Hilary Term
[2022] UKPC 11
Privy Council Appeal No 0097 of 2019

JUDGMENT

Lescene Edwards (Appellant) *v* The Queen (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Leggatt
Lord Burrows
Lady Rose
Sir David Bean

JUDGMENT GIVEN ON
4 April 2022

Heard on 15 and 16 February 2022

Appellant
Kirsty Brimelow QC
Graeme Hall
(Instructed by Simons Muirhead & Burton LLP)

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

SIR DAVID BEAN:

1. On 5 September 2003 Aldonna Harris-Vasquez died of a single gunshot wound to the head in the bathroom of her home at 5 Pinnacle Close in the parish of Saint Andrew. Lescene Edwards, the father of her twin children, was charged with her murder. His case was that she had committed suicide. His trial for murder took place just over ten years later before Miss Smith J and a jury. On 31 October 2013 he was convicted of murder.

2. Mr Edwards gave notice of appeal. The hearing before the Court of Appeal of Jamaica (Brooks and Sinclair-Haynes JJA and P Williams JA (AG)) lasted seven working days, from 18-26 April 2016. Some 21 months later, on 19 January 2018, the Court of Appeal handed down its judgment dismissing Mr Edwards's appeal against conviction.

3. On 1 July 2019 the Court of Appeal (Phillips, F Williams and P Williams JJA) granted final leave to appeal to Her Majesty in Council, pursuant to section 110 of the Constitution of Jamaica on the question of whether the ten-year delay between the incident and the trial contravened Mr Edwards's rights under the Constitution. Mr Edwards subsequently filed an application for permission to appeal on further grounds, including an application for an extension of time and for permission to adduce fresh evidence on the appeal. By order of 28 April 2021 the Board (Lords Lloyd-Jones, Hamblen and Burrows) granted permission to appeal on the further grounds. The application to adduce fresh evidence was adjourned to the hearing of the substantive appeal.

The incident and its aftermath

4. The prosecution's case was that on 5 September 2003, Mr Edwards, then a constable of police, was visiting Mrs Harris-Vasquez at her home at 5 Pinnacle Close in the parish of Saint Andrew. He is the father of her twin children, who were born before her marriage to a man who lived outside Jamaica. Despite her marriage, Mr Edwards and Mrs Harris-Vasquez, who was called "Patricia" at home, continued to have an intimate relationship.

5. That day, Mr Edwards went to visit Mrs Harris-Vasquez at about 11:00 am. While they were alone together in Mrs Harris-Vasquez's bedroom, Mrs Maud Harris, who is Mrs Harris-Vasquez's mother, and with whom Mrs Harris-Vasquez shared the

premises, dozed in the living-room of the house. Mrs Harris was awoken by a loud noise. Mr Edwards then came to her asking where Patricia was. She answered saying that he was the one who was with Patricia. After this answer he went back into the bedroom and returned to her. He was crying. She then followed Mr Edwards to the bathroom door, which was closed. He opened the door, which opened outward into a passage, and she saw Mrs Harris-Vasquez's body on the bathroom floor. Mrs Harris heard Mr Edwards say that "the girl" had used his gun to kill herself. Mrs Harris then fainted.

6. Mr Edwards called the police. The first officer to arrive was Sergeant Hyacinth Brown. Other officers followed shortly afterwards. A notebook was found on Mrs Harris-Vasquez's dresser in her bedroom. The notebook was open to a page, on which was written what seemed to be, a suicide note. It read:

> "Lescene I love you always. Take care of my children. Tell my babies I love them always. Tell my family I got a vision that it's my time and that if I go Ivy will be okay and Peaches will be fine too. If someone should go let it be me. Tell my mother all her dreams indicate that is my time. For the family, love you all. Tell my husband that I love him too"

7. One of the factual disputes at trial concerned the circumstances in which the notebook was found. Sgt Brown was not available to give evidence at the trial, having apparently emigrated. Her witness statement, made a few days after the incident, indicated that she had observed the notebook when checking the room. However, the investigating officer who gave evidence at the trial, Detective Inspector Phipps, alleged that Sgt Brown had told him that it was the defendant who drew her attention to the notebook.

8. The police took custody of that notebook, two other notebooks and a University of Technology form, the firearm and several other items. They also took photographs of the scene. Swabs were taken of Mr Edwards's hands, as well as those of the deceased. His clothing was also taken for examination. The body was taken to the morgue. The police then allowed the scene to be cleaned. On 11 September 2003, Mrs Harris-Vasquez's clothing was taken from the morgue for examination.

9. The notebooks, swabs, clothing and other material were sent to the police forensic experts. Testing of the clothing of both Mrs Harris-Vasquez and Mr Edwards, and of the swabs taken of their respective hands, did not reveal the presence of any gunshot residue (GSR).

10. The day after the incident DI Phipps showed the Defendant the suicide note and asked him to write down the words on the page ten times. He did not seek any specimens of Mr Edwards's handwriting from prior to the incident. DI Phipps gave evidence that this was the first time he recollects having taken a specimen of handwriting.

11. A post-mortem was conducted on 11 September by Dr Seshaiah. He was not available to give evidence at the trial as he had emigrated in 2009: Dr Prasad gave evidence in his place. He confirmed that the trajectory of the bullet was upwards, backwards, and to the left, and that it was a close contact wound (that is to say the weapon had been pressed hard against the right temple). He could not say whether the wound was the result of suicide or murder.

12. On 12 September 2003 a government forensic scientist, Marcia Dunbar, conducted testing on swabs taken by Supt Hibbert from the hands of the Defendant and the deceased. None of these revealed any GSR. Nor did Mr Edwards's shirt. Nor did the deceased's nightdress (although this had not been supplied to the police until 11 or 12 September 2003, and according to Ms Dunbar it might be that during storage in the morgue moisture could have had some effect on the clothing).

13. On 23 October 2003 Mr Edwards was interviewed by Assistant Commissioner of Police Gause and DI Phipps in the presence of Mr Edwards's attorney. A question and answer format was used with ACP Gause asking the questions and Phipps transcribing the answers. Some of the questions raised allegations which were not the subject of evidence from any witnesses. These included the suggestion that Mr Edwards was upset by the deceased's marriage to another man; that he thought she had deceived him by telling him a lie about who she was going to marry; and that the two of them had had a fight in the course of which he had received an injury to his eye.

