

Bally Sheng Balson

Appellant

v.

The State

Respondent

FROM

THE COURT OF APPEAL OF DOMINICA

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
6th December 2004, Delivered the 2nd February 2005

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Hutton

[Delivered by Lord Hope of Craighead]

1. The appellant was convicted on 17 March 1998 of the murder of Deirdre Raphael. The trial judge sentenced him to death, as he was required to do by section 2 of the Offences against the Person Act. On 26 October 1998 the Eastern Caribbean Court of Appeal (Commonwealth of Dominica) (Byron CJ (ag) and Singh and Redhead JJA) dismissed his appeal and affirmed the conviction and sentence. He has now appealed against the judgment of the Court of Appeal to their Lordships' Board.

2. At the conclusion of the hearing on 6th December 2004 their Lordships announced that they would dismiss the appeal against conviction, allow the appeal against sentence, quash the sentence of death and remit the case to the High Court of Dominica for

reconsideration of the question of sentence. Their Lordships now give their reasons for those decisions.

The appeal against conviction: the facts

3. At the time of her murder Deirdre Raphael ("the deceased") was living in the village of Bellevue Chopin with the appellant, who was her boyfriend, and her three children, Marshall Rolle, who was thirteen years old, and Russell Michel and Mislee Rolle, who were aged about ten and nine. She was expecting another child, as she was about seven months pregnant. She met her death at some point between the late evening of Thursday 12 December 1996 and the early hours of Friday 13 December 1996. She was in her bedroom when she was killed. Her neck was broken and she was asphyxiated. There were no eyewitnesses. The only question in the case was whether it was the appellant who murdered her.

4. The appellant first met the deceased, who was in business as a flower seller, about three years earlier. At that time she was in the process of obtaining a divorce from her husband Ross Rolle. They became friendly and started a relationship. After a while the appellant went to live with the deceased and her three children at her home. This was a block house which had been built on pillars. It had three bedrooms, a drawing room, kitchen, toilet and bathroom. There was also a porch. Stairs led up to the door of the house, which led directly into the drawing room.

5. The appellant helped the deceased by buying flowers for her on Friday and Saturday mornings. She used to go to Guadeloupe herself to sell them, but latterly due to the state of her pregnancy she had been sending the appellant to Guadeloupe to do this for her. The relationship became difficult and they quarrelled frequently. When there was no trouble the appellant used to sleep with the deceased in her bedroom. But when there was a disagreement he would sleep in the drawing room or on the porch. By December 1996 Mislee, who had a bedroom of her own in the deceased's house, had started sleeping in

another house nearby with the deceased's grandmother.

6. On Tuesday 10 December 1996 the appellant went to Guadeloupe to sell flowers. He returned to Dominica on Thursday morning 12 December. He spent that night in the deceased's house. At about 6.30 am the next day Russell and Marshall found the deceased lying dead in her bedroom. According to a post mortem which was carried out at 4 pm that day the cause of death was asphyxiation caused by external pressure on the neck. The death was contributed to by a fracture of the neck at the second neck vertebra. There were various facial injuries, including multiple swellings and haemorrhages, lip abrasions and a blood clot in the left eye. The pathologist, Dr Bellot, estimated that she had died at least 12 but no more than 24 hours earlier. On his findings the death occurred not later than 4 am on 13 December.

7. There were no eyewitnesses to the killing, and there was no scientific evidence that linked the appellant to the deceased's death. The evidence against him was circumstantial. But it was supported by answers that he gave when he was interviewed shortly after the death at the Police Headquarters by Corporal Daniel Carbon. The case for the prosecution concentrated on the evidence of the two children Russell and Marshall and of various other people who saw and spoke to the appellant between the late evening of 12 December and on the early afternoon of 13 December when he was asked by a police officer to accompany him to the police station, and on Corporal Carbon's description of what he found when he examined the house shortly after 8 am on 13 December. Their evidence can best be summarised by taking the relevant events in the order that they occurred during this period.

The prosecution's evidence

8. At about 7 pm on 12 December the appellant quarrelled with the deceased. They were arguing about the money that he had received for the flowers he had been selling in

Guadeloupe. He left the house and Marshall went to the kitchen to prepare supper. By about 9 pm the appellant had returned. Marshall saw him in the drawing room, where he was writing something at a table. The deceased was in her bedroom crying. She came out of the room and had some supper. At about 9.30 pm she returned alone to the bedroom. The appellant was still in the drawing room. About ten minutes later Marshall went into the bedroom which he shared with Russell. He could hear the deceased talking to herself in her bedroom.

