[2010] UKPC 26
Privy Council Appeal No 0077 of 2009

JUDGMENT

Noel Campbell *v* The Queen (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Rodger
Lady Hale
Lord Brown
Lord Mance
Lord Kerr

JUDGMENT DELIVERED BY
Lord Mance
ON

3 November 2010

Heard on 21 July 2010

Appellant	*Respondent*
Julian B Knowles Helen Law (Instructed by Dorsey & Whitney (Europe) LLP	Howard Stevens (Instructed by Charles Russell LLP)

LORD MANCE:

Introduction

1. On 21 July the Board heard submissions on an application for special leave to appeal to the Board and, after the Board had indicated that special leave would be granted, on an appeal by the appellant against his conviction on 10 April 2002 of the murder of Mr Leroy Burnett. Following conviction, the appellant was sentenced to life imprisonment, without eligibility for parole until he had served 40 years' hard labour.

2. Mr Burnett, a police officer, was killed in the Coral Reef Bar, Portmore at about 7.30 a.m. on 12 September 1999 by multiple gunshots, four to the head and one to the back of his right shoulder. Mr Clifford Anglin who was sitting with Mr Burnett was shot in the face but survived. Mr Anglin was the prosecution's sole witness to the shooting. He knew the appellant, he said that he had seen him that morning in and outside the Coral Reef Bar with another man (Mr Man), that at a moment when his back was turned to the appellant and Mr Man, he heard three shots, that he turned round to see the appellant who then shot him in the face, and that there were then two further shots as a result of which Mr Burnett fell off his stool. The appellant's response to Mr Anglin's account was and is alibi; Mr Anglin was either deliberately framing the appellant (a suggested motive being that he resented the appellant's suggested making of Mr Anglin's underage grand-daughter pregnant) or mistaken (it being suggested in this connection that he was always drunk).

3. The appellant was first tried in January 2001, when the jury was unable to reach a verdict and a retrial was ordered. The retrial before Pitter J and a jury occupied six working days from 3 to 10 April 2002, leading to the appellant's conviction on 10 April 2002. On 18 August 2003 a single judge of the Court of Appeal of Jamaica refused as without merit the Appellant's application for leave to appeal to the Court of Appeal against his conviction and sentence. On 21 October 2003 the Court of Appeal of Jamaica (Panton and Smith JJA and Cooke JA Ag) refused the Appellant's renewed application for leave to appeal. The Appellant was not represented at that hearing. Counsel for the Crown indicated to the Court that she had perused the transcript and had not seen anything which would provide a possible ground of appeal. In an oral judgment, Panton JA noted that the single judge was of the view that the application was without merit and stated that the Court had itself examined the record and was of the view that the trial judge had dealt adequately with the issues and that there was no ground on which the jury's verdict could be faulted.

4. The papers were in March 2006 reviewed by a pupil barrister, who provided a note to local solicitors. From April 2007 the appellant had the benefit pro bono of English solicitors and from mid-2007 the services also of senior counsel. Together they sought to investigate the matter and obtain certain further evidence. On 14 September 2009 the appellant applied to the Board for special leave as a financially assisted person. The Board invited submissions as to both its jurisdiction to grant, and the appropriateness of granting, special leave in the light of the Court of Appeal's refusal of leave to appeal to it.

Jurisdiction to grant special leave

5. As to jurisdiction, counsel for the appellant and for the respondent provided the Board with full and helpful submissions, both in the event concluding that there was jurisdiction to grant special leave in the present circumstances. Since the point is one of jurisdiction, the Board must consider it further. Perhaps because the requirement of leave to appeal to domestic courts of appeal was less common in the past, there appears to be no direct authority on the point. The present application provides an opportunity to clarify the position on the grant of special leave in such cases.

6. The royal prerogative power to grant special leave was regulated and restated by the provisions of s.3 of the Judicial Committee Act 1833 and s.1 of the Judicial Committee Act 1844. S.3 provides:

> "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his Majesty or his Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by his Majesty to the said Judicial Committee of his Privy Council, and such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to his Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open court)."

S.1 of the 1844 Act states further that "it shall be competent" for the Board:

> "to provide for the admission of any appeal or appeals to her Majesty in Council from any judgments, sentences, decrees of orders of any court

of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal within such colony or possession … Provided also, that any such order as aforesaid may be either general and extending to all appeals to be brought from any such court of justice as aforesaid, or special and extending only to any appeal to be brought in any particular case. . .”

Prior to the 1844 Act, the position appears to have been that, where there was an available domestic court of appeal or error, no appeal could be brought direct from a first instance court to the Board: see e.g. William Macpherson’s *The Practice of the Judicial Committee of the Privy Council* (2nd ed. 1873), p.31.

7. Section 110 of the Constitution of Jamaica states:

“**110 Appeals from Court of Appeal to Her Majesty in Council**

(1) An appeal shall lie from decisions of the Court of Appeal of Appeal to Her Majesty in Council as of right in the following cases--

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases--

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance

or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament.

(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

(4) The provisions of this section shall be subject to the provisions of subsection (1) of section 44 of this Constitution.

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a court of Jamaica."

8. The position regarding the grant of special leave in the light of s.110(3) has been considered in two previous decisions of the Board cited in counsel's submissions. In *Williams (Kervin) v The Queen* [1997] AC 624, the Board was concerned with a review procedure which had been introduced, by the Offences against the Person (Amendment) Act 1992, s.7, to classify previously passed sentences of death into two categories, capital and non-capital. The review was in the first instance to be undertaken by a single judge of the Court, without hearing representations or conducting any form of hearing, but there was under s.7(4) a right to have the single judge's classification reviewed by three judges of the Court of Appeal, before whom the defendant was entitled to appear or be represented and to make representations but whose determination was provided by s.7(5) to be "final". The defendants submitted that the three judges of the Court of Appeal making such determinations in their cases constituted a "court" and relied upon s.3 of the Judicial Committee Act 1833 and s.1 of the Judicial Committee Act 1844 as well as s.110 of the Constitution (p.630A-D).

9. The Crown disputed the Board's jurisdiction to hear an appeal in respect of such determinations, submitting that "The Constitution of Jamaica provides for the continuation of appeals to the Judicial Committee, but only under the terms of section 110 of the Constitution which supersedes the royal prerogative" (p. 630E-F). The Board did not find it necessary to decide whether the three judges constituted a "court". It took the view that "The jurisdiction of this Board to hear appeals from Jamaica now arises under section 110 of the Constitution of Jamaica" (p. 650D), and it held that s.110 did not apply for two reasons: first, assuming that the three judges were a court, the single judge was not (because he did not hear representations or conduct any form of hearing), so that any decision of the three judges was not given

"on appeal from a court of Jamaica" within s.110(5) (pp.652E-653C); and, secondly and independently, "whether or not section 110(3) and (5) of the Constitution would otherwise permit an appeal to the Board against the classification of the three judges to be brought by special leave", the words of s.7(5) of the 1992 Act providing for any decision of the three judges to be "final" excluded any such jurisdiction (pp.653C-654E).

