[2014] UKPC 2
Privy Council Appeal No 0029 of 2012

JUDGMENT

Jason Lawrence *v* The Queen

From the Court of Appeal of Jamaica

before

Lord Kerr
Lord Wilson
Lord Hughes
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

11 February 2014

Heard on 28 November 2013

Appellant	*Respondent*
Nigel Lickley QC Michael Paulin (Instructed by Dorsey & Whitney (Europe) LLP)	Peter Knox QC (Instructed by Charles Russell LLP)

LORD HODGE:

1. On 27 October 2005 in the St. Elizabeth Circuit Court in Black River, Jamaica, the appellant was convicted of the murder of Mr Ervin Madourie. The judge (the Hon. Mr Justice R. Jones) sentenced him to life imprisonment and ordered that he would not be eligible for parole until he had served twenty years at hard labour. The Court of Appeal of Jamaica dismissed his appeal against conviction and affirmed his sentence on 21 November 2008. The appellant later applied to the Privy Council for permission to appeal, which was granted on 7 November 2012.

2. The evidence at the appellant's trial included the following. On Christmas Eve and in the early hours of Christmas Day 2004 the appellant attended a party at Tern's Café, Black River. Near the entrance to the café there was a table at which people were playing the dice game, "crown and anchor". There was an altercation close to that table between Mr Wayne Salmon and Mr Madourie. In the course of that argument, Mr Madourie threatened Mr Wayne Salmon and slapped him on the shoulder with a machete. Mr Salmon ran away and a crowd of people started to throw bottles. Mr Madourie was stabbed in the chest and the weapon, which was probably a knife, penetrated into the right atrium of his heart. He died within minutes of being wounded.

3. Mr Wayne Salmon and the appellant were charged with his murder. Mr Salmon was acquitted at trial after an unopposed submission that he had no case to answer.

4. The Crown's case against the appellant rested on (i) the evidence of three eye-witnesses, Mr Leroy Williams, Ms Jacqueline Linton and Mr Nathan Smith, and (ii) the evidence of Elwardo Salmon, the fifteen-year-old younger brother of Mr Salmon, of a brief oral confession the appellant was said to have been made when travelling home after the incident. The appellant's principal grounds of appeal are (i) that the judge wrongly allowed Ms Linton and Mr Smith to make dock identifications or, in any event, failed to give proper directions in relation to those identifications and (ii) that the judge failed to give an appropriate "axe to grind" direction to the jury about Elwardo Salmon's evidence of the alleged confession. The Board deals with each in turn.

The dock identifications

5. The defence did not challenge Mr Leroy Williams's identification of the appellant. He had known the appellant and Mr Wayne Salmon for about five years and spent several hours in their presence in Tern's Café on Christmas Eve 2004. His identification of the appellant in the dock was a formality. He described the appellant

as wearing "white pants and a red shirt". He saw the altercation between Mr Salmon and Mr Madourie. He later saw the appellant "punch at" Mr Madourie, who was holding a machete, and observed Mr Madourie approach with blood on his chest immediately thereafter. Mr Madourie collapsed in the passageway outside the café and never got up. He did not see the appellant holding a weapon.

6. The identifications by Ms Linton and Mr Smith were of a different nature. They were dock identifications properly so called as they identified the person in the dock for the first time (viz. *France and Vassell v The Queen* [2012] UKPC 28, Lord Kerr of Tonaghmore at paras 33-36). Ms Linton had not recognised the appellant at two identification parades. She had identified Mr Salmon at an identification parade as the man who had had a confrontation with Mr Madourie. When giving evidence at the trial, she made a dock identification of Mr Salmon as the "black guy" whom she had seen at the "crown and anchor" game. She added, in what was a dock identification, that she also made out "the brown one" (that is the appellant, who was sitting in the dock with Mr Salmon) as a person who had stood around the crown and anchor table. He had been wearing a red and white hat and a red and white shirt. She said that Mr Salmon had flashed a knife at Mr Madourie, who had slapped him on the shoulder with a machete. Mr Salmon ran away. She said that she saw the "brown one" stab Mr Madourie with a knife. She went to assist the injured man and called out for help. On cross-examination by Mr Salmon's counsel, Ms Linton explained that she had not been able to identify the person who stabbed Mr Madourie at the identification parades because on the fatal night he had had his red and white hat over his head and she did not see his face. On cross-examination by the appellant's counsel she confirmed that she had not been able to identify the appellant at the identification parades.

