Hilary Term
[2023] UKPC 10
Privy Council Appeal No 0115 of 2019

JUDGMENT

James Miller (Appellant) *v* The King (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Lloyd-Jones
Lord Burrows
Lord Stephens
Lady Rose
Lord Turnbull

JUDGMENT GIVEN ON
13 March 2023

Heard on 12 January 2023

Appellant
Edward Fitzgerald KC
Amanda Clift-Matthews
Raquel Hall
(Instructed by Simons Muirhead & Burton LLP)

Respondent
Tom Poole KC
(Instructed by Charles Russell Speechlys LLP (London))

LORD TURNBULL:

Introduction

1. This is an appeal from the Court of Appeal of the Commonwealth of the Bahamas. On 10 June 2009, in the Supreme Court at Nassau, Bahamas, the appellant and his co-defendant Anthony Williams were both convicted by a jury of a number of offences, including the attempted murder of a police officer. The victim was shot in the head as the two men, each of whom was armed, attempted to make their getaway from a robbery at the Scotia Bank in Nassau. The appeal before the Board raises the question of how a jury should be directed to assess the intention of a person charged with attempted murder and brings into focus the application of the provisions to be found in section 12 of the Penal Code (Cap 84) of The Bahamas ("the Penal Code"). The appeal provides the Board with an opportunity to assess the extent to which these provisions are of value in assisting a jury to understand how to determine the question of a person's intention.

The central facts

2. Two masked men entered the Scotia Bank premises on 2 July 2008 around 12.30pm whilst it was open for business. Both were wearing gloves. One was armed with a handgun, the other with a pump action 12 bore shotgun. Two customers within the bank were robbed of possessions and money and three tellers were forced to hand over money totalling $21,344. The incident was recorded on the bank's security system. One robber was shorter than the other and was wearing a grey mask. The taller of the two was armed with the shotgun and was wearing a dark blue mask, a distinctive red and blue belt and a pullover with "919 Urbanwear" written on it. The subsequent evidence made it abundantly clear that this was the appellant and that the other robber was Williams.

3. Police Corporal Natasha Black and Sergeant Raquel Hanna were on duty in a marked police car when they were instructed to attend at the Scotia Bank. Corporal Black was driving the vehicle but she was unable to enter the parking area of the bank due to blocked traffic. Whilst her vehicle was stationary she saw a masked male smash open the lower portion of the glass entry door to the bank and emerge through it carrying a shotgun. At a distance from the officer of around fifty to sixty feet he stood erect, looked towards the police car, aimed the gun in their direction and fired it. Corporal Black was struck by eleven shotgun pellets in the area of the left side of her head. Despite her injuries she managed to manoeuvre her police car around the vehicle which was parked in front of her and then looked back in the direction of the

shooter to see that he had again pointed his gun in the direction of the police car. He fired a second shot as Corporal Black managed to drive the vehicle away from the immediate vicinity before Sergeant Hanna took over as driver and transported her to hospital.

4. The appellant and Williams attempted to make their escape in a black Honda Accord car before switching to a white Wyndham car which had been parked nearby. A third defendant, Janquo Mackey, was in the rear seat of this vehicle. Other police officers arrived at the scene and gave chase to the Wyndham car as it was being driven by the appellant. In the course of being pursued the car crashed into a telegraph pole and both the appellant and Williams left the vehicle. The appellant was seen to be holding the shotgun, which he discharged in the direction of the pursuing police officers' vehicle. An exchange of fire took place and the appellant ran off followed by other officers. During the course of this chase he was seen to have a further firearm and shots were fired in his direction by one of the pursuing officers. When he was apprehended he was found to be in possession of a silver and black .45 calibre pistol loaded with five live rounds of ammunition. He had sustained gunshot wounds to his right calf and left ankle.

