Privy Council Appeal No 4 of 2005

David Ebanks *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 16th February 2006

Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

*[Delivered by **Lord Carswell**]*

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1. The appellant was on 3 March 2000 convicted after a trial in the Home Circuit Court, Kingston before Harrison J and a jury of the capital murder on 4 February 1998 of Joel Russell and sentenced to death, in accordance with the mandatory provisions then in force in Jamaica. He appealed against his conviction, but on 31 July 2001 the Court of Appeal of Jamaica (Forte P, Walker JA and Smith JA (Ag)) dismissed his appeal. He

has appealed to the Privy Council against conviction and sentence, with special leave given on 27 July 2004. The appeal raises issues of the requirement of an identification parade in cases of identification by recognition and of the direction to be given to a jury in capital murder cases.

2. The appellant was charged under section 2 of the Offences against the Person Act, as amended by the Offences against the Person (Amendment) Act 1992. The material parts of section 2, which govern capital murder, provide as follows:

> **2.** – (1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say –
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> * * * * *
>
> (*b*) the murder of any person for any reason directly attributable to –
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> (i) the status of that person as a witness or party in a pending or concluded civil cause or matter or in any criminal proceedings;
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> * * * * *
>
> (2) If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (*e*) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

3. The sole eye-witness who gave evidence at the appellant's trial was Isaiah Russell ("Isaiah"), a brother of the murder victim Joel Russell ("Joel"). He stated that on 4 February 1998 about 8.40 pm he was walking along Olympic Way, Kingston in the direction of Maple View Avenue when he saw Joel in a van with his girlfriend. Joel stopped the van and Isaiah spoke to him. Isaiah saw two men approaching the van with their hands in their pockets. He said that he recognised one of them as a man known in his

neighbourhood as "Country". This man said to Joel "Yuh nah stop goh a court pon mi cousin?" The Crown case was that this was a reference to the fact, established in evidence, that Joel was prior to his death scheduled to be a witness in criminal proceedings for shooting with intent brought in the Gun Court against one Kevin ("Prince") Thompson. Joel and his girlfriend started to get out of the van when "Country" took something from his pocket and pointed it towards Joel. Isaiah heard a loud noise like a shot, then Joel and his girlfriend ran into 24 Maple View Avenue. Isaiah heard more explosions and retreated a short distance down Maple View Avenue. He turned to look back and saw "Country" and the other man emerge from the house and make off. Detective Corporal Fletcher arrived a few minutes later and found Joel's apparently dead body lying in the yard in 24 Maple View Road, with gunshot wounds visible to the back of the head, lower back and face. No one was willing to give a statement about the incident. Post mortem examination established that the deceased had sustained six gunshot wounds, which caused his death.

4. Isaiah said that he was able to recognise the gunman as "Country", because he was four or five feet from him when he pulled the gun and saw his face for about three minutes in bright street lighting. He did not know his proper name nor had he ever spoken directly to him, but he was known in the Majesty Gardens community where he lived by the name of "Country". There were some discrepancies and uncertainties in Isaiah's evidence about how long he had known "Country", but he claimed that he had known him for upwards of seven years, though he had not seen him for the previous two years. He said that he lived at one end of Majesty Gardens and the appellant at the other end, about a quarter of a mile away, and he used to see him regularly, "like once a week" (Record, p 17). Defence counsel suggested to the witness that the appellant never lived in the Majesty Gardens community, but that only shortly before the incident he used to visit a girl in Majesty Gardens (Record, p 19). At trial Isaiah made a dock identification of the appellant as the man he knew as "Country".

5. Isaiah did not give a statement to the police until immediately after the appellant was arrested in April 1998. He then described the assailant as brown, with a big nose and a gold or silver crown on a tooth. When asked why it was so long before he gave a statement he said that there was a reason, and when pressed he said that it was because he and the appellant were living in the same area.

6. On 4 May 1998 an identification parade was held, at which Isaiah Russell identified the appellant as the gunman whom he knew as "Country" and whom he had seen in Maple View Avenue at the time of the shooting. It was common case that there was at least one significant defect in the procedure, upon which the appellant's counsel placed some reliance in support of their contention that the conviction was unsafe.

