Trinity Term
[2024] UKPC 15
Privy Council Appeal No 0027 of 2020

JUDGMENT

Mohamad Jiaved Ruhumatally (Appellant) *v* The State and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Lloyd-Jones
Lord Hamblen
Lord Stephens
Lady Simler
Sir Tim Holroyde

JUDGMENT GIVEN ON
18 June 2024

Heard on 23 and 24 January 2024

Appellant
Zaredhin M N S Jaunbaccus
James P Ramdhun
(Instructed by Christy Chambers (Mauritius))

Respondents
Rashid Ahmine, Director of Public Prosecutions
Jagganaden Muneesamy
Bhavna Bhagwan
(Instructed by RWK Goodman LLP (London))

SIR TIM HOLROYDE:

1. In December 2015, after a trial in the Supreme Court before Presiding Judge Fekna and a jury, this appellant, Mohamad Jiaved Ruhumatally, was convicted of the murder of Mr Marie Gerald Lagesse. He was sentenced to undergo penal servitude for 42 years. He appealed to the Court of Criminal Appeal against both his conviction and his sentence, but succeeded only to the extent that his appeal against sentence was allowed and his sentence reduced to one of penal servitude for 40 years. With permission granted by the Board on 13 January 2022, he now appeals against his conviction and sentence.

The facts:

2. The events giving rise to the charge occurred in 2005. One Vinessen, who was employed at the head office of the Mauritius Commercial Bank ("the MCB") devised a plan to rob the MCB of a large sum of money. He recruited others, including the appellant, and advised how the plan should be carried out. Access was to be gained to a vault room via a corridor which led to a control room.

3. It was anticipated that two members of MCB staff would be working in the vault room and that they would be tied up. In a statement under caution which he made to the police on 14 March 2005, the appellant said that Vinessen had recommended that no one should be harmed.

4. On 10 January 2005 the appellant met Vinessen inside the MCB and was shown the layout. Plans were made for the robbery to be carried out on 12 January, but attempts made on that day, and on the following day, had to be abandoned. On each of those two days, the appellant had gone to the MCB armed with two sabres which he carried "to scare if needed".

5. One man had to drop out because he had been seen by a bank employee who knew him. The appellant recruited another man to take his place. He explained to the new recruit that the plan involved attacking two persons who would be working in the vault, taking the money and carrying it away in bags.

6. In a statement under caution made on 16 March 2005 the appellant said that in late January Vinessen advised him that a female employee who had been expected to be on duty in the vault room would in fact be absent, and her place would be taken by a man. The appellant said that Vinessen told him that this man should not be beaten or injured, so that the blame for the robbery would fall on him.

7. On 11 February 2005 the appellant and two others, Monvoisin ("Steeve") and Sambaccaie ("Baccaie"), went to the MCB and, on a signal from Vinessen, passed through a door which had deliberately been left insecure and entered the corridor leading to the vault room. On this occasion, the appellant stated, no sabres were brought, but Monvoisin had armed himself with a dagger. The appellant secured the door whilst Monvoisin and Sambaccaie went ahead into the vault room.

8. In his statement of 16 March 2005 the appellant said that, when he followed the others into the vault room,

> "I saw that Baccaie had grabbed Mr Lagesse by his neck on his chair with his left hand and with his right hand he had covered the mouth of the man to prevent him from screaming. Steeve had also leaned over the man but I did not notice what he was doing."

9. The appellant stated that he then filled the three bags which they had brought with high-denomination banknotes. He continued:

> "When I had finished filling those three bags, I do not remember if Baccaie or Steeve told me to tie the mouth of Mr Lagesse with my shirt and when I moved towards Mr Lagesse, I saw him down on his belly, his hands tied behind his back with tape. I did not remark his feet because there were bags of coin on his feet up to his back. I took out my shirt and when I was about to tie my shirt around his mouth I saw that they had already tied his mouth with tape and there were papers protruding from his mouth; even though I passed my shirt around his mouth and I tightened it with its two sleeves. While I was doing this I saw Steeve and Baccaie washing their hands which had blood on them with a bottle of water which they had obtained from the vault itself. There was much blood on the floor near the head of Mr Lagesse and while I was tying his mouth with my shirt blood got onto my hands and I wiped my hands with my trousers. While I was tying the mouth of Mr Lagesse, I knew he was still alive as he was moving. "

10. The robbers then left the MCB, taking with them a total of about 51 m rupees in cash, only some of which has been recovered.

11. Mr Lagesse was found by employees of the MCB. Police officers and doctors attended and examined the body. No pulse was detected. One of the doctors lowered the shirt from around Mr Lagesse's mouth.

12. Photographs of Mr Lagesse's body in the vault room show that his hands and feet were securely bound behind his back with adhesive tape about 3" in width. His head and mouth had also been bound with "several turns" of adhesive tape, and the appellant's shirt had been tied over his mouth. Eleven large bags filled with coins, each weighing about 5kgs, had been placed on Mr Lagesse's legs and lower back, making it very difficult, if not impossible, for him to move.

13. On post-mortem examination of the body by Dr Gungadin, Chief Police Medical Officer, the cause of Mr Lagesse's death was found to be asphyxia by gagging.

