Privy Council Appeal No 103 of 2006

Gerald Muirhead *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 28th July 2008

Present at the hearing:-

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Hoffmann**]*

1. On the afternoon of 27 August 1997 Carlos Gunn was in his house in McKoy Lane, Kingston, when a man opened the door, drew a gun from his pocket and shot him dead. The house consisted of a single room with two beds in which Carlos lived with his common law wife Nuncia Webb, their three children and her daughter by another man. At the time of the shooting Nuncia was out but the children and two little cousins were with Carlos in the room.

2. Shortly after the shooting, Detective Corporal Nelson from Hunts Bay CIB office went to the house and saw the body. He spoke to Orando Gunn, the eldest of the couple's children, who was then aged 7. Orando told him that the killer was a young man known in the local community as Zaza. There does not appear to have been any other identifying witness. The police tried to find Zaza but he had disappeared.

3. Zaza's official name is Gerald Muirhead and he is the appellant. He was about 17 at the time and lived with his parents Alty and Sue at the other end of McKoy Lane. He and his parents were known to Nuncia Webb's mother, Gloria Gray, who lived some little distance away and to whom the children fled after the murder. Orando said that he had never spoken to Zaza but had seen him regularly on his way from school and knew him by sight. His appearance is described by his former solicitor as "quite distinctive...very dark black and unusually short, with a long body and very short legs making him look disproportionate...stocky in build." DC Nelson made a note of the name in his notebook but does not appear to have asked Orando for a description of Zaza or taken a formal written statement.

4. On the morning of 4 August 1998, nearly a year after the murder, some police officers brought the appellant and a number of men into Hunts Bay police station in connection with an unrelated matter. One of the policemen pointed the appellant out to DC Nelson, who told him that he had been looking for him in connection with the murder of Carlos Gunn. According to DC Nelson's evidence at the trial, the appellant denied that he was called Zaza and said that he had nothing to do with the murder.

5. Three days later the appellant was put on an identification parade and identified by Orando Gunn. He was then charged with the murder.

6. On 17 November 1999 the appellant went on trial before Cooke J in the Home Circuit Court but, after a trial lasting two days, the jury were unable to agree. He was retried before Clarke J, starting on 4 May 2000, and this time he was convicted. The judge described the crime as a vicious murder and sentenced him to imprisonment for life, specifying that he should not be eligible for parole until he had served 25 years. At both trials the appellant was represented by Mr Eric Frater, a very experienced attorney whom their Lordships understand to have since retired from practice, and Miss Althea McBean, a member of his firm.

7. His counsel before the Court of Appeal was Miss Janet Nosworthy, who was called to the Bar by Gray's Inn in 1972 and has been in practice since 1973. In the course of argument she abandoned the criticisms she

had originally intended to make of conduct of the identity parade and the summing up. She submitted instead that, having regard to the fact that Orando was very young, his identification was uncorroborated and there were some inconsistencies between his evidence at the first and second trials, the verdict was unsafe. The Court of Appeal dismissed the appeal on 3 July 2001.

8. A petition for leave to appeal to the Privy Council was presented on 7 December 2006 and leave was granted on 14 December 2006.

9. At the hearing before the Board, Mr Birnbaum QC, on behalf of the appellant, argued thirteen grounds of appeal. On nine of these the Board did not find it necessary to ask for submissions from Mr Guthrie QC, who appeared for the Crown. Their Lordships will state their reasons for rejecting these submissions.

10. The first was that there were discrepancies between Orando's evidence at the first and second trials. For example, at the first trial he said that when Zaza came to the door, Carlos had peeped through a hole to see who was there. He did not mention this at the second trial. But he was asked no question at the second trial likely to elicit this detail and no significance can be attached to its omission. At the first trial he had mentioned only late in his evidence that he had seen the gunman's face while at the second trial he mentioned this early on. It was not entirely clear from his evidence exactly how many children were in the room.

11. More seriously, it was put to him that the killer had been one Lincoln, who was now dead. At the first trial Orando agreed that he knew Lincoln. At the second trial he denied that he knew him. Mr Frater made a good deal of this inconsistency in cross-examination at the second trial. Their Lordships consider that the question of whether the inconsistencies cast doubt upon Orando's credibility or were something which might be expected of a young child trying to recall what had happened on such a traumatic occasion was very fairly left to the jury in the summing up. The jury obviously did not think that it affected his veracity.

