[2011] UKPC 11
Privy Council Appeal No 61 of 2010

JUDGMENT

Peter Stewart (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Brown
ON

18 MAY 2011

Heard on 28 March 2011

Appellant
John Aspinall QC
Nicholas Robinson
(Instructed by Dorsey & Whitney (Europe) LLP)

Respondent
James Dingemans QC
Tom Poole
(Instructed by Charles Russell LLP)

LORD BROWN :

1. At about 1 pm on 14 May 2001 Lloyd Harvey (the deceased), a man of 28, was shot dead on the veranda of his house at 193 Zimbabwe 9th Street, Arnette Gardens, Trench Town, Kingston, Jamaica.

2. On 12 May 2003, following a two week trial before McIntosh J and a jury at the Home Circuit Court, the appellant was convicted of the deceased's murder and on 16 May 2003 sentenced to life imprisonment without eligibility for parole for 40 years. On 21 November 2005 the Court of Appeal dismissed the appellant's appeal against conviction but allowed his appeal against sentence to the extent of substituting 30 years for 40 years as the period of non-eligibility for parole. On 26 October 2010 the Board granted the appellant special leave to appeal against his conviction.

3. The deceased shared his house on 9th Street with his girlfriend, Lydia Minnott, who was the principal witness for the prosecution. Her evidence was that, on the day in question, the appellant, together with his mother and his young nephew, had come to the house and there had been an argument between them and the deceased. The appellant and his mother were "cussing" the deceased and at one point the appellant asked the deceased "Weh you diss up me nephew for?" There came a stage in which the appellant pointed his gun at the deceased and she (Ms Minnott) telephoned for the police. Shortly after that the appellant shot the deceased in the side of the head. Ms Minnott was at that time some five feet away from the deceased, the gunman a further two or three feet away. After that the appellant was joined by two other men ("Taffie" and "Peenie") who took the gun and between them shot the deceased a further few times as he lay on the veranda floor. A fourth man, the appellant's brother Shane, then arrived at the scene but did not fire a shot. All four men then ran off behind the house and into the gardens of Trench Town School. It was Ms Minnott's evidence, largely unchallenged, that she had known the appellant, his mother and his brother, Shane, for some years (as we shall shortly come to relate).

4. DC Myers arrived at the scene some five or six minutes after the shooting and found the deceased's body on the veranda lying face down in a pool of blood with wounds to the head, neck and back. He took a statement from Ms Minnott who told him that the man who fired the first shot was "Peter, Miss Patsy son", that she did not know his surname but "the family is known by the policemen who live in the area and work in the area". DC Myers said that with the assistance of other police officers who knew the appellant he quickly discovered his surname to be Stewart. Based on that information, the very next day (15 May 2001) he prepared warrants for the appellant's (and the other three men's) arrest, but it was not until 10 December 2001 that he was in fact able to execute the warrant on the appellant. DC Myers said that he and other

officers had searched everywhere that he heard the appellant usually frequented including the church that he attended. When charged on 10 December 2001 with the deceased's murder and cautioned, the appellant made no reply.

5. By the date of trial in 2003 the appellant was aged 23, Ms Minnott some two or three years older. She said that she had known the appellant (whom she knew just as "Peter", the only Peter she in fact did know) for a long time, having attended the same class with him at Trench Town Primary School. She said that she regularly passed his house and would see the appellant "every day" because he used to come to her house to buy things from her. This continued right up to the time of the murder, the last time she saw the appellant before that being at church the previous Sunday. She had also known the appellant's mother for some years: his mother had used to sell goods at the school gate. The appellant's elder brother, Shane, had also been at the primary school with her.

6. Although the defence challenged Ms Minnott's evidence that she was actually in the same primary school class as the appellant, there was no real challenge to her in fact knowing the appellant and his family in the way she described and accordingly being in a position to have recognised them on the day of the killing as she said she did. During cross-examination, Ms Minnott said that at a court hearing at Half Way Tree – nearly a year before the trial, presumably the preliminary inquiry into the case against the appellant, at that stage involving Shane also – she had told the judge that it was Peter who had shot the deceased, not Shane; Shane had not fired a shot.

7. The appellant gave his account by way of an unsworn statement from the dock. He said that he was a painter and lived at 20 Bay Farm Road, Kingston. He said that he did not know anything about going to school with Lydia Minnott; that he left Trench Town Primary School at the age of ten, at which point he went to Greenwich All Age school; that he did not know anyone called "Mother Patsy"; and that his mother was called Marva MaCalla and had died and was buried at Duff Cot. He stated that he was innocent and did not shoot anyone.

8. It is not altogether clear whether the defence being suggested to the jury at trial was that Ms Minnott was lying or that she was mistaken in identifying the appellant as the killer. At all events the summing up appears to the Board to have dealt satisfactorily with either possibility.

9. What, then, are the appellant's grounds of appeal? Mr Aspinall QC advances two. First, he complains about what he submits was a dock identification of the appellant by Ms Minnott, the police having failed to hold an identification parade in the case. Secondly, he submits that the appellant was wrongly denied the benefit of a good character direction. The Board will consider each of these grounds in turn.

10. It is the Board's clear view that this cannot properly be regarded as a dock identification case at all. As already indicated, Ms Minnott knew not only the appellant but also his mother and his brother as well and it can hardly be thought that she was mistaken in her recognition of all three of them as having been present on the day in question. By the time she came to point out the appellant in the dock at trial (the "dock identification" as Mr Aspinall seeks to characterise it) she had already told the police precisely who he was (the only Peter she knew and his relationship to Miss Patsy), had seen and identified him (and, indeed, given evidence exonerating his brother, Shane) at the preliminary inquiry, and had given the jury her full account of the killing and the events leading up to it, naming the appellant throughout as Peter Stewart. It was in answer to the question "and you see Peter Stewart here today?" that she pointed to the appellant in the dock. It was a pure formality.