The initial proceedings:

14. Following his arrest, the appellant was provisionally charged with murder and was kept in custody. That charge was struck out, a provisional charge of manslaughter was laid, and the appellant was granted bail. During the investigation, the appellant made a total of eight statements under caution to the police. At trial, the prosecution relied only on those dated 14 and 16 March 2005.

15. In April 2012 all three accused were charged with the murder of Mr Lagesse. In February 2013, however, the prosecution accepted guilty pleas from Monvoisin and Sambaccaie to an alternative charge of manslaughter. In January 2014 a fresh charge of murder was laid against the appellant alone, the particulars of which stated that he had "criminally, wilfully and with premeditation" killed Mr Lagesse.

16. Sections 215-217 of the Criminal Code of Mauritius provide:

> "Section 215: Homicide committed wilfully is manslaughter.
>
> Section 216: Manslaughter committed with premeditation or by lying in wait is murder.
>
> Section 217: Premeditation consists in the determined intention of attempting the person of any particular individual, or of any individual who may be found or met with, even

> though such intention should depend upon some circumstance or condition."

The trial:

17. After a number of delays, and rulings on preliminary matters, the appellant's trial began on 29 October 2015. It lasted about two and a half months. It is sufficient to mention only the following features of the prosecution evidence.

18. Witnesses who attended the scene and saw Mr Lagesse's body said that his mouth was tied with a shirt. One witness described a doctor lowering the shirt "which was over the mouth of the victim" to check where he was bleeding. The only evidence as to how tightly the shirt had been tied was that provided by the appellant's admissions in his statement of 18 March 2005, quoted at para 9 above.

19. Dr Gungadin gave evidence of his post-mortem examination of the body of Mr Lagesse. At the start of that examination, the appellant's shirt was tied loosely around Mr Lagesse's neck, but the Sellotape which had been wound two or three times around Mr Lagesse's mouth and neck was still in place. Both eyes were blackened; there were several lacerations to the face and limbs, including some defensive injuries to the hands and arms; a tooth was broken; and there was a fracture of the nasal bone. Dr Gungadin explained that Mr Lagesse's nose would have bled and swollen, thereby making it difficult for Mr Lagesse to breathe through his nose. He said that at the time of his examination, the nose was very much swollen, but that did not mean that Mr Lagesse would have been unable to breathe at all through his nose.

20. There was then the following exchange between the judge and Dr Gungadin:

> "Q: Once again I am going to refer to you an assumption, plus ask for your opinion as an expert. Assuming that the shirt was tied around the mouth and the nose, how would that interfere with the breathing process?
>
> A: Then definitely would have aggravated the situation.
>
> Q: … So assuming the shirt was around the mouth and the nose, you said that it would definitely aggravate the breathing process?

A: Then definitely it would aggravate that situation, it will prevent the person from breathing."

21. Dr Gungadin gave evidence that there were papers in Mr Lagesse's mouth and in his throat to a depth of about 10 centimetres. As a result of the fractured nose, broken teeth and wounds to the lips, the papers were soaked with saliva, blood and mucus. Dr Gungadin stated:

"In this case there was a swelling because of fracture of the nose, there is swelling at the level of the throat because of the paper which entered into his mouth up to this throat, has already completely interfered with the respiratory system. This means that the respiratory system of the person is blocked. "

22. In answer to a question by the judge, Dr Gungadin stated that the Sellotape over Mr Lagesse's mouth was around the mouth and neck, not near the nose.

23. Later in Dr Gungadin's examination in chief he explained that the normal reflex of a person would be to try to remove papers which had been introduced into his mouth. He continued:

"… Here his hands were tied up and moreover they had used an adhesive tape which had prevented this gag from coming out and on top of that a shirt was tied in the same region, around his nose, around his mouth which further prevents the gag from coming out, ie these papers from coming out. Here it is almost impossible for a person to breathe when it has been blocked to this extent.

Q: Now my question is more specific. Explain the effect of the shirt. Only the effect of the shirt on all of this?

A: Firstly there was an adhesive tape which had already blocked the mouth and on the adhesive tape there was a shirt which was tied. I think it would be logical to say that that shirt was blocking the tape further and at the same time it also blocked that system where he could breathe a little though his nose, this also was blocked. He will not be able to breathe in. Maybe it was just to prevent the tape from being removed."

24. A little later, the judge asked these questions:

> "Q: Assuming that the person was still alive at the time the shirt was being tied around his mouth and nose as you have said?
>
> A: Yes, My Lord.
>
> Q: How much time from there onwards would death follow, taking into account that the person had probably received blows, the piece of paper had been pushed into his mouth before that event that the Sellotape had been wrapped around his mouth before that event and that there was bleeding, most probably before that event, from the moment the mouth and nose are tied with a shirt, how long would you say this person would have taken to pass away in view of what you said that probably the shirt would have interfered even more with the breathing process, your opinion, doctor?
>
> A: Three to four minutes would be more than enough for that person to death, three to four minutes …
>
> Q: We are talking from the moment the shirt is tied?
>
> A: Maybe lesser or so, not more than this."

25. In the light of some of the evidence given by Dr Gungadin – including that quoted at para 21 above, and a later answer to the effect that death was due to asphyxiation by gagging due to the paper, the adhesive tape and the shirt – there was an issue as to whether the paper lodged in the throat would have caused death regardless of the tying of the shirt. Clarification was sought by prosecuting counsel:

> "Q: What effect did the shirt have, doctor?
>
> A: The effect of the shirt is that it prevents the gag coming out further. It will effect more pressure on the gag, ie those papers would further enter in his throat and if there would have been a chance for the paper to come out, it would not come out at all, ie it worsens the situation a bit more.

