

*Privy Council Appeal No. 62 of 2002*

**(1) Alexander Benedetto**

*Appellant*

v.

**The Queen**

*Respondent*

*and*

*Privy Council Appeal No. 88 of 2002*

**(2) William Labrador**

*Appellant*

v.

**The Queen**

*Respondent*

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL  
(BRITISH VIRGIN ISLANDS)**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th April 2003

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*Present at the hearing:-*

Lord Bingham of Cornhill

Lord Steyn

Lord Hope of Craighead

Lord Hutton

Lord Rodger of Earlsferry

*[Delivered by Lord Hope of Craighead]*

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1. The appellants Alexander Benedetto and William Labrador and two other men named Michael Spicer and Evan George went to trial on 21 April 2001 in the High Court of Justice of the British Virgin Islands charged with the murder on 14 January 2000 of Lois McMillen, whose body was found the next day on a beach in the West End district of Tortola. On 3 May 2001 the trial judge, Benjamin J, upheld submissions by Benedetto, Spicer and George

that there was no case for them to answer on the charge of murder and they were acquitted of this charge. He also ruled that the prosecution should not be allowed to proceed against them on a secondary charge that they were accessories after the fact. He rejected a submission of no case to answer by Labrador. The case against him was left to the jury. On 10 May 2001 Labrador was convicted of the murder and sentenced to life imprisonment. The Crown then appealed against the decision of the trial judge to acquit Benedetto and Spicer, and Labrador appealed against his conviction.

2. On 14 January 2002 the Eastern Caribbean Court of Appeal (British Virgin Islands) (Sir Dennis Byron CJ, Satrohan Singh and Albert Redhead JJA) allowed the appeal by the Crown against the ruling by the trial judge that there was no case for Benedetto to answer on the murder charge, set aside his acquittal and ordered his retrial on this charge. The ruling by the trial judge that the Crown was not to proceed with the charge of accessory after the fact against Benedetto, Spicer and George was upheld. The appeals by the Crown against Spicer's acquittal and by Labrador against his conviction were dismissed. On 26 June 2002 Benedetto and Labrador were each granted special leave to appeal against the judgment of the Court of Appeal against them to their Lordships' Board.

3. The case has some unusual features, and their Lordships must now set the scene for an examination of the various grounds on which the appeals for Benedetto and Labrador were presented. The facts must first be described in some detail. An account must then be given of the proceedings in the trial court and in the Court of Appeal which led to the decisions which are under appeal.

4. The following index is provided to help readers find their way through what is, regrettably, an unusually long judgment:

- (1) The facts (paras 5-11)
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- (5) The need for a warning in Labrador's case (paras 36-38)
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- (9) The conduct of the prosecutor at the trial (paras 53-57)
- (10) Fresh evidence in the Court of Appeal (paras 58-68)
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- (12) The conduct of the appeal before the Board (paras (73-76)
- (13) Conclusion (para 77)

### The facts

5. The deceased Lois McMillen had been staying with her parents at their holiday property on Belmont Point, near Smugglers Cove on the island of Tortola, British Virgin Islands (“BVI”). She was aged 34 and worked as an artist. The family home was in Connecticut in the United States of America. At about 9.30 pm on 14 January 2000 she left home after a light supper with her parents. She was driving a motor car which Mr and Mrs McMillen had rented for use during their holiday. She had been expected to return later that evening. When she failed to do so her parents became concerned for her safety. At 10 am the following day her mother Mrs Josephine McMillen called the police. They arrived about half an hour later and reported that a body of a woman had been found. The body was later identified as that of Lois McMillen.

6. The deceased’s body was found lying in shallow water on the seaside east of the police station at West End, partly in the water and partly on the shore. The car which she had been driving was found a short distance away to the west in the area of the ferry dock. Various items of clothing and other personal belongings including a can of mace, a chain and tampons were found scattered around the car and in the area where the body was found. They were identified as belonging to the deceased. There were traces of blood on the rocks nearby. An initial examination indicated that the deceased had been drowned. This was later confirmed following a post mortem examination on 18 January 2000. Particles of sand were found in her upper airways suggesting that she had breathed in sand before her death. There were incisions on her hands which indicated that she had fought off or grabbed at a sharp object such as knife. There were abrasions on her face caused by the rubbing of skin on a rough surface or the pressing of the face on a rough surface. A woman who lived in a house on the hillside near the area where the body was found said that shortly after 11.45 pm that evening she had heard a car applying its brakes suddenly and

then the sound of someone screaming for mercy for about three to four minutes. But there were no eyewitnesses to the incident, nor was anything seen or found where the body was lying or in the car to indicate who might have been responsible for the deceased's death.

7. A short distance away from the McMillens' holiday home was another holiday home called Zebra House. It too was owned by a family, the Spicer family, whose residence was in the United States. Benedetto, Labrador, Spicer and George were all staying there on 14 January 2000. A member of the US Coastguard named Jeffrey Simms, who was visiting BVI on leave, went to Zebra House that evening at about 8 or 9 pm. Benedetto, Labrador, Spicer and George were all there, but they all left at about 10 pm. A conversation between Spicer and Labrador suggested that they were going to meet somebody, and Benedetto indicated that they were going to the other side of the island in the direction of West End. Simms was asked if he wanted to go with them, but he declined.

8. On 15 January 2000 the police carried out a search of Zebra House. They found three pairs of sneakers which were wet. Labrador identified one of them as his and said that they had got wet the previous day when he had been hiking. He had a small fresh cut on the bridge of his nose. Some bloodstained napkins and fingernail clippings were also found, as well as some tampons which were similar to those used by the deceased. Benedetto had scratches on his arms and legs. All four men were then arrested on suspicion of murder. On 19 January 2000 they were charged with murder and remanded in custody.

9. An extensive search was carried out of the area, and various items which were found in the vicinity of the car and the body were subjected to forensic examination. Traces of DNA on the car keys and the key chain indicated that they had been handled by a male person, but these traces did not match the DNA samples taken from Benedetto, Labrador, Spicer and George. Semen was found on a tampon which the deceased had been wearing at the time of her death, but here too nothing was found to indicate that the semen came from any of them. The bloodstained napkins and fingernail clippings found in Zebra House and fingernail clippings and scrapings taken from each of the four men together with some articles of clothing were also tested but with negative results. There was no physical or scientific evidence which linked any of the four men to the car or the deceased's body or to the place where they were found.

10. Labrador gave a written statement to the police in which he said that on 3 January 2000 he had seen the deceased driving a vehicle which he thought belonged to her parents. He said that he and the other three men had met her at a place called the Bomba Shack on 12 January 2000, and that he seen her again the following day as they thought that they should ask her over for a drink because she had given them a lift the night before. Spicer, who had her telephone number, gave her a call and she agreed to pick them up and drive them to a place called Pussers in Sopers Hole. Benedetto stayed at home. The others were with her at Pussers until about 7.15 pm when she went home. He said that he and the others were back at Zebra House by about 11 pm to 11.15 pm. The following day, 14 January, they had all gone hiking, then went for a swim and had dinner together at Zebra House. He gave an account of his movements for the rest of the evening in which he made no mention of having had any contact with the deceased. Benedetto also gave a statement to the police in which he said that he had sustained the scratches to his arms and legs while climbing around Belmont Point.

11. Benedetto and Labrador were detained in Her Majesty's Prison in Balsam Ghut, where at first they were put together in the same cell. Another US citizen named Jeffrey Plante, who was also facing criminal charges in Tortola, was in another cell in the same prison. On 25 January 2000 Labrador was moved from the cell which he had been sharing with Benedetto to the cell in which Plante was being held. They remained together in that cell for 130 days. On 11 May 2000 Plante gave a statement to the police, which he amplified on 3 June 2000 and again on 17 July 2000. He said that while they were in the cell together he asked Labrador whether he had had anything to do with the deceased's death, in answer to which Labrador had said yes. When he asked him what had happened Labrador said that they were driving and they were arguing. She had attempted to pull into a police station, and he had prevented that. The argument got heated and out of control. He said that the deceased was drowned and that he had his foot on her neck. When Plante asked him why he had done this Labrador said it was over money and that she was no good. Plante also said that he had overheard constant arguments and disagreements between Benedetto and Labrador about who had more guilt for the crime they had been charged with. On 30 June 2000 the charges against Plante were terminated. He was released from custody but ordered to remain in BVI. In December 2000 he was charged with further offences and remanded in custody at the Road Town police station.

