[2012] UKPC 28
Privy Council Appeal No 0049 of 2010

JUDGMENT

Mark France and Rupert Vassell (Appellants) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT DELIVERED BY LORD KERR ON

16 August 2012

Heard on 24 April 2012

Appellant	*Respondent*
Malcolm Bishop QC Sarah Fawcett	Tom Poole
(Instructed by Slaughter and May)	(Instructed by Charles Russell LLP)

LORD KERR:

Introduction

1. On 11 May 2001, following a trial before Cooke J and a jury, the appellants were convicted of murdering Glenroy Sutherland on 14 June 1998. They were sentenced to life imprisonment. It was recommended that Mr France serve a minimum of thirty years and that Mr Vassell serve twenty years before becoming eligible for parole. Mr France had three previous convictions. These were for robbery, possession of a firearm and wounding with intent. Mr Vassell had a clear record.

2. The appellants applied for leave to appeal against their convictions and the sentences which had been imposed. The application was refused by the single judge. They renewed it before the full court. Their application for leave to appeal against conviction was dismissed by the Court of Appeal on 2 June 2003. The sentence imposed on Mr Vassell was upheld. Mr France's sentence was reduced from thirty years without parole to twenty five years. On 16 March 2011 the Judicial Committee of the Privy Council advised Her Majesty that permission to appeal against the appellants' conviction should be granted.

The facts

3. On the evening of the day that he was killed, Glenroy Sutherland was outside his home at 3 Greenwich Road, St Andrews, Jamaica. He was with his brother, Hubert, and three friends, Richard Smith, Andrew McKenzie and Michael Henry, who had earlier been in the Sutherland home watching a basketball game on television. After the match, the group left the house and their friends gathered on the opposite side of the road from that on which the Sutherland brothers were sitting. They were talking across the road to each other about the game. A minibus drew up. According to Hubert Sutherland, the vehicle was brought to a halt on the side of the road where he and his brother were sitting. It was then about four feet from where he and his brother sat. Mr Sutherland described the vehicle as being white with a blue streak that ran around it. He recognised it as a Toyota.

4. When it stopped, Hubert Sutherland looked towards the vehicle and he claimed that he recognised two occupants: the appellant, Mark France, and another man whom he knew as "Legamore". Each had a gun in his hand.

Mark France was in the front passenger seat area and Legamore was near the steering wheel. The passenger side of the vehicle was nearer the Sutherland brothers. The two occupants, according to Mr Sutherland, pointed their guns out of the windows, France placing the gun outside the nearside window and Legamore out of the offside. When he saw the gun held by France pointed towards him and his brother, Mr Sutherland ran off. His brother also ran off. Hubert Sutherland heard four shots. He stopped then and turned round to discover his brother lying about eight feet from where he had been sitting. He had been shot. The minibus had been driven off. He took his brother to hospital but he was found to be dead on arrival.

The trial

5. At the appellants' trial the deceased's father, Elroy Sutherland, gave evidence that he was watching television in his home while his two sons were outside talking to friends. He heard shots and left his house. He found the body of his son, Glenroy, lying some twenty to twenty five feet from the front door of his house.

6. Hubert Sutherland gave in evidence the account set out above. He also testified that, although it was a dark night, there were two street lights outside the house and that the minibus had stopped directly under one of these. He observed the face of France for some 4 seconds and that of Legamore for about 6 seconds. He had known both for about eight to ten years before the murder. Although he did not know Legamore's real name, he pointed to the appellant, Vassell, when asked to identify him during the trial. He had known him through playing football with him on a regular basis. He had also seen him in a betting shop, although, as he accepted under cross-examination, he did not speak to him then. It was put to him that he was mistaken about his identification but he rejected this suggestion.

7. Detective Constable Ainsworth Williams gave evidence that, as a result of information he received on 15 June 2008, while on duty two days later he noted a white Toyota Hiace minibus with a blue streak on the side. The minibus was being driven by Rupert Vassell whom he knew as Legamore.

8. Detective Inspector Karl Malcolm gave evidence that at about 10.50 pm. on the evening of 14 June 1998 he received certain information that led him to attend Madden's Funeral Parlour where he observed the body of the deceased. He then went to 3 Greenwich Road where he spoke to several persons including Hubert and Elroy Sutherland. He took statements from both of them.