> Q: And what effect did the shirt have in the time the victim took to die?
>
> A: Well, the effect it worsens the situation, it will diminish the time the person had to survive."

26. Defence counsel took up this point in cross-examination:

> "Q: If there was no shirt, there was, how we call it, there was paper as you explained up to the throat, there was cellotape, would that person survive?
>
> A: Maybe not. He would have died, even then."

27. At the conclusion of the prosecution evidence, defence counsel made a submission of no case to answer. He submitted that Dr Gungadin had only said that the shirt was on the mouth, not that it was on the nose. The judge recollected that in examination in chief the doctor had said the shirt was on both mouth and nose, a proposition with which prosecuting counsel agreed. The judge observed that there had been no challenge to the doctor's evidence in this respect, and said it would be important to check the transcript to establish precisely what had been said.

28. The submission of no case to answer was rejected. The appellant did not give evidence, but made an unsworn statement from the dock.

The judge's directions to the jury:

29. The judge directed the jury that the offence of murder required proof of six elements: first, that there was an assault on the deceased; secondly, that the assault must have been an act which was carried out wilfully; thirdly, that the accused committed the assault or participated jointly with others in the commission of the assault; fourthly, that the death of the victim resulted from that assault; fifthly, that the assailant had the intention to kill the victim; and sixthly, that the assailant premeditated the killing.

30. As to the fourth of those elements, medical causation, the judge referred to a defence submission that Mr Lagesse would have died anyway as a result of the papers which had been stuffed into his mouth by the other robbers, so that the appellant could not be held responsible. He continued:

> "However, you will have to bear in mind what Dr Gungadin told you about the effect of the shirt of the accused being tied over the mouth of the victim. It had the effect of strengthening the gag – you will remember Dr Gungadin having said that – and of pushing the paper deeper inside the mouth of the victim until it blocked his respiratory system completely after having penetrated you remember almost ten centimetres was mentioned. You will have to ask yourselves the role that the acts of the accused in tying his shirt around the mouth of the victim had in contributing or causing the latter's death."

31. The judge went on to refer to a further defence submission that Mr Lagesse had already died "before the intervention of the accused". In that regard, the judge referred to the appellant's own statement that Mr Lagesse was still living at that time, and then read from a transcript the last nine lines of the exchange which has been quoted at para 24 above (beginning with the words "From the moment the mouth and the nose are tied …").

32. As to the fifth element, intention to kill, the judge referred to drawing an inference as to intention from the surrounding circumstances. He then added:

> "Finally, because it is easy for somebody to do something and then to say subsequently that he did not intend to do it, the law stipulates that we can act on a reasonable assumption, namely that a person must be deemed, he must be taken to intend the natural consequences of his act. Thus, for example, if an accused points a gun at a victim and shoots him in the heart, and subsequently says that he did not intend to kill, the law will reject his contention. The law will assume that he intended the natural consequences of his act and, therefore, that he intended to kill the victim when he pointed a gun at him and shot him."

33. As to the sixth element, premeditation, the judge referred to what was said in a French legal text and directed the jury as follows:

> "*La premeditation c'est le dessein que l'accusé forme dans le calme de son âme de tuer*. This expression can be explained as follows: the accused deliberated or, in other words, he thought about it and formed '*le dessein de tuer*', and the

> important word is '<u>before</u>' he did the act or acts that led to the death of the victim." [emphasis in original]

The judge then explained that the plan to kill may be formed "quite some time" before the act of killing, but that there could also be premeditation even if the act of killing happened quite fast:

> "What you must realise is that the time lapse between the premeditation and the act of killing does not have to be long. In fact, during what has been referred to as killings that take place in the heat of the moment, premeditation can be formed in the mind of the accused within a matter of seconds. What is essential is that there must be a cooling off period, no matter how short it is. During that time the killing is taken [sic] place. The killing is being carried out. In other words, even if the accused is being driven by his emotions and the action of the time being, there must be those few seconds when he stops and what he is about to do strikes his mind and he says to himself *dans le calme de son âme* 'I will kill this person'. That is enough for premeditation."

34. The judge listed features of the evidence which the jury might consider relevant to this sixth element, including parts of the appellant's statements. He said:

> "[5] When he had finished placing the money in the bags, he approached the deceased and saw the deceased lying on the floor. The latter's hands had been tied behind his back and there were coin bags on his lower body.
>
> [6] The accused then noticed that his confederates has placed a piece of paper in the mouth of the deceased and had tied his mouth by surrounding it with adhesive tape.
>
> [7] The accused nevertheless removed his shirt and rolled it around the mouth of the deceased on top of the adhesive tape and tied the two sleeves of the shirt tightly. He saw that there was a lot of blood on the floor near the head of the deceased when he was in the process of tying the latter's mouth.