Evidence at the trial

14. Mrs Harris-Vasquez's mood, in the period before her death, was also the subject of evidence placed before the jury. Various relatives spoke, with varying opinions, to her mood on her wedding day and in the week prior to her death. Mrs Harris testified, however, that earlier in the morning of the day of her death, Mrs Harris-Vasquez had a conversation with Mrs Harris, in which Mrs Harris spoke of having had a dream that she would lose one of her children. Mrs Harris testified that during that conversation Mrs Harris-Vasquez appeared to be crying. Mrs Harris also said that her daughter and

Mr Edwards did not have any quarrels or difficulties. Mrs Harris said that she also had a good relationship with him.

15. The prosecution's handwriting expert, retired Senior Superintendent of Police Mr Carl Major, who examined the suicide note, handwriting in the notebooks and on the University of Technology form as well as the sample handwriting of Mr Edwards, gave evidence at the trial that in his opinion the suicide note had been written by Mr Edwards.

16. Mr Major agreed, however, with the view expressed in one of the works on questioned documents by Albert S. Osborn that handwriting assessments should start "not with an examination of the questioned writing itself but with a careful study of the standard writing with which it is finally to be compared" (in this case Mr Edwards's natural or ordinary handwriting). He also agreed that the disputed handwriting should not be shown to the person providing the specimen but the words in it should instead be dictated. Nevertheless, his conclusion was that the suicide note and the specimen handwriting from Mr Edwards were written by the same person, whereas the names "Aldonna Harris" and "Aldonna Vasquez" written in other notebooks which were the property of the deceased were written by someone else. It does not appear that Mr Major had any other examples of the handwriting of the deceased.

17. The defence instructed Mr Charles Haywood, a forensic document examiner working in Florida. He told the jury that in his opinion on an examination of the relevant documents Mr Edwards could neither be identified nor eliminated as the writer of the suicide note. The evidence in his view was inconclusive. He considered that the writer of the contents of 12 sheets photocopied from one of the notebooks found in Mrs Harris-Vasquez's room, which was said to be her notebook, could likewise not be excluded as the author of the suicide note. Mr Haywood criticised the method of collecting the sample handwriting from Mr Edwards as being not in accordance with best practice.

18. Mr Edwards gave sworn testimony in his defence. His case was that when he went to the house, Mrs Harris-Vasquez and he talked about their respective future plans. She was to be going away to join her husband and Mr Edwards was also planning to go abroad. Mrs Harris-Vasquez, he said, expressed great sadness that they would be separating. They had sexual intercourse and while they were there in bed, she received a telephone call. She embarked on a telephone conversation with the caller. Mr Edwards formed the view that it was her husband, who had called her. Mr Edwards said that while she was having the telephone conversation he fell asleep.

19. He said that he was awakened by a loud explosion. Mrs Harris-Vasquez was not in the room and he noticed that his firearm was missing from the place on the dresser where he had put it, prior to him and Mrs Harris-Vasquez engaging in intercourse. He ran to the living-room and asked Mrs Harris for Mrs Harris-Vasquez. Her answer not proving informative, he went back toward the bedroom area and noticed that the bathroom door was closed. He opened the door and the torso of Mrs Harris-Vasquez's body, which, he said, appeared to have been in a sitting position, slumped out onto the floor of the passage. He saw his firearm in her right hand in her lap. He took it up out of fright, holding it only with his right thumb and middle finger, but immediately realising that he should not have picked it up, dropped it back into her lap. He called the police, put on his trousers and shoes, and waited in the living room for the police to arrive. Mrs Harris, he said, was present and conscious from the time that he spoke to her until the police arrived, at which time she fainted.

20. Mr Edwards said that although the police took his underpants from him at the scene, no exhibits were sealed in his presence and no note or notebook was shown to him or pointed out by him. He did hear mention of a note while at the house, but didn't see the "suicide note" until the following day at the Duhaney Park Police Station. He denied having had anything to do with Mrs Harris-Vasquez's death and denied having written the suicide note.

21. In the course of the trial the jury visited the house where the incident took place. They were able to see the layout for themselves. There had only been a slight change between the time of the incident and the visit by the jury.

The summing-up

22. The learned judge's summing up took some 13 hours (spread over four working days and occupying 343 pages of the transcript). It contains a number of standard directions of law about which no complaint is made. The greater part of it by far is what is often called a notebook summing-up, that is to say a narrative of all the evidence given by each witness in the order in which they testified.

23. The summing-up contained little by way of comment or analysis, with one striking exception. The exception is that on reaching the end of the narrative of the evidence for the prosecution the judge summarised the case for the Crown in the following terms:

"Now, what are the circumstances that the Prosecution is asking you to consider in order to satisfy you to the extent that you feel sure of the accused's guilt? The following circumstances that I am going to point out to you is not an exhaustive list, and there may be others on the evidence that you have heard that you may wish to consider. I think in her address to you, counsel for the Prosecution had pointed out certain of these circumstances which she is saying that, when taken together, points in the direction of the guilt of the accused. She spoke about the opportunity that the accused was present at 5 Pinnacle Close during the incident, and it was his gun that was used to commit or to cause the death of this deceased Ms Aldonna Harris-Vasquez.

Now, the other circumstance that was pointed out to you was that the accused claimed that the deceased was feeling down, because he had told her on the morning of the 5th of September 2003 he was leaving for good to go overseas. Yet, in his evidence, he said he had gone on leave in order to go to England, and his plan was to go and get a job, he didn't plan on returning because his cousin was seeking a job over there for him. However, he stated that Aldonna was aware of this because she had gone with him some time before to the embassy to pick up the visa.

Another circumstance that was pointed out to you was that the accused's gun was a revolver, which the ballistic expert Superintendent Hibbert in his evidence had indicated would leave an elevated level of gunshot residue on a person's hand if they had fired the firearm. In this case it is being said by the Prosecution: if the deceased Ms Aldonna Harris had, in fact, killed herself and she had fired that gun, then her hand should have elevated levels of gunshot residue, however, when her hands were swabbed none was found on the back of her hand - and in particular her right hand. I think there was evidence to suggest that she was right handed. So you will have to look at that and - that is a circumstance which the prosecution is saying that the absence of this gunshot residue from her hand, if she had fired the gun, based on the ballistic evidence, then there should have been elevated levels of gunshot residue on her hand, and bearing in mind that her hand was swabbed that very day.

Now, there was a suggestion that was put that if blood was on her hand, it could possibly have removed any traces of gunshot residue. But the Prosecution is saying that there were pictures of the deceased that were tendered in evidence and did not reveal her - that her right hand was in any blood, therefore, it could not be said that the blood could have removed the gunshot residue from her hand.

