Privy Council Appeal No 1 of 2008

Director of Public Prosecutions of the Virgin Islands *Appellant*

v.

William Penn *Respondent*

FROM

THE COURT OF APPEAL OF THE BRITISH VIRGIN ISLANDS

- - - - - - - - - - - - - - - - -

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

Delivered the 8th May 2008

- - - - - - - - - - - - - - - - -

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

- - - - - - - - - - - - - - - -

*[Delivered by **Lord Mance**]*

Introduction and facts

1. The Jury Act 1914 of the British Virgin Islands contains elaborate and detailed provisions for the preparation and publication each December of a list of persons qualified to serve as jurors and for its revision by a Magistrate (ss.8-10). This list is to be copied into a jurors' book to constitute the jurors' register for the ensuing calendar year (s.11) with amendments made from time to time by the Registrar and Magistrate to take account of deaths, etc. (s.13). Whenever necessary, the Registrar is to impanel from the list an array of thirty common jurors to serve at the

High Court (ss.14-18) and to summons them to attend (s.22-23). From the array, a jury of no more than nine is impanelled to try any proceeding (s.26). The annex at the end of this judgment sets out these and other relevant provisions in detail.

2. The practice of the last fifteen or so years has been very different. No jurors' list has been prepared and no jurors' book or register kept. When impanelling juries, successive Registrars have used the voters' list prepared under the Elections Act 1994 (No. 16 of 1994) (as amended by No. 8 of 1998). The qualifications for jurors and electors are not identical. Under section 31 of the Constitution, a person is qualified to vote if he is a British subject, belongs to the Virgin Islands (a concept defined by section 2 of the Constitution), has reached the age of 18 and is domiciled and resident in the Virgin Islands (or is domiciled there and resident in the United States Virgin Islands). There are exceptions for persons certified insane or adjudged of unsound mind, disqualified by reason of a conviction of an offence relating to elections, sentenced to death or serving a term of imprisonment of over 12 months. Under section 4 of the Jury Act a juror must be between 21 and 60 and own or rent property of a certain value, hold office at a certain salary or be in receipt of a certain income. The values and sums stated have with time become insignificant, so that there must now be few if any who do not satisfy the monetary requirement. Non-working mothers or wives without any other source of income and without any rental or proprietary interest in their homes would be an example. Under sections 6 and 7 the persons disqualified from jury service are aliens not domiciled for at least 10 years, those disabled by unsoundness of mind, deafness, blindness or other permanent infirmity of body, persons previously convicted of any felony (which the Board will assume refers, after the abolition of the distinction between felonies and misdemeanours, to crimes previously counting as felonies) and persons unable to read and write English or understand it when spoken. The differences between the voters' list and the jurors' list envisaged by the Jury Act 1914 therefore consist principally in the different age qualifications and, less significantly, the different criteria for disqualification.

3. No-one seems to have raised the non-compliance with the Jury Act 1914 until the present case. The case involves the conviction on 20th March 2006 of the appellant, William Penn, on three counts of burglary from tourist rental villas in respect of which he was sentenced to concurrent eight year terms in prison. When a jury of nine was being impanelled for his trial, the respondent through counsel, Dr Joseph Archibald QC, challenged peremptorily three persons (the maximum number susceptible to peremptory challenge), and challenged successfully a further six for cause. The Crown asked fourteen persons to

stand by. Two days after the respondent's conviction, Dr Archibald wrote asking for permission to inspect the jurors' book and the Magistrate's certificate of revision of the jurors' list for 2006. The reply elicited the fact that neither existed. The Registrar said that, after taking office, she had enquired about the practice of using the voters' register and had been advised that this practice had existed for many years, and so had, it appears, continued to follow it.

4. The respondent appealed to the Court of Appeal on various grounds. The Court (Brian Alleyne CJ (Ag.), Rawlins JA and Edwards JA (Ag.)) on 3rd December 2007 dealt only with the irregularity involving the jury in allowing the appeal and setting aside the convictions. The Court relied on the wording of s.1 of the Jury Act 1914, according to which

> "'juror' means a person whose name is included in a jurors' register for the time being in force".

On that basis, the Court held that the Registrar had no jurisdiction to impanel an array based other than on a jurors' register and that the nine persons impanelled as a jury were without jurisdiction. It ordered a fresh trial. Against that decision, this appeal has been brought and expedited by special leave of the Board.

Challenges to the array

5. At common law challenges to jurors for cause are either to the array or to the polls (i.e. to an individual member called from the array to be impanelled as a juror). Peremptory challenges were, within certain limits, recognised. The Jury Act 1914 reproduces all these possibilities (ss.24, 27 and 28). But there is a potentially important distinction between a challenge made at the time of the array or impanelling of jurors and an appeal on the basis of information acquired after conviction. The authorities draw this distinction, and make clear that merely to establish after conviction some reason why a juror should not have sat will not suffice to have a jury's verdict set aside. Thus the presence on the jury of someone disqualified by conviction for felony from sitting (*R v. Kelly* [1950] 2 KB 164) or of someone who mistakenly answered to the wrong name when the jury was being impanelled (*R v. Mellor* (1858) Dears & B 468, by a narrow majority) will not suffice in the absence of any injustice, unfairness or real prejudice (*R v. Mellor*, 499, 508, 514, 517, 518-9 and 522-3, per Erle, Crompton, Crowder, Willes, Channell and Byles JJ; cf also *R v. Comerford* [1998] 1 CAR 235, 244D). Deliberate impersonation of a juror by another person will in contrast lead to the verdict being set aside (*R v. Kelly*; *R v. Wakefield* [1918] 1 KB 216).

