Privy Council Appeal No. 8 of 2002

(1) Mark Sangster and
(2) Randall Dixon *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 7th October 2002, Delivered the 6th November 2002

Present at the hearing:-

Lord Steyn
Lord Hoffmann
Lord Hutton
Lord Rodger of Earlsferry
The Rt. Hon. Justice Gault

*[Delivered by **Lord Rodger of Earlsferry**]*

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1. On 9 July 1998 in the Home Circuit Court Kingston the appellants, Mark Sangster and Randall Dixon, were convicted of the murder, on 18 September 1996, of Detective Acting Corporal Philip Gordon, a member of the security forces acting in the execution of his duty. Dixon, who the jury must have held shot and killed Corporal Gordon, was convicted of capital murder and sentenced to death. Sangster, who the jury must have found acted as a secondary party, was convicted of non-capital murder and sentenced to life imprisonment. Both appeal to their Lordships' Board, with special leave, from the judgment of the Court of Appeal of Jamaica dated 23 March 2000 dismissing their appeals from their respective convictions. Dixon also appeals against the mandatory death sentence passed on him. On 7th October 2002, at the conclusion of the argument, their Lordships announced that they would humbly advise Her Majesty that the appellants'

convictions should be quashed, but reserved the question of ordering a new trial.

2. The case arose out of a robbery carried out by a number of men armed with guns at the office of the Western Union Bank in Spanish Town. At the relevant time four police officers were in the plaza where the bank was situated: Corporal Gordon, Special Constable Anthony Gayle, Special Constable Valimore Lawman and District Constable Mullings. Constable Gayle saw a crowd running from the direction of the bank and members of the crowd alerted him to the fact that something was happening at the bank. The officers then took up various positions in the vicinity of the bank. A number of armed men were seen coming out of the front entrance of the bank, one of whom had a Uzi sub-machine gun. He fired at Constable Lawman who was hit on the leg and fell down. After that, a different man, armed with a 9 mm gun, fired a shot at and hit Corporal Gordon who died as a result.

3. Their Lordships have deliberately given the briefest outline of the events and have confined it to matters that are not in dispute. The appellants did not at the trial - and do not now - challenge the fact that a robbery and murder took place at the bank on the morning in question. Rather, they deny that they were involved in it, both saying that they were elsewhere at the relevant time. The critical issue at the trial was accordingly whether the evidence identifying the appellants as being involved in the murder was credible and reliable.

4. The prosecution case against Sangster was that he was the man who came out of the main entrance of the bank carrying the Uzi. The prosecution evidence identifying him as that man was given by two witnesses, Constable Gayle and Constable Lawman, who had picked him out at an identity parade on 7 October 1996. The prosecution case against Dixon was that he was the man who shot Corporal Gordon with the 9 mm gun. Again the evidence identifying Dixon as this man came from Constable Gayle and Constable Lawman who had identified him at an identity parade on 16 October 1996.

5. A number of other people viewed the identity parades. These included employees from the bank. Some identified stand-ins, while others indicated that they did not recognise anyone on the parade or indicated that they did not see the person involved. In particular Miss Sophia Alvaranga, an employee who had been in the bank and who viewed the parade for Dixon, said "I don't see

him". She was the only civilian witness to the events of that day whom the prosecution called to give evidence at the trial. She spoke to events inside the bank and indicated that she thought that four men had been involved. In cross-examination by counsel for Dixon, Miss Alvaranga agreed that none of the four men was in court.

6. As is usual, the record of the trial which is available to their Lordships does not contain a transcript of the addresses to the jury by prosecuting and defence counsel. The nature of the Crown case against the appellants must therefore be gleaned from the way that the witnesses were examined and from the judge's summing up.

7. Both counsel for Sangster and counsel for Dixon raised the question of identification with Miss Alvaranga. That line of cross-examination would make sense only if the prosecution case against the appellants was that they were among the men inside the bank whom Miss Alvaranga would have had an opportunity to see. Similarly, in the course of giving directions to the jury on joint enterprise the judge said:

> "So, what is the prosecution saying? The prosecution is saying this is a robbery and you will recall that the evidence is that four men ran from the building."

