Privy Council Appeal No.30 of 2005

Steven Grant *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 16th January 2006

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hutton
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

*[Delivered by **Lord Bingham of Cornhill**]*

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1. At about 4.30 am on 18 April 1999 the appellant shot and killed Kymani Bailey, a 17 year-old student, in a car park off Knutsford Boulevard in Kingston. He was charged with murder, tried before McIntosh J and a jury and, on 28 February 2003, convicted. At the trial, despite defence objections, the unsworn written statement of an absent witness, Xavier Newton-Bryant, was admitted against the appellant, on the application of the Crown, under section 31D of the Evidence Act. The unsworn written statement of another absent witness, Michael Kinglock, was not admitted. On appeal against conviction, the appellant challenged the constitutionality of section 31D and also the trial judge's exercise of discretion to admit the evidence of Bryant, and to admit the evidence of Bryant without that of Kinglock. The Court of Appeal (Bingham and Walker JJA, and Harrison

JA(Ag)) rejected both challenges in reasoned judgments delivered on 12 July 2004. Before the Board, both challenges have been repeated. They are resisted by the Director of Public Prosecutions, and the Attorney General has intervened (as he did in the Court of Appeal) to address the constitutional challenge. The appeal raises important questions on the constitutionality of section 31D and exercise of the judicial power to admit unsworn written statements of absent witnesses.

The facts

2. The area of factual dispute at the trial was, and remains, very limited. Most of the salient facts relied on by the Crown were common ground. The appellant was the licensed owner of a 9 mm Sig Sauer semi-automatic pistol. During the incident early on the morning of 18 April he fired 13 shots which struck the deceased. Two of those shots entered his body from the front, striking the thigh and the scrotum. Those wounds, if treated, were not of themselves life-threatening. Eleven of the shots entered the body of the deceased through different parts of his back, when he had his back towards the appellant. The firing of each shot required a separate pull on the trigger of 1.5 kilograms. Hollow point bullets were used. The cause of death was multiple gunshot wounds. The deceased died in a matter of minutes. The issue for the jury's decision was whether, as the appellant contended, he had fired these shots in lawful defence of himself. That required the jury to address three questions. First, before and at the time of the shooting, was the appellant subject to a threat or attack, or what he perceived to be such? Secondly, if so, was the threat or attack such, or perceived to be such, as to justify the use of reasonable force in self-defence? Thirdly, if so, did the force used by the appellant go beyond what could in all the circumstances, making allowance for the emergency of the moment, be justified? It was of course for the Crown to rebut this defence, if properly raised, beyond reasonable doubt and not for the defence to make it good. The partial defence of provocation was not advanced by the defence, but the trial judge correctly treated it as potentially raised by the evidence, and properly left it to the jury.

3. The appellant drove straight from the car park where the shooting occurred to the Half-way Tree Police Station in St Andrew where he handed over his pistol and volunteered a statement, which was recorded. In this statement the appellant said that at about 4.15 am he left a bar to return to his van in the car park. As he approached the van he stopped to urinate against

a wall. He was zipping up his trousers and heard someone behind him say "Pussy hole, don't move". He turned round and saw a man pointing a gun at him. The man was to his right. He pulled out his fully-loaded firearm from his waistband, pointed it at the man and began to squeeze the trigger. He did not know how many shots he fired or if any caught the man. The man ran to the edge of the wall and continued to the other side, where he was out of the appellant's sight. The appellant followed the man and looked around the wall where the man, still holding the gun, was facing him. The appellant pointed the gun in the man's direction and squeezed the trigger again. He did not know how many shots were fired, or if any caught the man. After firing this second time, the appellant noticed a group of people running from Knutsford Boulevard towards where he was. To avoid the crowd, he walked to his van and drove to the police station. He had never seen the other man before, and he would not recognise him again. It was dark where the appellant was standing, but moderately lighted where the man stood. His attention had been drawn to the gun in the man's hand, and he had not noticed anything else.

