

**Errol Arthurton**

*Appellant*

v.

**The Queen**

*Respondent*

FROM

**THE COURT OF APPEAL OF THE  
BRITISH VIRGIN ISLANDS**

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

Delivered the 27th May 2004  
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*Present at the hearing:-*

Lord Nicholls of Birkenhead  
Lord Hope of Craighead  
Lord Rodger of Earlsferry  
Sir Swinton Thomas  
Dame Sian Elias

*[Delivered by Dame Sian Elias]*  
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1. Errol Arthurton appeals by special leave from a decision of the Eastern Caribbean Court of Appeal (British Virgin Islands) (Singh, Redhead JJA and Georges JJA (Ag), 15 July 2002) dismissing his appeal against conviction on two counts of unlawful sexual intercourse with a girl under the age of 13. The grounds of appeal are that there was a miscarriage of justice rendering the conviction unsafe because the trial judge first declined to discharge the jury when evidence prejudicial to the defence and of no probative value was given by a police witness and then failed to direct the jury in a manner which removed the prejudice caused by the evidence.

2. The complainant was 11 years old at the time of the events giving rise to the charges in 2000. Her mother had two other younger children of whom the appellant was the father. Although

the mother was no longer in a relationship with the appellant, the complainant and her sisters on occasions would stay with him. The offending was said to have occurred on two of those occasions. Apart from evidence of opportunity, prompt complaint, and medical evidence consistent with the complainant's account of what had occurred, the prosecution case against the appellant at trial effectively depended on the uncorroborated evidence of the complainant. The appellant, who had no previous convictions, had denied having sexual intercourse with her in his police interview.

3. The trial which gives rise to the present appeal was a retrial. The Court of Appeal had set aside the appellant's earlier conviction in part because defence counsel had deprived the appellant of a good character direction from the judge by failing to lead evidence that he had no previous convictions, and because no application to discharge the jury had been made when a prosecution witness had given hearsay evidence that the appellant had said to the police, when interviewed, "I was accused of something like this before and I got away".

4. It was clear from the history of the matter and the fact that the prosecution case turned on the credibility of the complainant that in the new trial the appellant's good character would be a significant part of his defence. Once absence of previous convictions is established, the trial judge is under a duty to direct the jury as to its relevance. The jury must be directed that the accused's good character is relevant in considering whether it is likely that he would have committed the offence; and, where the credibility of the accused is in issue (either because he gives evidence or because he has made an exculpatory statement), the jury must also be directed that his good character is relevant in considering whether he is to be believed: see *Barrow v State* [1998] AC 846, applying *R v Vye* [1993] 1 WLR 471 and *R v Aziz* [1996] AC 41. It was therefore necessary for the defence to ensure there was evidence before the Court that the appellant had no previous convictions and that he had denied having had sexual intercourse with the complainant in his interview with the police. It was also critical to ensure that the new trial was not put in jeopardy by inadvertent disclosure of the appellant's acknowledgement during the police interview that he had been arrested before on suspicion of wrongdoing of a similar character. The fact of arrest for suspected similar offending was of no probative value. If disclosed, it was likely to undermine the good character evidence and risk unfairness through baseless propensity reasoning.

5. Defence counsel foreshadowed an objection to the admissibility of the entire question and answer interview in which the acknowledgement of the unrelated arrest had been made. Counsel for the Crown agreed to its exclusion. The defence however needed to have in evidence the fact that during his interview the appellant had denied having intercourse with the complainant.

6. In the absence of the jury both counsel indicated to the trial judge that they had agreed that evidence of the question and answer interview would not be led. Instead, they proposed that defence counsel in cross-examination of the interviewing officer, Sergeant Vanterpool, would obtain from her confirmation that the appellant had denied the allegations when interviewed and that he had no previous convictions. The judge, who had expressed some anxiety that the same mistakes which had led to the retrial should not be made again, agreed to that course. The transcript of the hearing on the point includes the following exchange, apparently about alerting Sergeant Vanterpool to the questions defence counsel intended to put to her:

“Mr Compton [counsel for the defence]: I am quite concerned for Sgt. Vanterpool to be told this. I want to ask about the good character of this Defendant.

The Court: What does she know about that? You can ask her if she knows that.

