Michaelmas Term
[2021] UKPC 27
Privy Council Appeal Nos: 0069 of 2018
and 0057 of 2019

JUDGMENT

Maharaj and others (Appellants) *v* The State (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Sales
Lord Burrows
Lady Rose
Dame Julia Macur

JUDGMENT GIVEN ON

11 October 2021

Heard on 6 and 7 July 2021

Appellants	*Respondent*
Edward Fitzgerald QC	Tom Poole QC
Amanda Clift-Matthews	Hannah Fry
Jagedo Singh	
Karina Singh	
Suneesh Singh	
(Instructed by Simons Muirhead Burton LLP)	(Instructed by Charles Russell Speechlys LLP)

Appellants:

(1) Michael Maharaj
(2) Damien Ramiah
(3) Seenath Ramiah
(4) Samuel Maharaj
(5) Bobby Ramiah
(6) Daniel Gopaul
(7) Richard Huggins
(8) Leslie Huggins
(9) Mark Jaikaran

DAME JULIA MACUR:

Introduction

1. On 7 August 2001 the nine appellants were convicted of the murder of Thackoor Boodram ("Boodram") based on the evidence of one witness, Junior Grandison ("Grandison"). Subsequently, in 2011, Grandison swore a statutory declaration in which he stated that the evidence he had given at the trial of the appellants was not true. Consequently, in 2014 the President of Trinidad and Tobago referred the matter to the Court of Appeal for reconsideration. At the hearing, the appellants sought to rely on the statutory declaration and other fresh evidence, including taped audio recordings in which, it was said, Grandison admitted he had given false evidence at the trial. The State adduced fresh evidence in rebuttal to the effect that Grandison's retraction of his trial evidence was unreliable. The Court of Appeal refused to admit the appellants' fresh evidence and dismissed the appeals on 16 May 2018.

2. The central issues in this appeal concern the admissibility of the fresh evidence of Grandison's retraction, either because it was credible evidence of his perjury or because it otherwise impeached his reliability as a witness of truth. In these circumstances, the appellants argue that the Court of Appeal ought to have admitted the evidence which inevitably undermines the safety of their convictions on one basis or another.

The facts of the murder and the investigations into the offence

3. Boodram was kidnapped during the evening of 20 December 1997. The next day a ransom of $5m was demanded. On 30 December 1997, Boodram's severed head was recovered. A post-mortem examination concluded that the cause of death had been three gunshot wounds to the head.

4. The appellants and another man, Verne Pierre, were arrested for this murder at the end of March 1998 as the result of a statement provided by a man named Nigel Rajcoomar ("Rajcoomar").

5. Grandison first became a witness against the appellants in July 1998. He requested the police visit him whilst he was in custody on remand for the murders of Ian George, also known as "Pigeon", and Walter Regis and the attempted murder of Courtney Reid. Statements were taken from him on 7 and 16 July 1998 in which he

described being involved in a conspiracy with the appellants to kidnap and kill Boodram.

6. Grandison gave evidence at the First and Second Preliminary Inquiries, broadly in line with his statements. Grandison said that sometime in July 1997 he attended a meeting at the home of Damien Ramiah, the second appellant, at which Mark Jaikaran, the ninth appellant and another man, since deceased, were also present. Grandison had gone to collect monies owed to him for a job which he said had nothing to do with the kidnapping but which he refused to reveal "on grounds it may incriminate me". Subsequently, on the last Wednesday in December 1997, Grandison attended a meeting at which all of the appellants were present, and at which the plan to kidnap and murder Boodram was discussed.

7. Grandison said the plan was executed on the last Friday in December. Michael Maharaj, Damien Ramiah, Samuel Maharaj and Leslie Huggins, the first, second, fourth and eighth appellants respectively, drove off in one car to seize Boodram. Seenath Ramiah, Daniel Gopaul, Richard Huggins and Mark Jaikaran, the third, sixth, seventh and ninth appellants respectively, left in another car. Bobby Ramiah, the fifth appellant, drove off alone in a white car. Grandison followed in his own car, with his "personal driver".

8. Grandison alleged that he saw Boodram lying face down on the floor of the first car, his hands and feet tethered, before he was removed to the second car and it drove off. It had been intended that Boodram would be taken to somewhere in Kandahar in Tacarigua District. Grandsion did not go to the spot where Boodram had been taken. He saw that Michael Maharaj, Damien Ramiah and Samuel Maharaj all had guns. Grandison and his personal driver drove away. Grandison said that, as he was wanted for murder, he was reluctant to take a "front line scene".

9. Grandison gave himself up to the police on 28 February 1998 in connection with the other offences with which he was charged. His girlfriend had been killed on 26 February 1998 in a police shoot out. He said that he did not communicate with any of the appellants after the night of the kidnapping until they were in prison. He had heard in the news that Boodram's head had been found and who had been charged for the offence.

10. In April 1998, although he initially said June 1998, Grandison saw Michael Maharaj, Damien Ramiah and Seenath Ramiah in prison. Damien Ramiah made admissions about shooting Boodram in his face and head. Grandison said that Damien Ramiah promised to give him $60,000 from money which was being extorted from Boodram's brother Motie. Motie was in the same cell block as Grandison.

Court Proceedings

First Preliminary Inquiry (21 July 1998)

11. Rajcoomar and Grandison gave evidence. The two accounts contained irreconcilable differences. Grandison said that he did not know Rajcoomar and that Rajcoomar was not there on the night of the kidnapping. The prosecution indicated to the presiding magistrate that it relied primarily on the evidence of Rajcoomar. However, all the appellants and Verne Pierre were committed for trial by the magistrate on the basis of both witnesses' evidence.

Second Preliminary Inquiry (1999-2000)

12. In October 1999, Hail Selassie Amoroso ("Amoroso") took police to a forest area in Sangre Grande where he said his first cousin, Phillip, had killed Boodram. He did not allege that any of the other appellants were present at the shooting. The only appellant mentioned at all in his account was Leslie Huggins, although he claimed he knew Michael Maharaj, Damien Ramiah and Seenath Ramiah. Amoroso received immunity from prosecution in respect of the murder of Boodram in return for his testimony.