The trial

4. At trial, the Crown called only one witness who saw any part of the shooting incident. This was Constable Wynter, who testified that he was along Knutsford Boulevard between 3.30 and 4.30 am on 18 April, near the Asylum Nightclub, off duty. He heard 5 or 6 of what he described as explosions sounding like gunshots, coming from the direction of a car park. He walked to see what was happening, and while doing so heard another set of explosions, sounding like those he had heard before and coming from the same direction. He started to run to the car park which was surrounded by buildings, one of them the Jamaica Football Federation building. There were vehicles in the car park, and he saw a man in a crouching position on the piazza of the Federation building, with his arms around the mid section of his body and slightly bending forward. After that he heard no explosions. He then heard a voice behind him, and noticed a person who went to a dump truck and drove off. Wynter made a call to the police by radio, returned to his car and tried without success to follow the truck which had driven off. On returning to the car park, he saw the man he had earlier seen in a crouching position lying face downwards, with gunshot wounds to his back, gasping. He saw nothing in the man's hand. Other police officers were called to the scene. They saw the deceased lying on the ground wounded.

They found no weapon, and interviewed no potential witnesses. None of these officers witnessed the shooting incident.

5. Two statements had, however, been made to the police by witnesses who said they had seen the incident or part of it. The first statement was made by Xavier Newton-Bryant, a 40 year-old security officer and former police officer, on 30 April 1999. He said that he was on duty on the ground floor of the Football Federation building when he heard an explosion which he recognised as a gunshot. He became very alert. Six to eight seconds later he heard six more gunshot explosions in rapid succession. He went to the window, moved the blinds and looked out. He saw a man come into view from his left. He was staggering and holding his mid-section. He then turned on the side walk and fell on his face in front of the building about five or six feet from where Bryant was standing. He then saw another man coming towards the man on the ground with a semi-automatic pistol in his hand. He was standing about five feet from the injured man when he pointed the gun at the man on the ground and fired seven more shots in rapid succession. The man was still lying on his face. Bryant telephoned the police and reported what he had seen. On returning to the window he did not see the man who had fired the shots, but the other man was still lying on the ground. He did not see the man who was shot with a gun, and did not see anyone pick up a gun from the ground (although onlookers were picking up spent shells and bullets).

6. Michael Kinglock, a 32 year-old driver and night watchman, gave a written statement to the police on 7 May 1999. He said that on the morning of 18 April he was on duty in one of the buildings overlooking the car park. At about 4.15 am he went on to the third floor balcony to look over the car park, where there was little activity. He then saw a man walking towards the Football Federation building. The man stopped at the side of the building and urinated. He then saw another man walk up to the man who was urinating and heard him say "Pussy hole, don't move", holding his hand in a position pointing to the man who was urinating. The latter appeared as if he was pulling up the zip on his trousers, but came up with a gun instead and fired several shots in the direction of the man who had walked up behind him. That man turned around and ran. Kinglock saw something dropped, but did not know who it fell from. He saw several persons running to the car park. The man who had fired the shots ran in the same direction as the other man. Kinglock then saw a white van which reversed and sped away. From Kinglock's position he could not see what further transpired at the front of

the Football Federation building, and he never saw either of them again after they ran from his sight. Only once did he hear several shots fired from the gun held by the man who was urinating.

