Easter Term
[2020] UKPC 10
Privy Council Appeal No 0088 of 2017

JUDGMENT

Bain (Appellant) *v* The Queen (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Hodge
Lady Black
Lord Lloyd-Jones
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

27 April 2020

Heard on 17 March 2020

Appellant	*Respondent*
Martin A Lundy II Edward Fitzgerald QC Amanda Clift-Matthews (Instructed by Simons Muirhead & Burton LLP)	Tom Poole (Instructed by Charles Russell Speechlys LLP (London))

LORD HAMBLEN:

1. On 2 May 2013, the appellant, Simeon Bain, was convicted of offences of kidnapping, robbery, housebreaking and murder alleged to have occurred on 20 September 2009. He was subsequently sentenced on 30 July 2013 to sentences of eight, 19, 12 years and life imprisonment respectively, which were to run concurrently.

2. The appellant appealed against conviction and sentence. On 21 January 2016, the Court of Appeal (Allen P, Conteh and Adderley JJA) dismissed the appeal against conviction and allowed the appeal against the life sentence for murder, substituting a sentence of 55 years. All the other sentences were upheld.

3. On 25 September 2016, the Court of Appeal granted the appellant final leave to appeal his conviction and sentence to the Judicial Committee on a number of grounds. The principal ground of appeal against conviction arises out of the fact that following counsel's withdrawal the appellant was unrepresented for nearly all of his trial. It is contended that counsel's withdrawal was mismanaged by the trial judge, resulting in an unfair trial.

The case in outline

4. Rashad "Shanty" Morris ("Morris") was murdered on 20 September 2009 during the course of the housebreaking of a Burger King restaurant.

5. The key witness for the Crown was Ms Zina Davis ("Davis") who lived with the appellant. Davis was a close friend of Morris whom she had met whilst also working at Burger King. Davis gave evidence that she had informed the appellant that Morris was gay. It was the Crown's case that upon acquiring this information the appellant hatched a plan to use Morris to rob Burger King and Davis gave evidence that the appellant told her of his plan.

6. The attempted robbery took place, but Morris could not access the safe. The man accompanying Morris then stabbed him to death in the street outside. In addition to the stab wounds, Morris' throat was cut.

7. Davis said that before the murder, the appellant had texted Morris, using the name "Dwayne". This was apparently to gain his confidence, because he was gay. On the day in question, her evidence was that the appellant went to pick Morris up, brought

him home and locked him in a room. She said that she saw the appellant and Morris leaving the house together and gave a description of the clothes that they were wearing. She described the appellant as wearing a black jeans jacket, black jeans pants, white tennis shoes, a pair of beige gardening gloves and a black tam.

8. The attempted robbery was captured on CCTV, and showed Morris being struck by a man dressed in black, wearing a ski mask, with light-coloured gloves, who tried without success to make Morris open the safe. Davis gave evidence that, although the CCTV footage was blurry, she could identify the man in black in the video, by his clothing and his build, as the appellant.

9. Davis said that when the appellant returned home, he was wearing a t-shirt and greenish boxer shorts and had blood all over him and he told her that he had stabbed Morris. She said that he told her that he had got rid of the car and all his bloody clothes. He also had a Blackberry mobile telephone that she did not recognise as his and $500 that he told her he got from the Burger King counter. Morris had owned a Blackberry.

10. The appellant was also allegedly linked to the murder by the evidence of a private investigator, Mr Oswald Beneby ("Beneby"), who obtained an extract of Morris' cell phone records from Batelco. This showed calls made to him by a phone registered to the appellant, including a transfer of minutes shortly after the time of the murder, indicating that someone had both phones at that stage. It was the appellant's case that this was a number used by Davis.

11. After his arrest, the appellant was interviewed under caution on 31 December 2009 by Detective Sergeant Antoinette Hall in the presence of Detective Sergeant Basil Evans. During this interview, which was not recorded, the appellant allegedly confessed to the murder. It was the appellant's case that this confession was beaten out of him, that he was hit with a baseball bat, stamped on the chest and that a plastic bag was put over his head. A voir dire was held to determine the admissibility of the confession.

12. Dr Hastings Johnson was called at the voir dire and at trial to tender the medical report of Dr Reddy who had examined the appellant while he was in custody. Dr Johnson was called as a witness because, as he explained, Dr Reddy had since retired and left the jurisdiction. Dr Johnson said that he did not see that Dr Reddy had recorded the appellant as having any injuries consistent with having been beaten with a baseball bat or being stamped on the chest. Dr Reddy recorded the appellant's medical examination as "unremarkable".

13. At the voir dire, as well as the evidence of Dr Johnson, evidence was given on behalf of the prosecution by DS Hall and DS Evans, who said that they had not threatened or beaten the appellant. The appellant gave evidence and also called Davis

in order to seek to support his case that he had been beaten. Davis had been at the police station at the same time and it was the appellant's evidence that Davis was beaten in front of him, that he did not want Davis to be hurt, and that it was these beatings that led him to confess.

14. The judge found that the appellant was not oppressed and that his confession was voluntary. Accordingly, the judge ruled that it should be allowed into evidence.

15. The appellant gave evidence at the trial. His defence was that he had been framed and that he was not responsible for any of the offences with which he was charged. He denied being the person who contacted Morris using the name Dwayne. He stated that his cell phone had been stolen by two girlfriends. He denied planning or carrying out the kidnapping and robbery. He denied stabbing Morris. He denied confessing to Davis. He said that he confessed to the police, although not in the written statement, which they had doctored, but he had only done this because he had been badly beaten by the police. He had also seen them beating up Davis and was very afraid for her.

16. The appellant called the following witnesses:

(1) Mr Calvin Seymour, his former counsel, who said that he did not request phone records on the appellant's behalf before his dismissal as it was not part of his strategy for putting the appellant's case.

(2) Ms Deidre Young, an operations manager at Burger King, who testified that a reward of $10,000 had been offered by Burger King for information in connection with the death of Morris.

(3) Constable Gerard Miller, who gave evidence that on 29 March 2009 the appellant reported to the police that his grey and white Nokia cell phone number had been stolen when giving two women a ride in his car.

(4) Mr Philip Deveaux, a police officer, who said that at some point he telephoned the appellant regarding the matter of a cell phone, but said that he was unable to remember the number he used to call the appellant nor could he remember the date of the conversation.