He attended the address at night time and noted that there was a street light by each of the two gates to the property.

9. On Monday 15 June 1998 he prepared warrants of arrest for both of the defendants. On Wednesday 17 June 1998 he received information which led him to attend the Constant Spring Police Station where there was a white Toyota Hiace minibus. He noticed that it had a blue streak around the bottom which was 3 inches wide. He then went and spoke to Mr Vassell inside the police station. He knew him as Legamore. He was given the name Vassell by a colleague. He stated that before he cautioned him, he asked him about the bus and was told that Mr Vassell had got it from a Miss Smith from Stony Hill to "juggle". Under cross-examination the detective inspector accepted that the only thing that was distinctive about the minibus was the blue streak around it and he had seen other buses with similar streaks. He accepted that he knew several Vassells but said that he knew only one Legamore.

10. Neither of the appellants gave evidence. Both made unsworn statements from the dock. They denied involvement in the murder. Vassell claimed that he did not know the deceased or his brother, Hubert. France did not expressly deny knowing the brothers but he did not acknowledge that he did. Both appellants claimed that they did not know each other.

The appeal

11. Two principal grounds of appeal were advanced on behalf of both appellants. Two subsidiary grounds related solely to Mr Vassell. The main ground of appeal was that the trial judge had failed to give appropriate directions in relation to the identification of the appellants by Hubert Sutherland. The second ground (which was common to both appeals) concerned the manner in which counsel had conducted their defence. The grounds that related solely to Mr Vassell were that his trial had been irredeemably prejudiced by the failure of his counsel to adduce evidence of his good character and by the judge's having admitted hearsay evidence about his identity.

12. The submission that the trial judge had failed to give adequate directions on the identification evidence had a number of aspects. His charge to the jury was said to be generally deficient. It was disputed that this was a case that could properly be characterised as one of recognition but, if it could be, the appellants argued that the judge had not warned the jury in sufficiently clear terms of the dangers attendant on that species of evidence. It was claimed that the judge did not advert sufficiently to the fact that no identification parade had

been held. Finally, the appellants submitted that they had been subject to impermissible dock identifications and that the prejudice which this evidence had caused was compounded by the judge's failure to address its adverse impact in his charge.

13. On the question of the conduct of the trial by counsel, three points were made. First, it was suggested that they should have been present throughout the judge's charge. It appears that they were absent for at least part of his summing up. Secondly, it was claimed that they had compromised the appellants' defence by failing to call witnesses to the killing of Glenroy Sutherland. Lastly, it was contended that the brevity of counsel's closing submissions meant that the case to be made on their behalf had not been properly presented.

The identification evidence

14. Mr Bishop QC, who appeared with Ms Fawcett for the appellants, submitted that the directions of a trial judge, in order to sufficiently alert the jury to the possible frailties of identification evidence, must scrupulously, indeed meticulously, follow the various elements required of a summing up which had been identified in *R v Turnbull* [1977] QB 224. He took the Board through the judgment of Lord Widgery CJ in that case, identifying what he claimed were indispensable components of every judge's charge to a jury about identification evidence. As a preliminary and general comment, the Board would observe that a formulaic recital of possible dangers of relying on identification evidence, if pitched at a hypothetical rather than a practical (in the sense of being directly related to the circumstances of the actual case that the jury has to consider) level may do more to mislead than enlighten. The purpose of what has become known as a *Turnbull* direction is to bring to the jury's attention possible dangers associated with identification evidence but that purpose is not achieved by rehearsing before the jury difficulties that might attend that evidence on a purely theoretical basis. A trial judge should always be conscious of the need to relate conceivable difficulties in relying on this type of evidence to the actual circumstances of the case on which they have to reach a verdict. As the Board said in *Mills v The Queen* [1995] 1 WLR 511, 518 the *Turnbull* principles do not impose a fixed formula for adoption in every case. It will suffice if the trial judge's directions comply with the sense and spirit of the guidelines.

15. It was suggested that seven separate elements had to be present in a judge's charge to the jury in an identification case which relied on purported recognition of the accused. These were (i) a statement that there was a special need for caution; (ii) an explanation of the reasons for such need; (iii) a

direction that a convincing witness can be mistaken; (iv) a close examination of the circumstances of the purported identification; (v) a direction as to whether there was any material discrepancy between the description of the accused given to the police by the identifying witness and his actual appearance; (vi) in cases of purported recognition a special warning that mistakes in recognition of close relatives and friends are sometimes made; and (vii) a review of the various aspects of the evidence which were said to support the claimed identification and those which cast doubt on it .

