Michaelmas Term
[2016] UKPC 29
Privy Council Appeal No 0040 of 2015

JUDGMENT

Shavargo McPhee (Appellant) *v* The Queen (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

24 October 2016

Heard on 27 July 2016

Appellant	*Respondent*
Edward Fitzgerald QC Amanda Clift-Matthews Gina Morley (admitted to the Bahamas Bar) (Instructed by Simons Muirhead & Burton LLP)	Navjot Atwal (Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1. The appellant was convicted of murder in the course of armed robbery. The case against him consisted principally of the evidence of an accomplice together with an apparent written confession to the police. His appeal to the Court of Appeal, and now to the Board, centres upon whether the confession ought to have been excluded.

2. The robbery was carried out at a food store on Abaco by two men, each armed with a handgun, in the late afternoon of Thursday 27 November 2008. They demanded the contents of the till from the cashier. He did not co-operate and was chased from the shop into a rear storeroom where he was shot. The two gunmen escaped with the contents of the till, estimated by the storeowner at about $1300. Later, with the help of the accomplice, Edgecombe, the police recovered two handguns, one 9mm and the other a .38. Four spent ammunition casings were found in the vicinity of the body in the storeroom. They were matched to the recovered guns; three came from the .38 and one from the 9mm. The deceased cashier had two gunshot wounds, apparently both sustained at close quarters. One was a graze across the right chest. The other, which was the cause of death, entered the left lower abdomen and traversed the body, exiting in the area of the right shoulder blade.

3. The Crown prosecution case was that the two gunmen were the appellant and a friend Rahming. They both lived in Nassau and had apparently travelled to Abaco the day before the robbery. They were arrested together at the airport when about to leave for Nassau on the morning after the robbery (Friday 28 November). The two of them were tried, initially, together with others said to have been implicated in the offence, one of whom was the accomplice witness Edgecombe ("CJ"). Edgecombe asserted that he had driven the two of them to and from the robbery, and had disposed of the guns and some clothing after it. He became a prosecution witness during the course of the trial and the Attorney General offered a nolle prosequi in his case. Two other defendants, Russell ("Timer") and Mills, were not alleged to have been at the scene but were indicted on the basis of alleged complicity in the planning of the offence and/or of helping to transport and accommodate the two gunmen beforehand. The Crown abandoned the case against Mills during the trial. Russell was acquitted by the jury. Rahming absconded shortly before the end of the trial and was convicted in his absence.

4. Apart from the evidence of Edgecombe, the case against the appellant consisted of oral admissions and a written statement under caution said to have been made to the investigating police officers on the afternoon of the second day of their detention (Saturday 29 November). At the trial a challenge to the admissibility of these confessions was intimated (and the same applied to the case of Rahming). A voir dire ensued. The case mounted for both men was that they had been tortured on both the first

and second days of detention. This appellant contended through counsel and in an unsworn statement from the dock that after being made on the first day to sit on the floor handcuffed and threatened with violence, he had, on the second, been repeatedly "tazered" whilst his face was encased in a towel and his head covered by a plastic bag, and beaten with a piece of 4" x 2" timber, with a towel wrapped around it. Rahming was also similarly beaten in front of him, he said. It was, he said, as a result of this treatment that he had made the admissions.

5. Neither the appellant nor Rahming elected to support this account by sworn evidence in the voir dire, although both made unsworn statements from the dock. The principal police officers concerned gave evidence before the judge and were energetically cross-examined. The judge rejected the account of torture on the facts, as the jury must have done when it was renewed before it. That this case was rejected is unsurprising, if only because the appellant's oral and written admissions were made in front of a local pastor, Bishop Henfield, who treated him kindly and against whom no complaint was made, but to whom no suggestion whatever was made by the appellant of the grave mistreatment later alleged, even though if it had occurred it would have happened just before his arrival. Further, the appellant's first account, to the effect that the record of oral questions and answers and the written statement under caution were presented to him ready-written, was directly contradicted by the Bishop. The Board has not been asked by the appellant to go behind the findings of the judge in relation to the allegations of torture, and it would be very unusual for it to be prepared to do so in the absence of some compelling evidence not put before the court of trial, together with a convincing explanation for it not having then been adduced. The case of the appellant depends on other circumstances surrounding his detention and questioning which, although in part adverted to before the judge, were obscured by the florid allegations of torture.