> [8] Finally, when the accused was tying up the mouth of the deceased with his shirt he was fully aware that the latter was still alive because he was moving.
>
> [9] It has been established before you by expert evidence that the cause of death of the victim was asphyxia by gagging.
>
> These facts show that the two confederates of the accused were involved in the initial act of grappling violently with the deceased and of subduing him physically. The accused, for his part, was divorced from that heated action. His mind was involved with something else, which was the placing of bank notes in bags which were subsequently to be carried away.
>
> As he finished that job, he approached the deceased and saw the state in which the latter was. The accused then seems to have acted calmly in removing his shirt and carrying out the act of tying the mouth of the deceased, which act appears to have been uncalled for in the circumstances suggested earlier.
>
> The question is whether the accused, in this case, can be said to have acted in the heat of the moment when he was carried away by an emotional impulse at the time he did the action which led to the death of the deceased, or whether he had thought about the situation and has formed '*le dessein de tuer dans le calme de son âme.*
>
> The answers that you will give to these questions, Members of the Jury, may help you to decide on the issue of premeditation."

35. The judge directed the jury that they could return a verdict of not guilty of murder but guilty of a lesser charge: manslaughter; assault with premeditation causing death but without intention to kill; wounds and blows causing death without premeditation and without intention to kill; or simple wounds and blows. He explained the elements of each of those offences.

The verdict:

36. The jury convicted the appellant of murder.

The appeal to the Supreme Court:

37. The appellant appealed to the Supreme Court of Mauritius, Court of Criminal Appeal. He initially put forward 34 grounds of appeal against conviction, to which he sought leave to add a further five. In the event, not all those grounds were pursued. The appellant also put forward grounds of appeal against sentence.

38. It suffices for present purposes to say that in a detailed judgment dated 6 December 2018, the court rejected all the grounds of appeal against conviction. The appeal against sentence succeeded only to the extent that the court concluded that a modest reduction was appropriate to reflect the delay of more than 10 years between the appellant's arrest and his eventual conviction. On that basis, the sentence was reduced in length from 42 to 40 years.

The appeal to the Board:

39. This appeal to the Board again puts forward numerous grounds. In essence, the appellant repeats the arguments advanced in the earlier appeal, and criticises the Court of Criminal Appeal for failing to accept those arguments. The appellant's counsel, Mr Ramdhun (who did not appear below) and Mr Jaunbaccus (who did), have raised 12 broad issues, stated as follows in the appellant's Case:

> A: Whether the victim had already died at the time the appellant was tying his shirt around the mouth of the victim.
>
> B: Whether the manner in which the shirt was tied around the mouth of the victim had any effect of any whatsoever kind or caused victim's death.
>
> C: Whether the appellant as per the facts of the case had any intention (mens rea), did such act (actus reus) and or premeditated that can be reasonably viewed or said to have caused the death of the victim and whether any of the elements was present and properly interpreted and or explained to the jury.
>
> D: Given the circumstances of the facts in this case, whether the prosecution was wrong in not having all the co-accused including the accused who masterminded the crime tried jointly and thus caused serious prejudice and unfairness.
>
> E: Whether the evidence of the expert witness was properly interpreted by the court and whether the expert was completely biased.

F: Whether the trial can be said to be a fair one in particular upon considering the following:

(a) The manner on which the judge led the expert witness at trial.

(b) The frequent intervention and conduct of the judge.

(c) The judge's failure to explain to the jury about being customers of the Bank.

(d) The judge's failure to inform the jury of their right to dissent.

(e) The judge's failure in considering a letter sent to the appellant's lawyer.

(f) The composition of the jury.

(g) That the trial judge had prior knowledge of all the facts of the case.

(h) The oral statement of the judge.

G: Whether in all the circumstances, the judge misdirected the jury and/or failed to direct the jury on several other issues.

H: Whether the appeal was a fair one, whether the appellate court dealt with all the issues as raised properly or at all and whether it reached a fair decision.

I: Whether the trial is a nullity.

J: Whether the prosecution sought justice or sought conviction at all costs.

K: whether the fact that the appellant was prosecuted as a principal for murder and (a) his confederates were prosecuted for manslaughter and (b) the employee of the bank was prosecuted for a lesser charge is in breach of the principle of equality and fairness.

L: Whether the sentence is wrong in law.

The submissions:

40. All of those issues have been addressed in the written and oral submissions of the parties. In summary, the principal arguments on each side are as follows.

41. The appellant submits that the whole trial was unfair. It is submitted that the prosecution were unable to prove either an intent to kill or premeditation, and that the judge's summing up in relation to those necessary elements of the charge of murder was wrong in law. In particular, Mr Ramdhun submits that the law of Mauritius permits an inference of fact that a person intended the natural consequences of his acts, but there is no assumption or presumption to that effect. Accordingly, he argues, the judge's direction quoted at para 32 above wrongly took away from the jury an issue which was particularly important in the context of the appellant's defence: namely, that he intended to rob but did not intend to kill.

42. It is further submitted that the evidence merely showed the appellant acting as he was instructed by one of the other robbers, with no opportunity for any premeditation of the killing, and that the tying of the shirt over the mouth could not have had any effect on Mr Lagesse's ability to breathe.

43. Mr Ramdhun notes that the respondent accepts that there was no evidence that the shirt was tied over the nose as well as the mouth. He submits that the judge wrongly questioned Dr Gungadin on the assumption that there was such evidence, and in summing up wrongly repeated his exchange with the doctor: see para 31 above. The judge, he submits, presented to the jury a scenario which was unsupported by any evidence, but which must have had a substantial impact on the jury's consideration of the issues of causation of death and the appellant's intention.

