Privy Council Appeal No 96 of 2006

(1) Leslie Pipersburgh
(2) Patrick Robateau *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

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

Delivered the 21st February 2008

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Rodger of Earlsferry**]*

1. During the evening of 18 June 2002, at the premises of Bowen & Bowen in Belize City, two security guards were shot and killed. Earlier that evening a Coca-Cola truck had been driven into the premises. After the shootings, at about 9.15 the same evening, police were summoned to a different area of the city where shots had been reported. A police officer went to the area and saw a Coca-Cola truck, from which a shot was fired at his vehicle. The police officer gave chase. The occupants of the truck soon abandoned it and, eventually, both of them made their escape. When the area was searched, the bodies of a man and woman

were found about 300 metres from the truck. Both had been shot with the same weapon as had been used to kill the two security guards.

2. At the relevant time the appellants, Leslie Pipersburgh and Patrick Robateau, were employed as drivers by Crystal Trucks. In the course of their work they had occasion to make regular visits to the premises of Bowen & Bowen. The day after the shootings the appellants did not turn up for work. Suspicion fell on them and their names and photographs were subsequently published in the *Belize Times*. On 9 July, Mr Salvador Figueroa, the ambassador of Belize to Mexico, saw two men in the hallway of the embassy in Mexico City. They were, in fact, the appellants who had been detained by the Mexican authorities in Tijuana, where they had apparently been trying to cross into the United States. They were brought to the capital. The ambassador recognised their photographs from the newspaper. He spoke to them and Mr Pipersburgh gave his name as Lance Gabourel. The ambassador spoke to the appellants again the following morning at the Mexican government Immigration Detention Centre, in circumstances which their Lordships will have to examine in a little more detail later. In due course, the appellants were returned to Belize where they were tried on four counts of murder and one of attempted murder.

3. The trial before Gonzalez J and a jury lasted from 9 February until 15 March 2004. The appellants did not give evidence, but made unsworn statements from the dock. At the conclusion of the trial both appellants were convicted on all the charges. On 24 March they were sentenced to death. They appealed to the Court of Appeal of Belize against conviction. Mr Robateau also appealed against sentence but, at the outset of the appeal hearing, he abandoned that appeal. On 24 June 2005, by a majority (Carey JA and Mottley P, Sosa JA dissenting), the Court of Appeal dismissed their appeals against conviction. The Board granted them special leave to appeal and directed Sosa JA to reduce his dissenting judgment to writing. Which he subsequently did on 20 July 2007. Their Lordships are grateful for the care which he took in assisting them in this way.

4. Despite the fact that there was no live appeal against sentence in the Court of Appeal, the appellants' appeal to the Board is against both conviction and sentence. So far as sentence is concerned, they complain that the death sentences were imposed following an unfair procedure and that they were unconstitutional. They also allege that sentences of death by hanging would constitute inhuman and degrading punishment and that the carrying out of those sentences would accordingly be unconstitutional. But the Board must first address the appeals against conviction.

5. Before turning to that matter, their Lordships think it right to record that, although the Director of Public Prosecutions knew that the hearing before the Board was taking place, he was not represented. So the Board has had to deal with the appeals on the basis of the submissions of counsel for the appellants alone. They must also mention that the very long trial – only segments of which are available to the Board in transcript – was characterised by astonishingly rude remarks by Mr Willis, the defence counsel, both about the judge and about some of the witnesses for the Crown. This behaviour is unlikely to have been anything but prejudicial to his clients' case. At the same time it must have made the trial extremely difficult for the judge to handle.

6. At the trial, prosecuting counsel, Ms Moyston, adduced a total of five dock identifications of the appellants, as being involved in the murders at Bowen & Bowen's premises, from three witnesses - Karl Ventura (identifying Mr Robateau), John Ventura (identifying both appellants) and Virgilio Requena (also identifying both appellants). In the Court of Appeal the Director of Public Prosecutions accepted that the witnesses had not known the appellants' names. Moreover, the police did not hold an identification parade for either of the appellants. This was on the advice of the Crown Counsel then acting - apparently on the basis that an identification parade would have been inappropriate because the appellants' pictures had been published in the press and so there was a risk that witnesses would identify the appellants from the pictures. However well-intentioned that advice may have been, the decision not to hold an identity parade meant that the first time the three witnesses were asked if they could identify the men involved in the raid was more than eighteen months after the incident, when they were in the witness box and the appellants were sitting in the dock. In their Lordships' view, in a serious case such as the present, where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade.