### The criminal proceedings in BVI

12. At the preliminary inquiry before the magistrate the prosecutor conceded that there was no evidence to justify committal on the charge of murder against Benedetto, Spicer and George. They were committed instead on charges of conspiracy to pervert the course of justice contrary to section 93(a) of the Criminal Code of the British Virgin Islands 1997, and as accessories after the fact contrary to section 318 of the Code. This was on the ground that they had concealed the murder, made false statements and interfered with potential witnesses. But the Attorney General of the British Virgin Islands subsequently decided to proceed on a charge of murder against all four men. On 27 September 2000 they were all indicted together on a charge of murder. A separate charge of murder was preferred against Labrador alone, and there was another indictment which contained the secondary charges against Benedetto, Spicer and George. In October 2000 all four defendants entered pleas of not guilty.

13. The trial took place between 2 April and 10 May 2001. For the prosecution evidence was led from the woman who had heard the sounds of the braking car and the cries for mercy, from another woman who had found the body lying on the seashore, from Mrs Josephine McMillen about her daughter's movements on the night of her murder, from Jeffrey Simms about his visit to Zebra House that same evening and from the police officers who had attended to the deceased's body and searched the crime scene. Chief Inspector George described his visit to Zebra House on 15 January 2000, the defendants' arrest and the routes that could be taken to Zebra House from the ferry dock where the car was found. Evidence was also given of the statements which Labrador and Benedetto had made to the police. Dr Francisco Landron, a forensic and general pathologist, described the results of the postmortem which he had carried out on the deceased's body on 18 January 2000. Amongst the injuries which he described was a light blue contusion at the base and anterior side of the neck and incised wounds on the right index and left index and middle fingers which suggested that she had warded off or grabbed at a sharp object such as a knife. He said that his findings were consistent with death by drowning. Dr Carey, a consultant pathologist, confirmed that the cause of death was drowning. He rejected as laughable the suggestion that it was a case of suicide.

14. Plante also gave evidence. He admitted that he was facing criminal charges and that he was being held in Road Town Police Station. He said that he had previously been an inmate at the prison at Balsam Ghut when he was facing charges for using his wife's credit card which had later been dismissed. He admitted convictions in the United States amongst which were convictions for theft for which he had been sentenced to 45 years imprisonment. He said that he had served 9 years and 10 months of that sentence, that he had a parole violation after being released and that he had been reincarcerated. He had then been released again on parole on condition that he must report to his parole officer. He admitted that he had not been reporting to his parole officer while in BVI.

15. As the trial judge was later to observe in his ruling on the submission of no case to answer, the only substantive evidence against Benedetto was to be gleaned from the evidence which Plante gave about conversations which he said he had overheard while he was in the prison at Balsam Ghut. He said that in the course of one of their frequent arguments about attorneys and costs when Benedetto and Labrador were together in the same cell Benedetto had run up to Labrador and told him that he had better pay his father back the \$350,000 that he owed him and stop acting so pious and that he, Labrador, was more guilty than he was.

16. The prosecution case against Labrador was also crucially dependent on Plante's evidence about the confession which he said Labrador made to him while they were in the same cell. He said that he had had a discussion with him on or about 19 April 2000. What he said was this (transcript, volume IV, 17 April 2001, pp 104-105):

“About two days or two days anyway before Good Friday, we were both Roman Catholic and Mr Labrador had kind of left the religion and was trying to get back in, and I had a lot of Catholic bibles and prayer books, I was doing some Lenten praying in the evening, and Mr Labrador asked me did I think God would forgive him if he had anything to do with killing someone. And I told him that I was uncomfortable with that and he ought to talk to Father Peters who was the priest here in Road Town with St. William's Church. At that point, I asked him directly, did he have anything to do with killing Lois McMillen and he answered me yes. And I asked him why. And he said that it was over money and that she was no good. And I asked him how, how

did that happen. And he said that they were driving from West End, and they were arguing, the argument got heated and that she tried to pull into the police station and he prevented that and that one thing led to another; it got out of control and that he dragged her into the water and put his foot on the back of her neck and drowned her. He then went on to say that the jeep, her jeep, was taken to the ferry landing and that he took a trail from there up to Mr Spicer's house and I believe [it] took about 45 minutes."

He also claimed that Labrador had a long knife with him in the cell and that it had been found by the prison officials (transcript, vol V, 18 April 2001, pp 41-42).

17. Plante was cross-examined at some length about his past conduct to show that he was a liar and a thief and a witness whose word was not to be trusted. Although he denied some of the things that were put to him, he made a number of admissions too. He admitted that he had been married ten times. He admitted that he had pleaded guilty to overstaying on his visa in BVI. He admitted that he had given evidence of a confession which he said had been made to him by a fellow inmate who was on trial for murder in Hawaii in 1995, and that there was a warrant out for his arrest for a parole violation in Texas as he had left the USA without permission and had failed to report to his parole officer. But he insisted that when he gave his statement to the police there was not even a remote hint of any kind of a deal and he had not been promised that he would be released from custody. He said that he expected to be released from custody (as he was, on 30 June 2000) because of advice which his attorneys had given to him about his preliminary inquiry. He said that the evidence which he had given about his fellow inmate in Hawaii had lasted for less than five minutes. He agreed that a letter had been written to the parole board because he had testified in that case. He said that he was concerned about going back to Texas until his attorneys had done their work there, but that he expected to be exonerated by the parole board.

18. In answer to questions that were put to him about the content of the confession which he said had been made to him by Labrador, he accepted that he had not mentioned in his police statement the fact that Labrador said that he had put his foot on the back of the deceased's neck when he was drowning her. He was asked whether he knew that the deceased had drowned before he made his statement. He said that he did not think that the cause of death had

been mentioned in the press and that he did not read it there anyway.

19. At the close of the prosecution case each of the defendants submitted that there was no case for him to answer. On 3 May 2001, after having heard six days of legal argument, Benjamin J upheld the submissions for Benedetto, Spicer and George and acquitted them on the charge of murder. He held that they ought not to be required to face the alternative charge that they were accessories after the fact, as that count had not been advanced as part of the prosecutor's case. They were granted bail on the charge of conspiracy to pervert the course of justice. The judge rejected Labrador's submission that there was no case for him to answer. Labrador then gave evidence on his own behalf in which he maintained his defence of alibi. Plante's parole officer, Tisha Neville, was also called to give evidence with regard to Plante's credibility. On 8 May 2001 the jury were addressed by Labrador's counsel, Mr Richard Hector QC, and then by Mr Theodore Guerra QC for the Crown. On 10 May 2001 Benjamin J delivered his summing up to the jury. They convicted Labrador of murder later on the same day.

20. Labrador appealed to the Court of Appeal against his conviction. The Crown's appeal against the decision of the trial judge on Benedetto's submission of no case to answer was presented under section 51A(1)(b) of the Criminal Procedure Act, cap 18 of the Laws of the Virgin Islands, which provides that the prosecution may make an application for leave to appeal where the accused has been acquitted by reason of a submission having been upheld by the trial judge that there is no case for the accused to answer. Section 24 of the Interpretation Act, (cap 136) of the Laws of the Virgin Islands, provides inter alia that an appellate court upon an appeal from a decision of another court in a criminal matter may, for all purposes of and incidental to hearing or determining the appeal, exercise all the powers, authority and jurisdiction of the original tribunal and, in addition, may confirm, reverse or vary the decision or determination of the original tribunal and direct the matter to be retried.

21. Labrador's appeal was presented on the grounds of (1) insufficiency and unreliability of the prosecution evidence, (2) prosecutorial misconduct, (3) errors of the judge in his summing up, (4) errors of the judge in his handling of the jury's deliberations and verdict, (5) non disclosure and (6) additional evidence. All these ground of appeal were rejected. It is not necessary to repeat

all the court's reasons for doing so. But it should be noted that it was common ground, as Singh JA observed in paragraph 14 of the Court of Appeal's judgment, that the Crown's case against Labrador stood or fell on the reliability of Plante's evidence. It was also an accepted fact that he was a confidence trickster, had numerous convictions for dishonesty, had been married ten times and had an interest to serve in giving evidence against Labrador. He was also alleged to have done a repeat performance in this case of what he had done to another cellmate in Hawaii about 6 years previously.