5. On being apprehended the appellant was found to be wearing a bulletproof vest, the red and blue belt, the pullover with "919 Urbanwear" written on it and blue gloves. A dark blue mask and a grey mask were found in and by the Wyndham car and a bag containing money from the bank was located a short distance from where the pair were apprehended. The shotgun was also recovered nearby. Subsequent examination identified the presence of DNA inside the dark blue mask, which, to a high degree of probability, matched the appellant's DNA profile. DNA matching Williams' DNA profile was found within the grey mask.

The trial

6. The trial of the appellant and his co-defendants took place over a period of nearly five weeks between 11 May and 10 June 2009. In addition to the charge of attempting to murder Corporal Black the appellant faced five charges of armed robbery, being the individual offences concerning the two customers and the three tellers; one charge of grievous harm in respect of a customer who had been in the bank; one charge of possession of a firearm with intent to endanger the life of Sergeant Hanna and four charges of possession of a firearm with intent to prevent lawful arrest, all of which were related to the officers who pursued him from the area of the robbery.

7. The appellant elected to represent himself, having dispensed with the services of his assigned counsel. The defendant Mackey made a statement from the dock denying any responsibility but did not give evidence. Both the appellant and Williams gave evidence of alibi and denied being involved in any of the offences. They claimed they were simply stopped by police officers whilst driving together in the Wyndham car. The appellant explained that he ran away in an effort to get home because of previous involvement with the police. He acknowledged that he had been wearing a bulletproof vest, although claimed it was not the one that was said to have been removed from him. He claimed that the police had brought the pullover with the writing on it with them and forced him to put it on along with a pair of gloves. He denied having been in possession of any guns. The appellant was convicted on all of the charges which he faced, as was the co-defendant Williams. Mackey was acquitted.

8. On the charge of attempted murder the appellant was sentenced to imprisonment for life. He was sentenced to imprisonment for twenty-five years on each charge of armed robbery; imprisonment for five years on the charge of causing grievous harm; imprisonment for ten years on the charge of possession of a firearm with intent to endanger the life of Sergeant Hanna; imprisonment for ten years on each of two of the charges of possession of a firearm with intent to prevent lawful arrest and imprisonment for 14 years on each of the remaining two charges of possession of a firearm with intent to prevent lawful arrest. All of the sentences were ordered to be served concurrently.

The Court of Appeal of The Bahamas

9. The appellant raised a number of grounds of appeal against conviction before the Court of Appeal (Allen P, Conteh and Adderley JJA). The main challenge was to the fairness of the trial based upon a submission that he had not been afforded sufficient time to prepare to conduct his own defence. He also contended that the sentences imposed were unduly severe. In its judgment dated 14 January 2016 the Court of Appeal allowed the appeal against conviction for causing grievous harm, in light of a concession by the Crown, but dismissed the appeal against conviction on the remaining grounds. The sentence of imprisonment for life was quashed and a sentence of imprisonment for forty years imposed in its place. The sentences on the remaining charges were affirmed.

The appeal to the Privy Council

10. On 21 July 2020 the Board granted the appellant leave to appeal against both conviction and sentence. The conviction was challenged upon a single ground that was

not argued in the Court of Appeal, namely that the trial judge misdirected the jury on the 'intent' necessary for a conviction of attempted murder, by wrongly directing the jury:

> (i) That the effect of section 12(3) of the Penal Code meant that the jury could presume the appellant intended the natural or probable consequences of his acts.
>
> (ii) That, if they were of the view that the appellant "ought" to have realised that his action would probably result in death or that there was a great risk of death, then the intent element of attempted murder was made out.
>
> (iii) Since the defence had not produced any evidence to rebut intention, the only inference that the jury could make was that the appellant intended to kill the police officer.

The crime of attempted murder

11. Section 83 of the Penal Code provides the authority for a charge of attempting to commit a crime. Sections 289 and 290 of the Penal Code respectively define the crimes of manslaughter and murder. Manslaughter is committed where death is caused by any unlawful harm. Manslaughter by negligence results if death was caused by negligent harm. By way of contrast, an essential ingredient in the crime of murder is the intention to kill. Section 290 of the Penal Code provides that:

> "Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in this Title hereinafter mentioned."