The case for the appellant now

6. The case for the appellant as presented to the Board by Mr Fitzgerald QC relied upon the following aspects of the appellant's detention:

(i) he was, and was known to be, a minor, being aged 17 years and six months at the time of his arrest;

(ii) although the police asked for and obtained from him two telephone numbers where his mother might be contacted in Nassau, no contact with her was in fact made and he confessed without the support of any relative or friend and without any such person being made aware of his whereabouts and that he was detained on suspicion of murder;

(iii) nor was he at any stage represented by a lawyer;

(iv) nor was there any appropriate adult present; there was no adult to concern himself with the interests of the appellant until the Bishop was brought in immediately before the confession was made, and even then the Bishop was not properly apprised of the role which an appropriate adult has when a juvenile is in detention;

(v) he was in detention for some 31 hours before the confession was made; moreover it defied belief that there had not been extensive questioning in this period;

(vi) he had been without food and drink since 1950 the evening before, thus for some 20 hours prior to the confessions beginning at about 1600.

In those circumstances, Mr Fitzgerald submits that the only proper conclusion is that the Crown had not proved to the criminal standard that the confession was voluntary, in the sense that it was obtained without oppression or as a result of anything said or done which rendered it unreliable (section 20(2) Evidence Act). In the alternative, he submits that the only proper conclusion which a court could reach is that the admission in evidence of the confession had to be excluded as unfair pursuant to section 178 of the same Act.

The law

7. The central rule in the Bahamas, as elsewhere in the common law world, is that the confession of an accused person is admissible evidence against him providing that it was made voluntarily. A confession is not voluntary if it was obtained by oppression, nor if it was obtained as a result of anything said or done which renders it unreliable. If either possibility is raised, it is for the Crown to show that the confession was not obtained in circumstances in which either applied. These central propositions are not in doubt and are expressly laid down in section 20(2) of the Evidence Act.

8. Section 20(2) and voluntariness apart, the judge in a criminal trial has, by section 178 of the same Act, the power to exclude evidence on which the prosecution proposes to rely to be given if it appears to him that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. It is well established, and was not in dispute before the Board, that breaches by police interrogators of Codes of Practice and similar standards of behaviour are relevant to whether this power should or should not be exercised in

relation to evidence resulting from interviews with suspects. As it was put in the Board's judgment in *Peart v The Queen* [2006] UKPC 5; [2006] 1 WLR 970, 668 WIR 372, para 24, the criterion for admission of a statement [of confession] is fairness. A breach of proper practice does not necessarily result in unfairness such as to justify exclusion; it must be judged in the context of all the circumstances, foremost amongst which are its gravity and its consequences. A deliberate or reckless breach is plainly more serious than an accidental one.

9. Any arrested person is entitled under section 19(2) of the Constitution of the Bahamas to instruct without delay a legal representative of his own choice and to hold private communication with him. If an arrested person is under 18, he is additionally entitled under the same section to be afforded a reasonable opportunity for communication with his parent or guardian. These two constitutional rights are reflected in express provisions in the Police Force Standing Orders at para 17 of section C4. Those Orders go further because para 20 requires the police, when a minor such as the appellant is in custody, to contact an appropriate adult as soon as practicable and to ask him or her to come to the police station. An appropriate adult is, by para 22, a parent or guardian, a social worker, or, failing such a person, some other responsible adult who is neither a police officer nor a police employee. The same requirement is now made by statute in section 112(1) of the Child Protection Act 2007, but that section was not in force at the time of the appellant's arrest; in his case the relevant rule was para 17 of the Force Standing Orders.