10. The Board's advice in *Williams* does not expressly address s.3 of the Judicial Committee Act 1833 or s.1 of the Judicial Committee Act 1844, to which counsel for the defendants had referred. These were, in contrast, the focus of the Board's advice in *Grant v The Queen* [2004] UKPC 27; [2004] 2 AC 550, where however no reference was made in submissions or the advice to the earlier decision in *Williams*. In *Grant* the petitioner, awaiting extradition to the United States, had sought and been refused habeas corpus. He appealed unsuccessfully to the Court of Appeal under s.21A of the Judicature (Appellate Amendment) Act, providing that "The decision of the court in any appeal under this Part shall be final" (s.21A(3)). The petitioner then petitioned the Board for special leave. The Crown disputed the Board's jurisdiction. The Board restated the general position regarding special leave:

> "4. The nature of the Crown's right to grant special leave to appeal was considered most recently by the Board in *De Morgan v Director-General of Social Welfare* [1998] AC 275. The Board held that the right to entertain appeals to the Privy Council is no longer a wholly prerogative power but is regulated by the Judicial Committee Acts 1833 ... and 1844 ... It is not a normal prerogative power of the Crown. Lord Browne-Wilkinson said, at p 285, that it is 'at best, a power which is in substance statutory, being regulated by the Judicial Committee Acts, with a vestigial and purely formal residue of the old prerogative powers'. Accordingly, express words are not required to limit or abolish the right to entertain such appeals. It is enough if the statute excluding the right of appeal to the Privy Council shows 'either expressly or by necessary intendment' that the power to entertain such appeals is to be abolished."

11. The Board went on to hold that the clear purpose of s.21A(3) was to exclude the possibility of there being any further appeal pursuant to special leave granted by the Board (para 5). But that left a second "more difficult" issue, whether any such exclusion required a constitutional amendment to s.110(3) of the Constitution. The Board noted that any exclusion of the rights of appeal granted by s.110(1) and (2) would require a constitutional amendment, but held that, however anomalous this might appear, the right to seek special leave to which s.110(3) referred did not attract such protection, and so could be, and had been, validly excluded by s.21A(3). The reasoning is important:

> "11 …… Section 110(1) and (2) grant defined rights of appeal to the Board. Section 110(3) is expressed in negative terms. It does not grant any rights. Entitlement to an appeal to the Board on special leave granted by the Board does not derive from this provision, or any other provision, in the Constitution. Entitlement to such an appeal derives from the Judicial Committee Acts, continued in force on independence along with all other existing laws by section 4(1) of the Jamaica (Constitution) Order in Council 1962. On its face the evident purpose of section 110(3) is confined to ensuring that the rights of appeal to the Board conferred by section 110(1) and (2), which make no mention of the Board's right to grant special leave, are not to be taken impliedly to exclude or affect the latter right. Section 110(3) assumes the existence of such a right, although the draftsman has carefully catered for the possibility of change by using the phrase 'any right' rather than 'the right'."

12. There is therefore a significant difference between the Board's approach in *Williams* and in *Grant*, decided without reference to *Williams*. In *Williams* the Board proceeded on the basis that any right to seek special leave in respect of a decision of the Court of Appeal was encapsulated in s.110(3) and (5), so that it was necessary that such decision should be "on appeal from a court of Jamaica". In *Grant* the Board made clear that any such right was simply preserved by s.110(3). The Board considers that the approach taken in *Grant* was correct and should be followed in future. S.110(3) is carefully framed to preserve, rather than grant jurisdiction.

13. This conclusion is reinforced by statements in a case which was not among those cited to the Board by counsel: *General Legal Council v Antonnette Haughton-Cardenas* [2009] UKPC 20. The Board was there concerned with an application for special leave to appeal against a decision of the Court of Appeal on appeal from a Disciplinary Committee of the General Legal Council. It was argued that no such leave could be granted because the Disciplinary Committee could not be regarded as "a court of Jamaica" within s.110(5). The Board in rejecting this submission and granting leave explained the roles of both s.110(3) and s.110(5), saying:

> "12. The first point to notice, however, is that section 110(3) does not confer any power on Her Majesty: it simply confirms that nothing in section 110 affects Her Majesty's power to grant special leave from a decision of the Court of Appeal on appeal from a court of Jamaica. In other words, the enactment of the specific provisions in section 110 is not intended to affect the previous power of the Board to grant special leave to appeal.

13. Mr Knox QC, who appeared for the Council, pointed out that section 110 of the Constitution is similar in all material respects, save one, to section 82 of the independence Constitution of Trinidad and Tobago which was enacted just a few months later. The difference is that section 82 of that constitution contains no equivalent of section 110(5) of the Constitution of Jamaica. If the intention of those framing the constitutions had been to limit appeals to the Privy Council to appeals to the Court of Appeal from particular kinds of tribunal in Jamaica, then one might well have expected to find an equivalent provision in the constitution of Trinidad and Tobago. The fact that no such provision is found suggests that section 110(5) was inserted in the Constitution of Jamaica for a different purpose.

14. That purpose can easily be identified. During the period when Jamaica was part of the West Indies Federation, the Cayman Islands and the Turks and Caicos Islands were dependencies of Jamaica. When Jamaica became independent in 1962, the Cayman Islands and the Turks and Caicos Islands became separate Crown colonies. But provision was made for appeals from their courts to continue to be made to the Court of Appeal of Jamaica. Since, however, the two territories were now separated from Jamaica, appeals to the Privy Council from decisions of the Court of Appeal affecting the Cayman Islands and the Turks and Caicos Islands were provided for by an Order in Council relating to those territories: the Cayman Islands and the Turks and Caicos Islands (Appeal to Privy Council) Order in Council 1962. The definition of "judgment" in section 2(1) of the Order was framed in such a way as to limit it to judgments of the Court of Appeal (of Jamaica) given in the exercise of any jurisdiction conferred on the court by any law for the time being in force in the Cayman Islands or the Turks and Caicos Islands. The purpose of section 110(5) of the Constitution of Jamaica was, accordingly, to confine the provisions for appeal to the Privy Council under the Constitution to appeals from decisions of the Court of Appeal when exercising its jurisdiction in relation to Jamaica, as opposed to its jurisdiction in relation to the other islands.

