in a murder trial, and that regrettably an exception to the presumption must be made because any other approach would be absolutely impractical, and that for this reason alone the normal burden on the prosecution—applicable (once the evidential burden has been satisfied)—to loss of control, self-defence, automatism and other forms of defence—is reversed and placed on the defence?

Report by David Hargreaves, Solicitor
Commentary by Andrew Ashworth

Evidence

Taylor (Bonnett) v The Queen

Privy Council: Lord Hope of Craighead, Lord Kerr of Tonaghmore, Lord Reed, Lord Carnwath and Sir John Chadwick: March 14, 2013; [2013] UKPC 8

Failure to use witness statement at trial—statement arguably contradicting key prosecution witness—whether failure in itself making conviction unsafe—whether defendant having to show effect of using statement on trial and verdict

Bias; Failure to disclose; Fairness; Jamaica; Jurors; Miscarriage of justice; Murder; Witness statements

The victim was shot dead at about 21.30 one night at his home in Jamaica. The defendant was charged with his murder. The prosecution case depended almost entirely on the evidence of G, who said that he had been at his neighbours' house but had then gone to the victim's house, where he saw the defendant, whom he had known for many years, shoot the victim twice, once while the victim was standing on the verandah, holding weed in his hand to make a cigar, and once after he had fallen from the verandah and was lying on the ground. G said that he had then returned to his neighbours' house for the night. At trial, G's cross-examination was limited to the reliability of his identification of the defendant as the person who shot the victim because it was dark. A police officer gave evidence that when he found the victim's body lying on the ground there was vegetable matter resembling ganja in one hand and the doctor who carried out the post-mortem examination testified that one of the gunshot wounds was on the left side of the chest and the other was on the left jaw, with the exit wound towards the top of the skull. One of the inhabitants of the neighbours' house, H, gave evidence that he had heard two gun shots coming from the direction of the victim's house and that, shortly thereafter, G had knocked on his door. The defendant did not give evidence, but he made an unsworn statement from the dock in which he said that, on that night, he had been at home with his family and that G had falsely testified against him out of malice. On the last day of the trial, in the presence of the jury, Crown counsel told the judge that a juror had indicated that she knew the defendant and the judge then asked the juror to confirm that that was correct, which she did, and the judge discharged the juror, without making further inquiries as to what, if

anything, she had said about the defendant to the other jurors. In summing up, the judge told the jury:

> "Decide this case on the evidence and only on the evidence. Do not be influenced by anything that you might have been told by anyone, whether by some fellow member of the jury that sat or are sitting with you about some prior knowledge or feeling or view. That is unimportant, and if you act upon that justice will have miscarried because that is not evidence."

The defendant was convicted. It was then revealed that he had three previous convictions. Subsequently, it was discovered that another of the inhabitants of the neighbours' house, H's wife, had given a statement to the police a few days after the murder, saying that she was at her house on the night of the murder, along with her husband, her four children and two grandchildren and G, but she made no reference to G leaving the house at any time until the following morning. The defendant's appeal against conviction was dismissed by the Court of Appeal of Jamaica. The defendant appealed to the Privy Council, on the grounds that he had suffered a miscarriage of justice because: (i) the evidence of H's wife was of such importance that its absence from the trial was unfair; and (ii) the judge should not have questioned the discharged juror in the presence of the other members of the jury and should have made proper inquiry as to whether that juror had mentioned her knowledge of the defendant to the other jurors.

Held, dismissing the appeal (Lord Kerr of Tonaghmore dissenting) (1) that the failure to make use of a witness statement at trial, whether because of delay in disclosure by the prosecution or because of the fault of defence counsel, was not in itself sufficient to justify a finding that there had been a miscarriage of justice. The focus had to be on the impact which the failure had on the trial and the verdict. It was not enough to engage in speculation. The court had to have material before it which would enable it to determine whether the conviction was unsafe and the defendant had to show what effect the evidence would have had if use had been made of it at the trial, in order for the court to judge the likely response of prosecution witnesses if proper use had been made of the evidence in cross-examination. The crucial issue of fact was whether G was with the victim when he was shot. The defendant could point to a number of respects in which the statement of H's wife did not match the evidence that was given by G and H. However, there were no unequivocal contradictions of G's evidence in her statement. She was in her house with four children and two grandchildren and her attention might not have been directed to what G was doing. On the critical question whether G was with the victim when he was shot, G's evidence was supported by H. But there were also important indications within G's own evidence that he had to have been there. First, he gave evidence that the victim was shot twice and that he was lying on the ground when he was shot for the second time, which was consistent with the doctor's post-mortem report on the gunshot wounds. Secondly and thirdly, he said that the victim had weed in his hand when he was shot and that he fell from the verandah and dropped to the ground, both of which points matched the police officer's evidence as to what he found when he went to the scene. Demonstration that a witness had special knowledge of the things he testified to having witnessed was always a powerful reason for accepting his evidence as

