[2011] UKPC 16
Privy Council Appeal No 0003 of 2010

JUDGMENT

Maxo Tido (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Rodger
Lord Brown
Lord Kerr
Lord Clarke
Lord Dyson

JUDGMENT DELIVERED BY
Lord Kerr
ON

15 June 2011

Heard on 7 March 2011

Appellant
Julian Knowles QC

(Instructed by Simons Muirhead & Burton)

Respondent
Peter Knox QC
Tom Poole
(Instructed by Charles Russell LLP)

LORD KERR:

1. On 20 March 2006 in the Supreme Court of the Bahamas, after a trial before Allen J and a jury, the appellant was convicted of the murder of Donnell Conover. Following a sentencing hearing on 20 April 2006, the judge sentenced the appellant to death. On 14 October 2008 the Court of Appeal of the Bahamas (Sawyer P, Ganpatsingh and Osadebay JJA) dismissed the appellant's appeal against his conviction. His appeal against sentence was also dismissed.

2. On 9 December 2009 the appellant sought special leave to appeal to the Judicial Committee of the Privy Council. This was granted on 26 February 2010.

The facts as they emerged from the evidence at the trial

3. On the night of 30 April 2002 a young woman called Donnell Conover attended a political rally with her family. She was sixteen years old. She and other members of the family returned home at about 12.15am. Mrs Laverne Conover, Donnell's mother, went to bed shortly after that, leaving her daughter sitting at the dining room table reading a political manifesto that had been obtained at the rally.

4. Mrs Conover woke the following morning at about 7.15 am. Donnell was missing. Her night dress was found on top of a freezer in the house. A cordless telephone was in the porch of the family home. Mrs Conover checked the telephone and noted from the caller identification system that a call had been received from Mandingo's Restaurant at about 1.20 am. This restaurant was in Nassau Village. Another call had been received at 1.45 am but this was recorded on the system as being from "out of area".

5. The prosecution's case was that at about 1.20am the appellant telephoned Miss Conover from Mandingo's Restaurant and that, after that telephone call, she had left her family home and had gone to meet him. Miss Conover's body was found later that day between 12.30pm and 1pm in a quarry pit next to a road known as Cowpen Road. She had suffered severe head injuries. Evidence was given that these could have been caused by her being struck by a hard object such as a rock or that they could have been the result of a car being driven over her head. Her body had been set on fire, and when it was discovered it was found to have been partially burnt.

6. One of the principal witnesses for the prosecution was Lavette Edgecombe. She worked at – and was part owner of - Mandingo's Restaurant. She gave evidence that at about 1 am on 1 May 2002, a man entered the restaurant and asked to use the pay phone. She described him as being about 5' 4" tall, of medium build, and having a

dark complexion. This man had what the witness described as a 'low hair cut'. When the man was permitted use of the telephone, Ms Edgecombe kept him under close observation because the lock on the telephone had been broken and she was on the alert to ensure that money was not removed from it. She overheard part of the telephone conversation. She said that the man identified himself to the person whom he had called by the nickname 'Scum'. In the course of the telephone conversation, this man said to the person to whom he was speaking on the telephone words to the effect, "Come outside; I coming for you". He also told that person that he would be driving a white truck.

7. Ms Edgecombe continued to observe the man throughout the two to three minutes that the telephone conversation lasted. He was about five feet away from her. She described lighting conditions in the restaurant as "pretty bright". After the man had finished the telephone call, Ms Edgecombe watched him leave the restaurant and jump into the passenger side of a white truck. She identified this as a "Chevy" truck.

8. On 2 May 2002 Ms Edgecombe identified to police officers the man who had made the telephone call the day before. This identification took place in Mandingo's restaurant. The witness also said that she had seen the man in the restaurant on a couple of occasions before 1 May. On each of these occasions she had observed him for some ten to twenty seconds.

9. Ms Edgecombe was permitted by the trial judge to make a dock identification of the appellant as the man who had made the telephone call on the morning of 1 May 2002 and who had identified himself as 'Scum'.

