Privy Council Appeal No 102 of 2006

Nyron Smith *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 23rd June 2008

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

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

1. The appellant Nyron Smith was on 16 October 2001 convicted at the Home Circuit Court, after a trial before McCalla J and a jury, of the murder on 25 February 2000 of Errol Topping. He was sentenced to imprisonment for life, with a recommendation that he should serve 14 years before becoming eligible for parole. In a written judgement dated 11 April 2003 the Court of Appeal (Forte P, Bingham and Panton JJA) dismissed his appeal against conviction. He has appealed by special leave as a poor person to the Privy Council.

2. On the evening of 25 February 2000 a street party was held in Eighth Avenue, Newport West, Kingston. When it was in full swing about 9.30 pm Errol Topping, otherwise known as "Ram Puss", was fatally stabbed in the street. He had been dancing with a girl in the street and some kind of altercation took place between Ram Puss and the girl. Shortly afterwards a man came across to him and stabbed him in the chest. The appellant was identified as the assailant by a single eye-witness Dennis Singh, whose testimony was crucial to the prosecution case.

3. Eighth Avenue is a short street running between First Street and Newport Boulevard. On one side there was a row of shipping containers, which had been made into small shops. One of these, the second from the First Street end, was occupied by the appellant's father as a cook shop. On the night of 25 February 2000 Mr Smith Sr had arranged a "customer appreciation party", at which those present were eating and drinking, some at tables in the street. There was music equipment playing loud music. It appears that there was another similar party taking place nearby at the same time, so there was a fairly large crowd of people in the street.

4. There was a certain amount of evidence, not all of it clear and some of it conflicting, about the lighting at the place of the attack on the victim. There was a street light on First Street opposite the junction with Eighth Avenue, which Detective Corporal Graham estimated was about one and a half chains (33 yards) from the place where Ram Puss was dancing. Most witnesses deposed that this was lit, though Constable Morgan, who was called for the defence, said that it was not. There was some light from over the wall of the Shipping Association compound on the opposite side of Eighth Avenue from the cook shop. There was also light from Mr Smith's cook shop and from other container shops in the street. Dennis Singh stated at several places in his deposition that there was a light in Eighth Avenue itself opposite the cook shop, but the police witnesses all stated that this was incorrect. He also said that the street was well lit at that point and none of the other witnesses, with the exception of Constable Morgan, deposed that the lighting conditions were poor enough to make identification difficult, although Constable Hall accepted that the side of the road opposite the cook shop was darker. Constable Morgan said that the place was poorly lit, but accepted that he could recognise Ram Puss from where he was standing.

5. Mr Singh stated in his deposition that Ram Puss and a girl had been dancing energetically in the street for some time, but then she pushed him in the chest, pushing him away from her. They stopped dancing and seemed to be arguing. About a minute or so after this a young man came across the road and pushed a knife with force into Ram Puss's chest. He

pulled the knife out and went across the street to talk to a lady by the tree in front of the cook shop. While he was there he put his hand with the knife behind him and one of the group took it from him. Singh shouted out to police officers standing behind him that a man had stabbed Ram Puss, and pointed to a man who he said had done it. He ran across the road to Ram Puss, who was then lying on his back gasping. He claimed that he had not taken his eyes off the assailant from the time of the stabbing to his disposal of the knife. He could see his face throughout. One of the officers held on to the man to whom he had been pointing. He followed the officers over to where one of the officers was holding him.

6. Constable Randolph Hall was standing talking to a group of police officers attending the party, beside where Singh was situated towards the First Street end of Eighth Avenue. Singh spoke to him and pointed towards a man standing in the street, giving him a description. He had not seen the stabbing himself, nor could he see the man pointed out, as his view was obstructed by the sound boxes. He went over to the man described by Singh, who was the appellant, and told him that he had been accused of stabbing Ram Puss. He searched the appellant, who had no weapon on his person. He resisted arrest, and there was a struggle. Constable Hall and Detective Corporal Graham then took the appellant by car to Newport West police station nearby.

