[2013] UKPC 26
Privy Council Appeal No 0080 of 2012

JUDGMENT

Ackerley (Appellant) v Her Majesty's Attorney General of the Isle of Man (Respondent)

From the High Court of Justice of the Isle of Man (Staff of Government Division)

before

Lord Neuberger
Lord Clarke
Lord Wilson
Lord Hughes
Sir Patrick Coghlin

JUDGMENT DELIVERED BY LORD HUGHES ON

31 July 2013

Heard on 13 June 2013

Appellant
Michael Birnbaum QC
Paul Terence Rodgers
(Instructed by Simcocks Advocates Limited)

Respondent
Nigel Lickley QC
Timothy Meakin
(Instructed by Sharpe Pritchard)

LORD HUGHES:

1. The appellant Giles Ackerley was 22 years of age in May 2010 when he was alleged to have sexually assaulted a young woman at a party. He was tried in summary proceedings before the High Bailiff over three days, and was convicted. His subsequent appeal to the Staff of Government (Appeal Division) was dismissed. His further appeal to the Board renews the contention made before the Appeal Division that insufficient allowance was made in the court of trial for the very unfortunate autism from which he suffers, and that accordingly his conviction is unsafe.

2. The appellant was acquainted through past work with a man called Craig, who had a girlfriend, Claire. On Sunday 2 May 2010 the couple had camped overnight near the appellant's home where he lived with his parents. They picked him up and he joined them for a barbecue on the beach. That evening there was a party at the home of a friend of Claire and they invited him along to that also. The offence was alleged to have taken place during the night after the party, when several of the partygoers slept over at the house where it had taken place. Craig and Claire bedded down on the floor in an attic bedroom where the party-giver and her boyfriend also slept. There was no doubt that the appellant also arrived in this bedroom. Nor was there any doubt that in the small hours of the morning Claire woke up to find the appellant by her and that she immediately complained loudly that he had molested her. Craig then awoke and intervened, taking the appellant forcibly downstairs. On any view Craig assaulted the appellant severely inside and/or outside the house, causing him injuries which included a broken bone in his foot and multiple bruising. For this Craig was in due course prosecuted and convicted. The issue at the trial was whether the appellant had done anything indecent to Claire or not. His case at the trial was that he had not, although he had, he said, stumbled in getting up, had accidentally fallen over her, and had put out his hand which had in consequence touched her upper thigh over the cover under which she lay.

3. Much of the trial accordingly depended on the evidence of, on the one hand, Claire and Craig and, on the other, the appellant. The other two occupants of the attic bedroom slept through the commotion. There was, however, also some limited relevant evidence from others in the house.

4. Claire's evidence was that she and Craig had made up a makeshift bed on the floor and that she had almost immediately fallen asleep. She was under a duvet or cover. It was common ground between Craig and the appellant that the appellant had subsequently arrived and that he and Craig had had some conversation before Craig fell asleep. Claire said that she had been awakened by feeling something touching her between her legs. She said that as she came awake trying to brush it away, she

realised that it was a hand or finger and that it then penetrated her more than once. She had gone to sleep fully clothed, wearing on her lower half knickers and over them a pair of jeggings, or skin-tight legging-type trousers which have no belt, buttons or zip but an elasticated waist. When she came fully awake, she said, the jeggings were around her knees, but the knickers still on. She awoke, she said, to see the appellant near her feet, kneeling and resting his elbows on the floor with his head on his hands, and looking directly at her. She lost control and became hysterical. Craig beside her was awakened. His evidence was not significantly relied upon by the High Bailiff at the trial, but the appellant and he agreed that the appellant had looked at him and had said that he had done nothing. Thereupon, Craig took hold of the appellant, marched him downstairs and out of the house, and in the course of doing so assaulted him quite severely. The appellant ran away from him and telephoned his parents who were at home about 20 miles away. They in turn telephoned the police before setting off to look for him. The police found the appellant before they did. It was by then a few minutes short of 0400.