12. The distinction between sections 289 and 290 makes it plain that murder cannot be committed by reckless conduct, a point which was emphasised in the cases of *Dean v R* (1989-90) 1 LRB 534, *Rahming v R* [2002] UKPC 23 and *Pinto v R* (2011) 2 BHS J. No.77. It follows that where an accused person faces a charge of attempted murder it will be essential for the judge to direct the jury that a conviction cannot be returned unless it is satisfied that the accused's intention was to kill the victim. The question which then follows is what directions should a jury be given about the meaning of intention and how a person's state of mind is to be ascertained?

Section 12 of the Penal Code considered

13. In the appellant's case the trial judge sought to frame his directions on the meaning of intention by looking to the terms of section 12 of the Penal Code. Subsections (1), (2) and (3) provide that:

> "(1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.
>
> (2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event.
>
> (3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

14. It is clear that these are evidential provisions. Their aim is to assist a jury in determining whether the Crown has established the necessary level of intention for the commission of the particular crime charged (see *Rahming v R* at paragraph 14). Subsection (1) directs attention towards purpose, explaining that purpose equates to intention. Subsection (2) extends the concept of intention beyond purpose where something is done in the belief that it will probably have a particular outcome, even if that was not the person's purpose. Subsection (3) then sets out to provide a route through which such a belief can be established. In short, section 12 sets out certain statements as to intention and identifies a process through which intention can be established. The provisions of the section do not impose a burden of proof on the defence and the critical question of the defendant's intention remains to be determined by an examination of the whole evidence.

15. It is fair to observe that the process of arriving at a conclusion as to intention as set out in this provision is cumbersome and unnecessarily complex. It would not be straightforward for a judge to convey the import of section 12(3) to a jury with clarity and precision. One question which arises is what level of foresight of probability of consequence is contemplated? Subsection (3) explains that a defendant's appreciation that an act would "probably" cause an event can be sufficient to constitute intention. At face value this does not sit at all comfortably with the decisions in the cases of *R v Nedrick* [1986] 1 W.L.R. 1025 and *R v Woollin* [1999] 1 A.C. 82. In each of these cases the court identified the need for the defendant to appreciate that the outcome was a virtually certain consequence of his conduct.

16. In the case of *Pinto v R* the Court of Appeal of The Bahamas sought to provide some guidance on the meaning of the section, and as to what directions a judge should give. At paragraph 31 of the judgment Newman JA, with whom the other judges agreed, stated that the purpose which lay behind section 12(3) was to direct attention to the person's foresight, at the time the action was taken, of the probability of a particular consequence occurring in order to arrive at a conclusion as to intention. Reading shortly, he explained that this would involve the jury in a two-stage process. First, it should determine on an objective basis what would have appeared to the defendant as the probable consequence if he had used a reasonable level of caution or observation. Crucially though, he explained that this would not be the end of the process. Appreciating the import of the discussion in the cases of *R v Nedrick* and *R v Woollin*, he explained that the provision did not mean that a person was to be taken to have intended the natural and probable consequences of his action. Nor was it the case that any degree of foresight of a probable consequence would suffice. The second stage of the process required the jury to go on and determine on the whole evidence what the defendant's belief in the probability of his act causing the event was.

17. An insight into the heavy burden which section 12(3) imposes upon a trial judge in framing an effective direction can be gleaned from the passage of Newman JA's judgment in which he discusses what a jury should be told about what is meant by belief. At paragraph 37 he stated:

> "If, on the facts of a case under consideration, a jury conclude that the foreseeability of the accused of an event occurring would have been something like a virtual certainty the jury will be likely to reach the sure conclusion that the defendant believed in the probable consequence of his action as opposed to simply foreseeing it."