7. The parade was held with the use of a one-way mirror, through which the identifying witness could see the parade but could not be seen. In accordance with the Jamaica Constabulary Force Rules, as amended, an attorney-at-law and a Justice of the Peace should both have been present at the parade. If the prisoner did not nominate an attorney or if the attorney chosen by the prisoner was not available, then either one should have been drawn from a Legal Aid Clinic or the officer conducting the parade should have selected one from among those willing to undertake the assignment. Although the evidence of Sergeant Crawford was that a Justice of the Peace was at the parade, no attorney was present. The appellant's counsel was unable, however, when invited by the Board to do so, to point to any feature of the parade in respect of which the advice of an attorney was likely to have conferred a significant advantage upon the appellant. The prosecution evidence was that the appellant said that a relative of his, Rebecca Taylor, would represent him instead, and Sergeant Crawford deposed that Rebecca Taylor was present at the parade (though her name does not appear on the identification form completed). The appellant averred in his evidence (Record, p 164) that he did not state that he wished to be represented by a cousin. He said further that he did not have a cousin named Rebecca Taylor and then, in a later passage (Record, p 173) that he had no cousins at all.

8. Eight other men were lined up with the appellant on the parade, the appellant electing to occupy place number two. All were described on the parade form as being "dark brown" and their heights varied between five feet seven inches and five feet ten and a half inches. The appellant was five feet ten inches, so all the participants in the parade but that one person were shorter than the appellant, a fact relied upon by his counsel as constituting a defect in the fairness of the arrangements. Isaiah picked out the appellant as the man he knew as "Country" who took part in Joel's murder.

9. The feature upon which most stress was laid on behalf of the appellant was a claim that he had been exposed to the view of Isaiah Russell at the Gun Court and pointed out to him there, so that the identification made at the

parade was fatally flawed. The appellant said in his evidence (Record, p 163) that he had been taken to the Gun Court and there had seen a brown man who looked like Isaiah, then later he said more positively that he had seen him at court. Detective Sergeant James accepted in cross-examination that on a day prior to the identification parade which he could not specify he went to the Gun Court, where the appellant had been taken as the result of a "mix-up", to remove him from there. He said that he did not see Isaiah Russell at the Gun Court. Isaiah for his part denied (Record, p 58) that he had seen the appellant at that court and further denied the suggestion that the appellant had been pointed out to him there.

10. Detective Sergeant Hamilton proved that Joel Russell had been the complainant in a case brought in the Gun Court against Kevin ("Prince") Thompson of shooting with intent which he was investigating. It was still pending at the time of Joel's death and Joel had attended as a witness before he was killed. The case had later been disposed of, the implication being that it could not proceed without Joel's evidence.

11. The appellant gave evidence at trial, but did not call any witnesses. His evidence was to the effect that he had been wrongly identified, as he had nothing to do with the shooting. It consisted of a comprehensive series of denials of much of the testimony given on behalf of the Crown. He claimed that he was not known by the name of "Country" or any other nickname, nor did he live in Majesty Gardens. He lived in Grove Road, off Waltham Avenue, some distance away from Maple View Avenue or Majesty Gardens. He claimed not to know Olympic Way, though he did state that Waltham Avenue was not near that road, a point taken up with him by the judge. He denied knowing Joel or Isaiah Russell. He did not know where his girlfriend lived (contrary to the suggestion put to Isaiah by counsel), though she was the mother of his child, as he would meet her downtown at various places. When asked if he had a gun around the time of the shooting, he said (Record, p 149) "I cannot recall of that, sir". Then when asked if he ever had a gun at any time he replied "No, sir. I don't have a gun." He denied that he had a cousin who was involved in a court case. The prosecution relied on these matters in the appellant's testimony as proving that his evidence was unreliable and unworthy of belief.

12. Mr Fitzgerald QC on behalf of the appellant advanced three main grounds before the Board in support of the appeal, first, the irregularities in the conduct of the identification parade, secondly, misdirections and

inadequate directions by the judge to the jury relating to the parade and, thirdly, inadequate direction on the requirements for a finding of capital murder.