6. Challenges to the array relate to the process leading to the impanelling of the array. Such a challenge may be made on the basis of default, error or partiality on the part of the sheriff or other officer responsible for the return of the array. That, at least, was common ground in *O'Connell v. R* (1844) XI Cl & F 155, the case of the Irish patriot, barrister and MP, in whose hands, as The Concise Dictionary of National Biography records, "the system of constitutional agitation by mass meetings ….. reached a perfection never before attained". In February 1844 O'Connell was convicted in the Court of Queen's Bench in Dublin on lengthy charges related to his agitation for an independent Ireland and sentenced to a fine of £2000 and a year's imprisonment. At the trial a challenge to the array was made and rejected. Writs of error issued by the defendants came before the House of Lord with speed (motions for arrest of judgment having been refused on 27th May) and were argued before the Law Lords over six days in July 1844. The House took the advice of the Judges, which was delivered on 2nd September.

7. On 4th September 1844 the House decided in O'Connell's favour on grounds unrelated to the challenge to the array. This decision was only possible after lay peers of contrary opinion were persuaded to withdraw from the chamber by the consideration that, although a distinction between lay and law Lords was "not known to the Constitution", no-one "ought ever to decide a case, all the arguments in which he has not heard" (pp.423-4, per Lord Campbell and cf per The Marquess of Clanricarde). Obiter, the House expressed sharply divided views on the scope of challenges to the array.

8. The basis of O'Connell's and his co-defendants' challenge to the array was legislation which put in place (in lieu of the sheriff's former responsibility for all aspects of the identification, summoning and impanelling of jurors) a scheme calling for the preparation each year by the collectors of grand jury cess (a rate payable by occupiers of land) and the presentation by the clerks of the peace to the Recorder of Dublin of twenty several lists for correction and approval. From these the Recorder was to prepare one general list, arranged according to rank and property, and to deliver this to the clerks of the peace for them to copy and for the sheriff to use to return any array. O'Connell and his co-defendants averred that the Recorder had not prepared any general list from the several lists which he had approved. Someone else had prepared a paper-list purporting to be a general list, but had fraudulently omitted from it 59 persons whose names had been on the several lists which had been approved. It was this paper-list which had been used to make up the jurors' book. The challenge averred that the clerk of the Crown for Dublin and the solicitor acting for the Crown in the prosecution had notice of the irregularity before the panel was arrayed. There was no

complaint about the sheriff or the way in which he had impanelled jurors for the trial from the book. It was the Recorder exercising what Lord Denman described as judicial functions who defaulted. The issue which divided the House was whether a challenge to the array could lie in respect of default of the Recorder exercising a newly created judicial function which replaced the old shrieval function of identifying eligible persons.

9. The view of all the Judges, according to Lord Chief Justice Tindal (pp.247-9), and the opinions of the Lord Chancellor (Lord Lyndhurst) and of Lord Brougham (pp.323-5 and 347-8) were that there was no basis for a challenge to the array in the absence of any allegation of misconduct by the sheriff or his subordinate officers in relation to the compilation of the jurors' book (under the relevant legislation, no longer in fact the sheriff's responsibility) or in the return of an array from it. The practical consequences of any contrary view weighed heavily. Contrary views were, however, expressed with great force and at length by Lord Denman and Lord Campbell (pp.351-365 and 407-411), who were able to rely on, and in Lord Denman's case cite extensively from, an opinion sent to the Lord Chief Justice by Coleridge J whom illness had prevented attending the House (pp.353-5 and 411). Lord Denman noted that the fraud alleged related to matters previously the sheriff's responsibility and had allegedly occurred with intent to prejudice O'Connell in his trial (pp. 353-4). He quoted Coleridge J's opinion that default by anyone undertaking what had previously been the sheriff's duty should on a challenge to the array be equated with default by the sheriff (p.354). He rejected the suggestion that the remedy was an application at trial to "a discretion of the Court, the decision subject to no appeal" (p.364). (Lord Denman was in this respect echoing language of Abbott CJ in *R v. Edmonds* (1821) 4 B & Ald 471, 473-474, who said that a party seeking a *venire de novo* "applies to the Court, not for the exercise of the sound and legal discretion of the Judges, but for the benefit of an imperative rule of law, and the improper granting or the improper refusing of a challenge, is alike the foundation for a writ of error".) Lord Cottenham expressed no concluded opinion on the challenge, save to say that he found the Judges' advice, if right, "brings forward this very strange proposition, that there is no remedy for an acknowledged wrong of great magnitude" (p.390-1).