44. Mr Ramdhun also criticises the judge's comment, when directing the jury about the issue of premeditation, that the appellant "seems to have acted calmly" in tying Mr

Lagesse's mouth (see para 34 above). He submits that the appellant's actions were equally consistent with his focus being on quick escape with the stolen money.

45. For the respondent, the Director of Public Prosecutions Mr Ahmine, and the Acting Assistant Director Mr Muneesamy (neither of whom appeared below), accept that the evidence showed that only Mr Lagesse's mouth was tied, and that the judge fell into error in suggesting the shirt had also been tied over the nose. It is also accepted that there were instances of the judge "regrettably" intervening during the proceedings and that the closing speech of prosecution counsel was "at times passionate". It is, however, submitted that these matters, even collectively, were not "fatal errors".

46. The Director submits in particular that the judge's error as to where the shirt was tied has to be seen in context: there was evidence from those who attended the scene that the shirt was only tied over the mouth; Dr Gungadin's evidence for the most part referred to its being tied only over the mouth; the judge only once in his summing up said anything to suggest that the shirt was also over the nose; and all other references in the summing up were accurate reminders of evidence that the shirt was only tied over the mouth. In those circumstances, it is submitted, the judge's error cannot have had any significant impact, and cannot have misled the jury into thinking that the appellant had covered Mr Lagesse's nose as well as his mouth. Dr Gungadin's evidence clearly established that the tying of the shirt over the mouth alone contributed to the death of Mr Lagesse. The Director submits that the Board can therefore be sure that the jury would have convicted of murder even if no mention had ever been made of the shirt being over the nose, and that accordingly there has been no substantial miscarriage of justice and, if necessary, the proviso under section 6 of the Criminal Appeal Act 1955 could properly be applied.

47. As to the judge's directions on intention, it is accepted that there is no presumption of law in Mauritius that a man intends the natural consequences of his act. It is, accordingly, accepted that if the judge had directed the jury that there was such a presumption, that would have been a misdirection; but, it is submitted, the judge did not fall into that error. The judge simply referred to the inferences which the jury could draw from the facts and circumstances. The Director accepts that the judge might have expressed himself more clearly, but argues that the evidence provided a strong basis for the jury to infer that the appellant intended to kill. In particular, he submits, the judge was correct to invite the jury to consider why the appellant tied his shirt around the mouth of a man lying face down who was already powerless; was already gagged, and therefore needed no further "muzzling" to prevent him from summoning assistance; and was seriously injured. The Director submits that the jury were entitled to take into account the fact that the robbers, contrary to their original plan, had not covered their faces, and were therefore at risk of being identified if Mr Lagesse survived. The jury, he submits, could properly be sure that the appellant tied the shirt over Mr Lagesse's mouth in order to make sure that he died.

48. In his submissions on this issue, the Director referred to *Meersaheb v R* 1984 MR 152, 1984 SCJ 364, a decision of the Supreme Court of Mauritius which was also referred to by the judge in his ruling rejecting the submission of no case to answer. The accused in that case was charged with assault by pointing a revolver at the wife of one of his friends, who was sitting near him and was immediately frightened. Her husband pushed the accused's hand away: the gun was discharged and another man nearby was injured. The accused argued that his pointing of the gun was merely a playful gesture and that he had no intention to harm. Dismissing the appeal, the court held that the material element of the offence was plainly established and "gave a clear indication of the intention which [the accused] obviously had". The pointing of the gun was neither accidental nor involuntary:

> "He intended, whatever may have been his motive, to point the revolver at the wife and must be presumed to have intended the natural consequences of his act, the consequences being a physiological impact (fear for her physical integrity) on the wife."

49. The Director submits that the phrase "must be presumed" is not to be understood as referring to a presumption of law. Rather, he submits, the case is an illustration of facts giving rise to an irresistible inference as to the accused's intention.

The duty and powers of the appellate court:

50. The duty and powers of the appellate court in Mauritius are stated in section 6 and section 7 of the Criminal Appeal Act 1955, which in material part provide:

> "**6. Determination of appeals in ordinary cases**
>
> (1)(a) The Court, on any appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (b) The Court may, notwithstanding that it thinks that the point raised in the appeal might be decided in favour of the

appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(c) The Court may, where a serious irregularity has occurred, declare the trial to be a nullity and order a fresh hearing.

(2) Subject to the special provisions of this Act, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered.

…

(3) On appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence and substitute therefor such other sentence as it thinks fit.

7. Powers of Court in special cases

…

(2) Where an appellant has been convicted of an offence and the jury, or the judge, as the case may be, who tried him could on the information have found him guilty of some other offence, and on the finding of the jury or of the judge as the case may be, it appears to the Court that the jury or the judge, as the case may be, must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury or the judge, as the case may be, a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at trial as may be warranted in law for that offence, not being a sentence of greater severity.

…"

51. The Board must consider whether Court of Criminal Appeal was correct in its application of those provisions to the facts and circumstances of this case.

52. In *Dosoruth v Mauritius* [2004] UKPC 51, referring to corresponding earlier legislation governing appellate courts in Mauritius, the Board held at para 25 that the phrase "serious irregularity" should be given a generous construction.