9. At 10.45 pm Agrippa Morancie, who was the deceased's brother and a regular visitor, called at the house to collect some bread that he had left there earlier. The appellant answered the door. Agrippa waited in the main doorway while the appellant went for the bread. While he was there he noticed that there were cushions on the floor in the drawing room. He did not see the deceased. He assumed that she had gone to bed. At about 11.15 pm Marshall got up to go to the lavatory. He heard the deceased talking in her bedroom. She seemed to be crying, and he spoke to her. The appellant was sitting on the sofa in the drawing room watching television. They said goodnight to each other, and Marshall went back to his bedroom and fell asleep.

10. Later that night both Marshall and Russell were wakened by the noise of a disturbance. Loud screaming and crying was coming from the deceased's bedroom. They heard the deceased screaming the words "Bally behave" repeatedly. Marshall said that he did not go to her room because he was afraid. He then heard a door slam. Later he heard the deceased's door being opened. Someone went to the bathroom and turned the water on. After a while the water stopped. Someone put the light on, went into Misleee's room and then went into the kitchen. Then all the lights went off. He heard the tower bolts on the inside of the front door being unlatched and the noise of someone going outside. About five minutes later he heard the person

come back inside and lock the tower bolts again from inside. He went back to sleep.

11. At about 5 am the next morning Russell heard the appellant leave the house. He heard him pass through the kitchen door and a van starting up. He said that the appellant usually left at about 6.30 am. The appellant drove off in the deceased's Toyota pick up truck. After about 150 yards he was flagged down by a neighbour, Vanya Williams, and her husband who were waiting at the village bus stop. They asked him to give them a lift and he agreed to do so. But he refused to let them sit in the front of the van with him as his brief case was there. Vanya Williams said that that she did not see any marks or stains on his clothes and that he seemed to be peaceful.

12. At about 6 am Marshall and Russell got up. Marshall went to the kitchen to prepare breakfast. He saw that the kitchen lights were on. He then went to the drawing room. Cushions from the sofa and a bedspread were lying on the floor. The drawing room door which led outside was closed, but the tower bolts on the inside were unlatched. He made some breakfast for himself and Russell, and for Mislee who returned to the house shortly afterwards, and got ready for school. He and Russell went into the deceased's bedroom to wake her up as Mislee wanted her hair combed and they needed their bus fare to go to school. They found the deceased lying on the floor. She was on her back with her right arm on her face, and there was blood on her wrist and her left hand. They and Mislee went to the deceased's grandmother's house to get help. Marshall said that he was surprised that the appellant was not at home that early in the day.

13. At about 7.30 am Acting Police Inspector Defoe, who lived nearby, heard loud crying coming from the deceased's house. He went there to see what was happening. On opening the door of one of the bedrooms he saw the deceased lying on her back with blood stains on her face. He asked everyone to leave. Corporal Carbon, who was stationed at the Grand Bay Police Station, was notified. He

arrived at the house with other police officers shortly after 8 am. He found the deceased lying on her back on the floor in the bedroom. Her right arm was across her face and blood was coming from her mouth. Her body was taken to hospital, where she was pronounced dead. From there she was taken to the mortuary.

14. Corporal Carbon examined the house. The main front door leading to the drawing room was secured by lock and key. It could be locked and unlocked only from the outside with a key to the lock. An additional tower bolt secured the door from inside. This door could be locked and unlocked without a key from inside, but it could only be locked and unlocked from outside with a key. This was the door where Agrippa Morancie waited when he came to collect the bread. There was another door on the same side of the house which led to the kitchen. This door was secured by two tower bolts on the inside. Around the corner there was a porch. Carbon said that the lock to the main front door was working perfectly, and there was no sign of a forced entry to that or the other door. The windows too were intact and had no sign of forced entry. There were no finger prints on the doors or windows. The bedrooms did not appear to have been ransacked.