Mr Compton: He has no previous convictions. Secondly, that he said to her that he had not committed the offence. Thirdly, I just want to put to her one or two matters that the Defendant says he said to her about DNA.”

7. In conformity with the course of action discussed, Crown counsel did not lead evidence from the Sergeant about the interview with the appellant. Her evidence in chief was principally concerned with her dealings with the complainant. But the attempt by defence counsel to obtain confirmation through cross-examination that the appellant had no previous convictions had the consequences that gave rise to the present appeal.

8. The Sergeant acknowledged that she was “the officer in the case” and that at the time of giving evidence she held the rank of Acting Inspector. She was asked by defence counsel to confirm that “Errol Arthurton is a man of good character, has no previous

convictions”. There was an objection by counsel for the Crown, who seems from his later explanation to have been concerned that unless the question was confined to previous convictions alone there was a risk that the witness might refer to the appellant’s earlier arrest. The Sergeant answered the question asked, saying that, as far as she knew, the appellant was a man of good character. When asked to confirm that he had no previous convictions, however, she answered “I really can’t say”.

9. The answer was not as expected. It led to the following exchanges:

“Mr Compton: I did ask that you be shown his antecedent history before, and have you not seen his antecedent history?”

The Court: Have you seen his antecedent history?

Witness: No, Ma’am.  
(Document passed to the witness)

Mr Compton: Did you not check it as the officer in the case?

Court: Did you check his antecedent history?

Witness: My ma’am, I checked with Sergeant Alleyne. I know he was arrested and charged for a similar offence.

Mr Welch [Counsel for Crown]: Wait, wait.

The Court: Have you seen his antecedents?

Witness: No, My Lord.

Mr Compton: There’s a matter to raise in the absence of the jury.”

10. In the absence of the jury, counsel for the defence applied for discharge of the jury on the basis that the disclosure that the appellant had earlier been “arrested and charged for a similar offence” was so prejudicial that the trial could not fairly continue. He pointed out that he had raised the matter earlier in the absence of the jury to avoid such result and had expected counsel for the Crown to have spoken with the officer. He made the submission that the response of the officer in those circumstances was “gratuitous”.

11. Counsel for the Crown accepted the prejudice to the defence and confirmed that he had understood the request to him to speak to the officer to avoid such result. He had warned the officer not to make any reference to the interview and believed he had made it clear why that was necessary. While he had not specifically discussed the question of previous convictions with the officer, he had expected that, as the investigating officer, she would have been aware of the absence of previous convictions. He had not foreseen any danger of the disclosure which eventuated. Counsel accepted that the remark was prejudicial and suggested that, if the prejudice could be sufficiently overcome by a direction to the jury, it could only be by a direction “in extremely emphatic terms”,

“not just simply say to the jury, ignore that remark or forget about what you last heard from the witness, but this Court must go very, very far to tell the jury what they heard was totally irrelevant.”

12. It seems from the transcript of the discussion that the judge may have taken the view that the questions put by defence counsel had invited the officer to speak from her own knowledge and may have been dangerously loose. She deferred her decision on the application until the next day, to enable further submissions to be made and so that the transcript of the day’s hearing could be available.

13. At the hearing the next morning, defence counsel emphasised that the disclosure had not come about as the result of fault on the part of the defence. He submitted that the reference to arrest for “similar offending” was much more damaging in the context of a trial for sexual offending than a reference to previous unrelated offences would have been. He maintained that the prejudice could not be overcome by directions. They could only highlight the prejudicial material. Counsel for the Crown accepted that the “very unfortunate and totally unanticipated” remark of the officer was “highly prejudicial”. He suggested it could be countered, however, by a good character reference “in its strongest terms” and a direction that the information was “totally irrelevant and to be ignored”.

14. The judge ruled that the trial would go ahead:

“My duty here is to ascertain whether there is real danger that this Accused man, Errol Arthurton’s position has been prejudiced. You will agree that every decision turns on its own facts. There is no doubt that the statement is a

prejudicial statement. But is this one that there is such a danger? I am fully aware that I have to take into consideration the due administration of justice and not anyone's inconvenience or, for example, possibility of retrial. You see, it is my view after giving the evidence considerable consideration, that defence Counsel asked this witness further questions after she had already admitted that there were no previous convictions. And therefore, you cannot say it was a gratuitous answer. It is my view that the degree of prejudice suffered can be minimized by a proper summing up, overall weight of the evidence once properly directed by me as to the law, and I would inform the jury that he has no previous convictions, that they must take from their minds, take out from their minds what, that statement that had been blurted out by the police officer, that due administration of justice would have taken place.