18. Newman JA had in mind that something would require to be explained to the jury to convey the need for this level of belief in addition to being given the other directions concerning the operation of section 12(3), all with the eventual purpose of allowing a jury to arrive at a conclusion about the key ingredient of intention. Yet intention is an ordinary facet of human conduct and it is not normally a difficult concept to understand. In most cases it ought not to require any explanation. In the absence of an admission, or statement as to intention, this ingredient of an offence will generally be established through the process of drawing an inference from the surrounding, or primary, facts as proved. Such an exercise is part and parcel of the ordinary decision-making process which a jury is required to undertake. The importance of simplicity in jury directions is often emphasised. Lord Hope of Craighead captured this well in his speech in *R v Woollin* at page 97c when he stated:

> "I attach great importance to the search for a direction which is both clear and simple. It should be expressed in as few words as possible. That is essential if it is to be intelligible. A jury cannot be expected to absorb and apply a direction which attempts to deal with every situation which might conceivably arise."

19. The proposition that section 12 of the Penal Code involves an unnecessarily complex approach to proof of intention is supported by a brief consideration of the guidance given to judges in some other jurisdictions. The Crown Court Compendium published by the Judicial College for England and Wales and the Crown Court Bench Book published by the Judicial Studies Board for Northern Ireland both emphasise that it is generally unwise to elaborate on a simple direction on intention. They both suggest directing a jury to decide intention by taking account of what the defendant did and said before, at the time of and after the incident, and then drawing conclusions from these things. The Criminal Bench Book issued by the Judicial Institute of Jamaica adopts the content of the Crown Court Compendium. The Jury Manual published by the Judicial Institute for Scotland suggests directing a jury that intention is a state of mind to be inferred or deduced from what has been proved to have been said or done. The approach in each of these judicial guides is to identify directions on intention which are straightforward to formulate and easy to comprehend. Their use across a number of different jurisdictions vouches the value of such an approach.

20. In the present case the conflict between the Crown and the appellant was as to identity. The Crown's case was that he and the other defendants acted together in a common purpose which was to rob the bank using whatever force was necessary to achieve that objective, even if it included killing. The Crown's contention was that when Corporal Black was shot the whole circumstances in which that took place made

it perfectly plain that the gunman's intention had been to kill her. Neither the appellant nor counsel for Williams engaged in any cross examination designed to suggest that there might have been some other intention in the mind of the gunman, or to suggest that it was unlikely that death would have occurred in the circumstances which were described. Nor was any such submission canvassed before the jury. The case for each was based on their denial of involvement and evidence of alibi. If the jury concluded that the appellant was the gunman wearing the dark blue mask who fired upon Corporal Black, the only issue remaining would have been whether to categorise his conduct as the crime of attempted murder or something less.

A sufficient direction on intention

21. The Board considers that it would have been sufficient on this issue to have given a simple direction to the jury that they could only convict of attempted murder if they were sure that the gunman had intended to kill Corporal Black, and that if the Crown had not persuaded them that this was his intention then they could only convict of a lesser crime. No evidence had been led, or submission advanced, which called for a more complicated direction on the issue of foreseeability of consequence.

22. On this approach the jury would have been entitled to draw the necessary inference by taking account of the whole evidence, including the evidence demonstrating that the appellant had gone to the bank armed with a loaded shotgun and had taken the precaution of wearing a bulletproof vest. These features would be capable of providing powerful insight into what the appellant and Williams had expected to encounter and how they planned to respond.

The submissions in the appeal

23. In support of the appeal, Mr Fitzgerald KC drew attention to four passages in the trial judge's directions in which he gave the jury instruction on the meaning of intention. He submitted that in these directions the trial judge had failed to make clear to the jury that they were required to determine the subjective intention of the offender and conveyed the impression, either that the only conclusion available on the evidence was that the gunman had intended to kill Corporal Black, or that an objective assessment of the risk of death would provide the necessary level of intention to kill. In addition, he founded upon a further passage in which he submitted that the jury had been directed to the effect that, in the absence of defence evidence as to any different intention, the only conclusion available was that intention to kill had been established.