both credible and reliable. The details that G mentioned in his evidence were of that character. Taken together with the evidence of the doctor and the police officer, they would have provided the jury with ample grounds for rejecting any suggestion that doubt was cast on the veracity of his account that he was present at the shooting by the statement of H's wife. The gaps in her evidence, which taken at their face value might suggest that G was not present at the shooting, had to be balanced against the weight that the elements of special knowledge gave to G's evidence that he was there, taken together with the support which his evidence received from H. The balance lay so far in favour of accepting the veracity of G's account that there was no reasonable possibility that the jury would have arrived at a different verdict.

Pendleton [2001] UKHL 66; [2002] 1 W.L.R. 72 and *Teeluck v Trinidad and Tobago* [2005] UKPC 14; [2005] 1 W.L.R. 2421 applied.

(2) It was unfortunate that counsel for the prosecution did not draw the judge's attention to the problem concerning the juror before the jury were brought into court. The result was that the judge had no warning of what counsel, or the juror in her turn, were going to say. The question of how then to deal with the situation was at the judge's discretion—it was for him to take the course which he regarded as best suited to the circumstances. Nothing was said in the course of the ensuing discussion which was prejudicial to the defendant or might have affected the fairness of the trial. It was the duty of the judge to inquire into and deal with the situation so as to ensure that there was a fair trial. However, there was no hint in what the judge was told by counsel, or by the juror herself, that the juror had told the other jurors that she knew the defendant or that she was even aware of his previous convictions, let alone that she would have wanted to give that information to the other jurors. It was not obvious that the judge was seriously at fault in not making further inquiry, or that his failure to do so had led to a miscarriage of justice. The assumption had to be that the jury understood and followed the judge's summing up. The direction which the judge gave the jury about deciding the case only on the evidence was clear, understandable and to the point. It was sufficient to deal with any risk that the juror who was excused might have said something that the jury ought not to have been told.

Orgles [1994] 1 W.L.R. 108; (1994) 98 Cr. App. R. 185 CA and *Montgomery v HM Advocate* [2003] 1 A.C. 641 PC applied.

M. Birnbaum QC, *J. McLinden QC* and *M. Birdling* for the appellant.
H. Stevens QC for the Crown.

Commentary

Fresh evidence as a ground of appeal. Following a series of high-profile miscarriage of justice cases, the Runciman Commission and the new Criminal Appeal Act 1995, the House of Lords in *Pendleton* [2001] UKHL 66; [2002] 1 W.L.R. 72; [2002] Crim. L.R. 398 reassessed the approach that appellate courts should take when faced with fresh evidence. Lord Bingham C.J. (as he then was) gave the speech on behalf of the majority. He warned that:

> "The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful

> that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the trial."

The concerns were that the court did not know what the jury made of each piece of evidence. There is no reasoned judgment, only a verdict. It is therefore not known how the fresh evidence would have affected the jury's reasoning. Lord Bingham C.J. stated that whilst the ultimate test was that of safety, "in a case of any difficulty", it would usually be wise for the court

> "to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe".

This was seen by many as encouraging a more generous approach to the admission of fresh evidence on appeal. However, in a separate speech Lord Hobhouse rejected the so-called "jury impact test" and said that the court was required to assess the evidence itself without any reference to the jury's reasoning. The latter approach was emphasised by the Privy Council shortly afterwards in *Dial v The State of Trinidad and Tobago* [2005] UKPC 4; [2005] 1 W.L.R. 1660 PC (the majority surprisingly included Lord Bingham; see comments in *Burridge* [2010] EWCA Crim 2847; [2011] Crim. L.R. 251).