I am very sorry, another bit of evidence, I am sorry, is that the photographs which were tendered in evidence as Exhibit 1, there is a photograph of the dresser - and it doesn't show any space for the accused to have left his firearm in the holster on that dresser, that is what the Prosecution is alleging. What is significant is that the accused was, when asked, was unable to say or to remember where on that dresser he had put the gun, but his evidence was that he had put it on the dresser. Further, the picture of the dresser in Exhibit 1 reveals that the Seek notebook, Exhibit 5, was opened with the 'note' in it. Both Superintendent Stewart and Superintendent Phipps indicated in their evidence that it was the accused who had pointed out this book with the purported suicide note to woman Sergeant Brown. Of course, when the accused gave his evidence he is saying he was not there when the book was found, and he is removing himself from the notebook because he is saying that he was put to sit outside and told by the police to remain there, however, he agrees that he heard the police speak of a notebook and a book, but he never made any inquiries whatsoever about this note. What you are asked to look at, is the fact that if he is the father of these children by the deceased Ms Aldonna Harris Vasquez, if she has killed herself, would he have shown any interest, having heard about this note, and wouldn't he have wanted to see what the note was about? They are saying that the lack of interest on his part, even if he was not the one who pointed it out, should be something that you would consider.

The other aspect that you are asked to consider is that the accused was awakened by the gunshot, yet in such a small space he runs pass the bathroom door, which he says was closed, because he didn't know from which direction the shot was fired.

The Prosecution is saying you must consider the accused's training in this regard. He is not an ordinary Joe, or in other words, an ordinary person. He used to work at Scenes of Crime, and they have had training in things like detecting where sounds and gunshot sounds would be coming from. So they are saying, here he is running in that direction away and he runs past the bathroom door which is where it is alleged that the deceased was, and then going into the living room to her mother. Shouldn't he have, by his training, be able to detect where the sound was coming from? That is something they have deposited for you to consider or one of the elements or one of the circumstances which they ask you to rely on.

The accused also stated that he looked back and saw the bathroom door closed. He goes towards it and opens it and the body of the deceased falls out onto the floor and what is significant is he describes the deceased's hands on top of the revolver, and you remember the demonstration when he was asked in cross-examination as to how the hand was in relation to the revolver that day. The Prosecution contends it is not likely that if she had shot herself the gun and the band would be as described by the accused, because if you are holding a gun to kill yourself then how would it fall into your lap and your hand would be on top of it? It is a matter for you to look at. These are some of the things they say are circumstances which when taken together would point to the guilt of the accused.

They state that the position of the gun in the deceased's lap and the condom on the floor are things that would tend to give credence to the items being put there in order to set the stage for this to be looked upon as a suicide. A matter that you can take into consideration.

They also ask you to look at the accused's conduct after hearing the explosion. The accused said he ran to the living room and he asked Miss Maud Harris for Patricia, but why should he do this because he was in the room with Patricia? Patricia is the same Aldonna as you, no doubt will remember.

And you must also bear in mind the response of Miss Maud when the accused had told her that her daughter had killed herself. And she said to them what problem could Pat have that make her do that? The Prosecution is saying that that is a telling remark from all the evidence that we have heard in this case, and especially by the deceased's niece Miss Rosemarie Thompson and Miss Tricia Forrester. She was happy; she had just gotten married the month before. She was a student at Utech and based on what was said there were plans for her to join her husband. So, if that was her state of mind, what would be the reason for this suicide and the suicide note? These are some circumstances that I say that the Prosecution is asking you to consider with the facts proved, to say that you find such a series of undesigned, unexpected coincidences that as reasonable persons you would find your judgment being compelled to come to one conclusion and that is the guilt of the accused.

However, as I said, that list is not exhaustive. There are other evidence in the case. You have heard it all. You can look and see if you accept those circumstances as being unexpected coincidences which point to the conclusion that the accused is guilty. So if you find others which you think have been shown on the evidence, and based on the facts proved, then you can consider them.

However, Mr Foreman and members of the jury, if the circumstantial evidence that you have heard and which have been pointed out to you does not satisfy you, and it falls short of that standard, and it does not satisfy the test. If it leaves gaps, then it is no use at all. Because the only way you can find your judgment being compelled to come to one conclusion is if you are satisfied that it points to the guilt of this accused. So if there are gaps in it, it does not satisfy the test, and then it would be of no use at all. Circumstances may point to one conclusion, but if one circumstance is not consistent with guilt, it breaks the whole thing down. You may have all the circumstances consistent with guilt, but also equally consistent with something else, and that would be no good at all. What you want is an array, a set of circumstances which points to one conclusion and in those circumstances,

> to all reasonable minds, that conclusion only which is the guilty of the accused.
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> When you consider the facts, it may well be that none of the facts taken separately points exclusively to the guilt of the accused and each might be equally consistent with innocence as with guilt, but it may well be that when you consider the totality of them they constitute such a series of undesigned, unexpected coincidences, so as to satisfy you that the facts are such as to be inconsistent with any other rational conclusion other than the accused is guilty. If you find that array of circumstances such a series of undesigned and unexpected coincidences that satisfies you that the accused is guilty then you may so find.
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> However, I must warn you that you have to examine the evidence very carefully. You must remember that if, on the totality of the evidence, it is consistent with innocence as well as it is with guilt, or if, on the totality of the evidence it amounts to a mere suspicion, then the Prosecution would not have proven their case. It is only if it points to one conclusion and one conclusion only, the guilt of the accused, that you can accept that circumstantial evidence is suffice. If it leaves you in a state of reasonable doubt then that doubt must be resolved in favour of the accused, and if you do not believe it on the totality of the evidence then he must be acquitted. Now, as I said, that is the Prosecution's case."

24. The judge then proceeded to remind the jury of the evidence of the defendant, Mr Haywood and two character witnesses called for the defence. After giving directions of law she then asked counsel on both sides "to indicate to me whether there are any other areas that they think I should have emphasised or reminded you about". She had not at this point given any summary of the defence case to match that which she had given of the prosecution case.

25. Mrs Neita-Robertson for the Defendant replied that there were two essential aspects of the defence that had not been left to the jury. The first of these was the expert Mr Haywood's opinion that Mr Edwards was not confirmed as the writer of the suicide note. The second point raised by counsel and the reply given by the judge were in these terms:

(i) "MRS NEITA ROBERTSON: And the direction that the jury must consider whether murder is possible, having regard to the one injury, the unchallenged evidence of the locus.

