[2024] UKPC 24
Privy Council Appeal No 0077 of 2022

JUDGMENT

Nardis Maynard (Appellant) *v* The King (Respondent) (St Christopher and Nevis)

From the Court of Appeal of St Christopher and Nevis

before

Lord Briggs
Lord Burrows
Lord Richards
Lady Simler
Dame Julia Macur

JUDGMENT GIVEN ON
1 August 2024

Heard on 6 June 2024

Appellant
Siobhan Grey KC
Richard Vardon
Talibah Byron
(Instructed by Simons Muirhead Burton LLP (London))

Respondent
Anesta Weekes KC
Adam Payter
(Instructed by Myers Fletcher & Gordon (London))

DAME JULIA MACUR:

1. On 7 July 2004, Nardis Maynard ("the Appellant") was convicted after trial (Davidson Baptiste J and a jury) of the murder of Ernest Henry ("the deceased") on 22 March 2003. The deceased had three stab wounds to his left chest, but the cause of death was a stab wound to the right upper thigh leading to haemorrhage and shock.

2. A co-defendant, Ingle Rawlins ("Rawlins"), succeeded in his submission that there was no case for him to answer at the close of the prosecution case and the jury was directed to return a not guilty verdict.

3. The case against the Appellant relied solely upon identification evidence. The defence was alibi. The Appellant gave evidence that he was at home at the time of the murder with his sister, Yvette Maynard, her boyfriend and his brother, Terence Maynard. Neither Yvette nor Terence Maynard were called to give evidence on his behalf.

4. On 22 July 2004, the Appellant was sentenced to life imprisonment and no minimum period/tariff has ever been set as regards his life sentence.

5. The Appellant's first appeal against conviction was withdrawn on the morning of the listed hearing. The appeal against sentence proceeded but was unsuccessful. The abandonment of his appeal against conviction was subsequently declared a nullity, in the circumstances described below, and his restored appeal against conviction was heard by the Eastern Caribbean Supreme Court in the Court of Appeal (Pereira CJ, Thom JA and Farara JA(Ag)) ("the Court of Appeal"), on 25 March 2022. Judgment was handed down on 10 June 2022.

6. The Court of Appeal refused to admit the "fresh evidence" contained in the affidavit of Yvette Maynard sworn on 30 June 2020 which supported the Appellant's defence of alibi, and, although acknowledging deficiencies in the trial judge's summing up, upheld the conviction by applying the proviso in section 44(1) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act 2009 ("the Supreme Court Act").

7. The Appellant appeals against his conviction with the leave of His Majesty on the advice of His Privy Council on 15 February 2023, on the grounds that the Court of Appeal erred in:

   (a) refusing to admit the fresh evidence contained in the affidavit of Yvette Maynard;

(b) failing adequately to recognise the extent and impact of the deficiencies in the trial judge's summing up in relation to identification evidence;

(c) finding that the failure to give a good character direction did not undermine the safety of the conviction; and,

(d) applying the proviso in section 44(1) of the Supreme Court Act.

Identification evidence and witnesses

8. Kimesha Powell said that she and her mother, Marilyn Lowrie, had been at home between 12am-1am on 22 March 2003 when, from her mother's bedroom window, she saw the Appellant, whom she identified by his nickname "Daddy Screw" and as someone she had known "practically all her life", attack the deceased.

9. She referred to two other men as present at the scene, namely the deceased whom she referred to as "a short rasta guy", and Rawlins, whom she knew as "Marpo". She said the Appellant was wearing a white T-shirt and three quarters jean pants plus a baby blue and white head tie. Her observations were unobstructed and lasted for "15-20 minutes, if that long". She said that Rawlins had tried to pull the Appellant away as he walked towards the deceased, saying "chill out". He, Rawlins, then stood watching before he left the scene alone. She saw a policeman (PC Handley) arrive but did not speak to him.

10. Ms Powell made her statement on 26 March 2003, two days after the Appellant was arrested. She said in evidence that she gave the police "one statement" and it "was not the same night" as the incident. There is no record of her identifying the Appellant to the police by name or physical description before his arrest.

11. Marilyn Lowrie, said that she had known the Appellant for more than five years as "Daddy Screw" and knew his brother, Vincent, as Baldhead. She said that after hearing a noise outside she opened her bedroom window and saw the Appellant and another man approximately 10 feet away. "Daddy Screw" was wearing a white t-shirt and three-quarter long jeans turned up. She initially observed them for 10-15 minutes before turning away. However, soon after, she went outside the front door and viewed the incident from a distance of about 12 feet.

