Privy Council Appeal No 5 of 2005

Shabadine Peart *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 14th February 2006

Present at the hearing:-

Lord Rodger of Earlsferry
Lord Steyn
Lord Carswell
Lord Mance
Sir Swinton Thomas

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

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1. The Judges' Rules constitute a striking example of judge-made law. Although classed formally as administrative directions for the guidance of police officers interviewing suspects, they were afforded over time a higher status, and a general requirement became established that police officers had to observe them if confessions received were to be admitted in evidence. They have been replaced in England and Wales by the provisions of Code C made under the Police and Criminal Evidence Act 1984, which have similar

strong persuasive force, but in jurisdictions such as Jamaica which have not replaced them by legislative provisions the Judges' Rules retain considerable importance. This appeal concerns the status of the Judges' Rules, the requirements of rule III(*b*) and the way in which trial judges may exercise their discretion to admit evidence if there has been a breach of the Rules.

2. On 10 July 2000 the appellant was convicted of capital murder after a trial in the Home Circuit Court before James J and a jury and sentenced to death. He appealed against conviction and sentence to the Court of Appeal of Jamaica (Downer, Bingham and Smith JJA), which in written judgments given on 19 December 2003 affirmed his conviction and, by a majority, held that the mandatory sentence of death was constitutional in Jamaica. At the hearing for special leave to appeal to the Privy Council, which was given on 12 July 2004, it was conceded on behalf of the Crown that in the light of the Board's decision in *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472 the mandatory sentence of death must be regarded as unconstitutional and that the appeal against sentence should be allowed.

3. The deceased man Delroy Parchment was a security guard employed by Jamaica Protective Services Ltd, which issued to him for use in his duties a Taurus .38 revolver and ammunition. He also had a week-end night-time job as a security guard at DYC Fishing Plant, whose premises were at Brentford Road, Kingston. He customarily walked along Curphey Road, which joins Brentford Road, en route to his evening employment. On the evening of Friday 14 May 1999 between 7.30 and 8 pm he was shot and killed in Curphey Road on his way to DYC Fishing Plant. A witness who was in Brentford Road heard two gunshots from the direction of Curphey Road, ran to the scene and saw a Honda "Ninga" motor cycle being ridden away. The rider and passenger were by his estimate in their early twenties and wore multi-coloured plaid shirts and white and red peaked caps. As they passed him he heard one say "Mi bun de boy." After the incident the deceased's gun was found to be missing. The cause of death was found to be a gunshot wound from a 9 mm Beretta handgun. Wounds were also found on the backs of the thighs of the deceased, which could have been caused either by shotgun pellets or by fragments of a copper jacketed bullet, which could also have come from a Beretta gun. One spent 9 mm cartridge case was found at the scene.

4. The prosecution evidence directly linking the appellant with the murder came from Claudette Newell, who lived at 2 Lower Ivy Road, Kingston. She stated that about 7 pm on 14 May 1999 she came home from work and saw in the yard behind her house the appellant (whom she had known for about two years), a man known as Joycie Boy, a man named Dennis who lived in the same house and a tall man whom she knew only by sight. The appellant and Joycie Boy were each holding a handgun. Miss Newell went inside and came out a few minutes later into the yard. The four men were still there and she heard the appellant say "We are going for a security guard up by Curphey Road to kill him for his gun." Joycie Boy said "Come no man before it is too late." Joycie Boy and the appellant put their guns into their waistbands and got on a motor cycle, Joycie Boy in front and the appellant behind him. They drove off in the direction of Brentford Road. The time was then about 7.30 to 8 pm.