7. The first of the three identification witnesses to give evidence was Karl Ventura on the first day of the trial. He worked as a security guard at the premises of Bowen & Bowen. He described how he and another guard, Kevin Alvarez, had been confronted by two men pointing guns at them, and how, subsequently, one of the men had shot Mr Alvarez. He described the person who did so as "a red skin male person" dressed in a blue and white Crystal uniform shirt. The witness said that he had worked at Bowen & Bowen during May 2002 and had seen the man in question coming in through the gate every day. On the evening of the raid, the witness had been about 3 feet from the man. Prosecuting counsel eventually asked whether the witness saw "this red skin male

person here today." At that point Mr Willis, who was representing both the appellants, objected. The jury withdrew and the admissibility of the evidence was argued under reference, inter alia, to the decision of the Board in *Pop v The Queen* [2003] UKPC 40. The judge ruled "that the red skin can be pointed out in court", but added that some clarification was needed as to what was meant by a red skin person. Having attempted to clear that matter up – on the basis that the description referred to a person with light brown skin – prosecuting counsel asked Karl Ventura whether he saw the red skin person in court. He said that he did and she asked if he could point him out to the court and tell the court where he saw him. The witness then pointed to Mr Robateau.

8. Defence counsel renewed his objection on each of the four subsequent occasions when prosecuting counsel indicated that she was going to ask John Ventura or Virgilio Requena to identify either of the men involved in the raid. The trial judge treated his ruling on the first objection as applying to all the subsequent objections, which he accordingly overruled. On each occasion, the witness then proceeded to make a dock identification of one or other of the appellants as having been involved in the events at the premises of Bowen & Bowen. By the end of the trial, therefore, both of the appellants had been identified in this way by John Ventura and Virgilio Requena, while Mr Robateau had also been identified by Karl Ventura. It is unnecessary for present purposes to go into the evidence of the other witnesses in detail since, in presenting the appeals, Mr Fitzgerald QC took his stand on the broad ground that all the evidence constituted by the dock identifications had been, in principle, inadmissible. Alternatively, the judge had not given the kind of directions which were necessary in a case like the present where such evidence had been admitted.

9. As Mr Fitzgerald very frankly admitted, his primary submission - that evidence by way of a dock identification is inadmissible where the witness has not previously attended an identification parade - flies in the face of what the Board said in its judgment in *Pop v The Queen* [2003] UKPC 40. In that case, no identification parade had been held and the dock identification of the appellant by a witness, Adolophus, had occurred as a result of what appeared to have been a slip by prosecuting counsel in formulating one of his questions. Against that background, the Board said this, at para 9:

> "First, the police held no identification parade and in consequence the identification of the appellant was a dock identification. The failure to hold an identification parade was contrary to the practice in Belize as explained by the

Court of Appeal in *Myvett and Santos v The Queen* (unreported) (9 May 1994, Criminal Appeals Nos 3 and 4 of 1994):

> 'The detailed code adopted in England for the holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like looking suspects, the English procedure is in practice followed here in Belize.'

> The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: *R v Graham* [1994] Crim LR 212 and *Williams (Noel) v The Queen* [1997] 1 WLR 548."

10. Their Lordships see no reason to depart from their clear decision in *Pop* that the facts that no identification parade had been held and that the witness identified the appellant when he was in the dock did not make his identification evidence inadmissible. They accordingly reject the first of the grounds of appeal advanced by Mr Fitzgerald.

11. Nevertheless, the Board's decision in *Pop*, that the identification evidence was admissible, has to be read in the context of what the Board went on to say about the kind of directions the trial judge should have given to the jury on that evidence. Mr Fitzgerald pointed out that, despite being referred by counsel to what the Board had said in *Pop*, in this case the trial judge did not give the jury the directions which the Board had prescribed. This was indeed conceded by the Director of Public Prosecutions in the Court of Appeal.

12. The trial judge gave the jury the following directions on the matter in his summing-up:

> "In a situation like this, the proper course of action, I would say to you, where you have witnesses not giving you names of the persons they are seeking to identify, the proper course was for the police, as Mr Willis said, was to held an ID parade or an identification parade. The purpose of an identification parade is to ensure that accused persons identified by witnesses in a line-up over nine – sorry. The purpose of the identification parade is to ensure that the person identified by a witness is identified from a line-up of, say, nine or twelve persons of similar height, size, complexion and, preferable, race. This serves to make the identification a fair one, and one from which the jury can more accurately say that this was in fact the person that was identified. It is unfortunate, therefore, that the identification parade was never held.
>
> Now, these witnesses, madam forelady and members of the jury, you would recall, based their identification of the accused persons on recognition, because they said they had known the person before, they worked with them at the same place. But although that is so, madam forelady, and perhaps that's the reason why the ID parade was never held, I need to tell you that, or I need to remind you, that mistakes in recognition even of close friend and relatives are sometimes made. For there to be some certainty as to who accused persons are, it comes back to the ID parade. There ought to have been an ID parade to ensure that those persons were the persons that the witnesses say they saw. But, nevertheless, you have heard the evidence, they have say that they know them and on that evidence, if you accept it, or you believe it and you are sure of it, you can come to a conclusion that those were indeed the persons who were on the compound and who indeed fired the shots and caused the death of Kevin Alvarez and Fidel Mai."