24. Alongside these submissions Mr Fitzgerald also argued that there had been a misdirection as to fact. In the course of what he had said the trial judge spoke of aiming a firearm at a person's head and discharging a shotgun at a person's head, whereas Corporal Black's evidence was that the weapon had been discharged in her direction. A criticism as to absence of direction was also laid. It was contended that the trial judge ought to have directed the jury to consider what Mr Fitzgerald suggested were evidential factors pointing against an intention to kill, such as the distance over which the shotgun was discharged and whether the gunman's purpose was not to cause death but to evade capture.

25. On behalf of the respondent, Mr Poole KC submitted that there had been no material misdirection in relation to intention. In the context of an overwhelmingly strong case against the appellant the judge had given directions which conveyed the need for the Crown to satisfy the jury that the gunman possessed the necessary intention to kill and had directed the jury adequately on the meaning and effect of section 12(3). Looked at overall, the judge had made it clear that intention was not to be determined on an objective assessment. In the event of a material misdirection being established he submitted that, applying the proviso (in section 13 of the Bahamas Court of Appeal Act), no injustice would have resulted, as any jury properly directed would inevitably have convicted the appellant of attempted murder.

The trial judge's directions

26. The trial judge gave standard directions on the general framework within which the jury should approach its task. He gave directions on joint enterprise which are not criticised, but in any event that doctrine has no relevance to the appellant's appeal. The appellant was cross-examined upon the proposition that he was the gunman who shot Corporal Black and the evidence in support of that proposition was overwhelming.

27. In order to provide context to some of what the trial judge said two matters may be noted. The first is that, in defining the crime of murder, section 290 requires that death is caused by unlawful harm. For the purposes of the Penal Code harm and unlawful harm are separately defined in sections 23 and 24. It is sufficient to note that in section 23 harm is defined as any bodily hurt. Section 24 provides:

> "Harm is unlawful which is intentionally or negligently caused without any of the justifications mentioned in Title vii. of this Code."

The justifications to which reference is made include acting under lawful authority, necessity, self-defence and the defence of property. The Penal Code therefore recognises that a deliberate killing can take place in circumstances which will not attract criminal liability. The second matter to note is that section 290 recognises that conduct which would otherwise constitute the crime of murder may be palliated by the presence of circumstances which are sufficient to warrant a reduction in the label to be attached to the offending conduct.

Intention to kill

28. The trial judge began directing the attention of the jury to the individual offences charged at page 14 of the transcript of his directions. He started with attempted murder. He explained that, like any other offence, there were a number of ingredients making up the offence of attempted murder and that each element was required to be made out on the prosecution evidence. He then posed as an example the proposition that the evidence did not disclose intention to kill. He explained that in this situation a conviction of attempted murder could not be returned but that if the other elements of the crime were present, and if unlawful harm had been inflicted resulting in injury, then another offence might be found proved but not attempted murder. In concluding this passage he stated that for the crime of attempted murder there must be intention to kill.

29. The judge then immediately moved on to direct the jury as to the definition of murder by reading the terms of section 290 of the Penal Code and explained that for the crime of attempted murder there must be the same intention to kill. He later discussed the concept of an attempt to commit a crime in a little more detail and again emphasised that intention to kill would be necessary for the commission of attempted murder. The jury can have been left in no doubt that intention to kill was required to be established by the Crown as an essential element of the crime of attempted murder. The point raised in the appeal is that the judge's subsequent directions bring into focus the question of what the jury would have understood was meant by intention and how that necessary ingredient of the offence could be established.

Directions on intention

30. The judge began his directions on this issue by stating that intention is defined in the Penal Code. He then read the terms of section 12(3) to the jury. Having done so, he invited the jury to consider what reasonable inference would be drawn from the act of an individual pointing a shotgun which he knew to be loaded at another and pulling the trigger. He went on to canvass a brief description of Corporal Black's evidence and

directed the jury that it was for them to determine what was the intention of the person firing the shotgun. This passage reflects the judge's understanding of the need to direct the jury as to the two-stage approach to the application of section 12(3) described by Newman JA in the case of *Pinto v R*. He concluded this exercise by saying, at page 16 of the transcript lines 11 to 19:

> "… but if a person points a shotgun which you know has a power to kill at another individual at a distance no greater than 60 feet or so …… fires a shotgun at the individual, what is the intent of that person firing the shotgun? Not once, but twice. It's a matter for you, Mr. Foreman and members of the jury to decide."