> HER LADYSHIP: They must consider whether?
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> MRS NEITA ROBERTSON: Whether murder is possible, having regard that there being only one injury to the body. The condition and all, the evidence relating to bathroom, the bullet hole in the door, the trajectory of the bullet, no gunpowder deposit on Mr Edwards, or blood and no evidence to contradict all of that. If in those circumstances murder is possible, and if they are in doubt whether in those circumstances murder is possible, then they must acquit. I think that is all.
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> HER LADYSHIP: Those are, in my view, findings of fact which they will have to look at, but I have heard."

26. The judge then gave a further direction about Mr Haywood's evidence and reminded the jury that he had said that in his opinion Mr Edwards "is not confirmed as the writer of the questioned document". She then gave an emphatic direction about the burden of proof and added that the prosecution were under no obligation to prove a motive.

27. The jury retired to deliberate. After three hours they returned a verdict of guilty by a majority of 11 to 1. On 5 November 2013 the judge sentenced Mr Edwards to life imprisonment with a minimum term of 35 years in custody.

The appeal to the Court of Appeal

28. Section 14(1) of the Judicature (Appellate Jurisdiction) Act provides that:

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the

> judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
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> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

29. One of the grounds of appeal was that the verdict was unreasonable having regard to the evidence. Mr Patrick Atkinson QC, who represented the defendant before the Court of Appeal, argued that the killing could not have occurred in the way the prosecution had "theorised". His argument is well summarised at para 18 of the court's judgment:

> "Mr Atkinson submitted that the presence of a bullet hole and a bullet, in the bathroom door, were critical bits of evidence. The hole was 2 feet 8 inches from the floor and the bullet was found inside the bathroom door. Learned Queen's Counsel pointed out that the trajectory of the path of the bullet which went through Mrs Harris Vasquez's head was upward. Mrs Harris-Vasquez was 5 feet 11 inches tall. These physical factors meant, he submitted, that her head was at that low level, and she was probably seated, when she received her injury. In addition to that, learned Queen's Counsel submitted, the following factors contradicted the prosecution's case:
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> > 1. Mrs Harris-Vasquez's body slumped from a seated position into the passage when the bathroom door was opened outward. A smear on the bathroom door supported the oral evidence that that movement had taken place.
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> > 2. Her position from a photograph of the scene suggested that she had been seated, leaning against the door. The location of the bullet hole indicated the

door must have been closed at the time of the shooting. In those circumstances, the door could not have been opened and reclosed after she had been shot.

3. The bathroom was very small and the space between the bathroom basin and the door was insufficient to allow for any other person to have been present in the bathroom so as to shoot Mrs Harris-Vasquez, while she was so positioned.

4. There was no sign of any scuffle, trauma or other indication that Mrs Harris-Vasquez had been subdued in order to be in that position.

5. The characteristics of the entry wound suggested that the muzzle of the firearm was against Mrs Harris-Vasquez's head at the time that it was fired. This suggested that the majority of the GSR went into her head and explained the lack of GSR on her hand.

6. There was blood on the back of Mrs Harris-Vasquez's right hand and blood on fingernail clippings taken from that hand.

7. There was no blood on Mr Edwards's hand or otherwise on his person or clothing.

8. There was no time for Mr Edwards to have staged that situation. The timeline suggested that immediately after Mrs Harris heard the explosion, Mr Edwards came to her to enquire about Mrs Harris-Vasquez's whereabouts.

All those circumstances, Mr Atkinson submitted, were not catalogued by the learned trial judge in her summation to the jury. The result, he argued, was that the summation was, therefore, unfair to Mr Edwards."

30. The court continued:

> "[19] Mr Atkinson submitted that without the evidence of the handwriting expert, Mr Major, there would have been insufficient evidence on which Mr Edwards could have been convicted. Learned Queen's Counsel submitted that further arguments would demonstrate that the expert evidence in respect of the handwriting was also flawed. The totality of these matters, he submitted, required that the conviction should be quashed and the sentence set aside.
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> [20] In response to those submissions, Ms Salmon for the Crown submitted that this court was not charged with assessing issues of fact. That duty, she said, was the province of the jury. Learned counsel argued that the authorities established that the jury's verdict should not be disturbed unless it was shown to have been palpably wrong. On the contrary, learned counsel submitted, the evidence placed before the jury was overwhelming in justifying a conviction. The verdict was therefore not unreasonable and should not be set aside.
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> [21] Ms Salmon submitted that Mr Atkinson's approach, in his submissions, amounted to an attempt to re-try the case before this court. She argued that that was not the proper approach in this court. Learned counsel relied on *R v Joseph Lao* (1973) 12 JLR 1238 in support of her submissions.
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> [22] The arguments on either side did cause some pause. Ms Salmon's outline of the role of this court is, however, the route by which this court should approach the resolution of the issues raised by Mr Atkinson. The general principle in respect of questions of fact is that this court will only interfere with the verdict of the jury if the verdict is shown to be 'obviously and palpably wrong'.
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> [23] The principle was carefully considered by this court in *R v Joseph Lao*. It is that case which is most often cited in this court when the issue of the reasonableness of the verdict is considered. Henriques P, in delivering the judgment of the

court in *R v Joseph Lao*, approved the opinion of the learned editors of *Archbold - Pleading, Evidence and Practice in Criminal Cases*. It is apparently from para 934 of the 36th edition of that work that Henriques P quoted. The paragraph states, in part:

> 'In order to succeed an appellant must show, in the words of the statute [the equivalent of section 14(1) of the Judicature (Appellate Jurisdiction) Act], that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence ... Nor is it sufficient merely to show that the case against the appellant was a very weak one ... nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict ... nor that the judge of the court of trial has given a certificate on that ground ... The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong …'

The relevant provision of the English statute was, at the time, in almost identical terms as section 14(1) of the Judicature (Appellate Jurisdiction) Act. That country's statute has since had its wording and standard, in this regard, changed. Jamaica's has remained unchanged.

[24] The standard approved in *R v Joseph Lao* has been supported in several judgments of this court (see, for example, *R v William March and others* (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156, and 157/1976, judgment delivered 13 May 1977, *Charles Salesman v R* [2010] JMCA Crim 31 and *Everett Rodney v R* [2013] JMCA Crim 1). In the last mentioned case, the court cited another extract, upon which Henriques P had relied in *R v Joseph Lao*. It is an extract from *Ross on the Court of Criminal Appeal*, 1st ed, at p 88. The learned author is quoted by Henriques P, at p 1240, as saying, in part:

> '... The verdict must be so against the weight of evidence as to be unreasonable or insupportable ... The jury are

> pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury.'