16. Mr Bishop based this submission on the following passage from Lord Widgery's judgment at pp 228-229:

> "Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.
>
> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed

between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution."

17. The judge's charge in relation to identification is contained principally in the following passage from his summing up:

"This is a case in which the case against Mr France rests entirely on the identification evidence of Herbert (*sic*) Sutherland and the case against Mr Vassell rests substantially on the identification evidence of the same Mr Sutherland. I must, therefore, warn you of the special need for caution before convicting on the reliance of the correctness of that identification. The reason for this is that

> it is quite possible for an honest witness to make a mistaken identification and in jurisdictions like ours, where we have the adversary system, there have been notorious miscarriages of justice based upon mistaken identification although I, myself, am not aware of any such notorious miscarriages of justice in our country. Now in this, a case, where the identifying witness said he knew both accused for some time, he knows each of them for a number of years, I think eight is common to both, eight years, as such, this case may be classified as a recognition case. However, despite the fact that this is a recognition case, my warning to you on the caution to be exercised is not to be watered down at all. You have to consider, members of the jury, whether or not the identifying witness, Sutherland, did know each accused before, and if he did know each of them before, did he know either of them or both of them to such an extent so that each of their respective features would be so imprinted in his consciousness, that in the circumstances which you accept, that in those circumstances, the circumstances of the incident, that in those circumstances you can rely on the evidence of Mr Sutherland. In other words, did he know them to such an extent that in that short time he was able to make a proper identification? So as I review the evidence you will pay attention to the opportunity which Mr Sutherland had, you look at things like the amount of time, the lighting, the position of each accused, vis-a-vis, in respect to the identifying witness. You look at the lighting or any other factor which you think is relevant to determine whether or not this was a correct and proper identification."

18. The need for special caution in dealing with identification evidence had therefore featured prominently in the judge's charge. Likewise the reason that caution was required (viz that it was possible for an honest witness to be mistaken) was expressly drawn to the jury's attention. Mr Bishop suggested that the concepts of honesty and conviction should not be elided. He argued that the judge should not only have said that Mr Sutherland might be an honest but mistaken witness, he ought to have said that he might appear to be a convincing witness but could still be mistaken. The Board does not accept that submission. An apparently honest witness will normally be a convincing one. To require a judge to prescribe repeated layers of caution, drawing out a distinction between a patently honest witness and a convincing one is likely to confuse rather than properly inform a jury.

19. A discrete criticism was made of the comment that the judge made to the effect that the judge was unaware of miscarriages of justice because of identification evidence which proved to be mistaken. This was described as

"derisory commentary" which substantially undermined the effect of the *Turnbull* warning. The Board also rejects that submission. The remark must be viewed in context. The judge said that there *had been* notorious miscarriages of justice. The statement that he was unaware of them was superfluous but I cannot accept that his lack of knowledge of the cases where there had been miscarriages of justice lessened the impact of the information that such miscarriages had occurred.

20. The judge instructed the jury to have regard to the circumstances in which the identification was made. He referred to the lighting, the amount of time that Mr Sutherland claimed to have the two men under observation and their respective positions. In the Board's view this was an adequate reminder to the jury of the need to examine carefully the conditions in which Mr Sutherland claimed to have identified the appellants.

21. On the issue of the avowed failure of the judge to draw out the fact that Mr Sutherland had not, apparently, provided the police with a description of the persons in the minibus, Mr Bishop suggested that the jury had not been given the opportunity to consider whether this might sound on the reliability of the identification. If a description had been given and if this had not tallied with the appearance of the appellants, this would have been a reason to doubt the reliability of the identification evidence.

22. Although this argument was advanced persuasively, on analysis there is more than a hint of contrivance, not to say unreality, about it. The obvious but prosaic reason that no detailed description of the appellants was recorded from Mr Sutherland was that he had identified them as persons whom he had recognised. For the judge to have invited the jury to consider that a *possible* description by Mr Sutherland of the two appellants which had not been given but which, if it had been given, *might not* have corresponded with their actual appearance and that this *could have* raised questions about the reliability of his evidence is likely only to have thrown them into a state of confusion as to how to deal with the evidence that had actually been given and to ask them to embark on a speculative exercise of considering the potential effect of evidence that did not exist. I cannot believe that this would have been conducive to a proper assessment of the evidence against the appellants. Despite the attractiveness and ingenuity with which it was argued, the Board considers that there is no merit in this point.