7. Before the preliminary inquiry was held in this case, the Crown gave notice to the defence that it intended to put in evidence at the inquiry the statements of Bryant and Kinglock, of which copies were attached. Bryant, and possibly Kinglock also, was warned to attend the inquiry, but neither of them did so and it seems that the statements were not read to the court at that stage. The names of these witnesses were not included on the back of the indictment. After the inquiry and before the trial, the Crown again gave the defence a notice of its intention to adduce the statements of Bryant and Kinglock. The trial began on 18 February 2003, and prosecuting counsel called an identifying witness and Constable Wynter. She then, on the following day, applied to adduce the written evidence of several witnesses under section 31D of the Evidence Act. Relevantly to this appeal, she applied to adduce the statement of Bryant, but not that of Kinglock. Mr Phipps QC, then representing the appellant, opposed the application on a number of grounds. He contended that it was unfair to the appellant to admit the statement. He complained that the Crown were electing to call one of two eye-witnesses, but not the other who supported the defence. He contended that the court had an overriding discretion to exclude relevant and admissible evidence if it operated unfairly to a defendant. He suggested that if the application were allowed the appellant would be tried on a piece of paper in breach of his constitutional right. He came close to suggesting that section 31D was incompatible with the Constitution, but the judge indicated that her court was not the proper forum for such a submission, and counsel accepted that indication. Counsel for the Crown accepted that notices to adduce would ordinarily indicate that these were witnesses on whom the prosecution intended to rely, but submitted that it was not bound to call witnesses whose names did not appear on the back of the indictment. Having heard evidence and argument, the judge expressed herself satisfied that the statement of Bryant ought to be read in evidence, "as the prosecution has complied with the requirements of the law, the Evidence Act in which the Evidence Amendment Act asks that all necessary reasonable steps be taken to secure the attendance of a witness". She found that the requirements of the law had been met. In due course Bryant's statement was produced, made an exhibit and placed before the jury.

8. The appellant chose to give evidence on oath at the trial. His evidence was to very much the same effect as the statement he had made to the police immediately after the incident. He said he had fired first to protect himself, and then to make his way clear to go to his vehicle. Cross-examined, he agreed that he had not felt himself to be in danger when the deceased had been running away, but rejected the suggestions put to him that he had not been firing in defence of his life, that he had stood over the deceased and fired several shots into his back when he was on the ground, that he was not speaking the truth about the events of the night and that the deceased had never had a gun.

9. In the course of her summing-up to the jury, the judge read the material parts of Bryant's statement. Before doing so, she told the jury that it was not sworn evidence, or evidence, but a statement. Bryant had not gone into the witness box, testified on oath or been cross-examined. He had given a statement to the police, and the jury were to read it and attach such weight to it as they thought fit. She continued:

> "You can look at it in the context of the other evidence that you have heard in the case and see what you make of it. See what you accept of it, what you reject but you must not look at it in a vacuum. You must look at it in the context of the case and attach to it such weight as you . . . think fit, bearing in mind that you did not have the benefit of seeing Mr Xavier Newton-Bryant. You did not have the benefit of hearing him cross-examined, so you will have [to] treat it in the way I have told. Attach such weight as you see fit to the statement."

The constitutionality of section 31D

10. The Jamaican Evidence Act was passed in 1843 and amended thereafter from time to time. Relevantly for present purposes, it was amended by the Evidence (Amendment) Act 1995, which inserted a new Part 1A entitled "Hearsay and Computer-generated Evidence". Part 1A comprises twelve sections, numbered 31A to 31L, the general scope of which is indicated by the title. Section 31D provides:

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as

evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person—

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

Section 31G has no bearing on the present case. Heads (a), (b), (c) and (d) correspond closely with, and appear to be modelled on, section 23(2)(a), (b) and (c) of the Criminal Justice Act 1988 applicable in England and Wales. Section 31D(e), addressed to situations where a witness is kept away by fear, had no counterpart in the 1988 Act but is to the same effect as section 116(2)(e) of the Criminal Justice Act 2003. Section 31J of the 1995 Act gives new rights to a person against whom a statement is admitted under section 31D. It provides (so far as relevant):

"31J—(1) Where in any proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence pursuant to section 31D, 31E, 31F or 31G—

(a) any evidence which, if that person had been so called would have been admissible as relevant to his credibility as a witness, shall be admissible in the proceedings for that purpose;

(b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the party cross-examining him;

(c) evidence tending to prove that, whether before or after he made the statement, that person made

> (whether orally or in a document or otherwise) another statement inconsistent therewith, shall be admissible for the purpose of showing that the person has contradicted himself."

Section 31L declares that in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value.