Since that time the appeal courts have swerved between the "jury impact test" of *Pendleton* and what many see as the more restrictive "pure" safety test in *Dial*, even where the court has expressly recognised the dangers pointed out by the majority in *Pendleton* (see *Noye* [2011] EWCA Crim 650 at [37] and [41]). The attempt to seek clarification on this apparent distinction from the Supreme Court failed (see *Dunn* [2010] EWCA Crim 1823; [2011] Crim. L.R. 229), and the courts have often rejected the notion that there is in fact a distinction (see *Dunn* and *Burridge*). However, it seems clear that the choice of approach may have a real impact on the outcome of a particular case. Bonnett Taylor's may be one.

There should be a sense of unease and unfairness when a defendant is convicted after a trial in which a significant witness was not called. This is especially so when the statement (of H in this case) was on the trial lawyer's case file, but the lawyer was "unable to give a coherent or consistent explanation as to why he did not make use of the statement" (at [8]). Moreover, it was accepted by the Board that the crucial issue of fact at trial was whether the main prosecution witness (G) was with the deceased when he was shot, and that "Taking [H's] statement at its face value, G was in her house all the time and never left it" (at [14]). There was general agreement that the relevant test was the "jury impact test" in *Pendleton*, and "the real possibility of a different outcome" in *McInnes v HM Advocate* [2010] UKSC 7. (Both tests were thought to have the same effect: see also Lord Kerr dissenting, at [37]–[42].) The Board stated that it must ask itself whether H's evidence, if given at trial, might reasonably have affected the decision of the jury to convict" (at [20]). However, the Board then went against the warnings in *Pendleton* about the dangers of seeking to speculate on the jury's reasoning and their likely reaction to the fresh evidence: it was specifically stated that the court was to "judge what the response of the prosecution witnesses would be likely to have been if proper use had been made of it in cross-examination" (at [13], see Lord Kerr dissenting at [44]–[56]). The Board carried out a detailed analysis of H's statement and concluded that the "gaps" in the statement would have provided the jury with ample grounds for rejecting any suggestion that doubt was cast on the veracity of G's statement that he was present at the shooting (at [20]).

The difficulties with this approach are threefold. First, the Board's analysis and reasoning involved reaching speculative conclusions that should have been

peculiarly within the jury's domain (cf. Lord Kerr at [46]–[50]). Secondly, that the Board's reliance on factors that they found supported G's account that he was present at the killing were weak and speculative (at [17]). The fact that G was able to say that the deceased was shot twice may have been because he was at the Hartley's and heard "two explosions sounding like gun shots" (at [14]). The other matters such as the position of the deceased, and the weed in his hand may have been as a result of local knowledge after the killing—G's statement was made four days later—rather than being things that he could not have known if he had not been with the deceased (at [17] and [18], cf. [54]). Moreover, the Board's reliance on G's "special knowledge" as being a "powerful reason for accepting his evidence as both credible and reliable" (at [19]) is a troubling issue, particularly in light of the concerns about relying on such matters generally (see G.H. Gudjonsson, *The Psychology of Interrogations and Confessions* (Wiley-Blackwell, 2002), Ch.20, and the *Stefan Kiszko*, February 18,1992, case in particular). Thirdly, none of these matters—the fresh evidence or the witnesses' responses—were aired before the jury.

This case is an example of a court accepting the correct test, but then failing to apply it properly. The questions raised by the Board should have led them to conclude that the jury were deprived of hearing a significant witness whose evidence *may* have affected their decision to convict, rather than seeking to trespass on the territory of the jury and to speculate on what the jury would have made of matters that were not put before them, were not expanded upon or tested in evidence, and which may well have impacted on other witnesses evidence. As Lord Kerr stated in his dissenting judgment (at [44]):

> "The essential question is whether the evidence *might reasonably have affected* the outcome. This question is to be answered, I believe, by theoretical rather than deductive analysis. In other words, a detailed forensic examination of how the material might or might not have been treated by the jury is not appropriate. Much less is it appropriate to hypothesise on challenges that might have been made to the evidence or on explanations that might have been given to diminish its apparent inconsistency with evidence that had actually been given at trial."

He concluded that:

> "I consider it to be incontestable that proper, effective use of that statement would have cast a significant cloud over the veracity of the vital core of the prosecution case. On that basis, the conclusion that the verdict is unsafe is, to me, inexorable." (at [57])

Report by Jill Sutherland, Barrister
Commentary by Paul Taylor, Doughty Street Chambers