11. In giving the majority judgment of the Board in *Ronald John v The State* [2009] UKPC 12 I discussed at some length the whole question of identification parades and dock identification in the course of which I considered a number of situations in some of which an identification parade would be well-nigh essential, in others not merely unnecessary but possibly positively misleading. Nothing would be gained by the Board rehearsing all the relevant authorities again here. It is sufficient to say that it was never this appellant's case, and certainly never put to Ms Minnott, that she was in no position to recognise him – indeed, knowing as she did the whole family, it really would have been an impossible case – and, of course, unsurprisingly, he never asked to be put up on an identification parade. It would have been pointless to hold an identification parade here. There is, in short, nothing in this ground of appeal.

12. The second ground of appeal rests on firmer ground to this extent: it appears that the appellant was indeed a man of previous good character and that his counsel ought properly to have elicited this fact in evidence and thereby procured for his client a full good character direction to the jury. As it was, the fact that the appellant was of good character only emerged when his antecedent report was read at the subsequent sentencing hearing. The reason for counsel not putting his client's good character into evidence is to be found in his recent letter of 2 March 2011 responding to a request for an explanation from those acting for the Crown:

> "I did not raise the issue of Mr Stewart's good character. I did not discuss it with him. The primary reason for this was that at the time the question of raising 'good character' in those trials was not a practice. Certainly not as far as I was aware. It has begun to be a practice to some extent, in the past few years. At the time I felt that my efforts would stand a more realistic chance of success focusing on the issue that I thought most germane for a Kingston jury, always the most difficult jury to persuade."

13. Although Mr Dingemans QC for the Crown makes no formal concession that the appellant was indeed of entirely good character – pointing out, for example, that his apparent disappearance between May and December 2001 was never explored in evidence – or that he has clearly waived his privilege as to communications with his then counsel, the Board think it right to assume these matters in the appellant's favour. The Board is also prepared to overlook the fact that the incompetence of counsel was not raised as a ground of appeal in the Court of Appeal notwithstanding that the appellant was already by then represented by fresh counsel. As for trial counsel's observation that it "was not a practice" at the time (2003) to raise the defendant's good character, whilst indeed this accords with the Board's own experience in these cases, it cannot be said to have been justified: the law as to good character directions had already been made clear by the Board's judgments in cases such as *Sealey* and *Headley v the State* [2002] UKPC 52.

14. Given that good character had not been raised here by the defence at trial, clearly the judge cannot be criticised for not giving the direction: *Thompson v The Queen* [1998] AC 811, *Barrow v The State* [1998] AC 846. There was accordingly no material non-direction and no question now arises, therefore, as to the application of the proviso. The question rather is, assuming (as we do) that the failure was due to counsel's incompetence, whether that occasioned an unfair trial resulting here in a miscarriage of justice: in short, whether the Board can be satisfied that the jury would necessarily have reached the same verdict even had they been given the full direction as to the appellant's good character.

15. Again this is an area of the law that I discussed in some detail in giving the Board's judgment in *Bhola v The State* [2006] UKPC 9 and again the Board think it unnecessary to rehearse the case law afresh here. The one further general point that is perhaps worth making on this appeal is that the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence. In applying *Bhola* the very next month in *Simmons* and *Greene v The Queen* [2006] UKPC 19, the Board (at para 35) inferred as much in a brief parenthesis: "Nor realistically could they have benefited from a direction as to credibility (least of all Simmons who chose not to give evidence on oath anyway)."

16. In this very case, for example, had the credibility direction been given, it would have been appropriate to balance it with a full direction about the weight to be accorded to unsworn statements – see the guidance given in *DPP v Walker* [1974] 1 WLR 1090 at 1096B-E. True, the judge here did point out to the jury that the defendant's unsworn statement from the dock "is not sworn evidence which can be tested in cross-examination" and that "it is entirely up to you what, if any, weight you will give to it". She would have been entitled to go further, however, and add that the jury might perhaps have been wondering why the accused had elected to make an

unsworn statement; it could not be because he had any conscientious objection to taking the oath since, in that event, he could affirm. "Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why?"

17. Mr Aspinall submits that the lack of a good character direction in the present case was particularly unfortunate because of what Ms Minnott had said about the appellant's family being "known by the policemen who live in the area and work in the area" (enabling them to discover his surname). He suggests that the jury might have inferred from that that the appellant was in fact a man of bad character. In any event, he submits, a good character direction here, in particular the propensity limb of the direction, could have persuaded the jury that the appellant was not the kind of young man who would be likely to carry out a killing (effectively an assassination) such as Ms Minnott described here.

18. The Board are unable to accept these submissions. This was an overwhelmingly strong recognition case and no one has ever suggested any reason why Ms Minnott should want to identify the appellant as the killer if in truth it was someone else. She may well have been, indeed almost certainly was, mistaken in saying that the appellant had actually been in the same class as her at primary school. But that had been some 18-20 years before she gave evidence at trial and mainly her knowledge of him had come from his repeatedly purchasing goods from her for years afterwards. The jury had ample opportunity to decide on Ms Minnott's credibility and reliability from her lengthy evidence in the witness box. It is hardly surprising that at the end of the day they were convinced by it. Realistically the appellant's statement from the dock did little to refute it. After all, if really the appellant's mother had never been known as "Miss Patsy" or if, say, she had died before the killing, evidence of such matters could and surely would have been adduced to this effect. In short, this was, in the Board's view, a straightforward case and it can safely be said that, even had a full character direction been given, the jury would inevitably still have convicted.

19. Accordingly the Board will humbly advise Her Majesty that this appeal should be dismissed.