7. At the station Singh, who came there at the request of the police, was asked if the appellant was the man who had stabbed Ram Puss and said that he was. Singh said in his deposition that the appellant was then behind bars, whereas Detective Corporal Graham said in his deposition that he was in the guard room, although in his evidence he did not specify the location within the station. The appellant made no response to the accusation.

8. The preliminary enquiry was held in the magistrate's court over four separate days between 27 April and 19 May 2000. Evidence was given at some length for the prosecution by Dennis Singh, who was extensively cross-examined. Depositions were also made by Constable Hall, Detective Corporal Graham, Constable Morgan and Corporal Briscoe. In the course of his evidence, Singh made a dock identification, which appears to have been unprompted, of the appellant as the man who stabbed Ram Puss.

9. The case came to trial on 30 April 2001 before Dukharan J and a jury. When Singh was called to give evidence, he declined to do so, saying only the following:

> "My name is Dennis Singh. I just have something to say. The thing is this, I don't want to go further with this, my life is being threatened. I went to the police, I reported it and nothing was done. I got a call from someone saying they are going to kill my wife, my mother and father and my kids and whosoever is close to me. My parents live in Olympic Gardens. I have a trucking business in Newport West where I operate trucking business all over the island."

He then added: "I am afraid of my life your honour."
The judge discharged the jury at the request of prosecuting counsel and adjourned the trial. Later that day Mr Singh made a statement to the police in which he recounted an incident which had occurred in the court building shortly before the trial commenced and which he found disturbing. It is apparent from the terms of the statement and the fact that prosecuting counsel had no notice that he would refuse to give evidence that this incident triggered his decision, on top of the threat which he said he had previously received.

10. The retrial commenced on 8 October 2001 before McCalla J and a fresh jury. At the beginning the judge held a voir dire in the absence of the jury to determine the admissibility of Singh's deposition, which the prosecution wished to adduce. Their authority for doing so was section 31D of the Evidence Act 1843, as amended:

> "Subject to section 31G a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person
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> (a) is dead;
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> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
>
> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
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> (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

Section 31J(1) provides for the admissibility of evidence to attack the credibility of the maker of the statement so admitted or to prove an previous inconsistent statement made by him. Section 31L permits the court to exclude evidence if in its opinion the prejudicial effect of that evidence outweighs the probative value.

11. In the voir dire a shorthand writer read the transcript of the part of the proceedings in the first trial in which Singh refused to give evidence. A representative of the Witness Protection Unit gave evidence about the difficulties about arranging relocation for Singh and his extended family and the problems which it would make for Singh to leave his business, for which the witness protection scheme could not compensate him. Singh's deposition at the magistrate's court was proved in evidence, then submissions were made by the advocates on its admissibility. The judge ruled:

> "I am satisfied by the evidence given that the necessary conditions pursuant to section 31D have been satisfied, and accordingly I will allow the application."

12. The trial proceeded before the jury, with Singh's deposition, including cross-examination, being read to the jury. The prosecution did not call Constable Morgan or Corporal Briscoe, notwithstanding the fact that they had made depositions. No reason was given, and defence counsel did not raise the matter with the judge.

13. He did submit that there was no case to answer, based on the quality of the identification evidence, but the judge, rightly in their Lordships' view, refused the application. When the defence case opened the appellant did not give evidence, but made an unsworn statement from the dock, the material parts of which read as follows:

> " … I was cooking that night, Your Honour, the kitchen get a little hot so I decide to take a breath of fresh air … The rice run out so I decide to get a new fresh set. There was one plate with rice and meat, Your Honour. There was one plate left with rice and meat in it so I picked it up and while making my way across the road, before I hit the curb wall I felt someone bounce into me, I have to use my left hand to ease off the person so that the food didn't throw away. I go up on the curb wall and hand the food to a gentleman … I see a gentleman come up towards me, he identified himself as police, but he have on plain clothes, so I think it was a joke, Your Honour. He said someone tell him I stab Ram Puss … so I smile and said, 'No, I didn't stab nobody' … I

> didn't have a knife on me, Your Honour, and I know I didn't do it, Your Honour ..."