22. Singh JA said that he accepted that these facts would prima facie lead a trier of fact to approach Plante's evidence with extreme caution. But he did not agree that that was enough to satisfy a submission of no case to answer. He said that a jury, if properly directed, could properly come to the conclusion on Plante's evidence that Labrador was guilty of the offence charged. He also rejected a submission that the trial judge erred when he failed to direct the jury that they must treat Plante's evidence with great caution. He accepted a submission that a direction by the trial judge that the pathologist had not yet reached the conclusion that the deceased was drowned when Labrador was said to have told Plante that he had drowned her was a misdirection, but he did not accept that this had given rise to a miscarriage of justice.

23. With regard to the other grounds of appeal, Singh JA said that he was not persuaded that prosecuting counsel Mr Guerra was guilty of making prejudicial and inflammatory remarks in his address to the jury and of failing to discharge his duty as a minister of justice in other respects. Nor, despite the fact that Mr Guerra had relied on alleged lies by Labrador to bolster the Crown's case against him, was he persuaded that any injustice was done by the absence of a Lucas direction from the summing up by the trial judge. He refused to consider statements from witnesses who did not give evidence at the trial which Labrador's counsel had asked the court to look at in support of the appeal. He said that, even if it were legally permissible for the court to use this material, so much had already been evidenced by way of challenge to Plante's credibility that he was certain that a jury having heard that additional evidence would have had the same opinion about Plante's credibility as they had when they reached their verdict.

24. Singh JA noted in paragraph 120 of the judgment, in regard to the Crown's appeal in Benedetto's case, that there was no physical or scientific evidence linking Benedetto to the deceased or to the scene where the body was found. The evidence against him

consisted of scratches on his arms and legs and the evidence which Plante gave of things said by him while he was in the cell with Labrador. In his view Benedetto's words that Labrador was more guilty than he was amounted to an admission of his complicity in the crime of murder, as Plante's evidence was that this statement was made during an argument which they were having about the case. What he was alleged to have said, if accepted by the jury, could have amounted to an admission of the crime charged.

#### The grounds of appeal before the Board

25. The main thrust of the appeals by both Benedetto and Labrador was directed to Plante's evidence. Mr Fitzgerald QC for Labrador submitted that the failure by the trial judge to give an express warning to the jury to regard Plante's evidence with caution had resulted in a miscarriage of justice. He said that the trial judge had also failed to expose weaknesses in and the fallibility of that evidence and that his summing up about it was unbalanced and unfair. He took issue too with the way in which his arguments about Plante's evidence had been dealt with by the Court of Appeal. He said that the court had wrongly minimised the effect of the misdirection by the trial judge about the time when the pathologist reached the conclusion that the cause of death was drowning, and he said that the court was also wrong to refuse to admit the fresh evidence which he had sought to adduce to reinforce his arguments about Plante's evidence. He sought to add to that evidence a quantity of additional material which had been discovered subsequently. He also said that the Court of Appeal had been wrong to hold that there was no need for a lies direction. And he renewed the arguments which he had addressed to the Court of Appeal about the conduct of the prosecutor and the management of the jury by the trial judge.

26. Mr John Perry QC for Benedetto adopted Mr Fitzgerald's submissions about the general nature of Plante's evidence. He addressed his attractive, clear and concise argument simply to the content of the words which Plante had attributed to Benedetto during his argument with Labrador. He said that it was for the trial judge to say whether those words were capable of amounting to a confession of murder, and that the judge's decision that they were incapable of doing so ought not to have been reversed by the Court of Appeal.

#### The cell confessions

27. The evidence which Plante gave about the things allegedly said by Benedetto and Labrador while they were in the prison at Balsam Ghut lay at the centre of the Crown case against each of them. The circumstantial evidence, such as it was, was plainly insufficient on its own to implicate either of them in the deceased's murder. In this situation the case for the Crown stood or fell on the credibility and reliability of Plante's evidence. Without that evidence the case against them was bound to fail. This case therefore raises once again, as did *Pringle v The Queen* [2003] UKPC 9, the problem of how to deal with evidence of a confession which a prisoner is alleged to have made while in his prison cell.

28. It would be hard to imagine a witness who was less deserving of belief than Jeffrey Plante. Even those facts about his background which he was prepared to admit to while he was giving his evidence were more than enough to show that he was not to be trusted. He had numerous convictions for theft, cheque fraud and other crimes of dishonesty. They had culminated in a conviction for theft in Texas, for which he had been sentenced to 45 years imprisonment. He admitted to two violations of parole, for the first of which he had been returned to prison to serve a further period in custody. He also admitted to pleading guilty to overstaying the time allowed to him in BVI in breach of the immigration rules. It was plain that the reason for this was his desire to avoid being dealt with by the authorities in Texas for his second parole violation. He was a thief and he was a liar. The fact that he had been married ten times added further weight to the argument that he was utterly cynical in his dealings with others and totally unscrupulous. From October 1999 to June 2000, when following his statement to the police he was released from custody, he had been awaiting trial in BVI for credit card fraud. By the time he came to give evidence he was back in custody charged with offences relating to 32 bad cheques. Moreover he had already experienced the benefits of giving evidence against a fellow prisoner. He admitted to having received a thank you letter from the prosecutor in Hawaii for the evidence that he had given in the murder trial there six years earlier which had been put on his file with the parole board in Texas.

29. So, even without all the additional material which Mr Fitzgerald sought to adduce in evidence before the Board as he heaped Pelion upon Ossa in his efforts to expose every aspect of Plante's bad character, there was more than enough material at the trial to raise the issue as to whether the judge ought to have directed the jury to be cautious before they accepted his evidence. Very properly, Mr Dingemans QC for the Crown conceded that the

threshold for such a warning had been crossed in this case. His position was that every relevant issue had been explored at the trial and that, as the whole case had been presented on the basis that there was a need to be cautious, the judge had said enough to meet this requirement. In any event, he said, the Court of Appeal was best able to assess whether a warning to the jury that they should be cautious would have made any difference to the verdict which they reached after considering all the evidence.

30. As Singh JA explained in para 64 of the judgment, the Court of Appeal based its decision that what the trial judge said in his summing up was adequate on the principles which were described by Lord Taylor of Gosforth CJ in *R v Makanjola* [1995] 1 WLR 1348, 1351H-1352E. One of the issues discussed in that case was whether a judge should warn the jury that it was dangerous to convict on the uncorroborated evidence of a complainant in a sexual case or of an alleged accomplice. It was held that it was a matter for the judge's discretion whether a warning should be given, that where he decides to do so it will be appropriate for this to be done as part of his review of the evidence rather than as a set piece direction and that the court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. On that approach it is hardly surprising that the Court of Appeal felt disinclined to hold that what the judge said in this case was inadequate.

31. Their Lordships are conscious of the fact that it is undesirable to restrict the circumstances in which a judge may, as a matter of discretion, urge caution in regard to a particular witness when summing up to a jury, and the terms in which any warning should be given if the judge thinks that this is appropriate, by laying down rules as to when warnings of that kind must be given. But evidence of the kind on which the Crown relies in this case, where an untried prisoner claims that a fellow untried prisoner confessed to him that he was guilty of the crime for which he was then being held in custody, raises an acute problem which will always call for special attention in view of the danger that it may lead to a miscarriage of justice. Another example is identification evidence, where experience has shown that such evidence can have this result. As Lord Bingham of Cornhill said when he was delivering the considered opinion of the Appellate Committee in *R v Forbes* [2001] 2 WLR 1, 5B-C, para 6 it has been recognised for many years that eyewitness identification evidence, even when wholly

honest, may lead to the conviction of the innocent. So juries need to be warned of the special need for caution before convicting an accused in reliance on the correctness of such evidence, and of the reason why such caution needs to be exercised: *R v Turnbull* [1977] QB 224.

32. The problem which is presented by cell confessions is, of course, different. In the case of identification evidence it is that a wholly honest and convincing witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken, and that the value of such evidence is notoriously difficult to assess: see Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976) HC 338, para 8.1, quoted in *R v Forbes* [2001] 2 WLR 1, 5D, para 6. In the case of a cell confession it is that the evidence of a prison informer is inherently unreliable, in view of the personal advantage which such witnesses think they may obtain by providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice. They are men who, as Simon Brown LJ put in *R v Bailey* [1993] 3 All ER 513,523j, tend not to have shrunk from trickery and a good deal worse. And they will almost always have strong reasons of self-interest for seeking to ingratiate themselves with those who may be in a position to reward them for volunteering confession evidence. The prisoner against whom that evidence is given is always at a disadvantage. He is afforded none of the usual protections against the inaccurate recording or invention of words used by him when interviewed by the police. And it may be difficult for him to obtain all the information that is needed to expose fully the informer's bad character.