23. It was submitted that the judge failed to give sufficiently explicit directions on the dangers inherent in purported recognition cases. It was suggested that he ought to have drawn to the attention of the jury that a common experience was that people mistakenly believe that they have

recognised someone well known to them, the phenomenon colloquially described as, "I could have sworn it was you". In the present case the judge suggested to the jury that the need for caution in this case (which was plainly one of purported recognition) was just as great as in an identification case which did not involve the witness claiming to have recognised the appellants. He advised the jury that they should examine closely the question whether Mr Sutherland was correct in his claim to have known them and whether he had had sufficient opportunity to register their features so as to be able to make a reliable identification of them. In the Board's judgment this fulfilled the need to comply with the sense and spirit of the *Turnbull* guidelines.

24. The claim that the judge failed to sufficiently address the matters that might have cast doubt on the reliability of the identification evidence cannot be accepted. Possible inconsistencies in Mr Sutherland's evidence were drawn to the jury's attention by the judge. He pointed out that his statement at the preliminary inquiry that both appellants had chrome coloured guns did not correspond with his evidence at trial when he stated that one gun was black and one was chrome coloured. The judge also referred to Mr Sutherland's evidence during examination-in-chief to the effect that the van drove up and then the gun came out, whereas in re-examination he stated that he saw a face before the gun came out. On this subject the judge pointed out to the jury that if the gun came out immediately Mr Sutherland might well not have had time to see the face of the person who held it and would therefore have had no opportunity to see if he recognised that person's face. On a number of occasions the judge made it clear that it was a matter for the jury as to whether Mr Sutherland's identification was correct and reliable. The general challenge to the judge's charge fails.

Identification or recognition

25. Hubert Sutherland gave evidence that he had played football with Rupert Vassell for some four years at John Mills All Age School. This was from 1992 until 1996. They played every weekday evening and on Saturday and Sunday mornings. During this time he knew that Vassell lived on Lincoln Road. Following this period he used to see Legamore three times per week at a betting shop on Half-Way-Tree Road. This pattern continued throughout the period from 1996 until 1998 when the murder of Glenroy Sutherland occurred.

26. Mr Sutherland claimed to have known Mark France for about eight years. He lived in Elgin Road which was a road that ran parallel to that where the witness lived, Greenwich Road. He saw him about five times a week. France rode a red 'CBR' motor cycle. He had the nickname "Twinnie", apparently because he had had a twin brother who had died in 1997.

27. Although counsel for the appellants submitted that these were not cases of recognition, there is really no basis on which that claim can be made. Mr Sutherland described how he knew both appellants before the shooting of his brother. He gave evidence about his knowledge of where they lived. He was not challenged on that evidence. Nor was he challenged about his claim that Legamore attended the betting shop on Half-Way-Tree Road or on the evidence that France rode a red CBR motor cycle. It is true that Mr Sutherland did not know Legamore's proper name before the killing but that is nothing to the point. His acquaintance with both men before the murder was extensive. He had had countless opportunities to observe them. His claim to be able to identify them on the basis of those earlier contacts cannot be characterised as anything but recognition. The judge was plainly right to direct the jury that this was a recognition case and, for the reasons given at para 23 above, his directions as to how it was to be approached cannot be criticised.

Lack of identification parade

28. It is now well settled that an identification parade should be held where it would serve a useful purpose – *R v Popat* [1998] 2 Cr App R 208, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in *Goldson and McGlashan v The Queen* (2000) 56 WIR 444. In *John v State of Trinidad and Tobago* [2009] UKPC 12, 75 WIR 429 addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice – see *Goldson* at (2000) 56 WIR 444, 450.

29. In France's case there was no challenge whatever to Mr Sutherland's claimed prior knowledge of him. Indeed, in his unsworn statement from the dock, France referred to Mr Sutherland by name and did not refer to his evidence about the circumstances in which Hubert Sutherland claimed to know him. The Board is satisfied that the holding of an identification parade in his case would have served no useful purpose.