10. In *Hayes and Fogarty v. R* (1846) 10 Ir Law Rep 53, a challenge to the array was made at trial and pursued after conviction by writ of error, on the basis that jurors had been summoned less than six days in advance and that the sheriff had returned jurors whose names were not in the jury book. The challenges failed. The requirement to summon six days in advance was regarded as "directory, and made with a view to the ease and convenience of the jurors" and one which "could never have been

intended to have the effect of frustrating the entire proceedings" (pp.62-63). As the requirement to return jurors from the jury book, the court said that "the Sheriff certainly had no right" to return any others, but that his default "if matter of challenge at all" went to the polls and not to the array.

11. The case of *O'Connell* did not lead to long-term adherence to the statutory procedures. In the later treason Irish case of *R v. Burke* (1867) 10 Cox CC 519 in April 1867 a challenge to the array was again made on the basis that no general list, classified according to rank and property, had been prepared from the individual alphabetical lists approved by the justices or clerk of the peace (the responsibility being by now assigned to one or other) and no general list had therefore been compared with the high constable's list as required, or delivered to the sheriff. Instead an alphabetical list had been copied from the detailed lists into a book for 1866, which was still being used for the trial in April 1867. The Chief Justice of Ireland, sitting with two other High Court judges as the County of Dublin Special Commission, refused to sustain the challenge, referring to the advice of the judges (though not the Law Lords) in *O'Connell* for the proposition that "no ground of challenge to the array exists where the sheriff has not been guilty of a fault". Non-compliance with merely "ministerial duties" was "no ground for challenge" (p.524). Fitzgerald J added that the sheriff "would not [have been] justified in going into the question which book he was to adopt" (p.524)

12. That impropriety relating to the officer responsible for returning the jury may be ground for an order for a fresh trial is illustrated by *Baylis v. Lucas* (1774) 1 Cowp 112 (Aston J) and *Brunskill v. Giles* (1832) 9 Bing 13 (Tindal CJ, who delivered the Judges' advice in *O'Connell*). In these cases (both civil), the objection was that the officer was the attorney, or in *Brunskill* the partner of the attorney, for the other party. In *Brunskill*, the objection had been made at trial, but was not then supported by evidence and so rejected; and, although on the application for a *venire de novo* an affidavit was tendered, it was regarded as insufficient because it did not show that the defendant had been taken by surprise or had used due diligence to establish the conflict of interest at trial.

13. In contrast, in the more recent case of *R v. Solomon* [1958] 1 QB 203, all parties at trial were aware of and agreed to a procedure whereby, the jury panel having by mistake being discharged at the end of the previous day, the clerk of the court "prayed a tales, by taking four persons from the back of the court and eight from an office across the road" (pp.203-4). On an appeal after conviction, the Court of Criminal Appeal presided over by Lord Goddard CJ held that it was impossible in law to

"have a complete jury of talesmen" – the tales procedure was only permissible to complete a jury when a full jury cannot be impanelled from the names on the panel (p.207). On that basis, the Court held "with great reluctance" that "it is as if the trial had taken place before no jury at all" and a *venire de novo* must issue (p.208). The case was one where the officer impanelling the jury erred in law, in a manner which eliminated any array at all and led in effect to himself selecting the entire jury impanelled to try the case.

14. In the present case, there was default of the returning officer (the Registrar) who omitted to perform his or her statutory duties over a long period. It is therefore unnecessary for the Board to decide how far non-compliance with statutory requirements not involving any default of the sheriff or other officer responsible for the return of the array may result in a challenge to the array, or to resolve the conflict between the members of the House of Lords on this point in *O'Connell*. The Board will say only that it would share Lord Cottenham's surprise if, no matter how great the default or the potential prejudice to the accused in the procedures leading up to the selection of the array, a conviction could never be set aside unless the default could be attributed to the sheriff or equivalent, or his or her subordinate officers. The creation by fraudulent means of a general list omitting eligible persons and its use to select the array would not be likely to be overlooked today.

15. The question in the present case is whether, when default by the returning officer is revealed after trial, the consequence is, either automatically or in the circumstances of this case, that a *venire de novo* should issue and a retrial be ordered. The Court of Appeal considered this to be the effect of the Jury Act 1914. But, before looking more closely at that statute, the Board will address a previous decision which the Court of Appeal distinguished as inapplicable in view of the wording of the Jury Act.

16. *Montreal Street Railway Company v. Normandin* [1917] AC 170 involved, like the present case, "very elaborate and minute" statutory enactments (p.173, per Sir Arthur Channell). Municipalities were to provide annually lists of qualified persons, which a board on which the sheriff sat and which he apparently chaired was to revise to make a list of grand jurors. This list was then to be provided to the protonotary, who was to take from it the names of all persons residing within 15 miles of his office in order to create a list of civil jurors, from which civil juries were to be impanelled. The sheriff and board had neglected their duties for several years by 1912 when the case was tried, and the protonotary (who the Board in its reasoning assumed thereby also to have been in

default: p.176) used old lists to impanel civil juries. There had been no challenge to the array or to any individual juror at the trial.