33. The problem as to how to deal with evidence of a cell confession is not new, as was observed in *Pringle v The Queen* [2003] UKPC 9, para 25. Writing in 1833, Alison, *Practice of the Criminal Law of Scotland*, pp 584-5 said that from a remote period in Scots practice it had been held competent to prove confessions made in jail by one prisoner to another, or which had been overheard by the turnkeys and jailers. But he referred to this as a delicate branch of the law of evidence and concluded at p 586, after a review of the authorities, that

“it is the duty of the judge to sift narrowly, by previous examination, the circumstances in which it has been obtained, and of the jury to remember that even when

presented in the most exceptional form, it is always of a suspicious character; that it often proceeds from a hoped or obtained exemption from prosecution, in consideration of the evidence so tendered, and generally flows from the most worthless of the community, who have superadded to the crimes for which they were themselves placed in confinement, the betrayal of their fellow-prisoners, who had incautiously confided to them the secrets of their lives.”

Human nature being what it is, the risks mentioned in that passage are still present in every legal system under which cell confessions are held to be admissible in evidence. As the cases of *Bevan and Griffith v The Queen* (1993) 82 CCC (3d) 310 and *Pollitt v The Queen* (1992) 174 CLR 558 show, this problem has recently been addressed in Canada and in Australia. That is the background to the examination of the problem which the Board undertook in *R v Pringle*.

34. In *Pringle v The Queen* [2003] UKPC 9, para 30 the Board recognised that it was not possible to lay down any fixed rules about the directions which the judge should give to a jury about the evidence which one prisoner gives against another prisoner about things done or said while they are both together in custody. But, as the Board said in para 31, a judge must always be alert to the possibility that the evidence by one prisoner against another is tainted by an improper motive, and the possibility that this may be so has to be regarded with particular care where a prisoner who has yet to face trial gives evidence that the other prisoner has confessed to the very crime for which he is being held in custody. The following guidance was then given:

“The indications that the evidence may be tainted by an improper motive must be found in the evidence. But this is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the jury’s attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner’s evidence.”

35. It should be noted that there are two steps which the judge must follow when undertaking this exercise, and that they are both equally important. The first is to draw the jury’s attention to the indications that may justify the inference that the prisoner’s evidence is tainted. The second is to advise the jury to be cautious

before accepting his evidence. Some of the indications that the evidence may be tainted may have been referred to by counsel, but it is the responsibility of the judge to examine the evidence for himself so that he can instruct the jury fully as to where these indications are to be found and as to their significance. Counsel may well have suggested to the jury that the evidence is unreliable, but it is the responsibility of the judge to add his own authority to these submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence.

#### The need for a warning in Labrador's case

36. The judge told the jury at the outset of his summing up that they would have to have careful regard to Plante's evidence. Later in his summing up he reminded the jury of its content, including the various admissions which Plante had made both in chief and in cross-examination as to matters bearing on his credibility. As he put it to the jury more than once, they had to have regard to whether Plante could be believed. But nowhere in his summing up did he draw the jury's attention to the various factors which would justify the inference that Plante's evidence was tainted by self interest and to their significance. It was not enough for him simply to mention them while he was going through the evidence which he had written down in his notebook. What he omitted from his summing up was the drawing together of these factors so that the inferences and conclusions that might be drawn from them were made plain for the jury's consideration when they were assessing their significance. Nor did he advise the jury to be cautious before accepting Plante's evidence.

37. The case for the Crown against Labrador was, as has been said, wholly dependent on Plante's evidence. As in *Pringle's* case, it was crucial for the steps mentioned in that case to be taken if Labrador was to receive a fair trial. The facts and circumstances pointing to the fact that the evidence was tainted are even stronger in this case. Leaving aside all the additional points that Mr Fitzgerald sought to make, there are ample grounds for treating it as highly suspicious. It was likely to lead to a miscarriage of justice unless great care was taken and it was treated with extreme caution. The omission of the necessary steps from the summing up was in itself such a fundamental defect that on this ground alone Labrador's appeal must be allowed and his conviction quashed on the ground that it is unsafe.

38. But that is not an end of the points that must be made about Plante's evidence, bearing in mind (a) the decision of the Court of Appeal that the trial judge was wrong to hold that there was no case for Benedetto to answer and (b) Mr Dingemans' submission that, if Labrador's conviction were to be set aside, his case should be remitted to the Court of Appeal to consider whether there should be a new trial.

#### Further comments on Plante's evidence

39. It is obvious that the weight to be attached to confession evidence will vary according to whether it contains within it elements of special knowledge about the crime or its circumstances which could only have been in the possession of the perpetrator. Conversely evidence of a confession which contains nothing new, as everything the accused is alleged to have said was in the public domain or was already known to the witness from other sources, will be more readily suspected as being untrue. An examination of the contents of the alleged confession is therefore an essential part of any assessment as to whether or not it is genuine. In view of the suspicion that must always be attached to evidence of a cell confession given by a fellow prisoner, the responsibility of drawing together the various factors indicating that it is a genuine confession lies with the prosecutor.

40. There is no doubt that by 19 April 2000 when Labrador was alleged to have made his confession it was common knowledge that the deceased had met her death in tragic circumstances and where her body had been found. There was evidence at the trial that the incident had been reported in the press and that Plante had read about it. But the alleged confession contained some elements which at first sight were not previously known to the witness and might have been known only to the perpetrator. Labrador is alleged to have said that he dragged the deceased into the water, put his foot on the back of her neck and drowned her. He is also alleged to have said that it took him about 45 minutes to get from the ferry landing where the car was left to Mr Spicer's house. The trial judge told the jury that the pathologist had not yet reached the conclusion that the cause of death was drowning by the date when the confession was alleged to have been made. He was wrong about this, as Dr Landron had concluded as a result of his post mortem examination on 18 January 2000 that his findings were consistent with death by drowning and this had been announced by the police press officer and given extensive press coverage. This was, in the circumstances, a serious misdirection as its effect was to

suggest that there was here an element of special knowledge which the jury would be entitled to take into account in their assessment of whether or not the confession was genuine.

41. No attempt was made at the trial to show that by the time when the confession was made the fact that the deceased had been drowned had already been reported in the newspapers. Plante claimed that he did not know that the deceased had met her death by drowning before he gave his statement to the police. He sought to evade the issue by saying that, while he had seen newspaper articles, he was not familiar with everything that had been published. Mr Fitzgerald sought to make good this omission in the Court of Appeal by producing copies of various newspaper articles, including one which appeared in the BVI Beacon on 16 March 2000 in which it was stated that the deceased had died of unnatural causes consistent with drowning. For reasons that their Lordships will have to examine later (see para 69 below), the Court of Appeal was unwilling to look at this material. It was, of course, evidence that was available at the date of the trial. But it has a bearing on the question whether Plante's evidence was of such a quality that it would be in the interests of justice that there should be a new trial. Their Lordships are satisfied that it was already common knowledge that the deceased had been drowned by 19 April 2000 when, according to Plante, a confession that he had drowned her was made to him by Labrador.

42. Then there is the detail which Labrador is alleged to have mentioned, that he put his foot on the back of the deceased's neck as he drowned her. The prosecution did not attempt to relate this to any of the findings at the post mortem of the deceased's injuries. No mention was made of any bruising to the back of her neck. But there was mention of bruising at the base and anterior side of the neck. This suggests that the pressure was applied to her neck from the front and not the back, and that the detail which Labrador is alleged to have given was inaccurate. Dr Landron said in cross-examination that there were no injuries to the neck to indicate that the deceased had been drowned by putting a foot on the back of her neck. There was also a significant omission from what Labrador is alleged to have said. No mention was made of the use of any sharp instrument such as knife which had caused the incised injuries to the deceased's fingers. As for the estimate of the time taken to walk from the ferry landing to the Spicer's house, this was unsurprising to anyone who was reasonably familiar with the locality.

43. Nothing in the alleged confession can be said therefore to reveal special knowledge of facts which Plante could have learned about only from the perpetrator. Plante's attempts to persuade the jury that he was unaware that the deceased was drowned are obviously at variance with what was already common knowledge in Tortola. This suggests that he was trying to cover up the fact that he had invented the confession. The impression that it was invented is reinforced by the fact that there was no evidence to support the use of a foot on the back of the deceased's neck and that no mention was made of any sharp instrument.