12. Secondly, Mr Birnbaum complained that the police investigation had been incompetent and inadequate. Other children had been present in the house but only Orando was called. He had not been asked to give a description of the killer or make a statement. DC Nelson should not have waited until after the appellant had been arrested before taking statements from Orando and his grandmother. The police had also taken far too long to find the appellant and the delay had prejudiced his defence.

13. None of these matters was put to DC Nelson or otherwise investigated at the trial. The police may have had perfectly good explanations; for example, apart from Orando's half-sister, all the other children in the house were even younger than he.

14. Thirdly, the appellant says he was particularly prejudiced by the delay in charging him because it weakened his alibi, which was that he had been at the house of a woman named Alma Seymour. Ms Seymour had known him for some years because he would come to her neighbourhood on Sunday mornings to sell calaloo. She would ask him into the house and occasionally give him clothes and money. By the time of the first trial, however, she could not remember whether the appellant had been at her house on the day in question. She was therefore not called to give evidence in support of the alibi.

15. It must however be said that the police can hardly be blamed for not investigating his alleged alibi at an earlier stage. It took some time to emerge. At the identity parade the appellant had given the officer in charge, Sergeant Verta Thomas, a telephone number which she understood to be that of his mother. In fact it was Ms Seymour's number; the Muirheads had no telephone. According to Sgt Thomas at the first trial, she rang the number and spoke to someone who said she would pass the message on to the appellant's mother. The question was not pursued in cross-examination and it was not suggested to Sgt Thomas that the appellant had said that he was with Ms Seymour on the day in question. Nor was it put to DC Nelson. It was only when the appellant gave evidence at the first trial that he mentioned he had been with Ms Seymour. She has made a witness statement saying that she only heard of his arrest when she received a note from him seven months later. At the second trial Sgt Thomas could not remember anything about the telephone number, but again it was not put to her that the appellant had mentioned Ms Seymour as a potential alibi witness. At the second trial DC Nelson said that when he first told the appellant he was being questioned in connection with the murder of Carlos Gunn, he said that he was at the time "at the top of McKoy lane". Again, he there was no suggestion that he had mentioned Ms Seymour.

16. In their Lordships' view there is no substance in the complaint that the conduct of the police weakened the alibi. It has all the appearance of an afterthought.

17. Mr Birnbaum next produced a list of criticisms of the way the identification parade was conducted: the appellant did not have a lawyer, he was not told that he could make representations about the parade, the other members did not sufficiently resemble him and so on. By the time

of the trial, however, the parade no longer had any evidential significance. It was only held because DC Nelson had understood the appellant to deny that he was the Zaza whom Orando knew. The only purpose in having the parade was to establish that Orando knew the appellant. It had no value in supporting Orando's identification of the appellant as the killer and the judge so instructed the jury: compare *Brown and Isaac v The State* 2003 UKPC 10 at paragraph 16. By the time of the trial, the appellant admitted that Orando knew him and the evidence of the parade had become unnecessary. Their Lordships would not accept that the parade was open to criticism when one considers that the way it was conducted was in accordance with its limited purpose, but in view of the way the issues emerged at the trial, it does not matter.

18. Next it is said that the judge should have withdrawn the case from the jury at the end of the case for the prosecution. There is nothing in this point. There was plainly evidence upon which a jury could reasonably convict and counsel for the defence rightly made no such application.

19. Mr Birnbaum made a number of criticisms of the directions on identification in the summing up. The judge did not sufficiently emphasise the possible deficiencies in Orando's identification, did not say that it was weakened by the absence of a description and the subsequent lapse of time before the trial, did not tell them that it was significant that the other children had not been called as witnesses, did not give them directions on the inadequacy of the identification parade, did not list the factors such as the lighting and time available for seeing the gunman and unfairly mentioned a number of times that Orando had claimed that Zaza shot his father.

20. Their Lordships do not propose to deal with these complaints in detail because they consider that there was nothing unfair about the summing up. From start to finish, from the time the police came to the scene of the crime until the end of his evidence at the second trial, Orando maintained that Zaza had shot his father. The chances of his having been mistaken must have been very small, but the judge left this possibility to the jury with appropriate warnings about the fallibility of identification evidence. The real question was whether Orando was telling the truth.

21. Next, Mr Birnbaum applied to introduce new evidence in the form of an expert report by Dr Helen Dent, who was given the transcripts of the two trials and asked her opinion on whether the way Orando was questioned would have affected the reliability of his evidence. Her opinion was that it could not be relied upon.