5. Neither the two police officers who had first found the appellant, nor his parents, had any idea, at that stage, that there was any complaint against the appellant at the party. When the officers found him, limping and shoeless, they asked him what had happened. Their evidence was that he had told them that he had been to a party and had tried it on with a girl; the boyfriend had then assaulted him. He had run away and thought that others were still after him. He was asked who it was who had assaulted him He replied:

> "I'm making no complaint. It's my fault. I tried it on with a girl."

Quite soon after this, his parents arrived.

6. The appellant's parents (and he himself) made it quite clear to the police that he was autistic, and in due course that fact was recorded on his custody record and resulted in an accepted need for an appropriate adult to attend any interview. In these early hours of the morning he was taken to hospital and thence home. He was arrested at home that evening and taken to the police station, accompanied by his father. He was bailed without being interviewed since no independent appropriate adult was available; his parents were potential witnesses. His only additional recorded comment was to one of the officers responsible for finding him substitute clothing and was "I knew going into that house was a bad idea; we had all had too much to drink." The following day he returned by arrangement for interview. He was by then represented by an advocate and accompanied by a social worker whom he knew as an appropriate adult. He had with him a prepared typed statement which was given to the police, and a supplemental handwritten statement was produced, it seems after a consultation of about 60-70 minutes with his advocate. An interview followed. Some care was taken to ensure that he understood. His responses to neutral questions about the meaning of

the caution showed that he understood that well and could re-state it in his own terms entirely appropriately, because his answer to the question what the court might think if he were later to say something different in court was "That I've been trying to hide something". He began by saying that everything that he wanted to say was in his statement. He did thereafter give, in answer to questions, an account of the earlier part of the day in question, and of the barbecue, but he then asked for the interview to be halted for consultation with his advocate, and thereafter, no doubt on advice, he perfectly properly declined to answer further questions, save for some relatively inconsequential ones. His account of the party was accordingly given in the prepared statements.

7. The main statement ran to about a page and a half of typescript. It was sequential and well expressed. It began by describing his autism and some of its features relevant to his situation. He said that he found it very difficult to communicate with people, that he tended to try to be generous with others, hoping that they will be his friends and that he found it difficult to read situations. Sometimes, he said, people took advantage of him because of his disability. The statement then asserted that Craig, in helping him organise his leaving party at the workplace where both had been employed, had been instrumental in costing him £250, which was all he had in the bank. Then he said that he had felt pressured to go to the party but had found it difficult to refuse. He had not liked the look of the house where the party was taking place. He had asked to be taken home at about midnight but no-one seemed interested in doing so, so he had had to stay. Claire, he said, had been very nice to him and he thought that she liked him.

8. Of the critical moments, he said this:

> "Craig and Claire were on the floor. They had left a space for me next to them so I lay down on the floor. I didn't move from this position. I was very drunk and went to sleep. Claire was next to me. Later I woke up but Craig seemed very angry with me and pulled me up, hitting me."
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> Speaking of the police officers who found him, he added:
>
> "I told the police that I thought the trouble was caused by people being very drunk and that a person's boyfriend thought that I was coming on to his girlfriend."

9. The short handwritten statement was also signed by the appellant. In it he added this:

> "This morning….I asked my dad to type out a statement at my dictation, about the events for which I had been arrested. He typed out the exact words that I said…
>
> In addition to that statement I would like to say that at no time did I indecently assault Claire…by any means and in particular I did not penetrate her vagina with my finger.
>
> When I told the Police that I had tried it on with a girl I was still a bit drunk and thought that I had been assaulted for trying to chat up a number of different girls. I felt a little bit to blame for this."