11. The plain purpose of section 31D is to permit the admission of an unsworn statement made out of court, where the statutory conditions are met and subject to the exercise of any relevant judicial discretion when, but for the section, the statement would have been inadmissible as hearsay. Therein, submits Lord Gifford QC for the appellant, lies its constitutional vice. He points to section 2 of the Constitution as establishing its supremacy: unless the Constitution is amended in accordance with its provisions, it shall prevail over any law inconsistent with it and the other law shall, to the extent of the inconsistency, be void. The provisions of the Constitution with which section 31D is inconsistent are, Lord Gifford submits, to be found in Chapter III, the fundamental rights and freedoms chapter of the Constitution. The chapter opens with section 13 which, so far as material, provides:

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) . . . . the protection of the law;
>
> . . . .
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The subsequent provisions of the chapter include section 20, which in subsection (6) provides:

> "(6) Every person who is charged with a criminal offence—
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> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
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> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
>
> (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language."

The appellant relies in particular on the right to examine in person or by his legal representative the witnesses called by the prosecution before any court. He does not contend that section 20(6)(d) is incapable of amendment. But he points out that section 49 of the Constitution imposes special conditions on legislation amending section 20, and those conditions were not met when the 1995 Act was enacted. Thus if, as the appellant submits, section 31D of the 1995 Act amended section 20(6)(d) of the Constitution, it is to the extent of the amendment invalid.

12. In submitting that section 31D of the 1995 Act amended section 20(6)(d) of the Constitution, counsel relies on the old and fundamental common law principle, applicable in Jamaica as in Britain and elsewhere, that the evidence against the accused at a criminal trial should be given by witnesses who attend court to give evidence on oath, who can be cross-examined by or on behalf of the accused and whose demeanour under

questioning can be assessed by the tribunal charged to evaluate the reliability of their evidence. Section 31D of the 1995 Act, he says, undermines that rule.

13. Counsel for the appellant bases this argument, first and foremost, on the language of section 20(6)(d) which, he contends, clearly and unambiguously expresses the familiar common law rule. But he relies on a number of other sources also. First, he relies on the very similar right of a criminal defendant under article 14(3)(e) of the International Covenant on Civil and Political Rights 1966: "To examine, or have examined, the witnesses against him . . . .". Secondly, he relies on the right, also very similar, of a criminal defendant under article 6(3)(d) of the European Convention on Human Rights: "to examine or have examined witnesses against him". He also relies on the substantial Strasbourg jurisprudence which considers and applies that provision, as showing that the fairness of a trial is compromised if the defendant or his lawyers do not, at some stage of the proceedings, have the opportunity to question, in person, those giving evidence against the defendant. Thirdly, he relies on the sixth amendment to the Constitution of the United States, guaranteeing to a criminal defendant the right "to be confronted with the witnesses against him". He points to the long and famous historical pedigree of that provision, recently expounded by the US Supreme Court in *Crawford v Washington* 541 US 36 (2004). And he relies, fourthly, on strong statements by courts of high authority around the world: see, for example, *Teper v The Queen* [1952] AC 480, 486; *Klink v Regional Court Magistrate* (1996) 3 LRC 667, 675; *R v Starr* [2000] SCC 40, [2000] 2 SCR 144, para 159.

14. The Board would not wish to question the general validity of the principle for which the appellant argues. The evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence, and should continue to be so regarded. Any departure from that practice must be justified. But for a number of reasons, in large measure those advanced for the Attorney General and accepted by the Court of Appeal, the Board cannot conclude that section 31D of the Evidence Act is inconsistent with section 20(6)(d) of the Constitution.

15. It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the

burden on a party seeking to prove invalidity is a heavy one: *Mootoo v Attorney-General of Trinidad and Tobago* [1979] 1 WLR 1334, 1338-1339. Thus the appellant has a difficult task.

16. While it is true, secondly, that a general common law rule against the admission of hearsay evidence has been recognised for some centuries, it is not a rule to which there were no exceptions, either in England or in Jamaica before it became independent and adopted its Constitution in 1962. Common law exceptions were recognised in both jurisdictions in the cases of, for instance, dying declarations and statements forming part of the *res gestae*. Statutory exceptions were established in relation, for example, to entries in bankers' books (section 33 of the Evidence Act, as amended). Under Part II of the Justices of the Peace Jurisdiction Act it was permissible for a deposition sworn before a magistrate, in certain specified circumstances and subject to procedural conditions designed to protect the interests of the defendant, to be given in evidence at a trial despite the absence of a deponent. It would, in the opinion of the Board, be wrong to construe sections 13 and 20(6)(d) of the Constitution as guaranteeing that there would not (without a constitutional amendment) be any further statutory exception to the hearsay rule, applicable in criminal proceedings, but it is of course clear that any new exception must not compromise the fairness of the proceedings which section 20 is designed to protect.