12. She had a clear view, but at no stage did she ever see Rawlins, whom she also knew as "Marpo". She saw the policeman (PC Handley) on the scene immediately after the stabbing but never spoke to him to identify the assailant. The night before she gave her statement an unnamed police officer "came by my house to tell me what he heard and

then he told me he will come the next day to take a statement and that was it". She too made her witness statement on 26 March 2003, two days after the Appellant's arrest.

13. Jason Hamilton said that he had been driving along Market Street at about 12.15am and stopped to speak to an acquaintance, James Hanley. He noticed two males both wearing white shirts, one of whom had dreadlocks. In his witness statement, also apparently made on 26 March 2003, he referred to the assailant as being 5'10" and recognised him as a relative of a man known to him as "Bishop" and that he knew the assailant's brother. He did not name the Appellant.

14. Mr Hamilton made a dock identification of the Appellant as the assailant when making his deposition before the Resident District Magistrate on 24 June 2003. He said he now knew the Appellant "as screw but at the time I did not know his name but I knew his face".

15. PC Mark Handley was in uniform and driving home from his shift when he witnessed the incident, first from his car through his rear-view mirror and then after he alighted his vehicle. He knew Rawlins but he did not recognise the man who stabbed the deceased. His first description of the assailant was in his statement dated 26 March 2003. He referred to the assailant as wearing a white T-shirt, and when making his deposition on 13 June 2003 and at the subsequent trial described him as being short. He said Rawlins was present throughout and left the scene with the assailant.

16. Police Sergeant James Sutton, the officer in charge of the case, said that he was on duty at Basseterre police station on the night of the incident, when at about 2am he received information regarding the killing. He attended Upper Market Street, and then went to the hospital to see the body of the deceased, before going to the home address of Rawlins whom he noticed had bruising to his right-hand knuckles. His clothing had been washed and was airing on the washing line. PS Sutton took Rawlins to the hospital.

17. The police received an anonymous call naming the Appellant's brother, Vincent, in connection with the stabbing. PS Sutton attended the Maynards' house in the early hours of the morning and the Appellant was then at home, but he was not the subject of the investigation at that time. As the police were leaving the address, they met Vincent on the road making his way home. He was taken to the police station but none of his clothes were seized and scientifically examined.

18. Rawlins was also arrested on the Saturday within hours of the killing but not charged at that time. He was subsequently arrested on warrant and charged on Monday 24 March 2003. The Appellant was arrested on 24 March and, after caution, denied involvement in the offence. He provided the police with the clothing he said he had been

wearing on the Saturday night. He was charged on 25 March 2003. There was no forensic evidence which implicated the Appellant in the murder.

19. PS Sutton did not consider that it was necessary to have an ID parade. He stated that when he arrested the Appellant, he already had information from both eye-witnesses Kimesha Powell and Marilyn Lowrie.

Alibi

20. The Appellant's trial lawyer and acting junior counsel, Anthony Johnson, sent a letter to the Registrar of the High Court of Justice in St Kitts dated 25 August 2003 identifying Yvette and Terence Maynard as alibi witnesses. On 3 September 2003, the DPP's office acknowledged receipt of the letter and asked for full copies of their statements. However, there is no indication from the Appellant's former lawyers that witness statements were ever taken and, in her affidavit dated 30 June 2020, Yvette Maynard states that she was never asked to provide one. Her brother, Terence, died in 2012.

First Appeal

21. The Appellant filed a notice and grounds of appeal on 4 August 2004, which included that the trial judge failed to sum up the weaknesses in the identification of the Appellant to the jury. However, his leading trial lawyer, Dr Henry Browne (now KC) abandoned the appeal against conviction on the morning of the hearing saying, "The real issue in this case My Lord was the question of identification, and the learned Judge gave an almost impeccable direction to the jury on the issue of identification". He then addressed the court on the appeal against sentence and said that the Appellant, "has shown considerable remorse". The Court of Appeal (Gordon QC, Barrow SC and Rawlins JJA) dismissed the appeals against both conviction and sentence on 22 May 2006.