15. That being the purpose of the provision, section 110 must be interpreted accordingly. In particular, section 110(3) simply means that nothing in the section is intended to affect the power of the Board to grant special leave from decisions of the Court of Appeal when it is exercising its jurisdiction in relation to Jamaica. The Board is accordingly satisfied that the phrase "Court of Jamaica" in section 110(5) should be interpreted broadly, as applying to any body exercising jurisdiction in Jamaica from which an appeal lies to the Court of Appeal.

> 16. The respondent takes the provision much further and contends that section 110(3) is to be interpreted as, in effect, having a twin effect. Not only would it *affirm* the continued existence of the Board's power to grant special leave from decisions of the Court of Appeal in appeals from Jamaican courts, but it would also, by implication, *remove* the pre-existing power of the Board to grant special leave from decisions of the Court of Appeal in appeals from Jamaican tribunals and other bodies such as the Disciplinary Committee. Since the real purpose of section 110(5) is readily identifiable and has nothing to do with cutting down the scope of appeals in Jamaican matters, the Board must reject that interpretation. The effect of section 110(3) and (5) is to leave the Board with power to grant special leave from a decision of the Court of Appeal, exercising its jurisdiction in relation to Jamaica, in any case where it is appropriate.
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> 17. Therefore the Board had power to grant the Council special leave to appeal in this case. It now turns to the substance of the appeal."

14. Neither *Grant* nor the *General Legal Council* case was however concerned with the present issue, which is whether it is necessary before special leave can be sought that there should have been a decision on the merits by the Court of Appeal, rather than a refusal by the Court of Appeal to grant leave for any appeal to it on the merits. That issue has two aspects. The first is whether (although s.110(3) was framed so as to preserve, rather than grant, the right to seek special leave) it is also inherent in the carefully constructed framework of s.110 as a whole that special leave cannot be sought except where there has been "a decision of the Court of Appeal ….. on appeal from a court of Jamaica" within the meaning of s.110(5). The second is whether a refusal by the Court of Appeal to give leave to appeal to it constitutes such a decision and, in any event, whether it constitutes an order of a kind in respect of which the Board can grant special leave under s.3 of the 1833 Act and s.1 of the 1844 Act.

15. As to the first aspect, just as local legislation may restrict the right to seek special leave (cf *Williams* and *Grant*, above) so too may constitutional provisions by necessary implication. An example of this is provided by *Attorney General for Saint Christopher and Nevis v Rodionov* [2004] UKPC 38; [2004] 1 WLR 2796. Under domestic law, no appeal could be brought against a decision of the High Court in habeas corpus proceedings. The Attorney General petitioned the Board for special leave to appeal against a judge's decision to grant habeas corpus. By order in council in 1962, the right of appeal from a lower court direct to the Board had been removed, and a power of special leave preserved only in respect of judgments of the relevant local court of appeal (at that time, the British Caribbean Court of Appeal). By three contemporaneous orders in council made in February 1967, the 1962 order in council was prospectively revoked, and replaced by the West Indies Associated States (Appeals to Privy Council) Order 1967 (SI 1967/224) providing for appeals from the

relevant local court of appeal (which had become the West Indies Court of Appeal) to the Privy Council in such cases "as may be prescribed by or in pursuance of the Constitution" of St Christopher and Nevis, scheduled to one of such orders. S.101(3) of that Constitution read "As appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil or criminal matter". Following upon the independence of St Christopher and Nevis, the 1967 Order in Council was repealed and the 1983 Constitution introduced containing a section exactly reproducing s.101(3) of the 1967 Constitution. The Board concluded that the right to petition for special leave from a first instance court, expressly recognised by s.1 of the 1844 Act, had been abrogated:

> "14. The Board has anxiously considered whether, despite the language of these instruments dating back to 1962, there remains in the Board a power to grant special leave in a deserving case even though there is no possibility of appeal to the Court of Appeal under the domestic appellate regime and thus no decision of the Court of Appeal against which a petitioner can seek special leave to appeal. But St Kitts, as just noted, is a sovereign state. While both the 1967 Constitution (section 103) and the 1983 Order (Schedule 2, paragraph 2) afford a qualified measure of protection to existing laws, it is to the 1983 Constitution that reference must now primarily be made to ascertain the rights afforded to those aggrieved by decisions of the High Court or the Court of Appeal. The Privy Council is the final court in the St Kitts hierarchy of courts (*Ibralebbe v The Queen* [1964] AC 900, 921-922; *Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd* [1998] 1 WLR 202, 204). It is plainly open to the state to regulate access from one tier of its courts to another. It is not surprising that a state should require appellate remedies before its local courts to be exhausted before a litigant seeks access to the Board; and not very surprising that a state should preclude an appeal to the Board from a High Court decision where it has itself precluded an appeal to the Court of Appeal. The Board is constrained to conclude that that is what St Kitts has done."

16. There are significant differences between s.101(3) of the Constitution of St Christopher and Nevis and s.110(3) of the Constitution of Jamaica. First, s.101(3) had to be seen against the background of the previous instruments. Second, s.101(3) was in terms granting jurisdiction and could be read as comprehensive, whereas s.110(3) is in terms doing no more than preserving jurisdiction. It is true that it does so only in respect of "decisions of the Court of Appeal", defined as "decision[s] of that Court on appeal from a court of Jamaica". But s.110 as a whole is only dealing with "appeals from [the] Court of Appeal to Her Majesty in Council". Its language cannot be said to make clear an intention to exclude in other respects the right to seek special leave which is contained in s.3 of the 1833 Act and s.1 of the 1844 Act.

17. On this basis, the second aspect reduces itself to the question whether those sections permit the grant of special leave where the only decision of the Court of Appeal has been to refuse to hear an appeal. S.3 of the 1833 Act provides for the Board to consider "all appeals …. from or in respect of the determination, sentence, rule, or order of any court, judge or judicial officer", while s.1 of the 1844 Act enables the admission of "any appeal …. from any judgments, sentences, decrees, or orders of any court of justice ….., although such court shall not be a court of errors or a court of appeal". The language is as comprehensive as possible, and the contrast between any "determination" or "judgment" and any "rule", "decree" or "order" is to be noted. The background of the royal prerogative, which these statutory provisions were intended to regulate, also suggests an expansive interpretation.