10. Two witnesses (Derrick Bastian and his girlfriend, Vanda Ford) gave evidence that late in the evening of 30 April 2002 (Bastian said between 9 to 10pm, Ford 10.50 pm) the appellant was in a car which pulled up alongside them while they were in Bastian's white Chevrolet truck. He asked Bastian if he could borrow the truck "because he had something important to do". Bastian agreed to lend the appellant the truck so long as it was returned the following morning. The appellant then drove off in the truck. He returned it at about 8 am on 1 May 2002. During the cross-examination of Ms Ford, it was put to her that the appellant had not borrowed the truck; and in the course of Bastian's cross-examination, it was suggested that Bastian himself was the person who had driven the truck to Mandingo's. Both denied these claims.

11. Bastian had taken the truck for repairs to a garage owned by Andrew Curry on the day that it was returned by the appellant. Police officers collected it from Mr Curry's garage on 9 May 2002. They found what appeared to be bloodstains in a number of areas including the lower panel of the passenger door. Swabs were taken of these areas for later forensic analysis. In the meantime, on the same date, 9 May

2002, after the truck had been inspected, but before tests had been carried out on the suspected blood samples, Detective Sergeant Ferguson interviewed the appellant. According to this police officer, the appellant admitted knowing Miss Conover. He also admitted having been in possession of the truck from between 11.30pm on 30 April and 7.45 am on 1 May. He said that, after he had borrowed it, he had stopped at a few places, and had then gone to see his girlfriend, Deanne Miller, at around 12.30 am. He had stayed with her for four hours and they had sex before he returned home. He denied that he had picked up or killed the deceased.

12. It was Detective Sergeant Ferguson's evidence that he asked the appellant to provide intimate samples but Mr Tido refused this request. During cross examination of this police officer it was suggested to him that he had fabricated the contents of the interview and that he had not asked the appellant to provide intimate samples. The detective sergeant rejected these suggestions.

13. The only bloodstains found capable of analysis were those on the passenger door panel. It was established that the blood from these traces was that of Donnell Conover.

14. Deanne Miller gave evidence that at the time of Miss Conover's murder she had been the appellant's girlfriend for two years. She knew him by the name "Scum". She testified that the appellant did not have sex with her on 1 May 2002. She was unable to recall whether she had seen him between midnight and 5 am on that day.

15. The appellant made an unsworn statement from the dock. He said that on 30 April 2002 he attended a political rally. He left this at about 10 pm and went home. The following night he went to a rally at Clifford Park, and spoke to his girlfriend, Deanne. He said that he had not slept with her on the night of 30 April/1 May, contrary to the suggestion that Detective Sergeant Ferguson had made about his admissions at interview. He denied that he had said the things attributed to him by DS Ferguson. He also said that he had not borrowed Bastian's truck and he had not gone to Mandingo's restaurant in the early hours of the morning of 1 May. He did not recall having known the deceased but he denied that he had killed her.

The case for the appellant

16. For the appellant Mr Knowles made two principal submissions. The first was that the judge should not have permitted a dock identification by Ms Edgecombe. Alternatively, it was contended that the directions given by the judge in relation to the identification were deficient. The second main argument was that the murder of Miss Conover was not one that fell within the wholly exceptional category of killing that warranted the imposition of the death penalty. Again this argument was supplemented

by a subsidiary, alternative submission. It was to the effect that before the sentence of death could be imposed, the judge ought to have ordered that a psychiatric report on the appellant be obtained, principally for the purpose of determining whether there was any reasonable prospect of reform. Finally, it was argued that the Court of Appeal in the Bahamas had adopted a different test for the imposition of the death penalty from that prescribed by various decisions of the Judicial Committee of the Privy Council.

Dock identifications

17. Dock identifications are not, of themselves and automatically, inadmissible. In *Aurelio Pop v The Queen* [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence – see paras 9 *et seq*. In particular, the Board considered in that case that the failure to adhere to what was the normal practice in Belize of holding an identification parade should have led the judge to warn the jury of the dangers of identification without a parade. Delivering the advice of the Board, Lord Rodger of Earlsferry said at para 9:

"[The judge] should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: *R v Graham* [1994] Crim LR 212 and *Williams (Noel) v The Queen* [1997] 1 WLR 548."