7. Mr Nathan Smith gave evidence that he had been in charge of the game of "crown and anchor". He did not see the confrontation between Mr Madourie and Mr Salmon or who had killed Mr Madourie. But he spoke of a confrontation building up when Mr Salmon placed a knife on the table. Mr Smith took the knife. "The brown one", whom he identified as the appellant in the dock, came up behind him with a long knife. When a third man approached with an ice pick, he gave the knife back to Mr Salmon as he feared "a war". Mr Smith refused a demand to hand over $500 and a fight broke out, with people throwing bottles, rocks and stones. He gave evidence to the prosecutor that at an identification parade he had been able to identify only "the black one" (Mr Salmon). He confirmed on cross-examination by the appellant's counsel that he had not identified the appellant at the identification parade.

8. In his summation, the judge informed the jury that an important issue in the cases was the credibility of "the witnesses who …say they saw the accused man stab the deceased". He focused on the evidence of Mr Williams and Ms Linton and did not address the testimony of Mr Smith who gave no evidence of the stabbing. He said that Ms Linton had not been able to identify the appellant at an identification parade but had been able to identify him on the night by the colour of his shirt. He gave a standard

direction on the need for care in judging the circumstances and quality of an eye-witness identification, in accordance with the guidelines in *R v Turnbull* [1977] QB 224, 228-229. But he gave no warning of the dangers of dock identification.

9. In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen* [2003] UKPC 40; *Holland v H M Advocate* [2005] UKPC D1, 2005 SC (PC) 1; *Pipersburgh and Another v The Queen* [2008] UKPC 11; *Tido v The Queen* [2012] 1 WLR 115; and *Neilly v The Queen* [2012] UKPC 12. Where there has been no identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care. In *Tido v the Queen* Lord Kerr, in delivering the judgment of the Board, stated (at para 21):

> "…Where it is decided that the evidence [i.e. the dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged."

10. In *Holland v H M Advocate*, witnesses had failed to identify an accused at an identification parade but made dock identifications. In that respect, it is the closest of the five cases, to which we have referred, to the circumstances of this appeal. In the others there had been no identification parade. In *Holland* Lord Rodger of Earlsferry spoke (at para 58) of "the peculiar dangers of a dock identification where a witness previously failed to identify at an identification parade." He had set out those dangers earlier in his judgment (at para 47), when he spoke of:

> "the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the

> accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

Those criticisms were, he stated, at their most compelling when a witness who had failed to pick out the accused at an identification parade was invited to try to identify him in court (para 48).

11. In this case the identity of Mr Madourie's killer was the central issue in the trial. Ms Linton's and Mr Smith's dock identifications took place without objection from the appellant's counsel. But Crown counsel should have been at pains to avoid them occurring; he should not have invited them. We do not know what use, if any, defence counsel made of their failure to identify the appellant at the identification parades; but that is not important where the principal challenge in relation to identification is the content of the judge's directions. It is well established that judicial directions which meet the *Turnbull* guidelines on the dangers inherent in all identification evidence do not address the separate issue of the dangers of dock identification. Such directions are insufficient for this purpose. In his summation the judge did not refer to Mr Smith's evidence, which placed the appellant close to the crown and anchor table at the time of the incident. He briefly mentioned Ms Linton's failure to identify the appellant at the identification parades. But he did not refer to the advantages of an identification parade or warn of the heightened risk of a false identification when a witness, who had been unable to identify at an identification parade, made a dock identification. By failing to do so, he misdirected the jury.