18. Nevertheless, it is necessary to recognise that apparently general statutory language has been restricted in the parallel contexts of the jurisdiction of the House of Lords and now Supreme Court, as well as other appeal courts. The rule of restriction in such contexts originates in *Lane v Esdaile* [1891] AC 210. That was a case on the scope of s.3 of the Appellate Jurisdiction Act 1876, which provided that "an appeal shall lie to the House of Lords from any order or judgment of" the Court of Appeal. However, existing rules of court provided that no appeal to the Court of Appeal should lie, except by special leave of the Court of Appeal, after 21 days in the case of an interlocutory order and one year in any other case. In *Lane v Esdaile*, the House of Lords held that there could be no appeal to the House in respect of a decision of the Court of Appeal to refuse special leave to appeal to it outside the relevant one year period. Lord Halsbury LC said that a provision that "an appeal shall not be given unless some particular body consents to its being given" is "intended as a check to unnecessary or frivolous appeals" which "becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself" (p.212) and that it seemed to him obvious, when he looked "both at the subject-matter with which the order deals and at the language of the order itself ... that it was intended that the decision should be final (whether that is said in terms or not seems to me to be immaterial), unless the Court of Appeal …. in the exercise of that jurisdiction should give leave to appeal" (pp.212-213); Lord Herschell said that "the exercise of a discretion of that sort entrusted to [the Court of Appeal] is not, within the true meaning of the Appellate Jurisdiction Act, an order or judgment from which there can be an appeal" (p.214), and Lord Field that "the Legislature intended that the matter should not go beyond the Court of Appeal" (p.216). The reasoning was thus based on an interpretation of the scope of s.3 of the 1876 Act against the background of the limitation of appeals to the Court of Appeal.

19. The implicitly intended finality of an order refusing leave to appeal, the "absurdity" of allowing appeals on the question whether there should be leave to appeal and the "common sense" of the rule in *Lane v Esdaile* were all re-affirmed in *In re Housing of the Working Classes Act 1890, Ex p Stevenson* [1892] 1 QB 609 (Court of Appeal) and *In re Poh* [1983] 1 WLR 2 (House of Lords). In *In re Poh* the House apparently extended the application of *Lane v Esdaile* to a decision of the Court

of Appeal dismissing a renewed application for leave to apply for judicial review, which the applicant had been entitled to make to the Court of Appeal without seeking leave to appeal (see *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228A), and, consistently with this extended view, Lord Diplock in giving reasons for dismissing the petition to the House noted expressly that the House was "not concerned with the procedure whereby this application moved from the Divisional Court to the Court of Appeal": [1983] 1 WLR 2, 3. In *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1, the Privy Council distinguished these cases, holding that a requirement of leave to issue a summons seeking judicial review was not itself sufficiently analogous to a requirement of leave to appeal to attract the reasoning in *Lane v Esdaile*, and so that it was open to the Court of Appeal in Bermuda to hear an appeal from a refusal by a first instance judge to grant leave for judicial review. The judge had in fact given leave to appeal, so far as necessary, from her decision in that case. As the Board recognised (pp.18G-19B), there is a tension between this conclusion, recognising the possibility of an appeal to the Court of Appeal in the field of judicial review, and the House's decision in *In re Poh*, refusing to recognise the possibility of an appeal to the House of Lords in the same field.

20. In *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, the House re-affirmed and applied the rule in *Lane v Esdaile* when refusing leave to appeal to the House, in a case where the Court of Appeal had refused to the applicant not only leave to seek judicial review, but also leave to appeal to the Court of Appeal (by then necessary under new rules in force in May 2000). In *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23; [2002] 1 WLR 1593, the Court of Appeal had granted leave to appeal but refused a renewed application for leave to seek judicial review, and the House had no hesitation about its jurisdiction to entertain a further appeal and doubted the correctness of what Lord Diplock had said in *In re Poh*. In *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340; [2007] Bus LR 162 the Court of Appeal of England and Wales recognised the application of *Lane v Esdaile* to attempts to appeal to it from decisions of a first instance judge refusing the permission required for such an appeal under the Arbitration Act 1996, s.69(8), but also recognised a qualification in any case where the first instance judge's decision refusing permission could be shown to be so flawed as to amount to a breach of article 6 of the European Convention on Human Rights.

21. The present case does not concern a refusal of leave to apply for judicial review and there is no suggestion of a flaw in the Court of Appeal's decision to refuse leave on the material before it of the type discussed in *CGU International Insurance*. As in *Lane v Esdaile*, so here leave to appeal was required and was refused by a domestic court of appeal to take the matter to that court, and an attempt is being made to take the matter to a higher court. The question is whether a rule such as that in *Lane v Esdaile* applies to the interpretation of the Judicial Committee Acts 1833, s3 and 1844, s.1. Several points are to be noted. First, there is no trace of any such rule being applied to the interpretation of those sections, although factors contributing to this

may have been the lesser frequency in the past of requirements for leave for appeals to domestic courts of appeal and the past, though over the last two centuries much diminished, reluctance of the Board to entertain appeals in criminal cases where special leave is a normal requirement: see e.g. *A W Renton, The Conditions of Appeal from the Colonies to the Privy Council* (1888), p.14, Proposition 4 and *Sir Kenneth Roberts-Wray , Commonwealth and Colonial Law* (1966) pp.437-440. Recently at least, there has been a series of cases of special leave granted where a domestic Court of Appeal has refused leave to appeal to it. Secondly, as previously noted, ss.3 and 1 are drafted in broad terms, applying not only to any determination or judgment, but also to rule or decree or order; however, the statutory language in *Lane v Esdaile* itself also covered orders as well as judgments. Thirdly, s.3 and s.1 contemplate that special leave may be given in respect of a decision or order of a first instance court. Fourthly, they "affirmed and regulated" in statutory form the former royal prerogative, which itself "cannot be restricted or qualified save by express words or by necessary intendment": *British Coal Corporation v The King* [1935] AC 500, 512 and 519; Renton's *The Conditions of Appeal from the Colonies to the Privy Council* (1888), p.11, Proposition 2.

22. The third point derives from the 1844 Act, and is illustrated by a number of authorities where special leave was granted, in each case on a point of law and never as a matter of course, even though all available means of domestic appeal had not been exhausted: *In re George Barnett* (1844) 4 Moo PCC 453; *Harrison v Scott* (1846) 5 Moo PCC 357; *Attorney-General for the Island of Jamaica v Manderson* (1848) 6 Moo PCC 239; *Hitchins v Hollingsworth* (1852) 7 Moo PCC 228; *In re the Initiative and Referendum Act* [1919] AC 935, 939; and see Sir Kenneth Roberts-Wray's *Commonwealth and Colonial Law* (1966), p.436. In the first case, the Board granted special leave, but at the same time acceded in effect to counsel for the respondent's submission that it "impose such terms upon the Petitioner as will put the party in the same position as he would be in the Island", by ordering security for the costs of the appeal, he would have been obtainable under local legislation had a domestic appeal been pursued. One cannot infer from this that the Board should refuse special leave, if a domestic court of error had power to grant and had refused leave to appeal to it. If anything, the power to grant special leave without requiring a petitioner to exhaust domestic avenues of recourse militates against any implied limitation on the Board's power to grant special leave where a domestic court of appeal has refused leave to appeal to it. But none of these cases is of direct assistance on the point.