44. There were a number of other passages in Plante's evidence where it is now plain that he was lying. Their Lordships do not find it necessary to explore in each and every detail all the points to which Mr Fitzgerald attached importance in the course of his argument. The following examples will suffice:

(1) He claimed not to remember the evidence which he gave against his fellow prisoner in Hawaii, and then suggested that it was so trivial that it took only about five minutes (transcript, volume V, 18 April 2001, p 98-99). A transcript of his evidence, which was produced at the trial, extends to 32 pages of evidence and legal argument. It indicates that his evidence, which was similar in some respects to that which he gave against Labrador, took at least thirty minutes.

(2) He lied about his past convictions. For example, he denied any convictions while in BVI (transcript, volume IV, 17 April 2001, pp 79-80). In fact he had been convicted of overstaying his landing rights in BVI for which he received a sentence of three months imprisonment on 12 October 1999. He stated that the only convictions which he had were in Texas (*ibid*, p 80). But he had also been convicted in Florida in 1964 for issuing worthless cheques. He denied that he had been convicted for passing a bad cheque in 1993 (*ibid*, p 158). In fact he was convicted of three such offences in 1993, and his parole was revoked in the same year for further offences of dishonesty. He admitted only one parole violation leading to his reincarceration. His record shows that his parole was revoked twice, in 1987 and again in 1993.

(3) He claimed several times that he had been given permission by his parole officer to leave Texas in 1999 to visit BVI (eg transcript, volume IV, 17 April 2001, pp 164, 169). He rejected the suggestion that he had a motive to lie in order to ingratiate himself with the authorities in BVI. He said that he had nothing to fear if he were to return to Texas (transcript,

volume V, 18 April 2001, pp 27-31). This was not true. When he was returned to Texas in December 2001 his parole was revoked for, among other reasons, leaving the State without permission.

45. For these reasons and in the light of further material relating to his parole history referred to in paragraph 14, their Lordships have concluded that no value whatever can be attached to Plante's evidence. He has been shown to be a compulsive liar. His evidence is so lacking in credibility as to make it impossible to regard any conviction on his evidence alone as safe. This conclusion has a direct bearing on the question whether it is in the interests of justice that there should be a new trial in Labrador's case. The Board will normally leave it to the local court to decide whether or not it is in the public interest that there should be a retrial. But in this case all the relevant factors have been fully deployed in argument before the Board. In the light of what is now known about Plante and all the defects that have been revealed about the content of his evidence their Lordships are in no doubt that it would be wholly contrary to the interests of justice for Labrador to have to face a new trial based, as it would have to be, wholly on Plante's evidence.

#### The case against Benedetto

46. Benedetto is alleged by Plante to have said to Labrador in the course of an argument while they were together in the same cell that he had better pay his father back the \$350,000 that he owed him and stop being so pious and that he, Labrador, was more guilty than he was. But, as Mr Perry pointed out, Plante accepted in cross-examination that he could not remember the exact words which were spoken by Benedetto. The words which Plante attributed to him were in indirect speech, so they were no more than his interpretation of what was being said. Moreover, although Plante said that this was one of many arguments about the charge of murder which they were both facing, the exact context in which the words were uttered is unclear. Nor is it clear what, if anything, Benedetto was admitting to. At best for the Crown, his remark is open to the construction that he was accusing Labrador of having something to do with the murder. But it is not possible to regard it as a confession by Benedetto that he participated in any of the acts which led to the deceased's death. In their Lordships' opinion the trial judge was right to hold that it would not have been open to the jury to find Benedetto guilty of the murder on this evidence.

47. The Crown contend that Benedetto's appeal should nevertheless be dismissed as he is in the position of an appellant who has escaped or absconded. This submission is made in the light of the events which have happened since he was acquitted by the trial judge on the ground that there was no case for him to answer on the murder charge. He was granted bail in respect of the charge of conspiracy to pervert the course of justice which was still outstanding against him. He then left BVI and returned to his home in New York. The Crown's appeal against the decision that there was no case for him to answer on the murder charge was heard in his absence. It was concluded on 12 October 2001, and the Court of Appeal's judgment was delivered on 14 January 2001. On 22 March 2002 he failed to surrender to his bail and attend court for a hearing on the charge of conspiracy to pervert. A warrant was issued for his arrest, but it has not been executed against him as he is still in the USA.

48. The Court of Appeal has a discretion, in exceptional circumstances, to hear an appeal in the appellant's absence when he has escaped from custody: *R v Gooch* [1998] 2 Cr App R 130. But the European Court of Human Rights has held that a restriction on the right of an appellant to pursue an appeal where he has absconded is justifiable, so long as it does not impose a burden on the appellant which is disproportionate: *Karatas v France* (2002) 35 EHRR 37; *Papon v France*, (unreported) (Application No 54210/00) 25 July 2002, para 92. The question is whether Benedetto is to be treated as having absconded for the purposes of this appeal, bearing in mind that it relates to the charge of murder of which he was acquitted by the trial judge and not to the charge for which he was granted bail and which is the subject of the warrant for his arrest.

49. The charge of conspiracy to pervert the course of justice for which Benedetto was on bail is plainly collateral to the murder charge. He is not in breach of any order of the court relating to the murder charge, which is the only subject of this appeal. As has been noted, the appeal by the Crown against his acquittal of the charge of murder by the trial judge was heard in his absence by the Court of Appeal. In these circumstances it would be disproportionate for him to be denied the right to appeal against the Court of Appeal's decision to quash that acquittal and order a retrial on the ground that he is breach of the court's order on another matter. Their Lordships reject the Crown's objection to his appeal which, it is fair to say, Mr Dingemans did not put at the forefront of his argument. In their opinion his appeal too must be allowed, as

they are satisfied that there was no case for him to answer in the light of the content and nature of Plante's evidence.

The need for a lies direction

50. The trial judge omitted to give a Lucas direction in the course of his summing up about the lies that were alleged to have been told by Labrador: *R v Lucas* (1981) 73 Cr App R 159. Relying on *R v Burge and Pegg* [1996] 1 Cr App R 163, the Court of Appeal held that, while it might have been more prudent for the trial judge to have given the Lucas direction, it depended on the circumstances whether this was necessary and that in this case no injustice was done by the absence of such a direction. In *Burge and Pegg* the Court of Appeal said that, where a direction requires to be given, it will normally be sufficient if it makes two basic points. The first is that the lie must be admitted or proved beyond reasonable doubt. The second is that the mere fact that the defendant lied is not of itself evidence of guilt since defendants may lie for innocent reasons, so a lie can only support the prosecution case if the jury is sure that the defendant did not lie for an innocent reason. Mr Dingemans accepted that the trial judge omitted to make the first point, but he said that there was enough in the summing up to leave the jury in no doubt about the second.

51. The lies that were attributed to Labrador were, on one view, relatively trivial. They were to be found, for the most part, in statements made by him out of court. One example was his denial when he was interviewed by the police that any of his co-defendants had a relationship with the deceased. It was put to him in cross-examination that he was aware that Benedetto was on intimate terms with her, and he appeared to concede that he had not told the whole truth about this to the police. Another was his description of himself as an investment banker in an affidavit for habeas corpus which had been filed in the High Court, which he admitted under cross-examination was not true. But the jury were invited to attach a great deal of importance to these lies by the prosecutor. Mr Guerra began his speech by asserting that Labrador was a stranger to the truth and that the jury could not have regard to anything that he had told them. Having admitted that the evidence for the prosecution was "now small", he then devoted more than half of his speech to an attack on the defence case. Much of what he said was directed to his assertion that Labrador was telling lies. It is plain that he was attempting to use these lies in support of the Crown case. As he put it:

"I will deal first with the evidence for the defence and having got that out of the way, I will then deal with the evidence of

Jeffrey Plante and show you where out of the mouth of Labrador has come the support to what Jeffrey Plante has told you.” (Transcript, Volume VIII, 8 May 2001, pp 47-48)

He ended his speech by relying once again on alleged lies by Labrador in support of his assertion that the Crown had proved that he was guilty.

52. The prominence which these alleged lies were given in the presentation of its case by the prosecution was such that a Lucas direction was plainly needed in this case. Mr Guerra did say to the jury that they should not find Labrador guilty because he had told lies, but it was for the trial judge to instruct the jury as to how to deal with this part of the Crown’s argument. He confined himself to a brief direction at the end of his summing up of the defence case. He said that if at the end of the day the jury did not believe Labrador, maybe because they felt that he was telling lies, that was not a ground on which they could convict him. That fell far short of what was required in this case. Their Lordships do not need to decide whether the omission of a Lucas direction led to a miscarriage of justice in Labrador’s case in view of the conclusions which they have already reached about Plante’s evidence. But they are satisfied that a Lucas direction was required and that its omission was a significant defect in the summing up.