18. In *Pipersburgh and Robateau v The Queen* [2008] UKPC 11 the Board re-affirmed (in para 10) its rejection of the suggestion that a dock identification where no prior identification parade had been held was without more inadmissible, although it again emphasised the importance of proper directions designed to deal with the possible dangers of such evidence in the absence of an identification parade held in advance of trial.

19. On one view, the opinion of the Board in *Edwards v The Queen* [2006] UKPC 23 appears to go further than the views as to the admissibility of a dock identification expressed in *Pop* and reiterated in *Pipersburgh*. Giving the judgment of the Board, Lord Carswell at para 22 said:

"[The victim] was permitted at several points in his evidence to point out the appellant in the dock as the man whom he identified as the gunman who shot him. It is well established that this would be a serious irregularity if it were the first identification:

see, e.g. *The State v Constance, Wilson and Lee* (1999, unreported), where Sir Patrick Russell, giving the judgment of the Board, stated that it is only in the most exceptional circumstances that any form of dock identification is permissible: cf the discussion in the Scottish devolution appeal *Holland v HM Advocate* [2005] UKPC D1, 2005 SLT 563 … It is … an undesirable practice in general and other means should be adopted of establishing that the defendant in the dock is the man who was arrested for the offence charged."

20. In *Holland v HM Advocate* it was not suggested that dock identifications were only to be permitted in the most exceptional of circumstances. On the contrary Lord Rodger (at para 57) stated that there was no reason that dock identifications should be regarded "except perhaps in an extreme case" as inadmissible per se either under domestic law or the European Convention on Human Rights and Fundamental Freedoms. Lord Rodger again returned to the theme of the importance of the directions that the trial judge gives to the jury about the possible dangers of dock identifications. He was at pains to point out that these dangers were not sufficiently conveyed to the jury by the rehearsal of standard directions as to the risks associated with eye-witness evidence generally.

21. The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged.

22. The Board does not consider that this was a case where the judge was bound to have concluded that the admission of the dock identification of the appellant by Ms Edgecombe would result in an unfair trial to the accused. But the discretion to admit the evidence must be exercised in light of the particular circumstances of the individual case. Relevant circumstances will always include consideration of why an identification parade was not held. If there was no good reason not to hold the parade

this will militate against the admission of the evidence. Conversely, if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence. In England and Wales and in Northern Ireland, various means have been devised whereby identification of accused persons by witnesses before trial can take place even where they are unwilling to participate in a formal parade. On that account, dock identifications in those jurisdictions are rare. In Scotland, identification evidence invariably requires corroboration and this may explain why dock identifications more frequently occur in that jurisdiction. In this case, however, counsel for the appellant had pointed out that the prosecution had not offered any explanation for the failure to hold such a parade but the judge in giving her ruling that the evidence was admissible made no reference to this. There was therefore no consideration of why an identification parade had not been held. On the hearing of the appeal to the Board, Mr Knox QC for the respondent accepted that no good reason for failing to hold an identification parade had been given.

23. There were circumstances which might well have favoured the admission of the dock identification evidence. For instance, the judge would have been entitled to decide that the following factors supported that approach: the opportunity that the witness had to observe the man that she identified as the person who made the telephone call; her claim to have seen him on a couple of previous occasions in the restaurant; her having heard him identify himself during the telephone conversation as 'Scum'; her evidence that she saw him enter a Chevy truck especially since other evidence tended to establish that he had used a Chevrolet truck on that night; and, finally, Ms Edgecombe's having pointed him out to police the day after he had made the telephone call. Arguably, these were all factors favouring the admission of the evidence. The Board considers, however, that the failure of the trial judge to address – much less consider – the reasons that an identification parade was not held means that there was not a proper exercise of her discretion. If those issues had been addressed, it is possible that the dock identification could have been properly allowed. Since they were not, its admission in evidence cannot be upheld.

