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*Privy Council Appeal No. 62 of 2004*

**David Gordon** *Appellant*

*v.*

**The Queen** *Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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

Delivered the 15th December 2005

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*Present at the hearing:-*

Lord Bingham of Cornhill
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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

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1. The appellant was on 6 July 2001 convicted after a trial in the Portland Circuit Court before Reid J and a jury of the capital murder of Nadine Barnes in the course or furtherance of a sexual offence. He was sentenced to death under the mandatory provisions then governing murder cases. He appealed to the Court of Appeal of Jamaica (Bingham, Harrison and Smith JJA), which in a written judgment dated 12 December 2002 dismissed his appeal against conviction and sentence. He was granted special leave on 16 June 2004 to appeal to the Board as a poor person. At the end of the hearing on 7 November 2005 their Lordships announced that they would humbly advise Her Majesty that the appeal should be dismissed, and that they would give

their reasons at a later date. This judgment now contains the reasons for their decision.

2. The facts of the case were set out in careful detail in the judgment of Smith JA in the Court of Appeal, which counsel for both parties accepted was an accurate account. In these circumstances their Lordships need only summarise the evidence in outline. In the early hours of 18 November 2000 the murder victim Miss Barnes and Eric Dewey were sitting in the front seats of Mr Dewey's pick-up van, which was parked at Folly Point, near Port Antonio. Two men appeared and held knives to their throats through the open windows of the van, demanding money, then ordered them out of the vehicle. Mr Dewey gave one of the assailants $3000 which he took from his pocket. He was manoeuvred by that person round the back of the van and into the passenger seat, while the other man held Miss Barnes outside. Mr Dewey heard Miss Barnes say that she had gonorrhea, whereupon the man holding Mr Dewey said "Go fuck her in her bottom den." Following this Mr Dewey heard moaning sounds from Miss Barnes. He was robbed of his watch and ring and other personal items. The two men changed places and he again heard moaning sounds from Miss Barnes.

3. The attackers marched Mr Dewey and Miss Barnes some three chains away from the vehicle and made them lie down on the ground. Dewey then heard Miss Barnes cry that her throat had been cut. The man with her then told his accomplice to cut Dewey's throat, saying "Bredda bus de bwoy throat." Mr Dewey succeeded in knocking the accomplice off balance and fled into the sea, bleeding from wounds to his neck and hand. Police later arrived at the scene and found the partly-clothed dead body of Miss Barnes, who had a large wound to the throat. Mr Dewey was rescued from the sea and taken to hospital.

4. The cause of Miss Barnes' death was found, following a post mortem examination, to be "severe shock, due to excessive internal bleeding as a result of the deep cut to the neck", which was consistent with a knife cut administered with severe force. Swabs and smears containing semen were taken from her vagina and submitted for DNA analysis.

5. On 15 December 2000 the appellant was arrested by police when on the excursion described below and gave a sample of blood. On testing it was found that the DNA of this blood sample matched the

DNA of the vaginal swab taken from Miss Barnes' body, from which the examiner concluded "with a high degree of certainty" that the appellant would have been the contributor of the semen in the vagina. She also ascertained, though to a lower degree of probability, that the DNA of the appellant's blood sample matched that of bloodstains found on Mr Dewey's van.

6. The appellant was interviewed under caution by police on 22 January 2001, when he denied that he knew Miss Barnes or that his sperm could have been in or on her. He denied knowing Folly Point, averred that he did not know his whereabouts on 18 November 2000 and was not with an associate named Jacko.

7. When Mr Dewey gave evidence at trial he stated (Record, p 43) that he never knew the men before and never attended an identification parade.