(5) Mr Ernest Green, a programmer at Batelco, who testified that in order for the transfer of minutes to occur, the person who did it had to have possession of both phones. Mr Green said that the sim card allegedly used to contact Morris

was an unregistered prepaid sim card, meaning it was not assigned to any given person.

The appeal to the Court of Appeal

17. The appellant appealed against conviction to the Court of Appeal on various grounds, principally:

(1) failure to give a *Turnbull* (*R v Turnbull* [1977] QB 224) direction in relation to the identification by Davis of the appellant on the CCTV footage;

(2) wrongful admission of the confession into evidence; and

(3) unfair hearing as a result of the withdrawal of the appellant's counsel.

18. The Court of Appeal dismissed the appeal on all grounds and further held that, should they be wrong in any of their views, it was an appropriate case for the application of the proviso to section 13 of the Court of Appeal Act ("CAA") which is in the following terms:

> "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."

19. In so concluding the Court of Appeal stated as follows at para 35:

> "Given the evidence available, particularly the testimony of Zina Davis, and the appellant's confession, we are assured that a reasonable jury properly directed, would on the evidence inevitably have convicted the appellant. We are satisfied, beyond a reasonable doubt, that no miscarriage of justice has occurred in this case and as such dismiss the appellant's appeal against the convictions."

20. In relation to the appeal against sentence, the Court of Appeal substituted the term of 55 years for the life sentence for the appellant's murder conviction.

The grounds of appeal

21. The grounds of appeal against conviction are that the Court of Appeal erred:

(1) In failing to appreciate the unfairness of the trial and the serious prejudice suffered by the appellant given (i) the lack of discovery and full disclosure by the Crown; (ii) the difficulties in locating and securing the attendance of defence witnesses; (iii) fresh evidence adduced at trial; (iv) the withdrawal of the appellant's counsel and (v) the resultant inability of the appellant to properly defend himself pursuant to article 20(2)(c) of the Constitution of the Commonwealth of The Bahamas.

(2) In failing to determine the lawfulness of the procedure adopted by the court and the Crown in dealing with the voluntary bill of indictment.

(3) In holding that there was no need to provide a *Turnbull* direction.

(4) In finding that the appellant was not prejudiced by the Crown's failure to produce Dr Reddy.

(5) In finding that section 120(6) of the Criminal Procedure Code ("CPC") and section 66 of the Evidence Act ("EA") obviated the need for Dr Reddy to be in attendance for cross-examination.

(6) In failing to hold that the confession should not have been admitted into evidence.

(7) In accepting the credibility of Davis.

(8) In failing to give any or sufficient weight to the submissions of the appellant on the overall lack of corroborative forensic evidence and the Crown's over reliance on circumstantial evidence.

(9) In applying the proviso to section 13 of the CAA and concluding that no miscarriage of justice occurred in this case.

22. The grounds of appeal against sentence are that the Court of Appeal erred:

(1) In denying the appellant the opportunity to address the court on the duration of the sentence prior to its imposition upon him and failing to provide sufficient reasons as to why the term of 55 years' imprisonment was the appropriate sentence in his case.

(2) In failing to take into account the three years four months that the appellant had spent on remand prior to conviction.

(3) In failing to take into account that the appellant was almost 41½ years old at the date of conviction that a sentence of 55 years' imprisonment would deny him any real prospect of ever being released.

(4) In failing to recognise that the sentence of 55 years' imprisonment imposed upon the appellant is an inhuman punishment in breach of article 17(1) of the Constitution.

23. The grounds of appeal were settled by Mr Martin Lundy II on conviction and Ms Amanda Clift-Matthews on sentence. Shortly before the hearing this team was supplemented by Mr Edward Fitzgerald QC and supplementary submissions were produced on conviction appeal grounds (1) and (4)-(6) and on sentence. Mr Fitzgerald attended the hearing and made the principal submissions on sentence and supplementary and reply submissions on conviction. We are grateful for the considerable assistance he provided. The Crown was represented on the appeal by Mr Tom Poole.

The conviction appeal

The withdrawal of counsel

24. At the appeal hearing Mr Lundy and Mr Fitzgerald realistically concentrated their submissions on the alleged mismanagement by the judge of the withdrawal of counsel and consequent unfairness of the trial.

25. The trial began on 10 April 2013. The jury were empanelled, the Crown opened its case and there were then submissions in relation to the admissibility of the evidence of Beneby, with the judge reserving her ruling. There then arose the issue of the withdrawal of the appellant's counsel, Mr Seymour. How this arose and was dealt with is set out in the following excerpts from the transcript:

"THE COURT: Mr Bain, you need something?

THE ACCUSED: I would like a copy of the disclosed material, please.

THE COURT: Sorry?

THE ACCUSED: I would like to have a copy of all of the disclosed material so I can be able -

THE COURT: You have counsel.

MR SEYMOUR: My Lady, in the absence of the jury.

[The jury is asked to leave with the appropriate instructions given.]

THE COURT: Sorry, Mr Bain, you have a lawyer to represent you.

THE ACCUSED: Yes, ma'am.

THE COURT: So, normally your lawyer should be the one addressing me. I don't know what's your concern now, you need - what you said? [sic]

MR SEYMOUR: My Lady, it would appear that I may not be competent.

THE COURT: You may not be?

MR SEYMOUR: Competent to represent Mr Bain. He's saying that I must do it his way. And if I have to do it his way I must ask the court to excuse me in these difficult circumstances.

THE COURT: Yes, I agree with you, Mr Seymour. Mr Bain, you had Mr Seymour, a qualified lawyer, with years experience, not only on the Police Force, but as a lawyer who has appeared before this court on numerous occasions. And if you wish to challenge him now and to tell him how to do the case you will run into

difficulties because if he withdraws you are going to deal with this case by yourself.

THE ACCUSED: Yes, ma'am, I understand that. But I also want my Lady, that when Mr Jerome Roberts was representing me he asked for two disclosures, one for my counsel and one for myself.

THE COURT: Sorry he asked for what?

THE ACCUSED: Two copies of the disclosed -

THE COURT: Well Mr Roberts can't ask. The Crown can only disclose one. What are you saying the surveillance tape?

MR SEYMOUR: What I understand him to be saying is Mr Roberts asked through perhaps the court to get two sets of document one for counsel and one for him.