17. The judgment of the Board was delivered by Sir Arthur Channell and is worth quoting at length:

> "The statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the appellants that the consequence is that the trial was coram non judice and must be treated as a nullity.
>
> It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P. C., p. 50, *Rex v. Leicester Justices* (1827) 7 B & C 6, and Parke B. in *Gwynne v. Burnell* (1835) 2 Bing N C 7, 39); to provisions as to rates *(Reg. v. Inhabitants of Fordham* (1839) 11 Ad & E 73 and *Le Feuvre v. Miller* (1857) 26 L J (MC) 175); to provisions of the *Ballot Act (Woodward v. Sarsons* (1875) LR 10 CP 733 and *Phillips v. Goff* (1886) 17 QBD 805); and to justices acting without having taken the prescribed oath, whose acts are not held invalid *(Margate Pier Co. v. Hannam* (1819) 3 B & Al 266). In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list ipso facto null and void, so that no jury trials could be held until a duly revised list had been prepared. As to the objects sought to be attained by these elaborate provisions for the mode of preparing the lists, there seem to be three things aimed at: first, to distribute the burden

> of jury service equally between all liable to it; secondly, to secure for the use of the Courts effective lists of jurors likely to attend when called, the names of dead men and absent or exempted men being left out; thirdly, to prevent the selection of particular individuals for any jury, commonly called packing. The duties imposed on the sheriff appear intended for the first and second of these purposes, and those of the prothonotary for all the three. His duty to take the names in rotation prevents packing, and his taking the names next after those who last served distributes the burden. In this case the prothonotary had a list in fact, although an old one, and the men on it had all been qualified, and probably in most cases remained so. The names were taken in proper rotation, and those ultimately sworn appear all to have been qualified. As to some of the matters, such as the omission to initial correct alterations, it would be impossible to hold that these made the whole list null and void. Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect, if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box, to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by Monet J. that he ought not to interfere where the appellant had shown no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities." (pp 174-176)

18. The modern tendency is no longer to seek to identify or distinguish between mandatory and directory acts, but the Board's judgment in the *Montreal Street Railway* case underlines the need for careful examination of the relevant legislation, to ascertain the purpose of statutory procedures for the impanelling of an array and whether an intention should be attributed to the legislature that non-compliance with such procedures should render a jury trial a nullity, irrespective whether it may have occasioned potential unfairness or prejudice. The Board recognises the seriousness of a criminal charge and the particular vigilance that the courts will exert to maintain the fairness and integrity of criminal proceedings. But the Board considers that there is scope for the reasoning in the *Montreal Railway* case in a criminal context.

19. Such an approach would be generally consistent with the views of the majority in *R v. Mellor* (above) and pragmatically expressed dicta in *Hayes and Fogarty v. R* (above). It would also be consistent in spirit with the approach adopted in more recent authority. In *R v. Sekhon* [2003] 1 WLR 1655 and *R v. Soneji* [2005] UKHL 49; [2006] 1 AC 340, confiscation orders were made outside the six-month period prescribed by statute. In *Soneji* the House of Lords concluded, on an objective analysis of the consequences that Parliament might be taken to have contemplated as attaching to failure to make such orders within the statutory period, that they did not involve total invalidity, at least in circumstances not amounting to abuse of process making it unfair and inconsistent with the spirit of the Act to make such an order after the six-month period (para. 42, per Lord Rodger of Earlsferry). In *Tiwari v. R* [2002] UKPC 29; (2002) 61 WIR 452, the Board held that a magistrate's failure at a preliminary enquiry to comply with statutory requirements, by asking the accused whether he wished to call any witnesses and by hearing and recording the testimony of any such witnesses, did not invalidate the appellant's subsequent conviction at his trial on indictment.

20. It is true that in certain criminal law contexts, the courts have identified a Parliamentary intention to treat particular steps as pre-conditions to the validity of the proceedings. In *Crane v. DPP* [1921] 2 AC 299, the trial jointly of two defendants who had been indicted separately was held to be a nullity (although, if a joint indictment had been properly presented, the two could have been tried together). In *R v. Angel* [1968] 1 WLR 669 and *R v Bracknell JJ, Ex p Griffiths* [1976] AC 314, criminal proceedings, which by statute required, and had not received, the leave of, respectively, the Director of Public Prosecutions and the High Court, were held to be a nullity. In *Seal v. Chief Constable of South Wales Police* [2007] UKHL 31; [2007] 1 WLR 1910 the same approach was, by a narrow majority of the House, taken in relation to civil proceedings requiring leave of the Director of Public Prosecutions under the Mental Health Act 1983. In *R v. Clarke* [2008] UKHL 8; [2008] 1 WLR 338 a criminal trial began and proceeded on the basis of an unsigned indictment. Late in the trial, an amended indictment was preferred and signed, which was the basis of all but one of the counts upon which the jury convicted. With some expressed regret, the House held that, in the light of the legislative history and statutory language, the existence of a properly signed indictment from the outset of the trial was a pre-condition to the validity of the entire proceedings.

