto his verandah. Grey came into his yard and knocked on the door. Grey spoke to him and told him something. He did not speak to his wife. He then went to bed. Mr Hartley was asked some questions to test his reliability, but there was no challenge to the substance of his evidence.

5. The appellant did not give evidence, and he called no witnesses. He made an unsworn statement from the dock in which he said that on 10 September 1998 he had been at home with his family. He and the deceased did not have anything between them, and he did not shoot him. But he and Grey had had a fuss over some fishing gear, as a result of which he had beaten Grey up. He said that it was because of malicious feelings for him that Grey had said that he had seen him at Grassy's home that night.

6. At the start of the third day of the trial, Crown counsel told the judge in the presence of the jury that there was a matter on which his guidance and assistance was required regarding a member of the jury. A juror had indicated to another barrister that she knew the appellant and that this was more than a passing acquaintance. She wanted the matter brought to the court's attention because her conscience was affected. Still in the presence of the jury, the judge asked the juror to confirm what she was said to have said, which she did. He asked her whether or not the fact that she knew the appellant as someone who was not just of passing acquaintance meant that she did not wish to proceed any further to try the case, to which she said, "Yes sir." She confirmed that her conscience would affect her, one way or the other, in determining any issue of fact in the case. Counsel for the appellant, Mr Carl McDonald, said that he had no questions to ask her. The judge then discharged the juror from participating any further in the trial.

7. Mrs Hartley had given a statement to the police a few days after the murder on 15 September 1998, but her evidence was not adduced at the preliminary examination and she did not give evidence at either trial. She said in her statement that the deceased, whom she had known from about November 1997, came to live in a house about five chains from her house in April 1998. She saw him on 10 September 1998 at about 7 pm at the gate of her house. He asked for a bag with mangoes that he had

left there, took the bag and went to his yard. At about 9.30 pm she was at home with her husband, her four children, two grandchildren and "a friend of the family, Aubin Grey o/c "Skinner". She heard two explosions sounding like gun shots. She said to her husband, "Bigga, what is that?" He replied, "Betty, I don't know". She also heard a voice saying "Jesus". It seemed to come from the deceased's yard. She told her husband to shut the door. The next day her husband and Grey left the house at about 5.30 a.m. and 6.00 am respectively. At about 7.00 am she and three others went to the deceased's yard, where they saw him lying on his back and that his house was open. On seeing that, they turned back and raised the alarm.

8. Steps were taken by the appellant's solicitors to discover why Mrs Hartley's evidence was not adduced at the trial. It was discovered that Mr McDonald had a copy of her statement on his case file. He said that he was not certain when he received it or in what circumstances. He was unable to give a coherent or consistent explanation as to why he did not make use of the statement at the second trial or call Mrs Hartley to give evidence. The statement which she gave to the police is the only indication, even now, of what she might have said if she had been called to give evidence.

The issues

9. There are two issues in this appeal, neither of which was mentioned in the "home made" grounds of appeal that were before the Court of Appeal.

10. The first issue arises from the fact that Mrs Hartley's evidence was not before the jury at the second trial. The appellant submits that her evidence was of such importance that in its absence the trial was unfair. If it is essential to establish who was at fault, he submits that the prosecution was at fault for not having disclosed the statement in sufficient time to enable his lawyers to interview her and seek to call her if they wished. Alternatively, if the statement was served sufficiently early to enable defence counsel to seek to call Mrs Hartley, counsel was negligent in failing to use the statement as a basis for cross-examination of Grey and Mr Hartley and in failing to call her or seek to have her statement read under section 31D of the Evidence Act, as amended.

11. The second issue arises from the discharge of the juror who said that she was unwilling to remain on the jury because she knew the appellant. When the appellant's antecedents were made known to the court after the verdict was returned it was revealed that he had three previous convictions recorded against him: (1) assault occasioning bodily harm; (2) unlawful wounding; and (3) possession of ganja. His sentences were a fine of $500 or ten days', a fine of $400 or four months' and $500 or ten days' hard labour respectively. The appellant submits that the questioning of the

juror should have been done in the absence of the other members of the jury. In any event the trial judge should have made proper inquiry as to whether the juror had mentioned her knowledge of the appellant to the remaining jurors and, if so, to whom she had spoken and what she said.

12. The appellant submits that on either or both of these grounds he has suffered a miscarriage of justice, and that his conviction should be set aside as unsafe.