10. The conduct of interviews with suspects is governed both by Police Force Standing Orders and by the (English) Judges' Rules (1964 ed). The latter did not mandate the keeping of records of interviews except those with persons who have been charged, which the appellant had not, and those of children, which in that context then meant persons under 14, rather than all minors (section 107 Children and Young Persons Act 1933). But the Force Standing Orders provided by paras 60-61 of section C4 that a record of all interviews must be kept. Where possible that record is to be a contemporaneous one; otherwise an accurate and adequate summary must be made promptly in the officer's notebook. This requirement for a scrupulous record of all interviews with a suspect is a critical part of modern policing. Experience the world over has shown the damage that can be done to the criminal process by informal interrogations or assertions of informal admissions and/or by allegations that such conversations have taken place. The rule requiring a record is both a very necessary protection of suspects and also designed for the protection of police officers against unfounded allegations, all too easily made by those who have little to lose and, in the absence of a record, extremely difficult to refute. In sum, the rule is a vital feature of a system which aims to convict the guilty and acquit those whose guilt is not proved. It is central to the fairness of the process.

11. In the case of minors such as the appellant, para 70 of the Force Standing Orders further requires that interviews are to take place in the presence of an appropriate adult,

as defined above. These Force Orders reflect similar provisions in other countries, such as, in England and Wales, the Codes of Conduct made under the Police and Criminal Evidence Act 1984. The expression "appropriate adult" in the Standing Orders is plainly borrowed from those provisions. In *Rolle v The Attorney General* [2012] 2 BHS J No 42, paras 23, 26 the Court of Appeal for the Bahamas accordingly applied the approach of the English Code to the role of an appropriate adult. It approved the statement in that Code (at Note C13C (now paragraph 11.17 (May 2014 rev)) that:

> "The appropriate adult should be informed that he is not expected to act simply as an observer. The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed."

That case came after the present, but the Code paragraph has been in existence in England and Wales since 1985 and attention has been drawn to it in many cases since, beginning with *DPP v Blake* [1989] 1 WLR 432, 437. Where the law of the Bahamas stipulates the presence of an appropriate adult it accordingly carries with it the role thus described.

The admissions

12. Leaving aside the rejected, and plainly unreliable, unsworn statements of the appellant himself, the evidence in relation to the admissions amounted to this. The appellant had been arrested, with Rahming, at the airport on the morning of Friday 28 November. He was recorded as received into custody at the local police station at 0920. The admissions were made sometime between 1600 and 1730 on the afternoon of the following day (Saturday 29). They were made to the principal investigating officer, Detective Sergeant 772 Lorenzo Johnson, who was part of a team of officers who had flown in from Grand Bahama to handle the investigation. The persons present when the admissions were made were Detective Sergeant Johnson and Bishop Henfield. The Bishop had been asked by the police just shortly before his arrival to attend "to witness a statement".

13. The oral admissions were recorded verbatim and signed by both the sergeant and the Bishop. Each answer was initialled by the appellant. They read as follows:

> "You are suspected, along with others of robbing Dion Strachan of M & R Foodstore of cash and of committing his murder on 27 November 2008 at Marsh Harbour, Abaco. You are not obliged to

say anything. But whatever you say will be taken down in writing and given in evidence.