13. Phillip was arrested on 4 November 1999 and interviewed. He said that he, Richard Huggins and another man kidnapped Boodram, on the instructions of Leslie Huggins, and some of the other appellants were also involved. He said it was Leslie Huggins who shot Boodram three times in the head. He later repudiated the statement when he gave oral evidence, stating that he was tricked into signing it. The prosecution relied upon Grandison's account of the kidnapping and murder to refute Phillip's account of the kidnapping.

14. Phillip was committed for trial and his case joined with that of the appellants.

Trial

15. Rajcoomar had been granted immunity from prosecution in June 1998. On 1 May 2000, the prosecution indicated that the evidence of Rajcoomar was unworthy of belief and no longer relied upon. Proceedings against Verne Pierre were discontinued.

16. The appellants' and Phillip's trial took place between 20 June and 7 August 2001. The prosecution's case was that the ten co-defendants had been part of a joint enterprise.

17. Grandison was intended to be the first witness for the prosecution. He was first brought to court from custody to give evidence on 27 June 2001 but told the judge he had a headache and was too sick to give evidence. Grandison was brought before the court again on 2 July 2001. This time he affirmed and gave evidence which was largely consistent with what he had given in the First Preliminary Inquiry.

18. Grandison gave evidence that he was in custody awaiting trial for a number of offences and that he had not been granted immunity from prosecution. There were 11 charges outstanding, including murder and attempted murder, robberies and firearms offences but he had made no bargain with the State for these charges to be dropped in return for his testimony. He had become a born-again Christian in late 1998.

19. Grandison identified all the appellants in the dock. He said that, whilst on remand in prison, Damien Ramiah asked him if he was a witness in the case. He had denied that he was.

20. Grandison was cross examined over several days about various matters including: (i) whether he had killed Pigeon; (ii) the offences against him which had been discontinued shortly before trial, and the failure to charge him for the instant offence; (iii) discrepancies in his account of the July meeting; (iv) inconsistencies in the dates when he said the kidnapping had occurred; (v) his identification of Damien Ramiah as the man who killed Boodram, when it coincided with the prosecution case; and, (vi) the existence and identity of his "personal driver".

21. Grandison denied that he had killed Pigeon, although at one point he said that he had played a part in Pigeon's murder and, at another, that he would confess his role in Pigeon's murder "if it reached to that […] but that will include [Seenath and Bobby Ramiah] and his mother". He confirmed that the charge against him for Pigeon's murder had been discontinued on 7 June 2001 and the charge of attempted murder of a witness to the murder, was also discontinued on 15 June 2001. He denied that this was in return for his testimony in this case. He said that he did not know why he had not been charged with Boodram's murder.

22. In cross-examination he changed his evidence about the date of the July meeting at Damien Ramiah's house, and explained why he had made a mistake about the date of the kidnapping.

23. Grandison denied knowing that the prosecution's case had initially been that it was Damien Ramiah who had shot Boodram; he said Damien Ramiah must have been "boasting" when he admitted doing so to him.

24. Grandison gave scant details about his personal driver. He denied knowing Panalal Boodram ("Panalal"), the deceased's brother, or that he had been induced to give evidence by him. He denied being told what to say in his evidence by the police. He also denied trying to extort money from Damien Ramiah in return for not giving evidence. Grandison stated that his girlfriend had been murdered by police and that this was connected to the trial. However, he denied he had any scores to settle.

25. Amoroso's evidence related in the main to the actual execution of Boodram, but he also referred to a conversation between Leslie Huggins and Phillip regarding the demand for ransom made by "dem boys" and a conversation he had with Phillip regarding the beheading and disposal of the body by others. He had taken police officers to the scene at which charred human bones were discovered, identified as those of Boodram by a silver bracelet found nearby. He said the reason that he had not come forward earlier was fear.

26. All but Samuel Maharaj and Daniel Gopaul gave evidence on oath in which they denied being party to any conspiracy to kidnap and murder Boodram. Evidence was adduced which established that Mark Jaikaran was in custody until the afternoon of 31 July 1997 and therefore could not have been at a meeting with Grandison in July 1997. The appellants gave alibis for the time of the kidnapping. Phillip said that Amoroso's account was false and that he did not have anything to do with Boodram's kidnap and murder.

Judge's directions to the jury

27. In his summing up, the trial judge reminded the jury that the State's case "stood or fell" on the testimony of Grandison and Amoroso. He warned the jury in no uncertain terms about Grandison's disreputable character, of the outstanding criminal charges and, that as an accomplice with a possible ulterior motive, they should exercise the greatest caution before accepting his evidence.

28. Nevertheless, on 7 August 2001, the appellants and Phillip were convicted of Boodram's murder and sentenced to the mandatory penalty of death.

First Appeal

29. The appellants and Phillip appealed against their convictions. The Court of Appeal dismissed their appeals by a judgment dated 2 October 2002 which, amongst other grounds of appeal, specifically dealt with the adequacy of the trial judge's accomplice direction.

30. The appellants petitioned the Judicial Committee of the Privy Council for leave to appeal against conviction and sentence. Following an oral hearing and by order dated 13 March 2006, the appellants' application for permission to appeal against their convictions was dismissed. However, their sentences of death were quashed, and sentences of life imprisonment substituted.

Events leading to the second appeal

31. Subsequently, as per his affidavit sworn on 8 September 2017, Michael Maharaj said that, in 2011 and 2017, he communicated with Grandison by telephone, some of which conversations were recorded. They were transcribed and annexed as exhibits to his affidavit ("the audio recordings"). He said that Grandison had initiated contact in about April 2011 through a mutual prison acquaintance. Grandison expressed regret for giving false evidence at the appellants' trial. During the course of those earlier conversations, Michael Maharaj advised Grandison of the steps he should take to give effect to his recantation. In doing so he referred to the case of *Pedro v The State* Cr App No 61 of 1995 (10 October 2000). He told Grandison that he should visit a priest and swear an affidavit stating that he had lied. That affidavit could then be sent to the appellants' attorneys. As it transpired, Grandison followed that procedure.