Mrs Hartley

13. Inquiries as to when Mrs Hartley's statement was disclosed to the defence and as to why, assuming that it was available to the defence at the second trial, no use at all was made of it have not produced a satisfactory answer. But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for not having made use of it, this would not be enough to justify a finding that there has been a miscarriage of justice. The focus must be on the impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or defence counsel were at fault: *Teeluk v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, para 39, per Lord Carswell. The court must have material before it which will enable it to determine whether the conviction is unsafe. So the appellant must be able to show what effect Mrs Hartley's evidence would have had if use had been made of it at the trial. It is not enough to engage in speculation. He must be able to show what she would have said if her statement had been disclosed in time for the case for the defence to be prepared thoroughly. Only then can the court judge what the response of the prosecution witnesses would be likely to have been if proper use had been made of it in cross-examination.

14. The crucial issue of fact is whether Grey was with the deceased when he was shot. The only information as to what Mrs Hartley might have said about this is what she told the police when her statement was taken from her on 15 September 1998. The appellant can point to a number of respects in which her statement does not match the evidence that was given by Grey and Mr Hartley. She says that the deceased went to his yard at about 7 pm on the day when he was murdered, and that Grey was at home with her and her family at about 9.30 pm going on to ten that evening. She then describes hearing two explosions sounding like gun shots, asking her husband what they were and telling him to shut the door. No mention is made of Grey leaving the Hartleys' yard with the deceased shortly before the sound of the explosions. Nor is any mention made of his coming back again almost immediately afterwards or of any conversation that took place on his return. Taking her statement at its face value, Grey was in her house all the time and never left it.

15. Grey gave two descriptions of his return: “Mi run go over de yard an tell Bigga and Betty” and “Mi run go over Bigga and tell Bigga”. Later, after he had said that he slept at the Hartley’s house that night, he was asked whether he spoke with Bigga and his wife and he said that he had done so. Mr Hartley said that he went on to his verandah after hearing the gun shots, that Grey came into his yard, knocked on the door and told him something. He was asked whether Grey also spoke to his wife, to which he replied: “Me he spoke to, he spoke to me”. Mrs Hartley does not mention any such conversation. Taking her statement at its face value, it never took place.

16. There are plainly some important gaps in Mrs Hartley’s statement. She does not mention Grey’s leaving to go to the deceased’s house minutes before the sound of the explosions. Nor does she mention his return and speaking to her husband, and perhaps to her too, almost immediately afterwards. On the other hand she does not say that these things could not have happened. She was, after all, in the house with four children and two grandchildren. Her attention may not have been directed to what Grey was doing. The fact that she does not mention his return and his conversation with her husband is more surprising. But she had told her husband, who said that he went onto the verandah when he heard the shots, to shut the door. The conversation which was spoken to by both Grey and her husband, which her husband insisted was with him only, could have taken place outside on the verandah. These matters were not explored with Mrs Hartley when her statement was taken. They have not been explored with her at any time since then. So there are gaps, but there are no unequivocal contradictions of Grey’s evidence.

17. On the critical question whether Grey was with the deceased when he was shot, Grey’s evidence was supported by Mr Hartley. But there are important indications within Grey’s own evidence that he must have been there. First, he gave evidence that the deceased was shot twice and that he was lying on the ground when he was shot for the second time. Second, he said that the deceased had weed in his hand when he was shot. And third, he said that when he was shot the deceased fell from the verandah and dropped to the ground. Mr Stevens QC for the respondent submitted that these details, all of which were mentioned in a statement that Grey gave to the police four days later and the first and third of which he mentioned when he gave evidence at the first trial, were things that he could not have known if he had not witnessed the shooting.

18. The most significant of these is the first. Dr Taylor said that on examining the body he found two gunshot wounds. One was to the left side of the chest. The other was to the left jaw, with the exit wound at the left parietal zone – that is, towards the top of the skull. The significance of these injuries was not explored in evidence, as the appellant’s counsel did not challenge Grey’s evidence that he was with the deceased when he was shot. But they are consistent with Grey’s account of the sequence of events. Someone hearing two shots from the Hartleys’ house would not have been able to say whether or not they both hit their target. Grey was clear on this

point from the moment when he gave his first statement to the police. A chest wound was to be expected if someone was shot while standing up, but the upwards line of travel of the bullet that entered the left jaw would have been difficult to achieve when he was in that position. It might be thought to be consistent with his being shot for the second time with his head back while lying down. The second and third points matched Detective Sergeant Hart's evidence as to what he found when he went to the scene the next morning.