So I will allow the case to continue. And I am telling you, this gave me quite a bit of concentration. I have been thinking of nothing else since I left here yesterday afternoon to this morning.”

15. It may be noted here that the judge in her reasons for the ruling was in error in the view that defence counsel had questioned the witness further after he had already obtained an acknowledgement that the appellant had no previous convictions. No such acknowledgement had been made at the time the prejudicial statement was made. The answer given by the police officer may have been a genuine attempt to answer the question of antecedent criminal history and therefore not “gratuitous”. But, as fairly accepted by counsel for the Crown, it was a surprising answer for a senior police officer with the conduct of the investigation to make, particularly when she had the criminal record sheet put in front of her and particularly when she was aware of the history of the case and the need for care.

16. Following the ruling, the trial continued. Sergeant Vanterpool completed her evidence. In it she confirmed both the appellant's lack of previous convictions and his denial of the offending during his interview.

17. During the course of her summing up, the judge referred on two occasions to the disclosure made by Sergeant Vanterpool. In the first reference, she used the evidence of the officer on the point as an example of discrepancies in evidence:

“You also have a discrepancy when you came to the evidence of Inspector Vanterpool that on Tuesday she said that she didn't know this Accused man had previous convictions, but on Wednesday morning she told you he had no previous convictions. Members of the Jury, you will consider this. It is a discrepancy, but she's saying he has no previous convictions and the defence himself has used this 'no previous convictions' to tell you that this is not a man who is likely to commit the offences for which they have brought him here and that he does not have the propensity.”

18. In the second reference, the Judge dealt directly with the prejudice in the disclosure:

“Now, Members of the Jury, during the evidence whilst earlier on Sergeant Vanterpool blurted out that this Accused man, was once involved in a similar offence, you are to dissuade this from mind. You are to take this off your mind. You have heard her say he has no previous convictions, and that is what the matter is. That is a very important aspect when you are considering his good character. I know you are human beings and if sometimes it is said that it is difficult, but I am telling you that you must not consider it. That's my direction to you. You consider the evidence that he's of good character and what the others say about him. The defence is saying a man of this kind over 40 years, never been convicted of any offence and what his co-workers have to say about him and those who work nearby on Virgin Gorda, shows that he is a man who is not likely to have committed the acts which he's alleged to have committed. The Crown on the other hand is saying, oh, yes he may have been of good character, but in 2000 between February and July, he committed the act and again on the 5th August. So it's a matter for you. You will weigh that. You will consider it, because you have to consider his good character.”

19. Earlier, the Judge had directed the jury about the use to which they could put evidence of good character:

“Members of the Jury, I told you that I would point out a bit to you about the good character of Errol Arthurton. You've heard I pointed it out earlier, but I'm again saying it. He has no previous convictions so he's not a likely person to have committed this offence. He hasn't got the propensity to do such a thing. He is a person less likely to do it. The evidence has not shown that he has behaved dishonest in any

way to this case and, therefore he is a person of previous good character and would not commit the offence as charged.

So you will take his good character into consideration. You will also bear in mind that counsel for the Crown told you there's a first time. So you will see you have to weigh it."

20. At the conclusion of the summing up, in the presence of the jury, counsel for the Crown intervened to seek an additional direction about the prejudicial evidence given by Sergeant Vanterpool:

"Mr Welch: The other matter, the matter relating to Sergeant Vanterpool. I believe your Ladyship has dealt with it by telling the Jury to ignore it, but perhaps your Ladyship could even tell them that it is totally unfounded as well and the Crown accepts that. And she said something about somebody else telling her that, but that's totally unfounded.

Judge: That's it?

Mr Welch: Yes My Lady.

Judge: Okay. Well, Members of the Jury, you will recall that I did say that you are to put away from your minds that statement that what Inspector Vanterpool had said because you heard her yesterday, no previous convictions and that means it goes heavily on good character. So you bear that into consideration."