21. In both *Seal* and *Clarke and McDaid* the House of Lords distinguished its previous decision in *Soneji* by identifying a difference in the intent to be imputed to Parliament in the legislation governing the different situations which these authorities concerned. In *Seal* Lord

Bingham said (paragraph 7) that:

> "The important question is whether, in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement; but not nullifying the proceedings: see *R v Soneji* [2006] 1 AC 340, para 23."

In *Clarke and McDaid* Lord Bingham cautioned (paragraph 20):

> "The decisions in *R v. Sekhon* [2003] 1 WLR 1655 and *R v. Soneji* [2006] 1 AC 340 are valuable and salutary, but the effect of the sea-change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect."

De facto judges

22. The Board was also referred to cases on *de facto* judges. In *R v. Cronin* [1940] 1 All AER 618, the Recorder of Bury St Edmunds, hindered by bad weather from getting to court, appointed the chairman of quarter sessions to hear a case of dangerous driving. The chairman was not a barrister, and did not therefore have the statutory qualification to act as deputy recorder. The Court of Criminal Appeal set aside the conviction as a nullity, citing *Crane v. DPP*. In *Fawdry & Co v. Murfitt* [2002] EWCA Civ 643; [2003] QB 104 a case was heard and decided by a judge "ticketed" to hear Technology and Construction Court (TCC) cases but not cases in the Queen's Bench Division of the High Court. In the event, the Court held that the case had been validly transferred to the TCC, but expressed the strong view that, even if this had not been so, the de facto doctrine would have protected the judge's judgment from invalidity. Hale LJ regarded *R v. Cronin* as doubtful authority in the absence of any argument on the de facto doctrine. In *Coppard v. Customs and Excise Commissioners* [2003] EWCA Civ 511; [2003] QB 1428 a Queen's Bench Division case was decided by a TCC judge who believed that his appointment to the TCC gave him authority to sit in the Queen's Bench Division. The de facto doctrine was held to validate both the office which everyone thought he was performing and his judgment. In *Fawdry* and in *Coppard* the court said that a decision by someone aware that he had no power to reach it would fall into a different category and be a nullity. The Board's attention has been directed to a further Wisconsin case, *State ex rel Dunn, Sheriff v. Noyes* (1894) 27 LRA 776; 58 NW 386. There, the de facto doctrine was applied to validate the decision to return true bills of

indictment for fraud against defendants made by a grand jury whose term of office had expired, but who had continued in good faith to sit in the next law term.

23. The qualification recognised in the de facto cases - that the de facto judge must act in good faith and be believed by himself and all concerned to be acting with authority – matches the qualification regarding impersonation identified in the jury cases which the Board has already discussed. The Board shares Hale LJ's doubt about the correctness of *R v. Cronin*. The de facto cases reflect an approach which can be said to be broadly consistent with, and may even be regarded as going further than, that taken in the jury cases, including the *Montreal Railway* case. But the two strands of authority have not proceeded along identical lines (the isolated *Wisconsin* case appears to be the only instance of the de facto doctrine being applied to a jury), and it is, in the Board's view, unnecessary in order to resolve the present appeal to rely on the de facto cases or to enquire further as to their precise relationship with the extensive case-law on juries.

The Jury Act 1914 and other legislation

24. The Board turns against this background to the Jury Act 1914 and the consequences which the legislature may be taken to have intended in the event of non-compliance with its provisions regarding the identification and impanelling of an array of jurors. As in the *Montreal Railway* case, so in the case of the Jury Act 1914 the detailed prescriptions of the Act appear to have been designed, first to distribute the burden of jury service equally between all liable to it, secondly to secure for the use of the Courts effective lists of jurors likely to attend when called, the names of dead men and absent or exempted men being left out, and thirdly to prevent the selection of particular individuals for any jury (packing). The presence in the Jury Act 1914 of section 16(4) indicates the small size of the potential pool of jurors in the Virgin Islands in 1914, and the practical importance then for jurors of the first two aims. The Board was told that the current voters' list (and no doubt of any jurors' register) would contain around 10,000 names. The risk of packing or any other distortion in the representative nature of the jury chosen to try a case is correspondingly diminished.

25. A number of statutory provisions were invoked in the course of submissions as throwing light of the intention to be imputed to the legislator. Foremost among these were sections 1 and 24 of the Jury Act 1914 and section 51 of the Criminal Procedure Act of 1873. Mr Terrence Williams, the Director of Public Prosecutions, in submissions to which the Board pays tribute, also argued that section 18 of the English Juries Act 1974 was received in the Virgin Islands by virtue of section 28 of the

West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80 and section 48 of the Criminal Procedure Act 1873. The Board finds it unnecessary to consider that last submission, or therefore to consider whether section 18 could be so received into Virgin Islands law consistently with sections 24 of the Jury Act 1914 and section 51 of the Criminal Procedure Law 1873.