23. Sir Kenneth Roberts-Wray's *Commonwealth and Colonial Law* is also silent upon the present point. At p.436 it states that applications for special leave fall into three categories: (1) where the court below has no power to grant leave, (2) direct appeals under s.1 of the 1844 Act, "short-circuiting a Court of Appeal" and (3) "when leave at the discretion of the Court has been refused". The third category, relied upon by counsel in oral submissions before the Board, is clearly directed, not at the present point, but at the situation where a domestic court has power to grant but refuses leave to appeal to the Board.

24. Counsel were however able to refer the Board to a significant number of cases, in which special leave had been granted following a refusal of leave by the Court of Appeal of Jamaica in criminal matters: *Flowers v The Queen* [2000] 1 WLR 2396; *Smalling v The Queen* [2001] 4 LRC 307; *Pringle v The Queen* [2003] UKPC 9; *Taylor v The Queen* [2006] UKPC 12; *Williams v The Queen* [2006] UKPC 21; *Maye v The Queen* [2008] UKPC 36; *R v Jackson* [2010] 1 LRC 594. All the cases cited were relatively recent, and in none was any point on jurisdiction raised. Nonetheless, the issues raised and their outcome demonstrate that the availability of special leave can have great potential significance in some cases where, for one reason or another, leave to appeal to the Court of Appeal has not been obtainable from that Court.

25. In the last analysis, the combination of the points stated in paragraph 21 above is in the Board's view decisive. There is nothing clearly or necessarily to restrict the broad language reflecting the royal prerogative power to grant special leave now enacted in statutory form in s.3 of the 1833 Act and s.1 of the 1844 Act. The breadth of the prerogative power, now statutorily expressed, and the very varied contexts in which it applies militate against the recognition or introduction of any formal limitation upon s.3 and s.1 paralleling the rule in *Lane v Esdaile*. The Board concludes therefore that the rule in *Lane v Esdaile* is not applicable on any application made for special leave to the Privy Council itself. It follows that there was power to grant special leave in this case. The fact that a domestic court of appeal has refused leave to appeal to it will however always be a relevant, and often no doubt decisive, consideration for the Board to consider when deciding whether or not to grant special leave.

Whether special leave should be granted

26. The Board turns to the question whether special leave should be given in this case. The Board notes first that it invited and received submissions as to whether there remains any possibility of an appeal to, or of seeking leave a second time from, the Court of Appeal. S.13 of the Judicature (Appellate Jurisdiction) Act provides for convicted persons a right of appeal on a point of law or with leave of the Court of Appeal on any ground involving fact alone, or mixed law or fact, or on any other ground. But under neither head would it appear likely to be possible to bring the matter a second time before the Court of Appeal. Although the statutory language does not expressly exclude a second appeal or application for leave, that has in England been treated as the effect of equivalently open wording, in the interests of finality: *R v McIlkenny* 93 Cr App Rep 287, 293 ("Once an application for leave to appeal is dismissed, the Court of Appeal is functus officio. There is no right to a second appeal"); *R v Pinfold* [1988] QB 462; *R v Hughes (James Francis)* [2010] 1 Cr App Rep (S) 146. The Board notes that ss.26-27 of the Judicature (Appellate Jurisdiction) Act refer to the suspension of particular sentences (death, corporal punishment and restitution of property) until after "the determination of the appeal, or where an application for leave to appeal is finally refused, of the application", words

which also contemplate finality in the appellate process. There is under s.29 of the Judicature (Appellate Jurisdiction) Act a power in the Governor-General on the advice of the local Privy Council or in his own judgment in a case of urgency to refer a case back to the Court of Appeal. But that is a non-judicial power, which cannot influence the present decision. The Board adds that, in the light of defence counsel's death, there would in any event be no apparent advantage in the matter being dealt with in the Court of Appeal, assuming that were possible.

27. Turning more generally to the merits of the petition, the Board has already noted (para 3) that the appellant was not represented on the application to the Court of Appeal, and the Court of Appeal's attention was in these circumstances, understandably, never directed to the substantive issues which are now apparent. Their force and significance for the appellant will become clear in the following paragraphs, and the Board, after hearing submissions, announced during the hearing that it would grant special leave accordingly to enable them to be developed.

Substantive issues: (i) identification

28. The Board turns to the substantive issues on the appeal. The appellant raises two points, both related to the summing up; first, the judge's directions regarding identification were inadequate, and, secondly, no good character direction was given not due to any fault of the trial judge, but by reason of counsel's incompetence. Starting with identification, both credibility and accuracy were in issue, and it is submitted that the judge should, in accordance with the principle in *Beckford v The Queen* (1993) 97 Cr App R 409, have given the jury first a direction to consider whether Mr Anglin was telling the truth and to disregard his evidence unless satisfied that he was, and then, if they were satisfied as to his truthfulness, directions in terms complying with *R v Turnbull* [1977] QB 224. These would include directions (i) warning as to the special need for caution, before convicting the appellant in reliance on the correctness of the identification, because the case against the appellant depended wholly or substantially upon it; (ii) giving the reason for such need; (iii) pointing out that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken; (iv) telling the jury to examine closely the circumstances in which the identification was made; (v) reminding the jury of any specific weaknesses in the identification evidence in a coherent manner so that the cumulative impact of any weaknesses was fairly laid out: *R v Fergus (Ivan)* 98 Cr App R 313; (vi) reminding them that mistaken recognition can occur even of close relatives and friends; and (vii) identifying the evidence capable of supporting the identification, as well as any evidence which might appear to, but does not in fact, support the identification.

29. The need for directions in accordance with *Turnbull* applies in recognition as well as pure identification cases, but no precise form of words need be used so long as

the essential elements of the warning are pointed out to the jury: *Shand v The Queen* [1996] 1 WLR 67, 72, per Lord Slynn. In the present case, it is submitted that the judge failed to give directions in accordance with *Beckford* and that, although he covered all of points (i) to (iv), he did not support these general directions with appropriate specific directions meeting points (v) to (vii), and also directed the jury inaccurately on some factual matters.