#### The conduct of the prosecutor at the trial

53. Mr Fitzgerald drew attention to various aspects of the way in which the case for the prosecution was conducted by Mr Guerra in support of his argument that Labrador did not have a fair trial. He said that Mr Guerra cross-examined Labrador in an oppressive manner and that he made an unjustified attack on Tisha Neville, a parole officer from Texas who had been called to give evidence as to Plante’s credibility. He also said that in his address to the jury Mr Guerra used terms which were xenophobic and inflammatory, referred to inadmissible evidence and made improper attacks on the credibility of Labrador. Here again, in view of the decision which they have already reached, their Lordships do not need to decide whether these complaints, if justified, led to a miscarriage of justice. But there are various aspects of the way in which Mr Guerra conducted himself which call for comment as they were wholly at variance with the way in which prosecuting counsel, as a minister of justice, should behave.

54. In *Randall v The Queen* [2002] UKPC 19; [2002] 1 WLR 2237, 2241G, para 10(1) the Board drew attention to the fact that the duty of prosecuting counsel is not to obtain a conviction at all costs but to act as minister of justice. Reference was made to the description of the prosecutor's role by Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 Can CC 263, 270 which is so much in point in this case that it is worth repeating again:

“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

This is not to say that a standard of perfection is expected. In practice this is, no doubt, unattainable. But the defendant has an absolute right to a fair trial, as the Board explained in *Randall v The Queen* [2002] 1WLR 2237 at p 2251B-D. If the departure from good practice is so gross, or so persistent or so prejudicial as to be irremediable, an appellate court will have no choice but to hold that the trial was unfair and quash the conviction.

55. Their Lordships have very much in mind the point which Singh JA made in para 35 of the judgment of the Court of Appeal that the principles which determine the proper role of the prosecutor have to be applied in the context of his own environment. He said that juries need to be spoken to in a language and style that they will understand, and there was nothing wrong with a prosecutor delivering a robust but respectful speech. That is true. But there is an obvious difference between a robust speech and one which is xenophobic, inflammatory and seeks to make use of inadmissible and irrelevant material. Regrettably, some parts of Mr Guerra's speech fell plainly into the latter category.

56. The following examples (transcript, volume VIII, 8 May 2001) will suffice to demonstrate this point:

(1) He devoted much of his speech to an attack on the credibility of Labrador and his witness, Tisha Neville. There was more than a hint of xenophobia in the methods which he used to develop this attack, as he sought to align himself with the local jury against these American witnesses: eg “We who have been brought up in the British tradition of justice” will not tolerate any disrespect by anyone “no matter who it may be or where they come from” to the laws and morals of “our country” (p 45); referring to Tisha Neville: “This woman is playing with our grey matter. She figure that they can come from their big country and fool people here” (p 91); referring to Labrador’s statement, in answer to a question from the jury, that he was not angry when he discovered that Plante had given the police a statement: “If that is the American way, we in the West Indies know it is different” (p 96); asserting that it was the jury’s job to decide whether Plante was speaking the truth, “Not any American witness who has her own agenda” (p 102).

(2) He began his attack on Labrador’s credibility by referring to an incident during the trial when the judge had occasion to rebuke Labrador’s sister for gesturing to him while he was giving evidence (pp 45-46). She denied that she was gesturing, but the judge insisted that she was. Having reminded the jury of this exchange, aligning himself once again with the jury against the Americans by using the words “we” and “our”, he said: “We have respect for our judges and no one is going to come and tell our judge he is a liar. And later on I am going to show that lying is a natural tendency of the Labradors.” This remark, which was the subject of a rebuke by the trial judge, was improper. Labrador’s sister was not a witness and the exchange between her and the judge was not part of the evidence.

(3) He developed his attack on Labrador by suggesting that he was disloyal to his friends (p 55) and unfeeling and cold-blooded towards them (p 60), asserting that he was “taking care of numero uno” (p 70) and observing, with reference to the fact that he agreed to be treated separately from the other accused: “with a friend like that who needs enemies?” (p 68). None of these remarks was directed to his credibility. They were designed simply to prejudice the jury against him.

(4) He attacked the evidence which Tisha Neville gave about Plante’s parole status and the motive which he had for lying, by suggesting that she had been fed with information by the defence and was part of “the Labrador defence team” (p 87).

He suggested that the transcript of the trial in Hawaii, to which Tisha Neville referred to show similarities between the evidence which he gave against his fellow prisoner at that trial and the evidence which he had given against Labrador, was a concoction (pp 81-91), that it had been “manufactured” (p 86) and that she had “come here” to the West Indies “to pull wool over our eyes.” He described her as “a woman who cannot tell the truth about anything; a woman who uses all these subterfuges” (p 92) who “had her own agenda” to say that she did not believe Plante (p 102). His sweeping denunciation of her had no foundation in fact. He had no evidence that the transcript was false. It has been subsequently been shown to have been genuine (see para 59 below).

57. Singh JA said at para 43 that he could not discern any form of xenophobia in Mr Guerra’s remarks and that at para 55 he did not see that in any other respect there was misconduct. The views of the Court of Appeal on a matter of this kind are entitled to great weight but, having studied the transcript carefully, their Lordships cannot agree with this assessment. Issues of credibility lay at the heart of this trial. The prosecutor’s failure to deal with them fairly reinforces the decision which their Lordships have already reached that Labrador’s conviction was unsafe.

#### Fresh evidence in the Court of Appeal

58. Mr Fitzgerald said that the Court of Appeal was wrong to refuse to admit the evidence which he sought to adduce as fresh evidence in order to reinforce his argument about the unreliability of Plante’s evidence. As has already been said (see para 29 above), there was already more than enough material at the trial to raise the issue whether the judge ought to have directed the jury to be cautious before they accepted his evidence. But there was some significant additional material which the Court of Appeal refused to consider. Some important points of principle are raised by that refusal.

59. Before the hearing of his appeal against conviction Labrador issued and served two summonses for leave to adduce further evidence at the hearing in the Court of Appeal. The first of these, dated 3 October 2001, was supported by an affidavit of Labrador’s local counsel. It related to three items of evidence. First was a notarised declaration by Melissa Noble, a court reporter in Hawaii, exhibiting and verifying the transcript of the trial in Hawaii at which Plante had given evidence of a confession allegedly made by

a fellow-prisoner. The ground given for this application was to contradict Plante's unanticipated evidence on the length of his evidence at the trial in Hawaii (see para 44 (1) above) and to rebut the attack made by Mr Guerra in his closing speech on the authenticity of the transcript (see para 56(4) above). Second was a statement by Edward Smith, the Deputy Superintendent of HMP Balsam Ghut, to the effect that prison records did not indicate the finding of a knife in Labrador's cell. The ground given for this application was to contradict Plante's unanticipated evidence that a knife had been found there (see para 16 above). Third was a statement by Kevin Jenkins, the prosecutor at the Hawaii trial, giving as his reason for not calling Plante as a witness at the retrial in Hawaii that he had not found Plante to be a credible witness but explaining that this was not the reason he had given Plante for not calling him on the second occasion. The ground given for this application was to rebut the attack made by prosecuting counsel in his closing speech on the bona fides of Trisha Neville, who had testified to Plante's habitual mendacity (see para 56(4)).

60. The second summons, dated 8 October 2001 (the first day of the Court of Appeal hearing), related to four items of evidence. It was again supported by affidavit. First was a series of newspaper articles published following the murder of the deceased. These referred to drowning as the cause of death and so were relied on to contradict the trial judge's suggestion to the jury in his summing-up that Plante had learned of the cause of death from Labrador (see para 40 above) at a time when the pathologist had not formed an opinion. Second was Plante's deposition, relied on for discrepancies between it and the evidence given by Plante at his trial. Third was a statement by Father Brannelly, a Roman Catholic priest, stating that he had first met Labrador in prison in January 2000. This was relied on to contradict Plante's evidence that at the time of Labrador's confession in April 2000 he (Plante) had offered to introduce Labrador to this priest. Fourth was material from Plante's prison file, relied on to show that Plante had made allegations against fellow-prisoners and prison officers which had been investigated and found to be false.

61. The adducing of new evidence on appeal against a criminal conviction in BVI is governed by the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80), which contains two relevant powers. The first is section 42 which provides:

“Without prejudice to the generality of the preceding section of this Ordinance (supplementary powers), where evidence is tendered to the Court of Appeal under that section, the Court of Appeal shall, unless they are satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its power under that section of receiving it if

–

(a) it appears to them that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and

(b) they are satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it.”