26. The Board has set out above the definition of "juror" contained in section 1 of the Jury Act 1914. Section 24 reads:

> "24. Every application, made at a sitting of the High Court, for the quashing of an array, shall be heard and determined by the presiding judge, and no array shall be quashed on the ground of any formal defect, or of any breach of any of the provisions of this Act, unless the presiding Judge is satisfied that it is expedient, on the merits and in the interests of justice, that the array should be quashed."

Section 51 of the 1873 Law reads:

> "51. Judgment, after verdict, upon an indictment for any felony or misdemeanour shall not be stayed, or reversed, for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the Provost Marshal, or other officer; and, where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes, the offence in the words of the statute creating the offence or prescribing the punishment, although they be disjunctively stated, or appear to include more than one offence or otherwise."

27. The language of section 51 is archaic. The reference to felony must be understood as embracing the present offences of burglary. The section must be understood against the background of the Juries Ordinance No. 9 of 1868, in force when it was enacted though later replaced by the Jury Act 1914. The 1868 Ordinance identified certain persons as liable to, and others as exempt from, jury service (sections II and III). Section IV, headed "Formation of the Jury List", provided:

> "That twenty days at least before the commencement of each Term, the Marshal and Secretary shall attend on the Chief Judge or other

presiding judge with a book to be called the Jury Book, and in the presence of such judge or presiding judge make a list in alphabetical order fairly written in such book of the names of forty person qualified to serve on juries, and shall hand over the same forthwith to the Chief Judge or other presiding judge of the General Court, who shall at least three days after receiving such list as aforesaid return the same to the Marshal after having first chosen from such list the names of twenty persons whom he shall select as being best qualified to serve as jurors in the said Court. …..”

28. Under the heading “Mode of Summoning Juries”, the 1868 law continued:

> “V. Five days at least before the commencement of each Term, the Marshal or some one appointed by or for him for that purpose shall summon the twenty persons whose names shall have been selected from the Jury List as aforesaid with a printed or written summons …..
> ….
> VII. The Marshal shall deliver to the Registrar of the Court a panel containing the names, places of abode, and description of the persons summoned, which list the Registrar shall produce in open Court.
> …..
> XIII. Upon the sitting of the Court a list of the names of the jury on the panel shall be delivered to the Secretary of the Court by the Marshal and upon the trial of any criminal information or matter or civil suit or issue where a jury is required, the Secretary of the Court shall in open Court draw therefrom until such number of men appear as are required, who after all just causes of challenge allowed shall remain as fair and indifferent, the names of the jurors shall be drawn alternately from the top and bottom of the List of names; and the same shall be done whenever it is necessary to form a new Jury.”

29. Section 24 of the Jury Act 1914 concerns the disposal of challenges to the array made at trial. Section 51 covers the approach to be taken on an appeal in respect of the matters which it identifies. Mr Knox QC for the respondent submits that neither section 24 nor section 51 was or could have been relevant in this case. The failure to follow the statutory procedures was so fundamental that there was nothing that could be called an array under section 24. But, if that was wrong, then the trial judge, on an application under section 24, would have been bound to quash the array and discharge any jury impanelled, and the respondent could be no worse off after conviction in relation to the default disclosed

in answer to counsel's letter dated 22nd March 2006.

30. As to section 51, Mr Knox submits that "returned as a juror by the Provost Marshal" postulates, at the least, the existence of a jury list (or, under the 1914 Act, register) containing the names of the nine jurors impanelled to try the case. The argument might be carried further, by confining section 51 to situations similar to that in *R v. Mellor* where all nine jurors were among the array though one of them came forward by mistake and served, though not actually named to serve, on the trial jury. But on that narrow construction section 51 would not even cover situations like that in *Hayes and Fogarty v. R.*, which would seem surprising.

31. The Board does not in the event find it necessary to determine the precise scope of section 51. Whatever the position in that regard, it is far from clear that section 51 is apt to cover a default by the returning officer of the nature in issue in this case. Assuming, therefore, that the present situation falls outside the scope of section 51, the question remains what the consequences are of such a default.

32. Turning to section 24, the Board does not accept the submission that, because there was no jurors' register, there was no array so that the section is irrelevant. The Registrar was under the statute the officer responsible for impanelling and summoning an array for the purpose of any sitting of the High Court. The persons who were summoned by the Registrar for the sitting at which the respondent was tried and convicted constituted an array, however defective the process by which the Registrar had identified them. It is clear from *O'Connell* that an application to quash the array is available in respect of any default in the process leading to the summoning of an array in which the sheriff or equivalent (here the Registrar) is involved. If the whole process was defective, the remedy was thus by way of application to quash the array, falling within section 24.

33. The Board accepts that, had the Registrar's default been the subject of a challenge at trial under section 24, the judge might have decided that it was "expedient, on the merits and in the interests of justice," to conclude that the array should be quashed. But, assuming that a judge would have so decided at trial, the Board does not accept Mr Knox's further submission that it follows from this that an appeal after conviction made on the basis of the same defects must also succeed. The situations are different. Where there has been a trial, the considerations identified by the Board in the *Montreal Railway* come into play. To treat the trial as a nullity and to order a new trial "in cases where there was no reason to think that a fair trial had not been had" (quoting Sir Arthur Channell) is a

course which the Board should be reluctant to take unless the statutory language and intent requires it.