19. Demonstration that a witness has special knowledge of the things he testifies to having witnessed is always a powerful reason for accepting his evidence as both credible and reliable. It has a special place in Scots law, which still requires that a confession by the accused is not sufficient for a conviction unless it is corroborated. That requirement will be satisfied if, for example, the accused tells the police where he had hidden the stolen goods or the murder weapon and, on being searched for, these things are found in the place that the accused himself identified: *Manuel v HM Advocate* 1958 JC 41, 47-48 per Lord Justice General Clyde. The accuracy of the knowledge revealed by what he told the police shows that it was his own knowledge as the perpetrator: *Wilson v HM Advocate* 1987 JC 50, 53, per Lord Justice General Emslie. The principle applies to a witness too. It is enough that the witness had no reason to be aware of the details to which he speaks other than that he was an eyewitness to the incident. The details that Grey mentioned in his evidence are of that character. Taken together with the evidence of Dr Taylor and Detective Sergeant Hart, they would have provided the jury with ample grounds for rejecting any suggestion that doubt was cast on the veracity of his account that he was present at the shooting by the gaps in Mrs Hartley's statement.

20. Mr Birnbaum QC for the appellant accepted that the relevant test was whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome – that the jury might reasonably have come to a different conclusion as to whether the appellant was guilty of the murder: *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28, para 24 per Lord Hope, para 35 per Lord Brown and para 41 per Lord Kerr. As Lord Bingham of Cornhill said in *R v Pendleton* [2001] UKHL 66, [2001] 1 WLR 72, para 19, the question is what effect the evidence would have had on the minds of the jury. The Board must ask itself whether Mrs Hartley's evidence, if given at the trial, might reasonably have affected the decision of the jury to convict. The gaps in Mrs Hartley's evidence, which taken at their face value might suggest that Grey was not present at the shooting, must be balanced against the weight that the elements of special knowledge give to Grey's evidence that he was there, taken together with the support which his evidence received from Mr Hartley. The Board finds that the balance lies so far in favour of accepting the veracity of Grey's account that there is no reasonable possibility that the jury would have arrived at a different verdict. This ground of appeal must be rejected.

The juror

21. Mr Birnbaum advanced two arguments in support of this ground of appeal. First, the questioning of the juror should have taken place in the absence of the other members of the jury. Second, it was the duty of the trial judge to investigate the circumstances so as to ensure that there was a fair trial. He should have made proper inquiry as to whether the juror had mentioned her knowledge of the appellant to the remaining jurors and, if so, to whom she had spoken and what she said.

22. As to the first point, it is unfortunate that counsel for the prosecution did not draw the judge's attention to the problem before the jury were brought into court. The effect of her decision to raise it after the jury roll call was that the judge had no warning of what she, or the juror in her turn, were going to say. The question how then to deal with the situation was at the judge's discretion. It was for him to take the course which he regarded as best suited to the circumstances: *R v Orgles* [1994] 1 WLR 108, 112 G, per Holland J. In *R v Craig Stuart Thorpe* (Court of Appeal, Criminal Division, 9 October 2000, not reported), para 12, Kay LJ said of a recorder, faced with unusual circumstances which had come upon him with little warning, that it was not surprising that he took a course which he no doubt believed at the time was a fair course and would properly deal with the circumstances in which he found himself. The discussion which then ensued in this case (see para 6, above) was directed to the question whether, because she knew the appellant, the juror ought to be sitting on the jury. But it did not go beyond establishing that she knew the accused and that he was not just someone of passing acquaintance. Nothing was said in the course of it which was prejudicial to the appellant or might have affected the fairness of the trial. In these circumstances the judge cannot, thus far, be faulted for the way he responded to the situation with which he was faced by the prosecutor.

23. The more difficult question is whether the judge should have gone further and conducted an inquiry, in the absence of the jury, as to whether the juror had said anything about the appellant to the other jurors and, if so, whether this was something which they should not have been told. The general rule is not in doubt. It is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial: *R v Orgles*, p 112. Here again, however, much has to be left to the discretion of the trial judge. He was confronted in this case with a situation which, on the information he was given, was external to the jury as a whole. It was the not unfamiliar situation where a juror says that she recognises the accused or a key witness as someone she knows. There was no hint in what he was told by the prosecutor, or by the juror herself, that she told the other jurors that she knew the appellant. The judge was told that this information was given to a barrister who appears not to have been engaged in the trial. It would, of course, have been open to the judge to conduct the kind of inquiry that Mr Birnbaum has suggested. The appellant had three previous convictions: see para 11, above. On the other hand the juror said nothing to indicate that she was aware of them, let alone that she would

have wanted to give that information to the other jurors. It is not obvious that the judge was seriously at fault in not making further inquiry, or that his failure to do so has led to a miscarriage of justice.