13. It appears that, in the Court of Appeal, counsel for Mr Pipersburgh did not advance any argument in relation to the dock identifications. When considering the appeal by Mr Robateau, however, the majority in the Court of Appeal dealt with this aspect of the judge's summing up in the following passage:

> "It is patent that the trial judge did not follow *Pop* to the full extent, and that much was conceded by the Director. We think that the jury would have appreciated from what he had said that there was a danger of accepting the identification evidence where a parade had not been held. It is not disputed that he did not explain the potential advantage of an inconclusive parade to the accused persons. The argument has not been advanced before us that the full *Turnbull* guidelines were not followed by the trial judge in this case. The importance of exercising special caution in a case depending on identification evidence was amply stressed in our opinion. But this case did not depend wholly on visual identification by a sole witness. This was not a case of a fleeting glance or identification in difficult services [sic: circumstances?], albeit at night. The lighting was generally described as bright, distances were not significant and opportunity was adequate. The witnesses were not strangers to the appellants; they were security guards at the workplace of the appellants and prior to the incident were acquainted with them over various periods although they did not know their names. The appellant Robateau did not challenge in his statement from the dock the witnesses' knowledge of him. The identification was by recognition and, as to this, the trial judge gave proper directions. We would add that there was supporting evidence connecting this appellant with the crime. This would incline us to apply the proviso as we are of opinion that no substantial miscarriage of justice would have occurred."

14. The Court of Appeal considered two matters: first, the issue raised by the fact that the identifications were dock identifications, and, secondly, the directions given by the trial judge about the potential pitfalls of identification evidence in general (the *Turnbull* directions). In effect, the Court of Appeal ran the two issues together.

15. In *Holland v HM Advocate* [2005] UKPC D1; 2005 1 SC (PC) 3 the Board was concerned with the contention that dock identifications of the accused, where the witnesses had failed to pick him out at an identification parade, had contributed to making his trial unfair in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms. In Scotland, recommendations on the way that judges should approach identification evidence, in general, are to be found in a Practice Note issued by the then Lord Justice-General in 1977. In the course of his judgment in *Holland*, at p 20, para 58, Lord Rodger of Earlsferry said:

> "It is necessary, however, to distinguish between directions which a judge gives on the approach to be adopted in relation to eye-witness identification evidence in general and directions on the dangers of dock identification evidence, in particular. The Lord Justice-Clerk referred to the Lord Justice-General's 1977 Practice Note and to a series of decisions in which the appeal court have given guidance on eyewitness identification in general. Important as these are in relation to that matter, they do not deal with the peculiar dangers of a dock identification where a witness previously failed to identify at an identification parade."

In other words, a judge does not discharge his duty, to give proper directions on the special dangers of a dock identification without a prior identification at an identification parade, by giving appropriate directions on the approach to be adopted to eyewitness identification evidence in general. Though related, the issues are different and, where they both arise, the judge must address both of them. So, in the present case, even assuming that the judge gave adequate *Turnbull* directions on the difficulties inherent in all identification evidence, this does not mean that, taken as a whole, his directions were adequate where the identifications were dock identifications without a previous identification parade.

16. The problems posed by dock identifications as opposed to identifications carried out at an identification parade are well known and were summarised in *Holland* 2005 SC (PC) 1, 17, at para 47:

> "In the hearing before the Board the Advocate-depute, Mr Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited

> to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

Allowing for any differences in practice, their Lordships consider that these observations apply equally to the position in Belize.

17. In the present case, it may well be that the judge bemoaned the fact that no identification parade had been held and pointed out the advantages of such a parade. But, despite what the Board had said in *Pop*, he did not point out that Mr Robateau had thereby lost the potential advantage of an inconclusive parade. Moreover, while giving directions on the care that needs to be taken with identification evidence in general, the judge did not warn the jury of the distinct and positive dangers of a dock identification without a previous identification parade. In particular, he did not draw their attention to the risk that the witnesses might have been influenced to make their identifications by seeing the appellants in the dock. And, perhaps most importantly, even if the judge's directions would have ensured that the jury appreciated that this type of identification evidence was undesirable in principle, he did not explain that they would require to approach that evidence with great care. On the contrary, the closing words of the direction really left the whole matter to the jury on the basis that the witnesses said that they knew the men and it was simply up to the jury to accept or reject their evidence.