15. Meanwhile the appellant had driven for a distance of about 16 miles to a farm belonging to Eustace Pond. He picked up Pond on the way there at about 7.10 am and dropped him off near the farm. He asked him to cut some flowers for him and said that he would come back to collect them later. At about 9.30 am the news of the deceased's death was broadcast on the local radio. Pond heard the broadcast and decided to sell the flowers that he had cut for the appellant. At about 1.15 pm the appellant returned to the farm in the pick up truck. He said "What am I hearing?" before Pond spoke to him. Pond told him what he had heard on the radio, which was that the deceased had been found dead in her home and that the police were seeking the appellant's whereabouts. He said "Oh my God, Oh my God", started to cry and

left. At about 1.20 pm he was seen driving the pick up truck by Police Constable Bernard Ulysses who told him that the deceased had been found dead and that he was wanted by the police in connection with her death. He agreed to go with him to Police Headquarters.
The police interview

16. The appellant was interviewed by Constable Carbon at Police Headquarters. The interview lasted from 3.30 pm to 3.48 pm. Carbon said that he cautioned the appellant and told him that he had the right to an attorney, to which the appellant replied "No problem". He then questioned the appellant. He said that he noted the questions and answers in his pocket book at the time of the interview. He also said that he read them over to the appellant when he was finished and that the appellant said that they were correct. Counsel for the appellant, Mr Don Christopher, was asked whether he had any objection to the witness refreshing his memory from his pocket book. He said that he had no objection, so permission was given for this to be done.

17. The following are the questions and answers as written in Corporal Carbon's pocket book:

Question No. one: Did you have any quarrel or fight with Deirdre during the night of Thursday, 12th December 1996?

Answer: No we had no quarrel nor fight.

Question No. two: What time did Deirdre go to bed that Thursday night?

Answer: She went to bed about 9.30 pm.

Question No. three: Did you sleep in the same room with Deirdre last night?

Answer: No I slept in the drawing room, its a thing I normally do.

Question No. four: When was the last time you saw Deirdre last night?

Answer: About 9.30 pm last night.

Question No. five: Who else slept in the house with you all?

Answer: Marshall and Menthe slept in the house.

Question No. six: When you saw Deirdre how was she?

Answer: She was upset with me.

Question No. seven: Did you beat or punch Deirdre last night?

Answer: No, I have never beat Deirdre, I have never put my hands on Deirdre.

Question No. eight: What time did you leave home this morning?

Answer: About 5.30 this morning.

Question No. nine: did you check on Deirdre before you left this morning?

Answer: No, I don't normally do that because I knew she was alright.

Question No. ten: Did you lock the entrance door before you left this morning?

Answer: When I left home this morning about 5.30 I locked the front door, all the doors were locked.

Question No. eleven: Did you kill Deirdre Raphael?

Answer: I would do no such thing."

18. Corporal Carbon was challenged in cross-examination on some of this evidence. It was put to him that he did not caution the appellant and that he told him that he could not have a lawyer until the investigation was over. He insisted that he had cautioned him and told him of his rights. It was also put to him that the appellant did not give the answers that were recorded to questions 3 and 10 - that he did not say that he had slept in the drawing room, or that he had locked the front door when he left the house at 5.30 am.

And it was put to him that the appellant, when asked, had objected to these entries and refused to sign the police officer's pocket book. Carbon denied this. He said that he read over the questions and answers that were recorded in it and that the appellant had said they were correct. He denied that he said to the appellant "I can write what I

want." But he said that he did not know that under the Judges Rules the accused should sign the questions and answers, and he admitted that he had not recorded in his pocket book the cautions that he was required by the Judges Rules to give before the interview and after charging the appellant with the offence.

19. At this point in the cross-examination Mr Christopher asked for a *voire dire* because there had been an irregularity in respect of the witness's pocket book. The jury were sent out. Counsel then submitted that there had been two irregularities. The pocket book had not been produced, and the appellant had not been cautioned as required by the Judges Rules. Counsel for the prosecution said that he had no objection to the production of the pocket book. But he submitted that it was in the judge's discretion to allow or disallow the evidence even if there had been a breach of the Judges Rules. The judge overruled the objection. He pointed out that Mr Christopher had previously said that he had no objection to Carbon referring to his pocket book to refresh his memory about the interview. There was no *voire dire*.