30. The challenge to Mr Sutherland's claimed knowledge of Vassell could hardly be described as forthright. It is contained in the following passage of the cross-examination:

"Q. Tell me, John Mills have a playing field?

A. Yes.

Q. Big playing field?

A. Not really a big playing field.

HIS LORDSHIP, But it is you he was playing football with?

WITNESS: Yes, 'Legamore'.

Q. You didn't know his name before you come to Gun Court?

A. 'Legamore'?

Q. You didn't know his correct name?

A. No.

Q. It is not somebody that you used to talk to?

A. No, I don't talk to him. I just play ball with him.

Q. You don't really know him?

A. Mi know him, but not to talk to.

A. You never talk to him? Okay."

31. In his unsworn statement Vassell claimed not to know Mr Sutherland. He said that he knew "none of them" and that he knew nothing of what Mr Sutherland had been talking about.

32. It is at least open to question whether the diffident challenge made to Mr Sutherland's claimed acquaintance with Vassell was such as to render an identification parade necessary. After all, it had been claimed that they met on a daily basis for four years and that Mr Sutherland saw him on average three times a week in the two years before the murder. There was no challenge to the evidence that Vassell played football at John Mills School or that he attended the bookmaker's premises in Half-Way-Tree Road. Likewise, the address given for Vassell by Mr Sutherland was not disputed nor that he was known by the nickname "Legamore". It is difficult to resist the conclusion that, against this background, it is extremely likely that Mr Sutherland would have picked out the man that he claimed to have known as "Legamore" for eight years and more and whom he had already identified to the police as one of the occupants of the minibus. It is, therefore, at least, very doubtful that any useful purpose would have been served by holding an identification parade. In any event, it cannot be plausibly suggested that the failure to hold an identification parade caused a serious miscarriage of justice. The appellants' arguments on this aspect of the appeal must be rejected.

Dock identification

33. The argument that the trial judge should not have permitted a dock identification of the appellants and that he failed to deal adequately with the dangers of such an identification can be taken together and dealt with briefly. A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified. The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings – see, for instance, *Pop* (Aurelio) *v The Queen* [2003] UKPC 40; 147 SJLB 692, *Pipersburgh v The Queen* [2008] UKPC 11, 72 WIR 108; *Edwards v The Queen* UKPC 23, 69 WIR 360 and *Tido v The Queen* [2012] UKPC 16, [2012] 1 WLR 115. The inclination to assume that the accused in the dock is the person who committed the crime is obvious.

34. There has been a tendency to apply the term "dock identification" to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be

assumed that the nature of the warning that should be given is the same in both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, "This is the person who committed the crime". He is saying that "the person whom I have identified to police as the person who committed the crime is the person who stands in the dock."

35. In *Stewart v The Queen* [2011] UKPC 11, 79 WIR 409 the identifying witness, Ms Minnott, claimed to have known the appellant and his family for a long time. Although the defence attacked Ms Minnott's evidence on this, the Board held that 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. At para 10, Lord Brown, delivering the judgment of the Board said:

> "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 … 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"

36. The same considerations apply here. This was not in any real sense a dock identification. It was, as Lord Brown said in *Stewart*, a pure formality. The warning in the present case needed to be directed, therefore, not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made. For the reasons given earlier in this judgment, the Board considers that the necessary directions to deal with those circumstances were contained in the judge's charge.

37. As it happens, of course, the trial judge, unnecessarily in the Board's view did warn the jury about the dangers of dock identifications. He said:

> "There are two things, two more things I wish to say to you before I review the evidence. One pertains to Mr Vassell. You

> see, the first time that the witness was pointing out Mr Vassell, after the incident, was in court. This is known as a dock identification. Now, Mr Foreman... and members of the jury this is quite undesirable and it is undesirable because, you know, if you see somebody in the dock, you know, you going to say it must be him. Why, in other words, why would he be in the dock? So this is a further reason to emphasise the caution. Then in respect of Vassell, Mr Vassell, who is known as Leggo Man – Leggo More (*sic*), did the witness know Leggo More? Did he know him to such an extent that in those circumstances he could have properly identified him".