18. In these circumstances the Board has come to the clear view that the directions given to the jury on the dock identifications were inadequate in the case of both appellants. In dealing with Mr Robateau's appeal on the point, the majority in the Court of Appeal indicated that, if they had concluded that there had been a misdirection, they would have been inclined to apply the proviso on the view that, having regard to the other evidence against Mr Robateau, no substantial miscarriage of justice would have occurred. Part of the evidence which the majority judges had in mind was that given by Mr Figueroa, the Belize ambassador, who spoke to certain remarks which Mr Robateau had made to him during his visit to the detention centre on 10 July 2002. Mr Fitzgerald submitted that the judge had been wrong to admit the evidence, since the ambassador fell to be regarded as a person in authority who had, in effect, induced Mr Robateau to make the admissions which he did, in the hope of obtaining travel documents.

19. When considering this submission, the Board was particularly conscious that it did not have the benefit of submissions on behalf of the Crown. While Mr Fitzgerald contended that the appellants were at the embassy to try to obtain travel documents which they would use either to travel on to the United States or to remain in Mexico, passages in the ambassador's evidence suggest that, in fact, they had been taken to the embassy by the Mexican immigration authorities to try to ascertain whether they were citizens of Belize so that they could be deported there. In which event, Mr Robateau would not have been wanting travel documents from the ambassador and so could not have been induced to make any admissions to the ambassador by the hope that, in return, the embassy would supply him with such documents. Mr Fitzgerald accepted that this might indeed be the appropriate interpretation of the evidence, but maintained that, even if it were, the evidence of what Mr Robateau said to the ambassador should not have been admitted. The Board prefers to express no concluded view on the matter, since it is unnecessary to do so.

20. When prosecuting counsel reached the point at which she was about to lead the evidence of the conversation between the ambassador and Mr Robateau at the detention centre, defence counsel objected. The jury was sent out and counsel's submissions ran over to the next day, which was a Friday. On the Monday morning the judge gave his ruling, overruling the objection. Defence counsel relied on Rule 15 of the Judges' Rules of Belize, which is in these terms:

> "Persons other than police officers charged with the duty of investigating offences or charge offenders shall so far as may be possible comply with these rules."

He argued that, in the circumstances, the ambassador could, in effect, be regarded as a person charged with the duty of investigating the offences in terms of the rule.

21. On behalf of the Crown Ms Moyston opposed the objection, but in the course of her submissions she argued that the point might fall to be considered not only under the Judges' Rules, but also on the basis that the ambassador was a person in authority in terms of *Ibrahim v The King* [1914] AC 599, 609-610. She further submitted that, whether the matter fell to be considered under the Judges' Rules or on a wider basis, it should be ventilated after the facts had been explored in a voir dire. In his reply counsel for the defence did not allude to that point and really confined his submission to Rule 15.

22. In giving his ruling, the judge said:

> "At this stage, I must say that I agree with the argument of Ms Moyston that a voir dire *should have been held* because that would have been the best course of action to take so that the court would have sufficient material before it to determine not only the legal issues involved but the whole question of the voluntariness of the statement. It would only be in the voir dire that the judge would be able to have before him exactly what Robateau said and how he said it for the judge to consider whether, to begin with, what he said was incriminating and then to determine whether he said it in a voluntary way or not" (emphasis added).

Despite this, he then proceeded to hold that the ambassador did not fall within the scope of Rule 15 and concluded that

> "In the circumstances I find the Judges' Rules, particularly Rule 15 does not extend to Ambassador Figueroa in this instant case, as he's not a person in a position, analogous, an investigator or to a person charged with the duty to investigate or to charge anyone for any crime which that person may have committed. In the circumstances I do not consider myself having the discretion to disallow anything Robateau might have told the Ambassador when he was being interviewed by the Ambassador in Mexico. Ruling according."