Analysis:

53. With respect to the appellant's counsel, the terms in which they have identified the issues (see para 39 above) are unhelpfully diffuse, with a good deal of overlap between them. For reasons which shall shortly be explained, the Board sees merit in a number of points relating to the evidence and the judge's directions in relation to the elements of intention and premeditation. Those points fall within the broad headings of issues C, E, F, G and H. The Board sees no merit in the numerous other points raised by the appellant, which will be addressed only very briefly. First, however, it is appropriate to make a general point.

54. The Court of Criminal Appeal felt it appropriate to include in its judgment a reminder of paragraph 4 of the Code of Ethics for Barristers:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. He also has an overriding duty to the Court, to the standards of his profession and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interest. He has a duty to the Court which is paramount. …"

55. The Board endorses that reminder. The Board does not wish to be unfairly critical. It of course understands the difficulties sometimes faced by defence advocates who, trying their best to discharge their professional duties towards their lay clients, are anxious not to overlook any point or argument which may assist the defence. It is however an important part of the advocate's role to exercise judgement and discrimination in focusing on the arguable points, rather than obscuring them by a plethora of poor points and weak submissions. No court is assisted by the multiplication of arguments regardless of their merit. Nor is a defendant assisted by such an approach, which runs the risk of undermining the stronger points in the defendant's favour. It must, moreover, be clearly understood that a defendant who advances a multitude of arguments, including some which are plainly without merit, cannot thereby create an artificial ground of appeal based upon a complaint that the court below did not give a detailed response to every single point which was raised. In such circumstances, a failure by the court to address particular points in detail is not in

itself an indication that the defendant's case has not been considered and decided in accordance with the law.

56. Turning to the submissions which in the Board's view have merit, it is clear that the appellant denied any intention to kill and so denied any premeditation of the killing. It was therefore particularly important for the judge to be accurate when reminding the jury of the evidence about what the appellant did to Mr Lagesse. Unhappily, with all respect to the judge, he fell into error in this regard.

57. First, in the exchange quoted at para 20 above, the judge most unfortunately misstated the evidence. Up to that point, Dr Gungadin had said nothing to suggest that the shirt was tied over the nose as well as the mouth. There was no other evidence that it had been tied over the nose. On the contrary, as noted at para 18 above, the evidence of those who attended the scene, and who saw the shirt in the position in which the appellant had tied it, was that it was only tied over the mouth. True it is that Dr Gungadin subsequently referred to the shirt being tied "around his nose, around his mouth" (see para 23 above); but it seems highly likely that he did so only because of the terms in which the judge had just questioned him, and in the remainder of his evidence Dr Gungadin consistently referred to the shirt overlying the tape over the mouth, but not covering the nose.

58. In the Board's view, that was a serious error on a matter of central importance. Given that Mr Lagesse had already been rendered immobile, and cruelly gagged with papers and Sellotape, it was certainly open to the jury to infer that the appellant's purpose in tying his shirt around Mr Lagesse's mouth was to secure and tighten the gag and to reduce yet further Mr Lagesse's ability to remove it. The jury were also entitled to accept Dr Gungadin's evidence as proving that the tying of the shirt around the mouth had caused or materially contributed to the death, in that it accelerated death by a short time. But if there had been evidence that the appellant had tied his shirt in such a way as also to prevent breathing through the nose, that was plainly capable of being a most important fact for the jury to take into account when assessing whether the appellant intended to kill Mr Lagesse, and whether the killing was premeditated. Conversely, and also importantly, if the evidence showed – as it did – that the appellant had tied the shirt in such a way as to secure the gag but to leave Mr Lagesse's nose clear, the fact that he had chosen to do so could be regarded as providing significant support for the defence case that the killing was unintended and unpremeditated. That is so, whatever the precise details of Dr Gungadin's evidence as to how long Mr Lagesse would have lived if the shirt had not been tied around him: the important point, for present purposes, is the possible inference which it was open to the jury to draw from the position in which the shirt had been tied.

59. Secondly, when the judge summed up, he did not correct his error and direct the jury to put out of their mind any suggestion that the shirt had covered the nose as well as

the mouth. In the Board's view, he should have done so. Instead, he reminded the jury of Dr Gungadin's answers to his questions, reciting the last nine lines of the exchange quoted at para 24 above. He thereby compounded the error. It is not clear whether anyone had checked the transcript as the judge had suggested (see para 27 above); but such a check was necessary, in the light of defence counsel's submission, and it would have shown that the doctor's evidence, referring to the shirt covering both the mouth and the nose, had very probably been prompted by the judge's question.

60. In their closing speeches, neither counsel suggested there was any evidence of the shirt being over the nose as well as the mouth. If the judge felt it important to refer to his exchange with the doctor, it was in the Board's view necessary for him to remind the jury that it was he himself who had suggested that the shirt was tied over the mouth and nose, that there had been no evidence to that effect before that suggestion was made, and that the remainder of Dr Gungadin's evidence was to the effect that it was not tied over the nose. Regrettably, this passage of the summing up would unintentionally have had the opposite effect: because it quoted only part of the relevant exchange, it gave the impression that Dr Gungadin had volunteered evidence that the shirt was tied over both the mouth and the nose.