1. Do you understand what I have just read over to you above?

1. Yes Sir.

2. Can you read and write?

2. Yes Sir.

3. Do you know Lavardo Rahming?

3. Yes Sir.

4. What is the relationship between you and Lavardo?

4. He is my close friend.

5. Do you know a guy called ‘Timer’?

5. Yes Sir.

6. Do you know a guy called ‘CJ’?

6. I ain’t know him to talk to him but that is Lavardo friend or cousin.

7. What was your reason for coming to Marsh Harbour, Abaco?

7. Because Lavardo asked me to come along with him.

8. Did he say why he wanted you to come with him?

8. No.

9. Did you and Lavardo rob the cashier at M & R Food Store in Marsh Harbour, Abaco on Thursday 27 November 2008?

9. Yeah we went in there and rob it.

10. Did you shoot the cashier?

10. No Sir.

11. Did you or Lavardo shoot the cashier?

11. No Sir.

12. Did you have a gun on you at the time of the robbery?

12. Yes Sir.

13. Did you fire that gun in that Food Store during the robbery?

13. Yes Sir when me and the cashier was hassling.

14. Do you know where that gun is now?

14. I give it to CJ.

15. Do you wish to give a written statement under caution?

15. Yes Sir.

16. Do you wish to read and sign your answers?

16. Yes Sir."

14. There followed a narrative statement which occupied just over five pages of the sergeant's handwriting, and which was likewise initialled by the appellant and signed by the officer and the Bishop. It amounted to a full confession of travelling with Rahming to Abaco, of staying overnight in a hotel to which they were taken by others, of being taken out the next evening by CJ and of selecting the target shop which had no cameras and was thought to have only two women staff, of walking up to the cashier with the gun and demanding the money, of chasing him to the storeroom when he escaped, of pointing the gun at him and then grappling with him when he tried to take hold of the gun hand, of squeezing the trigger, shots going off and the cashier letting go of him, of hearing another shot as he walked to the front of the shop, of their being picked up outside by CJ, and of their movements thereafter.

15. These confessions were made after the appellant had been in custody throughout most of Friday 28, from his arrival at the police station at 0920, and most of Saturday 29, up until the interview in which they were made at around 1600. Neither the detention record nor the evidence of the officers who were called at the voir dire and trial gave much clue as to what had been happening to him during that time.

16. The detention record logged his arrival at 0920 on Friday. Next, it showed that he had been removed from the cell at 1012 and "taken on inquiries with Chief Inspector Poitier and a team of officers from CDU [Central Detective Unit]". The CDU was sited upstairs from the cells. He was shown as returned to the cell at 1330. Chief Inspector Poitier was the local officer. He was not called in either the voir dire or the trial, and no officer who did give evidence suggested that he had had any significant role in relation to this appellant. There was also in the police station Inspector Fernander, who had come from Nassau for this enquiry, but he gave evidence that, apart from seeing the appellant when he was brought in, he neither had dealing with him nor knew what anyone else was doing in relation to him; the officer in charge of the investigation was not him but Detective Sergeant Johnson. That latter gentleman, who everyone agreed to have been in de facto control of the investigation and who interviewed not only this appellant but also Rahming and Russell, gave evidence that he had no dealings with the appellant during this period on Friday, and asserted that he did not know what might then have been happening to him. There was evidence that the bags of both the appellant and Rahming had been seized with them at the airport, and in the trial (although not in the voir dire) Detective Sergeant Johnson gave evidence that he had opened the bags, separately in front of each owner, but this was sometime after 1430 rather than in the morning. There was thus an entirely unexplained period of just over three hours on the first morning (Friday 28) when the appellant was out of his cell "for inquiries" but nobody could say what those inquiries consisted of.

17. After his return to a cell at 1330, the record then logged the appellant's removal to the CDU for a second time at 1410. It did not record his return, but did show that he was given lunch at 1550, and that a routine check on him was made at 1600; these two entries may well mean that he had by then been returned. This second removal may

have related to his confrontation with his bag; there was, however, neither contemporaneous nor later note of whatever was said on either side when the bag was opened. Even without the evidence of Detective Sergeant Johnson that the appellant's bag contained a hoodie, tennis shoes and trousers which bore red stains, it seems highly improbable that nothing at all was said; given that evidence, it is inconceivable. It is exactly this kind of exchange which the rules require to be noted, and for very obvious reasons. Either they may be relied upon later as inconsistent or unsatisfactory explanations, or as partial admissions, or they may have affected what was later said in a recorded interview.