24. Even if it had been possible to admit the dock identification, however, this was plainly a case where, once the evidence was admitted, it was of the utmost importance that proper directions about the dangers of dock identification evidence be given to the jury.

The judge's directions on dock identifications

25. On the issue of the absence of an identification parade, the trial judge said this:

"Another weakness that I point out to you is that no identification parade was held to test [Ms Edgecombe's] ability to identify the person she identified as the accused. So,

she identified him here for the first time. Other than, of course, the time that she said she identified him to the police the day after. But an identification parade is held to test the ability of a witness to pick out a person from a group of persons. And so that is a weakness which I point out to you."

26. Now, true it is that the judge warned the jury that they should be careful in deciding whether they could rely on Ms Edgecombe's identification evidence and that they could act on it only if they were sure that she not only told the truth but was also correct in her identification. She reminded them that the examination of this issue should take place against the background of the warnings she had already given. True it also is that she cautioned them in general terms of the dangers of relying on that evidence and emphasised that the jury should examine carefully the circumstances in which the identification was made. But none of these directions focused directly on the specific problems associated with dock identification evidence where no prior identification parade had been held. The judge did not warn the jury about the absence of opportunity for the appellant to take advantage of a possible inconclusive outcome to an identification parade nor did she tell them of the danger of Ms Edgecombe concluding that the appellant was the man that she had seen making the telephone call because he was the defendant in the trial.

27. The Board therefore concludes that the directions of the judge on the issue of the dock identification were inadequate.

The exercise of the proviso

28. So far as is material section 13 (1) of the Court of Appeal Act (Ch. 52) provides:

"13.(1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that-

(c) under all the circumstances of the case it is unsafe and unsatisfactory

... Provided that the court may, notwithstanding that it is of 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."

29. As the Court of Appeal in the present case pointed out this is in very similar terms to section 2 (1) of the Criminal Appeal Act 1968 of England and Wales, as

amended by section 44 of the Criminal Law Act 1977. The question of the application of the proviso did not arise in the Court of Appeal since it concluded that there was no merit in any of the arguments advanced on behalf of the appellant. Since the Board has reached a different view from that expressed by the Court of Appeal on the question of the dock identification of the appellant, it is necessary for us to consider whether this is a case where the proviso should be applied.

30. A summary of the principles that govern the application of the proviso is perhaps most conveniently to be found in the judgment of Lord Hope in *Stafford v The State (Note)* [1999] 1 WLR 2026 where he said at 2029:

"The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v Director of Public Prosecutions* [1935] AC 462, 482-483, *per* Viscount Sankey LC In *Stirland v Director of Public Prosecutions* [1944] A.C 315, 321 Viscount Simon L.C said that the provision assumed: 'a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.' As he explained later on the same page, where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence."

31. Applying this approach to the present case, the Board has no doubt that the proviso should be applied. Quite apart from the dock identification the evidence against the appellant was simply overwhelming. He had unquestionably borrowed the Chevrolet truck from Bastian. Not only had Bastian and Vanda Ford steadfastly asserted that this was so, he had been seen by another witness, Princess Pennerman, driving the truck at 7 am on 1 May 2002. Before he realised the significance of the blood stains found on the truck, he had admitted to Detective Sergeant Ferguson that he had borrowed it. The bloodstains found on the truck were those of Miss Conover. A call had been made to the telephone at Miss Conover's house at 1.28 am on 1 May. That telephone call indisputably came from Mandingo's restaurant. A man who identified himself as 'Scum' had indubitably made a telephone call from that restaurant at about 1.20 am on that date. It was never challenged that the appellant was known as 'Scum'. That person was seen to enter a Chevrolet truck after the telephone call. It was a white truck and he had said that he would arrive for the person to whom he was speaking on the telephone driving a white truck. His claim to have had sex with his girlfriend on the night of the killing had been destroyed by her evidence. Indeed, he even recanted on this account when he made his unsworn

statement from the dock. There is no conceivable reason that Detective Sergeant Ferguson should have concocted a story that the appellant had offered an alibi to this effect. All of these elements of the evidence were essentially unchallengeable – and, indeed, unchallenged. They created a formidable case against the appellant. That case remained unanswered at the close of proceedings. A finding of guilt was inevitable, regardless of whether the dock identification took place. No miscarriage of justice took place as a result of the appellant being convicted.