THE COURT: I don't know about that law, but Mr Roberts asked no court will grant that order because that means additional expense on the Crown. But if a lawyer privately wants to take into their chamber and photocopy documents and do surveillance tapes, that's up to them. But the Crown here is under duty to disclose to your lawyer only one set of documents.

THE ACCUSED: I understand that.

THE COURT: If you need another set, then you have to do that at your own expense. You are legally aided. The Crown is already doing a lot. The state is already doing a lot to provide you with a lawyer of some years experience. Because Mr Seymour is not a lawyer who just came out of law school. And so you as far as I'm concerned if you want to conduct your own case, you can do so. But you will not get two documents at this time after numerous case management conferences ...

There is no obligation on the state to give you those documents. Your lawyer has them if you don't need your lawyer, I know Mr Seymour will withdraw from the case very quickly. Because no lawyer wants to be put under pressure.

He’s the lawyer. He is trained and he has to deal with it in accordance with law. If there weren’t people in court I would have told you certain thing that you should do also but I make no such comments here sitting on the bench, which will shorten this case.

THE ACCUSED: So in other words my lady is saying only way I could get copy of those documents.

THE COURT: Sorry what do you need a copy of what?

THE ACCUSED: My Lady is telling me only way I could get a copy of the material is if Mr Seymour is not representing me anymore. So for that reason I need copies. I represent myself.

THE COURT: You will represent yourself

THE ACCUSED: For that reason

THE COURT: Please take that down it’s very important. That must be a part of the record. Say it again so the court reporter can take it down. You would not like Mr Seymour to represent you.

THE ACCUSED: No my Lady, I represent myself, my lady.

THE COURT: Yes, Madam DPP, what do you have to say?

MADAM DPP: My Lady, I could not - I concur with my learned friend today. From my learned friend came in this morning he made certain indications to me and I on his behalf asked for an adjournment. I saw this coming. I really saw this coming ... my learned friend has put forward the position he has found himself in and I totally agree with my learned friend, concur with my learned friend that under these circumstance my Lady, one cannot reasonably expect my learned friend to represent the accused in these circumstances that he finds himself. And so, my Lady you are - the court is quite right when the court has pointed out to the accused the option that he has. And he has chosen his option. Because in other words he seems to be dissatisfied with the service of my learned friend. That is what it amounts to. And I would not like for my learned friend for any unusual allegations that accused

> persons make against defence lawyers of incompetence to come to my learned friend in this matter. I know the difficult circumstances under which he is put himself to appear for this accused. And so, I do not hesitate my Lady, to agree that the court should allow my learned friend in these circumstances to withdraw.
>
> THE COURT: Mr Bain, we will continue with this case this afternoon. I will ask and you still maintain that you don't wish counsel to represent you, you will represent yourself?
>
> THE ACCUSED: Yes, my Lady.
>
> THE COURT: Okay, I will ask Mr Seymour to hand over all the documents to you. We will continue this afternoon with the evidence ...
>
> Mr SEYMOUR: For the record most of the items when I visited the prison was shared with him, so there's no reason.
>
> THE COURT: Okay I'll rise ..."

26. In summary, the relevant exchanges began with the appellant addressing the court directly and seeking a copy of the disclosed material. Having sent the jury out, the judge said that he had counsel to address the court. Mr Seymour then explained that he may not be competent to represent the appellant as he was "saying that I have to do it his way". The judge immediately agreed with Mr Seymour and warned the appellant that if he told him how to run the case Mr Seymour may withdraw leaving him to conduct the case himself. The appellant pointed out that his previous counsel had asked for two sets of the disclosed material so that the appellant could have one himself. There was then a discussion about the provision of disclosed material and how the Crown was only obliged to provide one set, which culminated in the appellant stating that, as he understood it, he was being told that the only way he could get a copy of the material was if Mr Seymour was not representing him anymore and "for that reason" he would represent himself. Madam DPP was then asked by the judge what she had to say, and she explained that she had seen "this coming" as a result of discussions with Mr Seymour, that the appellant appeared to be dissatisfied with the service of Mr Seymour and that she agreed that the court should allow him to withdraw. Having asked the appellant to confirm that he still maintained that he did not want to be represented by counsel and would represent himself, the judge allowed Mr Seymour to withdraw, asked him to hand over the papers to the appellant and stated that trial would continue with the evidence that afternoon.

The Constitution and relevant case law

27. The Constitution of the Commonwealth of The Bahamas provides in article 20(2)(c) and (d) that every person who is charged with a criminal offence:

> "(c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or by a legal representative at the public expense where so provided by or under a law in force in The Bahamas."

28. The Court of Appeal placed considerable reliance on the case of *Robinson v The Queen* [1985] AC 956 which concerned a similar provision in section 20(6) of the Constitution of Jamaica. In that case the defendant was charged with murder. He did not apply for legal aid. The main prosecution witness having disappeared, the case was adjourned on 19 occasions, on six of which the trial date had been fixed. In January 1981, the trial was definitely fixed for a date in March with the consent of the defendant's two counsel, who had been instructed privately. When the trial began the prosecution's principal witness was present but the defendant's counsel were absent and the trial started without them. They were at court the following day and applied for permission to withdraw, because they had not been fully paid, and for an adjournment for a legal aid assignment. The judge offered counsel the legal aid assignment but that was declined. Both applications were refused by the judge who feared that the main prosecution witness might not be available if the hearing was adjourned. The defendant's counsel withdrew and the trial continued without the defendant being legally represented. He was convicted of murder and sentenced to death. He applied to the Court of Appeal of Jamaica for leave to appeal against conviction and sentence, but his applications were refused. His appeal to the Privy Council was dismissed by a majority, with Lord Edmund-Davies and Lord Scarman dissenting.

29. In giving the judgment of the majority Lord Roskill stated as follows at p 966-967:

> "Section 20(6) provides:
>
> > 'Every person who is charged with a criminal offence … (c) shall be permitted to defend himself in person or by a legal representative of his own choice.'

It is contended that the defendant's trial and conviction without legal representation was a breach of those fundamental constitutional rights, and that those rights having been so breached, his conviction for murder should be quashed.