22. Dr Dent is a distinguished child psychologist and has made a valuable contribution to the understanding of how small children may respond to what they perceive as the suggestions of adults about the answers they should give. This is particularly important in family cases in which children make allegations of improper behaviour by adults which may never have happened. But their Lordships consider that the present case was very different. There is no doubt that someone entered Orando's house and shot his father before his eyes. On this point there is no room for suggestion or imagination. The only question is who it was. From the very beginning Orando told the police it was Zaza. Dr Dent makes a great deal of the fact that in the course of questioning, the name "Zaza" was, according to context, sometimes used to mean the person in Orando's narration of the murder and sometimes to mean the appellant outside that narration. But their Lordships consider it fanciful to suggest that, if counsel had adopted a form of questioning which distinguished these meanings, Orando might have said that he had been wrong and that the murderer was not Zaza after all. They therefore do not find Dr Dent's evidence helpful and do not admit it.

23. Finally in this list of rejected submissions, Mr Birnbaum complains that the jury were sent out at 4:40 pm. This, he says, was unreasonably late and would have made them feel under pressure to give their verdict without adequate deliberation. In fact they returned with a unanimous verdict of guilty at 5:13 pm. The judge clearly did not think there was anything unusual about the timing and thanked the jury for taking "time out to deliberate". Their Lordships consider that these questions are entirely a matter for the discretion of the judge and the supervision of the local court of appeal. They do not consider it appropriate to interfere.

24. There was rather more substance in Mr Birnbaum's submission that the judge did not deal adequately with the significance of statements by the appellant which the jury may have thought to be lies, such as his alleged denial that he was called Zaza and what they may have thought to be an invented alibi. The judge did not give the jury the standard instruction that people may tell lies for reasons other than a consciousness of guilt. However, it seems to their Lordships that in the context of the overwhelming importance of the issue of identification by Orando, these side-issues had less significance than they might otherwise have had. They would not regard the absence of a direction on lies as sufficient to justify setting aside the conviction.

25. Their Lordships must now turn to the two matters which have given them more concern. They both relate to the conduct of the case by defence counsel. The first is that the appellant was not called as a witness. He gave evidence at the first trial but says that after the close of

the prosecution case at the second trial, Miss McBean told him that leading counsel had advised that he should rather make a statement from the dock. He was surprised and disconcerted by this advice but did as he was told. He made a fairly lengthy statement but immediately after the verdict, when asked whether he had anything to say, regretted his decision:

> "I was so nervous when I was standing I was standing a while ago, I would have rather to be in the box where to the lady I could have explain certain thing and bring across certain things that I could answer in the right way."

26. The second point is that counsel did not call evidence of the appellant's good character. At the first trial, Mr Frater called evidence that the appellant had no convictions. There was other evidence of good character. But none was called at the second trial and the judge therefore did not give the standard directions on the relevance of good character to credibility and propensity. As the appellant did not give evidence on oath, the value of the former direction may be doubtful but he would have been entitled to the latter.

27. In *Bethel v The State* (1998) 55 WIR 394, 398, in which the appellant complained that he had wanted to give evidence and his counsel had prevented him from doing so, the Board said:

> "They are bound to say that they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future."

28. It may well be that Mr Frater considered, after observing the impression the appellant made in the witness box at his first trial, that he would be wiser not to give evidence at the second. The fact that the appellant did better at the first trial in the sense of securing a disagreement among the jury is not necessarily inconsistent with this view. And it may be that, contrary to what the appellant now says, he freely accepted this advice. It is more difficult to imagine why it was decided not to call any character evidence, but Mr Frater may have

learned something before or at the second trial which made it seem to him inadvisable to put the appellant's character in issue.

29. The difficulty is that the Board has no information on any of these matters. Neither Mr Frater nor Miss McBean have been willing to answer any questions about the case. Nor have they produced any written instructions from the appellant along the lines suggested in *Bethel*. This is a matter very much to be regretted; the Board considers that counsel have a duty to the court and the administration of justice to follow the practice recommended in *Bethel* in order to avoid precisely the situation which has arisen in this case. But there is at present nothing to contradict the appellant's account of what counsel said to him. No one appears to have approached Miss Nosworthy, who represented the appellant in the Court of Appeal, to see whether she can throw any light upon the subject.