10. Three months later, in August 2010, the appellant provided the police with a further typewritten statement of about three pages. In it he voiced a number of complaints. He asserted (i) that he had been given drugs at the party against his will and that both Craig and Claire either knew or should have known about it, (ii) that Claire was in breach of a duty of care in not taking him home when his parents had been told he would be returned, (iii) that the police had not fully respected or understood his position as victim, (iv) that the police had wrongly refused to allow his parents to be present when he was interviewed, (v) that the conditions of his police bail were unreasonable and (vi) that he had not been kept informed of the police investigations into the assault upon him. In the course of this statement, he repeated the account of the critical part of events at the party in exactly the same terms as he had used in his first typed statement. Whether this document, which was provided to the police, was before the High Bailiff is not clear, and it may well be that there would be no occasion for it to be. The complaints about the police handling of the case are not now pursued.

11. On 15 September, the appellant was seen again by the police, accompanied by the same advocate and independent adult. An interview ensued in which he was asked questions designed (a) to establish whether he had had <u>any</u> physical contact with Claire and (b) to give him an opportunity to deal with a scientific finding of Claire's DNA on his clothes, which no doubt suggested possible contact of some kind. The appellant declined to answer any of these questions, it may well be on advice. To anticipate, at the trial the High Bailiff found the scientific evidence to be inconclusive and of no significance; since they had spent much of the day in each other's company there was no doubt a real possibility of contact between the appellant and Claire whether or not he had committed the indecent assault alleged.

12. A little later that month, on 28 September, the appellant provided a written witness statement for use in proceedings against Craig for assault. It traversed the

critical moments at the party. This document did not consist simply of words lifted from the previous statement provided the day after the event, and it added small details such as that he was not sure whether Claire was awake when he himself woke up to find Craig shouting at him. It is likely, no doubt, that whoever took the witness statement had the earlier document to hand and referred to it. Essentially the account was the same, that he had gone to sleep and not moved until awakened to find Craig angry with him.

13. Eight months after that, however, on 24 May 2011, the appellant volunteered to the police an "addendum" to his statement. By now it was just over a year since the incident which was in dispute. The additional statement said this:

> "I am making this statement as I have remembered more details of what happened in the early hours of Sunday 3 May 2010. It is not unusual for me to remember things a long time after the event. This is a feature of my autism. It is well researched in high functioning young people with autism and its cause lies in an inability to organise memory.
>
> I was sitting in the bedroom with my back against the uprights and my bottom was on the floor, with my elbows on my knees (which were bent up) and head in my hands. I felt really sick. I tried to get up because I thought I might feel better, but I stumbled and fell. I fell on Claire, on top of the bed cover, on to her legs. At this point, Claire woke up and started shouting. I said I was sorry. I can't remember what she said. She then shouted at Craig and he sat up.
>
> Craig came over to me and then started to assault me. My statement continues as given previously."

That was the first appearance of the account on which the appellant relied at trial.

14. There was unchallenged evidence from some of the other partygoers, including the mother of one of the house residents. In part this evidence proved the complaint which Claire was making immediately she went downstairs in considerable distress, which was that she had been indecently touched in her private parts. The evidence also showed that the appellant had been trying rather unsatisfactorily to 'chat up' several of the girls at the party, and that he had been attempting to impress people by saying that he was a property developer and that he had a lot of money.

15. The High Bailiff heard the oral evidence of Claire, of Craig and of the appellant. He delivered a reasoned judgment running to approximately twenty pages