The retraction and subsequent events

32. Grandison swore a statutory declaration before a Commissioner of Affidavits on 1 June 2011, stating that the evidence that he gave at trial implicating the appellants in the kidnapping and murder of Boodram had been fabricated. He said the false evidence was initiated by the deceased's brother, Panalal, who was in Grandison's cell block in 1998. At that time, the appellants had already been charged with the offence and the preliminary inquiry was in progress. He was told that the evidence of Rajcoomar had been discredited. Panalal said he was aware of how the appellants had treated Grandison and that he "could sink them for good" if they worked together. Over the course of the next two weeks, he was given all the information he needed by Panalal. They would convey information in the margins of newspapers passed between them. It was Panalal who gave him the wrong date of the kidnapping and he had to correct the date in a subsequent statement. Grandison said that the contents of his police statements were untrue and that he was not present at any meetings to discuss a plan to kidnap and murder Boodram or present when any kidnapping took place.

33. In 1998 to early 1999, Grandison said he became a born-again Christian and "got saved". He had changed his life. Consequently, he did not want to give evidence at the trial of the appellants in 2001 and told the court on the day he was due to testify that he was sick. But once the police became aware that he did not wish to give evidence, their behaviour towards him changed. He said that he was left in a van all day long and left

to sleep on the floor in a very cold room overnight. He was afraid of what the police might do next. Therefore, he gave evidence against the appellants but afterwards, when back at the prison, he cried because he knew what he had said was not true. Grandison said that he had thought about coming forward and telling the truth after the appellants were convicted but he was still in the State's witness protection programme and was not sure what would happen to him. He had now left that programme and decided that he could no longer live with the burden of what he had done.

34. Unbeknownst to the appellants, on 16 July 2011 Grandison provided a statement to David Nedd ("Nedd"), then Assistant Commissioner of Police, which repudiated the contents of his statutory declaration. Nedd had been a witness at the appellants' trial and kept in touch with Grandison after his release from prison and departure from the witness protection programme. He said Grandison told him that he had done something which he thought would "get Tommy and them off his back" but the newspapers had not reported events accurately. Grandison had spoken at length to him about the instructions he had received from the appellants which included contacting a priest, several attorneys, and going to a Commissioner of Affidavits to sign the concocted statement. Grandison indicated that he had signed the self-prepared statement which he handed to Nedd in the name of Jeremiah Trimmingham (Grandison changed his legal name in November 2003) in contrast to his signature as "J Grandison" upon the statutory declaration. He also produced a red mobile phone and charger, which he gave to Nedd which was said to contain the text messages referred to within his statement.

35. The text messages recorded in Grandison's July statement were attributed by him to phone numbers said to be associated with Michael Maharaj and Seenath Ramiah. They were reproduced with the date and precise time of receipt and commenced in April 2011. He said he had retained them, despite instructions from certain of the appellants to delete them. In one text he was directed to contact a named priest and supplied with "confession times". He was given the name of lawyers to contact, including Mr G Ramdeen. On "27/04/2011 10:14pm", instructions in a text told him to "tell them that Don (Panalal) told you that Nigel Rajcoomar evidence did not stand up because he confess to three murders and the police charged different people for one of them so there and then they know his evidence could not stand up. So he told you they needed someone else and you accepted their offer ... on the other hand you had a beef with us because we owed you money". Michael Maharaj and Seenath Ramiah informed him that they had a fellow inmate named Springer who would "collaborate" (sic) his new evidence.

36. He had read in the newspapers that the appellants' lawyers were going to visit them in prison. He received a text message from Seenath Ramiah's cell phone at "15/07/2011 01:26pm" saying: "Stay strong and make sure and lie low and be safe The lawyers will try their best an deal with it as soon as possible … God is the boss ... Bless ...".

37. John Frederick ("Frederick") was appointed to investigate Grandison's statutory declaration. He met with Grandison on 23 July 2013 and questioned him about the statement he had provided to Nedd and also the contents of the statutory declaration. Grandison confirmed the former as true and disavowed the latter. On 8 August 2013, Grandison provided Frederick with an unsigned statement to the same effect as the statement he had given to Nedd. He refused to sign it since he complained that the State had reneged upon certain promises to him but confirmed that it was true. Frederick made inquiries regarding the telephone numbers and text messages contained in the statement but had not been able to progress the issue since the contents of text messages could not be retrieved. Frederick also contacted the Commissioner of Prisons who stated that it was very likely that Grandison and Panalal were in custody on remand in the same prison at the same time. The two would have been able to communicate by unconventional means such as passing messages in newspapers.

38. Michael Maharaj apparently next communicated with Grandison in May 2017, by which time, as has been mentioned in para 1 above, the appellants' case had been remitted by the President of Trinidad and Tobago to the Court of Appeal. Further telephone conversations took place between Michael Maharaj and Grandison, some of which were audio recorded without Grandison's knowledge, and have been relied upon by the appellants as evidence of Grandison's admitted perjury.

The Second Appeal

39. The appeal under review was heard between 19 September and 7 November 2017. Michael Maharaj and Damien Ramiah sought to adduce the fresh evidence of Grandison's statutory declaration of 1 June 2011, the truth of which was corroborated, they submitted, by the contents of the telephone conversations between Michael Maharaj and Grandison in 2011 and then between May and August 2017.

40. The appellants' primary position was that the fresh evidence was plainly capable of belief. Alternatively, the fact that Grandison had made multiple inconsistent statements demonstrated him to have been an unreliable witness.

41. The State, the respondent, opposed the application to adduce the fresh evidence and submitted that it was plainly incapable of belief and should not be admitted.