17. Thirdly, the Board readily accepts the relevance of the Strasbourg jurisprudence on article 6(3) of the European Convention, since that Convention applied to Jamaica before it became independent and the close textual affinity between article 6(3)(d) and section 20(6)(d) makes it appropriate to pay heed to authority on the one when considering the meaning and effect of the other. Both parties acknowledged the persuasive authority of the Strasbourg jurisprudence, as did the Court of Appeal, and rightly so. That jurisprudence undoubtedly gives general support to the appellant's argument on the need for prosecution witnesses to give evidence in court, and expose themselves to cross-examination by a defendant, at some stage of the proceedings. But the jurisprudence does not support the full breadth of the appellant's argument, for three main reasons:

(1) The Strasbourg court has time and again insisted that the admissibility of evidence is governed by national law and that its sole concern is to assess the overall fairness of the criminal proceedings in question: see, for example, *Kostovski v Netherlands* (1989) 12 EHRR 434, para 39; *Windisch v*

Austria (1990) 13 EHRR 281, para 25; *Lüdi v Switzerland* (1992) 15 EHRR 173, para 43; *Saidi v France* (1993) 17 EHRR 251, para 43; *Doorson v Netherlands* (1996) 22 EHRR 330, para 67; *PS v Germany* (2001) 36 EHRR 1139, para 19. The specific rights set out in article 6(3) of the European Convention (and thus, by analogy, section 20(6) of the Constitution) are "specific aspects of the right to a fair trial" (*Kostovski v Netherlands*, above, para 39) or "particular aspects of the right to a fair trial" (*Doorson v Netherlands*, above, para 66), and the right to a fair trial can never be compromised in any circumstances. But the constituent rights in article 6 and section 20(6) are not themselves absolute: *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681, 704. The Strasbourg court has been astute to avoid treating the specific rights set out in article 6 as laying down rules from which no derogation or deviation is possible in any circumstances. What matters is the fairness of the proceedings as a whole.

(2) Just as section 13 of the Constitution recognises that individual rights cannot be enjoyed without regard to the rights of others, so the Strasbourg court has recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, and has described the search for that balance as inherent in the whole Convention: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, para 52; *Brown v Stott*, above, p 704. Thus the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must also be respected. An example, not based on the present facts, illustrates the point. In Jamaica, as in England and Wales, as already noted, the statement of a witness may be adduced in evidence if he is shown to have absented himself through fear of the consequences to him if he gives evidence. In the case of a prosecution witness, such fear is likely to have been induced by or on behalf of a defendant wishing to prevent adverse evidence being given. As observed by Potter LJ in *R v M(KJ)* [2003] EWCA Crim 357, [2003] 2 Cr App R 322, para 59, echoed by Waller LJ in *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257, paras 36, 52-53, it would be intolerable if a defendant shown to have acted in such a way could rely on his human rights under article 6 (or section 20) to prevent the admission of hearsay evidence. Where a witness is unavailable to give evidence in person because he is dead, or too ill to attend, or abroad, or cannot be traced, the argument for admitting hearsay evidence is less irresistible, but there may still be a

compelling argument for admitting it, provided always that its admission does not place the defendant at an unfair disadvantage.

(3) While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant have been safeguarded. For reasons given in paragraph 21 below, the law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence.

18. Fourthly, the right to legal representation in section 20(6)(c) of the Constitution was held by the Board in *Robinson v The Queen* [1985] AC 956 to be not an absolute right, a decision followed in *Dunkley v The Queen* [1995] 1 AC 419 and, more recently, in *Jahree v The State* [2005] UKPC 7, [2005] 1 WLR 1952.