of typescript. Except that he accepted that Craig had honestly believed that the appellant had assaulted Claire, he did not attach weight to the former's evidence; there were unsatisfactory inconsistencies between his oral evidence and prior written statements, he had probably exploited the appellant's eagerness to please by getting him to buy some drink earlier in the day, and he did not give convincing oral evidence. However, the High Bailiff considered the evidence of the appellant and of Claire at some length. He believed Claire and disbelieved the appellant. His principal stated reasons for doing so were that Claire's account (i) had been consistent throughout, (ii) was supported by her spontaneous complaint immediately on waking, (iii) was supported also by what the appellant had said to the police when first found and (iv) could not be explained as mistake or imagination. She could not have imagined the repeated penetration she described. He rejected the possibility that she could have mistaken the appellant falling on her and touching her leg over the duvet for such penetration. He dealt with the several submissions made on behalf of the appellant which criticised her evidence. That she had denied seeing Craig assault the appellant he held consistent with her distraught condition, of which there was ample evidence. That she had taken drugs he did not believe; he accepted her denials and the blood test gave no support for the suggestion. That she was less than forthcoming about the exact source of some valium given to her after the event to calm her down was not, he held, surprising and did not affect the reliability of her account of the offence. He found that there was nothing sinister in the timing of the report to the police, particularly given Craig's assault on the appellant. He rejected the appellant's evidence because he accepted Claire's. He also relied upon two particular parts of the appellant's evidence. The first was his assertion that he did not know at the time why he was being assaulted, and only realised this when the police arrested him; this was inconsistent with what he had said when first found by the police. The second was the extreme lateness of the appearance of the account of falling accidentally upon Claire, which was described as recent invention.

16. In arriving at his conclusion, the High Bailiff had ample evidence of the autistic condition of the appellant. Apart from the several explanations of it in the statements made by the appellant, he also heard the oral evidence of his father, who explained the condition at some proper length, and the unchallenged written statement of his mother, also dealing with it; he accepted the evidence of both without reservation. He made appropriate enquiries during the trial about any procedural adjustments which might be required. But what he did not have was any expert medical report on any implications of the appellant's condition for the assessment of the evidence in the case. When the appellant appealed his conviction to the Appeal Division, he tendered reports from Dr Ludlow, who confirmed the diagnosis of autism which had never been in doubt, but also from Professor Baron-Cohen, who is an acknowledged world leader in the study of the condition. The Crown did not oppose the admission of these reports, which the court in consequence admitted as fresh evidence. Indeed at that stage the Crown's initial stance was not to oppose the appeal, but to contend that there should be a re-trial. The appellant, however, was not prepared to agree to re-trial. The court correctly concluded that it was for it, and not for the Crown, to determine

whether the appeal should be allowed. The Crown now says that its initial stance was erroneous.

17. The appellant's case in the Appeal Division was that the report of Professor Baron-Cohen demonstrated that the conviction was unsafe, either because sufficient procedural safeguards for the appellant's condition had not been adopted or because the High Bailiff had, without such report, over-valued the significance of what the appellant had said to the police, and of the lateness of appearance of his trial account of falling accidentally onto Claire. The Appeal Division considered Professor Baron-Cohen's evidence in detail but concluded that it did not justify the conclusion that the conviction was unsafe. Before the Board, Mr Birnbaum QC for the appellant renews and somewhat expands the argument that the effect of the fresh expert evidence is to render the conviction unsafe. The Board was provided with a supplementary report of Professor Baron-Cohen, in which he responds to submissions made by the Crown in its initial written case about his evidence. That was admitted without objection and can be treated as somewhat expanding and explaining the first report, although it largely represents argument, rather than additional expert evidence.

18. Professor Baron-Cohen's expertise is undoubted and for the most part the expert evidence contained in it can be accepted, as it was by the Appeal Division. There were some parts of his report which strayed, no doubt inadvertently, into offering his own assessment of the evidence in the case generally, which is the function of the court and not of the witness. Thus the Appeal Division was plainly correct to put to one side the professor's statements that "there was plenty of scope for misunderstanding [by Claire] of what happened" and that the inconsistencies in the appellant's accounts "by no means persuade me of his guilt". The Appeal Division detected a third example of such straying in what it recorded as the professor's statement that "it is clear that he did not commit the alleged offence and that he did not have the intention of committing it either". In that third case, the Appeal Division misread the professor's report, which was confined to recording that the Appellant *said* ("*he* is clear…") that he did not commit, or intend to commit, the offence. However, that error of the Appeal Division has no bearing on its conclusion; it was correct to identify the respects in which the professor had exceeded the legitimate bounds of expert evidence, and the simple recording of the appellant's present denial of the offence added nothing.