[25] The question to be addressed, hereafter, is whether the issues of fact were properly placed before the jury. Learned counsel have differed in their submissions in this regard.

[26] A trial judge, in summarising to the jury, the evidence adduced during a case, is not required to do a minute examination of the evidence to explain the case of either the prosecution or the defence. The level of detail required will vary from case to case, but it will generally be sufficient for the summation to give a fair and balanced outline of each of the respective cases and to point out major discrepancies where they occur. A direction as to the method of dealing with discrepancies and inconsistencies, where they occur, is also required.

[27] The learned trial judge adhered to the required standard. On several occasions during her summation she outlined the competing cases for the jury. For example, at p 1486 of the transcript, in reminding the jury of what constituted the offence of murder, the learned trial judge is recorded as saying:

> '... In this case the Prosecution is saying that this accused, Mr Lescene Edwards, killed the deceased, Aldonna Harris-Vasquez, by a deliberate act; that is, by shooting her and then staging the scene to give the appearance that the deceased committed suicide.
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> The Defence on the other hand is saying that Aldonna Harris-Vasquez committed suicide, and the defendant

> knows nothing about her death. In other words, she was the author of her own demise.'

Similar statements are recorded in other contexts at pp 1458, 1519-1520, 1540- 1541, 1701-1702 and 1772 of the transcript.

[28] In the context of outlining the application of the standard of proof in the area of circumstantial evidence, the learned trial judge is recorded at pp 1540-1541 as saying, in part:

> 'If you are left in a state of reasonable doubt having examined all the evidence, then the law says you would have to resolve that doubt in his favour, and if you believe him when he says that he had nothing to do with it, and that Mrs Vasquez had taken his gun and shot herself, then you will have to resolve in favour of him. It is only if you are satisfied to the extent that you feel sure that on the evidence that has been presented, then and only then would you be able to return a verdict which is adverse to him.'

[29] Further, in setting out the circumstantial evidence on which the prosecution was asking the jury to accept the guilt of Mr Edwards, the learned trial judge cautioned them, at p 1673, thus: [the Court then set out the passage we have cited at the end of the judge's summary of the prosecution case].

[30] There is also no doubt that the jury would have heard from counsel for the prosecution and the defence what their respective stances were in respect of the case. Indeed, Mrs Neita-Robertson, who was lead counsel for Mr Edwards at the trial, in suggesting an additional direction for the learned trial judge to give to the jury, had her view of the evidence recorded in the transcript. [The Court then set out the exchange we have recorded above when counsel asked the judge to direct the jury to consider whether murder was possible].

> [31] The learned trial judge, after hearing Mrs Neita-Robertson and lead counsel for the prosecution, Mrs Palmer-Hamilton, then said to the jury:
>
> > 'You have heard the concerns raised by the attorneys on behalf of their respective cases …' (See p 1768 of the transcript.)
>
> [32] She then went on to address the various points raised by counsel. In respect of the injury to Mrs Harris-Vasquez, the learned trial judge said to the jury:
>
> > '... it is a matter for you to determine whether you believe that the injury, the one injury that you saw there, would have caused her death, and caused it in the way that the Crown is saying that she met her end.' (See pp 1770- 1771 of the transcript.)
>
> [33] Based on those directions, the jury would have been in no doubt as to the task that they had been asked to perform and the issues of fact that they were required to consider, in deciding who had fired the shot that killed Mrs Harris-Vasquez. They decided, on those facts, that it was Mr Edwards who had done so. This court, on the basis of the written evidence alone, cannot say that they were 'obviously and palpably wrong'.

31. Another ground of appeal to the Court of Appeal was lack of balance in the summing-up. At paras 119-122 the court said:

> "[119] Mrs Neita-Robertson submitted that whereas the learned trial judge set out for the jury all the various elements that the prosecution was relying on in its presentation of a case based on circumstantial evidence, the learned trial judge did not similarly point out the weaknesses in the prosecution's case that the defence relied on. Those weaknesses, learned counsel submitted, failed to bring home to the jury the thrust of the defence. Learned counsel also argued that the learned trial judge merely recited the

evidence of the various witnesses to the jury and failed to analyse the import of that evidence. The combined effect of these flaws in the summation, Mrs Neita-Robertson submitted, resulted in Mr Edwards being deprived of a fair trial.

[120] Miss Salmon, for the Crown, submitted that there was no particular form that a summation should take. She contended that the learned trial judge did what was required of her in directing the jury on the relevant law, reminding them of the evidence and placing before them the issues in contention between the prosecution and the defence. The summation, Miss Salmon argued, cannot be faulted.

[121] Miss Salmon is correct in respect of these submissions. Reliance is again placed on the duty placed on a trial judge conducting a summation, as set out in the extract, cited above, from the judgment of Carey JA in *Sophia Spencer v R*. The learned trial judge was true to her duty in this aspect of the case. She:

a. properly directed the jury several times as to the burden and standard of proof; that it was the prosecution which was required to prove Mr Edwards's guilt (eg see pp 1450-1451, 1460, 1540, 1673, 1695 and 1772-1773 of the transcript);

b. faithfully recounted the evidence adduced by both the prosecution and the defence;

c. several times, stated the kernel of the defence's case (eg see pp 1458, 1486, 1520, 1540, 1702-1703 and 1772); that Mr Edwards knew nothing about the shooting and that Mrs Harris-Vasquez was the author of her own demise;

d. gave several examples of discrepancies in the prosecution's case, including that concerning the absence from SSP Phipps' statement of any indication that

Sergeant Brown had said that it was Mr Edwards who had brought the 'suicide note' to her notice (at p 1625); and

e. explained to the jury, as she went along, the complaints that the defence made in respect of various aspects of the prosecution's case, including the delay in the trial and the absence of Dr Seshiah and the articles of clothing taken from Mrs Harris-Vasquez's body.

[122] This ground also fails."

32. On the issue of delay and the effects of delay, the Court of Appeal agreed that the period of ten years which it took for the case to come on for trial was unacceptable. They also accepted the submission that there had been several instances of failure in the investigation of the case. These included the failure to collect samples from surfaces in the bathroom before it was cleaned; to send the deceased's clothing for analysis until several days after the death; the destruction of the material collected (albeit after it had been analysed); and the emigration of two potential witnesses, the pathologist who had conducted the post-mortem (Dr Seshaiah) and Sgt Brown. However, they did not consider that the delay itself, the failures in the investigation or the absence of witnesses or material resulted in a situation where it had been unfair to subject the appellant to a trial or resulted in a trial that was unfair to him.