This direction clearly proceeded on the basis that the appellants had been two of the four men seen running from the building. Again, when dealing with identification, the judge said to the jury:

> "Now, as we are on the question of identification, I must go on to tell you the importance of the identification parade. You will recall that parades were held and these two accused were identified by the two policemen. They were not identified by other civilian witnesses."

Since the civilian witnesses concerned included bank employees who would have been inside the bank, the trial judge was telling the jury that, in assessing the evidence of the two police officers identifying the appellants, they should bear in mind that other people, who would have had a chance to see them (inside the bank), did not identify them. This direction is also consistent only with a trial where the Crown case was that the appellants were among the robbers inside the bank.

8. These factors indicate that the prosecution case against both the appellants was that they had been two of the men who actually carried out the robbery inside the bank and that it was after leaving

the bank that Sangster had shot and wounded Constable Lawman and Dixon had shot and killed Corporal Gordon.

9. In the case of Sangster the position is in any event beyond doubt, since the evidence of both Constable Gayle and Constable Lawman was that he came out of the main entrance to the bank carrying the Uzi sub-machine gun. The implication is that he was coming out after having been involved in the robbery inside the bank. In the case of Dixon the evidence is less clear-cut. It was to the effect that, when the man fired the shot that killed Corporal Gordon, he and another man were coming "from the back of the building". In theory that evidence could have been presented as part of a prosecution case to the effect that Dixon had been outside the bank, acting as a look-out. But if the prosecution had presented their case in that way, it would have been reflected in the judge's summing-up. In particular, he would have given the jury the familiar kind of directions designed to explain how, under the doctrine of joint enterprise, someone who stays outside and acts as a look-out is just as much involved in the robbery as the other participants. Here, more particularly, the judge would have had to explain the application of that aspect of the doctrine in relation to the possibility of convicting Sangster as a secondary party if they convicted Dixon of murdering Corporal Gordon. Nothing of the kind is found. On the contrary, the doctrine of common enterprise is put on the footing that the prosecution were alleging that all four men ran out of the bank. The implication of the prosecution's approach was that all four, including the appellants, had taken part in the robbery inside.

10. The fact that the trial was conducted on the basis that the appellants were among the robbers inside the bank is of importance because of a video recording which forms the basis of the two grounds of appeal on which their Lordships heard argument. In the first the appellants submit that there was a miscarriage of justice in terms of section 14(1) of the Judicature (Appellate Jurisdiction) Act 1962 in that their convictions are unsafe because the prosecution failed to investigate and to disclose to the defence a video recording showing scenes in the bank during the robbery. In the second the appellants submit, in the alternative, that there was a miscarriage of justice in that their convictions are unsafe because the video recording is fresh evidence which was not led, and which defence counsel were not in a position to lead, at the trial.

11. In the course of the hearing their Lordships had the opportunity to see the video recording. It is in black and white and

shows what appear to be a series of still pictures of what are undoubtedly different scenes inside the bank during the robbery. While some of the pictures are somewhat blurred, others are remarkably clear. In particular, some of the pictures show the faces and clothing of men who were in the bank carrying out the robbery. It is common ground that none of the images shows either Sangster or Dixon. The best estimate of counsel was that the images showed 4 robbers. In these circumstances Mr Guthrie QC, for the Director of Public Prosecutions, very frankly conceded that, had they been available, the pictures on the video recording would have been material evidence at the appellants' trial. Their Lordships fully endorse that concession: in a case where the crucial issue was identification and the prosecution were contending that the appellants had been inside the bank, the fact that the appellants were not among the robbers shown in the pictures of the robbery would have been highly material. Indeed, had the video recording been available before and during the trial, the conduct of the trial by both the prosecution and the defence would inevitably have been different.

12. Counsel explored various matters relating to the video recording with the aid of a number of affidavits and a draft affidavit by Mr Conrad Nicely, who was employed by Grace Kennedy Remittance Services Ltd and was responsible for the proper running of the security cameras at the bank at the time of the robbery. The recording for any given day was captured on a single tape. At the time of the robbery there were 4 security cameras in various positions in the bank, one of which moved from side to side, scanning the counters and the main lobby. The pictures from the four cameras were recorded in four quadrants on the original video tape. So someone looking at that tape would have seen pictures from all four cameras at the same time. On the other hand the video recording which was shown to the Board was not of this kind. It consisted, rather, of a series of still black-and-white images. It seems likely that these were images which had originally been in one or other of the four quadrants of the original video tape, since the edge of an adjacent image was sometimes to be seen. In this situation Mr Guthrie made the point, which counsel for the appellants did not dispute, that it was impossible to be sure that the tape which was shown to the Board contained all of the pictures that had been taken by the security cameras during the robbery. On the other hand there was, of course, no suggestion that the tape had been edited to assist the appellants.