24. There was, however, another course that the judge could have taken, and did take, in this case. At the outset of his summing up he gave the usual direction to the jury that it was for them to decide what evidence to accept and what to reject. He then gave this direction:

> "Decide this case on the evidence and only on the evidence. Do not be influenced by anything that you might have been told by anyone, whether by some fellow member of the jury that sat or are sitting with you about some prior knowledge or feeling or view. That is unimportant, and if you act upon that justice will have miscarried because that is not evidence.
>
> I hope that I am making myself absolutely clear that it is the evidence and only the evidence in this case that you have heard that you are entitled to act upon, and determine. Having looked at the evidence, examined it, weighed it, determine what the facts are and ultimately what your verdict is, after applying the law that I will give you to the facts that you find proved."

25. The assumption must be that the jury understood and followed the direction that they were given: see *Montgomery v HM Advocate* [2003] 1 AC 641, 674 per Lord Hope of Craighead. In the Supreme Court of Canada in *R v Corbett* [1988] 1 SCR 670, 692 Dickson CJ said that the experience of trial judges is that juries perform their duty according to law. In the High Court of Australia in *R v Glennon* (1992) 173 CLR 592, 603, Mason J and Toohey J said that the law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. To conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions by the trial judge. In the Irish High Court in *Z v Director of Public Prosecutions* [1994] 2 IR 476, 496 Hamilton J expressed confidence in juries to follow the directions given to them by the trial judge. The direction which the judge gave in this case was clear, understandable and to the point. The Board is satisfied that it was sufficient to deal with any risk that the juror who was excused might have said something that the jury ought not to have been told.

26. It is however worth noting that in November 2012 the President of the Queen's Bench Division (Sir John Thomas) issued a Protocol on Jury Irregularities in the Crown Court in England and Wales which contains valuable advice on the procedures

that ought to be followed where a jury irregularity occurs. That will be the position if anything occurs which may compromise the jury's independence or introduces into the case material or considerations extraneous to the evidence in the case. Among the many detailed points it makes are (a) that any irregularity relating to the jury should be drawn to the attention of the trial judge in the absence of the jury as soon as it is known; and (b) that, if it appears that a juror has improperly obtained information, consideration should be given to the risk that the information has been shared with other members of the jury or will be shared if the jury remain together. In that situation the trial judge should try to establish the basic facts of what has occurred. This initiative was, no doubt, prompted by a concern that jurors may have obtained information available on websites or social media which they ought not to have had and the risk, if that occurs, that they have shared or will share that information with the other jurors.

27. That is not, of course, the situation in this case. The trial took place in 1999, when means for the widespread and immediate dissemination of information were not nearly as developed as they are now. But the advice that the jury should be absent when the judge's attention is drawn to a matter that may affect the integrity of the jury, and that there may be a need for the facts to be inquired into, is relevant to what happened in this case. The prosecutor in this case was at fault in drawing the judge's attention to the problem that had arisen in the presence of the jury and then proceeding to invite him to deal with it while the jury were still present. Problems of that kind should be raised in the absence of the jury, in case anything may be said in the ensuing discussion which may give rise to the risk that there will not be a fair trial.

28. A further step which might usefully be taken, if it is not already the current practice in Jamaica, was described by Lord Justice General Hope in *Pullar v HM Advocate* 1993 JC 126, 134-135:

> "… when [the jurors] arrive in court they should be told the name or names of the accused whose case is to be tried. They should be reminded at that stage that if they know the accused they should make this known to the clerk. But it would be advisable for them also to be told the name of the complainer or of anyone else who is sufficiently important to the case to have been named in the charge or charges in the indictment. This simple step should ensure that, so far as reasonably practicable, the potential jurors are made aware of the names of all those persons knowledge of whom might give rise to the suspicion of prejudice."

He went on to say that there will be an opportunity, when the jury has been empanelled and the jurors are ready to try the case, for the judge to remind them that, if they feel that there is any reason why they should not serve on the jury, they should

inform the court of this fact immediately. This is a matter for the discretion of the trial judge, but if he thinks it desirable to do so it would be appropriate to give the jurors an opportunity by means of a brief adjournment to act on his directions before the evidence is led.

29. These are matters of practice that are, of course, best left to the judiciary in Jamaica to decide upon for themselves. But it is possible that, if those steps had been taken in this case, the juror would have made her position known at the outset and that, if this had been done, there would have been time for another juror to be selected to take her place.

Sentence

30. The Court of Appeal, when dismissing the appeal, ordered that the sentence that the appellant must serve 25 years before becoming eligible for parole was to run from 15 April 1999. That date was eighteen months after the appellant was taken into custody. There are no grounds for criticising that decision at the time when it was made. It was in accordance with the normal practice, as the appellant's counsel conceded that there were no arguable grounds for an appeal. But the Board was of the opinion that there was sufficient substance in the fresh grounds that were shown to it for the appellant to be given permission to appeal, and it is plain from the division of opinion on the Board as to how the appeal should be disposed of that those grounds cannot be said to be frivolous or devoid of merit.