21. The appellant was convicted by majority verdict. He appealed his conviction to the Court of Appeal on a number of points no longer in issue. Relevantly, the grounds included the refusal of the Judge to discharge the jury because of the prejudicial evidence given by Sergeant Vanterpool and the adequacy of the summing up in redressing the prejudice caused.

22. The Court of Appeal dismissed the appeal. Singh JA, who delivered a judgment concurred in by the other members of the court, emphasised that the trial judge exercised a discretion in declining the application to discharge the jury. The appellate court could interfere only if in all the circumstances an injustice had occurred. Singh JA considered that the disclosure may have been "goaded" from the witness by counsel, as part of a "strategy". It arose from counsel's effort to "trigger" a character direction from

the judge. Because so elicited, the evidence was treated as admissible and probative:

“[17] I heed the plea of learned Counsel and do not use his guile or strategy against the appellant.

[18] The fact remains that the impugned evidence, if a statement of fact from Vanterpool’s own knowledge, was elicited as evidence of the appellant’s antecedent history, in order for the jury to determine his character. That made it admissible and more probative than prejudicial. He relied on his character as a vital part of his defence. He exercised his right to remain silent at the trial on the main issue.”

Singh JA took the view that the evidence was not hearsay because the transcript suggested that the witness was answering from her own knowledge. But, if properly to be regarded as hearsay “and therefore of no probative value”, the “total irrelevance and weightlessness of the remark” had been sufficiently impressed upon the jury by the cumulative effect of the whole course of the trial, including

“consideration of addresses of both counsel, the concession of good character by Counsel for the Respondent to the judge before the jury, the extensive and repeated clear directions to the jury by the judge on the appellant’s good character...”

23. Singh JA took the view that the prejudicial evidence did not have the “impact severity” of the disclosure made in the previous trial, with its suggestion that the appellant had boasted he had “got away with it”. He considered that the jury would have applied the “clearest possible” directions given by the judge in summing up. He concluded that there was no real danger that the appellant’s position was compromised by what happened.

24. The appeal is brought by special leave from the decision of the Court of Appeal. The two points raised concern the judge’s decision not to discharge the jury and the adequacy of her direction on the use of the prejudicial information inadvertently disclosed. Whether these constituted errors which deprived the appellant of his right to a fair trial turn on the context of the trial: *R v Weaver* [1968] 1 QB 353, *R v Palin* (1969) 53 Cr App R 535. Error correction in such matters is principally the responsibility of the Court of Appeal. In *Stafford v The State* (Note) [1999] 1 WLR 2026 at 2029, Lord Hope of Craighead confirmed the long-standing approach that “it is not the function of the Judicial Committee to act

as a second Court of Criminal Appeal”. The Board will accordingly not intervene readily where the Court of Appeal has upheld the exercise of a discretion as to discharge by the trial judge and concluded that the directions given to the jury removed any risk of unfairness. In the present case, however, the Court of Appeal was mistaken in two respects. First, it took the view that the disclosure was the fault of counsel for the appellant and may even have been a deliberate tactic to elicit the information. Secondly, it was of the view that the disclosure made by the police officer was “more probative than prejudicial”. Counsel for the respondent accepted that both assessments were wrong. The concession was appropriate and responsible.

25. The errors were material to the conclusion of the Court of Appeal that, in the circumstances of the trial, there was no resulting injustice. The admission of prejudicial evidence through inadvertence does not of itself require the discharge of a jury: see *R v Weaver* [1966] 1 QB 353, *R v Palin* 53 Cr App R 535. The critical question is whether in all the circumstances of the trial it may have resulted in unfairness to the accused. One of those circumstances, as the statement of principle in *R v Weaver* suggests with its reference to “inadvertence”, may be whether the prejudicial material has been deliberately elicited as a matter of trial tactics by either prosecution or defence. Although the Court of Appeal said that it did not hold what it thought to be deliberate conduct by defence counsel against the appellant, it thought it decisive that the information was elicited by the defence in order for the jury to determine the appellant’s character. It was that circumstance that caused the Court of Appeal to treat the evidence as “admissible and more probative than prejudicial”. The mistaken belief that the information was introduced by the defence was important to the reasoning of the Court of Appeal and to its assessment of whether there had been a miscarriage of justice.