19. Fifthly, it is clear that the English courts have not interpreted article 6(3)(d) of the European Convention as imposing an absolute prohibition on the admission of hearsay evidence against criminal defendants: *R v D* [2002] EWCA Crim 990, [2003] QB 90, para 41; *R v M(KJ)*, above, para 60; *R v Sellick*, above, paras 52-56; *R v Al-Khawaja* [2005] EWCA Crim 2697, para 26. The Board would endorse that interpretation.

20. Sixthly, the right to confrontation expressed in the sixth amendment to the US Constitution, for all its interest to legal antiquarians, is not matched by any corresponding requirement in English law: *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393, para 14.

21. Lastly, and very importantly, the law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence when it is sought to admit a hearsay statement:

(1) Section 31D prescribes with clarity the conditions to be met before application may be made. Relevant to this case is the requirement that all reasonable steps must have been taken to secure the attendance of the witness. The Court of Appeal was right to stress in *R v Michael Barrett*

(Appeal No. 76/97, unreported, 31 July 1998) that the section refers to all reasonable steps.

(2) Section 31J gives the defence an enhanced power to challenge the credibility of the author of a hearsay statement.

(3) Section 31L acknowledges the discretion of the court to exclude evidence if it judges that the prejudicial effect of the evidence outweighs its probative value. In *R v Sang* [1980] AC 402, some members of the House of Lords (notably Lord Diplock at pp 434, 437 and Viscount Dilhorne (pp 441-442)) interpreted this discretion narrowly, and in *Scott v The Queen* [1989] AC 1242, 1256-1257, the Board appears to have accepted that reading. It is not, however, clear that the majority in *R v Sang* favoured a similarly narrow interpretation (see Lord Salmon at pp 444-445, Lord Fraser of Tullybelton at p 449 and Lord Scarman at pp 453, 454, 457). In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. Such a discretion has been recognised by the Court of Appeal in *R v Donald White* (1975) 24 WIR 305, 309, and *R v Michael Barrett,* above. It has been recognised by the Board in *Scott v The Queen,* above, pp 1258-1259 and *Henriques v The Queen* [1991] 1 WLR 242, 247: both these appeals concerned the admission of depositions, but the need for a judicial discretion to exclude is even greater when the evidence in question has never been given on oath at all. In England and Wales, the discretion has been given statutory force: see section 25(1) of the Criminal Justice Act 1988; *R v Lockley* [1995] 2 Cr App R 554, 559-560; *R v Gokal* [1997] 2 Cr App R 266, 273; *R v Arnold* [2004] EWCA Crim 1293, para 30. Conscientiously exercised, this discretion affords the defendant an important safeguard.

(4) The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: see, for example, *Scott v The Queen,* above, p 1259; *Henriques v The Queen,* above, p 247. It is not correct to say that a statement admitted under section 31D is not evidence, since it is. It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury

have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may.

22. For these reasons the Board concludes that section 31D of the Evidence Act does not infringe the appellant's right under section 20(6)(d) of the Constitution. It follows that the special procedure provided by section 49 of the Constitution was not called for. In agreement with the Court of Appeal, and for largely the same reasons, the Board would dismiss the appellant's constitutional challenge.

The exercise of discretion

23. Lord Gifford challenged the finding that all reasonable steps had been taken to find Bryant. But the judge, having heard evidence, concluded that they had, and the Court of Appeal endorsed that conclusion. It would not be appropriate for the Board to review that factual conclusion. Thus it must be accepted that Bryant's evidence satisfied the condition of admissibility under section 31D. Had this statement stood alone, an application to admit it would have been very hard to resist, since it is generally desirable to provide the jury with all admissible evidence bearing on the important and difficult matters they have to decide (see *Scott v The Queen*, above, at pp 1258-1259).