The evidence of a confession

12. Mr Wayne Salmon's younger brother, Elwardo, gave evidence that, when travelling home in a taxi at about 4 am on Christmas morning, the appellant had whispered in his ear that he was to tell his mother that he, the appellant, had stabbed the boy who had slapped his brother with a machete. The appellant's counsel challenged this account on cross-examination. Elwardo Salmon had given a statement to that effect to the police at his home on the morning after the incident at a time when he knew that the police had asked his mother to bring his brother to them. He had seen his brother when he got home but there was no evidence that he had spoken to him about the incident.

13. In his summation the judge described Elwardo Salmon's evidence as "a crucial bit of evidence" because it supported the identification evidence of the eye-witnesses. Drawing on the evidence which the prosecutor had obtained from Elwardo, he stated

that the boy had not and could not have intimidated the appellant to make the statement and that there had been no inducement to the appellant to confess. He also stated that the appellant had not denied the making of the confession in his unsworn statement to the court.

14. Mr Lickley criticised this summation on two related grounds. First, he submitted that the judge had failed to give the jury a warning about the danger of relying on Elwardo Salmon's evidence which served the interests of his brother, the co-accused. Secondly, he submitted that the judge had misdirected the jury by asserting that the appellant had not denied making the confession to Elwardo. He pointed out that in his unsworn statement the appellant had stated that he had run away from Tern's Café with the crowd when people started throwing bottles and "then I spoke to nobody that night".

15. In the Board's view there is substance in those criticisms. The Board affirms that a judge has a discretion in the circumstances of the particular case whether to give a warning that a witness's evidence might be tainted by an improper motive (*Benedetto v The Queen* [2003] 1 WLR 1545 PC, Lord Hope of Craighead at para 31). But, as Lord Ackner stated in *R v Spencer* [1987] 1 AC 128, 142, "the overriding rule is that he must put the defence fairly and adequately".

16. The courts have recognised the need for a judge to warn a jury about the possibility of an improper motive in cases where the witness is of bad character. The paradigm is the accomplice. The courts have also required a judge to give a warning in other circumstances, including (i) where patients detained in a secure hospital after committing criminal offences complained of ill treatment (*R v Spencer* (above)), (ii) where a prisoner gives evidence of a confession made in a cell (*Benedetto* (above); *Pringle v The Queen* [2003] UKPC 9), and (iii) where a person awaiting sentence for an unrelated offence had his sentencing hearing postponed to enable him to give evidence against an accused and use his cooperation with the authorities as a mitigating factor (*Chan Wai-Keung v R* [1995] 2 Crim App R 194 PC). But the need for such a direction arises from a demonstrated risk of the witness's having an improper motive for his evidence. That risk is not confined to persons shown to be of bad character.

17. There must be evidence which supports the possibility that a witness's evidence is tainted by an improper motive. In *Pringle v The Queen* (above) Lord Hope stated (at para 31):

> "The indications that the evidence may be tainted by an improper motive must be found in the evidence. But that is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the

> jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence"

18. What, if anything, the judge needs to say will depend on the circumstances of the particular case. In *R v Spencer* (above) Lord Ackner (at 141D-E) rejected the use of formulaic warnings and stressed that the good sense of the matter be expounded with clarity and in the setting of the particular case.

19. In this case, in order to put the defence fairly and adequately, the judge needed to refer to the appellant's denial that he spoke to anyone after the incident. In the Board's view, because the evidence of the confession was, as the judge recognised, an important part of the prosecution case, he should also have directed the jury, when assessing Elwardo's evidence, to consider whether they were prepared to rely on that evidence which incriminated the appellant. He should have reminded the jury that when Elwardo gave his evidence in court his brother had been a co-accused. He should have explained that Elwardo might have had an interest in giving the police his account of the confession, because he had been aware that the police wished to speak to his brother when he spoke to them at his home on the morning after the incident. The judge should have invited the jury to consider the possibility that Elwardo's evidence might be tainted by a wish to protect his brother.