26. The Court of Appeal appears to have been under the misapprehension that evidence of earlier arrest on suspicion of another crime would only have been inadmissible if hearsay from the witness. Its assessment that the steps taken by the trial judge were a sufficient response is undertaken on the assumption that the prejudice is in the admission of hearsay and in case it was wrong in its earlier conclusion that the evidence was not hearsay. The Court does not seem to have appreciated that the error was more serious. Irrespective of how it was introduced, evidence of the fact of an unrelated arrest was probative of nothing. It was irrelevant, as Crown counsel at the trial rightly accepted.

27. Given the errors in the reasoning of the Court of Appeal, it is necessary for the Board to consider the appeal against conviction afresh. In this it has had the considerable advantage of concise and helpful argument from counsel.

28. A decision to discharge a jury is a matter of discretion for the trial judge. It falls to be exercised in the context of the trial, the flavour of which may not be readily recaptured on appeal. It will often be a difficult decision. Questions of fairness arise in relation to others, as well as to the accused. The judge in the present case was conscious that the case was a retrial, involving a young complainant. In many cases jury directions will sufficiently meet fears of prejudice through disclosure of irrelevant or insufficiently probative evidence. Whether there is unfairness turns on the context, including in particular the issues at trial. The decision whether or not to discharge a jury is one an appellate court will not interfere with lightly, as cases such as *Weaver* and *Palin* emphasise. Where the trial judge has not fallen into any error of principle, it is necessary for the appellate court to form the view that there has been unfairness which, if not corrected, would amount to a miscarriage of justice.

29. The central issue for the trial was whether the complainant was to be believed. The appellant's good character was critical to that inquiry. It entitled him to a credibility direction in respect of his statement denying intercourse with the child complainant and to a direction that his good character was relevant in assessing the likelihood that he would have offended in the way alleged. Although the judge gave these directions, as she was required by law to do, the evidence that the appellant had been arrested on suspicion of similar offending on another occasion bore directly on the issue of propensity. As such, it directly undermined the propensity limb of the good character direction and with it a major plank in the defence case. The disclosure here was far more serious than the unspecific references in *Weaver* and *Palin*.

30. It is to be expected that juries will conscientiously apply the directions given by a trial judge. If good character had not been so critical to the defence, any prejudice in disclosure of previous offending (particularly if of offending unrelated to the charge) might well have been adequately addressed by directions not to reason to guilt from the separate offending and characterisation of the evidence as irrelevant. That is not the case here.

31. The jury was being asked by the defence to rely on the accused's good character in concluding that he was unlikely to have committed an offence of sexual abuse of a child. It is a type of offending in which propensity reasoning may be significant. It is asking too much to expect that a jury can be expected to give fair consideration to an affirmative good character propensity direction when it is told of suspicion of similar offending, even if it succeeds in putting the disclosure out of mind when considering the question of guilt as established by the other evidence. At best, the accused's character is likely to be treated as irrelevant by the jury. If so, the accused is effectively deprived of the good character direction.

32. In the context of the issues at trial, it may be doubted whether any directions could have overcome the unfairness. On that basis, the jury should have been discharged. In any event, however, the directions given were insufficient to remove the unfairness to the appellant. The judge's use of Sergeant Vanderpool's evidence as an illustration of inconsistencies in evidence was unfortunate. It may well have highlighted the prejudicial evidence. The terms in which the jury was directed to put the evidence out of mind reminded them that it had been "blurted out", leaving open the impression that the jury may have been inadvertently given credible information which had been suppressed. At the very least it might have been expected that the jury would have been told that the information was not evidence at all as a matter of law. Nor did the judge accept the suggestion of Counsel for the Crown that the jury be told that the Crown accepted that the arrest described was "totally unfounded", which might have made it clear that it had no probative value at all. The instruction to ignore the evidence, with no further explanation, was inadequate.

33. It is impossible to conclude that there has been no miscarriage of justice as a result. The Crown case depended entirely on the evidence of the complainant. Credibility was critical. The good character of the appellant and the direction it required as to credibility and propensity was the fundamental plank in the defence. It was undermined by disclosure of information which was of no probative value. None of the steps taken at trial to address the prejudice caused were effective. The Board is left with the view that the trial was unfair and the convictions cannot stand. The Crown does not seek a new trial. The Board will humbly advise her Majesty that the appeal should be allowed and the convictions quashed.