38. Somewhat ironically, therefore, the jury was warned about the dangers of convicting based on a dock identification when Mr Sutherland's pointing out the persons whom he had already told the police had been in the minibus was not, in any real sense, a dock identification at all. The appellants' arguments on this ground must also be rejected.

The conduct of counsel

39. The first basis on which counsel's conduct of the trial was criticised was that they absented themselves during the judge's charge. For this argument to succeed, it would have to be demonstrated that the judge's charge was objectionable and that, if counsel had been present, any deficiencies in it would have been noted, if not corrected. It would have to be shown that the charge should – and would – have been different. The judge's charge to the jury has withstood the challenge presented to it, in the Board's opinion. On that account this particular challenge must also fail.

40. The submission that counsel failed to call witnesses can be dealt with even more briefly, not least because it was not pursued in oral argument. There was no suggestion, much less evidence, that if Richard Smith, Andrew McKenzie or Michael Henry (who were the witnesses that in their written case, appellants' counsel suggested ought to have been called) had been asked to testify their testimony would have assisted the appellants' case in any material way. This argument is simply not viable.

41. As to the brevity of counsel's submissions, little needs to be said. For this argument to be remotely feasible, there must be at least some indication that a particular aspect of the appellants' defence case had been neglected in the closing speeches of counsel. It should not be assumed that conciseness of presentation means that the issues have not been comprehensively addressed.

A well crafted, succinct speech will often be far more effective than a long discourse. The case turned on a very narrow set of issues. It did not require a lengthy disquisition. There was no evidence that the shortness of the speeches had any impact on its outcome.

Lack of a good character direction for Mr Vassell

42. Mr Vassell had not been convicted of a criminal offence before he stood trial for the murder of Glenroy Sutherland. It does not follow, however, that he is inevitably of good character: see *Gilbert v The Queen* (Practice Note) [2006] UKPC 15, [2006] 1 WLR 2108 at paras 18-20. In *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421 at para 33 (v) Lord Carswell, delivering the judgment of the Board, said this:

> "The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen*, at p 844 ..."

43. The observation that the judge has no duty to raise the question of the defendant's good character must be qualified in light of statements made in the subsequent case of *Gilbert v The Queen* [2006] 1 WLR 2108 where Lord Woolf said (at para 17) that in a case where the defendant was obviously a person of good character the judge would be well advised to ask counsel whether he intended to put his character in issue in order to clarify the situation. But the fact that a direction was not given, as opposed to the reasons for that failure, is sufficient to justify an examination of the effect that this may have on the safety of the conviction. In *Smith v The Queen* [2008] UKPC 34, 74 WIR 379 at, para 30, Lord Carswell said:

> "... 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 v The State* (2002) 61 WIR 491; *Teeluck v The State* [[2005] 1 WLR 2421], (2005) 66 WIR 319."

44. And in *Nigel Brown v State of Trinidad and Tobago* [2012] UKPC 2, [2012] 1 WLR 1577, it was held that the failure of counsel to adduce evidence of good character can bring about an unsafe verdict. It should not be automatically assumed, however, that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel. There might well be reasons that defence counsel decided against that course. But in the absence of an explanation from counsel as to why he did not raise the issue of the defendant's good character, it is necessary to examine whether the lack of a good character direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction ought to have been given.

45. This question was considered at length in the case of *Nigel Brown* in the following passages:

> "It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction - *Jagdeo Singh*... [2006] 1 WLR 146, para 25 and *Bhola v The State* [2006] 4 LRC 268, paras 14-17. As Lord Bingham of Cornhill said at para 25 in *Jagdeo Singh's* case, 'Much may turn on the nature of and issues in a case, and on the other available evidence.' Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case. Thus, in *Balson v The State* [2005] 4 LRC 147, a case which turned on the circumstantial evidence against the appellant, the Board considered that such was the strength and cogency of that evidence the question of a good character direction was of no significance. At para 38 the Board said:
>
> > "… a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the

> appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence."