31. This passage was relied upon by Mr Poole to demonstrate that the judge had directed the jury adequately on the meaning and effect of section 12(3). He submitted that here the judge had made it plain that the crucial issue was what was in the mind of the gunman and that his intention was not to be determined on an objective assessment. Two subsequent references to the intention of the shooter were relied upon and it was contended that, overall, the jury could have been left in no doubt that the Crown was required to establish actual intention to kill on the part of the shooter. He contended that there was no force in the suggestion that the jury had been led to think that any burden of proof had passed to the appellant. The judge had made plain both at the beginning and at the end of his directions that the burden of proof remained on the Crown throughout.

32. Despite these submissions, the Board is satisfied that the trial judge did misdirect the jury in four subsequent passages of the directions given.

The first two misdirections

33. The passage which immediately followed on from the direction founded upon by Mr Poole requires to be set out in full. It is found at page 16 line 20 through to page 17 line 17:

> "But the definition of intent is that you take a firearm, you point it at an individual and you shoot them and in this, if you aim it at their head and you shoot them in the head knowing that the brain is in the head, that the brain is, you might think, a vital organ, that without it you cannot survive.

> *In those circumstances, you might think that the only purpose the person has for shooting the other individual in the head with a shotgun is to kill them*. A person may have a very good reason for doing so. They may have been acting in self-defence. They may have thought that they would miss, the person would duck or the gun wasn't loaded. They may have been provoked to do as they did.
>
> If you find that any of those circumstances existed, then you cannot find the accused men guilty of attempted murder. There would have been some justification for their actions or some matter of partial excuse which would have reduced it from attempted murder to a lesser offence. You have to decide whether any of those justifications existed in this case. *There has been no evidence to show what the shooter believed to the contrary of what was disclosed in the Crown's case. You are therefore left with the only inference that can be drawn which is that the person firing a deadly instrument at another individual's head, the person having received injury from the first shot and the shooter firing again at the individual, that that person must have intended the necessary consequences of that act*." (emphasis added).

34. What can be seen is that, having begun by telling the jury that they needed to address the intention of the person firing the shotgun, at lines 11/19 of page 16, the effect of what the judge went on to say in the first italicised part above was that there was only one inference available to be drawn, namely that he had intended to kill. This impression is conveyed again in the second italicised part above which also suggests that there was an onus on the appellant to disprove intention to kill.

35. The structure of the judge's directions suggests that in this passage he may have had in mind what was said by Newman JA at paragraph 29 in the case of *Pinto v R* where he gave some examples of circumstances in which the requisite intention for murder would be absent. He may also have had in mind that murder or attempted murder can only be committed by unlawful harm and he may have felt it necessary to draw a distinction between this and justifiable conduct, or to explain that some circumstances could exist which would reduce what would otherwise be murderous conduct to a lesser crime. On this understanding, in the last two sentences of the passage quoted, the judge may have simply had in mind that there was no evidential basis for arriving at any such view in the present case.

36. The difficulty is that the whole exercise was introduced by the judge beginning to explain what was meant by intention to kill as an essential ingredient of the crime. At no stage did he explain that he was turning to address any of the other ingredients of the crime or any other consideration. In the absence of any such explanation, for the judge to have addressed issues such as justification, or partial excuse, which did not arise on the evidence, must have raised a very real prospect of confusion or misunderstanding. Furthermore, references to intention, belief and purpose all appear in the passage quoted without any explanation of the context which the judge had in mind.