13. The judge commenced his directions on identification in a passage at pages 205-6 of the Record to which no exception was taken:

> "So a very vital issue which arises in this case as had been pointed out by both counsel for the prosecution and the defence, is one of identification. So, this is the issue which I now come to at this point, and it is what is termed identification by the witness Isaiah Russell, who is saying to you that he knew this accused man for some time before, and so on the night in question he was able to recognise this person as the accused man.
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> Now, this is what the law says Mr Foreman and members of the jury, where the prosecution's case rests wholly or substantially on the evidence of someone who says that he recognised the assailant, then I have to warn you that you must be careful how you assess that evidence because it is possible that a person who says he knows so and so, one who claims that he recognises someone else, as a perfectly honest witness can make a mistake and a mistake is no less a mistake because the person is an honest person.
>
> So I must warn you that it is dangerous to convict persons on this evidence unless you are satisfied that the person who comes along and claim that he has seen this accused man had the kind of opportunity to make the recognition and to recall the circumstances of this recognition, and you the jury can be quite sure that the person is not making any mistake at all. You must be satisfied that it is a true and correct recognition, so we will to take into consideration a number of things."

He went on to discuss the factors which may affect the reliability of an identification, the extent of the witness's acquaintance with the suspect, the lighting conditions, his distance from him and other matters bearing on his

opportunity to see and identify the suspect. Again, no exception was taken to these directions.

14. The judge then turned to consider the identification parade. He commenced by saying (Record pp 221-2)

> " ... I say this, it is a recognition case, as the witness Isaiah Russell says that he knew the accused man before the date of this incident. It could be said that there was no need for an identification parade, but there was one and the accused man was pointed out by the witness Isaiah Russell."

He went on to direct the jury that they must consider all the circumstances to see that there was no unfairness and that the identification was obtained without prompting.

15. The judge returned to the need for a parade in a passage at pages 222-3 of the Record:

> "Of course, Mr Foreman and members of the jury, another issue came by way of comment by the defence; that is whether or not this accused man was exposed to the public before the parade was held. But a comment I make here, Mr Foreman and members of the jury, if you were to say that they knew each other, or rather, Isaiah Russell knew this accused man, years before this incident happened, and you were to believe that he knew him, the question is, what would be the need for an identification parade? Or would there be a problem if he was so exposed before the parade?
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> If you were to find that he knew the accused man before the 4th of February, 1998, would it matter that he was exposed before the parade was held? A matter for you. But as I have said, a parade was held and since the parade was held, you as judges of the facts will have to determine whether or not this parade was fairly held."

He then examined in some detail the evidence relating to the holding of the parade, and emphasised to the jury that they had to determine whether there

was any unfairness about its conduct. He followed that by rehearsing the evidence relating to the suggestion that the appellant had been exposed to Isaiah before the identification parade. He concluded consideration of this topic by reminding the jury that they must decide whether it was fairly or unfairly held, having repeated this several times as he proceeded through the evidence and pointed out to them (page 237(b)) that if it was unfairly held it would be unsafe to convict the accused.

16. The issue of the judge's directions on the identification parade was not argued on the appellant's behalf in the Court of Appeal, who did not pronounce upon it in their judgment, but their Lordships permitted counsel appearing before the Board to argue the point. Mr Fitzgerald relied upon three cases, two in the Privy Council and one in the English Court of Appeal (Criminal Division) in support of his thesis that the judge had given a material misdirection when suggesting that in a recognition case an identification parade could be regarded as superfluous. Each of these was a case of a disputed claim by a witness to have known and recognised the defendant, but in none was an identification parade held. The court in each case held that it was wrong to fail to hold a parade, thereby depriving the defendant of the possible advantage of testing the validity of the recognition.