5. Miss Newell stated that about 15 or 20 minutes later the appellant and Joycie Boy returned on the motor cycle from the direction in which they had left. When they had parked it she heard the appellant say to Joycie Boy and Dennis "Dem two shot weh me give the security boy me sure him can't live." He took two guns from his waist and said of one of them "This is the gun that we took from the security." Joycie Boy said "Me have a feeling that the boy no dead." The appellant laughed and said to Miss Newell "Mummy, you done know how dem things yah go." He put the gun he had taken from the security man back in his waist and gave the other to Dennis, saying to him "Me have to show the boss weh me tek from the security." It was alleged by the Crown that the person referred to as "the boss" was a man known as Pie Q, who was also termed the "area don" or controller of the neighbourhood.

6. Miss Newell immediately went to the police to report the incident. When she arrived home later that evening she was met by the appellant, Joycie Boy and the tall man. The appellant said "Me hear say you go call up mi boss name a station" and the three men commenced to beat her, accusing her of being an informer. The assault continued for some little time, and she was rescued only by the arrival of the police, who took the appellant and also Miss Newell and her children to the police station.

7. In cross-examination the defence brought out a number of discrepancies between the evidence given by Miss Newell at trial and the content of a statement made by her to the police on 17 May 1999. It was put

to her that her nickname was "Tuffie" (perhaps properly "Toughie"), because she was a "warrior" who was always picking fights with people (which latter allegation she denied). It was also put to her, and denied, that she had fabricated a case against the appellant because she was jealous of the appellant's girlfriend, had tried to get him to enter into a sexual relationship with her and was angry when he refused.

8. The appellant was detained in custody and on 18 May 1999 he was arrested and charged with the murder of Delroy Parchment. He was cautioned and said in reply "A mi woman house mi did deh when that happen". There was no evidence about what, if any, interviewing of the appellant had taken place before that time. The next morning 19 May Detective Inspector Wright, who was in charge of the investigation into the murder of the deceased, spoke to the appellant and told him of his intention to ask him a number of questions in relation to the murder of Delroy Parchment with which he had been charged. At this stage rule III(*b*) of the Judges' Rules applied to the case. The material part of rule III(*b*) (1964 revised version) reads:

> "It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement." (See *Practice Note (Judge's Rules)* [1964] 1 WLR 152, 154.)

The appellant was taken to the CIB office, where Detective Inspector Wright and Detective Woman Corporal Campbell conducted an interview. DI Wright asked him if he had any objection to being asked the questions, to which he said he had not. DI Wright then wrote out a caution, which the appellant signed and dated, then asked him a total of 63 questions. The questions and answers were each recorded in writing by DI Wright and read over to the appellant, who initialled each. The questions and answers were witnessed by Detective Woman Corporal Campbell and certified by DI Wright.

9. The questions and answers so recorded read as follows:

"Q.1. What is your name?
A.1. Shabadine Alphanso Peart.

Q.2. Where do you live?
A.2. Number 135 Torrington Park housing scheme, Kingston 5.

Q.3. With whom do you live?
A.3. My mother Ida Graham.

Q.4. What is your age?
A.4. 18 years.

Q.5. When were you born?
A.5. The 4 April, 1981.

Q.6. Where were you born?
A.6. Kingston Public Hospital.

Q.7. Where was the first place you lived after birth?
A.7. Number 103 Upper West Street, Kingston.

Q.8. Where did you live next?
A.8. At my present address.

Q.9. Where did you attend school?
A.9. Saint Annie's Primary and Secondary School, Bond Street, Kingston.

Q.10. Did you attend any other school?
A.10. No, sir.

Q.11. What did you do if anything for a living after leaving school?

A.11. I got employment as a porter at the Kingston Public Hospital from that time up until now.

Q.12. Do you work at any other job?

A.12. Yes. Sometime I help Mr. Henry to fix fridge at his shop off Lyndhurst Road. I do not remember the address.

Q.13. Do you know Joycie Boy?

A.13. Yes, mi know him.

Q.14. For how long do you know him?

A.14. Mi know him from youth. Him born and grow a Hannah Town with mi.

Q.15. What does he do for a living?

A.15. Him do sanitation work at K.P.H.