42. The Court of Appeal decided that it would hear the evidence de bene esse before deciding whether to admit the fresh evidence. A subpoena was issued for Grandison's attendance at court. However, he could not be traced and he did not attend the hearing, albeit that it is said that he was sighted in the precincts of the court house during the appeal.

43. During the course of the hearing, two further affidavits were filed on behalf of the appellants from Gillian St Clair (sister of Grandison's deceased girlfriend), and from Shawn Parris, a prisoner and acquaintance of Grandison in prison.

44. The respondent applied to adduce fresh evidence in rebuttal, including from Nedd and Frederick.

45. Seven witnesses gave live evidence including Shawn Parris, Nedd and Michael Maharaj. The appellants also adduced the audio recordings made by Michael Maharaj of the conversations between himself and Grandison.

The Court of Appeal's decision

46. The Court of Appeal directed itself conventionally, in accordance with the guidance of *R v Parks* [1961] 1 WLR 1484, as to the "four factors" to be considered when exercising its discretion in admitting fresh evidence. It went on to remind itself that the "Court of Appeal is not simply a conduit through which the proposed additional evidence is uncritically advanced. The evidence must satisfy a minimum threshold standard of credibility and reliability in order to justify its reception, otherwise there would be no proper end to the adjudicative process": Mohammed JA in *Moonsammy v The State* Cr App No 14 of 2014 at para 12. It noted, nevertheless, that the power to receive fresh evidence represented a significant safeguard against the possibility of injustice and the discretion to do so ought to be exercised if after investigation of all the circumstances, the court thought it necessary or expedient in the interest of justice to do so: Narine JA in *Hernadez v The State* Cr App No 63 of 2004, para 27, referring to *Benedetto v The Queen* [2003] 1 WLR 1545. The Court then adopted the same course as in *Pedro v The State* Cr App No 61 of 1995 and, in assessing the fresh evidence, found it was logical to ask two questions, the first being the reason the witness had given for lying at trial and the second being the reason he had given for telling the truth now.

47. The Court of Appeal were satisfied that the fresh evidence which the appellants sought to adduce had not been available at trial and was potentially relevant to the authenticity of Grandison's "trial testimony". They identified their first task in assessing the fresh evidence to be an "analytical interrogation of its credibility" to determine whether it was capable of belief. It was only after the credibility of the fresh evidence had been determined that the Court could consider whether that fresh evidence had the capacity to render the appellants' convictions unsafe.

48. The Court of Appeal noted the "conspicuous absence" of Grandison as a witness despite Michael Maharaj's assertion that he would have attended court as a witness if he had paid him. The Court of Appeal concluded that Grandison had declined to appear

whether to clear his conscience and exonerate the appellants or to defend the very serious allegations of attempting to pervert the course of justice that he had levelled against them.

49. Ultimately, the Court of Appeal held that the statutory declaration fell "short of the threshold for admission as fresh evidence in terms of its capacity for belief"; it was not in the interests of justice to admit it. The Court of Appeal also declined to admit the evidence relating to the telephone conversations between Michael Maharaj and Grandison on the basis that the evidence had been "so heavily tainted by the appellants' influence that its capacity for belief has been greatly diminished and it would be contrary to the interests of justice to admit it".

50. Consequently, the Court of Appeal dismissed the appellants' appeals and affirmed their convictions and sentences.

51. The Judicial Committee of the Privy Council granted Michael Maharaj, Damien Ramiah and Seenath Ramiah, permission to appeal on 22 May 2019, and the remainder of the appellants permission to appeal on 4 July 2019.

Appeal to the Board

52. The four grounds of appeal which are relied upon by all the appellants overlap considerably and may be summarised as follows. Grandison's retraction of his trial evidence against the appellants, as evidenced in his statutory declaration of June 2011 and admissions of deceit in the audio recorded telephone conversations, is capable of belief and the Court of Appeal would have so found but for their erroneous approach which demonstrated they had applied too high a test of credibility to assess whether the new evidence was capable of belief (grounds 2 and 3). In the alternative, and in any event, if the retraction is not credible then the Court of Appeal failed to recognise the impeachment value of the fact of Grandison's retraction, subsequent repudiation of the retraction, and ensuing admissions of perjury in telephone conversations between himself and Michael Maharaj and to others (ground 1). The fresh evidence, whether of credible retraction or innate unreliability, would be bound inevitably to render the convictions unsafe because the case against the appellants was dependent upon Grandison's evidence alone (ground 4).

53. Therefore, the issues for the Board are:

(i) Did the Court of Appeal apply too high a test of credibility in deciding on the admissibility of the new evidence?

(ii) Did the Court of Appeal misrepresent and underestimate the value of the retraction statements contained in the audio recordings?

(iii) Did the Court of Appeal ignore the impeachment value of Grandison's retraction regardless of its substantive credibility?

(iv) Did the Court of Appeal fall into error when it relied upon the fact that Grandison's evidence at trial was supported by the independent evidence of two other witnesses?

54. Section 47 of the Supreme Court of Judicature Act provides:

> "47. For the purposes of an appeal in any criminal cause or matter, the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice -
>
> (a) receive the evidence, if tendered, of any witness including the appellant …"

Did the Court of Appeal apply too high a test of credibility?

55. Upon whatever basis the retraction of material evidence is sought to be introduced into the appeal, as substantively true or for reason of impeachment, "[t]he ease with which mere recantations can be fabricated … demands an especially rigorous qualitative assessment … to give substance to the cogency requirement, which must be satisfied to permit the introduction of fresh evidence": *R v MGT* [2017] ONCA 736 at paras 110-111 per Watt JA. See also *R v Asif Patel* [2010] EWCA Crim 1858 at para 43 in which the Court of Appeal was "astute to the risk of post-trial manipulation of any witness (and particularly one of significance) who may by one means or another be persuaded to assert after the event that his testimony at trial was untrue". It is well established and patently correct that it would be contrary to the interests of justice to admit evidence that is unreliable in source and/or content: see for example *R v Kassa* [2013] ONCA 140 at para 97. Fresh evidence that lacks cogency cannot possibly provide a viable ground of appeal.