14. Mr Hamilton, counsel for the defendant, asked for and was given an adjournment overnight because he had difficulty in securing the presence of police witnesses whom he wished to call. He obtained further time the next morning, then called Constable Morgan. At the conclusion of his evidence Mr Hamilton told the judge that he was having difficulty in contacting Corporal Briscoe, whom he also wished to call for the defence. He was given a short period to make another effort, but returned to court at 3.07 pm and stated that as he could not contact him he would have to close his case. He did not make any further request for an adjournment, nor did he apply to read Briscoe's deposition. The court then rose for the day.

15. The judge's directions to the jury in her summing-up were the subject of some criticism by Mr Birnbaum QC, who appeared for the appellant before the Board, although no objection was taken to any of them at trial nor was any of them the subject of the appeal to the Court of Appeal.

16. In the Court of Appeal the appellant relied on a single ground, that the requirements of section 31D of the Evidence Act had not been complied with. The court dismissed the appeal at the conclusion of the hearing on 10 February 2003 and gave written reasons in a judgment dated 11 April 2003. The court rejected all the arguments put forward on behalf of the appellant and confirmed the conviction and sentence. Much of the hearing and judgment concerned a submission that the evidence of Mr Longmore from the Witness Protection Unit was inadmissible as hearsay, which the court, rightly in their Lordships' view, dismissed as unfounded.

17. Before the Board Mr Birnbaum advanced a multiplicity of grounds of appeal against the conviction, although only that based on section 31D had been relied on in the courts below. They were enumerated as follows in his printed case:

1. Error in admitting the deposition of Dennis Singh.
2. Failure to exclude the identifications.
3. Unfair conduct of prosecuting counsel.
4. Failure to adduce evidence of good character.

5 and 6. Misdirections by the trial judge.

18. Their Lordships propose to deal with some of the grounds quite briefly. Many of the points made at some length by Mr Birnbaum were simply not issues which should be brought before the Privy Council in a

criminal appeal. It is well established that such issues should be confined to points of law of sufficient significance or matters which tend to show that a serious miscarriage of justice may have occurred. Their Lordships do not propose to rehearse *in extenso* the flaws alleged to have existed in the summing-up, to all of which they have given consideration. Apart from the question of the identifications, which they will deal with separately, they consider that they were at most very minor. Taking the summing-up as a whole, the matters complained of fall well below the threshold of casting doubt on the safety of the conviction.

19. The same may be said of the complaints against the behaviour of prosecuting counsel. Their Lordships do not condone inappropriate behaviour by any counsel, least of all prosecuting counsel in a criminal trial, who owe a duty to behave as ministers of justice rather than partisans seeking to achieve a conviction by any means possible: see *Boucher v The Queen* (1954) 110 Can CC 263, 270, per Rand J; *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, 2241, para 10, per Lord Bingham of Cornhill. The Board dealt with the issue of unfairness consisting of misbehaviour by prosecuting counsel in the recent appeal of *Huggins, Huggins and Phillip v The State* [2008] UKPC 32, and their Lordships would refer to their judgment in that appeal for an extended discussion of the issue.

20. If prosecuting counsel behaves improperly, in what he says in court or what he does in conducting the case, the issue for decision then becomes whether the departures from good practice have been such as to deny to the defendant the substance of a fair trial: *Randall v The Queen, supra*, paras 28-9. Their Lordships have considered the remarks of prosecuting counsel complained of, in particular those in the cross-examination of Constable Morgan. They consider that they were not of the standard of propriety and fairness to be expected of a prosecutor, but that they did not approach the level of gross, persistent or prejudicial behaviour which could affect the fairness of a trial. His comment to the jury about blood on the appellant's shirt was unfounded, but the judge put the matter right in her summing-up. His speculation about the lighting may have been inadequately based, but again the judge put the issue of the lighting fully and fairly before the jury. The names of Constable Morgan and Corporal Briscoe were not on the back of the indictment. It is not clear why they made depositions, but were not then called for the Crown; no reason appears in the transcript, nor was any furnished to the Board. It does appear, however, to have been envisaged from the time of the first trial that they would be defence witnesses, and no submission was advanced on behalf of the defence that they should be called by the Crown. It was not the fault of the prosecution that Corporal Briscoe was

not available, and it would have been open to defence counsel to seek an adjournment overnight to make a further attempt to secure his attendance.