The third misdirection

37. The problem identified is amplified by the fact that the judge continued to talk of intention immediately after the passage set out above. After again referring to the evidence of Corporal Black about what had taken place, at page 18 of the transcript lines 7 to 16 the judge said:

> "*You will find*, Mr. Foreman and members of the jury, that as the brain is located in the head, it is necessary to sustain life. *If a person discharged a shotgun at a person's head that that person's intention was to cause the death of that person*. The definition of murder says whoever intentionally causes. It is a matter for you, Mr. Foreman and members of the jury, whether an event is fairly and reasonably to be described (sic) to a person's act as having been caused thereby." (emphasis added).

38. It is not easy to determine what the judge was seeking to convey to the jury in this passage but, looking to what follows, it may have been that he had in mind the need for the harm inflicted to have met the definition of "unlawful harm" and to have been caused by the intentional act of the person concerned. Once again however the italicised parts convey the impression that there was only one inference available to be drawn in the present case. This impression is all the more firmly conveyed when this passage is set alongside what the judge said in the first italicised sentence in the passage quoted at paragraph 33 above.

39. Whatever lay behind the framing of the passages which have been set out, the factual context in which the directions fell to be given could hardly have been more straightforward. In the view of the Board there was no requirement to canvass issues such as whether the weapon was loaded, self-defence, provocation, justification,

unlawful harm or cause. None of these issues was raised in the trial and so any such direction would have no context. Beyond identification, the only live issue was whether the Crown had persuaded the jury that they were sure the gunman had intended to kill Corporal Black.

40. The lack of clear guidance began with the reading of section 12(3). As was pointed out by Newman JA at paragraph 36 of the judgment in *Pinto v R*, "Merely reading section 12(3) to the jury should be avoided and if done, without proper explanation, will amount to an inadequate direction." In the present case the absence of precise instruction as to its meaning was highly likely to introduce uncertainty. No clear exposition of the meaning of the section was given and the directions which followed introduced further confusion and unnecessary complication. The value of Lord Hope of Craighead's advice on the search for simplicity could not be more apposite. Instead, the approach which the trial judge followed led him to give the directions set out in the passages identified. Each constituted a misdirection on the issue of intention. The effect of each direction was to instruct the jury that the necessary inference was to be drawn by them, not that they must determine whether to draw it or not.

41. A simple direction inviting the jury to consider whether they were sure that the gunman had intended to kill Corporal Black would have been sufficient without any need to explore the content of section 12(3) at all. Even in a case in which foresight of consequence is properly in issue the Board doubts that there will be value in inviting a jury to absorb and apply the provisions of this subsection.

The fourth misdirection

42. As the judge came towards the end of what he had to say about the charge of attempted murder he sought to draw together the various matters he had been seeking to explain. These directions appear at page 19 of the transcript line 26 through to page 20 line 11:

> "So before you can find the offence of murder (sic) has been made out, you must be satisfied on the prosecution's evidence that all of the ingredients of the offence are present; namely, that an attempt was made to kill woman police Officer Black, the cause of her injuries was inflicted by the defendants and that such harm was without legal justification and the act resulted in this harm was intentional and by intentional, I mean the defendants either had as their

> purpose to cause death or believed it would probably cause death *or ought to have realised it would probably cause death or create a great risk of death* because of the kind of harm or the manner in which it was inflicted. Remember, a person points a shotgun at another individual, discharges it in that person's direction, what is the intention of the shooter? It's a matter for you to decide, Mr. Foreman and members of the jury." (emphasis added).

43. This was an important passage in the judge's directions and, unfortunately, it includes a plain instruction in the italicised part informing the jury that attempted murder could be established if the defendants ought to have realised that their conduct would probably cause the death of the police officer. This is the standard for negligent rather than intentional conduct and it invited a conclusion as to guilt based on an objective assessment of intention. The direction was inappropriate and inconsistent with the correct legal position.