In their Lordships' view the important word used in section 20(6)(c) is 'permitted'. He must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be *permitted* to exercise those rights. It is apparent that no one could have done more than the judge to secure the defendant's representation by counsel of his choice. Those two counsel were on the record and the judge refused them leave to withdraw. It was those two counsel who in defiance of the judge's refusal of leave to withdraw absented themselves and thus left the defendant unrepresented. The judge even invited Mr Soutar [previous counsel for the defendant] to appear on legal aid. Mr Soutar refused. Faced with this position the judge exercised his discretion not to grant a further adjournment. It is clear that it was the repeated adjournments in the past coupled with the facts of Irving's [main prosecution witness] previous absences, his current presence and the risk of his future disappearance, which weighed with the judge in refusing a further adjournment. It is also clear the judge was influenced by the fact that when Mr Soutar refused to appear on legal aid, a grant of a legal aid certificate to other counsel must necessarily have entailed another adjournment.

In their Lordships' view the judge's exercise of his discretion, which counsel for the defendant rightly conceded to exist, can only be faulted if the constitutional provisions make it necessary for the judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way to give rise to an absolute right to y legal representation which if exercised to the full could all too easily lead to manipulation and abuse.

In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the defendant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not

> forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder, of the date of which the defendant had had ample notice, does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights.
>
> Their Lordships have therefore after full consideration reached the conclusion that there was no breach of the constitutional rights to which the defendant was entitled."

30. In their dissenting judgment, the minority considered that the trial judge had failed to permit the defendant to defend himself by a legal representative of his own choice and that the effect of his decision to continue the trial without adjournment after the withdrawal of the defendant's counsel "was to deny the defendant the option to which the Constitution entitled him". In an observation which the Board considers has undoubted force, they said at p 974 that:

> "… it is difficult to imagine a more serious turn of events for an accused facing a capital charge than to be abandoned mid-trial by his legal advisers and to be denied by the court the opportunity of replacing them."

31. *Robinson* shows that under a Constitution such as that of The Bahamas there is no absolute right to legal representation. As the majority point out, any such right could "all too easily lead to manipulation and abuse" (p 966). Whether to allow the trial to continue without legal representation for the defendant is a matter for the discretion of the judge. In the exercise of that discretion relevant considerations identified in that case include whether the lack of representation is due to the fault or choice of the defendant and the impact of any adjournment on the availability of witnesses.

32. In *Dunkley v The Queen* [1995] 1 AC 419, another Jamaican murder case, counsel withdrew after the judge refused to hear him on an admissibility objection he had raised. The judge continued with the trial, despite the defendant's complaint that he was not capable of representing himself, and did not consider whether to adjourn to allow the defendant to seek alternative representation. The Board observed at p 427 that while there is "no absolute right to legal representation throughout the course of a murder trial", "it is obviously highly desirable that defendants in such trials should be continuously represented where possible". The Board gave the following guidance at p 428 as to the approach to be followed where counsel seeks to withdraw during a trial on a capital charge:

> "In the first place where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge he should consider whether it would be appropriate to adjourn the trial for a cooling-off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation."

The Board then considered the extent to which this guidance had been followed in that case and observed that:

> "In this case although the judge did not exactly encourage Mr Frater [counsel for the defendant] to withdraw he made no attempt to dissuade him and it does not appear that he considered the possibility of the first defendant trying to obtain alternative representation. Indeed he allowed the trial to proceed as though nothing had happened without even so much as an adjournment until the following morning. Their Lordships can sympathise with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try and secure alternative representation."

33. The Board went on to consider the impact of the defendant being unrepresented at the trial and found that he was prejudiced in two particular respects. First, the prosecution improperly referred to identification evidence from a witness they did not call, but no objection or application for a retrial was made. Second, the defendant was deprived of the advantage of skilled cross-examination of a key witness. The Board held that the cumulative effect of these matters was to render the conviction unsafe.

34. *Dunkley* highlights that it is important for a trial judge faced with the potential withdrawal of defence counsel in a capital case to seek to persuade counsel to remain; to afford, where appropriate, time for reflection or a cooling-off period; to consider the prejudice that the defendant will suffer if counsel withdraws, and to consider an adjournment to enable the defendant to try to obtain alternative representation. It also suggests that where a defendant is left unrepresented "through no fault of his own" an

adjournment to secure alternative representation should be granted save in "the most exceptional cases".

35. The guidance provided in *Dunkley* was approved and followed by the Privy Council in *Mitchell v The Queen* [1999] 1 WLR 1679, again a Jamaican murder case. In that case, on the second day of the trial, the defendant's leading counsel told the judge in the presence of the jury that the defendant wished to cross-examine the witnesses himself. She asked the judge to allow her to withdraw. The judge told the defendant that if he rejected his existing counsel he would be on his own and the judge would not provide him with different counsel. The defendant made allegations against his leading counsel and it became apparent that he did not wish to continue with either of his counsel and that they no longer wished to represent him. He stated that he would defend himself. He did not apply for an adjournment to investigate whether other counsel could act for him, and he was not advised to do so by counsel or the judge. The judge permitted both the defendant's counsel to withdraw and the trial proceeded without the defendant being legally represented. He was assisted by the judge in questioning witnesses but did not understand the court procedures and was at times confused. He had little opportunity to prepare his defence of alibi, and the evidence given on his behalf by his daughter and her mother was confused and inadequately clarified. He failed to indicate to the judge two errors in the summing up. He was convicted.

36. In *Dunkley* counsel withdrew because of a disagreement with the judge and without any involvement of the defendant. *Mitchell* concerned a disagreement between the defendant and counsel. The Board considered it to be a case in which in all the circumstances counsel did not wish to act for the defendant and he was not content to continue with them. It could not, however, be said that the defendant had of his own volition dismissed counsel or that he was attempting to manipulate proceedings. The Board held at p 1686C that it was a case in which "the approach to be followed" was that set out in *Dunkley* in the passages cited above.

37. The Board noted that the defendant had not asked for an adjournment and had stated he would conduct the case himself whereas in *Dunkley* the defendant had wanted another counsel. It was observed, however, at p 1687A that "when regard is had to the fact that he was told firmly by the judge that he would not provide another counsel, the defendant was left with no choice other than to continue with existing counsel or to do it himself". In those circumstances the Board considered that it would not be right "to distinguish the general principle stated in *Dunkley v The Queen* from the present case on the basis that here the defendant wished to go on his own".