30. With regard to *Beckford*, the judge's directions are in the Board's view open to the criticism that they did not clearly separate the issues of credibility and mistake, and moved repeatedly from the one possibility to the other. A limited number of passages from the summing up suffice to show this. At the start, the judge said:

> "Now, the main issue in this case, I would think, is one of identification because Mr Anglin is telling you that he saw the accused man come in this bar and in fact he himself, Anglin, was fired upon by the accused. But the accused man is saying he was not there. So this is a case where the case against the accused depends wholly and substantially on the correctness of identification of the accused and which the accused man himself says, 'you are mistaken'.
>
> I must warn you of the special need for caution before conviction in reliance on the correctness of the identification, for it is quite possible for an honest witness to make a mistaken identification. A mistaken witness can be a convincing one and even a convincing witness can also be mistaken.
>
> You will have to examine carefully the circumstances in which the identification was made. You will have to look and see if you find any weaknesses in it and also whether these weaknesses were induced by deceit.
>
> Now, it is common knowledge that this island is inhabited by two and a half million people, therefore there is this rich mixture of all the races in this population. There is always therefore, the possibility that one person may bear a marked similarity or resemblance to another in any given geographical area. There is the further possibility than an honest and prudent person may make a mistake in visually identifying another. A mistake is no less a mistake even if it is made honestly. It is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake.

> So in order to determine the quality and cogency of the identification, you must examine carefully the circumstances in which the identification was made. You will look at the opportunity the witness might have had of viewing the accused. You will ask yourselves whether the accused was known to Mr Anglin before the date of the commission of the crime and for what period."

In this passage, the judge focused mainly on mistake, but touched on credibility with his reference to deceit. Later, he made that issue more explicit:

> "Now, he was cross-examined and he says that – Well, it was suggested to him that he was telling lies. He said no he is not telling any lies.
>
> …..
>
> He doesn't know that the accused had a tailor shop and he says he does not know of the rumour that the accused had gotten Nicola pregnant, and he didn't vow to get rid of the accused. So you might be asking yourselves this question: Why this bit of cross-examination? But the defence has raised this to say that the reason why the accused man, Mr Anglin, is saying it is the accused he saw in the bar is because there was some bad blood between them, malice, because the accused is fooling around his granddaughter, got her pregnant, and therefore he wants to pin this murder on him. …"

The judge concluded his summing up as follows:

> "Now, Mr Foreman and members of the jury, you have to determine whether Mr Anglin is a reliable witness; whether his credibility has been shaken; whether you can believe what Mr Anglin was saying, because he was the man who was on the scene. In fact he got shot during that time too. The accused said he is making a mistake. You will have to ask yourselves this question then: Was Mr Anglin making a mistake when he said the accused man was the person who shot him and who was shooting that morning? As a matter of fact the accused himself agrees that they knew each other well. There is no bad blood between them. All these are matters for you. You will have to determine whether the identification was correct, whether you are satisfied so that you feel sure that Mr Anglin is making no mistake when he said it was the accused he saw in that bar, and who had the gun and who turned the gun on him.

…..

> If you feel so satisfied that you feel sure that Mr Anglin is speaking the truth that he saw the accused there and that the accused was the man who had gone there, then you may convict him of this charge of murder."

Counsel for the prosecution then said:

> "…aside from this accused man has been saying that it is a deliberate attempt to implicate him with this offence, it is not only that, but that it is also a mistake".

Counsel's concern related to the issue of mistake rather than credibility. The judge's response, as recorded in the transcript, cannot have assisted the jury on either subject:

> "Just that I think the jury must have understood that because he is saying because of this evidence of this pregnancy… As Crown in her address is saying, it is a red herring. So you consider all the evidence and as I told you, you are at liberty to reject whatever evidence you want to reject and accept whatever you want to accept, as you are the judges of the facts."

31. Despite the criticisms that can be made in this area, the Board considers that, after a six-day trial, the jury cannot have been in any doubt that the fundamental issues between the prosecution related to (a) Mr Anglin's truthfulness, bearing in mind such motive as had been canvassed for him to pin the murder on the appellant, and (b) if he was truthful, his reliability, bearing in mind his account of events, the nature of the incident and the possibility of mistake. The judge covered both subjects in his summing up, albeit he did not treat them separately in the manner which would have been desirable. Nonetheless, the Board does not think that such criticisms as can be made lend any real support to a conclusion that the trial was unfair or the verdict unsafe.

32. In his written case, counsel for the appellant also submitted that the sentence appearing in the above quotations "There is no bad blood between them" was fundamentally misleading on the crucial question of credibility. But the judge went on immediately to say "All these are matters for you", indicating that he had been dealing with matters in issue, and earlier he had represented the picture accurately when he described the suggested motive for Mr Anglin to lie as being "because there was some bad blood between them, malice, because the accused is fooling around his

granddaughter, got her pregnant, and therefore he wants to pin this murder on him. …". In these circumstances, it is implausible to think that the jury can have been misled on this point, and counsel realistically accepted the probability that there was some error in the transcription.

33. Counsel for the appellant submitted that the summing up was also inaccurate in another respect, relating to the evidence of the appellant's mother, Miss Josephine Campbell, called for the defence. The judge recorded Miss Campbell as saying that Mr Anglin and she

> "had an argument and he told her that she should tell her son, that is the accused, to leave his granddaughter alone, this is in April 1999, but he didn't say which granddaughter. …
>
> She says she don't mix up in any argument about Mr Anglin's granddaughter, that is a young people's thing, and she doesn't know that Mr Anglin's granddaughter got pregnant. You will remember the accused man said this accused had a fuss between the family. She said she doesn't know of it."

In fact, Miss Campbell had also said in cross-examination by counsel for the prosecution, without amplifying this, that, in addition to the argument in April 1999, there was "more fuss" with Mr Anglin "about some baby business …. like the girl was pregnant". However, she had gone on to accept that she had only heard "what people talk about pregnant business" and that she did not really know. The judge's condensed summary of Miss Campbell's evidence appears to the Board to have conveyed a broadly accurate picture of very unspecific evidence, and cannot on any view lend support to the suggestion that the summing up was unfair or the verdict unsafe.

34. It is also submitted on the appellant's behalf that the judge undermined the general direction which he gave about the need to examine the circumstances of identification closely by the way in which he summarised the evidence. Reference is made to passages when he said:

> "Now, he says the bar was lighted; it was clear that you could see anyone; it was broad daylight. So here again is one of the circumstances you look at when you are considering the opportunity that Mr Anglin would have to view the accused. He says it was light – morning.
>
> He says he went inside the bar and leaned on the counter and he told you that there were some persons there …. He says Brem-Brem was inside

> and Mr Man along with another man named Corey. Now, he says the accused man is called Brem-Brem. He say he knows him from the same district where he came from. He has known him for over twelve years. Again you consider that. You take that into account when you are considering the question of identification. He has known him for over twelve years, in broad daylight, and he lives in the same district. He says he lives with his mother, Miss Campbell, … and he says that they live about fifteen chains apart. … He says he saw the accused's face and everything; that is why he knew who it was. So you bear that in mind, that he is seeing the face of this person, the accused man who he has know for over twelve years, in broad daylight. ….."