24. But the statement of Bryant did not stand alone. There was also the statement of Kinglock. That statement was highly pertinent to the jury's deliberations, since he was the only independent witness claiming to have seen the beginning of the fatal incident, and the only independent witness

whose evidence bore on the answer to the first question the jury had to resolve (see para 3 above). That was a very significant question, since if answered adversely to the appellant his defence necessarily failed. But Kinglock's statement in large measure corroborated the appellant's account, given to the police at once and repeated in evidence, of how the incident began. Thus the question arises whether it was fair to admit the statement of Bryant, apparently damning for the appellant, and leave the jury ignorant of Kinglock's statement which was much more favourable to him. The prosecution's notice to adduce assumed that the section 31D conditions were satisfied in Kinglock's case also, and the contrary has never been suggested.

25. The extent of the duty on a prosecutor to call witnesses named on the back of an indictment was fully reviewed in *R v Russell-Jones* [1995] 3 All ER 239. The principles there summarised were not criticised in argument, and provide authoritative guidance. That summary need not be repeated. Plainly the prosecutor has a discretion. It is a discretion to be exercised by the prosecutor acting as a minister of justice, in the interests of fairness. Thus the prosecutor need not call witnesses who are incapable of belief, or whose evidence is pure repetition (*R v Haringey Justices, Ex p Director of Public Prosecutions* [1995] QB 351, 356), or whose evidence is not material (*R v Harris* [1927] 2 KB 587, 590, *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 307-308). The general rule, however, was that stated in *R v Russell-Jones*, above, at p 245:

> "The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say 'incredible', then his evidence cannot help the

> jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called."

In the present case the names of Bryant and Kinglock did not appear on the back of the indictment, but their inclusion in notices to adduce made clear the Crown's intention to rely on their evidence; and there has never been any suggestion that either was regarded as incapable of belief or immaterial.

26. It is, in the Board's opinion, plain that fairness required the admission of Kinglock's statement. If admitted, it might not have been understood to exonerate the appellant. The proliferation of shots to the back of the deceased was a formidable problem for him to overcome. The jury might have convicted anyway, and been entitled to do so. But the jury should have known how, according to Kinglock, in large part corroborating the appellant, the incident began. The appellant was entitled to have his case assessed, and his own evidence evaluated, in the light of all the available evidence. The Board feels bound to conclude that prosecuting counsel mistook the nature and extent of her prosecutorial discretion. The Board also feels bound to conclude that in the difficult position in which she unexpectedly found herself the trial judge failed to discharge her duty to ensure the overall fairness of the proceedings. She could have invited prosecuting counsel to adduce Kinglock's statement in evidence. Had that invitation, improbably, been declined, the judge could, on grounds of fairness, have declined to admit Bryant's statement unless Kinglock's statement were also admitted or could, in the last resort, have introduced the statement of Kinglock herself (*R v Oliva* [1965] 1 WLR 1028, 1035-1036). As it was, she did not allude to Kinglock or, apparently, acknowledge any discretion to exclude the evidence of Bryant. In the particular circumstances of this case it is not an answer to say that defence counsel could have adduced the statement of Kinglock. The Crown having given the defence notice of its intention to adduce the statement of Kinglock as well as the statement of Bryant at the trial, defence counsel appears to have been taken by surprise when on the second day of the trial prosecuting counsel applied to adduce the statement of Bryant, but not that of Kinglock. A further consideration, whilst not decisive on the point, is that it appears that, anxious to protect the appellant's interest, defence counsel did not wish to weaken what he regarded, understandably although in the Board's view mistakenly, as a sound constitutional objection to section 31D. It was, however, the responsibility of prosecuting counsel and the trial judge to ensure that the proceedings were fair, and they failed to do so. This failure was compounded by an inadequate direction on Bryant's

evidence. The jury were given no encouragement to scrutinise it with particular care, and were not alerted to apparent discrepancies between it and the evidence of Constable Wynter (or, of course, the statement of Kinglock).

27. This second ground of challenge succeeds. It would not be appropriate to apply the proviso in a case where potentially significant evidence was never before the jury. The Board will humbly advise Her Majesty that the appeal should be allowed, the appellant's conviction quashed and the case remitted to the Court of Appeal for it to decide whether, in all the circumstances, there should be a retrial. Written submissions on costs before the Board are invited within 28 days.