30. In these circumstances their Lordships consider that they have no option but to allow the appeal. They do so with very considerable misgivings. In *Bethel* the Board went on to say:

> "They are very conscious of the ease with which it is possible for condemned prisoners, as a last resort, to invent allegations of refusal to accept instructions or "incompetence on the part of counsel who defended them or conducted their appeals. It is also, for practical reasons, not possible for their Lordships to investigate such allegations and the only course open to them is either to dismiss the petition or to refer the matter back to the Court of Appeal for investigation. Their Lordships wish to make it clear that the fact that such allegations are made and persisted in, despite denial by the counsel involved, does not amount to a reason for referring the matter to the Court of Appeal. Ordinarily, their Lordships would not be inclined even to entertain such allegations when they are raised for the first time before the Board and, in those cases in which they think it appropriate that counsel should be asked to respond to the allegations, they will accept his explanation."

31. In this case, however, we are concerned with two important decisions on which counsel have not been able to give the Board any assistance. That leaves too great a risk that the appellant did not have a fair trial. The Board will therefore humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal of Jamaica to decide whether a retrial should be ordered.

Concurring judgment of LORD CARSWELL and LORD MANCE

32. We agree in the conclusion reached by the other members of the Board, but we shall spell out our reasons for so holding, since there is some difference in emphasis in this judgment from that contained in the main judgment.

33. We agree with the view expressed in the main judgment that the appellant has not made out a case on the large majority of the grounds of appeal argued before the Board. The only two live issues are the failure of the appellant's counsel to adduce evidence of his good character before the jury at trial and his failure to call the appellant to give evidence, when he advised him instead to make an unsworn statement from the dock. These two issues are linked, stemming from the acts and omissions of counsel who appeared at trial on behalf of the appellant.

34. The Board has been told in a number of appeals that there was until recently a widespread misunderstanding in the Caribbean jurisdictions about the necessity to adduce evidence of good character, so that the judge might give the appropriate direction to the jury, and the way in which it could be done. Be that as it may, it has now been made clear in a series of cases before the Privy Council that it is important that a defendant who is of good character in the legal sense should be given the benefit of the direction which is now standard in the criminal process in England and Wales, and that where the defendant is entitled to such a direction and likely to benefit from it, it is the affirmative duty of his counsel to ensure that the court is made aware of his character, through direct evidence given on his behalf or through cross-examination of the prosecution witnesses. The judge's duty to give the direction only arises when such evidence is before the court: *Thompson v The Queen* [1998] AC 811.

35. It was established in a line of cases commencing with *Sealey and Headley v The State* [2002] UKPC 52, (2002) 62 WIR 491 that the failure of defence counsel to discharge his duty of ensuring that the defendant receives the benefit of a good character direction may in some cases, which are to be regarded as exceptional, make a conviction unsafe. The focus of the court should be on the effect of the failure on the fairness of the trial, rather than the extent or degree of the error on the part of counsel: see, eg, *Boodram v The State* [2001] UKPC 20, [2002] 1 Cr App R 103. Where the outcome of the trial would not have been affected by the lack of a good character direction, then that lack will not make a conviction unsafe: *Bhola v The State* [2006] UKPC 9, (2006) 68 WIR 449. The direction has two limbs, being directed, first, towards the credibility of the defendant and, secondly, to his propensity to commit a

crime of the nature charged. If he has not given evidence, but has merely made an unsworn statement, the importance of the first element is reduced, but the direction may still be material in respect of propensity. The Board was not given any reason why no evidence of the appellant's good character was put before the court. That had been done in the first trial and his counsel Mr Frater, who appeared for the appellant also in that trial and is an experienced criminal advocate, regrettably did not reply to inquiries on the subject made by the appellant's present advisers. It may be noted that this was a distinguishing fact from *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, where counsel provided information for the appeal before the Board which set out how the omission had occurred and clearly established that he had been in error. There may in some cases be proper reasons for not adducing evidence of good character, but in the absence of any explanation from counsel it is difficult to discern any such reason when it was done at the first trial. One must nevertheless look at the trial as a whole and the evidence against the appellant to see what difference the giving of a direction could have made to the verdict. As the direction in the present case would have been relevant mainly in respect of propensity and the strength of the identification evidence was fully tested, we would have held, if this were the only live issue, that this case did not fall into the exceptional category and that the appellant's conviction was not unsafe.