22. An e-mail sent by the Chief Registrar dated 22 July 2015 indicated that the Appellant had been present throughout the hearing. However, on 26 March 2014 the Appellant, who had "just received a transcript citing the status of my case" contacted the Chief Registrar of the Court of Appeal and said he "was not even made aware" of his counsel's withdrawal of the appeal against conviction. He thanked the Chief Registrar for her previous response to his sister, Yvette's e-mail. On the same day he wrote to solicitors, Simons Muirhead Burton LLP, whom his sister had already contacted, instructing them to prepare a renewed appeal.

Second Appeal

23. The Appellant waived legal professional privilege. In 2015 Simons Muirhead Burton LLP wrote to Dr Browne QC, as he had become, and Anthony Johnson seeking information regarding the abandonment of the Appellant's appeal and matters concerning alibi witnesses, identification, and good character at trial.

24. Mr Johnson replied indicating that: the trial and appeal had taken place more than ten years ago; the 2006 Record of Appeal was delivered to the Appellant's family members; and the file was closed and filed away in storage and could not now be found. He did not recall whether any witness statements were taken from potential alibi witnesses and, if not, why not. He could not now recall why the alibi witnesses were not called to give evidence at the trial. He did not recall whether the issue of good character was raised before the trial judge and, if not, why not. As far as he could recall, the Appellant did not sign any document indicating that he agreed to abandon his appeal against the conviction and no Notice to Abandon appeal against conviction had been filed.

25. Dr Browne did not respond to the correspondence.

26. The Appellant's application to treat the abandonment of the appeal against conviction in 2006 as a nullity commenced on 10 December 2021 and was adjourned part heard with a direction that Dr Browne file an affidavit. The resultant affidavit is dated 17 March 2022. Dr Browne accepted that at no stage during the murder case did he ever speak to the Appellant, his lay client: "I have never interacted with [him] personally in any manner… All representations made by me at any time in the proceedings were because of clear instructions given me by the late Mr Johnson. I had no reason to question his instructions as solicitor for the said [Appellant]."

27. The Crown thereafter conceded that the abandonment of the original appeal against conviction in 2006 was a nullity. On 25 March 2022, the Court of Appeal so declared and proceeded to hear the Appellant's appeal against conviction on the grounds that:

(1) There was fresh evidence from Yvette Maynard, which was available at the time of the original trial but was not called and no statements had been taken despite notification to the DPP's office in 2003. The new evidence, in affidavit form, supported the Appellant's evidence of alibi given at trial. The failure to call Yvette Maynard undermined the safety of the conviction since the jury would question why she had not been called.

(2) The trial judge's summing up of the identification evidence was defective in that he failed to direct the jury on the serious inconsistencies and weaknesses in

that evidence, as required by *R v Turnbull* [1977] QB 224. The importance of an identification parade in circumstances where one was not held was not explained to the jury in its proper context. The judge only dealt with it in the context of the recognition evidence, in which there were also inaccuracies which went unaddressed. There is no evidence of independent verification in advance of the Appellant's arrest that the killer was him. The evidence appears to build around him only after the arrest.

(3) The trial judge failed to provide a good character direction to the jury in a case where credibility was a critical issue.

28. On 10 June 2022, the Court of Appeal dismissed the Appellant's restored appeal against his conviction for murder.

29. The Court of Appeal determined that in relation to the prospective alibi witnesses:

> "the evidence does not demonstrate what informed [the Appellant's] former counsel's decision not to call the evidence of Yvette or Terence…it does not follow automatically from the giving of the notice of alibi that there could not have been any good reason which arose either before or during the course of the trial for not calling their evidence. …[it] could have been made for a myriad of reasons. … Further, no assertion is being made as to the lack of competence and/or skill of Maynard's former counsel. In the absence of evidence of what informed Maynard's former counsel's decision not to call the alibi witnesses, it would not be appropriate for this Court to simply infer that there was no good reason for the failure to call Yvette or Terence to give evidence at trial."

30. The Court of Appeal concluded that the affidavit evidence of Yvette Maynard lacked credibility, and moreover did not provide cogent evidence of alibi. The "contention that the jury must have disbelieved" the Appellant because two of his siblings were not called to give evidence "is mere speculation". The jury had heard the Appellant's evidence putting forward his alibi, the trial judge had given irreproachable and unchallenged directions on the law of alibi, and PS Sutton had given evidence that he saw the Appellant in the yard at his home address shortly after the incident.