56. The well-established formula in *R v Sales* [2000] 2 Cr App R 431 at p 438 describes the three categories of new evidence which an appellant may seek to adduce as plainly capable of belief, plainly incapable of belief and possibly capable of belief. The Board considers it highly unlikely that any retraction evidence will be regarded as "plainly capable of belief" at face value and unequivocally agrees with the Court of

Appeal that in this case the new evidence falls within the third category which calls for a rigorous analysis. The Court of Appeal patently did carry out such an analysis.

57. Although there will be cases where the witness cannot be traced with reasonable diligence it is difficult to envisage the circumstances in which a court of appeal would not require that a witness, who has recanted the evidence they have given previously under oath or affirmation, to give evidence before them. This is not just a matter of form to assess whether the witness comes "up to proof" in confirming his/her fresh evidence, rather it is an important part of the Court of Appeal's rigorous examination and analysis of the substance and circumstances of the recantation and the reasons why the alleged erroneous/false evidence was given at trial. In this case, there was evidence upon which the Court of Appeal were entitled to find that there was no good reason which prevented Grandison from attending before them. Both sides had an interest in him doing so. Michael Maharaj said that he thought that Grandison, who was aware of the appeal, would have attended if he had paid him "security" money. In the circumstances of Grandison's "conspicuous absence" it would have been difficult to criticise the Court of Appeal's refusal to consider the fresh evidence further.

58. Nevertheless, the Court of Appeal undertook a scrupulous and thorough appraisal of the evidence concerning the retraction of Grandison's trial evidence. This necessarily involved an analysis of the circumstances in which Grandison came to make the statutory declaration nearly ten years post-trial, the manner in which he engaged in the audio recorded telephone conversations with Michael Maharaj and the repudiation of the retraction, all set against the context of the evidence that he had given at trial.

59. In doing so, the Court of Appeal did not find details of Grandison's attendance upon Mr Ramdeen, or subsequently the Commissioner of Affidavits, to be capable of supporting the credibility of Grandison's statutory declaration. Mr Ramdeen had not appeared to engage in any "meaningful interrogation of this issue" and had no reason to disbelieve Grandison. The other witnesses upon which the appellants relied, including Father Ventour, the priest to whom Grandison "confessed" that he had given false evidence and from whom he sought assistance in approaching a lawyer, did not go into details with Grandison regarding his claim. The Court of Appeal found this evidence supported Grandison's assertion that he did as he had been directed to do by Michael Maharaj.

60. Shawn Parris, one of Grandison's previous prison mates, had delayed 16 years before providing information which may have exonerated the appellants, including at a time when they were under penalty of death, which was incongruous with his desire to "do some good". His motives were dubious. His oral evidence was unconvincing and inconsistent with what Grandison said in his statutory declaration.

61. Michael Maharaj was described by the Court of Appeal as "self-assured and confident". In his view, Grandison's admission that he had lied during the trial as recorded in the telephone conversations was all that mattered. The Court of Appeal fairly concluded that Michael Maharaj's credibility was "buttressed" by information he gave that was "inimical" to his appeal, that is, he had carried on conversations with Grandison against prison rules and encouraged and instructed him in the making of a statutory declaration. The Court of Appeal concluded in effect that Michael Maharaj was the dominant participant and had manipulated the conversations to his own end. This assessment was informed, at least in part, by the contents of the audio recordings which are referred to in greater detail below.

62. The Court of Appeal compared the contents and circumstances surrounding the making of the statutory declaration and the statement made and signed by Grandison and provided to Nedd in July 2011. Nedd was determined to be a credible witness whose evidence as to the timing of Grandison's voluntary approach to him after making the statutory declaration was significant. Grandison's statement recorded the contents of texts said to have been sent by Michael Maharaj and Damien Ramiah to Grandison with reference to specific dates and precise timings which "chimed" with some of the directions Michael Maharaj agreed he had given to Grandison. Grandison said he had left "false trails in the statutory declaration" to alert the authorities to his predicament of acting under coercion which the Court of Appeal were able to identify and which they regarded as adding weight to his repudiation of the statutory declaration.

63. The Board agree with the submissions of Mr Poole QC on behalf of the respondent, that the Court of Appeal were best placed to evaluate the witnesses who gave evidence before them and the weight they should afford to their evidence. The Board do not discern any irrationality in the Court of Appeal's approach in assessing the evidence and do not consider that there were any findings that were not available to the Court of Appeal upon the evidence.

64. Mr Fitzgerald QC concedes that it was necessary for the Court of Appeal to assess the cogency of the fresh evidence but argues that the court fell into error since they did so by examining whether the evidence was true, or should be preferred over other evidence, rather than determining whether it was capable of belief. He seeks to illustrate this submission by reference to phraseology in the Court of Appeal's judgment. He asked rhetorically on a number of occasions: "What would the jury have made of that?" and complains that the Court of Appeal evidently drew certain inferences from the fresh evidence, regardless of the fact that there were alternative reasonable interpretations that were properly a matter for the jury to decide. In doing so, he submits, the Court of Appeal effectively placed the onus upon the appellants to establish the truth of Grandison's recantation.

65. The Board does not accept that the isolation and construction of individual phrases within the judgment such as "true", "credibility", "plausibility" and the like, reveal that the Court of Appeal exceeded their legitimate remit. On the contrary, the Board considers that the use of this vocabulary, in its context, reflects the conduct of the necessary and legitimate exercise of determining the cogency of the retraction evidence. That is, the Court of Appeal were right to make a qualitative assessment of whether the fresh evidence ought to be received for the purposes of the appeal in the interests of justice not whether the evidence would be capable of belief by a jury.