8. Leon Wright stated in evidence that he had known the appellant for some ten years by the nickname of "Banton". On 14 December 2000 the appellant asked Mr Wright to take him to a "bush doctor" or "science man", because the police were looking for him. He proceeded to tell the witness that he and another man named "Jacko" (identified as a man named McNaught) had been gambling unsuccessfully together, then went to Folly Point. When a van containing a man and a woman drove up they held up the occupants and took from them $3000, a watch and a walkman "or something". The appellant stated that he then took away the girl, while his associate held the man with a knife to his neck. He said that he raped the girl, then took out a knife and cut her throat. He gave as his reason for doing so the fact that his associate had called out his name "Banton", at which the girl said that she knew him, using another name "Huddy" (which the appellant accepted in interview was a pet name of his), and he did not want her to identify him. He thought that his associate had killed the man, but the man had got away. The appellant showed Mr Wright the knife which he said he used to cut the girl's throat.

9. The appellant gave Mr Wright money for petrol to take them to the bush doctor. They later met by arrangement to go to see him. The appellant still had the knife with him and Mr Wright persuaded him to jettison it, in case the police should stop them. The appellant threw it on top of a shed and they set off. En route they were stopped by a police patrol and taken into custody.

10. At trial the appellant rather belatedly challenged through his counsel the admissibility of the answers given by him to questioning on 22 January 2001. Although these were not incriminating, it was claimed on his behalf that they were false and that he had made these untrue denials because he had been beaten by police officers. The judge held a voir dire, at the conclusion of which he held that the appellant had not been assaulted and that his answers were properly taken and should be admitted.

11. The appellant gave an unsworn statement from the dock, in which he averred that he had been severely beaten on 22 January 2001 by the police, who threatened to kill him, in consequence of which he had given untrue answers. He said that he had in fact known Miss Barnes for some six weeks before 18 November and that they had had sex together earlier on that evening. He denied ever being at Folly Point and denied that he had murdered or raped Miss Barnes. He did not at any point in his statement refer to Mr Wright's evidence or deny its contents.

12. The appellant appealed to the Court of Appeal on two main grounds. They centred round suggestions that Leon Wright was an accomplice and had an interest to serve, and accordingly the jury should have been warned of this and directed that corroboration of his evidence was required. Neither of these grounds has been advanced before the Board. The arguments in support of the appeal have been based upon submissions that the judge misdirected the jury in respect of joint enterprise and the elements of capital murder. Their Lordships will therefore examine the judge's directions in the light of these contentions.

13. At the time of the appellant's conviction the provisions governing capital murder were contained in section 2 of the Offences against the Person Act, the material parts of which read as follows:

> **"2.** – (1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say –
>
> * * * * *
>
> (*d*) any murder committed by a person in the course or furtherance of –

(i) robbery;

* * * * *

(iv) any sexual offence.

* * * * *

(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) Murder not falling within subsection (1) is non-capital murder."

Section 3 provided for a mandatory death sentence for capital murder, but following the decision of the Board in *Watson v The Queen* [2004] UKPC 34, [2005] 1 AC 472 the Jamaican legislature passed the Offences against the Person (Amendment) Act 2005 ("the 2005 Act"), whereby the death sentence is no longer mandatory but lies in the discretion of the sentencing judge. 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.

14. It appears from the judge's summing-up that the main thrust of the case presented at trial for the Crown was that the appellant was guilty of murder as a participant in a joint enterprise, which he contemplated would extend as far as killing or the infliction of grievous bodily harm. In the judge's directions, however, he also put the case on the basis that the appellant himself was the man who cut the victim's throat, which would make consideration of joint enterprise superfluous. Their Lordships consider that the evidence was such that the judge was entitled to leave this basis to the jury, though they consider that when constructing his directions he could have distinguished with a greater degree of clarity between the two possible bases of guilt.

15. Following his preliminary remarks the judge defined the elements of the crime of murder. Before he did so he referred to the description of the charge in the indictment as capital murder and stated (Record, p 310) that the prosecution case was that the killing was as a result of the rape and was done to avoid subsequent detection, which made it murder committed in the course or furtherance of a sexual offence. One of the grounds on which counsel for the appellant relied was that the judge did not elaborate any further on the meaning of the phrase "in the course or furtherance". He was clearly correct, however, in stating that if the murder was done to avoid detection it could be regarded as having been committed in the course or furtherance of the crime of rape. In these circumstances it was not a material defect in his directions that he did not dilate any further upon the meaning of the phrase, since this was a sustainable ground upon which to base a verdict of capital murder and there was evidence upon which such a finding could properly be made.