38. The Board considered the impact of the lack of representation on the conduct of the trial and found that there were a number of areas in which skilled cross-examination might have affected the outcome of the trial, including in relation to identification evidence and the voluntariness of the defendant's statement. They also found that he

had had little opportunity to obtain proofs and witnesses in support of his case of alibi and that evidence he did adduce was confused and lacking in clarity.

39. The Board 's conclusion in *Mitchell* at p 1688A-B was that:

> "… their Lordships are satisfied that here there should have been an adjournment to see whether other counsel were able and willing to represent him or at least to advise him as to the courses open to him. It was only after such advice that he could properly reflect on what he should do in the situation in which he found himself. It was not suggested that witnesses would be unavailable if there was a short delay."

40. The guidance provided by *Robinson, Dunkley* and *Mitchell* may be summarised as follows:

(1) There is no absolute right to legal representation.

(2) When counsel seeks to withdraw during the course of a trial consideration should be given to (i) persuading counsel to remain; (ii) explaining clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation; (iii) affording, where appropriate, time for reflection or a cooling-off period; (iv) the prejudice that the defendant will suffer if counsel withdraws, and (v) whether there should be an adjournment to enable the defendant to try to obtain alternative representation.

(3) The decision to allow a trial to continue with an unrepresented defendant is a matter of the trial judge's discretion, but it is a discretion which must be carefully exercised. Relevant factors will include (i) whether the defendant is at fault and, if so, the degree of such fault; (ii) whether there is any suggestion of manipulation or abuse; (iii) whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice; (iv) the history of the proceedings and the stage which the trial has reached; (v) the apparent abilities of the defendant; (vi) the seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed; (vii) the availability of alternative representation; (viii) whether an adjournment will be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses.

(4) The fact that a defendant is unrepresented does not in itself mean that the trial is unfair. If it is the result of the free and informed choice of the defendant or if he has brought it upon himself, as, for example, if he is judged to be manipulating the system, then it is unlikely to be unfair. Even if there is no such choice or fault, the prejudicial effect of the lack of representation needs to be considered. All relevant circumstances must be taken into account, including the impact of the defendant's lack of representation on the conduct of the trial, the evidence and the outcome.

The Board would expand upon (2) to say that if there appears to be an impasse between the defendant and his counsel, consideration should be given to exploring whether there are any ways in which it might be overcome, if need be with a degree of compromise on both sides. This is especially important in a trial on a charge of murder or other grave offence, reflecting the observation in *Dunkley* (p 427) that it is highly desirable that a defendant in a murder trial should be continuously represented "where possible".

The parties' cases

41. On behalf of the appellant, Mr Lundy and Mr Fitzgerald emphasised that he is a man who struggles to read and that he was facing a capital charge for which the prosecution was seeking the death penalty.

42. They criticised the judge's management of the withdrawal on a number of grounds. In particular:

(1) There was no attempt to address or deal with the apparent immediate concern of the appellant, which was to have a set of the disclosed material for himself. The volume of paperwork was minimal. It could quickly and easily have been copied. The appellant appeared to think that the only way he could get the documents was to represent himself and this misunderstanding should have been immediately corrected.

(2) There was a failure to explain the serious consequences of the appellant being left to represent himself. The judge should have made clear to him what this would involve, the potential difficulties the appellant might face, and the advantages of retaining counsel. Rather than advising the appellant against such a course of action, the judge almost encouraged it.

(3) There was no attempt to persuade counsel not to withdraw, to encourage counsel to seek to sort out his differences with the appellant, or to see if a cooling off period might assist.

(4) There was no consideration of an adjournment to see if the appellant could obtain alternative representation, either to advise him or to take over the case.

(5) The judge did not consider the extent to which the appellant would be prejudiced if left unrepresented, particularly having regard to his limited reading ability.

43. It was further submitted that the appellant's lack of representation had a significant impact on the fairness of the trial.

44. First, the credibility of Davis was critical to the case against the appellant. It was essential that this was properly tested in cross-examination. It is apparent from the transcript that the appellant was unable to do this. His cross-examination of Davis during the trial was perfunctory and focused on peripheral issues. He did not even put it to her that she was lying.

45. Important aspects of her evidence which competent counsel would have explored include the reason that she was arrested and in custody from 25 December 2009 until 1 January 2010; her evidence in re-examination that when she saw the appellant at the police station he was "on the floor" and was "getting beating", and the inconsistencies in and uncertainties of her identification evidence.

46. Secondly, competent counsel would have challenged the admissibility of the written report of Dr Reddy, who did not attend to give evidence. At the voir dire and at trial the evidence was admitted without any consideration of the legal basis for doing so. In the Court of Appeal, two possible routes of admissibility were identified: section 120(6) of the CPC and section 66 of the EA. Both are open to challenge and the defence could and should have resisted the admission of the evidence unless Dr Reddy attended or gave evidence by video-link.

47. Dr Reddy's evidence was central to the admission of the confession. His evidence was part factual and part expert. The factual aspects of his evidence could not be tested through the tendering of Dr Johnson. Nor could the expert aspects be properly explored with someone who did not carry out the medical examination of the appellant.

48. Even if Dr Reddy's written report was properly admitted, competent counsel would have emphasised that limited weight could be placed upon it in the light of the Crown's failure to call him to give oral evidence. He would also have ensured that this was made clear in the directions given by the judge, which it was not. Indeed, no direction of the need for caution was given.

49. In all the circumstances, it was submitted that this is a case in which the withdrawal of counsel was mismanaged by the judge and in which the appellant's lack of representation seriously impacted on the conduct of the defence case, with the result that the trial was unfair.

50. For the respondent, Mr Poole's principal submissions in relation to the judge's management of the withdrawal of counsel were:

(1) The appellant chose to represent himself. It is not the case that this choice was only made because the appellant understood that this was the only way he could obtain a set of documents. If regard is had to the manner in which the issue of withdrawal was first introduced by Mr Seymour, the comments of Madam DPP, and later evidence given by Mr Seymour when called as a witness by the appellant, it is apparent that there had been a breakdown in the relationship between the appellant and Mr Seymour, that the appellant had lost confidence in him, and that he did not want to be represented by him. The judge understood this, which is why she did not explore the issue further.