33. Another ground was that in reminding the jury of Mr Edwards's interview, the judge failed to caution them that the issues raised as to motive in the questions asked by Retired ACP Gause and which were not subsequently supported by any evidence were not to be relied on, were only prejudicial and of no probative value, and that they should disregard them and any innuendo that may arise therefrom. The Court of Appeal rejected this. They noted that the document in which the questions and answers were recorded was tendered and received into evidence without any objection by the defence. The court said at para 86:

"It is true that the learned trial judge did not direct the jury as to the approach it should take concerning the questions that were asked during the interview which suggested acrimony resulting from Mrs Harris-Vasquez's marriage. It would have been correct to say that the questions did not constitute evidence and it would have been better if the learned trial judge had given that direction. She did,

> however, remind the jury of Mrs Harris' evidence as to the good relations that Mr Edwards and Mrs Harris-Vasquez enjoyed. The learned trial judge also recounted, for the jury, Mr Edwards's evidence as to the continued good relations that he and Mrs Harris-Vasquez maintained despite her marriage to someone else."

34. After referring to the judge's warning to the jury that the morals of the individuals involved were not on trial and that the issue was whether Mr Edwards killed the deceased or she took her own life, the court concluded that there was no miscarriage of justice as a result of the judge's failure to give a direction concerning the use of the questions asked during the interview.

35. In the result the appeal against conviction was dismissed. The Court of Appeal did, however, reduce from 35 years to 20 years the minimum period in custody to be served by Mr Edwards before he would be eligible for release.

The fresh evidence

36. The application to adduce fresh evidence before the Board sought to introduce three expert reports. One was a joint report of Mark Mastaglio, a ballistics expert, and Angela Shaw, a gunshot residue expert, dated 17 September 2019. The other two were a report of Gillian Leak, a forensic consultant dealing with blood spatter evidence, dated 3 July 2019 and an addendum report dated 22 July 2019 after Mrs Leak had been supplied with better quality photographs of the scene.

37. In the joint report of Mr Mastaglio and Ms Shaw, Mr Mastaglio notes that the right temple is one of the most common elective sites in suicides and that the position of the body, the location of the gun and the height of the bullet hole in the bathroom door "can all be explained by suicide". There was no firearms evidence of third party involvement. The scene ought to have been examined by an expert in trajectory reconstruction analysis. The fact that this did not occur was a failure to adhere to best practice. The deceased could not have been standing upright when she was shot due to the low level of the bullet hole in the door.

38. Ms Shaw concludes that the absence of GSR on the deceased's hands "does not support the view that she was shot by a third party". Moreover, she writes, the GSR testing method used in the case cannot be relied upon due to a lack of specificity and

sensitivity. GSR ought to have been found on the deceased's nightdress (whoever fired the gun) and the absence of it supports the conclusion that the testing was unreliable. The area of the hands from which swabs were taken was too limited. Supt Hibbert should not have taken the swabs due to the risk of cross-contamination from his routine ballistics work. The loss of the deceased's clothing prior to trial "certainly prejudiced" the defence as there was no opportunity to retest using proper techniques.

39. Mrs Leak's reports on blood spatter state that the blood patterns indicate that when the fatal shot was fired the deceased was sitting down with her back against the left side of the closed bathroom door and jamb. Following the shot she slumped to the left. The area of space available for someone else to be present in the bathroom and to deliver the shot would be minimal. It is highly likely that the deceased's heart continued to beat for a short time after the bullet passed through, projecting spurts of blood from the injured temple region; and there would be a high expectation of finding projected blood spatter type pattern on anyone who was present and stepped over the body when it was partially blocking the doorway. If Mr Edwards had shot the deceased, he would thus have been spattered with some of the blood bearing similar distribution patterns to those found on the bathroom wall; but there is no evidence that any blood was found on Mr Edwards or his clothing. Photographs of the right hand of the deceased show staining consistent with her holding a gun and firing it and there is no evidence providing any alternative explanation of how that pattern of staining of the hand could occur. Mrs Leak's conclusion is that, while it cannot be completely ruled out that the deceased was shot by a third party, the available evidence "far more readily" supports a hypothesis of suicide than of murder.

40. No contrary expert evidence has been obtained by the prosecution.

41. A statement of Valerie Neita-Robertson QC (as she now is) explains that:

> "There was a combination of factors as to why such expert reports were not obtained for the trial. They are as follows:
>
> a) There were and still are no independent ballistic, blood splatter or GSR analysts in Jamaica and as such we would have had to secure persons from overseas.
>
> b) The limited resources available from the client were used to bring to Jamaica from the USA a handwriting

expert who was of paramount importance. This was an expensive exercise.

c) It was decided by Co-Counsel Ms Martin and I that best efforts would be made through cross- examination of the State's expert witnesses. Those witnesses in particular Ms Marcia Dunbar were not able to help us as they had not done extensive testing at the time and/ or could not retest as it was disclosed during the trial that the exhibits were destroyed and were not available for them to give their opinions.

d) We do not have in Jamaica an independent crime scene reconstruction expert to analyze photographs.

Further, since Mr Edwards self-funded his representation we had to use the funds available in a manner that would achieve the maximum results in his interest.

That in any event the crime scene had been prematurely cleaned by relatives of the deceased as it had not been secured as is required and so that restricted the defence's conduct of an independent analysis.

Further the defence was at a severe disadvantage in respect of the 2009 destruction of firearm, clothes and other exhibits, which action by the State prevented any possible analysis post their destruction."

Whether the fresh evidence should be admitted

42. It is common ground that the leading case on the admission of fresh evidence on appeal is the decision of the Board (Lord Hope of Craighead, Dame Sian Elias, Lord Kerr of Tonaghmore, Lord Reed and Lord Hughes) in *Lundy v The Queen* [2013] UKPC 28; [2014] 2 NZLR 273. Lord Kerr, giving the advice of the Board, said that the overriding test is that the new evidence should be admitted if the interests of justice require it. He continued at para 120:

> "The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."

43. Lord Kerr went on to say that "the requirement that evidence be fresh can be of less critical importance in cases involving scientific evidence". After citing the judgment of Hammond J in *Wallace v R* [2010] NZCA 46, he continued at para 122:

> "In the Board's view, Hammond J was doing no more than to indicate that where a case against an accused rested exclusively or principally on scientific evidence, when on an appeal, application is made to have admitted new scientific material which presents a significant challenge to that evidence, the court should not be astute to exclude the new material solely because it might have been obtained before the trial. This is the approach which the Board would endorse."