Q.16. Which school did Joycie Boy attended?

A.16. Chetolah Park Primary School.

Q.17. Is he your friend?

A.17. Yes, my best friend.

Q.18. Where does he live?

A.18. Torrington Park. I do not know his lot number.

Q.19. Can he drive or ride a motor cycle?

A.19. Yes.

Q.20. By what other name is he known?

A.20. Delroy Morgan.

Q.21. Do you know the name of his mother?
A.21. Miss Joyce, Joycie.

A.22. Where does she live?
A.22. At the back of Torrington Park scheme with Delroy.

Q.23. When was the last time you saw Delroy Joycie Boy?
A.23. Friday morning in Torrington Park going to work.

Q.24. Did you saw him Friday evening?
A.24. Yes.

Q.25. Where did you saw him?
A.25. Number 2, Lower Ivy Road, Kingston 5.

Q.26. About what time did you saw him?
A.26. About after 7.00 in the evening.

Q.27. Do you have a girlfriend?
A.27. Yes, by the name of Debbie.

Q.28. Where does she live?
A.28. Upper Ivy Road. I don't know the address.

Q.29. Does she live alone?
A.29. Yes, she has her own room.

Q.30. Do you know anybody else that lives in the yard that Debbie lives in?
A.30. Yes, Nadine, just Nadine.

Q.31. Where is this yard situated?
A.31. Just beside a little old lady shop on the left hand going up Ivy Road. There are two other shops on the opposite side of

that shop. The house is painted white with iron rusted gate, with rusty zinc. There is only one house in the yard and she lives in the back room.

Q.32. When was the last time you saw Debbie before coming into police custody?

A.32. Deep down in a the Friday evening before the police pick mi up, mi check her up a her yard.

Q.33. Was she alone when you checked her?

A.33. Yes.

Q.34. Have you seen her since?

A.34. Yes, she come look for me in custody at the Cross Road police station, she and Nadine.

Q.35. Did you saw her any time Friday evening or night?

A.35. No, sir.

Q.36. How long now are Nadine and yourself friends?

A.36. About seven months now. She is my main girlfriend.

Q.37. Did you see any of your other girlfriend that Friday?

A.37. No.

Q.38. Does Debbie work for a living?

A.38. Yes, sometimes she go to the country and sell slippers and so on.

Q.39. Did she went to the country on Friday last?

A.39. No.

Q.40. Do you know Dennis who lives at number 2 Lower Ivy Road?

A.40. No.

Q.41 Have you ever visited number two …? Have you ever visited number two Lower Ivy Road?

A.41. No. No.

Q.42. Have you ever walked on Lower Ivy Road?

A.42. Yes, when mi go check Debbie and give her money and go over back.

Q.43. Do you have any friends on Lower Ivy Road?

A.43. No.

Q.44. Do you know anyone by the name of Dennis?

A.44. Yes, a big fat man live over the site weh do wood work.

Q.45. Do you know anybody else by the name of Dennis?

A.45. No.

Q.46. Do you know a man by the name of Pye Q?

A.46. No, I know no one by that name.

Q.47. Do you know an area don by the name of Pye Q who runs things at Torrington Park where you live?

A.47. No.

Q.48. Who employed you at K.P.H.?

A.48. Mr Williams. I do not know where he lives.

Q.49. Do you know Nadine's cousins [Nadine Cousins?]?

A.49. No.

Q.50. Do you know Mial?

A.50. No.

Q.51. Do you know Claudette Newell?

A.51. No.

Q.52. Were you taken to the Admiral Town police station by the police last Friday night, the 14 of May, 1999?

A.52. Yes.

Q.53. Why were you taken there?

A.53. A don't know. Dem just see mi and mi girlfriend sit down, way down Lower Ivy Road on a stone.

Q.54. Did you saw a woman making a complaint against you at the Admiral Town police station?

A.54. Yes.