17. In *Goldson and McGlashan v R* (2000) 56 WIR 444 the Board accepted the proposition advanced by the appellant's counsel that the holding of an identification parade was desirable where the witness's claim to have known and recognised the suspect is disputed. Lord Hoffmann, giving the judgment of the Board, said at page 448, referring to the defendant's denial that he was the person whom the identifying witness Claudette claimed, as in the present case, to know by his nickname:

> "The truth of this issue could have been tested by an identification parade. If Claudette had failed to pick out the accused on the parade, her assertion that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth. On the other hand, if she had picked them out, the prosecution case would have been strengthened, although the judge would have had to direct the jury that the evidence went only to support her claim that she knew them

> and did not in any way confirm her identification of the gunmen."

The function of the parade would accordingly have been, not the normal one of testing the accuracy of the witness's recollection of the person identified, but to test the honesty of her assertion that she knew the accused. The same opinion was expressed by the Board in *Aurelio Pop v R* [2003] UKPC 40, (2003) 62 WIR 18, a similar case of disputed identification, where Lord Rodger of Earlsferry referred (para 9 of the judgment) to "the potential advantage of an inconclusive parade to a defendant such as the appellant."

18. In *R v Harris* [2003] EWCA Crim 174, also a disputed recognition case, the trial judge had said to the jury that in cases of purported recognition an identification would, generally speaking, serve no useful purpose. The Court of Appeal held that he was in error and that the conviction was unsafe. Potter LJ, giving the judgment of the court, pointed out at paragraph 33 that although the holding of an identification parade in a recognition case put the matter no further from the prosecution point of view, it could be material where the recognition was disputed, since

> " ... it ignores the possibility of a change of mind and/or a failure to identify the appellant at the identification parade, of which possibility the appellant was, in the end, deprived."

19. The trial judge in the present case was therefore wrong to suggest to the jury that a parade would have served no useful purpose. A parade had, however, been held, and the judge went on, each time he suggested that a parade was not necessary, to give the jury detailed directions about the necessity to be satisfied that it had been fairly conducted. In their Lordships' view, although the judge was in error in making that suggestion, the fact was that a parade had been held and he gave ample directions on the need to ensure that it had been fairly conducted.

20. Nor were the alleged defects in the process sufficiently established to cause its fairness to be in doubt. The suggestion of a conspiracy to point the appellant out to Isaiah Russell had no evidential basis. The evidence relating to the presence of Rebecca Taylor was inconclusive and counsel was unable to suggest any material respect in which the absence of an attorney from the parade could have made a significant difference in the circumstances of the case. The appellant said in his evidence that he had seen a brown man like

Isaiah at the Gun Court, but Isaiah was, as the Court of Appeal pointed out, quite positive that the next time he saw the accused man after the murder was at the identification parade (Record, pp 14, 58) and he equally categorically denied that the appellant had been pointed out to him there. The evidence of the appellant on this issue was no better than equivocal. Their Lordships accordingly conclude that it has not been established that the conviction was unsafe on either of the first two grounds advanced on behalf of the appellant.

21. The third ground was based on a contention that the judge had failed to direct the jury adequately on an essential requirement for a conviction for capital murder. Under section 2(1)(*b*) of the Offences against the Person Act it had to be established that the murder of the victim was directly attributable to his status as a witness in criminal proceedings. As counsel for the appellant quite correctly maintained, the prosecution had to prove a causal nexus between the victim's status as a witness and his murder. The judge did not at any stage in his directions to the jury mention the need for such direct attribution.

22. At an early stage (Record p 193), when directing the jury on the elements of the crime of murder, he said:

> "It becomes capital murder if the person killed, as alleged in this case, was a witness in a pending criminal trial."