16. The judge went on to give fairly detailed directions to the jury on the meaning of a joint enterprise and the matters which the Crown required to prove. Mr Tomlinson QC for the appellant made a number of trenchant criticisms of his directions, which he submitted were confusing and fundamentally flawed. Mr Guthrie QC for the Crown was prepared to accept that in places the directions were not very clear, but submitted that the case for capital murder was clearly made out and sufficiently clearly put before the jury. Their Lordships agree that the directions on joint enterprise contain a number of serious infirmities, and if the validity of the conviction depended upon a finding of guilt on that basis the verdict could not stand. For the reasons which they will set out, however, they consider that the Crown case must have been accepted by the jury on the basis that the appellant himself was the killer of Miss Barnes. They therefore do not propose to carry out a further examination of the passages in the summing up in which the judge discussed the issue of a joint enterprise or to discuss the authorities on this topic to which they were referred by counsel in the course of their submissions.

17. Their reasons for taking this course centre upon the fact that the judge consistently in his directions instructed the jury that only the actual killer could be held guilty of capital murder. At p 316 of the Record he stated that on the evidence of Mr Dewey alone the jury might find a common design to kill, but –

> "he may not be the person who did the killing, so as to have it amount to capital murder, because it's only the person himself who did the killing who would be guilty of capital murder."

The judge went on then to say that if they considered the testimony of Mr Leon Wright they might infer that the appellant in talking to him was describing the killing at Folly Point, that he was one of the two assailants, that the girl that called out by some name referred to him and because of that he had slashed her throat. He stated at p 317 that if they found those facts he was guilty of capital murder, as being the man who raped and himself slashed the throat of the girl. Again, at p 318 he said:

> " ... if it is he in fact who did the killing, he is guilty of capital murder."

He returned to the subject again at the end of his directions, when he said (Record, p 360):

> "But, if you find that he was with a person, the person who depending on what you make of Leon Wright's story, who told Leon Wright, the narrative that Leon Wright gave, describes the defendant – of the defendant's participation to the extent of slashing the girl's throat, it is open to you to find the ingredients of the murder, in furtherance to the sexual offence of rape, amounts to capital murder" (Punctuation corrected)

Mr Tomlinson pointed to a passage in the judge's final directions (Record, p 363) in which he said:

> "You will have to find that there was sex of her, rape followed by a killing and those were the circumstances that you find before you say guilty or not guilty of capital murder."

He submitted that this could have been taken by the jury to mean that rape of the victim followed by a killing by either man would form a sufficient foundation for a verdict of capital murder. Their Lordships consider, however, that in the context of his previous directions the judge was referring to a killing by the appellant himself and that the jury would have so understood this passage.

18. The jury were accordingly left with the clear direction – which was of course unduly favourable to the defence – that only the direct killing by the appellant himself would suffice for a verdict of capital murder. After an absence of merely fourteen minutes they returned with a unanimous verdict of guilty of capital murder. Their Lordships consider that it is plain that on the direction which they received they must have reached this verdict on the basis that the appellant himself had killed Miss Barnes. Consideration of the joint enterprise was therefore immaterial, and the undeniable imperfections in the judge's directions on that issue do not affect the validity of the verdict.

19. Mr Tomlinson advanced one further argument on the evidence, that Leon Wright's evidence was unsatisfactory and inconsistent with that of Eric Dewey, so that it should not properly have been relied on by the jury. Their Lordships do not consider that there is any substance in this point. If there were weaknesses in Mr Wright's evidence, the jury were nevertheless entitled to rely on its main thrust, that the appellant had admitted to him that he cut the victim's throat. There may have been differences in detail between the account of Mr Dewey and that retailed by the appellant to Mr Wright, but the essence of the two accounts was consistent and the jury was entitled to take the view that they can stand together.

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