18. The appellant was recorded as being given another meal at 1950 and as being checked at 2156 and 2345. The next entry, however, shows his return from the CDU at 0130. When he had gone there and for what purpose was never explained. Although at one stage the doctor who was called to take a blood sample from him thought he might have done so in the small hours of that night (Friday/Saturday), the evidence settled in the end on this having been done at about 1315 on the second day (Saturday). There was thus a second period of removal from the cell, of unknown duration, which was unexplained.

19. On the second day of detention, Saturday 29, the log showed the appellant removed from the cells to the CDU for inquiries at 0915. It did not show his return, nor did it show any routine check, nor any meal, between then and the confession at or after 1600. None of the officers was able to say what the appellant had been, or might have been, doing in this period of about seven hours. The officer in charge of the investigation, Detective Sergeant Johnson, gave evidence that he did not know, and that nobody had been dealing with him on his instructions, or even that they had reported dealing with him. This was thus a third, and prolonged, period of removal from the cell which, except for the time it took to take a blood sample at about 1315, was again unexplained by anyone.

20. It is of course possible that the keeping of the detention record was simply not complete. One of the station officers gave evidence that the routine was disrupted on both days by the presence of a crowd or mob outside objecting noisily to the murder, and this might have led to a failure to record events punctiliously. It would, however, be extremely surprising if no attempt at all was made to find out any information from the appellant throughout nearly two days in custody, nor any effort made to interrogate him, formally or informally. Quite apart from obtaining some account from him, or at least presenting him with the allegation, an obvious enquiry on the first morning would have been as to who else might be involved and where they might be found; Russell, for example, was not arrested with the appellant and Rahming, and was only found at the ferry dock sometime after 1600 that afternoon. Further, Detective Sergeant Johnson gave evidence that in the morning of the second day (Saturday) Rahming was interviewed at 1035 and confessed, but there was no sign of whatever he said ever being put to this appellant, as one might have expected it to be. Next, if, as the Bishop said,

he was called in just before 1600 on Saturday "to witness a statement", it seems at least probable that something had occurred to prompt his being called, and apparently something which led to the conclusion that the appellant would be willing to make a statement under caution. But there was no evidence from anyone at all what that might have been. On the contrary, the evidence of Detective Sergeant Johnson was that the first words spoken to the appellant, other than whatever was said when his bag was opened and except for obtaining telephone numbers for his mother, consisted of the recorded questions and answers initialled by the appellant at or after 1600 on the second day, and amounted to a spontaneous confession.

21. Bishop Henfield was a local pastor in his mid-seventies. His evidence was that he had been asked to come to the station to witness a statement from a juvenile. He went into an office where the appellant and a police officer who must have been Detective Sergeant Johnson were present. He did not ask for nor was he given any opportunity to speak to the appellant alone. He learned at some stage from the police that they were unable to contact the appellant's parents, and understood that that was why he was there. He saw his role as simply to witness the making of a statement, rather than to give any advice, ask questions or investigate whether there was any complaint. He did, however, observe that the appellant seemed tired and hungry; he asked him whether he had eaten, and was told that he had not. At that, he said, he asked the officer why not, but received no reply. Thereupon he took out a $20 bill of his own and gave it to the police to get the appellant some food. The detention record showed the supply of a Kentucky Fried Chicken meal some time after the end of the interview at 1840. The appellant's assertion that he had not eaten is consistent with the absence from the detention record of any entry relating to any food at all on that second day (Saturday) until the fried chicken bought by the Bishop. In due course the judge found at the end of the voir dire that the appellant may well have been without food for a lengthy period, but that there was no basis for concluding that this had been deliberate maltreatment.

22. The Bishop's evidence was critical to the judge's rejection of the appellant's assertions of prolonged prior torture, for the appellant said nothing to him to suggest any such events, and although no-one enquired of the Bishop how the mechanical business of taking the statement proceeded, and what questions were asked of the appellant to elicit it, it was implicit in his evidence that there was no sign of force having induced it and explicit that it had not been pre-prepared by the police. The Bishop did not, of course, know what if anything had been said to or by the appellant over the course of thirty hours or so before he arrived.