44. Mr Poole QC for the Respondent, while not disputing that the reports of Mr Mastaglio, Ms Shaw and Mrs Leak are all credible, opposed their admission in evidence. In his written case he submitted that the expert evidence could, with reasonable diligence, have been adduced at the trial and that in any event "no injustice will be caused by refusing to admit the GSR, ballistic, and blood spatter reports. This is because the reports do not go very far and had the suggested evidence been given at trial it would have made no difference to the jury's verdict."

45. The Board has no hesitation in rejecting the submission that the fresh evidence could have been obtained for the trial with reasonable diligence. There is no challenge to Mrs Neita-Robertson's statement that independent forensic experts, whether on

ballistics, GSR, blood spatter, or handwriting, are not available in Jamaica. There was no legal aid to enable Mr Edwards to have experts flown in from overseas at public expense. The defendant was only able to pay for one expert, namely Mr Haywood, to be instructed to come to Jamaica to attend the trial. It is only because Mr Mastaglio, Ms Shaw and Mrs Leak (as well as solicitors and counsel for the appellant) are acting pro bono that the appellant has been able to adduce the fresh evidence before the Board.

46. The first two of the three sequential tests set out in *Lundy* are therefore clearly satisfied. The evidence is both credible and fresh. The third *Lundy* test is whether its admission would have a significant impact on the safety of the conviction. For the reasons which follow the Board considers that this test is also met. The fresh evidence, which in the usual way was admitted *de bene esse* for the purpose of the hearing, will therefore be formally admitted.

47. Once fresh evidence is formally admitted on appeal the question, as Mr Poole accepts, is whether the Board considers that, taking the evidence as a whole, the conviction is safe: see *Stafford v Director of Public Prosecutions* [1974] AC 878; *R v Pendleton* [2001] UKHL 66; [2002] 1 WLR 72 and *Dial v Trinidad and Tobago* [2005] UKPC 4; [2005] 1 WLR 1660. This applies both where the test on an ordinary appeal against conviction (that is to say one not involving fresh evidence) is, as in Jamaica, whether the verdict of guilty was unreasonable, and where, as in England and Wales since the Criminal Appeal Act 1968, the test is whether the conviction is safe.

The impact of the fresh evidence

48. Both Mrs Leak and Mr Mastaglio have concluded that when the fatal shot was fired the deceased was seated on the bathroom floor with her back against the closed door. If that was the case - and there is no evidence to the contrary - there is simply no satisfactory explanation of how the defendant could have managed to murder the deceased in the very confined space of the bathroom, then move the body, open the door and appear a very short time afterwards in the living room without any blood being seen on him or his clothes, and without any bloodstains or bloodied footprints being found anywhere outside the bathroom. The near-impossibility of the prosecution hypothesis is not answered by the submission that the jury saw the bathroom for themselves or that the defence, for example, made the point in submissions about the defendant not being covered in blood when he entered the living room. There is a world of difference between a lawyer's assertion that the prosecution theory is implausible and expert evidence that shows, in the words of Mrs Leak, that the suicide hypothesis is far more likely than the murder one.

49. Mr Poole was asked what questions he would have put to Mrs Leak if the Board's procedures had enabled her to be called to give evidence. His answer was that she would have been asked to confirm that murder could not be ruled out. Even if she had confirmed, in accordance with her report, that this suggestion could not be ruled out completely, that would fall a very long way short of persuading the Board that the conviction is safe.

50. A further issue throwing serious doubt on the safety of the conviction is the evidence of Ms Shaw that the fact that no GSR was found on the deceased's hands is in the circumstances of this case not indicative of the defendant's guilt. Mr Poole argues that the absence of GSR was only one piece of circumstantial evidence in the case, and that "Mrs Dunbar's evidence, and the judge's summing-up, would have left the jury in no doubt that it was not possible to deduce from the absence of GSR on the deceased's person and clothing whether or not she had shot herself". The Board cannot agree. The absence of GSR on the deceased's hands was mentioned three times in the summing-up, and it seems to us to have been second only to the suicide note in its importance to the prosecution case. Any lay person, without the assistance of an independent ballistics expert, would naturally attach enormous significance to it. Mrs Dunbar did concede in cross-examination that the absence of GSR on the nightdress might be explained by the fact that it had not been tested until after it, and the body, had been in the morgue for a week. But this was a minor point compared with the supposed importance of no GSR being found on the hands of the woman who, the defence argued, had committed suicide by pressing the gun to her temple and firing it.

51. The ultimate question is whether, taking into account the fresh evidence, the conviction can be regarded as safe. The Board has reached the clear conclusion that it cannot. Indeed it may be questioned whether, had the evidence of Mr Mastaglio, Ms Shaw and Mrs Leak been available at the trial, the case would have been allowed to go to the jury.

The original grounds of appeal

52. Since in the light of the fresh evidence the conviction cannot be regarded as safe, the Board can deal more briefly with the principal grounds of appeal as they were before the Court of Appeal. It will be seen from the passages we have cited that the Court of Appeal placed much reliance on *R v Lao.* However, as Mr Poole rightly accepted in argument, cases such as *Lao* (or, in England and Wales, *R v Pope* [2012] EWCA Crim 2241; [2013] 1 Cr App R 21) deal with the situation where the sole ground of appeal is that the verdict is unreasonable or against the weight of the evidence. In such cases it has always been exceptional for an appellate court to intervene. There

are some notable examples of the jurisdiction being exercised, such as *R v Wallace* (1931) 23 Cr App R 32, but they are few and far between.

53. If the sole ground of appeal in this case had been that the verdict of the jury was unreasonable, and if the fresh evidence had not been forthcoming, the Board would have agreed with the Court of Appeal that the conviction should be upheld. On the evidence presented at the trial the result, though surprising, could not be said to be obviously and palpably wrong. But authorities such as *Lao* do not assist in fresh evidence cases, nor where it is alleged that there was a misdirection by the judge or a material irregularity in the course of the trial.

54. The Board cannot agree with the Court of Appeal that the summing up by the learned judge gave the jury a balanced assessment of the case on each side. We have set out earlier the powerful summary of the prosecution's best points which the judge gave at the conclusion of her narrative of the prosecution evidence. There is no equivalent summary of the defence case anywhere in the summing up. It was only after prompting by Mrs Neita-Robertson that the judge gave a single paragraph summary of topics raised by the defence, but it was, with respect, so compressed as to be difficult to follow.