13. The history of the video recording could not be cleared up completely. On the day of the robbery itself Miss Alvaranga gave a statement to the police in which she said that there were security cameras covering the offices and that she was "sure that these men [the robbers] were caught on the cameras." On the same day Mr Nicely took possession of the video tape containing the recording made during the robbery. It seems clear that one or more of the police officers investigating the incident viewed the tape with Mr Nicely. What happened next is a matter of dispute.

14. Mr Nicely's recollection is that he then gave the tape to a police officer who took it away but returned with it next day. Mr Nicely and the officer took it to a studio where two copies were made. One copy appears to have been of the section of the tape covering the robbery, while the second copy was in the same form as the tape that was shown to the Board. The first copy was given to the company responsible for security at the bank, while the second copy was kept by Mr Nicely's company at their head office in Kingston for training purposes. Mr Nicely and the police officer watched the part of the original tape dealing with the robbery several times and in particular they looked at the sections where the robbers could be seen most clearly. While the tape was fuzzy in parts, it was clear in others and in general the quality was good. Mr Nicely says that around the same time he went with a police officer to another studio where prints were made of the portions of the tape on which there were clear images of one or more of the robbers. The police officer took away the prints.

15. The account derived from the police officers concerned is rather different. In an affidavit dated 13 June 2001 Deputy Superintendent Lee said that he saw the tape on the day of the robbery in the presence of Mr Nicely but that the images were blurred and of no use. The tape was left with Mr Nicely. According to Detective Sergeant Thomas, Mr Nicely said that he would have to get the tape enhanced.

16. On the police account, therefore, shortly after the robbery the images on the tape were so blurred as to be of no assistance and the police did not take possession of the tape but, rather, left it with Mr Nicely. In preparation for the trial in June 1998 counsel for Sangster spoke to the manager of the bank who told her that the video had been handed to the police on the day of the robbery. Counsel then asked the police to see the video but they denied having the tape. The tape was accordingly not produced at the trial nor at the hearing before the Court of Appeal in January 2000.

When preparing the petition to the Board for special leave, the Privy Council agents for Sangster wrote to the agents for the Director of Public Prosecutions on 15 March 2001 asking about the video tape. The Director's agents replied on 22 March, saying that they were "instructed that there was no video tape". On 31 May the Director's agents wrote again pointing out that "the Director of Public Prosecutions' office has never had the videotape in their possession or knowledge of it". On 8 June 2001 Ms Joan Powell, who had been the General Manager of Western Union in Jamaica at the time of the robbery, swore an affidavit saying that the police had asked for the video tape and that Mr Nicely had told her that he had given the original tape to the police. She had later been shown enlarged photographs of faces from the tape. At some point in 2001 Ms Powell contacted Mr Nicely and asked him to find the copy of the video that he had kept for training purposes. The next time he was in Kingston he retrieved the tape and handed it to Ms Powell who passed it to the Director shortly before the hearing of the petition for special leave in July 2001. Police officers who then studied the tape were not able to identify the robbers shown on it. The tape retrieved by Mr Nicely is the tape that the Board saw.

17. Even though some parts of the narrative are disputed, certain points stand out. Police officers saw the video tape on the day of the robbery. If, as Mr Nicely maintains, some of the images they saw were clear, then the duty of the police would clearly have been to use those images in the investigation of the murder. Mr Guthrie did not dispute that – indeed, he made the point that, if the police had had a tape with clear images of the robbers, they would surely have used it in the investigation of the murder of one of their colleagues. If, on the other hand, the images on the tape were blurred and Mr Nicely kept the tape but indicated that it would have to be enhanced, then equally the duty of the police officers investigating the murder would have been either to have arranged themselves for the images to be enhanced or, at the very least, to check to see whether Mr Nicely had had them enhanced. Plainly they did not carry out either possible aspect of that duty.