23. It was accepted by the several police officers who gave evidence that the appellant was known to be a minor, and his date of birth on 2 May 1991 was duly recorded on the detention record, thus showing him to be a little under six months short of 18. The officers gave evidence that he was asked for, and provided, two telephone numbers for his mother, one a landline in Nassau and one a mobile. More than one officer gave evidence that he had tried to call those numbers, and on more than one

occasion, but had obtained no reply. It was not suggested that anyone had returned to the appellant to ask him for any further alternative means of communication. No independent adult was contacted until the Bishop was asked on Saturday afternoon to attend the taking of a statement.

24. Mr Fitzgerald complains that no lawyer was ever present, or provided for the appellant to consult. But the law does not require the police to obtain a lawyer, nor to interview only in the presence of a lawyer; it requires them to allow the suspect to consult one if he wishes. It is plain that the appellant was told that he could consult a lawyer if he wished; he signed the appropriate box on the detention record to confirm this. At no time did he suggest, nor was it suggested on his behalf, that he had asked to speak to a legal representative.

25. The detention record similarly shows that the appellant was told that the Constitution gave him the right to be afforded a reasonable opportunity to contact his parent or guardian. Mr Fitzgerald wisely abandoned the attempt to persuade the Board to receive fresh evidence from the appellant's mother as to her availability; if cogent, that could readily have been adduced at the trial, or in the Court of Appeal and it is far too late to attempt to do so now. Mr Fitzgerald's broad submission that the constitutional right meant that the appellant had to be handed a telephone himself to make any call that he wished cannot be accepted without qualification. There may be very good reasons why a detained suspect should not be permitted to make unsupervised telephone calls, other than those which are known to be connected to a legal representative. But what is a reasonable opportunity will depend on the circumstances obtaining in each case. In some cases it may be reasonable to allow the suspect to make a supervised telephone call, if it can properly be monitored. Here, the appellant was known to come from a different island, Nassau, and that is where his mother was understood to be. It was perfectly proper for the police to take on the task of telephoning the numbers which the appellant had given them in an attempt to contact her. But when those efforts failed, to afford him a reasonable opportunity of contacting her would have involved at least telling him that she could not be found. For all anyone knew, he might have suggested either another contact number or another relative. The Board does not, however, endorse Mr Fitzgerald's submission that to afford the appellant a reasonable opportunity to contact his mother meant that he had to be transferred to a Nassau police station. It can no doubt be said that there was no evidence that this was considered, but nor was it ever suggested at the trial that it ought to have been done. If such a suggestion is to be made it must be placed before the principal investigating officer in the voir dire for him to respond to it. There may be several good reasons why such a transfer is impracticable, especially if the investigating team is in the present police station and other suspects are being investigated there also. Another relevant factor might be the possibility that any eye witness might need the opportunity of an identification parade. There are no doubt other possible considerations.

26. However, quite apart from section 19 of the Constitution, para 20 of the Force Standing Orders required the police themselves to contact the appellant's parent or guardian as soon as reasonably practicable. It may be that it was not practicable to send anyone on Nassau to her address, but there was no evidence that this, or any other alternative to trying to telephone the numbers given, was even considered.

27. There were accordingly breaches of section 19(2) of the Constitution and of para 20 of the Force Standing Orders. If these breaches had stood alone, they might well not have led to the exclusion under section 178 of the evidence of a confession made in front of a neutral observer by a suspect who was not far short of 18 and who was travelling independently between islands. Contrary to Mr Fitzgerald's submission, it is not to be assumed that any parent or other relative, if contacted, would or ought to have advised the appellant not to speak to the police; that is by no means always in the interests of a detained suspect. Nor was there any evidence, or even assertion, from the appellant that he could have suggested other means of contacting either his mother or anyone else.