As is evident, this section imposes a mandatory duty on the Court of Appeal to receive fresh evidence if, in respect of that evidence, it finds both of the conditions in (a) and (b) to be satisfied. This provision is in terms identical to those of section 23(2) of the (English) Criminal Appeal Act 1968 as originally enacted, which itself reproduced section 5 of the Criminal Appeal Act 1966. Until then there had not been a mandatory duty to receive fresh evidence on appeal in any circumstances, although a discretionary power to receive fresh evidence had existed since enactment of section 9 of the Criminal Appeal Act 1907.

62. The mandatory duty to receive fresh evidence imposed by section 42 in cases where the specified conditions are met is supplementary to a wider discretionary power. This is found in section 41 of the Ordinance which, so far as relevant, provides:

“For the purposes of an appeal in any criminal cause or matter, the Court of Appeal may, if they think it necessary or expedient in the interest of justice –

(a) exercise any or all of the powers conferred by section 32 on the Court of Appeal ...”.

For present purposes the relevant power conferred by section 32 is found in paragraph (c) of that section:

“if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not a compellable witness, ...”.

63. Thus, under these provisions, the court has a discretionary power to receive fresh evidence, to be exercised when the court

thinks it necessary or expedient to do so in the interest of justice. The provisions are similar in effect to section 23(1) and (3) of the Criminal Appeal Act 1968 as originally enacted, the ancestry of which can be traced back to section 9 of the 1907 Act.

64. Exercise of the court's discretionary power to receive fresh evidence has been the subject of consideration in a number of cases which include *R v Lattimore and Others* (1976) 62 Cr App R 53 at 55-56; *R v Criminal Cases Review Commission, Ex p Pearson* [2000] 1 Cr App R 141 at 146-148; *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72, 75F-79E, paragraphs 6-11. It is unnecessary to cite from those cases or to repeat the discussion which is found in them. There are however two points which call for emphasis.

65. First, the integrity of jury trial depends on the presentation of a criminal defendant's full case at trial to the jury as the body charged with the all-important task of returning a verdict of guilty or not guilty. Those representing a defendant should take all reasonable and practicable steps to gather and present at the trial all the evidence needed to present his defence. It is never legitimate to neglect to take reasonable and practicable steps to gather and present evidence at the trial, still less to hold back evidence available to be adduced at trial, in the expectation or calculation that it can be adduced on appeal if need be. But, secondly, the discretionary (and, where it applies, the mandatory) power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice. The court's discretionary power is one to be exercised if, after investigation of all the circumstances, the court thinks it is necessary or expedient in the interest of justice to do so. While it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence. A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.

66. An application to adduce fresh evidence on appeal must always annex (as was done here) either the documentary evidence or a statement of the evidence which it is sought to adduce. The court's first duty is to read it. If, having done so and listened to any submissions made about it, the court considers the evidence on its face to be obviously unworthy of belief, or considers that the evidence would afford no ground for allowing the appeal even if accepted, the court would be very unlikely to admit it: see *R v Sales*

[2000] 2 Cr App R 431 at 438; *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72, 78H-79A, paragraph 10. Although these decisions were based on section 23(2)(a) and (b) of the Criminal Appeal Act 1968 as it now stands, the approach commended is in truth no more than common sense.

67. Cases arise in which the evidence which it is sought to adduce is a document which there is no reason to question or is a statement which appears to be not only capable of being believed but to be correct and incontrovertible. In such cases a responsible prosecutor may resist admission of the evidence on grounds of its irrelevance or lack of probative value, but he will not resist its receipt as evidence if the court rejects his objections on those grounds.

68. Cases also arise in which the evidence which it is sought to adduce appears on its face to be capable of being believed but is challenged by the prosecutor as false, or incomplete, or misleading. If, in such a case, the evidence is a document, the court may wish to consider other related documents. If it is a witness statement, the court may be willing to receive the evidence only if it has heard the witness examined and cross-examined. The court may in such instances find it convenient to defer a final decision on whether to receive the evidence until after it has heard the witness: *R v Sales* [2000] 2 Cr App R 431 at 438; *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72, 79D-E, paragraph 11.

#### Whether the fresh evidence should have been rejected

69. Neither the summonses for leave to adduce fresh evidence nor the affidavits sworn to support them identified the sections under which the application was made in this case. The skeleton argument submitted on Labrador's behalf at the appeal hearing did not address the fresh evidence in detail, although reference was made to section 41(a) in relation to the statement by the Deputy Superintendent of the prison. No reference was made to section 42. When Mr Fitzgerald, representing Labrador, invited the Court of Appeal to receive fresh evidence at the appeal hearing he did so in very broad and unspecific terms, and the court did not react favourably.

70. The Court of Appeal rejected Mr Fitzgerald's application for leave to adduce fresh evidence for reasons given by Singh JA in paragraphs 100-106 of the judgment:

“100. During the hearing of this appeal, Counsel for Labrador asked this Court to look at statements of numerous

witnesses who gave no evidence at the trial, in order to arrive at a just decision in this matter. These statements were all unsworn and untested. As I understood Mr Fitzgerald, he did not intend calling these witnesses, he was not reopening the case, and he was not asking for a retrial. His sole purpose was for us to use the statements, as they were, against the case for the Crown.

101. I have never before encountered this procedure as suggested by Mr Fitzgerald. I know that the Privy Council, within recent times, have been encouraging a procedure for the production of statements at the hearing of appeals before that body. However, if I am not mistaken, when they do so, they would purport to act under the fresh evidence rule and they would then refer the matter to the inferior tribunal to have the witnesses testify and the evidence tested. I do not subscribe to the view that a Court of Appeal could arrive at a just decision, and quash a conviction, relying on unsworn and untested statements, as submitted by Mr Fitzgerald. To accede to such a submission would be to create a procedure of horrendous magnitude.

102. On this question of doing justice, I may have been persuaded by this argument of learned Queen's Counsel, if what he sought to do was e.g. to produce a legally authenticated official document, say, Plante's record of previous convictions, had Plante not admitted his dishonest and criminal "degrees". It could then have been successfully argued that the admission in evidence of such a document, which was legally permissible without more, would have assisted in determining the overall justice of the case. But I do not see how that end could have been achieved by asking us to look e.g. at two conflicting unsworn and untested statements of the Hawaii prosecuting authorities, as to why Plante was not called as a witness at the new trial of the accused there. That is a virtually impossible task and, as earlier mentioned, a bad precedent. Justice is a two way street.

103. Also, Plante testified that Labrador had a knife in the prison cell and as a result he was afraid of Labrador. Mr Fitzgerald asked us to look again at an unsworn and untested statement from the Prison Authorities, which stated that they found no knife in the cell. In my view, merely looking at that statement would not assist. It was not evidence in the case.

In any event, the statement is not unequivocal. The fact that no knife was found did not necessarily mean that none was there.

104. Mr Fitzgerald advised the Court that he was not seeking to adduce fresh evidence as contemplated by the fresh evidence rule. He said this despite what he said in his skeleton arguments that he was inviting the Court to admit the evidence pursuant to S.32 of the West Indies Associated States Supreme Court Virgin Islands Act Cap 80.

105. The provisions of this Act do not admit of the procedure suggested by Mr Fitzgerald. I do not propose to use the statements in my determination of this matter. In any event, their proposed probative value related only to Plante's credibility which was within province of the jury and quite unsuited for this Court. In my opinion, even if it were legally permissible for us to use them, my conclusion would have been, that so much having already been evidenced by way of challenge to Plante's credibility, that I am certain that the jury hearing this additional evidence, would, having regard to the other circumstances of the case, have had the same opinion of Plante's credibility as they had at verdict stage.

106. I would therefore refuse the application. Diligence of counsel for Labrador at his trial could have had that evidence displayed before the jury. No reasonable explanation has been proffered to this Court why the evidence was not given at the trial. [See *Williams Cardinal v R.* (1998) 53 WIR 162].

71. The Board has considerable sympathy with the Court of Appeal, to whom the fresh evidence issues were not at all clearly presented. But certain of the paragraphs quoted above call for comment:

(1) It is not a conclusive objection to the reception of a statement that it is unsworn and untested. It may be obviously correct and there may be no need to test it. There are also reported cases in which police officers, on whose credibility a conviction depended, are subsequently shown to have been guilty of such gross misconduct in other cases as to undermine the safety of any conviction based on their evidence: *R v (Maxine) Edwards* [1996] 2 Cr App R 345; *R v Campbell* (14 October 1999, unreported, CACD, No 99/0642/W5). In such a case it may be enough for the

court to be told of the later misconduct, without any need to enquire into the officers' conduct in the particular case.