It is true that in *Teeluck*... at para 33(iv) Lord Carswell, giving the judgment of the Board, said that 'where credibility is in issue, a good character direction is always relevant'. And in para 33(ii) he said that the direction 'will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial.' In *Bhola*...the Board considered these remarks. After reviewing the cases of *Balson, Jagdeo Singh* and *Brown (Uriah) v The Queen* [2006] 1 AC 1, Lord Brown of Eaton-under-Heywood, delivering the judgment of the Board, said that the statement in para 33(ii) of *Teeluck*...required to be applied with some caution. He continued:

> "In *Teeluck's* case itself, of course, the appellant's credibility was said to be "a crucial issue" to the extent that the Board was unable to conclude "that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given" (para 40). So too in *Jagdeo Singh's* case [2006] 1 WLR 146. But the Board reached a different conclusion in *Balson's* case [2005] 4 LRC 147 and in *Brown's* case [2006] 1 AC 1 and their Lordships have no doubt that the Court of Appeal were right to have done so in the present case too. The cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so 'rare'."

46. The Board concluded that the approach in *Bhola*, if and in so far as it differed from that in *Teeluck*, was to be preferred. It observed that there would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close

examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence.

47. The good character direction is, of course, comprised of two elements: a so-called credibility limb (signifying that the defendant who has no previous convictions is entitled to claim that he should be more readily believed than one who has been convicted previously) and a propensity limb (which means that someone who has not been found guilty of an offence in the past should be regarded as less likely to have a predisposition to offend than someone who has a criminal record).

48. Where, as in this case, a defendant who complains about not having had a good character direction has not given evidence, the force of the argument that the credibility limb of the good character direction rendered the conviction unsafe is greatly diminished: see *Stewart v The Queen* 79 WIR 409, para 15. Vassell's claim that he did not know Mr Sutherland was baldly stated; it was not developed in cross-examination of Mr Sutherland; none of the incidents of the claimed acquaintance was challenged. His evidence contained a wealth of detail which, if it was inaccurate or untrue, could have been subjected to the most direct testing. Against that background, the value of a good character direction on the question of credibility would be, at best, negligible.

49. On the question of propensity, the strength of the evidence against Vassell is of considerable importance in deciding whether the absence of a good character direction caused a serious miscarriage of justice. But one must also be clear-sighted about the possible effect of such a direction. In this case the real issue was whether Mr Sutherland's identification of Vassell could be relied upon. If the jury had been told that Vassell had no previous convictions and that he must be regarded on that account as being less predisposed to commit the crime of which he was accused than someone who had been convicted of crime previously, could this be regarded as likely to have caused them to alter their view as to his guilt? Or is it overwhelmingly probable that it would have made no difference whatever. Given the forthrightness of Mr Sutherland's evidence, the poverty of the challenge made to it and the lack of direct relevance of the question of propensity to the case made against Vassell, the Board has reached the firm conclusion that a good character direction would not have had any influence on the jury's verdict.

The receipt of hearsay evidence

50. The final argument advanced on Vassell's behalf was that the testimony of Detective Inspector Malcolm that he had learned from a colleague that the name of the man known as "Legamore" was Vassell was hearsay and should not have been received in evidence. The detective inspector's testimony on this point was given in response to a series of questions asked of him by the judge. The relevant passage from the transcript is as follows:

> "Witness: I went inside the CIB office where I saw and spoke to Detective Constable Williams and I saw and identified myself to Rupert Vassell who was inside the office also.
>
> His Lordship: You knew him before?
>
> Witness: Yes, sir.
>
> His Lordship: Did you know him by both names, before?
>
> Witness: I, no, sir, I know him as Legamore.
>
> His Lordship: So, how were you able to, the warrant that you took out, you took it out in what name?
>
> Witness: Rupert Vassell o/c Legamore.
>
> His Lordship: But you said you didn't know his name before?
>
> Witness: But I spoke to my colleague.
>
> His Lordship: You got Rupert Vassell from your colleague?
>
> Witness: My colleague.
>
> His Lordship: You asked him who this Legamore was?
>
> Witness: Yes."

51. It was submitted that without the admission of this hearsay evidence, there would have been no evidence to connect Vassell with the nickname Legamore and the evidence against him would have been significantly weakened.

52. This argument cannot be accepted. As recorded at para 7 above, Detective Constable Williams knew Vassell by name and by his nickname Legamore. In any event the appellant was identified by Hubert Sutherland as

one of the two gunmen and stated that he knew him as Legamore. There was ample evidence to connect Vassell to the nickname and that he was known as Legamore was never challenged.

Conclusion

53. None of the grounds advanced on behalf of the appellants has succeeded. The Board will therefore humbly advise Her Majesty that the appeal should dismissed.