20. The judge could also have pointed out with fairness that Elwardo's evidence of the confession was consistent with the evidence of Leroy Williams. If he had done so, it is likely that this would have diminished the effect of his warning on the jury. But the Board is not persuaded by the Crown's submission that this would have cancelled out the benefit of a warning. In our view the judge's failure to refer to the defence's challenge to Elwardo's evidence of the confession, his mistaken statement that the appellant had not denied the confession, and his failure to invite the jury to consider the possibility of an improper motive for Elwardo's evidence meant that he did not put the defence case fairly and adequately to the jury.

21. The Board is satisfied that the misdirections on dock identification and on the alleged confession are sufficient to render the appellant's conviction a miscarriage of justice. It is not necessary therefore to deal at length with the other challenges which Mr Lickley made on the appellant's behalf, as they do not raise issues of principle.

The other challenges

22. Mr Lickley made five other challenges. First, he submitted that the trial counsel had failed to raise, and the judge had failed to direct the jury on, the appellant's previous good character. Secondly, he argued that the judge had failed to order a retrial once the

co-accused, Mr Wayne Salmon, had been acquitted when the police had given evidence of a statement by him which incriminated the appellant. Thirdly, he submitted that the judge had failed to deal adequately with allegations that members of the appellant's family had been seen communicating with members of the jury. Fourthly, he advanced a new argument that the judge had prejudiced the appellant, who denied stabbing the deceased, by addressing the jury on the defences of provocation and self-defence. Fifthly, he submitted that trial counsel had failed to put the appellant's case properly in relation to the dock identifications and Elwardo Salmon's evidence of the confession and in relation to the first three of the other challenges (above). The Board addresses each in turn.

23. The appellant's counsel did not apply for a good character direction and did not set up in evidence the basis for such a direction. The absence of previous convictions was disclosed only after conviction in the antecedent report given by the police. Detective Sergeant Campbell read out the report, which also said that the appellant was "easily led and associate[d] with people of questionable character and because of his inability to read he [was] unable to resolve his problems without resorting to violence". As the appellant's counsel died before the appellant made the allegations against him, he did not have an opportunity to answer the criticisms. Without his account of the events, the Board would be speculating if it were to take a view on whether he should have sought a good character direction. There may, as Mr Knox QC submitted, have been good reasons in this case why counsel decided not to do so. The appellant did not give evidence on oath. A direction on the relevance of good character to his credibility would therefore have been of less significance than if he had *(France and another v The Queen* [2012] UKPC 28, Lord Kerr at para 48*)*. This is because, as counsel would have known, the trial judge would have reminded the jury that the appellant had not submitted to cross-examination. Further, adducing evidence to support a direction on the relevance of good character to propensity might have been counterproductive if the detective sergeant's comments quoted above had come out in evidence.

24. The Board has stated on several occasions that ordinarily it will not entertain allegations of incompetence against counsel which are raised for the first time before it (*Campbell v The Queen* [2011] 2 AC 79, Lord Mance at para 39 and the cases which he cites). This is not a case in which the Board should depart from that approach. We reach this view for two reasons. First, there appear to be circumstances in which counsel could reasonably have decided not to seek such a direction. Secondly, counsel's death has prevented him from answering the allegations.

25. The judge is not as a general rule obliged to give a good character direction if counsel does not raise the matter (*Thompson v The Queen* [1998] AC 811, 844; *Teeluck v the State of Trinidad and Tobago* [2005] 1 WLR 2421, at para 33(v)). Nor is this a case in which the appellant was so obviously of good character that, in the absence of evidence directly bearing on the issue, the judge would have been well advised to raise

the issue with defence counsel (*Brown v State of Trinidad and Tobago* [2012] 1 WLR 1577, Lord Kerr at para 31).