61. Thirdly, and again relevant to the element of intention, it is common ground between the parties that there is no presumption of law in Mauritius that a person must be taken to intend the natural consequences of his acts. Rather, in the absence of an admission or other direct evidence as to the accused's intention, the tribunal of fact is required to consider all the evidence and to determine what inference can be drawn as to that intention. The legal position is therefore the same as it is in England and Wales, following the passing of section 9 of the Criminal Justice Act 1967. The respondent accepts that it would accordingly be a misdirection for the judge to instruct the jury that there was a presumption of law.

62. In the Board's view, the prescriptive terms of the judge's direction quoted at para 32 above ("must be taken to intend"; "the law will reject"; "the law will assume") would surely have been understood by the jury as an instruction that they must find the appellant to have intended the natural consequences of his action in tying the shirt around the mouth of Mr Lagesse, and must therefore reject any statement by the appellant to the contrary. The Board accordingly accepts the appellant's submission that the judge, by this direction, took away from the jury an issue which only they could properly decide.

63. Fourthly, a further error was unfortunately made by the judge in his summing up of a related issue. In order to convict the appellant of murder, the jury had to be sure both that he intended to kill Mr Lagesse and that the killing was premeditated. Although the robbery had long been planned, there was no evidence that the robbers had planned in advance that they would kill anyone. The appellant's statements under

caution, relied on against him by the prosecution in other respects, were to the effect that no one was to be seriously hurt. The jury were entitled to accept one of those statements as an admission that the appellant intended that at least some force would be used if necessary against any MCB employee who was in the vault room; but even if the jury so found, there was no evidence of premeditation of killing at any time before the robbers entered the vault room. It is clear that, under the law of Mauritius, it is not necessary for premeditation to be of long duration. It is, however, necessary – as the judge correctly directed the jury – that the accused must stop, think about what he is doing and decide *dans le calme de son âme* that he will kill his victim.

64. Given that requirement, and given that the jury needed for this purpose to focus on events taking place within a short period of time in the vault room, it is unfortunate that the judge again misstated the evidence. With all respect to him there appears to have been no evidential foundation for his telling the jury, in the passage quoted at para 34 above, that the appellant "seems to have acted calmly" in tying the mouth of Mr Lagesse, an act which "appears to have been uncalled for". That statement is likely to have been regarded by the jury as a clear indication that the judge believed the necessary period of calm reflection had been proved. True it is that the judge more than once directed the jury that he was not telling them what they should decide, merely identifying the issues which they would want to resolve; but on this specific point, he said nothing to make clear that it was for the jury to decide, on their assessment of the evidence as a whole, whether premeditation had been proved. Nor, in his list of features which the jury might find relevant to that issue, did he refer to the appellant's statement that he tied his shirt around Mr Lagesse's mouth only because one of the other robbers told him to do so.

65. In the judgement of the Board, the Court of Criminal Appeal should have concluded that the combination of those errors, all bearing on issues of central importance, made it impossible to uphold the conviction. The court should have found that the combination of errors amounted to a serious irregularity, and had resulted in a substantial miscarriage of justice, such that it would not be possible to apply the proviso to section 6(1)(b) of the 1955 Act. The court should have exercised its power under section 6(1)(c) to declare the trial a nullity and order a fresh hearing.

66. That being the Board's view, it is unnecessary to address the many other grounds of appeal (see para 39 above) in any detail. The Board is satisfied that they are without merit, for the following brief reasons.

67. Issue A: the short, and complete, answer to the appellant's written submission is that he himself admitted in his statement of 16 March 2005 that Mr Lagesse was still alive when he tied the shirt around his mouth: see para 9 above. The appellant's case on this issue was not assisted by speculation, in the written grounds of appeal, as to how

long the actions of the other robbers may have taken. In oral submissions, this issue was not pursued.

68. Issue B: the unchallenged evidence of Dr Gungadin was that the tying of the shirt over the mouth worsened the situation by reducing the chance that the papers would come out of the mouth, and diminished the time Mr Lagesse could survive. The jury were therefore entitled to find that the appellant's admitted act accelerated asphyxiation and so made a material contribution to the death.

69. Issue C: For the reasons briefly given in relation to Issue B, there was ample evidence of the necessary actus reus. Given the appellant's own account of the parlous state in which he found Mr Lagesse when he tied the scarf over his mouth – clearly seriously injured; trussed; immobilised with heavy weights; obviously helpless and unable to do anything to raise an alarm; gagged in a manner which would plainly make breathing through the mouth extremely difficult, if not impossible; and bleeding from the nose – it would have been open to the jury, if properly directed, to infer that the appellant intended to kill. It would also have been open to the jury, if properly directed, to infer that there was premeditation, albeit of short duration: on his own account, the appellant had noted Mr Lagesse's situation, had time to reflect before he acted, and knew what he was doing as he passed the shirt around the face of his helpless victim and "tightened it with its two sleeves". There was, therefore, evidence on which – but for the errors referred to in paras 56 to 64 above – the jury were entitled to be sure of the necessary mens rea.

70. Issue D: There is no substance in this point. The appellant accepts that he was given the opportunity to plead guilty to manslaughter but, unlike his co-accused, chose not to do so. The prosecution acted properly both in accepting guilty pleas to manslaughter from the other two accused, and in pursuing the charge of murder against the appellant. The acceptance of the guilty pleas from the co-accused was no bar to the prosecution alleging against the appellant that he was party to a joint intention to kill and to joint premeditation of the killing. The appellant was able to, and in his statements under caution and unsworn statement from the dock did, explain his own actions and say what the other two men had done. He suffered no unfair prejudice from the fact that he stood trial alone.