28. Those breaches of the Standing Orders and section 19(2) did not, however, stand alone. The Bishop was plainly not apprised of the nature of his role as an appropriate adult. For the reasons given above, it is not the law that such a person is expected to advise the suspect as to the law, still less routinely to tell him not to answer questions. But if the Bishop had been told the nature of his role, it is likely that he would have wished to speak to the appellant alone, or at the least to make some inquiries of him of what had happened during his time in custody. Whether he would have ascertained from him what his account was of events since his arrest cannot be known, but he might have discovered that the appellant had been speaking with investigating officers and that might well have led to further enquiry as to what had transpired.

29. Next, there was, on the findings of the judge and the evidence of the Bishop and the detention record, at least the probability that the appellant had not been fed as he should have been on the Saturday. It does not follow, as Mr Fitzgerald submitted, that he had been without both food and water, since there is no reason to suppose that the provision of water would have to be logged. By itself the absence of food would not necessarily lead to the exclusion as unfair of a confession statement as to which there were no other doubts. But that is not this case.

30. The judge concentrated in his ruling at the voir dire on whether the confession was voluntary. That was entirely understandable, since the case being made for the appellant was based on the assertion of prolonged torture. The Board is conscious that the case as presented to it has had an entirely new emphasis. Although the judge directed himself as to his powers under section 178, he did so in the context of complaints of deliberate maltreatment. Thus, he concluded that there had been no deliberate withholding of food, and that there was no deliberate effort to deny the appellant his

right to a reasonable opportunity to communicate with his parent. He does not appear to have been addressed on the failure to apprise the Bishop of the full role of appropriate adult. More importantly, he does not appear to have been addressed, separately from the allegation of torture, on the central matter of unrecorded interviews.

31. In those circumstances, the Board must make its own assessment in relation to those two matters. It is very conscious that it has not heard the evidence in person, and has only a transcript. For this reason, it proceeds on the basis of the police evidence alone, disregarding the unsworn and rejected assertions of the appellant, and it has warned itself that the evidence of witnesses may be more impressive in person than is suggested by the written page. However, limiting itself in that way, it is apparent to the Board that the evidence of the police officers, and particularly of Detective Sergeant Johnson, was far from satisfactory. The several periods of removal from the cells were simply entirely unexplained. It is not easy to see any excuse for this. Either the principal investigating officer was himself concerned with the suspect during these periods or he ought to have discovered who was, and what was happening. The Board has not overlooked the suggestion appearing from later entries on the detention record that it is possible that the appellant was, at some time whilst in police custody, also interviewed in relation to other matters, but if this had accounted for any of the periods on Friday and Saturday which give rise to the present concern it would have been easy enough (on a voir dire in the absence of the jury) to say so, and it was never suggested. This absence of explanation for the whereabouts of the appellant has to be combined with the overwhelming likelihood that the investigators would have wished to question him, with the fact that the Bishop was called in on the basis that a statement was imminent, and with the patent improbability that the recorded questions and answers constituted the very first things which were said to him concerning the murder which he was alleged to have committed. When those things are taken together, they lead inevitably to there having been interviews which were unrecorded. Informal they may have been, but it is to the dangers of informal interviews that the requirement for a record is in large part directed. The significance of these interviews cannot be gauged simply because of the lack of record. To that bleak conclusion must be added the perfunctory manner in which the Bishop was involved without any attempt to explain his full function, the probable lack of food and the shortfall in the efforts to get a parent or guardian to the police station.

32. Taken together, the Board has no doubt that these factors would have justified the conclusion that the state had been unable to prove, as required by section 20(2)(b) of the Evidence Act, that the confession was not rendered unreliable by something said or done, or omitted to be said or done, prior to the arrival of the Bishop. Whether that is so or not, it is quite clear that they mean that the admission of the oral and written recorded confession was unfair and ought to have been excluded pursuant to section 178 of that Act.