Q.55. Do you know that woman?

A.55. No, the first mi see her.

Q.56. Did you spoke to her?

A.56. No, mi never talk to her.

Q.57. Did you say anything to the police about hitting the lady at the Admiral Town police station that Friday night?

A.57. No.

Q.58. Can you drive or ride a motor cycle?

A.58. No.

Q.59. Where were you on Friday the 14 May, 1999, between 7.00 pm to 8.00 pm?

A.59. Right which part the police, the Cross Roads police pick mi up on Lower Ivy Road. Before them pick mi up mi see a police car come down there and go weh back and mi also see a TV news van with a brown policeman in it come down deh and drive away. My girlfriend Debbie was with me.

Q.60. Where were you immediately before you visited Debbie that evening?

A.60. I was over the Torrington Park Scheme at the Councillor, Patrick Tucker's bar, talking to him.

Q.61. Did you kill Delroy Parchment?

A.61. No, mi don't know who name so.

Q.62. Do you know who killed him?

A.62. I don't know.

Q.63. Do you know why he was killed?

A.63. I don't know him."

10. In his examination in chief in the voir dire held by the judge to determine the admissibility of the questions and answers DI Wright stated that he had put the questions because the appellant had said after his arrest and charge that he wanted to talk to him. When asked in cross-examination if he felt that he did not have enough and wanted something more, he replied:

> "Anything, any other evidence I can get, evidence cannot be too much as far as I am concerned."

He agreed that he had not said at the committal proceedings that the appellant had asked to speak to him. When he was asked why he had asked questions instead of letting the appellant tell his story, the following exchange took place (Record 2/63-4):

> "A. In his own – in his best interest and in the interest of justice it is always best for me to do what is necessary.
>
> Q. You agree that his Question and Answer form is not the most usual way to take a confession statement, the narrative is the common form usually, you agree with that?
>
> A. Yes, madam.

> Q. Okay. And you agree that it is usually when there are issues arising out of the narrative that you go on to the Question and Answer, you agree?
>
> A. Yes, yes.
>
> Q. What made this case so different then?
>
> A. Perhaps it is my practice, how I do things."

DI Wright stated in cross-examination in the main trial (Record 2/316-8) that the appellant had started to talk to him in the interview, then when he had heard enough he commenced to ask him questions. The appellant himself said in evidence in the main trial (Record 3/32-3) that before the questions and answers he gave the inspector information about his girlfriends Tavon and Debbie and about their friend Nadine.

11. It was put to DI Wright that the appellant asked for an attorney but was refused, that he was beaten and that he was threatened with a firearm. It was further put to him that some of the answers did not represent what the appellant had replied to the questions put to him and that when the appellant did not give a statement of admission DI Wright wrote his own answers. These allegations were supported by the evidence of the appellant in the voir dire, and all were denied by DI Wright and Woman Detective Corporal Campbell, who also gave evidence in the voir dire. The latter was asked in cross-examination if she knew of the Judges' Rules, but counsel did not pursue with her the matter of their application to the case. In the course of her submissions to the judge defence counsel touched on the matter further, submitting shortly that there had been a breach of rule II(*b*) – clearly intended to be a reference to rule III(*b*) – and that there were no exceptional circumstances to justify the asking of the questions. The judge rejected the allegations of ill-treatment and found that the questions and answers were given voluntarily by the appellant. He went on (Record 2/222):

> "I still have residual power to say, notwithstanding the finding that voluntariness prevailed throughout the entire session, I should still exclude it. I do not think that I will do so on this occasion, and I rule that the questions and answers are admissible in evidence."