31. In these circumstances the basis on which the Court of Appeal was proceeding when it made the order no longer applies. The proper course is for that order to be set aside and for the appellant to be given credit for the whole of the period he spent in custody awaiting disposal of his appeal: *Hamilton v The Queen* [2012] UKPC 37, paras 67-69. The period of 25 years that he must serve in custody before being eligible for parole will run from 23 September 1998, and not from 15 April 1999 as ordered by the Court of Appeal.

Conclusion

32. For these reasons the Board will humbly advise Her Majesty that the appeal against conviction should be dismissed, but that the appeal against sentence should be allowed to the extent that the period that the appellant must serve in custody before being eligible for parole is to start on 23 September 1998.

LORD KERR : (DISSENTING)

33. In determining whether a challenged conviction should be quashed, an appellate court's function is to decide if the conviction is safe. The possible guilt of the appellant is not only irrelevant, it should not feature in the court's deliberations. This is clear from statements of unquestioned authority to that effect in such cases as *R v Davis* [2001] 1 Cr App R 115, *R v Pendleton* [2002] 1 WLR 72 and *Michel v The Queen* [2009] UKPC 41, [2010] 1 WLR 879. How does a court decide whether a conviction is safe? This appeal exposes a possible tension in different approaches that have previously been taken to that question particularly where the appeal is based on the claim that relevant material had not been put before the jury. For reasons that I will develop, I do not believe that such a tension in fact exists.

34. In *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28, an appeal in a Scottish case involving a devolution issue, the question arose as to the proper test to apply in deciding whether there had been a miscarriage of justice where there had been non-disclosure by the Crown to the defence of relevant material (*ie* material that might assist the defence or weaken the prosecution case). The Supreme Court held that, in that particular situation, the test was whether, after taking all the circumstances of the trial into account, the material which the jury did not have the opportunity to consider created a "real possibility" of an outcome other than a finding of guilt.

35. The test articulated in *McInnes* has been criticised in the latest edition of Archbold: *Archbold, Criminal Pleading Evidence and Practice 2013*. At para 7.53 the editors state:

> "Article 6 of the ECHR guarantees a person a right to a fair trial in the determination of a criminal charge … The first question which arises in the context of criminal appeals is whether a conviction at the end of a trial which fails to match up to the requirements of article 6 can ever be anything other than unsafe. It is submitted that the answer must be in the negative, and that section 3 of the Human Rights Act 1998... obliges the Court of Appeal and the House of Lords to 'read and [give] effect to' the word 'unsafe' so as to include any conviction resulting from such a trial. Strong support for this approach is to be found in *R v A (No. 2)* [2002] 1 AC 45...where Lord Steyn observed (at para 38) that it was well-established that the right to a fair trial was

absolute in the sense that a conviction obtained in breach of it cannot stand. See also *R v Forbes [2001] 1 AC 473, HL: R v Togher [2001] 3 All ER 463, CA* (if a defendant has been denied a fair trial, it would be almost inevitable that the conviction would be regarded as unsafe); *Randall v The Queen* [2002] 1 WLR 2237, PC (right to a fair trial is absolute, and there would come a point when departure from good practice was so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court would be bound to condemn a trial as unfair and quash the conviction as unsafe, however strong the grounds for believing the defendant to have been guilty); and *Bernard v State of Trinidad and Tobago* [2007] 2 Cr App R 22, PC (where a trial had been vitiated by irregularity, the strength of the evidence would only be relevant to the issue of whether the trial had been fair if the irregularity was an incorrect admission of evidence; in cases of procedural irregularity, however, the approach should be to weigh the seriousness of the defects; the trial may still have been fair if they were minor, but if they were sufficiently serious, the trial would have been unfair, however strong the evidence (*Randall v The Queen* ante, considered)). However, the recent decisions of the Supreme Court in *Mclnnes (Paul) v HM Advocate* [2010] HRLR 17, and *Allison (Steven Edward) v HM Advocate* [2010] HRLR 16, tend to undermine this approach. Aspects of the decision in *Mclnnes*, in particular, are likely to lead to confusion. First, it was said that there can be a violation of article 6 without the trial as a whole being unfair (see per Lord Hope of Craighead (at para 19, 20). Lord Rodger of Earlsferry (at para 30), and per Lord Brown of Eaton-under-Heywood (at para 39)). Secondly, it was said that a trial will only be unfair as a whole if there is a real possibility that the verdict would have been different had the error not occurred (per Lord Hope of Craighead (at paras 20, 23, per Lord Rodger of Earlsferry (at para 30, and per Lord Brown (at para 35)).