44. Having recognised the strength of Mr Fitzgerald's submissions to this extent the Board does not consider that there is any merit in his remaining criticisms. In the context of a shotgun being aimed at the visible part of the upper body of the officer sitting in her police car, and bearing in mind that she was in fact shot in the head, there was no misdirection as to fact. Nor was the trial judge required to give any directions bearing upon intention by drawing attention to the distance or suggesting any other purpose. No focus had been drawn to any such point and these factors were part of the obvious factual matrix which the jury would have had in mind to consider.

Disposal

45. The disposal of the appeal against conviction requires consideration to be given to section 13 of the Bahamas Court of Appeal Act (Cap 52) which provides, so far as relevant, that:

> "13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that –
>
> (c) there was a wrong decision or misdirection on any question of law or fact;

> Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred."

46. The test for the application of a proviso of this sort is a high one (see *Woolmington v Director of Public Prosecutions* [1935] A.C. 462 and *Stirland v Director of Public Prosecutions* [1944] A.C. 315). Nevertheless, the evidence in the present case was overwhelming. No reasonable jury properly directed to ask themselves whether they were sure that the gunman had intended to kill Corporal Black could have failed to convict on the charge of attempted murder. It is therefore the Board's view that, even though there were misdirections and even though those misdirections may be regarded as material, the proviso here applies.

The appeal against sentence

47. The Court of Appeal decided to quash the sentence of imprisonment for life imposed upon the appellant. It did so upon the view that in the cases of *Poitier v R* SCCrApp No. 95 of 2011 and *Meadows v R* SCCrApp No. 132 of 2009 the court had identified certain unsatisfactory features of a life sentence. These related to the uncertainty which flowed from the fact that whilst a life sentence was intended by Parliament to constitute imprisonment for the whole of the remainder of the prisoner's life, clemency could be exercised by the Governor General resulting in release at some earlier period. Accordingly, the court concluded that a determinate sentence was appropriate and imposed a sentence of imprisonment for 40 years in place of the sentence imposed by the trial judge.

48. On behalf of the appellant Mr Fitzgerald drew attention to paragraph 35 of the judgment of the Court of Appeal where it stated:

> "It is trite that the sentence for an attempt is the same as that for the substantive offence. Shooting a police officer in the course of her duties is a most grave offence, and it is incumbent on the Court to demonstrate that such acts will not be tolerated."

It was submitted that the Court of Appeal had misdirected itself and applied the wrong legal principle. The sentencing court should distinguish between an attempt and a completed offence when determining the appropriate sentence. It was also submitted

that the sentence was manifestly excessive. Information was provided to the Board to demonstrate that the sentence selected appeared to be the most severe sentence to have been imposed in the Bahamas for the offence of attempted murder in more than a decade and was equivalent to the sentence imposed following murder convictions.

49. The Board recognises that a court will in almost every case maintain a proportionate discount from the term appropriate to be served for the full offence, although in extreme cases it need not always do so. In circumstances such as disclosed in the present case the need for deterrence is indistinguishable as between attempted murder and murder, although it may be that the need for retribution is less. The Board rejects the submission that the Court of Appeal applied the wrong legal principle. In the part of the decision to which attention was drawn the Board would understand the Court of Appeal to be acknowledging that in appropriate circumstances the same sentence can be imposed for both offences.

50. The appellant's antecedent record discloses nothing of comparable offending but does record a history of criminal conduct dating back to 1995 and includes minor offences of violence and possession of an unlicensed shotgun.

51. The sentence imposed was undoubtedly severe. A severe sentence was merited. What influenced the selection of that punishment is clear from the second sentence of the passage quoted above. The Court of Appeal of the Bahamas is well placed to judge the need for severe punishment and is well aware of sentencing practice in its own jurisdiction. What is abundantly clear is that the attempted killing of a police officer in the course of her duties in the aftermath of committing another violent crime is an offence of the utmost seriousness. In these circumstances the Board rejects the submission that the sentence selected was manifestly excessive.

Conclusion

52. For the reasons given above, the Board will humbly advise His Majesty that both the appeal against conviction and the appeal against sentence should be dismissed.