12. When the interviewing officers repeated their evidence before the jury the question of the Judges' Rules came into sharper focus. It was put much

more directly to both that there were no circumstances which could justify questioning the appellant after he had been charged. DI Wright claimed that there were such exceptional circumstances, which were the reason for his line of questioning, in that Joycie Boy was still at large and "all good investigators would try to find him and have him brought to justice" (Record, 2/234-5). He also claimed in the course of cross-examination that there were ambiguities which he wished to clear up (Record, 2/320-1). He denied the suggestion put to him that the reason for the interview was that he hoped that the appellant would incriminate himself (Record, 2/317). The allegations of ill-treatment were repeated in the main trial and again denied by the officers.

13. The appellant gave evidence in his own defence. He claimed that between 7 and 8 pm on 14 May 1999 he was with his girlfriend Debbie and a girl named Nadine on Lower Ivy Road, where they were talking about a murder incident that had taken place in the area (Record 3/52-4). The fracas (or "fusion") between Claudette Newell and himself had broken out because Claudette had propositioned him to enter into a relationship with her and attacked him when he refused (Record 2/369-73). He was forced to hit in the face to keep her off. He alleged that he had been beaten and threatened and forced to sign the questions and answers and that some of the answers recorded did not represent what he had actually said.

14. The appellant's girlfriend Christine Hibbert (known as Debbie) was called on his behalf. She supported his claim of jealous behaviour on the part of Claudette Newell and her attack upon him. She failed, however, to support the appellant's alibi for the material time on 14 May 1999. She stated that she arrived home about 8.30, having heard on the way about the murder on Curphey Road, and there found the appellant watching television (Record 3/87-9). She could not say what he was doing before that time (Record 3/115).

15. The trial judge referred a number of times in his summing-up to the questions and answers, from which it is plain that he was inviting the jury to regard them as a significant part of the evidence. He said at Record 3/211-12 that the jury might very well form the opinion that "these are the questions which touches on certainly his presence at certain places or what may have been said or done." At 3/256-63 he dealt in some detail with the interview and the giving of the answers by the appellant. He did not,

however, spell out for the jury the inconsistencies between the several answers and between the answers and the evidence given.

16. The appellant appealed to the Court of Appeal on a number of grounds, most of which have not been pursued before the Board. Much of the discussion in the judgments was taken up with the constitutionality of the mandatory death sentence, which is no longer in issue. The ground of appeal which was the subject of argument before the Board was the admission in evidence by the trial judge of the 63 questions and answers recorded by DI Wright on 19 May 1999. On this ground Smith JA, who dealt with the issue in his judgment, stated that the test of admissibility of a statement is whether it is a voluntary statement. He expressed the view that the fact that Joycie Boy was still at large and that "Pie Q" was alleged to be the "area don" with the appellant under his command constituted exceptional circumstances which justified the questioning. Smith JA went on (Record 3/388-9):

> "However, even if the circumstances were not exceptional the judge's discretion to admit the statement in the interest of justice should not be disturbed. The Judges' Rules are not rules of law but rules of practice for the guidance of the police. A statement made not in accordance with the Rules, is not in law inadmissible if it is a voluntary statement. However, the court may in the exercise of its discretion refuse to admit a statement if the court finds that it was made in breach of the rules.
>
> The learned judge after hearing full submissions from counsel ruled in favour of admitting the document containing the questions and answers. The document does not contain a confession. In fact most of the answers were innocuous. Some of the questions relate to another man. It is fair to say that the relevance of the statements to the prosecution is only in so far as they are inconsistent with the defence evidence.
>
> In my view it cannot be said that the learned judge acted unreasonably in deciding to admit the questions and answers. There was no miscarriage of justice arising from the technical breach of Rule 3 of the Judges' Rules."