19. Professor Baron-Cohen's comprehensive report identified concerns about the procedural course which the case took. However, whilst his concerns are perfectly understandable as general observations on good practice when dealing with autistic defendants, the task of the Appeal Division was to decide whether the matters which he raised affected the safety of the conviction on the facts of the present case. It was perfectly entitled to conclude that they did not; indeed the Board is satisfied that it was correct to do so. Thus:

i) the need for care in interrogation may well mean that comments made in police interview by a defendant with a disability such as the appellant has ought to be 'treated with caution', but there was no instance in the present case of anything the defendant said in interview being taken in any way as adding to the case against him;

ii) even if it be right that 60-70 minutes of consultation with his advocate before interview was not long enough – and, given that the appellant had already prepared a detailed written statement with his father, the Board sees no basis for thinking that it was not – since the interview added nothing to the case against him, the point has no bearing on the conviction;

iii) the criticism that the parents should have been enabled to act as appropriate adults, or that the appellant should have had the opportunity to consult with them, misunderstands both their potential status as witnesses and the ample opportunity which the appellant had had to go over events in their reassuring company before speaking to the police, but even if the criticism had not been thus flawed, it would for the same reason have had no impact on the safety of the conviction, as Mr Birnbaum realistically recognised;

iv) whilst Professor Baron-Cohen rightly identified two instances of double questions addressed to the appellant in the witness box, and rightly pointed out that it is not clear which part the appellant was answering, the answers to these questions were of no significance to the conclusions of either the High Bailiff or the Appeal Division and the formation of those questions is irrelevant to the safety of the conviction; the same applies to other criticisms advanced by Mr Birnbaum of the cross examination of the appellant; and

v) whilst it might have been good practice to enable the appellant to sit near his advocate, the High Bailiff canvassed this with counsel and was not asked to adopt it, but in any event there is and can be no suggestion that the advocate was in any way less than fully instructed with the appellant's case, nor is it suggested that there was anything the appellant needed to say to him which he was not able to say.

20. A further part of Professor Baron-Cohen's report addressed the possible misunderstandings which may arise if the behaviour of a person with the appellant's disability is judged as if he had no such disability. It is plainly correct that the appellant may have felt ill at ease or confused in a strange house. It is plainly also correct that an autistic person may engage in what would normally be regarded as socially inappropriate behaviour. It is well understood that such a person may not pick up the ordinary, but subtle, social signals which characterise interaction between

persons without this disability. The appellant's incongruous and clumsy attempts to 'chat up' the girls at the party, and his own description of himself in court as "always a ladies' man" were no doubt examples of this likely tendency, and indeed the witnesses who described it went on to say that once they were told of his autism they accepted that it probably explained his behaviour. But this was not a case, as some may be, of a failure to pick up subtle social signals, nor is it a case of the interpretation to be put upon the behaviour of the defendant. This is a case where the issue was whether he had penetrated Claire with his fingers or not. If he had, there was not and could not be any suggestion that because of his condition he had not committed the offence. If anything, very sadly, a tendency to inappropriate or incongruous social behaviour is consistent with this offence having been committed. It was rightly not treated by either the HB or the AD as evidence positively supporting the accusation, but it cannot be said that it weakens the evidence which does support it.

21. The important parts of Professor Baron-Cohen's report in the present case were those which addressed the likely impact of the appellant's disability on what he had said about the evening in question. There were three strands to this. First, the appellant, like some other autistic persons, is affected by a degree of echolalia, which means that he is unusually influenced by what other people say and may repeat their words as if they were his own, even if he may not, internally, agree that they are accurate. Indeed, he may accept what others say and feel guilty about his behaviour even if he has no need to do so. Second, Professor Baron-Cohen's evidence is that autistic people may have difficulty organising memory and may genuinely find that the course of events is recalled only in fragments, and perhaps over a long period. Third, his evidence is that autistic persons are generally poor liars; they tend not to see the occasion for any lie and their condition is often characterised by sometimes embarrassing truthfulness, even when social niceties would, to most people, dictate a tactful "white lie".