The appellant's evidence

20. The appellant gave an account of his movements up to and including the evening of 12 December 1996 which was consistent with that given by Marshall and Russell. He admitted that he and Deirdre had quarrelled when he returned home at about 7 pm. He said that this was because Deirdre had been cross with Mislea when she returned late from school and had whipped her. He had disapproved of this, and Deirdre got upset with him. She went to bed at about 9.30 pm while he was watching television. He mentioned the visit by Agrippa Morancie to get bread. A few seconds later the deceased asked him to get out, which he did. He did not always sleep in her bedroom, as he slept on the porch or in his car when they had misunderstandings. He went out of the house at about 11 pm that night and went downstairs to sleep in his car.

21. He woke up at about 5 am the next morning. He realised that he was running out of time as he had to get to Marigot in the country. So he left without going back into the house. He then gave an account of his movements during the morning as he drove from place to place in the deceased's pick up. He said that he was asked whether he knew what had happened when he called at Mr Mano's house to get some flowers before he returned to Mr Pond's farm. But it was not until he got to Pond's farm that he heard the news coming from Pond's portable radio. He was shocked by what he heard.

22. He said that when Carbon interviewed him at Police Headquarters Carbon told him that he had better speak "because my lamp has ran out." He said that Carbon did not caution him. He had something like a folder in which he wrote. He did not see him write anything in his pocket book. He did not sign any statement or make any confessions. He was not asked to sign what Carbon wrote in the folder. He did not give the answers that Carbon said he had given to questions 3, 8 and 9 and that he was not asked question 10. It was not until three days after he had been charged that he was told that he could contact an attorney.

23. In cross-examination the appellant insisted that he had had no quarrel with the deceased that night. She told him to get out because she was upset about Mislea. He said that when he left the house at 11 pm the deceased was in the drawing room and the drawing room door (the main door of the house) was open. He did not close it when he went outside. He had the key to the house in his pocket. He did not hear any sound outside that night, nor did he hear the deceased cry out. He accepted that he had given a lift to Mrs Williams and her husband and did not put them in the front of the truck, but he denied that this was because he did not want them to see his demeanour. He said that the truck had a radio but that he did not turn it on. The first time he was told the news was at Mano's place. He was shocked when Mano told him what had happened

and he cried. He heard the news for the second time at Pond's farm.

24. The appellant was also cross-examined about his police interview. At first he said that Carbon had asked him only one question and that he gave him only one answer. This was about Marshall and Russell sleeping in the house that night. He then accepted that Carbon asked him question 8 ("At what time did you leave the house that morning?"). He said that he had answered "5 am", not "5.30 am" as recorded in Carbon's notebook. He said that this was the only other question that Carbon asked him. But later he accepted that Carbon asked him question 3 ("did you sleep in the same room with Deirdre last night?"). He said that he answered that he slept in the car. He also accepted that Carbon asked him question 4 ("When was the last time you saw Deirdre last night?") and question 6 ("When you saw Deirdre how was she?"). He admitted that he gave the answers to these questions that were recorded in Carbon's notebook. In answer to a question from the jury, he accepted that cushions were on the floor of the drawing room when Agrippa called for the bread. He said that he had put them there because he was lying on the floor but that there was no bedspread. He left the cushions there when the deceased asked him to leave. He did not go to the deceased's bedroom at any time that night.

The appeal against conviction

25. The first thing that must be said is that the evidence that pointed to the appellant's guilt was very strong, even without the evidence of the police interview. There was no effective challenge to the pathologist's evidence, which was based on the fact that rigor mortis was established by the time of his post mortem at 4 pm on 13 December and on the deceased's body temperature. This was that she must have died at least 12 hours previously. Nor was it disputed that she was still alive when Agrippa Morancie visited the house at 10.45 pm. It was some time afterwards that Marshall and Russell heard her crying out the words "Bally behave". On his own account, which was supported by

Russell, the appellant did not leave the house until about 5.00 am the next day. On the pathologist's evidence the deceased was dead before he left.

26. The appellant admitted that he normally slept in the drawing room when there were disagreements. He said that he slept in his car that night. But this does not account for Marshall's evidence, supported by Morancie's observation the previous evening, that he saw cushions from the sofa and a bedspread on the floor of the drawing room when he got up at about 6.00 am on 13 December. There was no sign of a forced entry or of any of the rooms having been ransacked. The only other people in the house were two boys. Marshall appears to have been doing his best to hold the family together, demonstrating a sense of maturity beyond his years, during what must have been a difficult period. Nobody suggested that either of them could have inflicted the injuries which caused the deceased's death. Their evidence about the noises and movements in the house that night supported the inference from the other facts and circumstances that her killing was a domestic incident. There was no indication that anybody else was involved.