26. Turning to the second challenge, the Board is satisfied that the judge was correct in not ordering a new trial after the acquittal of Mr Wayne Salmon. Defence counsel did not ask for a new trial and may have had good reasons for deciding not to do so. The matter arose in this way. During the trial Detective Sergeant Williams gave evidence that Mr Wayne Salmon, when he was arrested, stated that the appellant had confessed to the crime. He said:

> "A 'Colour' come a mi yard and talk seh him kill man, him stab man."

Mr Salmon's counsel challenged that account. This hearsay evidence was admissible only against Mr Wayne Salmon. The judge gave a clear and sound direction to the jury that this was not evidence against the appellant and that they were to disregard it. The Board sees no basis for criticising either counsel or the judge on this matter.

27. The third challenge concerns an allegation by the deceased's mother that four members of the jury had been communicating with relatives of the appellant and that the foreman of the jury had also spoken to members of the appellant's family before the jury was empanelled. Junior counsel for the prosecution raised the issue in court in the presence of the jury on the morning of the third day of the trial, before the judge commenced his summing up. The judge did not send the jury out of the courtroom but had the mother of the deceased identify the members of the jury of whom she spoke. The judge asked those jurors about the allegation and each denied it. He then decided to proceed with his summing up. In the Board's view the judge's method of investigation was inappropriate. He should have asked the jury to withdraw before ascertaining from the prosecution and the deceased's mother the precise nature of her allegations. He would then have put himself in a position to decide whether to question the jurors individually or collectively before deciding on the best course of action (*Blackwell and Others* [1995] 2 Cr App R 625 (CA), 633F – 634B). He did not do so. But the Board is not persuaded that the judge's handling of the allegations caused any prejudice to the appellant. The allegations which the mother of the deceased made were far from clear; they were denied by the jurors; and there is no reason to think that the making and the court's handling of the allegations had an improper influence on the jury in the performance of their duty.

28. It is not necessary to examine the allegations of failure which are directed against the deceased trial counsel. As we said in para 24 above, this is not a case in which the Board should entertain such allegations which are made for the first time before it. The Board has upheld the challenges to the judge's handling of the dock identifications and the alleged confession, making it unnecessary to consider separately any failure by

counsel in relation to those matters. The Board rejects the criticisms of the judge's decisions in the other challenges.

29. Finally, the Board is not persuaded that the judge erred in giving the directions on provocation and self-defence. While the appellant's defence was that he did not stab the deceased, the judge in directing the jury had to address the possibility that the jury did not accept that defence. As there was evidence that the deceased had slapped Mr Wayne Salmon with a machete shortly before the fatal attack and was carrying the machete when he was stabbed, there was clearly material which made it necessary for the judge to direct the jury to consider the issue of self-defence. The case for a direction on provocation was less clear on the evidence, but the direction was appropriate and was within the judge's discretion. In any event, it caused the appellant no prejudice.

The application of the proviso

30. The Board considers that it is not appropriate to classify as minor the errors in relation to dock identification and the presentation of the defence case in relation to the alleged confession. The Board is not satisfied that the jury would inevitably have returned a verdict of guilty if those errors had not been made.

Appeal against sentence

31. Mr Knox did not dispute the merits of the appeal against sentence. If the Board had decided that there was no merit in the appeal against conviction, it would have advised Her Majesty to allow the appeal against sentence so that it ran from 27 October 2005, the date of the appellant's conviction.

Conclusion

32. For the reasons set out above, the conviction was unsafe. The Board will humbly advise Her Majesty that the appeal should be allowed and the conviction quashed. The Board will also advise Her Majesty that the case be remitted to the Supreme Court of Judicature for Jamaica for a retrial, and that the appellant should remain in custody in the meantime but can apply to that court for bail.

33. In any retrial of the appellant the prosecution should not invite either Ms Linton or Mr Smith to make a dock identification as their evidence identifying the appellant goes no further than resemblance by colour of skin or clothing. Crown counsel should take care to avoid such dock identification occurring and should confine those witnesses' evidence to what they can properly say.