66. This approach accords entirely with the decision of the House of Lords in *Stafford v Director of Public Prosecutions* [1974] AC 878, where Viscount Dilhorne said at pp 892-893:

> "I agree that in deciding whether to admit fresh evidence, the court, which at that stage has not heard the evidence, has not to decide whether it is to be believed but I do not agree that, when the court has heard the evidence, it has not to consider what weight, if any, should be given to it. Lord Parker's fourth principle, as he called it, was that the court, after considering the evidence, would go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. I cannot see how the court can consider this question without considering what weight should be given to the fresh evidence they have heard; and I do not see that this principle is applicable to the question whether the evidence is to be admitted."

67. It appears to the Board that Mr Fitzgerald's submissions on the test of whether the fresh evidence was capable of belief elide what is a two-stage process. The first question for the Court of Appeal is whether it is necessary or expedient to admit the evidence in the interests of justice. This will depend upon the Court of Appeal's own analysis of the integrity and relevance of the fresh evidence and not what the jury may have thought of it. This assessment may be possible on the face of the evidence, although not in situations such as presented by this and other cases of recantations as the Board indicates above, but deciding whether to receive or accept the fresh evidence remains a distinct stage in the process. Only if the fresh evidence is deemed trustworthy or "well capable of belief" (*R v Parks* [1961] 1 WLR 1484, 1486) by the Court of Appeal is it necessary to pose the second question: what impact does it have upon the safety of the conviction. See the judgment of the majority of their Lordships, including Lord Bingham, in *Dial v State of Trinidad and Tobago* [2005] 1 WLR 1660 at para 31 which states that:

> "Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, *assuming always that it accepts it*, to evaluate its importance in the context of the remainder of the evidence in the case." (Emphasis provided)

The Board has no doubt that this passage deals with any confusion created by the judgment of Lord Bingham in *R v Pendleton* [2002] 1 WLR 72 in paras 11 and 18, which assumed that where the Court hears evidence "(whether pursuant to its own decision, by agreement or de benne esse), the evidence will almost always have appeared, on paper, to be capable of belief and to afford a possible ground for allowing the appeal".

68. If the fresh evidence is admitted and the second question does arise then the nature and/or extent of the "fresh evidence" may, of itself, conclusively determine the appeal, for example, advances in the isolation and interpretation of DNA recognised by the mainstream scientific community may exculpate an appellant. However, whether it does so and whether the fresh evidence renders the conviction unsafe remains a decision for the Court of Appeal who may, "*in a case of any difficulty* [emphasis provided] … test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe" (Lord Bingham in *R v Pendleton* at para 19). That is, a Court of Appeal may wish to apply the "jury impact test" if in any doubt as to the impact of the fresh evidence it has received upon the safety of the conviction, but it will be unnecessary to apply this test otherwise. To be clear, the admission of fresh evidence by the Court of Appeal does not automatically trigger the jury impact test and the Board consider that the occasions when it does so are likely to be few and far between. In most cases, the single issue for the Court as to whether the fresh evidence raises a doubt about the safety of the conviction in their mind will be readily answered without recourse to such speculation.

69. In this case the Court of Appeal found the fresh evidence to be tainted by the adverse influence brought to bear by some of the appellants and consequently refused to admit it. That is, the fresh evidence was unreliable at its source and in its content, therefore it was not "well capable of belief" and consequently it was not "necessary or expedient in the interests of justice" to receive it. Since the appeal depended on the Court of Appeal admitting the fresh evidence, the second question did not arise.

<u>Did the Court of Appeal misrepresent and underestimate the value of the retraction statements contained in the audio recordings?</u>

70. The Court of Appeal make specific reference to four of the transcripts, which are reproduced in the judgment with their own emphasis provided. It is sufficient to give

the following two examples. The only audio recorded telephone call in 2011 on an unspecified date was as follows:

> "M M: ... well the reason why I doesn't really tell you nothing and thing too is because I don't want no … *I don't want nothing look like if I want you come and lie for we and thing nah boy*, right because, …,
>
> J G: Yea and that ain't necessary too,
>
> M M: I don't want no lies at all, I don't want no lies from you at all, I don't want no lies ... *as we get a date, Grando, as we get a date everything go just run smooth, you understand I hope you ain't get frighten and back out and thing to come in court and thing inno*,
>
> J G: Wam to you boy,
>
> M M: No I just saying something na boy you know them sometime with them thing you know, *you hadda come and handle that and talk the truth and flickin mash up the state there boy*,
>
> J G: Yea,
>
> M M: You understand, yea they real fight we down you know,
>
> J G: Yea you know ah mean and on top of that, above all that, is the right thing to do you know,
>
> M M: Yea,
>
> J G: *And clear my conscience too and all that you check what I saying*,
>
> (No response)

J G: *Yea I can't tote that no more brother, I … nah can't tote that again boy*." (Emphasis provided by the Court of Appeal)

71. Mr Fitzgerald QC highlights that Michael Maharaj was here stressing that he did not want Grandison to lie. He submits that Grandison's references to "the right thing to do" and in order to "clear [his] conscience", can only be construed as Grandison admitting that he would be coming to court to retract his evidence because it was not true. Alternatively, that it would be a reasonable interpretation that Grandison was admitting to lying at the trial.

72. The Court of Appeal considered the sections of the conversation to which Mr Fitzgerald QC referred them to be selective. When seen in the context of the "conversations as a whole" the Court of Appeal observed that Michael Maharaj's "preoccupation" and "perception" was that Grandison's evidence should appear untruthful. They noted the encouragement to Grandison to come and "mash up the state". The Court of Appeal commented that there was no indication of how Grandison intended to clear his conscience or what he intended to tell the court. The Court of Appeal concluded that the conversation did not support the retraction in the statutory declaration. If it took place after the retraction had been signed, Michael Maharaj was simply inviting Grandison to attend to give evidence in support of the same. If it took place before, Michael Maharaj was influencing the retraction which undermined its credibility.