27. The appellant was given an ample opportunity to disassociate himself from the incident if he could. But he failed to do this when he was being interviewed, if Corporal Carbon's record of the questions and answers is accurate. The appellant said in his evidence that Carbon told him that he had better speak because his lamp had run out. This is a hint here that the appellant was suggesting that he had been rushed into giving answers. But this point was not put to Carbon when he was cross-examined, nor was it suggested that the interview was in any other way unfair. Of the eleven questions and answers noted in the pocket book, only three were challenged by Mr Christopher when Carbon was cross-examined. There was no criticism of the accuracy of the other entries in the pocket book.

28. When he came to give his evidence the appellant at first said that he did not give the answers to questions 3, 8 and 9 that were recorded in the pocket book and that he was not asked question 10. In cross-examination he first said that the only question that Carbon asked him was question 10, to which he had replied that it was at 5 o'clock, not about 5.30. Then he admitted that he was asked question 3. He said that his answer was that he slept outside in the car but that he would, as Carbon had noted, normally sleep in the drawing room. He then admitted that he was asked questions 4, 5 and 6 and that he gave the answers to these questions that were recorded in the pocket book. Although he did not accept that questions 1, 2, 7 or 9 were put to him, the answers that were recorded were in accordance with his own evidence that he had no quarrel with the deceased, that she went to bed at about 9.30 pm, that he did not lay hands on her and that he did not check on her before he left the house.

29. Mr Guthrie QC for the appellant said that his basic submission was that the trial was unfair. There were a number of worrying features in the case. First, there was no scientific evidence to link the appellant with the deceased's death. Secondly, the doors and windows were checked for fingerprints and none were found. So the possibility of the murder having been committed by an intruder could not be ruled out. Thirdly, the appellant did not reveal any signs of guilt by his demeanour afterwards. In this situation the questions and answers that Carbon had recorded in his notebook were very important, as they appeared to contradict the appellant's evidence that he left the house when the deceased asked him to do so, that he slept outside in the car and not in the drawing room and that the main door of the house was open when he left.

30. But the main thrust of Mr Guthrie's argument was that the case for the defence had been conducted incompetently. He said that there had been a failure to take proper instructions, as a result of which there had

been a failure to insist on a *voire dire*. It is, of course, clear from the transcript that the circumstances of the appellant's police interview were not the subject of a *voire dire* before the questions and answers that Carbon had recorded in his pocket book were admitted into evidence. Mr Christopher did not object to this when he was invited to do so. It was not until the issue of whether Carbon had noted that he had cautioned the appellant as the Judges Rules required him to do that he took this objection. This was on the ground that there had been an irregularity in the cautioning procedure, not that the interview itself was obtained by undue pressure or by unfair means. Mr Guthrie maintained that this was due largely to incompetence on the part of Mr Christopher, because he had failed to take proper instructions from the appellant before he conducted his defence.

31. Their Lordships are not persuaded that there is any substance in this argument. If there were grounds for arguing that Carbon's evidence was inadmissible because the answers attributed to the appellant had been extracted from him by unfair means, the proper time to object was at the outset before the questions and answers were admitted into evidence. But the fact that a *voire dire* was not asked for at that stage does not of itself mean that the appellant was deprived of a fair trial. The question is whether there was a reasonable prospect that, if a *voire dire* had been held then, the trial judge would have held that the evidence was inadmissible. Only then could it be said that the appellant was deprived of a defence that would have been open to him if his defence had been conducted properly.

32. The appellant had the opportunity to say that he was subjected to unfair pressure when he gave his evidence. Although he said that Carbon had told him that he could write what he liked and that he had better speak because his lamp had run out, his evidence fell far short of what would have been needed to provide the judge with a basis for saying that the entries in the pocket book were

inadmissible. Then there is the fact that, in the end, so much of what was recorded in these entries was admitted or was consistent with his own evidence. The only answers that remained under serious challenge by the end of his evidence were questions 3, 8 and 10 (that he slept in the drawing room, that he left the house at 5.30 am and that when he left home all the doors were locked). These were, of course, the answers that tended to incriminate him when taken together with the other evidence. This means that the issues about the police interview went to its credibility only, not to its admissibility. Their Lordships conclude that there was no basis for holding that the evidence of the interview was inadmissible.