21. The twin elements which have to be established to the satisfaction of the court under section 31D(e) are that the witness is kept away from proceedings by threats of bodily harm and that no reasonable steps can be taken to protect the person. The latter was readily proved by the evidence of Mr Longmore. The judge expressed herself "satisfied on the evidence" that both conditions had been satisfied. In their Lordships' opinion the standard applicable is proof beyond reasonable doubt, but there is no indication that the judge adopted any lesser standard. On the evidence their Lordships consider that she was entitled so to conclude. Mr Birnbaum submitted that the judge should have refused to admit the deposition because its prejudicial effect outweighed its probative value. Their Lordships cannot agree. If a statement which is adduced in this way is only marginally relevant to the Crown case against the defendant and highly damaging in proportion to its value as part of the case, then it may be appropriate to exercise the discretion. The content of the deposition was, if true, obviously strongly probative of the appellant's guilt, and, because the deponent's evidence had been fully tested in the cross-examination recorded, it had greater cogency than a mere statement made to the police. It was equally obviously prejudicial in the sense that it was vital evidence against the appellant which might result in his conviction, but that is not a ground for invoking the discretion of the court under section 31L or similar statutory provisions or common law rules: see *Scott v The Queen* [1989] AC 1242, 1257, per Lord Griffiths.

22. Lord Griffiths, giving the judgment of the Board in that appeal, set out the limits of the court's general discretion to refuse to admit a statement propounded under provisions similar to section 31D in a passage at pages 1258-9 which is worth repeating at length:

> " … [T]heir Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition, for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness, it may well place the lives of witnesses at risk particularly in a case

where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case …

Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said, that neither the ability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example, if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence - the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair

> trial that the discretion should be exercised to exclude the deposition."

It is only necessary to add that the trial judge discharged adequately in her summing-up the duty placed upon her to warn the jury of the lesser weight which could be placed on evidence not given *viva voce* and of any inconsistencies between that evidence and the remainder of the testimony.

23. Much of the argument on behalf of the appellant was directed to the lighting conditions and the quality of Singh's identification. Their Lordships do not propose to examine the evidence about the lighting, since they will not act as a second court of appeal and their function is to satisfy themselves that there has been no serious miscarriage of justice in basing a conviction on the evidence given in the case. They are so satisfied. There was ambient, if not direct, light from a number of sources and the evidence relating to the lighting was carefully probed at trial. The jury were entitled to accept on this evidence that Singh could see the assailant well enough to identify him.

24. Moreover, this was not a case where the identifying witness saw the assailant on one occasion and picked him out on a later occasion as the perpetrator. Singh said that he had not taken his eyes off the assailant from the time of the stabbing until his disposal of the knife, so it was not a case of a fleeting glance. He directed the police officers towards him, with a description, then went himself to the place where an officer was holding the man arrested. It is very hard to suppose that he would have failed to say anything if the officer had got hold of a man other than the one whom Singh had seen carrying out the stabbing.

25. Counsel criticised the procedure in the station, which he suggested was a contrived confrontation, but there is no evidence to support that suggestion. Their Lordships do not consider that it was improper for Detective Corporal Graham to seek confirmation from Singh at that point that they had the right man. No identification parade was held, an omission which counsel also criticised before the Board, although no issue was raised at trial or in the Court of Appeal about the identification in the station or the lack of a parade. By the stage when an identification parade could have been held it would have had limited usefulness, for it was then a case akin to one of recognition. If a parade had been held and the appellant had been picked out, the defence would have been able to maintain that Singh was identifying him as the man whom he had seen in police custody, at the scene and in the police station, not as the man whom he had seen committing the crime. Holding a parade would, however, have conferred on the appellant the potential advantage, limited though it may be in practice, that the witness might have failed to pick the

appellant out: see, eg, *Goldson & McGlashan v R* [2000] UKPC 9, (2000) 56 WIR 444, 448, per Lord Hoffmann; *Pop v R* [2003] UKPC 60, (2003) 62 WIR 19, para 9, per Lord Rodger of Earlsferry.