Later, the judge also said:

> "If it is broad daylight and the person who did the act was somebody he had known for over twelve years and only a foot from him, would there be any difficulty in identifying that person?"

In the Board's view, in so far as the judge in these passages was identifying features which pointed towards the reliability of the identification, he did not go beyond the legitimate. Mr Anglin had been in the Coral Bar for half an hour when the shooting occurred, he said that he had seen the appellant repeatedly at different points and that, when he turned round and was shot, the appellant - his assailant - was very close ("a yard or two yards") from him, and he was able to see all of him, "head and down to foot, face, everything". It is not easy on the facts of this case to identify features throwing real doubt on the clarity of Mr Anglin's identification of the appellant in the Coral Bar at the critical time, in a context where the appellants' case was that he was nowhere near the bar that morning.

35. Nevertheless, it is submitted that the judge failed to address key weaknesses in the identification evidence, particularly relating to (a) Mr Anglin's drunkenness at the relevant time and (b) Mr Anglin's inability to describe the appellant's height and that the judge failed in this connection to remind the jury that mistaken recognition can occur even of close relatives and friends (point (vi) in para 28 above). As to drunkenness, there was no specific evidence that Mr Anglin was drunk that morning. The appellant, who denied being in the Coral Bar on 12 September 1999, simply asserted that Mr Anglin was always drunk. Miss Campbell said that whenever she passed the bar she saw him drunk or drinking, but the bar-owner, Miss Jennifer Douglas, said that she had never seen him so drunk that he had lost control or needed assistance. Mr Anglin himself denied that he was drunk, or had been drinking the preceding night or that morning, and was able to give precise evidence of the course of events that morning, including an accurate account of the number of shots fired. The judge reminded the jury of the issue regarding drunkenness, and had in the

Board's view no obligation to go further than he did in describing it or evidence relating to it. As to the appellant's height, it was common ground that Mr Anglin and the appellant had been well known to each other for years. Yet Mr Anglin was still unable, even in the witness box, to give an estimate of the appellant's height, although he did describe the appellant's hair-style at the time of the shooting, which evidently differed from that which he had at trial. When the appellant was asked to stand up in the witness box, Mr Anglin said he supposed that he was about six foot four or five tall. There is in fact no evidence that this estimate was correct, but, assuming that it was, Mr Anglin's inability until that point to give an estimate of the appellant's height hardly seems significant when it is common ground that he knew and had been able to recognise the appellant for years from childhood on.

36. Finally, counsel raised in his oral submissions a point not canvassed in his written case, namely that the judge should have directed the jury regarding the absence of any identification parade. The evidence was that the appellant went missing after the shooting, despite police attempts to locate and interview him. The police evidence was that they tried to locate him through his mother, Miss Campbell. The most she eventually conceded was that there had been a telephone conversation in which the police had asked her where her son was. Five months after the shooting, the appellant was arrested at Norman Manley National Airport. There has been no previous complaint about the absence of any identification parade, and in circumstances in which the appellant and Mr Anglin had known each other for years and Mr Anglin had already named the appellant as the killer, it is not difficult to understand why not. The point is not one which the Board will in these circumstances entertain under the special leave which it has granted, and in any event it is not one which could possibly render the conviction unsafe.

(ii) Absence of good character direction

37. The Board turns to the other complaint made of the summing up, relating to the absence of a good character direction on both aspects which would have been relevant on the facts of this case: that is, a direction that the appellant's good character was relevant first to the credibility of his evidence and secondly to propensity or the likelihood of his having committed the murder of which he stood accused. In his oral submissions, counsel for the appellant abandoned the faint submission made in his written case that the issue of good character had been raised on the evidence. No complaint can therefore be directed at the trial judge for failing to give a good character direction. But it is submitted that the failure to raise good character was due to the incompetence of counsel who then appeared for the defence, Mr Bryan, since deceased in 2009. Mr Bryan was by registered letters dated 7 January and 21 April 2008 twice approached and asked why good character was not raised. He made no reply. The appellant has by affidavit dated 11 January 2009 sworn that he told Mr Bryan at his first trial that he was of good character and that "the court did investigate this and confirmed that it was correct". (No transcript is available to confirm this.)

38. At the re-trial, immediately after the appellant's conviction, a police officer, Det. Corp. Gray, gave evidence that the appellant had no previous convictions recorded against his name. This, if elicited during the trial, would on the face of it have entitled him to a good character direction. Counsel for the prosecution points out that "The fact that a defendant has no previous convictions recorded against him, does not mean that he inevitably is of good character": *Gilbert v The Queen (Practice Note)* [2006] UKPC 15; [2006] 1 WLR 2108, para 21. But the prosecution has not been able to suggest anything which could count against the appellant's character in this case. The most that counsel has been able to suggest is that defence counsel at trial may have had reason to hold back on the issue, having regard to answers given by the principal police investigator in the case, Det Insp Barrington Campbell. In answer to defence counsel's suggestion that he did not know the appellant before 12th September 1999, he said he did not. But, in answer to a further suggestion that he did not know of him either, Det Insp Campbell said: "I knew of him, yes", and there were further questions and answers as follows:

> "Q. Did you know his name as Noel Campbell?
>
> A. I know the name Brem-Brem.
>
> Q. But you didn't know the name Noel Campbell?
>
> A. No."

There the questioning stopped. These exchanges appears to the Board a very thin basis for thinking that the police knew anything adverse to the defence, and it is far from clear to what they were directed. With hindsight, in the absence of any relevant information adverse to the appellant's character from the prosecution side, it does not appear that Det Insp Campbell can have had any such information. If the questioning was intended to elicit good character, it also appears to the Board to have been an incompetent method of seeking to do this.

39. Ordinarily, the Board will not entertain a ground of appeal based upon allegations of incompetence of counsel raised for the first time before the Board: *Bethel v The State* (1998) 55 WIR 394, 397; *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14; [2005] 1 WLR 2421, para 38; *Ramdhanie v State of Trinidad and Tobago (Practice Note)* [2005] UKPC 47; [2006] 1 WLR 796, para 14. Behind this reluctance lies, as explained in *Bethel*, awareness of the ease with which it is possible for a convicted defendant to invent, or indeed after the event to persuade himself or herself of, allegations of incompetence, as well as the practical difficulty of investigating such allegations at so late a stage, when they should have been raised before the domestic Court of Appeal.