36. The "requirements" of article 6 must be viewed in two aspects. The overall imperative is that there must be a fair trial. It is possible, however, that where some of the individual elements of the right to a fair trial have not been observed, the trial taken as a whole may nevertheless be considered fair. Thus in *Brown v. Stott* [2003] 1 AC 681, 704 PC, Lord Bingham of Cornhill said that whilst the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of those rights would be acceptable if reasonably directed towards "a clear and proper public objective", provided the qualification was not greater than the situation called for.

37. The statements made in *McInnes* must be read against this general background. In that case it had been held that non-disclosure of the relevant material was "incompatible" with the appellant's article 6 rights. That can be regarded as a failure to observe one of what Lord Bingham described as the "constituent rights" comprised in article 6. But alone this did not render the trial unfair. When Lord Hope of Craighead said in para 20 of *McInnes* that "[a] trial is not to be taken to have been unfair just because of the non-disclosure" one should regard that as an acknowledgment that a constituent right arising under article 6 (*ie* the right to have access to relevant material) had not been respected but that it was nevertheless possible to conclude that, overall, the trial had not been unfair. Thus understood, *McInnes* does no more than apply what Lord Bingham of Cornhill had said in *Brown v Stott*. A constituent right of article 6 had not been observed but the general right to a fair trial had not been violated.

38. Of greater moment in the present appeal is the criticism that the editors of Archbold voice in relation to the formulation of the test of safety of the conviction in terms of "a real possibility that the verdict would have been different". In *R v Graham* [1997] 1 Cr App R 302, 308 Lord Bingham said this:

> "…if the court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted or not, then it must of necessity consider the conviction unsafe" (emphasis added)

39. It is possible to read the test in *McInnes* as setting a higher standard than that propounded in *Graham.* Requiring an appellant to show that there was a real possibility that the jury would reach a different verdict might be supposed to be more onerous than leaving the court in doubt as to whether the appellant was rightly convicted. But the two tests can be reconciled if one regards the recognition of a real possibility as signifying no more than an acceptance that one is left in doubt as to the safety of the conviction. That is how, I believe, the enunciation of the test in *McInnes* should be understood.

40. Moreover, in *McInnes* the Supreme Court did not suggest that it was required of the appellant that he should demonstrate that there was a real possibility that the jury would reach a different verdict. What Lord Hope said in para 20 was that the verdict should be deemed unsafe if "there [was] a real possibility that the jury would have arrived at a different verdict". He did not

suggest that it was incumbent on the appellant to establish that as a proposition. This is not surprising. The examination of whether a verdict is unsafe does not lend itself to the application of a burden of proving that a particular claim has been made out. Of its nature, the examination of whether a verdict is safe must be conducted in the round. It is not assisted by asking whether one side or the other has shown that a particular assertion is correct.

41. A further possible criticism of *McInnes* is that the suggestion that the court should focus on whether there was a real possibility of the jury reaching a different verdict invited emphasis on how the jury might have reacted to the evidence had it been led at the trial, I do not consider that the judgment should be so construed. At para 19 of his speech in *Pendleton*, Lord Bingham said this:

> "[The House of Lords] in *Stafford v Director of Public Prosecutions [1974] AC 878* were right to reject the submission of counsel that the Court of Appeal had asked the wrong question by taking as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury ([1974] AC 878 at 880). It would, as the House pointed out, be anomalous for the court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury. I am not persuaded that the House laid down any incorrect principle in *Stafford*, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty. But the test advocated by counsel in *Stafford* and by Mr Mansfield in this appeal does have a dual virtue to which the speeches I have quoted perhaps gave somewhat inadequate recognition. First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

42. There is no reason to believe that *McInnes* casts doubt on this approach. It can be – and I believe that it should be – considered to be consistent with *Pendleton.*

43. That the primary responsibility for deciding what effect the new material has on the safety of the conviction rests with the appellate court was also clear in the opinion of the Board in *Dial v State of Trinidad and Tobago* [2005] 1 WLR 1660. At paras 31 and 32, Lord Brown of Eaton-under-Heywood, delivering the opinion of the majority of the Board, said:

> "31 In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict': *R v Pendleton* [2002] 1 WLR 72 , 83, para 19. The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford's* case [1974] AC 878, 906, and affirmed by the House in *R v Pendleton*:
>
> 'While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].'
>
> 32 That is the principle correctly and consistently applied nowadays by the criminal division of the Court of Appeal in England-see, for example, *R v Hakala* [2002] EWCA Crim 730, *R v Hanratty, decd* [2002] 3 All ER 534 and *R v Ishtiaq Ahmed* [2002] EWCA Crim 2781. It was neatly expressed by Judge LJ in *R v Hakala*, at para 11, thus:
>
> 'However the safety of the appellant's conviction is examined, the essential question, and ultimately the only question for this court,

> is whether, in the light of the fresh evidence, the convictions are unsafe.'