36. It was not the only live issue and this is where the fact that the appellant did not give evidence becomes material. The appellant has set out the sequence of events in his affidavit sworn for the purpose of the appeal to the Board. He had given evidence in his first trial, he thought without untoward effect. It is difficult to appreciate the atmosphere at a trial from a transcript and the impressions which a witness is making upon a jury, but there is nothing on the face of the transcript to show that his evidence at the first trial went particularly badly. He states in his affidavit that he expected to give evidence at the second trial, an averment which is borne out to some extent by what he said to the court before sentence was passed. His version of what happened is set out in paragraphs 33 to 37 of his affidavit:

> "33. Just before I thought I was about to give evidence in the second trial Ms McBean [Mr Frater's assistant] leant over to me and said that Mr Frater thought that for my own good I should not give evidence from the box but instead he thought that I should make a statement from the dock. Ms McBean did not give me a reason nor did she give me any advice about making such a statement or about what I might say.

34. My conversation with Ms McBean did not last more than a minute and a half and straight after this I was told that I should make my statement. I had no time to neither speak to Mr Frater nor obtain his advice about the consequences of not giving sworn evidence. I also had no time to prepare myself on what to say.

35. I would have preferred to give evidence, as I had done in my first trial, because I was eager to explain my defence properly but nobody asked me whether I would prefer to give evidence.

36. Nobody advised me about the consequences of my not giving sworn evidence. I was not advised that the jury might well attach less significance to a statement from the dock than to sworn evidence. It was only when the Judge commented about me not giving sworn evidence in his summing up that I realised the effect of not going into the box.

37. I have been asked how I felt when making the statement. It was strange and confusing. I only knew I was going to give such a statement just before I gave it and I was extremely nervous and did not know how to get my case across. It had been easier to speak in court at the first trial, when I was being asked questions which assisted me to understand what was important that I should talk about. It was easier for me to explain myself when I was asked questions."

37. One has to approach with a degree of caution statements of this kind made some time after a trial. The maker may suffer from some infirmity of recollection, as the appellant himself acknowledged in paragraph 15 of his affidavit. Such statements, which are obviously self-serving, are easy to make and not always easy to rebut, and we are very conscious from recent experience of a number of appeals in which similar points have been raised of the validity of the remarks made by the Board in *Bethel v The State* (1998) 55 WIR 394, 398 quoted in paragraph 30 of the main judgment. We fully share the misgivings expressed in that paragraph. It is undeniable, however, that the appellant's counsel did not follow the practice prescribed by the Board in *Bethel* of obtaining and recording the client's instructions on the decision made about his giving

evidence. In the absence of any such record or of any assistance by way of information from those who represented him at trial and on appeal, it is difficult for the Board to assume now that the decision was given sufficient consideration and that the appellant accepted the advice given to him with proper understanding of the reasons behind it. There may well have been good and sufficient reasons for Mr Frater to give that advice, and one does not lightly suppose that experienced counsel gave it without adequate foundation. But in the light of the uncontradicted evidence from the appellant the Board is not in a position to do more than speculate about that. It is also averred by the appellant, again without contradiction, that he received no advice from his counsel about what he should say in his statement from the dock.

38. In our opinion the result of the appeal hinges upon this decision by the appellant's counsel that he would be best not to give evidence and the way in which his advice was imparted. The effect was that the appellant – on his own account without his mind going with the decision – did not give sworn evidence, but instead gave a rambling unsworn statement which carried materially less weight. In consequence the absence of a good character direction assumed greater importance: if the appellant had given sworn evidence, the direction may have had an effect on the jury in accepting or rejecting his evidence. In a case which depended so heavily on the reliability of a very young identifying witness, whose testimony was controverted by the strong denial of the appellant, it would be difficult to be sufficiently satisfied that the jury would have been bound to reach the same conclusion if he had given evidence and had received the benefit of a good character direction. That degree of doubt is increased by the fact that the jury in the first trial failed to agree.

39. In these circumstances we feel impelled, after careful consideration, to agree with the conclusion that the appellant may not have received a fair trial. We fully share the misgivings expressed by Lord Hoffmann in paragraph 30 of his judgment, and we are also conscious of the statements made in many of the older authorities that the Privy Council will not act as a court of criminal appeal and will only set aside a conviction if there has been a grave miscarriage of justice. Nevertheless, we cannot be satisfied that the conviction is safe. We therefore agree with the proposed disposition of the appeal.