(2) The appellant wished to represent himself regardless of the possible availability of alternative counsel. This is the proper interpretation of the appellant's affirmative answer to the judge's question:

> "I will ask and you still maintain that you don't wish counsel to represent you, you will represent yourself?"

(3) The only mismanagement by the judge was that found by the Court of Appeal, namely that the judge should have explained fully to the appellant what choosing to represent himself in a case of this nature would entail and also should have given the appellant more time to consider the files and prepare for the continuation of the case.

51. With regard to the issue of prejudice, Mr Poole submitted that it was important to recognise that throughout the trial the judge took steps to ensure that the appellant received a fair trial despite his lack of representation. The trial transcript shows that the judge was careful to assist the appellant and on a daily basis enquired whether the appellant needed anything from the court. It also shows how the judge and prosecution counsel facilitated the appellant in his search for witnesses and further evidence and his conduct of the case generally. Examples include the court's enquiry about bringing in defence witnesses from Freeport, Grand Bahama; the judge's reminder to the appellant that the court was trying to locate his witnesses in Freeport; the judge giving the appellant time to prepare his address to the jury and checking he had all of the transcripts; the efforts made by the judge and the prosecution to obtain phone records

that the appellant had requested from Batelco, which resulted in the phone records being produced, and the fact that the appellant was afforded additional time to produce witnesses.

52. Mr Poole also submitted that the appellant's defence was clearly and cogently presented to the jury despite the absence of defence counsel. The trial transcript shows that the appellant cross-examined prosecution witnesses and asked pertinent questions aimed at establishing his defence that he had been framed and that the police had beaten a confession out of him. He gave sworn evidence denying any involvement in the murder. He called a number of witnesses in support of his defence and was able to adduce useful evidence from them. For example, he called Mr Green, a programmer at Batelco, and was able to elicit from him that people sometimes make mistakes transferring minutes and that his evidence did not necessarily mean that the person in question had to have both phones in their possession at the same time.

53. In relation to the evidence of Davis, Mr Poole accepted that there was no testing of the credibility of her evidence at trial and that it was not put to her that she was lying. He submitted, however, that it would have been clear to the jury that the appellant's case was that he had been framed and that Davis was lying. This was apparent from his closing speech and also, Mr Poole said, from the judge's summing up. The key point that the appellant focused on in relation to Davis' evidence was that the phone linked with Morris was a phone she used, thereby making clear her alleged involvement.

54. In relation to the evidence of Dr Reddy, Mr Poole submitted that the Court of Appeal was correct to rule that his evidence was admissible under section 120(6) of the CPC and section 66 of the EA and in stating that allowing another doctor to read into the record the report of a colleague who is unable at the time of trial to give evidence is a "frequent and necessary occurrence". The appellant was able properly to cross-examine Dr Johnson on the findings in Dr Reddy's report and the Court of Appeal cited that cross-examination of Dr Johnson as an excellent example of the appellant aptly putting his case. More fundamentally, the appellant failed to identify anything that he would have asked Dr Reddy that he could not properly have asked Dr Johnson, as acknowledged by his counsel before the Court of Appeal.

55. In all the circumstances, Mr Poole submitted that the Court of Appeal was correct to conclude that no serious prejudice had been suffered as a result of the appellant's lack of representation. As the Court of Appeal stated at para 33:

> "We have considered the transcript of the proceedings carefully and while we frown upon the very short time span between the withdrawal of counsel and the resumption of the hearing we are of the view that the appellant did not suffer any serious prejudice as

> a result of the same. Notably, the appellant was asked on numerous occasions whether he would like to adjourn the matter, the appellant stated clearly that he would like the trial to go on. Additionally, while witnesses were called on the same date that Mr Seymour withdrew, the appellant was not called upon to cross-examine any of them until the following day."

56. In this context he submitted that it was important to bear in mind the strength of the prosecution case. Quite apart from the appellant's confession, this was an overwhelming case. Davis' evidence was that the appellant returned home on the night of the murder covered in blood and told her that he "had to stab Rashad". The CCTV footage showed the perpetrator and Davis' evidence was that, although the footage was blurry, she could identify the man in black by his clothing and his build as the appellant.

57. Finally, Mr Poole submitted that the Court of Appeal was correct to conclude that this was an appropriate case for the application of the proviso to section 13 of the CAA. The Board will not normally review the application of the proviso by the Court of Appeal unless the Court of Appeal has misdirected itself in important respects - *Stafford v The State (Note)* [1999] 1 WLR 2026, per Lord Hope at p 2030. There has been no such misdirection in the present case. The Court of Appeal reviewed all of the evidence and were correct and, on any view, justified in concluding that a reasonable jury properly directed would on the evidence inevitably have convicted the appellant.

Was the trial unfair?

58. It is instructive to consider what happened at the trial having regard to the guidance summarised at para 40 above, considering first the decision to allow counsel to withdraw.

(i) Did the judge seek to persuade counsel to remain?

59. The judge appears to have made no attempt to persuade counsel to remain. It is striking that when Mr Seymour first raised the issue that he may not be competent to continue to represent the appellant, the judge immediately replied: "I agree with you". At that stage there had been no real explanation of what the issue might be.

60. The Board accepts that care has to be taken in enquiring into issues which arise in relation to continuing representation. There is a danger of straying into privileged matters and of prejudicial details being disclosed. One would, however, expect some enquiry to be made, even if it is in guarded terms. Indeed, it is to be noted that the judge

did ask such questions during Mr Seymour's evidence. At the time of withdrawal, however, no such questions were asked.

61. There was also an obvious need for enquiry and clarification. It is apparent that a major concern which the appellant had was in relation to obtaining a second set of the disclosed material. This was obviously not a good or sufficient reason for dispensing with the services of counsel and yet this was the reason stated by the appellant for doing so. The judge made no attempt to address this issue or explain to the appellant that this was not a sensible reason for dispensing with the services of counsel.

62. The Board agrees with Mr Poole that it is likely that there were more fundamental issues underlying Mr Seymour's wish to withdraw, but the judge should have sought to identify them and to see whether there was any way they could be addressed so as to avoid the withdrawal of counsel.

(ii) Did the judge explain clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation?

63. No such explanation was provided. As the Court of Appeal held at para 31, "an effort should have been made on the part of the learned trial judge to explain fully to the appellant what choosing to represent himself, in a case of this nature, would entail".