32. The Board will therefore humbly advise Her Majesty that the appellant's appeal against conviction should be dismissed.

The appeal against sentence

33. The two cardinal rules to be observed in deciding whether the death penalty should be imposed were summarised by Lord Carswell in the recent case of *Trimmingham v The Queen* [2009] UKPC 25 in the following passages from paras 20 and 21:

"20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in *Pipersburgh v The Queen* [2008] UKPC 11, and should be regarded as established law.

21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare". In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled."

34. Although the Court of Appeal in the present case delivered judgment before the decision in *Trimmingham* was given, it appeared at first to follow a broadly similar approach to the first of the two principles that Lord Carswell had enunciated, for at para 125 it said:

"125. In our view, the worst cases of murder which may call for the imposition of the most condign punishment which the law allows, would be those in which the murder is carefully planned and carried out in furtherance of another crime, such as armed robbery, rape, drug smuggling, human smuggling, drug wars, gang enforcement policies, kidnapping, preventing witnesses from testifying, serial killers, as well as the killing of innocents for the gratification of base desires mentioned by Lord Bingham. It must also be borne in mind that in some cases, persons who commit murder in the last mentioned kinds of cases, may themselves be found to be suffering from mental illness of one kind or another which may not attain the level of insanity under the McNaughten Rules, but would be sufficiently weighty as to cause justice to be tempered with mercy in their cases."

35. Ultimately, however, the Court of Appeal concluded that it should not interfere with the exercise of the trial judge's discretion and the appeal against sentence was dismissed.

36. Epithets such as "the worst of the worst" and "the rarest of the rare" can give rise to conceptual difficulties as to which cases will qualify. Murder is always a heinous crime. But it is clear that a death sentence – the ultimate and final sentence – must be reserved for the wholly exceptional category of cases within this most serious class of offence. Whatever "the worst of the worst" and "the rarest of the rare" may mean, the Board is satisfied that this case does not come within that wholly exceptional category. This was a dreadful crime. A young life was extinguished in brutal circumstances but it is not a case that can be placed along side the most horrific of murders of which, sadly, human beings are capable. There is no warrant for believing that it was planned, nor is there unmistakable evidence that it was accompanied by unusual violence, beyond that required to effect Miss Conover's killing. There certainly appears to have been sexual contact (spermatozoa having been found on a vaginal swab) but there is no clear indication that she was the victim of rape. This was, in short, an appalling murder but not one which warrants the most condign punishment of death.

37. The Board will therefore humbly advise Her Majesty that the appeal against sentence should be allowed and that the matter should be remitted to the Supreme Court of the Bahamas for the imposition of the appropriate sentence in light of the Board's judgment.

38. It is strictly unnecessary in these circumstances for us to reach a conclusion on the second ground on which the appeal against sentence was advanced *viz* that the judge should have ordered that a psychiatric report on the appellant be obtained, in order to decide whether there was any reasonable prospect of reform. No psychiatric or psychological report was commissioned. The judge indicated to counsel well in advance of the sentencing hearing that, since no issue about the appellant's psychiatric

condition had been raised, she did not consider it necessary. Counsel agreed. By the conditions that applied at the time, one can sympathise with the judge's approach to this matter. Since it is now clear, however, that, before imposing the sentence of death, a judge must be satisfied that *both* conditions stipulated in *Trimmingham* have been satisfied and since one of these is that there is no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the ultimate sentence of death, it appears to the Board that a sentencing court, contemplating the possible imposition of the death penalty, would require to have professional advice as to whether the possibility of reform does not exist.