55. Of course there are criminal trials in which the prosecution evidence is so overwhelming, and the defence so insubstantial, that a summary of the prosecution case followed by a summary of the defence case simply highlights the disparity. But this cannot possibly be said to be such a case. The eight points raised by Mr Atkinson QC before the Court of Appeal, or something on those lines, could and should have been set out at the end of the defence case.

56. It is not an answer to this to say, as Mr Poole did, that the judge repeatedly told the jury that the defendant's case was that the deceased had committed suicide and that they had to be sure that he was guilty of murder. That was no substitute for properly contrasting the prosecution theory as a whole with the defence theory as a whole. For example, the judge set out with some emphasis the prosecution argument that it was very unlikely that an experienced police officer would have run past the bathroom door without opening it; but the judge does not even raise the question: if this was a case of murder, how was it that Mr Edwards was able to get out of the bathroom and to appear very soon afterwards in the living room with no blood on him or on his clothing and no blood being found anywhere in the house other than in the bathroom? Another example is that the judge mentioned three times the prosecution reliance on the absence of GSR on the hands of the deceased, without even expressly stating that neither was GSR found on the defendant's hands.

57. A further cause for concern is the treatment of the evidence of Mr Major. Like the Court of Appeal, the Board considers that the trial judge was right to rule that, despite the flaws in the method of taking the handwriting samples from the defendant, and despite the failure to seek examples of "natural" handwriting by the defendant or handwriting by the deceased other than her name on a number of notebooks, the evidence of Mr Major was admissible. But it should have been the subject of clear warnings referring to the flaws in the methodology which needed to be considered before the jury could rely on it.

58. As for the police interviews, it does not appear that any attempt was made by the defence to exclude the interview records from being placed before the jury; but if they were to be admitted in unredacted form, especially in a document which we understand the jury were allowed to take out with them when they retired to deliberate, then, as the Court of Appeal held, the judge should have warned the jury that the questioner's allegations were not evidence.

59. There were other points made by Ms Brimelow QC on behalf of the appellant which had less force. Although the delay in bringing the case to trial was unacceptably long, as the Respondent concedes, it does not seem to the Board that this of itself made the trial unfair. Mr Poole referred to the useful guidance given by the Divisional Court in England and Wales in *R (Ebrahim) v Feltham Magistrates' Court* [2001] 1 WLR 1293 in which Brooke LJ said at para 27:

> "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

60. Similarly, in *R v RD* [2013] EWCA Crim 1592 Treacy LJ said at para 15:

> "In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere

> speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

61. Under this heading, Ms Brimelow's best point is perhaps the destruction of exhibits, including the deceased's nightdress, in 2009, with the result that the nightdress could not be retested for the presence or absence of GSR; but this is sufficiently speculative to fall, in the view of the Board, within the *Ebrahim* principle.

62. Ms Brimelow also relied on the unavailability at the delayed trial of the two witnesses who had emigrated. The first was the pathologist who conducted the post-mortem, but that is a complaint of no substance. The post-mortem evidence was neither controversial nor of critical importance. It is very common in such circumstances, if the original pathologist is unavailable, for a substitute to be fielded and Ms Brimelow was unable to point to any question which could have been put to Dr Seshaiah which could not equally well have been put to Dr Prasad.

63. The other unavailable witness was Sgt Brown. This covered slightly more controversial territory, in that DI Phipps said in oral evidence that he had been told by Sgt Brown that the Defendant had pointed out to her the notebook containing the suicide note, whereas Sgt Brown's witness statement made a few days after the incident said no such thing. However, this was a discrepancy which the defence were able to point out to the jury.

64. In short, the problems with the evidence in this case were not caused by the long delay in bringing it to trial. The mistake in allowing the bathroom to be cleaned before proper forensic testing had occurred was made on the day itself and the poor practice in taking swabs very soon afterwards. There was no application in advance of the trial (as there was, for example, in *Cameron v Attorney General of Jamaica* [2018]

JMFC Full 1) for a stay; and we do not think that such an application would or should have succeeded. It follows that the Board agrees with the decision of the trial judge to refuse the defence application for a ruling at the end of the prosecution evidence that there was no case to go to the jury.

The proviso

65. The prosecution's written case argued, under the heading "Proviso", that if, contrary to their submissions, the judge's directions did constitute a material irregularity, "no injustice can have resulted from such deficiency, as any jury properly directed would inevitably convict the Appellant. Mr Major's evidence was clearly accepted by the jury as reliable. In the circumstances, in convicting the Appellant of murder the jury must have rejected the suggestion that the deceased wrote the note, and dismissed the Appellant's defence that he did not shoot the deceased".

66. The Board was not persuaded by this argument even in relation to the original grounds of appeal. However, it is unnecessary to decide whether the complaints made about the summing-up would have amounted to grounds for allowing the appeal before the fresh evidence was admitted, in the light of the Board's conclusion that on the evidence as it now stands the conviction is plainly unsafe. It cannot be said in this case that, in the words of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act "no substantial miscarriage of justice has actually occurred". On the contrary, the Board considers that a substantial miscarriage of justice *has* occurred and that the conviction cannot stand.

67. The Respondent very properly concedes that given the lapse of more than 18 years since the incident it would be wrong to seek an order for a retrial.

The constitutional appeal

68. It is conceded that Mr Edwards's right under section 16 of the Constitution of Jamaica to a fair trial within a reasonable time was breached by the ten-year delay between arrest and trial, and the Respondent does not oppose the making of a declaration to that effect.

69. The Board was not addressed in oral argument on the separate question of whether the Court of Appeal's 21-month delay in giving its reserved judgment, which

the court itself said was “sincerely regretted”, or the total delay of more than eight years between the conviction and the hearing before the Board, also amounted to a breach of section 16 of the Constitution.

70. The Board has not been asked to decide whether compensation should be payable in this case for a breach of the right under section 16 of the Constitution to a fair trial within a reasonable time. A more significant issue, though it is not one within the jurisdiction of the Board, is whether Mr Edwards should receive compensation for the miscarriage of justice which occurred. We commend his case to the Jamaican authorities for their consideration.

71. The Board also wishes to express its appreciation to Mr Mastaglio, Ms Shaw and Mrs Leak; to Ms Brimelow QC and Mr Hall; and to their instructing solicitors Simons Muirhead and Burton, for acting without fee - truly pro bono publico - in bringing this very troubling case before the Board.

Conclusion

72. The Board will humbly advise Her Majesty that Mr Edwards’s appeal should be allowed and his conviction quashed.