44. The approach of Lord Bingham in *Pendleton* emphasises the need for an appellate court to recognise the primacy of the jury's role in deciding whether an accused should be found guilty while deprecating speculative assessment by that court of the degree to which new evidence might have affected the minds of the jurors. The essential question is whether the evidence *might reasonably have affected* the outcome. This question is to be answered, I believe, by theoretical rather than deductive analysis. In other words, a detailed forensic examination of how the material might or might not have been treated by the jury is not appropriate. Much less is it appropriate to hypothesise on challenges that might have been made to the evidence or on explanations that might have been given to diminish its apparent inconsistency with evidence that had actually been given at trial. I must therefore, with great respect, differ from the majority on their statement at para 13 that the appellant must be able to show what effect Mrs Hartley's evidence would have had if it had been used at the trial.

45. It is for the appellate court to assess the possible impact of the new evidence. It does not do so by requiring of the appellant that he show what its effect would be. Nor should the court impose on the appellant the burden of showing what the response of the prosecution witnesses would be likely to have been. That would involve the very type of speculation that has been decried in cases such as *Pendleton*. Moreover, it invites an assessment as to whether the evidence that had actually been given at trial was sufficient to establish guilt notwithstanding any possible effect of the new evidence. That approach has been expressly rejected, most notably perhaps in *Bain v The Queen* [2007] UKPC 33 where Lord Bingham at para 115 said this:

> "… the issue of guilt is one for a properly informed and directed jury, not for an appellate court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but whether there is or was evidence on which it might reasonably decline to do so …"

46. In my opinion, the proper test to be applied where new evidence which ought to have been put before the jury has subsequently come to light is whether that evidence might reasonably have led to an acquittal. Brought home to the circumstances of this case, the question is "might the jury have reasonably declined to convict if they had been made aware of the evidence of Mrs Hartley?"

47. In para 14 of the majority's judgment it is said that at face value, Mrs Hartley's statement suggests that Grey was in her house all the time and never left it. I agree. But, I consider that it is the face value of her statement which must be taken into account in assessing its possible impact on the safety of the conviction.

48. The majority has said that there are "gaps" in Mrs Hartley's statement. One of these is identified as her failure to "mention Grey's leaving to go to the deceased's house minutes before the sound of the explosions" (para 16). It is true that Mrs Hartley did not say explicitly that Grey left or that he did not leave her house before the explosions (which we now know was the gunfire which killed the deceased). But is that omission a gap? If Mrs Hartley intended to convey to Detective Sergeant Hart (the officer who took her statement) that Grey was in her house at the time that she heard the explosions, the fact that she did not say that he had not left is not a gap. One would not expect her to say that he did not leave. There was no need for her to do so if the sense of her statement was that he was still in the house. And, indeed, it seems to me that this plainly was the sense of her statement for the relevant section reads:

> "At about 9.30pm going to ten, I was at my home along with my husband, Lascelles Hartley o/c 'Bigga', my four children and two grand children and a friend of the family, Aubin Grey o/c "Skinner". I heard two explosions sounding like gun shots."

49. Another gap identified by the majority is the failure of Mrs Hartley to "mention" Grey's return and his speaking to her husband and perhaps also to her. But again, with respect, this can only be regarded as a gap if one supposes that these events occurred. If they did not, there is no question of Mrs Hartley's failure to refer to them amounting to a gap. And if they had occurred, one must ask, is it conceivable that Mrs Hartley would have failed to mention them to the police?

50. I acknowledge, of course, that my examination of whether Mrs Hartley's statement can be said to contain gaps and whether it is imaginable that she would have failed to tell police if Grey had returned to her house with an account of witnessing the killing involves the very type of speculation about her evidence that I have earlier said is impermissible in the exercise in which an appellate court should engage. I refer to these aspects for the sole reason of demonstrating that speculation on supposed gaps in her evidence or explanations for failure to mention certain things can lead to diametrically opposite conclusions depending on the path of conjecture that one chooses. As I have said, I believe that it is the face value content of Mrs Hartley's evidence

to which regard must be had in deciding whether the jury might reasonably have declined to convict if it had been made aware of her statement.

51. The plain and unalterable fact is that, taken at face value, her statement suggested that Grey could not have been present at the scene of the killing when it took place. If the jury had been aware of that, it seems to me inescapable that they might reasonably have declined to convict. After all, the critical evidence of Grey and Mr Hartley was that Grey *was present at the scene of the killing*. If there was evidence from a credible witness that he was not, it was at least distinctly possible that a jury would not convict and that it would have been entirely reasonable in refusing to do so.