73. Turning now to a conversation on 22 May 2017:

"M M: Boy hear what does beat me eh hear what does really beat me eh boy, you is man you tell me, you is a man me and you was real liaising and thing *and you tell me the truth, you tell me boy Rat, you can't walk that life again, you know you do wrong, you lie on we and thing*, and you tell me you can't walk that life again, remember them conversation we used to have,

J G: Boy watch me we talk about all kinda thing,

M M: No but what I mean nah you know, *I talking about me and you me and you me eh talking about Tommy and them, you understand, alright look Rajcoomar lie on we, right, your story was a false story, they get fresh evidence* in Grande about a kidnapping and they still ain't want to believe that and they go just use you because hear what going on, they couldn't use that evidence in Grande against we, you understand, and that's a mad

scene boy the *police can't be coming around you for that boy and them know you did lie boy*,

…

J G: You understand, that's how it go, watch me I go tell you something eh man, watch meh I go tell you something, in every case, I believe in every case it don't have a 100% truth,

M M: Yeah yeah, no oh God let me tell you something eh,

J G: Because *even in my evidence it wasn't 100% lie*, *for example I knowing so and so with the person and what I do to Tommy and them and what and not you understand what I saying, that was truth*,

M M: What you talking about,

J G: No I talking about what I do with pigeon and remember I say that with the case you know,

M M: Oh yeah that yeah,

J G: That what I saying nah,

M M: That part of the evidence was true, what you and with pigeon for Tommy and them to come out and all them kinda thing,

J G: In every case Rat, you don't ever get 100% truth, you know that too them police does come and change up their evidence in court you know that too,

M M: yeah yeah" (Emphasis provided by the Court of Appeal)

74. Mr Fitzgerald QC submits that Grandison's statement that "even in my evidence it wasn't 100% lie" can only be construed as an admission that most of it was lies and that it was wholly unreasonable for the Court of Appeal to state that the exchange

"seems to confirm that his trial testimony was true". Mr Fitzgerald QC also refers to the dialogue which indicates that Grandison accepts it as unremarkable to lie in giving evidence in Court.

75. The Court of Appeal said they found the exchange "somewhat confusing", but were clear that Grandison did not accept the suggestion that he lied in giving evidence. The Court of Appeal were also struck by the sudden change in case being discussed and regarded this with a measure of suspicion, since it would appear that it was "another case involving 'Pigeon'". It confirmed their view that Michael Maharaj, aware that the telephone call was being recorded, had been alert to Grandison's apparent contradiction of the suggestion that he had lied when giving evidence which would therefore "undermine the evidential value of [Michael Maharaj's] own prompting".

76. Mr Fitzgerald's submissions range across several other conversations in addition to those that the Court of Appeal specifically analysed in their judgment. He relies upon the tone of the conversations and invites the Board to find that the Court of Appeal were wrong to assess them as other than spontaneous exchanges, without any evidence of coercion or threat. He seeks to demonstrate Grandison's ingrained deviousness by reference to the following conversation regarding his attitude to the death penalty which had been passed upon the appellants:

> "M M: Knowing then the evidence wasn't truthful against we,
>
> J G: No just now, just now, just now, hear how I go answer that eh, based upon how I used to think before and not how I thinking now, it woulda be as simple as pointing a gun at somebody and pulling the trigger, and all of we dead, it eh no different,
>
> M M: No I talking about if we did going and hang,
>
> J G: Well that's what I telling yuh that is the same thing like pointing a gun at somebody and pulling the trigger and killing them,
>
> M M: Yuh was saved already that's what I telling yuh,
>
> J G: Yea well that's what I tell yuh I answering it from how I was before,
>
> M M: Yea yea"

77. In response, Mr Poole QC points to the dialogue in which Michael Maharaj is shown exerting significant influence over Grandison's evidence and demonstrating an intent to manipulate the evidence and subvert the course of justice. This goes to the credibility of both the contents of the telephone calls and also the statutory declaration. He submits that there was ample evidence from which the Court of Appeal could decide that the conversations were "specifically initiated, prompted and recorded" by Michael Maharaj, were plainly self-serving and self-corroborative of his evidence and contrived to support the retraction.

78. Mr Fitzgerald QC roundly criticises the Court of Appeal's interpretation of the telephone calls as perverse and irrational. He repeated before the Board many of the submissions that he addressed to the Court of Appeal on the correct interpretation of the conversations and explicitly invites the Board to substitute its own opinion for that of the Court of Appeal.

79. Although the audio recordings contain much colloquial language, the Board was assisted by the comprehensive transcripts and counsel's submissions of the meaning and significance of particular passages. In the event, the Board is persuaded that certain of the exchanges, seen in isolation, can be interpreted as Grandison admitting that he lied when giving evidence and that there is evidence that Grandison was "playing" both sides to achieve his own ends. However, the Board notes that there is also evidence, in what were determined to be "selected recordings" that abruptly commenced or ended in the middle of statements of "potential value", of Michael Maharaj's dominance, prompting, steering and manipulation of conversations. Consequently, the Board do not find the Court of Appeal's ultimate conclusions to be perverse or irrational.

80. The Board is in no doubt that it should accord all due deference to the Court of Appeal's assessment of Michael Maharaj as a witness and as participant in the telephone conversations and also their analysis of the audio recordings. This is for two reasons. Firstly, the Court of Appeal are "much closer … to the customs and habits of that state and the behaviour and reactions to be expected of its citizens" and were able to analyse far better the nuances of the conversations (see *Dial v State of Trinidad and Tobago* [2005] 1 WLR 1660 at para 39). Secondly, the Board "do not sit as a second court of appeal. The degree to which evidence is credible is very much a matter for the Court of Appeal and their Lordships will not lightly interfere with its assessment" (see *Clarke v The Queen* [2004] UKPC 5 at para 40).