(iii) Did the judge afford time for reflection or a cooling-off period?

64. The judge did not do so. It is possible that this would have made no difference, but it is a matter which should have been considered and, if appropriate, explored further. Allowing time for reflection is likely to have been particularly valuable if it had followed an attempt by the judge to persuade counsel to remain and a clear explanation to the appellant what representing himself would involve.

(iv) Did the judge consider the prejudice that the defendant would suffer if counsel withdrew?

65. The judge pointed out to the appellant that he would be losing the services of experienced counsel, but she appears to have given no consideration to the implications of the appellant representing himself in this particular case. This was a capital case in which the prosecution was seeking the death penalty. The trial had only just begun. The appellant was going to have to conduct the whole trial himself. Cross-examination would be very important to the defence case. There was also going to be a voir dire, the

outcome of which would be highly significant. The potential for serious prejudice was clear.

(v) Did the judge consider whether there should be an adjournment to enable the defendant to try to obtain alternative representation?

66. There does not appear to have been any consideration of this. This was a serious omission. The appellant seemingly had no issue with his previous counsel, Mr Roberts, who had had to return the case due to another commitment. The Board rejects Mr Poole's submission that the appellant made it clear that he did not want any counsel in response to the judge's question do "you still maintain that you don't wish counsel to represent you?". The discussion up until then had only related to Mr Seymour. There had been no mention of the possibility of alternative counsel and the appellant had no reason to suppose that that was what was being referred to, if indeed it was, which is doubtful. The possibility of alternative representation was an obvious matter to be considered. It is possible that this would have created delays and difficulties, but these may not have been serious. One does not know since the matter was simply not explored.

67. It is then appropriate to consider the factors relevant to the decision to allow the trial to proceed with an unrepresented defendant, as summarised in para 40 above.

(i) whether the defendant is at fault and, if so, the degree of such fault; (ii) whether there is any suggestion of manipulation or abuse

68. This is not a case, such as *Dunkley*, where it can be said that counsel's withdrawal arose "through no fault" of the appellant. This appears to be a case in which there had been an apparent breakdown in relations between the appellant and counsel, as there had been in *Mitchell*. The details of such breakdown are not known as the matter was not explored by the judge. The Board in *Mitchell* considered that it could not be said that such a case involves dismissal of counsel of the defendant's own volition and they held that a similar approach to that of the Board in *Dunkley* was appropriate.

69. This is also not a case in which there is any suggestion of manipulation or abuse. This not infrequently occurs, and a judge will rightly want to be assured that such considerations do not lie behind a falling out with counsel. In the present case, the appellant had lost his previous counsel through no fault of his own, but rather because of counsel's competing commitments.

(iii) whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice

70. It is right to observe that the appellant did state on a number of occasions that he wanted to represent himself. This was, however, in circumstances where the only choice on offer was representation by Mr Seymour. The possibility of alternative representation was not mentioned. He also appears to have been to an extent influenced by his desire to obtain a second set of documents, a concern that should have been set to rest. It was also in circumstances where it had not been properly explained to him what the implications of representing himself were likely to be. Against that background, in so far as the appellant was exercising a choice, it was plainly not a properly informed choice.

(iv) the history of the proceedings and the stage which the trial has reached

71. This was a case in which there had been considerable delay in bringing the matter on for trial. There was no suggestion, however, that the appellant had contributed to that delay. The issue of withdrawal arose at the start of the trial and before there had been any evidence. If the jury had had to be discharged and a new jury empanelled that would not have been a matter of great import. On the other hand, the appellant faced the prospect of having to conduct the whole trial himself.

(v) the apparent abilities of the defendant

72. The evidence was that the appellant was a man of limited education and reading ability. He said that he had been trying to improve his reading skills in prison.

(vi) the seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed

73. There could not be a more serious charge than one of murder for which the death penalty is sought. This would weigh heavily on the mind of anyone. This was not a document heavy case, but it was going to require careful and considered preparation and questioning. Skilled cross-examination was called for and a multi-witness voir dire would have to be conducted. It was also going to be necessary to deal with procedural and evidential matters, and to obtain, prepare for and examine defence witnesses.

(vii) the availability of alternative representation

74. As already stated, this does not appear to have been considered, but it has not been suggested that such representation would not have been available, if required.

(viii) whether an adjournment would be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses

75. Again, this was not considered, but there has been no suggestion that an adjournment would have raised any insuperable problem.

76. Having gone through all these considerations and factors, it is apparent that they nearly all indicate mismanagement by the judge. This was also the conclusion of the Court of Appeal, but to a much more limited extent. In the Board's view this is a case of serious mismanagement and the likelihood is that if matters had been handled properly the appellant would either have been persuaded to retain Mr Seymour or would have obtained alternative representation.

77. Turning to consider the impact of lack of representation and the issue of prejudice, it is apparent that the credibility of Davis was critical. Indeed, the judge repeatedly referred to her as being the prosecution's "star witness". It was essential to the defence case that she be effectively cross-examined. However, the cross-examination by the appellant runs to just over two pages of transcript. He did not ask questions on vital issues such as her identification evidence; the reason for her being in custody and whether this indicated that the police believed she was involved in the murder and hence might have a motive to incriminate the appellant by her evidence; and what she witnessed at the police station. He did not put it to her that she was lying, nor did he put a motive for her doing so. The prejudicial effect of this feature of the case was compounded by the way in which the judge dealt with it in her summing up, by emphasising to the jury that it had not been put to Davis in cross-examination that she was lying in her evidence about the appellant's involvement in the crime. Further, he did not pick up on uncertainties and inconsistencies in her evidence as, for example, in relation to what he was wearing, the blurry nature of the CCTV footage and how any reliable identification could be made.

78. An instructive example of the appellant's failure to cross-examine effectively is provided by her evidence in re-examination during the voir dire that at the police station she saw the appellant "on the floor" and that he was "getting beating". Although she then said that she did not see anyone hitting him, this cried out for robust further questioning. The appellant was given the opportunity to ask further questions but did not pursue these responses.

79. Competent counsel would also have explored why Davis was in custody and, in particular, whether it had anything to do with the offending with which the appellant was charged. This was in fact a question raised by the jury, but the judge ruled it out as being irrelevant. Counsel would have challenged that.