33. Mr Christopher did object to this evidence as soon as Carbon indicated that there might have been a failure to comply with the Judges Rules. Mr Guthrie said that Mr Christopher should have insisted on a direction by the judge that the jury were to disregard this evidence. But the evidence had already been admitted without objection by that stage. So there was very little prospect of persuading the trial judge that it was inadmissible on the ground that was then being advanced. In any event it was in the discretion of the judge to admit the evidence even if no caution had been given before the commencement of the interview: *R v Bass* (1953) 17 Cr App R 51. Mr Guthrie said that the fact that the objection was not taken until it was too late demonstrated counsel's incompetence. But that begs the question whether there was a sound basis for objecting to this evidence earlier. For the reasons already given, their Lordships are not persuaded by anything that the appellant said about the interview that there was a sound basis for arguing that this evidence was inadmissible. They do not detect anything about counsel's conduct of the defence during this part of the trial that suggests that it was incompetent.

34. Mr Guthrie then said that Mr Christopher failed to take proper instructions from the appellant before the trial began. He made

various criticisms, drawing on material which had been obtained from Mr Christopher after the trial. He laid particular emphasis on the fact the appellant had not provided a proof of his evidence. Mr Christopher had been unable to produce any written statement from the appellant setting out his defence.

A brief handwritten note had been handed to him by the appellant which contained his comments on several of the prosecution witnesses, including Marshall, Mislea and Carbon. Mr Christopher used some of this information when he was cross-examining the witnesses. But Mr Guthrie said that the fact that the information had come in this form tended to confirm his basic criticism, which was that there had been a failure to take proper instructions from the appellant at the outset in the form of a proof of evidence.

35. Their Lordships reject this criticism also. Mr Christopher makes it clear in his affidavit, which has not been contradicted, that he came into the case after two other counsel had already been instructed. Mr Christopher conducted part of the cross-examination at the preliminary inquiry. He also had a conference with the other counsel, Mr Julien Prevost and Mr Kevin Williams. They told him that they had taken instructions from the appellant during the preliminary inquiry. When he visited the appellant to make his own inquiries Mr Christopher found him reticent and unwilling to talk. But he did have access to the information which had been obtained by Mr Prevost and Mr Williams. Mr Christopher has not provided details of that information. This is because he believes that it would be adversely prejudicial to the appellant for him to do so. But he says that he noted inconsistencies in the defence as given by the appellant to each of his previous counsel, and that he was aware that the appellant had lost confidence in Mr Prevost because he gave him advice with which he was dissatisfied. It is plain that the appellant's defence required careful handling in these circumstances. It certainly cannot be assumed that weaknesses in the defence as

presented at the trial were due to a lack of adequate preparation by counsel.

36. Their Lordships have had in mind the formulation of the test to be applied where counsel's conduct is called into question which was formulated by de la Bastide CJ in the Court of Appeal in *Boodram v The State* [2002] UKPC 20; [2002] 1 Cr App R 12 and which was endorsed by the Board in that case: para 39. The question, as the Chief Justice put it, is whether the conduct of counsel has become so extreme as to result in a denial of due process to his client. Among the examples he gave was the case where counsel conducted the defence without taking his client's instructions. His formulation of the test is consistent with the approach which has been taken in several other jurisdictions. The comparative jurisprudence on this issue was examined in depth by the High Court of Justiciary in Scotland in *Anderson v HM Advocate*, 1996 JC 29. Among the cases referred in that judgment were *R v Clinton* [1993] 1 WLR 1181, *R v McLoughin* [1985] 1 NZLR 106, *R v Birks* (1990) 19 NSWLR 677, *Sankar v The State* [1995] 1 WLR 194 and *Mills v The Queen* [1995] 1 WLR 511. The Lord Justice General (Hope), delivering the opinion of the court, said at p 43 that the question depended not upon a qualitative assessment of the degree of incompetence by counsel or the nature of his conduct but upon the effect of the failure on the accused's right to a fair trial. At p 44 he said of such conduct:

"It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to

the court, a fair trial was denied to him."