26. In England and Wales Code D issued under the provisions of the Police and Criminal Evidence Act 1984 imposes a mandatory obligation to hold an identification parade in all cases whenever a suspect disputes an identification, if it is practicable to do so and the suspect consents. Paragraph 2.4 of the Code formerly permitted an exception if the suspect's appearance is so unusual that it would not be practicable to assemble a sufficient number of people who resembled him (this is now dealt with by video identification). Further instances where it would be futile to hold a parade are set out in paragraph 21 of the opinion of Lord Bingham of Cornhill in *R v Forbes* [2001] 1 AC 473, 486:

> "If an eyewitness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification parade. If an eyewitness may be able to identify clothing worn by the culprit, but not the culprit himself, it will probably be futile to mount an identification parade rather than simply inviting the witness to identify the clothing. If a case is one of pure recognition of someone well known to the eyewitness, it may again be futile to hold an identification parade."

In jurisdictions where such mandatory provisions do not apply, their Lordships consider that, apart from the exceptional type of case to which they have referred, it should be regarded as desirable practice to hold an identification parade where there has been an identification which is disputed by the suspect.

27. If a parade is not held, the court may have to consider the effect of its absence on the fairness of the trial and the safety of the conviction. In doing so it will have regard to the strength of the prosecution case on the evidence adduced, including the quality of the identification of the suspect by the witness. Their Lordships have given consideration to this issue and have reached the conclusion on the facts of the present case that the absence of a parade was not sufficient to render the trial unfair or the conviction unsafe.

28. The same may be said for Singh's dock identification of the appellant at the preliminary enquiry, evidence of which was contained in the deposition read to the jury. If this was unprompted, the magistrate

was not at fault for allowing it to take place. It was submitted that the judge at the trial ought to have ruled it out, by some means such as having the deposition edited. It would perhaps have been preferable if she had done so, but it is right to bear in mind that this was not a first identification, nor was it the sole identification of the appellant, and the fact that it was in the transcript of the preliminary enquiry reduced the impact which it might have had on the jury. Dock identifications are not *per se* inadmissible (*Pipersburgh v The State* [2008] UKPC 11, para 10), but where they are made at a trial the judge should give directions to the jury on the lines set out in *Pop v R, supra.* The judge did not refer at all to the dock identification in her summing-up, and it is most unlikely that it had a significant adverse effect on the jury. Their Lordships accordingly do not consider that it made the trial unfair or the conviction unsafe.

29. The final issue is that of the absence of a good character direction. It was not the judge's duty to give such a direction if evidence of good character had not been brought before her, rather it was the responsibility of defence counsel to ensure that it was so brought. Mr Birnbaum was able to obtain some indication from Mr Earl Hamilton, counsel who represented the appellant at trial, why that had not been done. He appears to have been under the misapprehension, which was not uncommon in Caribbean jurisdictions at the time, that he was not entitled to adduce evidence of good character unless he had witnesses available to depose positively about the defendant's character. Ms Deborah Martin, who appeared for the appellant before the Court of Appeal, seems to have shared the same misapprehension. Mr Hamilton also took the view, which again was not uncommon, that for a defendant to put forward evidence of good character might appear to the jury to connote an admission of having committed the crime, and that it was better to keep it for mitigation if convicted.

30. The law has become clearer since the time of this trial and it hardly needs repetition now that a defendant is entitled to have a good character direction from the judge when the facts warrant it and that its absence may be a ground for setting aside a verdict of guilty. It is the duty of defence counsel to ensure that the defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe: *Sealey & Headley v The State* [2002] UKPC 52, (2002) 61 WIR 491; *Teeluck & John v The State* [2005] UKPC 14 [2005] 1 WLR 2421. It has, however, been emphasised by the Board in recent cases that the critical factor is whether it would have made a difference to the result if the direction had been given: see, eg *Bhola v The State* [2006] UKPC 9, (2006) 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood. In the present case the appellant did not give

evidence and merely made an unsworn statement from the dock, so that the credibility limb of the direction would have been of lesser consequence. The propensity limb might have been of some relevance, but their Lordships do not consider that, looking at the trial as a whole, it would have made any difference to the verdict.

31. Their Lordships accordingly are of opinion that the appellant has not made out any of his grounds of appeal and will humbly advise Her Majesty that the appeal should be dismissed.