17. The thrust of the case made by Mr Leslie QC on behalf of the appellant before the Board was, first, that there was a breach of rule III(*b*) of the Judges' Rules, in that there were no exceptional circumstances which could justify questioning the appellant after he had been charged. There was no evidence of any ambiguities in any previous statement or answers given to the police. The fact that Joycie Boy was at large was not an exceptional circumstance, but in any event very little of the questioning was directed to ascertaining his whereabouts. The admission of the evidence put the appellant at a serious disadvantage, since it introduced material which provided grounds for concluding that the appellant had told lies and made inconsistent statements, so in effect compelling him to give evidence, with prejudicial results to his case. Secondly, it was submitted that the trial judge failed to make a proper exercise of his discretion to admit the questions and answers notwithstanding the breach of the Judges' Rules, since he had not addressed the factors to which he should have had regard or weighed up those factors in reaching his decision. Mr Guthrie QC for the Crown submitted that exceptional circumstances did exist and that, even if that submission were not accepted, the evidence was correctly admitted, since there was no unfairness to the appellant or oppression and it was in the interests of justice that it should go before the jury. Finally, he invited the Board to apply the proviso, on the ground that the defence case had been fatally undermined by Debbie's evidence negating the appellant's alibi.

18. The principle underlying rule III (*b*) of the Judges' Rules long predates the publication of the Rules. It was articulated in 1882 by Hawkins J in a foreword to the Police Code:

> "Neither Judge, magistrate, nor juryman can interrogate an accused person ... Much less then ought a constable to do so."

The Judges' Rules were first published in 1912 in order to give guidance to police forces concerning the procedure which they should adopt and which would be acceptable to the judges, since a degree of diversity had developed between different forces concerning the permissible limits of questioning suspects and judicial attitudes tended to vary. The classic description of the status of the Rules is that contained in the judgment of the court given by AT Lawrence J in *R v Voisin* [1918] 1 KB 531, 539-40:

> "In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial."

19. The Rules did not purport to be a complete statement of the law governing the admissibility of statements made by accused persons, nor did their issue alter the law as to the admissibility of such statements (Report of the Royal Commission on Police Powers and Procedure (1929, Cmnd 3297) para 183). Nevertheless, in addition to introducing a modicum of consistency in the practice of police forces, they took on a more substantive function. Police forces, and to a large extent the courts, began to regard them as a code of practice which had in general to be followed if a statement taken from an accused person was to be admissible in evidence. A revised version of the Judges' Rules, which governs the present case, was published in 1964 (see *Practice Note (Judge's Rules)* [1964] 1 WLR 152, 154) and rule III(*b*) in its present form is contained in that version.

20. Lord Devlin in *The Criminal Prosecution in England* (1960) p 26 pointed to the reason underlying the prohibition in rule III(*b*) of the Judges' Rules of questioning after a suspect has been charged:

> "The inquiry that is conducted by the police divides itself naturally into two parts which are recognizably different, although it is difficult to say at just what point the first part ends and the second begins. In the earlier part the object of the inquiry is to ascertain the guilty party and in the latter part it is to prove the case against him. The distinction between the two periods is in effect the distinction between suspicion and accusation. The moment at which the suspect becomes the accused marks the change."

Once the suspect has been charged, the efforts of the police interviewers are directed to establishing his guilt. He is under a greater disadvantage at that stage, in that he may feel under greater compulsion to answer questions, notwithstanding a caution. These factors may tend to produce a feeling of

pressure upon the accused to speak where he might otherwise have remained silent and to result in unreliable statements from him when seeking to tell exculpatory lies to get himself out of trouble. The most cogent expression of this risk is contained in the dissenting judgment of Pigot CB in *R v Johnston* (1864) 15 ICLR 60 at 121:

> "The danger is that an innocent person, suddenly arrested, and questioned by one having the power to detain or set free, will (when subjected to interrogatories, which *may* be administered in the mildest or *may* be administered in the harshest way, and to persons of the strongest and boldest or of the most feeble and nervous natures) make statements not consistent with truth, in order to escape from the pressure of the moment ... The process of questioning impresses on the greater part of mankind the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency, and impels him to answer from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed the strict truth, become on a severe or artful cross-examination involved in contradictions and excuses destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not, therefore, tend to truth as the result of the inquiry."