37. In their Lordships' opinion this is not such a case. Mr Christopher has been suitably guarded in his comments about the instructions that the appellant gave to his previous counsel. But it is plain from what he has said that he was dealing with a difficult client who, having received unpalatable advice from Mr Prevost, was unwilling to talk frankly to him or give him instructions which were consistent and reliable. Notwithstanding these difficulties Mr Christopher cross-examined the witnesses for the prosecution in accordance with the instructions that he had been given, and the appellant himself gave evidence. There is no question in this case of the appellant having been deprived of the opportunity to present his defence or of his being deprived of a fair trial. Their Lordships also wish to make it plain, in fairness to Mr Christopher, that they are wholly unpersuaded that his conduct of the defence can in any way be described as incompetent.

38. There is one final criticism that must be mentioned. Mr Christopher did not lead any evidence as to the appellant's good character, with the result that a direction to that effect was not given by the trial judge. It is clear that the appellant had no previous convictions. This was an omission on counsel's part for which no satisfactory explanation has been given. But their Lordships are of the opinion that a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are

wholly outweighed by the nature and coherence of the circumstantial evidence.

39. For these reasons the appeal against conviction must be dismissed.

The appeal against sentence

40. The appellant submits that the sentence of death was imposed on him in breach of his rights under the section 5 of the Constitution of the Commonwealth of Dominica as set out in the Commonwealth of Dominica Constitution Order (SI 1978/1027), which provides:

"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

Section 2 of the Offences Against the Person Act (ch 10.31) provides:

"Any person who is convicted of murder shall suffer the penalty of death."

The effect of section 2 of that Act is that the sentence of death is mandatory for a conviction of murder. Sentence of death was passed on the appellant on the assumption that it was indeed mandatory.

41. Section 117 of the Constitution provides:

"This Constitution is the supreme law of Dominica and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Schedule 2 of the Commonwealth of Dominica Constitution Order, which contains transitional provisions, provides:

"2(1) The existing laws shall, as from, the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring

them into conformity with the Constitution and the Supreme Court Order.

...

11. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of punishment before 1 March 1967 (being the date on which Dominica became an Associated State.)"

42. These provisions are in all material respects the same as those of Saint Lucia which the Board considered in *R v Hughes* [2002] UKPC 12, [2002] 2 AC 259. Section 5 (which prohibits inhuman or degrading punishment or other treatment) and section 117 (the supreme law clause) of the Constitution of Dominica are in the same terms as sections 5 and 120 of the Constitution of St Lucia as set out in Schedule 1 to the Saint Lucia Constitution Order. The transitional provisions in paragraphs 2(1) and 11 of Schedule 2 to the Dominica Constitution Order are in the same terms, mutatis mutandis, as paragraphs 2(1) and 10 of schedule 2 to the Constitution Order of St Lucia.

43. In *R v Hughes* the Board held, following *Reyes v The Queen* [2002] UKPC 11; [2002] 1 AC 235, that the mandatory death penalty was to be regarded as inhuman or degrading punishment or treatment in terms of section 5 of the Constitution of St Lucia: para 16. It held accordingly that section 178 of the Criminal Code of St Lucia, to the extent that it required the infliction of the death penalty in all cases of murder, was inconsistent with section 5 of the Constitution of St Lucia and so void by virtue of section 120 of the Constitution: para 50. Applying para 10 of Schedule 2 to the Constitution Order it was open to the court under section 178 either to impose the death sentence or to impose a lesser punishment, depending on the view it took of

the case having regard to all the relevant circumstances: para 51.

44. The State accepts that the same reasoning must be applied to section 2 of the Offences against the Person Act. Their Lordships too accept that this is so, and that the reasoning in *R v Hughes* must be applied to this case in order that effect may be given to section 5 of the Constitution of Dominica.

At the heart of the conclusion that the mandatory death penalty for all cases of murder is inhuman and degrading is the essential point that the circumstances in which murders are committed vary greatly from case to case. They have no common pattern, nor is there a uniform standard of culpability. In some cases a close examination of the circumstances may show that the accused's culpability is relatively minor and that the imposition of the death sentence would be arbitrary and disproportionate. In others, no doubt, the crime is of a wholly different character. The Constitution of Dominica requires that each case must be examined on its own merits. The culpability of the accused must be assessed by the sentencing judge in the light of his own particular circumstances.

45. The appeal against sentence must be allowed on the ground that the imposition of the mandatory death penalty was unconstitutional.

Conclusion

46. The appeal against the conviction will be dismissed, but the appeal against sentence will be allowed and the sentence of death set aside. The case will be remitted to the High Court of Dominica to determine the appropriate sentence for the murder of which the appellant was convicted.