At pages 246-7 the judge returned to the point, in a passage which has to be considered in full in order to set the direction in its context:

> "The indictment charges this accused man with Capital Murder, and one of the things the prosecution would have to prove so that you feel sure, is that Joel Russell was a witness in a pending criminal trial at the time when he was killed. So you have the evidence before you of Detective Sergeant Hamilton who told you about the case that was pending in the Gun Court and in which the deceased man was a witness. So the prosecution is saying there is evidence before you, and you must now decide whether you accept the evidence of Detective Sergeant Hamilton. The prosecution is saying that on the night of this incident, the accused man who was identified by the

> witness, Isaiah Russell, came up to the accused man who was in a van at the time, and said to him, 'Yuh nah stop go a court pon mi cousin?' That is what the prosecution is saying, that these words were spoken by the accused man. So, it is a matter for you whether you believe Isaiah Russell that he in fact recognise that this was the accused man who he saw that night, bearing in mind my directions that I gave you relating to the question of identifying and being able to recognise this person who he said he knew for some seven years before the 4th of February 1998. So, the prosecution is saying that there is evidence coming from the accused man himself, making reference to the case that the deceased man was a witness in at the Gun Court. Because it is being said that the accused man said, 'Yuh nah stop go a court pon mi cousin?' and then a shot was heard and the deceased jumped out, ran off into the yard and several more shots were heard. So, the prosecution is saying there is evidence to this effect."

At page 261 the judge said:

> "There is also the requirement on the shoulders of the prosecution to prove that the deceased man was a witness in the pending criminal trial ... "

Finally, at the conclusion of his summing-up the judge repeated (Record, p 280):

> "I have explained to you what capital murder is and why it is capital murder – this trial. So it is open to you, Mr Foreman and members of the jury, do you believe that that accused man, by his own act, used violence in the course or furtherance of an attack upon the deceased man and that the person killed was a witness in a pending criminal trial?
>
> It is open to you, if you are not satisfied to the extent where you feel sure that the prosecution has discharged its burden then, as I say, it is open to you to find the accused man guilty as charged. But, if you find that it was the accused man who killed the deceased and then you are not sure that the deceased

> was a witness in a pending criminal trial, then it would be open to you to convict him of the lesser offence of non-capital murder."

Their Lordships emphasise that when directing a jury on the elements of capital murder it is imperative for a trial judge to ensure that they are apprised of all the elements which require to be proved. It is regrettable that the judge did not do so expressly in this case. Their Lordships strongly recommend that judges should be meticulous about directing juries in the words of the statutory provision, with any necessary supplemental explanation and consequent application of the test to the facts which the jury might find to be established.

23. It is, however, important to look at the context of his remarks to the jury on this issue in the several places to which he alluded to it in the course of his summing-up. It was entirely clear that the Crown case on the evidence was that the deceased was killed because he was to give evidence in a criminal trial against the person to whom one of the gunmen referred as his cousin. In the passage at pages 246-7 quoted above the judge referred twice to the statement attributed to the gunman "Yuh nah stop go a court pon mi cousin?" after directing the jury that it had to be proved that Joel Russell was a witness in a pending criminal trial at the time he was killed. The causal link between his status as a witness and his murder was entirely obvious in the context, indeed on the evidence inescapable, and the jury could have been in no doubt that the Crown case was that his murder was attributable to that status. The jury could not have imagined that the judge was referring to any other criminal trial or that there was anything but the most direct link between Joel's status as a witness and his murder. Their Lordships accordingly consider that notwithstanding the deficiencies in the judge's directions the jury's conclusion on the issue of capital murder cannot be regarded as unsafe.

24. On the law as it stood at the time of the conviction, under section 3 of the Offences against the Person Act the death penalty was mandatory for capital murder. The judge had no option but to impose it and, as the law remained unchanged at the time of the appeal the Court of Appeal was obliged to affirm that sentence. Following the decision of the Board in *R v Watson* [2004] UKPC, [2005] 1 AC 472 the Offences against the Person (Amendment) Act 2005 ("the 2005 Act") has amended the law by repealing the mandatory death sentence in cases previously classed as capital murder

and making provision instead for the trial judge in such cases to have a discretion to sentence the prisoner to death or to imprisonment for life, with restrictions on eligibility for parole. Under the transitional provisions contained in section 8 of the 2005 Act death sentences passed before the commencement of the Act but not carried out are to be quashed and substituted by sentences passed in accordance with the provisions of that Act.

25. Their Lordships will humbly advise Her Majesty that the appeal against conviction should be dismissed and the case be remitted to the Supreme Court of Jamaica for consideration of sentence in the light of the provisions of the 2005 Act.