34. The Court of Appeal regarded as decisive the statutory definition in section 1 of the Jury Act 1914 of "juror" as meaning "a person whose name in included in a jurors' register for the time being in force". The Act calls for the Registrar to participate in the process by which a jurors' register is prepared (sections 8-10) and to impanel and summon arrays of jurors whose names are included in the jurors' register (section 11(4), 14 and 22-23), from among whom a trial jury of nine is then to be selected (s.26). The Court of Appeal's reasoning would on one view even mean that any array would be a nullity if, even by mischance, any person was included in it whose name was not included in a valid jurors' register. If that were so, United Kingdom cases such as *O'Connell*, *Hayes and Fogarty* and *Burke* would, if their facts re-occurred in the Virgin Islands, have to be decided by a very different process of reasoning. In the Board's view that is most unlikely to have been the Virgin Islands' legislature's intention. In any event, however, the enacting of section 51 (dealing with appeals) and section 24 (dealing with challenges to the array) indicate that the legislature's intention was in a quite opposite direction. Section 24 shows that the legislature intended that neither the existence of a defect in the array nor any breach of any of the provisions of the Jury Act 1914 should be treated as making an array a nullity. The evident purpose was to confirm or, if or in so far as this did not already exist, introduce the element of discretion, or (more precisely) judicious evaluation "on the merits and in the interests of justice", into decisions whether or not to quash the array which Abbott CJ and Lord Denman (in the different legal climate of the early 19th century and in the absence then of any possibility of review on appeal in a criminal cause) disavowed (*Edmonds*, p.473; *O'Connell*, p.364). It is true that earlier sections of the Jury Act 1914 refer to an "array of …. jurors" (e.g sections 14(1) and (2) and 16(1) and (4) and see also section 22). But section 24 is a remedial section, not itself containing any words expressly tying the existence of an array to the presence on the array of jurors as defined in section 1. The Board regards section 24 as wide enough to cover situations (such as discussed in *O'Connell*) where an apparent array is summoned which is, because of default on the part of the person responsible for returning the array, defective as a whole. If the array is itself otherwise regular, but includes (for example) one or more persons not on the jurors' register, that would probably give occasion for no more than a challenge to the polls of those individuals under section 28.

35. Section 24 is not itself applicable on an appeal. It deals with applications to the presiding judge before whom the applicant is to be tried. But its flexible focus on the interests of justice assists to confirm the

appropriate approach to the question which is in issue on the present appeal: whether the appellant's trial and conviction should be regarded as a nullity or set aside and a fresh trial ordered. There is no suggestion that the trial judge or jury were aware of the Registrar's default in his or her statutory duties. The Board does not accept that the Registrar's awareness of the default equates with awareness on the part of the judge or jury. There is no suggestion of any disadvantage or prejudice to the respondent by reason of the defects in process which occurred. Any jurors' register would have been very largely identical with the voters' list from which the array was in fact selected. There is no suggestion that the array was not taken from the voters' list in a manner which was comparably random to the way in which it should have been taken from a jurors' register. There is no suggestion that any of the nine jurors who eventually served at the trial did not meet the age and other qualifications in the Jury Act.

36. The Board notes, for completeness, that there is also no evidence, of the nature regarded as important in *Brunskill v. Giles*, as to the state of mind of the respondent or his counsel during the trial, or as to what led Dr Archibald to write asking to inspect the jurors' book and Magistrate's certificate two days after its conclusion. In oral submissions, Mr Knox said that he was instructed that Dr Archibald had, prior to the Registrar's reply, no knowledge of any non-compliance with the Jury Act. His letter would on that basis be no more than a continuation of the concern regarding the composition of the jury that both sides manifested by their challenges to particular persons and requests to stand by at the trial. The Board will proceed on that basis.

Conclusion

37. In the Board's view, there is nothing in the Jury Act 1914 to compel a conclusion that either the array or the trial should in the present circumstances be regarded as a nullity. On an appeal after a trial during which such failures went unobserved by those responsible for trying the issues of law and fact and all appeared entirely in order, the question is whether the default now identified is such as to require the trial and verdict to be set aside. Highly regrettable though it was, there is no ground for considering that the default had or could have had any impact on the eligibility to serve, randomness, impartiality or ultimate decision of all or any of the members of the jury. In these circumstances and applying similar reasoning to that of its previous decision in the *Montreal Railway* case, the Board considers that the answer to the question is negative, and will humbly advise Her Majesty that this appeal should be allowed accordingly. Since the appellants' other grounds of appeal have not been considered by the Court of Appeal or the Board, the Board will further advise Her Majesty that the matter should be remitted to the Court of Appeal for these to be considered and determined.