31. The application to adduce fresh evidence did not satisfy the threshold test for admissibility in section 49 of the Supreme Court Act (see *Lescene Edwards v The Queen* [2022] UKPC 11 at para 42 which cited the earlier decision of *Lundy v The Queen* [2014]

2 NZLR 273.) Even if it had been credible and fresh it would not have had any effect on the safety of the conviction "given the quality of the evidence weighing against him."

32. The Court of Appeal observed that the guidelines in *R v Turnbull* were well known, and that the jury should be directed of the

> "special need for caution before convicting in reliance on the correctness of the identification, instruct them as to the reason for the need for such a warning and inform them of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken."

However, in *Mills v The Queen* [1995] 1 WLR 511, the Board had rejected a

> "mechanical approach to the judge's task of summing up. *R v Turnbull* is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in R v Turnbull as restated by the Privy Council in Reid (Junior) v The Queen [1990] 1 AC 363."

The trial judge is required to point out any specific weaknesses in the identification evidence to the jury, but it is not essential to "[list] all those weaknesses or every argument made against the credibility of a particular witness"; see *Omar Grieves v The Queen* [2011] UKPC 39 at para 29.

33. Dealing with the specific issues of weakness and inconsistencies in the identification evidence identified by Ms Grey KC, the Court of Appeal determined as follows.

> (1) That Ms Lowrie only saw two men at the scene, and not Rawlins, may be attributable to other witnesses' observations taking place from different positions and, to some extent, different times. In any event the inconsistency was immaterial, the evidence of Ms Lowrie putting the Appellant at the scene was corroborated by Ms Powell and Mr Hamilton.

(2) The evidence of Ms Lowrie and Ms Powell revealed "more similarities than differences." That Ms Powell was the only witness to say the Appellant was wearing a blue and white head tie did not undermine the quality of her identification. What was crucial was that both Ms Powell and Ms Lowrie described him as wearing a white T-shirt and "three-quarter jeans pants", which was corroborated, at least to some extent by PC Handley and Mr Hamilton.

(3) The Court could not infer without more that Ms Lowrie's and Ms Powell's failure to approach PC Handley at the scene to identify the assailant meant they were uncertain of their identification of the Appellant.

(4) The failure of the trial judge to highlight to the jury that Mr Hamilton first made a dock identification of the Appellant at the Magistrates' Court was not fatal in the circumstances. Mr Hamilton had made plain in a witness statement given shortly after the incident that he knew the assailant as the relative of a man he knew by the name of "Bishop". His account of the incident was consistent with the accounts of the other eye-witnesses.

(5) The failure to highlight specific weakness regarding the failure to hold an identification parade was not fatal in the circumstances. The judge explained to the jury the purpose of an identification parade and correctly advised them that an identification parade is not necessary where it is accepted that the accused person is well known to the witness. It was clear that PC Handley had not seen the assailant's face and did not recognise him, nor attempt to identify him by name.

> "Furthermore, as Mr Graham [Counsel for the Crown] submitted, Maynard's case at trial was that Ms Lowrie and Ms Powell fabricated their identification of him as the murderer, and not that they were mistaken. If it were that Ms Lowrie and Ms Powell had fabricated their evidence against Maynard, they would invariably have identified Maynard on the identification parade as the killer. It therefore follows that the identification parade would again have served no useful purpose."

34. However, the Court of Appeal agreed that the judge ought to have specifically highlighted to the jury the other weaknesses in the prosecution case, including that: the Appellant's brother, Vincent, is also left-handed, was never placed on an identification parade and neither were any of his clothes which he was wearing that night seized and forensically examined; there was no scientific evidence linking the Appellant to the crime; the clothes the witnesses described the assailant as wearing were never found; and the Appellant had no injuries while Rawlins had injuries to his hands. However, the Court of Appeal concluded that these matters did not "impugn the strength of the witnesses'

identification of Maynard which was critical to the prosecution's case. The quality of the identification evidence in this case was quite compelling…". In light of this compelling identification evidence there was no reason to doubt the safety of the conviction.

35. The Court of Appeal agreed that, as a general principle, a good character direction should be given by the trial judge. However, "the judge's failure to give a good character direction was not fatal in the circumstances of this case. … In light of the cogent and compelling identification evidence as well as <u>other</u> evidence against Maynard at the trial, it cannot be said that a good character direction would have somehow changed the view of the jury that Maynard was guilty." (Emphasis added).