22. The significance of possible echolalia relates to what the appellant said to the police when first found. If the appellant was simply repeating what he had been told without it being an admission of his own, it might lose much of its significance. Professor Baron-Cohen's report proceeds on the basis that the expression "I tried it on with a girl" repeated what the police officers had said to him. The source of this was a report to the professor from the appellant via his mother; she seems to have told the professor that the appellant had told her en route to the hospital that "*They said* its my fault; I tried it on with a girl". It was common ground before the Board that the police officers could not have said any such thing, because they were simply looking for a missing injured person, had no idea of what had happened, and were completely unaware of any accusation against him involving any girl. If, therefore, the appellant did indeed tell his mother this, he cannot have been correct and no such suggestion was pursued either at trial or subsequently. It is possible that Mrs Ackerley's report was itself a misunderstanding. There remains the possibility that Craig, when assaulting the appellant, might easily have said something to him by way of accusation to justify the beating which he was administering. The high point of the

appellant's case is that an exploration of this during Craig's evidence might have been prompted if Professor Baron-Cohen's report had been available at trial. There is, however, no evidence of this having been said, despite the ample opportunity for it to be asserted which has existed ever since the report, and indeed before. The appellant's explanations for his remark to the police have been different, albeit also grounded in his autism, viz either that he thought "a person's boyfriend" had, because drunk, mistakenly thought that he had been "coming on" to his girlfriend (in the first prepared statement) or that he felt guilty at having tried to ingratiate himself with various other women at the party (in the handwritten prepared statement and in oral evidence). It was his positive evidence at the trial that he did not understand from Craig why he was being attacked.

23. The Appeal Division considered the possibility that the very late appearance of the appellant's trial explanation of falling onto Claire might be explained by fragmentary memory recovery. It concluded that this was difficult because this was not a case of details being remembered bit by bit, but rather of a fundamental inconsistency between the first and later accounts. The first account, repeated several times over several months, was that the appellant had lain down, gone to sleep, and had not moved until awakened by Craig shouting at him. His later account was that he had not gone to sleep at all, and the assertion of getting up because feeling sick and accidentally falling on Claire was wholly inconsistent with what he had said earlier.

24. It may readily be accepted that an autistic person has a tendency to be embarrassingly truthful. Professor Baron-Cohen's evidence was not, however, that autistic persons never lie. It was, rather, that they tend not to do so because they see no point in it, and that when they do they are poor at it; he instanced the child who denies eating the chocolate when the smears on his face betray the obvious truth. The partygoers' evidence of the appellant's obviously inept assertions that he was a wealthy property developer is perhaps consistent with this. The expert report does not address the question of how likely or unlikely it is that an autistic person will, in self protection, deny an accusation against himself which he well understands is a serious one. The Appeal Division was clearly right to say that even for an autistic person repeated denials are not necessarily truthful and that the whole of the evidence must be assessed.

25. The Appeal Division concluded that although the High Bailiff had relied in part on the appellant's initial remark to the police, and on the late appearance of the accidental fall account, the case had always depended very largely on whether Claire was truthful and accurate. It is true, no doubt, that the determination of where the truth lies as between two witnesses who assert respectively black and white will inevitably involve an overlap between accepting the evidence of one and rejecting that of the other. However, the critical feature of the present case is that the High Bailiff and the Appeal Division were clearly fully entitled to reject as wholly implausible the suggestion that Claire could have mistaken an accidental fall onto her leg, over the