But the basic fundamental reason for the prohibition is the principle that to interrogate the prisoner at this stage tends to be unfair as requiring him possibly to incriminate himself.

21. In his introductory remarks when publishing the 1964 version of the Judges' Rules Lord Parker CJ emphasised that answers given and statements made are only admissible if they are voluntary in the sense defined by Lord Sumner in *Ibrahim v The King* [1914] AC 599, that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. In *R v Prager* [1972] 1 WLR 260

the criterion of voluntariness was afforded complete primacy, when Edmund Davies LJ, giving the judgment of the court, rejected the proposition that if a breach of the Judges' Rules had been established the judge should have rejected the accused's statement unless there emerged some compelling reason why the breach should have been overlooked. He stated in a passage at page 266, upon which much reliance was placed by Mr Guthrie for the Crown in the present appeal:

> "Its acceptance would exalt the Judges' Rules into rules of law. That they do not purport to be, and there is abundant authority for saying that they are nothing of the kind. Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily."

22. Their Lordships acknowledge the importance of the principle of voluntariness, but are unable to accept that it is the only applicable criterion, as Mr Guthrie attempted to argue. If it were the sole criterion, there would be no room for the operation of the principle whereby the judge may refuse in the exercise of his discretion to allow the admission of evidence which is otherwise legally admissible, as ex hypothesi confessions made voluntarily must be. One need only point to the remark of Lord Diplock in *R v Sang* [1980] AC 402 at 436:

> ".... there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."

The same sentiment was expressed by Lord Devlin (*The Criminal Prosecution in England,* pp 38-9):

> "The essence of the thing is that a judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence notwithstanding that there is no rule which specifically prohibits it; if he is not so satisfied, he will admit the evidence even though there may have been some technical breach of one of the Rules. It must never be forgotten that the Judges' Rules were made for the

guidance of the police and not for the circumscription of the judicial power."

23. In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence. There may be cases, as Lord Diplock observed in the passage quoted from *R v Sang,* where an admission has been voluntarily made but it would be unfair to admit it. An analogy may be found in the case-law relating to statements obtained by means of torture: other reliable evidence may demonstrate the truth of those statements, but the courts will nevertheless reject them, on the ground that reliance on statements so obtained shocks the conscience, abuses or degrades judicial proceedings and involves the state in moral defilement: see *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2005] 3 WLR 1249, paras 17, 39, per Lord Bingham of Cornhill. It was submitted on behalf of the appellant in the present case that his youth (he was 18 years of age at the time of his arrest) and the fact that he had not thitherto had the advice of an attorney constituted factors which demonstrated unfairness. Their Lordships agree that factors of this nature have to be taken into account by a trial judge in determining whether to admit an accused's statement in evidence.

24. From the foregoing discussion it is possible to distil four brief propositions:

(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but

would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.

25. Their Lordships are unable to agree with the Court of Appeal that there were exceptional circumstances justifying the use of questions after the appellant was charged. Smith JA referred to the fact that Joycie Boy was still at large and that the evidence indicated that the man known as "Pie Q" was an "area don", who may have been connected with the murder. It was undoubtedly the duty of the police, as Smith JA said, to try to trace the whereabouts of Joycie Boy and to establish whether there was a link between Pie Q and the murder. Only a few of the 63 questions could be said, however, to be directed to ascertaining the whereabouts of Joycie Boy and only two refer at all to Pie Q. DI Wright did not make any attempt to follow up in further questions any information which the appellant gave about them, which one would have expected if that was the central object of conducting the interview. Their Lordships consider that it is not possible to conclude that it was a prime object of the questioning to track down Joycie Boy or implicate Pie Q. Examination of the course of the questions appears to demonstrate much more clearly that they were intended to and did have the effect of pinning down the appellant in relation to his movements on the night of 14 May 1999 and corroborating the account given by Claudette Newell, which otherwise stood without independent support. The existence of possible exceptional circumstances was not brought out until a relatively late stage in the trial, and it is difficult to resist the conclusion that the prohibition in rule III(*b*) of the Judges' Rules was either overlooked or ignored by DI Wright at the time when he asked the appellant the series of questions. Whatever the reason may have been, their Lordships are satisfied that the asking of the 63 questions was a breach of rule III(*b*) and that there were no exceptional circumstances to justify it.