36. The Court of Appeal proceeded to address the proviso in section 44(1) of the Supreme Court Act:

> "Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

37. The Court of Appeal said they were guided by the principle in *Jevone Demming v The Queen* (unreported) 14 January 2020, para 39, referring to the decision of the Board in *Stafford v The State* [1999] 1WLR 2026, to the effect that:

> "The application of the proviso requires the Court of Appeal to look beyond the errors of a trial judge to examine whether, having regard to the admissible evidence before the jury, a conviction was inevitable."

38. The Court of Appeal also had regard to the judgment of the Board in *Cassell v The Queen* [2016] UKPC 19; [2017] 1 WLR 2738, at para 30, that

> "the more minor the error the easier it is likely to be for the appellate court to address and answer the question whether any jury must inevitably have convicted if the error had not occurred. Conversely the more extensive the error(s) at the trial, the more difficult it is likely to be to be sure that any jury must have convicted, and indeed there sometimes comes a point where the appellate court does not even embark on an analysis of the proviso question, the answer being obvious and/or the view being taken that it would plainly be a miscarriage of justice, because unfair, to sustain the conviction."

39. The Court of Appeal concluded that

> "… the jury would inevitably have come to the same conclusion that Maynard was guilty of murder upon a review of all the evidence in the case, and in particular the compelling identification evidence. In addition the jury also had before it the medical evidence of Dr Williams-Roberts which indicated that the deceased had sustained three lacerations on his body: namely, two lacerations to his chest and one to his right thigh. It is noteworthy that the medical evidence is plainly consistent with the witnesses' accounts of the attack, particularly Ms Powell's account. This no doubt served to bolster the prosecution's case against Maynard. On the totality of the evidence, even if the judge's non-direction on aspects of the evidence were to be considered as a misdirection and even when considered cumulatively along with the failure to give a good character direction, no miscarriage of justice has actually occurred. The proviso to section 44(1) of the Supreme Court Act is therefore engaged. Accordingly, it would have been proper for this Court to dismiss the appeal in any event by applying the proviso contained in section 44(1)."

The issues

40. The issues which arise for the Board's determination are:

(1) Whether the Court of Appeal erred in concluding that the evidence contained in the affidavit of Yvette Maynard, the Appellant's sister, was not credible and there was no reasonable explanation for the failure to adduce it at trial.

(2) Whether the Court of Appeal erred in concluding that, even if the alibi evidence had been credible and fresh, the evidence would not have had any effect on the safety of the Appellant's conviction given the quality of the evidence against him at trial.

(3) Whether the Court of Appeal erred in focussing upon certain weaknesses that the trial judge failed to highlight rather than recognising that the summing up did not draw to the jury's attention a single specific weakness in the identification evidence adduced by the Crown in a case where identification was the sole or principal issue.

(4) Whether the Court of Appeal erred in finding that the failure to give a good character direction did not undermine the safety of the conviction in circumstances where one was required and in circumstances where credibility was vital.

(5) Whether the Court of Appeal erred in applying the proviso to section 44(1) of the Supreme Court Act.

The potential alibi witness

41. The Court of Appeal doubted the credibility of Yvette Maynard's evidence in providing an alibi for her brother, by reason of her lack of diligence in assisting his defence at the time of his arrest and subsequently leading up to his trial and thereafter. However, the Board takes the view, bearing in mind her age and circumstances at the relevant time of the extant offence and trial, that she had approached the Registrar of Appeals for information regarding her brother's 2006 appeal, and her subsequent endeavours to obtain representation for her brother, that there is good reason to conclude that whilst she acted late in the day she did so in good faith. The Board would therefore regard the evidence she gave as credible, that is capable of belief.

42. There is clear and independent evidence that Yvette Maynard and Terence Maynard were identified as prospective defence witnesses at the outset, as notified to the DPP (see above). The Board acknowledges the possibility that, if a statement had been obtained from Yvette Maynard close to 22 March 2003, she may have recalled further significant detail which may have bolstered her evidence in support of the Appellant's alibi. However, as the affidavit of Yvette Maynard makes clear, this did not occur, and in the absence of witness statements from Yvette and her brother Terence, it is unsurprising that leading counsel did not call them to give evidence at trial. It is unnecessary and inappropriate, in those circumstances to speculate, about which of the other "myriad reasons" may have been in play.