(2) Where the evidence of witnesses was not obviously correct and was challenged by the prosecution, the court would be rightly reluctant to receive the evidence unless the witnesses were called. But it was not necessary for Mr Fitzgerald to reopen the case save to the extent inherent in any appeal. Nor was it incumbent on him to seek a retrial: he was entitled to seek to adduce the fresh evidence and to ask that the conviction be quashed in the light of it; only on the quashing of a conviction would the question of retrial arise (*R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72, 83H-84A, paragraph 20).

(3) Having read the transcript of the appeal hearing, the Board cannot accept that "Mr Fitzgerald advised the Court that he was not seeking to adduce fresh evidence as contemplated by the fresh evidence rule" (para 104). It appears that this is exactly what Mr Fitzgerald was seeking to do.

(4) While there might well be other grounds for resisting reception of witness statements relating to Plante's credibility, it was not a good ground for rejecting them that "their proposed probative value related only to Plante's credibility which was within [the] province of the jury and quite unsuited for this Court" (para 105). The credibility of Plante was the central issue in the trial, and it is true that the jury had ample grounds for questioning it. But it would be a very extreme proposition that because the jury accepted Plante's evidence despite ample reason to doubt it they would necessarily have accepted it no matter what additional grounds there were to doubt it.

(5) If an application to adduce fresh evidence is to be rejected on the ground that the evidence could and should have been adduced at trial, it is usually necessary to relate that conclusion to the particular evidence in question and to the stage at which the defence should reasonably have appreciated the need to adduce it.

72. Since the Board has already concluded on other grounds that Labrador's appeal should succeed, it is unnecessary to examine all the items which it was sought to adduce at the hearing in the Court of Appeal. Their Lordships consider that in the case of some of those items the court was right to reject the fresh evidence. Brief comment will suffice on two important items of evidence which, in their view, ought to have been admitted:

(1) Melissa Noble's verification of the Hawaii trial transcript. There was in truth no reason to question the authenticity of this transcript when it was produced at trial. Despite this, Mr Guerra found it possible to suggest to the jury that the transcript had been "manufactured" (transcript, volume VIII, 8 May 2001, page 86), that Miss Neville who had received the transcript was "part of the Labrador defence team" (*ibid.*, page 87) and that she was "part of a plot to undermine Plante's evidence" (*ibid.*, page 88). In his summing-up to the jury, the judge left open the question whether the transcript was genuine (pages 89, 90). The notarised statement by Miss Noble verifying the transcript left no room for reasonable doubt as to its authenticity. This had become an issue of some significance, less because of the length of Plante's evidence at that trial (although clearly this was longer than he suggested) than because of the attempt made to use doubts about the authenticity of the transcript as a ground for impugning the otherwise damning evidence of Miss Neville. Unless some good reason were given for not receiving Miss Noble's statement in evidence, and none was offered to the Board, this statement should have been received and its significance weighed in the overall consideration of the case.

(2) The newspaper articles. There was no question about the authenticity of the articles relied on, which showed that drowning had been publicised as the cause of death of the deceased from as early as 6 February 2000. If Plante had read any of these newspaper articles, they would have provided good ground for challenging any submission that Plante had not known drowning was the cause of death until Labrador had told him. If, as the judge suggested to the jury (summing-up, page 85), the pathologist had not himself concluded that drowning was the cause of death at the time of Labrador's alleged confession, this was an apparently compelling point in Plante's favour. It was not, however, a point on which any reliance was placed in the prosecutor's opening speech, and the defence were not thereby alerted to the need to explore other sources from which Plante could have acquired knowledge of the cause of death. As it was, some questions were asked of Plante in cross-examination about his reading of the newspapers: he said he had kept up with the press "somewhat" but did not think the cause of death was in the papers and had not read it there anyway (transcript, volume V, 18 April 2001, page 126), and later that he had had familiarity with what was published about the case, although "not everything, certainly" (*ibid.*, page 156). Had the defence appreciated that significance would be attached to Plante's knowledge of drowning as the cause of death as evidence of his credibility, it would seem overwhelmingly probable that the

newspaper articles which it was sought to adduce in evidence in the Court of Appeal would have been put before the jury and that Plante would have been cross-examined upon them. In these circumstances it would have been hard to escape the conclusion that the interests of justice would be best served by receiving this evidence on appeal.

#### The conduct of the appeal before the Board

73. Before the Board, Mr Fitzgerald sought to rely on a considerable body of material which was never before the jury and was not the subject of the summonses issued in the Court of Appeal. This included a 63 page bundle described as “Further material disclosed by the Respondent” and a 112 page bundle described as “Fourth affidavit of Sean Murphy”. These bundles, together with further written submissions on the admission of fresh evidence and a folder containing additional materials, were handed up by Mr Fitzgerald in the course of his argument on the first day of the hearing before the Board. It is unnecessary to review this material in detail, since much of it is of little probative value, some of it is contentious and much of it was served on the Crown far too late to permit proper investigation and a considered response. The Board considers that, subject to one exception, this material should not be received.

74. The exception relates to documentary material received by the defence from the Texas Department of Criminal Justice. It relates to Plante’s parole history, of which some detail dating back to 1984 is given. It is relevant to the issues arising on this appeal in two ways. First, it shows that Plante relied on his role as a prosecution witness in this case to mitigate the complaint of parole violation made against him. Second, it records the case advanced by Plante at the parole revocation hearing held in December 2001. His evidence was recorded in these terms:

“Testimony of RELEASEE: RELEASEE was a witness in a murder trial in the British Virgin Islands. He was under a court order to remain in the Virgin Islands and when the court order expired, the Crown Counsel Terrance WILLIAMS came up with these charges so that RELEASEE would remain there to testify in the murder trial. RELEASEE was never brought before a Judge and he never pled guilty to the charges. RELEASEE was held for 60 days but he was never sentenced.”

This evidence was in direct conflict with the known facts. It supports the defence contention that Plante was a man willing to lie whenever he thought it advantageous to do so. There is no reason to question the authenticity of this material, which was referred to at the hearing of the petition for special leave. In a case where the motivation and credibility of Plante are the crucial issues, it would have been appropriate to receive and take account of this material had it been necessary to do so in order to decide these appeals. As it is, it reinforces the Board's view (see para 45) that it would not be in the interests of justice that in Labrador's case there should be a new trial.

75. Mr Dingemans voiced a courteous but strong complaint at the late and piecemeal delivery of material on which the appellant proposed to rely. The Board considers this a justified complaint. Such a procedure is embarrassing and potentially prejudicial to the other party, as it impedes the preparation and presentation of its case. It also makes it difficult for the Board to do justice to the argument, as it is virtually impossible in the course of the hearing for so much new and previously unseen material to be assimilated. It is necessary that there be a fair and workable procedure.

76. Rule 70 of the Judicial Committee (General Appellate Jurisdiction) Rules requires the parties' Cases to be lodged and the appeal to be set down by the "closing date". This is normally between two and four weeks before the beginning of the term in which the appeal is provisionally listed to be heard, subject to any other direction which the Registrar may give. The documentary and transcribed evidence before the lower courts will (so far as relevant) be included in the Record. But there is no express rule governing the adducing of fresh evidence before the Board. In future, the Board will expect

- (1) that notice of any application to adduce fresh evidence be given to the other party or parties and to the Board;
- (2) that an affidavit in support of such application be sworn and served, giving the grounds of the application and the reasons for seeking to adduce fresh evidence before the Board;
- (3) that copies of the evidence in question be exhibited to any such affidavit; and
- (4) that such application, affidavit and exhibits be lodged with that party's Case.

While it is open to the Registrar to allow additional time, and the Board may itself permit evidence to be adduced despite non-compliance with this timetable, it should be clearly understood that departure from the timetable will be permitted only exceptionally and only where this course is necessary or expedient in the interests of justice.

### Conclusion

77. Their Lordships will humbly advise Her Majesty that the appeals by both Benedetto and Labrador should be allowed, that the orders made by the Court of Appeal in regard to the charge of murder should be set aside, that the order for Benedetto's acquittal on that charge on the ground that there was no case for him to answer should be restored and that Labrador's conviction for murder should be quashed.