71. Issue E: The Board has already expressed its views as to the terms in which the judge questioned Dr Gungadin and summed up his evidence. The Board sees no basis for the allegation that Dr Gungadin was biased, and deprecates the making of that allegation. It may be said that in some respects his evidence was not as precise as it should have been; but that was the result of the imprecise manner in which he was questioned by prosecution counsel, not an indication of bias. In any event, defence counsel had the opportunity to challenge his evidence in cross-examination, if there was any proper basis on which to do so.

72. Issue F: Again, this Issue unhelpfully conflates a number of discrete points. The Board sees no merit in them. The respondent rightly concedes that some of the judge's interventions were regrettable. The Board agrees with the Court of Criminal Appeal that at times the judge adopted a didactic tone and showed impatience towards both counsel. But, as the Court of Criminal Appeal rightly concluded, the judge's conduct was not such as to give rise to an appearance of bias or unfairness, and not such as to undermine the conviction.

73. There is no substance in the complaints that many of the jurors were, or were related to, customers of the MCB: the Board agrees with the Court of Criminal Appeal that the mere holding of an account with the MCB by a juror or his close relative cannot be said to constitute real ground for doubting his ability to bring an objective judgment to bear on the issue under consideration.

74. The Court of Criminal Appeal referred to section 52(1) of the Courts Act 1945, which simply states that "the verdict of the jury shall be given by a majority of 7", and commended the usual practice of judges directing juries that whilst they should strive to reach a unanimous verdict the law allowed a majority verdict of 8-1 or 7-2. The Court however dismissed this ground of appeal because the judge had directed the jury that they should try their best to reach a unanimous verdict one way or the other, and if they were deadlocked they should send him a message. The Board agrees that in the absence of any such message being received, it must be presumed that the jurors were in fact unanimous.

75. No arguable ground of appeal arises from the fact that the judge, in accordance with longstanding practice in Mauritius, had been given a copy of the record of proceedings at the Preliminary Enquiry. Such a practice seems entirely sensible and convenient. The Court of Criminal Appeal was correct to point out that the judge was not the trier of fact, and that the summing up referred only to the evidence given before the jury at trial.

76. Lastly, the judge cannot be criticised for his decision not to allow defence counsel to develop any argument based upon an anonymous, undated letter which had been sent to him and which it was suggested had been sent by a juror. Although shown to the judge, this anonymous letter was not provided to the Court of Criminal Appeal or to the Board.

77. Issues G and H: The Board has indicated its views on these submissions at paras 56 to 65 above.

78. Issue I: It is submitted that the trial is a nullity because part of the evidence was not given under oath. This is because, in some instances, a witness whose evidence was

part-heard over an adjournment was not required to re-take the oath, or reminded of it, when the hearing resumed. The Court of Criminal Appeal was correct to rule that the only statutory requirement is for a witness to be sworn, or to make his or her affirmation, before giving evidence. Whilst it is common practice to remind witnesses that they are still under oath when they resume their evidence, there is no basis on which it could be said that the failure to do so in this case rendered the verdict unsafe.

79. Issue J: Parts of the opening and closing speeches of prosecution counsel were certainly couched in emotive or otherwise inappropriate terms. In the context of the trial as a whole, however, they do not provide any ground for setting the verdict aside. The Court of Criminal Appeal rightly referred to passages in the summing up in which the judge reminded the jury that they must decide the case on the evidence and not be swayed by any emotional appeal. We would add that the appellant's counsel had the opportunity in his own closing speech to respond to anything said by prosecuting counsel which he regarded as inaccurate or unfair.

80. Issue K: this covers the same ground as Issue D, and fails for the same reasons.

81. Issue L: The delay between arrest and sentence was very lengthy, but there is no basis for going behind the Court of Criminal Appeal's assessment – after considering relevant case law – that only a modest reduction in sentence was warranted in this case, taking into account the degree of criminality and the period of the delay up to the determination of the appeal.

Supplementary submissions:

82. Following the hearing, counsel provided helpful written submissions as to how the Board might exercise the powers available to it. For the appellant, it is submitted that the conviction should be quashed and that it would be inappropriate to order a retrial in view of the very long passage of time. For the respondent, it is submitted that, if the appeal succeeds, the Board should either declare the trial to be a nullity and order a retrial, or quash the conviction and substitute a conviction for manslaughter.

Conclusion:

83. The Board has considered those submissions in the light of its analysis stated above. For the reasons given, there was evidence on which the jury would have been entitled to find the appellant guilty of murder, but the judge unfortunately fell into errors which amounted to a serious irregularity. It was accepted by the respondent that if the appeal were to succeed, it would be open to the Board to declare the trial a nullity and order a fresh hearing. It was not suggested that this was a matter which should be

remitted to the Court of Criminal Appeal. It was also accepted that if such an order were made, it would be open to the prosecution not to proceed on the charge of murder but rather to proceed on a lesser charge. The respondent indicated that in such circumstances it would proceed on a charge of manslaughter.

84. Given that statement of the respondent's position, and notwithstanding that many years have passed since the relevant events, the Board considers that in the circumstances of this case it is appropriate to exercise the power under section 6(1)(c) of the 1955 Act to declare the trial a nullity and order a fresh hearing.

85. The Board so orders.