The proviso

33. The case for the state may well have been a comparatively strong one. It is noticeable that in his unsworn statement before the jury the appellant said nothing at all about whether he had or had not been at the scene of the crime, nor did he give any explanation for his presence on Abaco. He confined himself to the (rejected) allegations of torture at the police station. The state of the appellant's clothes, found in the bag, may or may not have been evidence of significance, but it is not at all clear that it was relied upon. There was no eye witness identification. Apart from the confession, the case depended on the evidence of Edgecombe. His account was circumstantial and he may or may not have been convincing. The Board does not agree that any deduction as to his reliability can be drawn from the acquittal of Russell, since although it is true that he was implicated also by Edgecombe, the case against him may have failed simply because his association with the others did not prove complicity in the robbery. But it clearly cannot be said that the jury must inevitably have convicted the appellant even without the confession. Edgecombe was an accomplice, and moreover one who elected to give evidence for the prosecution very late indeed; the jury was rightly warned of the danger of convicting on his unsupported evidence. In those circumstances it is impossible to apply the proviso.

Additional grounds

34. That conclusion makes it unnecessary to consider two additional grounds ventilated by Mr Fitzgerald, neither of which was advanced either at trial or in the Court of Appeal.

35. First, Mr Fitzgerald raised the question whether the judge erred in not leaving to the jury the alternative verdict of manslaughter, if it was not satisfied that the intent for murder had been proved. That suggestion was founded on the content of the appellant's statement under caution, which contained this passage:

> "When I turn my back, I see the guy … running to the back of the store. I gone after him and I catch him in the office by the door shaking on it trying to open it with the key. I point the gun at him and I tell him not to move and I went up close to him and me and him started to hassle. He was trying to hold my right hand with the gun in it, so I start to squeeze the trigger and some shots gone off."

The possibility that this might justify a jury concluding that it was in doubt as to intent to kill was raised at trial, not by counsel for the appellant but by counsel for the Crown. It fell to be considered in the context of the Bahamas Rule contained in section 12(3) of the Penal Code, that where a person does a voluntary act which would, if he used

reasonable caution and observation, appear to him as occasioning a great risk of an event, he shall be taken to have intended it unless he shows that he believed that it would not cause it. That is of course an evidential rule, but it would fall to be applied in the absence of any assertion from the appellant that he had any belief that he would not kill the deceased. The transcript shows that counsel on all sides, and the judge, resolved to consider the point overnight. There is no material to show what transpired after this, but it is known that counsel for the defence did not raise any suggested misdirection on appeal. An alternative verdict must be left to the jury whether or not it is the defendant's case that he is or may be guilty of the lesser offence, if it is an obvious alternative, which would suggest itself to the mind of any ordinarily knowledgeable and alert criminal judge: *R v Coutts* [2006] UKHL 39; [2006] 1 WLR 2154 and *Von Starck v The Queen* [2000] 1 WLR 1270. In the present case the possibility was expressly considered and it plainly did not occur to counsel for the defence that the alternative met this test. That is unsurprising given that the confession was to chasing the deceased, placing the loaded gun close up to him, and squeezing the trigger. Whether the weapon was automatic, requiring only one pull on the trigger, or two, is not known but what was admitted might be thought to have carried the very obvious risk of killing the deceased, as it in fact did, and there was no assertion that the defendant believed otherwise.

36. Secondly, Mr Fitzgerald submitted that, having admitted the confession in evidence, the judge left to the jury simply the question of whether it was induced by torture, rather than the separate question whether the Crown had satisfied the onus lying upon it under section 20(2) of the Evidence Act - see *R v Mushtaq* [2005] UKHL 25; [2005] 1 WLR 1513. That the matter was left in the way it was resulted from the case which was being advanced before the court of trial, depending almost wholly on the allegation of torture. As has been seen, the judge directed himself essentially similarly. Beyond agreeing that if the case had been put at trial as it is now it would have called for a direction meeting the requirements of *Mushtaq*, it is unnecessary to say more.

Disposal

37. For the reasons set out above, the Board will humbly advise Her Majesty that the appeal against conviction should be allowed. The appeal against the form of sentence, which was not in issue, does not accordingly arise. The question of whether, if application for it be made, there ought to be a re-trial, should be remitted to the Court of Appeal.