18. Equally importantly, the police officers do not appear to have informed the Director of Public Prosecutions about the existence of the tape so that it was never disclosed to the defence. Indeed, when asked by counsel for Sangster about the tape, the police said that there was no tape. In these circumstances their Lordships are satisfied that the defence could not have been expected to go further at the trial than Mr Harrison did when, in cross-examination on behalf of Dixon, he asked Ms Alvaranga to confirm that the

bank had security cameras. The evidence now available in the video recording must therefore be regarded as fresh evidence for the purpose of these appeals.

19. Mr Guthrie was at pains to emphasise that the Director of Public Prosecutions did not wish to minimise the importance of the emergence of the video tape. He submitted, however, that the Board should remit the appeals to the Court of Appeal so that unresolved issues of fact could be investigated and, in particular, to see whether the copy of the tape that had been sent to the security company could be recovered. That version might contain more images and so give a more complete picture of the robbery. There might even be pictures of the appellants on that tape. Their Lordships note, however, that the prosecution case has always been that the appellants were two of four men who took part in the robbery. The images on the version of the tape which is presently available appear to show four men. Ms Alvaranga - the accuracy of other aspects of whose testimony is confirmed by the video recording - said that there were four robbers. Moreover, there is nothing in Mr Nicely's affidavit to suggest that the original tape showed robbers who are not to be seen on the version available to the Board. Similarly, the appellants do not appear on the images printed from the tape. Mr Guthrie's suggestion that the appellants might appear on the other version of the tape if it were found is accordingly really just speculation unsupported by the known facts. In these circumstances their Lordships are not persuaded that they should remit the appeal as a whole to the Court of Appeal.

20. Whether the matter is considered under the first ground of appeal, relating to the duty of disclosure, or under the fifth ground of appeal relating to fresh evidence, their Lordships are satisfied that the evidence of the video tape is material in the sense that, if it had been disclosed to the defence and had been led at the trial, it "might reasonably have affected the decision of the trial jury to convict" (*R v Pendleton* [2001] UKHL 66 per Lord Bingham of Cornhill at para 19; [2002] 1 WLR 72, 83G). That being so, the convictions of the appellants must be regarded as unsafe, with the result that there has been a miscarriage of justice. For these reasons at the conclusion of the hearing their Lordships indicated that they intended humbly to advise Her Majesty that the appeals should be allowed and the convictions quashed.

21. Their Lordships then invited submissions from counsel as to whether the Board should itself determine whether to order a new trial or should remit the case to the Court of Appeal to take that

decision. In *Reid v The Queen* [1980] AC 343, 348, 349, itself an appeal from the Court of Appeal of Jamaica, their Lordships gave general guidance which the Board has since followed. In particular they stressed that the public interest that is served by the power to order a new trial is "the interest of the public in Jamaica". The decision as to whether to order a new trial would depend on consideration of various factors, but

> "The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions."

22. Applying that guidance to the present appeals, their Lordships are satisfied that it is appropriate to remit the question of ordering a new trial to the Court of Appeal. Mr Dingemans QC advanced various arguments as to why no new trial should be ordered in this case, but they were all arguments that can be advanced before the Court of Appeal which is the body best placed to assess them in the light of the public interest. In any event some of his submissions were based on criticisms of the police conduct in relation to the video tape. As their Lordships have noted, the history of that matter is disputed. It may be that some at least of the areas of dispute can be resolved by the time of the hearing before the Court of Appeal who will, for that reason also, be better placed to assess the relevant submissions.

23. Finally, their Lordships are conscious that it is not for them to instruct the police in Jamaica as to the investigation of crime. Nevertheless, the video recording forms a possible starting-point for reopening the investigation of the robbery and murder as a whole, including any involvement of the appellants. The results of that investigation might well be relevant to the Court of Appeal's decision on ordering a new trial, not least because they might have a bearing on the potential prosecution evidence at any new trial. At the hearing before the Board, however, Mr Guthrie was unable to say what steps, if any, had been taken so far to reopen the investigation. That is an additional reason why the decision on a retrial should be remitted to the Court of Appeal.

24. Their Lordships will accordingly humbly advise Her Majesty that the appeals should be allowed, the convictions quashed and

the case remitted to the Court of Appeal to determine whether to order a new trial of the appellants.