43. Ms Grey's submissions on the failure to call defence witnesses were, as she conceded in response to an inquiry from the Board, a veiled attack upon the competence of the Appellant's trial counsel despite there being no ground of appeal drafted on this basis. Nevertheless, the Board records its considerable disquiet arising from matters revealed during the attempts of the Appellant's present lawyers to understand what occurred during the trial and 2006 appeal. These and the fact that leading trial counsel had no direct contact with the Appellant at any stage, suggest a less than satisfactory preparation for trial commensurate with the gravity of the charge.

44. However, the Board agrees with the Court of Appeal that the affidavit lacks cogency in supporting the Appellant's alibi. As the Court of Appeal put it:

> "There is nothing in Yvette's evidence which suggests that she was aware that Maynard had left the house and ventured into the yard. There is also nothing which suggests that she had observed Maynard in his room at any particular time. She merely states that she was able to see into his room when she stood on her bed and looked over the partition; that his television was on; that he would tell her when he was leaving the house; and that she would have heard him leaving the house. Yvette's evidence to my mind falls short of cogent alibi evidence. Nowhere in her affidavit does she indicate that she saw Maynard in the house between 12 am and 1 am when Henry was killed nor does she positively exclude the possibility that Maynard had left home without her knowledge."

45. The Board regards this lack of cogency as capable of supporting Yvette Maynard's credibility, for a dishonest witness may well have attempted to say that she was with the Appellant throughout. However, the issue of credibility does not determine that of cogency and section 49 of the Supreme Court Act requires the Court to be satisfied that the "new" evidence if received would afford a ground for allowing the appeal. Consequently, the Board endorses the Court of Appeal's decision not to admit the new evidence.

Identification

46. The Appellant, in answer to a question in cross-examination as to why they should accuse him, suggested that Ms Powell and Ms Lowrie lied and identified him as present at the scene because of their animus towards him. However, the Board does not consider that this exchange altered the issue in the case to one of "fabricated" identification so as to render the issue of mistaken identity redundant.

47. The Board notes that there is no real issue but that a full *Turnbull* direction was called for in this case and that the trial judge should have identified specific weaknesses in the identification evidence and drawn them to the attention of the jury, regardless that this was a "recognition" case. (See *Shand v The Queen* [1996] 1 WLR 67 at p 72 as reiterated in *Aurelio Pop v The Queen* [2003] WL 21161224 at para 12).

48. The thrust of Ms Grey's submissions on this aspect of the appeal is to challenge the failure of the Court of Appeal to address the fact that the trial judge did not remind the jury of a single weakness or inconsistency in the evidence, thereby resulting in an unbalanced summing up. Thereafter, the Court of Appeal wrongly made their own assessment of the asserted weaknesses and inconsistencies and so fell into the error of

substituting trial by appeal judges for trial by jury. (See above: *Cassell v The Queen* para 28).

49. The Board recognises there to be some force in this submission, but with the caveat that the Court of Appeal necessarily assessed the consequences of the misdirection in contemplation of the proviso.

50. In this regard, the Board agrees with the Court of Appeal that an analysis of the evidence of Ms Lowrie and Ms Powell reveals more similarities than differences, and that certain inconsistencies, such as whether the assailant was wearing a blue and white head tie, were immaterial and realistically and reasonably explicable by virtue of different viewpoints and focus of attention. Further, and on this basis, the Board entertains no real disquiet about the difference in the witnesses' descriptions of the duration of the incident or the height of the assailant; different perceptions and different perspectives offered by witnesses viewing the same fast-moving incident are well understood in the criminal trial process.

51. There is nothing in the criticisms made regarding the lack of an identification parade in the circumstances of this case. The Board agrees with the Court of Appeal that the value of a parade was questionable for the reasons given in para 33(5) above.

52. However, the Board is unable to so readily dismiss the inconsistency in the evidence between the four eye-witnesses as to whether there were two men present during the attack on the deceased, namely Rawlins and the assailant, or only one, that is the assailant, who was said by Ms Lowrie and Mr Hamilton not to be Rawlins. That three witnesses all professed to recognise the Appellant does not negate this very real difference between Ms Lowrie and Mr Hamilton on the one hand and Ms Powell and PC Handley on the other.