duvet, for repeated digital penetration. Nor could she have mistaken the fact that her jeggings were drawn down round her knees. Both courts were entitled to conclude that either she was lying or she was truthful. The High Bailiff, who saw her at length, was entitled to rely on his impression of her, just as he was entitled to rely on the unfavourable view he took of Craig's evidence. Both courts were also entitled to conclude that her spontaneous and rather hysterical accusation of the appellant had very little of the dishonest about it, and to reject the possibility that she had invented it. Given those conclusions, they were also entitled to conclude that the correct explanation, in this case, for the appellant's spontaneous remark to the police and for the late appearance of the accidental fall account were, despite the arguments based on his disability, respectively a truthful partial admission of something involving Claire and her boyfriend, rather than other women at the party, and a belated but untruthful attempt to provide a reason for physical contact. The Appeal Division had the added benefit of the evidence of Professor Baron-Cohen, but it was entitled to decide that it did not lead to a different conclusion. Nor did the initial concession by the Crown, prompted perhaps by a desire to ensure that all evidence favourable to the appellant was fully considered, provide any reason to conclude otherwise.

26. It is not the function of the Board to make itself a second constitution of the Appeal Division and to duplicate its process. In *Dial v The State (Trinidad and Tobago)* [2005] UKPC 4, [2005] 1 WLR 1660 Lord Brown, giving the judgment of the Board in another fresh evidence case, said this at [37] and [38]:

> "37. In their Lordships' view there is no reason to doubt that the court properly considered the fresh evidence in accordance with its own self-direction: to 'determine whether in the light of [it] we have any doubt, any reasonable doubt, as to the guilt of the appellants'.
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> 38. The real question for the Board, therefore, is whether the court could reasonably conclude, *on the facts*, that Shawn's lie about the .44 did not render these convictions unsafe, testing that conclusion, if the case were thought near the borderline, by reference to how a jury might reasonably have been affected by it. In resolving this question, the Board reminds itself, its own role is a limited one. As Lord Hope put it in giving the Board's judgment in *Stafford v The State* [1999] 1 WLR 2026, 2029:
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> > 'It has been said many times that it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal. Save in exceptional circumstances, the Judicial Committee will not embark upon a rehearing of issues such as the weight which may properly be given to the evidence or the inferences which may properly be drawn from it. These are matters which will be left to the

> Court of Appeal. Its decision as to whether the evidence was sufficient to support the conviction will not normally be reviewed by this Board.'"

27. Similarly, in *Nyron Smith v The Queen (Jamaica)* [2008] UKPC 34; 74 WIR 379 Lord Carswell, giving the judgment of the Board, declined to deal in detail with both submissions upon suggested flaws in the summing up and arguments relating to the quality of an identification, saying of the first at [18] that:

> "Many of the points made at some length…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."

Of the second he said at [23]:

> "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."

28. In the present case the Board is satisfied that the Appeal Division set itself the correct test for whether the conviction ought to be quashed and Mr Birnbaum does not suggest otherwise. It admitted the evidence of Professor Baron-Cohen without argument as to its freshness and it applied itself to the critical question whether that evidence caused the court to entertain any doubt about the safety of the conviction. No point of law is raised by the present second appeal to the Board. Mr Birnbaum's careful arguments amount to the submission that the Board ought to re-visit the process undertaken by the Appeal Division and to reach a different conclusion. The Board is satisfied that there is no reason to do so. The conclusions of the Appeal Division were fully open to it, indeed were clearly supported by the evidence as a whole. That the appellant should have done what he did was undoubtedly significantly mitigated by his unfortunate disability, as the suspended sentence imposed upon him rightly recognised. But whatever sympathy anyone must have for the real difficulties under which he labours, and for the entirely responsible concern of his parents to protect him so far as they can from adverse consequences of them, his disability as very fully explained by Professor Baron-Cohen, does not, on the facts of this case, provide any reason for doubting the safety of the conviction.

29. The Board will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.