26. The judge was nevertheless entitled to exercise his discretion to admit the evidence consisting of the questions and answers, notwithstanding the breach of the Judges' Rules. If he directed his mind to the correct considerations in doing so, the Board would not readily review the exercise of his discretion: cf the Board's decision in *Thompson v R* (1998) 52 WIR 203 and the authorities cited at p 229 by Lord Hutton. In his ruling the judge held that the answers given by the appellant to the questions were voluntarily given and that he would not exercise his "residual power" to exclude the evidence. For the reasons which they have given their Lordships do not consider that it was sufficient justification to find without more that the answers were voluntarily given. There is no indication that the judge took into account any other factors bearing upon the fairness to the appellant of admitting the evidence.

27. In the Court of Appeal Smith JA expressed the view that the answers given by the appellant to the questions were mostly innocuous and held that the judge had not acted unreasonably in deciding to admit the evidence. The court did not consider the content of the judge's discretion or the factors to which he should have had regard in exercising it. In their Lordships' opinion it is necessary for the Board now to examine those factors and itself to determine at this stage whether the judge should have exercised his discretion to admit the evidence.

28. The appellant was aged 18 years at the time of his arrest. He had not had the services of a lawyer before the interview at which the questions were asked. He was in custody and had been charged with capital murder. The factors referred to by Pigot CB in *R v Johnston,* supra, may have operated to make him ready to give replies which he might have been better advised not to make. By those replies he furnished the prosecution with material which supported the evidence of Claudette Newell and made it more difficult for the defence to submit that her testimony should be rejected as untrue. It is clear from the content of the answers that they contained internal inconsistencies, and when the appellant came to give evidence in the main trial there were significant inconsistencies between his testimony and the answers which he gave to DI Wright. It was submitted by counsel appearing for the appellant before the Board that the effect of the answers was to make it essential for him to give evidence before the jury, which he might otherwise have been advised not to do. The effect of his evidence at trial and the exposure of a series of inconsistencies and lies was very prejudicial

to his case and is likely to have had a material effect on the jury when they considered their verdict. No sufficient direction was given by the judge to the jury about the proper approach to lies told by the appellant, on the lines of that required by the decision in *R v Lucas* [1981] QB 720. The judge did direct them very briefly at Record 3/278 that if they found that the appellant was lying, they should not by that reason alone say he was guilty, but this could not be regarded as a sufficient *Lucas* direction.

29. Their Lordships are not satisfied that in the circumstances of the case the appellant's answering of the questions can properly be said to have been voluntary. In any event, even if the judge's finding that the answers were given voluntarily is upheld, those circumstances in their Lordships' opinion made it unfair to admit the evidence of the questions and answers.

30. Counsel appearing for the Crown submitted as a final point that the prosecution case was so strong, the appellant's alibi having been fatally undermined by his girlfriend Debbie's evidence, that the Board should apply the proviso. He contended that even if the Board held that the evidence of the questions and answers was wrongly admitted it should nevertheless uphold the conviction on that ground. Their Lordships are unable to accede to this argument. They cannot be satisfied that the jury would inevitably have reached the same conclusion if the evidence of the questions and answers had not been given. The trial might have taken a very different course and the appellant lost the chance of taking advantage of that and the possibility which it might have afforded of succeeding in his defence. The Board finds it impossible to hold that the result must have been the same if the evidence had been excluded.

31. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed, the conviction quashed and the matter remitted to the Court of Appeal of Jamaica to determine whether a retrial should be held.