53. The recognition evidence of Mr Hamilton was tainted by his dock identification and is not saved by the description of the man he saw as a relative of Bishop, who is the Appellant's brother. Vincent Maynard, who was first arrested by PS Sutton following an anonymous tip-off, and who was initially absent from home and had obviously been out when PS Sutton attended that night, was also a relative of Bishop. Ms Powell's evidence relating to the third man, whom she identified as Rawlins, was highly specific and exculpatory, and there is no ready explanation as to why, given the duration of his involvement, Ms Lowrie would not have seen him.

54. The Board disagrees with the Court of Appeal that the number of men seen by the eye-witnesses was an unimportant aspect of their evidence. Rather it had the potential to undermine the identification evidence, depending on the jury's assessment, and should

certainly have been highlighted by the trial judge to the jury as a weakness in the identification evidence.

55. However, the Board has a greater concern that the Court of Appeal's attention to a significant aspect of, and potential weakness in, the identification evidence was distracted by the submission that neither Ms Lowrie nor Ms Powell gave a statement to PC Handley at the scene of the incident, despite the fact that they had observed what was clearly a fatal attack. That is, neither Ms Lowrie nor Ms Powell described the assailant or identified the Appellant by name until two days after his arrest, and apparently did so, according to the evidence of Ms Lowrie, after they had been informed by an unnamed police officer (possibly PS Sutton) the night before they made their statements, of "all he [the officer] knew". This evidence should also have received considerable prominence at trial given that identification by recognition was in issue.

56. The centrality of the identification evidence in this case made it all the more important that the differences in what each witness said about what he or she observed (together with the other points of weakness referred to above, including the dock identification and the way in which the statements of Ms Lowrie and Ms Powell were taken) should have been identified by the trial judge in the summing up, for the jury to consider in assessing the reliability of that evidence. The judge gave a general *Turnbull* warning but, without identifying a single feature of the evidence that might have affected, still less undermined, its reliability, that was insufficient.

The good character direction

57. Counsel appearing for the DPP in the Court of Appeal in 2022 stated that the issue of good character had not been raised during the trial by either the Appellant's trial counsel or the trial judge but conceded that the Appellant was entitled to both the credibility and propensity limbs of the direction.

58. The Board considers that this direction was of crucial importance in this case. It was inevitable that the jury in considering whether the prosecution had disproved his alibi beyond reasonable doubt would have to assess the Appellant's credibility. Like the appellant in *R v Williams (James)* [2011] EWCA Crim 1739, the Appellant had "nothing else" but his credibility. As Elias LJ explained in that case, although there was a circumscribed discretionary power to dispense with a good character direction, prima facie such a direction must be given because it is evidence of probative significance. The essential case for the appellant was that he was driving at 70 mph according to his speedometer which was extremely accurate.

> "The case therefore turned significantly on his credibility. He had an army of prosecution witnesses who were contending for

> the contrary. In those circumstances it seems to us that the good character direction was potentially particularly important because it was one of the few supporting pieces of evidence in favour of the reliability and honesty of his account".

59. Furthermore, Ms Weekes KC in her written case and oral submissions emphasises that the offence was "callous with no real motive". This too predicates the necessity for the trial judge to give the propensity limb of the good character direction.

60. The Board respectfully disagrees with the Court of Appeal that a failure to give such a direction was not fatal in the circumstances of this case. The Board agrees with the Court of Appeal that the evidence of Ms Lowrie and Ms Powell is compelling as regards their independent description of the mechanics and locus of the assault upon the deceased's body, which is entirely corroborated by the pathologist's evidence, but consider that this factor does not necessarily support the reliability of their identification of the Appellant as the assailant nor provide "other evidence" of his guilt. Otherwise, the Board could not identify, nor could Ms Weekes assist the Board to identify, what the "other evidence" was in addition to the "cogent and compelling identification evidence" to which the Court of Appeal referred in applying the proviso.

The proviso

61. The Board has considered the application of the proviso de novo. Having done so, and for the reasons indicated above, the Board is not satisfied that a jury properly directed would inevitably have convicted the Appellant. Rather, the combination of failings to which the Board has referred means that this is a case where it would plainly be a miscarriage of justice, because unfair, to sustain the conviction.

Conclusion

62. Consequently, the Board concludes that the proviso ought not to be applied and that the several defects in the directions to the jury mean that the Board humbly advises His Majesty that this appeal against conviction must be allowed. The Board will advise remission to the Court of Appeal on the question of whether there ought to be a retrial.