80. For all these reasons, and those advanced on behalf of the appellant, the Board accepts that the appellant was seriously prejudiced by the lack of skilled cross-examination of the key witness, Davis.

81. As to the report of Dr Reddy, there were serious issues to be raised as to its admissibility which competent counsel would have been able to put forward. The appellant was in no position to raise such legal arguments and did not do so.

82. Section 120(1) of the CPC provides:

> "120(1) Any document purporting to be -
>
> …
>
> (b) a report made under the hand of an analyst on any matter or thing duly submitted to him for examination and report, shall be receivable in any criminal proceedings in any court as evidence of any matter or thing contained therein relating to the survey or examination as the case may be.
>
> (2) Notwithstanding subsection (1) the court may of its own motion or where it appears desirable in the interests of justice on the application of any party to the proceedings require the person who did the survey or the analyst to attend before the court and give evidence.
>
> …
>
> (6) Notwithstanding anything to the contrary in this or any other law, any document purporting to be a report of an analysis, test or examination carried out by a person employed in the public service in the capacity of an analyst, chemist, laboratory technician or medical practitioner shall be receivable, without proof of the signature, qualification, employment or office of the person by

whom the report purports to be issued, in any proceedings of a criminal nature as prima facie evidence of the results of such analysis, test or examination, as the case may be."

83. If the Crown had sought to rely on section 120(1) for the admission of the report then the defence would have been able to seek an order from the court under section 120(2) for the attendance of Dr Reddy. It is unclear if section 120(6) can be relied upon to circumvent section 120(2), but in *Stubbs v The Queen* SC Cr App Nos 203 and 280 of 2013 and No 106 of 2014 the Court of Appeal appear to have considered that the introduction of a disputed forensic report under section 120 was subject to the court's discretion under section 120(2).

84. Sections 66(1) and (2) of the EA provide:

> "66(1) Subject to section 67 a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if -
>
> (a) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and
>
> (b) any condition relating to the person who supplied the information which is specified in subsection (2) is satisfied.
>
> (2) The conditions mentioned in paragraph (b) of subsection (1) are -
>
> (a) that the person who supplied the information -
>
> …
>
> (ii) is outside The Bahamas and it is not reasonably practicable to secure his attendance …"

85. If the Crown had sought to rely on section 66 of the EA for the admission of the report they would accordingly have needed to show that Dr Reddy was outside The Bahamas and that it was "not reasonably practicable to secure his attendance".

86. Dr Johnson gave evidence that Dr Reddy had retired and had moved out of the jurisdiction, but there was no evidence that it would not be reasonably practicable to secure his attendance. No effort was made to explore whether Dr Reddy might have been available to give evidence via video-link.

87. Dr Reddy's report was highly significant to the judge's decision on the voir dire and therefore to the admission of the appellant's confession. It was also relied upon by the prosecution at trial to prove the voluntariness and truth of the appellant's confession. If it had been excluded as being inadmissible that would have been of significant benefit to the defence.

88. Alternatively, if objections to admissibility had been raised it is possible that Dr Reddy would have been required to be called. If so, the defence would have had the advantage of raising factual issues with him, such as what he had been told by the appellant, and of being able to cross-examine the person who had examined the appellant.

89. Even if the report had been admitted without Dr Reddy being called, counsel would have been able to challenge the weight to be given to it in the absence of Dr Reddy and to ensure that this was a matter covered in the judge's directions.

90. The Board is satisfied that in relation to this evidence also the appellant was seriously prejudiced by lack of representation.

91. It is to be noted that in its ruling on section 13 of the CAA the two aspects of the evidence referred to by the Court of Appeal were the evidence of Davis and the appellant's confession. It is in relation to these two critical elements of the evidence that the appellant was seriously prejudiced by lack of representation.

92. As to the Court of Appeal's decision to apply the section 13 proviso, the Board accepts that this was a justified conclusion on the basis of the evidence at trial. That evidence emerged, however, from a trial at which the appellant was unrepresented at all material times. For reasons already given, the appellant's lack of representation seriously prejudiced the appellant in relation to the evidence at trial and, in particular, the key evidence of Davis and of his confession. Had he been represented the evidence may well have been materially different. In such circumstances the Board does not

consider that the proviso can be relied upon to dismiss the appeal. In the Board's view a miscarriage of justice has occurred.

93. For all these reasons the Board would allow the appeal on the first ground of appeal. This means that it is unnecessary to address the other grounds of appeal. In so far as any of those grounds have merit, the Board considers that it is more as an illustration of the effect of lack of representation than as free-standing grounds of appeal.

The sentence appeal

94. In the light of the Board's conclusion on the conviction appeal, the appeal against sentence does not arise, although it should be noted that the respondent accepts that the three years four months that the appellant had spent on remand prior to conviction needs to be taken into account. The Board would, however, observe that there appears to be merit in the appellant's complaint that the sentence of 55 years was imposed without his counsel being afforded the opportunity to address the court as to the appropriate length of any determinate sentence.

95. Before the judge the issue was whether this was a case for the death penalty or life imprisonment. The judge did not consider that any other sentence was open to her and the question of what would be an appropriate length of a determinate sentence was not argued or addressed as a discrete issue.

96. The appellant appealed on the basis that the judge had erred in concluding that she was bound to impose a sentence of life imprisonment and that she should have considered the alternative of a determinate sentence. If the appeal was successful on that ground his counsel contended that the matter should be remitted to the judge and accordingly no argument was addressed either in writing or orally as to the appropriate length of a determinate sentence.

97. The Court of Appeal accepted that this was an appropriate case for a determinate sentence but proceeded to decide that sentence without any argument or submissions on behalf of the appellant. It may be that this should have been anticipated by the appellant's legal team, but it had not been, and no argument had been addressed as to the length of sentence, as the Court of Appeal would have known. The sentence imposed was a very lengthy one which may well have meant the appellant ending his life in prison. The potential range of sentence was very large, being between 30 and 60 years. There was considerable room for argument as to precisely where the appellant's case should be placed within that range. The Board considers that as a matter of basic fairness the appellant should have been given the opportunity to address the court on the appropriate length of sentence before a determinate sentence was imposed.

Conclusion

98. The Board will accordingly humbly advise Her Majesty that the appeal against conviction should be allowed and the case remitted to the Court of Appeal to consider the question of a retrial.