52. In both statements that he made to the police Grey claimed that he had told Mr and Mrs Hartley that he had witnessed the shooting. If indeed he had said this, the fact that Mrs Hartley did not refer to it in her account to the police would be a glaring, not to say astonishing, omission. It is possible to come up with possible reasons for that lapse, if lapse it be, but that is not the function of an appellate court. On its face Mrs Hartley's failure to say anything about having been told by Grey that he was present at the scene of the shooting raises substantial doubt about the veracity of his claim that he had witnessed the killing of Williams. It is, I believe, inevitable that such a doubt creates considerable misgivings about the safety of the appellant's conviction.

53. If proper use had been made of Mrs Hartley's statement the course of the trial would have been markedly different. Instead of suggesting to Grey that he had been mistaken as to his identification of the appellant, a direct challenge could have been made to the credibility of his claim that he was present at the scene of the shooting. That would have been a far more fruitful line of defence. The possibility that the jury would be unconvinced of the truth of his account is, in my view, unquestionable.

54. The majority has placed considerable weight on what has been described as the special knowledge that Grey had about the circumstances of the killing. It is, of course, to be remembered that he was not challenged about that evidence. The question of how he might have acquired the information about the circumstances in which Williams was shot other than by being present was not explored. Grey's statement was not taken until five days after the murder took place. It is likely that the circumstances of the killing would have been widely discussed in the neighbourhood in its immediate aftermath. What at first sight might have appeared to be important special knowledge could well have been common currency by the time that Grey came to make his statement. I do not believe therefore that this aspect of the case can sustain the claim that

the conviction was safe. I would therefore allow the appeal and quash the appellant's conviction.

55. Inquiries as to why Mrs Hartley's statement was not used by the defence during trial proved inconclusive. There can be little doubt, however, that it could have been deployed to potentially considerable effect. It provided a clear basis on which to challenge not only Grey's evidence but that of Mr Hartley. Such information as is available seems to point to error on the part of counsel for his failure to use the statement but one does not need to reach a judgment on that since what is at stake here is the safety of the conviction. That question must be approached by considering the possible impact that effective use of Mrs Hartley's statement would have had on the course of the trial, without regard to the reasons that this did not happen. In the hands of competent counsel, experienced in criminal law, Mrs Hartley's statement was replete with opportunities to undermine the central plank of the prosecution case. It could have been used to cross examine both of the principal prosecution witnesses. Indeed, it presented the most direct contradiction of their claims. That was, as I have said, a far more fruitful line of defence than that which was in fact proffered.

56. Mrs Hartley's statement was not automatically admissible in the trial but that should not be allowed to detract from its critical importance. Quite apart from its legitimate use in cross examination, Mrs Hartley was a compellable witness and if she had departed in evidence from its contents she could have been treated as a hostile witness and her statement could have been put to her.

57. It is true that the solicitors currently appearing for the appellant did not investigate whether Mrs Hartley was still available and willing to give evidence along the lines of her statement but that is entirely irrelevant to the essential question of whether proper use of that statement might reasonably have led to an acquittal. For the reasons that I have given, I consider it to be incontestable that proper, effective use of that statement would have cast a significant cloud over the veracity of the vital core of the prosecution case. On that basis, the conclusion that the verdict is unsafe is, to me, inexorable.

58. I have reached that conclusion independently of any consideration of the claim that the jury should have been discharged because of the way in which the request by a juror to be excused service was handled. On the hearing of this appeal, the respondent accepted that the prosecutor ought to have alerted the judge to the juror's concerns in the absence of the other members of the jury. Moreover, it was not disputed that she ought to have been asked whether she had shared any potentially prejudicial information with the other jurors and why she felt she was unable to continue at such a late stage in the trial.

59. The judge cannot be criticised for the faults of the prosecutor but it was open to him to ask the other members of the jury to leave while he conducted a more detailed examination of the juror. Although she did not suggest that she had disclosed prejudicial material to other jurors, she was not asked anything about this. It is therefore impossible to conclude that there was no risk of injustice. This is particularly so because the juror might well have been aware that the appellant had previously been acquitted of murder.

60. The judge's direction to the jury that they should decide the case on the evidence and nothing else is a standard charge. It is doubtful that it was alone sufficient to undo all potential unfairness arising from the circumstances in which the juror was discharged. As against this, however, the fact that the juror raised the issue herself indicates she was conscious of the risk of prejudice. On balance, therefore, I consider that this issue alone would not be sufficient to declare the verdict unsafe.