ANNEX
(Extracts from legislation)

(A) The Jury Act 1914

1. This Act maybe cited as the Jury Act.
(1) In this Act-…
…..
“juror” means a person whose name is included in a jurors’ register for the time being in force;
“jurors’ register” when not qualified by the addition of a year, means jurors’ register for the time being in force;
“prescribed particulars” means the place of abode and the title, quality, calling, or business, and the property qualification;
……

14. (1) Whenever the date approaches for a sitting of the High Court, the Registrar shall, on such a day as will leave sufficient time for the persons impanelled to be duly summoned, as hereinafter provided, impanel in the manner hereinafter prescribed, an array of common jurors to serve at the said Court.

(2) Subject to the provisions of subsection (4) of section 16, every array of common jurors shall consist of thirty persons, but any judge may, by an order in writing under his hand, direct a greater number to be impanelled and, when any such order has been made, the number directed in the order shall be impanelled accordingly.

15. (1) Subject to the provisions of subsection (4) of section 16, the Registrar shall not impanel in an array of common jurors any juror, who is known, or believed, by him to be temporarily absent from the Territory, and not likely to return in time to be summoned to attend a sitting of the High Court, and shall not impanel in the same array of common jurors more than one of the jurors, who, to the best of his knowledge, information and belief, are employed, at the time, in the same business:

Provided that where the number of jurors employed in the same business exceeds eight the Registrar may impanel in the same array of common jurors one third of the number of jurors so employed at the time
..…

16. (1) When the Registrar is impanelling an array of common jurors, he shall, subject to the provisions of subsection (4), make in the preliminary panel book a preliminary panel, in the form in the Fourth Schedule, in which he shall, after any names, which under the provisions of section 17, are to be inserted therein, insert as many more names as may be required,

taken alternately from the first and the last parts of the jurors' registrar, as follows, …..

…..

(4) Notwithstanding anything hereinbefore contained, if, when the Registrar is impanelling an array of common jurors to serve at the High Court, the number of jurors, whose names are included in the jurors' register, does not exceed thirty, the Registrar shall impanel, as the array to serve at the said Court, all the jurors whose names are included in the register, and such array shall be good and valid, although the number impanelled is less than thirty.

17. Every preliminary panel shall be made in the preliminary panel book, and shall be signed and dated by the Registrar, and, whenever the Registrar is making out a preliminary panel under this section, if there are any names included, but not marked "Impanelled" in the last preceding preliminary panel the Registrar shall insert such names, or such of them as have not been cancelled under the provisions of section 13 as the first names in the new preliminary panel, in the same order in which they occur in the last preceding preliminary panel.

18. (1) As soon as the Registrar has completed a preliminary panel as aforesaid, he shall cause the names, therein marked "Impanelled," to be entered in the prescribed manner in a panel of array.

(2) When an array is impanelled under subsection (4) of section 16 the names of the persons impanelled shall be entered in the prescribed manner in a panel of array…

…..

22. As soon as any array, whether of common or special jurors, has been impanelled, the Registrar shall proceed to summon each of the jurors included in the array to attend on the day fixed for the holding of the next sitting of the High Court, unless, in the case of an array of special jurors, another day has been appointed by a judge, in which case the jurors included in the array shall be summoned to attend on that day…

…..

24. Every application, made at a sitting of the High Court, for the quashing of an array, shall be heard and determined by the presiding judge, and no array shall be quashed on the ground of any formal defect, or of any breach of any of the provisions of this Act, unless the presiding Judge is satisfied that it is expedient, on the merits and in the interests of justice, that the array should be quashed.

25. If, at any sitting of the High Court, a proceeding is brought on for trial before the jury impanelled for the trial of any other proceeding have been

discharged, the presiding Judge may order another jury to be impanelled from the jurors who are not then impanelled.

26. Every jury impanelled for the trial of any proceeding shall consist of nine persons and no more.

27. When a common jury is being impanelled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanour-

> *(a)* the person charged, or each of the persons charged, may peremptorily and without assigning cause challenge any number of jurors not exceeding three;
> *(b)* the Crown shall have the same right as, at the commencement of this Act, it has in England, to ask that jurors stand by until the panel has been "gone through" or perused.

28. (1) When a jury is being impanelled for the trial of any proceeding, any juror, whose name has been drawn as hereinafter provided, may be challenged for cause by any of the parties to the issue, and, where any such challenge is made, the same shall be inquired into by the presiding judge, who, after hearing any evidence which may be adduced, may allow, or disallow such challenge, and the decision of the judge, as to what is or is not, sufficient cause, shall be final.

(2) In this section "cause" means anything which, in the opinion of the presiding judge, renders it improper, or inadvisable, that the person challenged should be impanelled for the trial of the proceeding.

(B) Criminal Procedure Act 1873

51. Judgment, after verdict, upon an indictment for any felony or misdemeanour shall not be stayed, or reversed, for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the Provost Marshal, or other officer; and, where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes, the offence in the words of the statute creating the offence or prescribing the punishment, although they be disjunctively stated, or appear to include more than one offence or otherwise.