<u>Did the Court of Appeal ignore the impeachment value of Grandison's retraction regardless of its substantive credibility?</u>

81. Mr Fitzgerald QC argues that the Court of Appeal did not consider the impeachment value of the numerous retractions and contradictory statements that had

been made by Grandison before, during and after giving evidence against the appellants. He cites *R v MacKenney* [2004] 2 Cr App R 5; *R v Hickey* (unreported) 17 March 1989; *R v Snyder* [2011] ONCA 445; *White v The Queen* [2006] WASCA 62 and *Pedro v The State* Cr App No 61 of 1995 (10 October 2000) in support of his submission.

82. The Court of Appeal acknowledged this part of the appellants' case in paras 77 and 83 of their judgment. However, in finding that the statutory declaration came into being in "suspicious circumstances" and that the telephone conversations were "so heavily tainted by the appellants' influence" and were not capable of belief, as indicated above, they found it would be "contrary to the interests of justice" to admit the evidence in relation to its impeachment value. As was said by Laskin JA, delivering the judgment of the Court of Appeal for Ontario in *R v Kassa* [2013] ONCA 140 at para 97:

> "… the overriding standard for the admission of fresh evidence on appeal is 'the interests of justice'. That overriding standard requires the court to consider how the recantation came about - more particularly to consider whether the appellant played any role in producing the recantation. If, on a rigorous assessment of the fresh evidence, the recantation is shown to be the product of collaboration between the appellant and the recanting witness, Fitzpatrick, or is unacceptably tainted by the appellant's influence, then its cogency is so undermined that it would not be in the interests of justice to admit the fresh evidence. See *R v Kelly* (1999) 135 CCC (3d) 449 (Ont CA); application for leave to appeal quashed, [2001] 1 SCR 741. The reason is obvious. An appellate court should not tolerate an appellant's attempt to influence the evidence of a Crown witness."

83. The Board cannot see that Mr Fitzgerald QC derives any support to meet this point from the authorities he cites. In each of those cases the recantation was critically scrutinised as to provenance and as against the evidence at trial. The late discovery of the unreliable character of the respective prime witnesses was revealed in many different respects and not merely by reason of their retraction and, in some cases, repudiation of retractions.

84. The Board regards it as axiomatic that evidence revealing a witness to be a fantasist may lead to an inevitable conclusion that their evidence at trial cannot be relied upon. In which case, the impeachment value of the evidence of retraction exists beyond its substantive veracity. However, there is no reasonable basis to regard the mere fact of a retraction to be determinative of admissibility. This is supported by *R v Flower* [1966] 1 QB 146 at 150-151:

> "Mr McKinnon contends that, even if we were utterly to disbelieve the evidence which Mrs Brown gave in this court, we ought still to order a new trial because it would have been established that she was an unreliable witness and the jury, so he says, should be given an opportunity to reconsider her evidence in this light. It is to be observed that if that is the correct approach the function of this court in assessing the credibility of fresh evidence largely disappears, and, if any key witness has second thoughts after the trial, a quashing of the conviction would be almost bound to follow, because if this court believes the witness it would itself be bound to set the conviction aside, whereas if it disbelieves the witness it would have to send him back discredited, with a view to his being disbelieved by the jury at a new trial. If the witness's new version of the case is disbelieved this may very well show he is now unreliable, but it is a fallacy to assume from this that he was also unreliable at the trial. Witnesses may have second thoughts for a variety of different reasons. Some become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at that time. It is trite to say that every case depends on its own facts but in our view there is no general requirement for a new trial merely because the witness's account in this court differs from that given in the court below. So much depends in every case upon the reason, if any, given by the witness for having changed his or her testimony."

85. Grandison's situation differs from the relevant witnesses in *MacKenny* and *Hickey* who were discredited beyond their inconsistency. In this case, the jury were fully appraised of Grandison's bad character, his immunity from prosecution for the murders of Pigeon, Regis and Reid, that he had not been prosecuted for Boodram's murder although, on his own evidence, he was an accomplice in the crime, and the inconsistencies in his evidence but he was believed over the appellants who did give evidence at trial.

Did the Court of Appeal fall into error when it relied upon the fact that Grandison's evidence at trial was supported by the independent evidence of two other witnesses?

86. The evidence of Grandison is not undermined nor contradicted by the evidence of Amoroso and another witness, Sumai, but the support that it provides to Grandison's evidence is very limited. The Board does not interpret the Court of Appeal's judgment as suggesting that the evidence of Amoroso and Sumai, predominantly implicates

Phillip and Leslie Huggins, was a necessary factor in their decision not to admit the evidence of the retraction. Consequently, this issue does not advance the appeal.

The Board's Conclusions

87. The Court of Appeal did not apply too high a test of credibility when deciding whether to admit the fresh evidence. The Court's analysis was comprehensive and necessarily robust. The Court was inevitably required to determine what weight should be given to the fresh evidence. The manner in which the fresh evidence was found to have been obtained characterised it as unreliable. The Board find no basis for legitimate complaint as to the assessment of the witnesses or the findings that were made as to the weight that could be afforded to their evidence. The Court of Appeal were right not to adopt the "jury impact test" to determine whether the fresh evidence is capable of belief.

88. The Court of Appeal has not been demonstrated to have misunderstood or mischaracterised the telephone conversations transcribed from the audio recordings. The Court rightly analysed the conversations as a whole with regard to the other evidence before it. The focus on selected dialogue lacks perspective. The findings were neither perverse nor irrational.

89. The Court of Appeal did not ignore the impeachment value of Grandison's retraction. The Court found that the retraction originated from the intervention of the appellants and was designed to undermine the case against them. It was not in the interests of justice to admit the evidence. The Board does not accept that the Court of Appeal ignored this aspect of the appeal before them.

90. The Court of Appeal were entitled to find some limited support for Grandison's evidence from Amoroso and Sumai. The extent and nature of the independent support is irrelevant in the light of the Court of Appeal's definite views upon the other issues in the appeal.

91. For the above reasons, the appeals against conviction are dismissed.

Prospective appeal against sentence

92. The application to appeal against sentence is dependent upon the decision of the Board in *State v Naresh Boodram* to be heard in November 2021 and will be adjourned.