40. In this case, however, the appellant was unrepresented on the appeal. Further, there are circumstances in which the Board has been in a position to consider such allegations even when raised for the first time before it. In *Bethel* defence counsel's affidavit led the Board to remit the case to the Court of Appeal for investigation and in *Teeluck* the Board entertained the issue because of its importance and because defence counsel's frankness enabled it to determine the issue without having to deal with any conflicts of fact, and allowed the appeal. On the other side of the line are cases where there is no sufficient information to enable the Board to form a view as to why evidence of good character was not adduced: see *Taylor v The Queen* [2006] UKPC 12, para 21 and *Ramdhanie*, paras 14-17, where, despite the obvious importance of credibility, the Board was "not prepared, on the exiguous and unsatisfactory material before it, to draw the speculative conclusion" that there had been a mistake or misunderstanding by counsel, as opposed to "a conscious decision based on (for example) well-founded fear" that the prosecution had material to rebut any suggestion of good character.

41. In the present case, it is clear that the police would, if asked directly, have accepted that the appellant had no prior convictions and the prosecution has never suggested that they knew anything adverse to the appellant. The Board has commented on the unsatisfactory nature of the questioning of Det Insp Campbell about his knowledge of the appellant. But the matter goes considerably further than that. The picture gained from a reading of the transcript is of unfocused and disordered conduct by counsel of the defence case at trial, accompanied by large numbers of impermissible questions as well as by inappropriate applications and submissions, leading to a number of judicial reproofs. At one point, Mr Bryan, on arriving late back in court following an adjournment, excused himself by saying that he had "taken on more than I can chew". At another point, the judge was moved to say "It is outrageous the way you behave". Unhappily, this appears to have been conduct not unknown in Mr Bryan's case. It transpires that he was disbarred from the Bar of England and Wales following his admission at a disciplinary hearing on 21st April 1987 of charges of professional misconduct. One charge involved accusing the judge of bias against the defendant, of shouting him down and of racial bias, as well intemperate and immoderate language, and accusations against the prosecution of lies and of refusing to withdraw an accusation against the prosecution of withholding a document although the defence solicitor had confirmed that it had been provided to the defence; another wasting the court's time and extending the length of the hearing through repetition, lack of familiarity with the detail of the case, pursuing irrelevant points and making a closing speech which extended some 28 hours. Mr Bryan was called to the bar in Jamaica on 17th July 1995, and by 4th June 2008 he had been found guilty by the Disciplinary Committee of the General Legal Council of Jamaica of two further charges, one of professional misconduct, consisting of negligence and delay, the other of charging fees that were not fair or reasonable and discrediting the profession by refusing to refund fees, and he was awaiting judgment on a third charge.

42. In these circumstances, the Board feels compelled to conclude that the only plausible explanation of the failure to adduce evidence of good character is defence counsel's incompetence. That being so, the focus moves to the impact of such failure on the trial, rather than an attempt further to rate the incompetence according to some scale of ineptitude: *Teeluck*, para 39. The absence of a good character direction is by no means necessarily fatal. In *Balson v The Queen* [2005] UKPC 2, "the nature and coherence of the circumstantial evidence" "wholly outweighed" any assistance that such a direction might have given (para 38). In *Brown (Uriah) v The Queen* [2005] UKPC 18; [2006] 1 AC 1, the nature of the offence charged (motor manslaughter) made such a direction of less significance than with other offences. In *Jagdeo Singh v State of Trinidad and Tobago* [2005] UKPC 35; [2006] 1 WLR 146, para 25 the Board said:

> "Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated".

43. In *Bhola v The State* [2006] UKPC 9 (a case of alleged demanding of money with menaces where the appellant denied any involvement), Lord Brown said, in giving reasons for the Board's decision:

> "The appellant relies heavily on the series of propositions set out in paragraph 33 of the Board's judgment in *Teeluck v The State of Trinidad and Tobago* [2005] 1 WLR 2421 and certainly it is right to say, as paragraph 33(iv) of *Teeluck's* case does, that 'where credibility is in issue, a good character direction is always relevant'. But the trilogy of cases examined above suggests that the statement in paragraph 33(ii) of *Teeluck's* case, that the direction 'will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial,' needs to be applied with some caution. In *Teeluck's* case itself, of course, the appellant's credibility was said to be 'a crucial issue' to the extent that the Board was unable to conclude 'that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given' (paragraph 40). So too in *Jagdeo Singh's* case [2006] 1 WLR 146. But the Board reached a different conclusion in *Balson's* case [2005] UKPC 6 and in *Brown's* case [2006] 1 AC 1 and their Lordships have no doubt that the Court of Appeal were right to have done so in the present case too. The cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so 'rare'." (para 17)

A similar caution appears in *Simmons v. The Queen* [2006] UKPC 19 (a murder case).

44. Counsel for the prosecution submits that the present is another case where the Board can be sufficiently confident of the safety of the verdict to be able to discount the significance of any good character direction. Mr Anglin's identification and evidence were detailed and cogent. The idea that he would, having himself been shot, have sought falsely to pin blame on the appellant for the murder of Mr Burnett, for the suggested or any reason, was fanciful, and the appellant's disappearance for five months and arrest at the international airport spoke for themselves. The defence had not been able to call evidence of any real value to support its suggestion that Mr Man had been the person responsible for the shooting. Mr Herman Lewis, called by the defence, said that he saw Mr Man running out of the bar alone with two guns, but this was in contradiction with other evidence from Miss Douglas, who said that she saw Mr Man and the appellant walking together after the shooting. Mr Lewis was also alone in speaking of seeing three, rather than two, men on the floor of the bar after the shooting, the third man having he said fouled himself.

Conclusion

45. There is force in these submissions, but nevertheless on the facts of this case the credibility and reliability of Mr Anglin's identification stood effectively alone against the credibility of the appellant's denial of any involvement. This is a case where the appellant gave sworn evidence. The absence of a good character direction accordingly deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being of greatest potential significance. The Board also notes in this connection that at the appellant's first trial, the members of the jury were unable to agree, and that it would appear, on the appellant's evidence, that his good character was at least before them (paras 3 and 37 above). In the result, the Board does not feel able to treat the absence of a good character direction in this case as irrelevant to the safety of the verdict, and will humbly advise Her Majesty that the case should be remitted to the Court of Appeal with a direction to quash the jury's verdict and to determine whether or not to order a re-trial.