23. At first sight at least, the position adopted by the judge is somewhat surprising. The submission by Ms Moyston was not that a voir dire would have been appropriate but that, unfortunately, it was now too late to hold one. Her position was simply that the whole matter should be ventilated in a voir dire so that the judge would have a satisfactory basis for deciding the question of admissibility. But when he gave his ruling, the judge said that he agreed with Ms Moyston that a voir dire "should have been held" – apparently proceeding on the basis that it was now too late to hold one and so he would simply have to rule on the objection at this stage on the basis of the evidence available so far. He may have been led into this position by the fact that defence counsel did not adopt the Crown's submission that the judge should hold a voir dire. In any event, having ruled that he could not prevent the Crown from leading the evidence, the judge continued with the trial before the jury. But it is apparent that the judge could not banish the thought that it would have been preferable to hold a voir dire, since he soon referred to it when Ms

Moyston was leading evidence about a tattoo which the ambassador had seen on Mr Robateau.

24. The critical point came when Mr Figueroa was asked what happened next and he replied:

> "What happened was that it occurred to me that this was a very soft spoken and humble and polite young man. Throughout the few minutes that I spent with him that day and the day before, he was always very polite.
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> The Court: He was very polite and what else?
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> Wtness: Soft spoken, humble, respectful and I said to him, 'Mr Robateau, you seem like such a nice person, such a nice young man. Yu polite and yu humble, respectful. I said to him, 'I don't understand how you could do such a terrible thing.'
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> The Court: Yes?
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> Witness: He said to me, 'I don't understand how I did it either.' He said, 'Things just got out of control an ih happen so fast that when it was over – it wasn't until it was over that I realised what he have done.'
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> The Court: Things got out of control?
>
> Witness: And that it happened so fast that it wasn't until it was over that he realised ['relied' in the transcript] what they have done or in his case, 'What we had done.'
>
> The Court: That I realised what I have done?
>
> Witness: What we have done.
>
> The Court: Yes?
>
> Q. Yes?
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> A. We continued to converse – well, actually what he said to me in the conversation is that I asked him if he understood how much pain he had caused to families and he said, 'Yes,' he did understand how much pain he had cause to families. And also – am trying to remember if it was right before or after that he said when it was over that they panicked and all they could thing of was getting out of Belize."

25. Subsequently, in cross-examination of the ambassador, Mr Willis put it to him that his purpose in interviewing the two appellants had been to investigate whether they had committed murder as alleged by the newspaper. The witness replied:

> "My purpose was to be as cautious as possible. I would not have wanted to unfairly put anyone in a position that [he] not deserve to be in and at the same time, as a member of this community, I would not have wanted to let two fugitives to slip out of fingers. I was simply trying to be cautious and protect both sides."

In reply to the judge, Mr Figueroa really repeated this part of his evidence, again concluding with the comment that, "as a member of this community, I would not have wanted anyone to slip through my fingers, in fact, if they were the fugitives."

26. Two points stand out in the passages which the Board has quoted.

27. First, the ambassador was clearly struck by the polite and respectful behaviour of Mr Robateau towards him. In itself, this opens up the possibility that Mr Robateau felt that the ambassador was someone to whom he had to listen and whose questions he had to answer, whether he really wished to or not. Had the judge held a voir dire, as prosecuting counsel submitted that he should, all this could have been explored and a better basis laid for deciding whether Mr Robateu's reply was truly voluntary. In such a voir dire Mr Robateau would have been able to give evidence on the whole situation, if he had so wished.

28. Secondly, although, of course, the ambassador was not himself a police officer, by the time that he was questioning Mr Robateau he had spoken to people in Belize, including a friend at Bowen & Bowen. While, as he said, the ambassador may well have been concerned lest he did anything to damage the appellants unfairly, he was, equally, concerned to make sure that, if the men were indeed the ones wanted for murder, he did not allow them to slip through his fingers. His attitude is entirely understandable, since he would plainly have laid himself open to criticism if, as a public official of Belize, he had allowed two men wanted for these four murders to slip through his fingers. To that extent at least, he might be seen as acting in support of the police. But, again, this is a matter which should have been explored in a voir dire before the judge ruled on the admissibility of the evidence of the ambassador's conversation with Mr Robateau, rather than – to much less effect – after that evidence had been led.

29. Their Lordships need express no concluded view on the admissibility of the evidence of Mr Robateau's conversation with the ambassador. Indeed, in the circumstances it would be premature to do so. But, like prosecuting counsel at the trial, they consider that, before ruling on admissibility, the judge should have held a voir dire in which the

various issues could have been fully explored in evidence and in which Mr Robateau could have given evidence, if he wished. By not holding a voir dire, the judge not only deprived himself of this potential assistance, but deprived Mr Robateau of the opportunity to have the admissibility of the evidence determined on a proper footing. The failure to conduct a voir dire was, accordingly, prejudicial to him.

30. The Board now returns to the issue of the proviso. Given its conclusion that the judge should have held a voir dire before admitting the evidence of the ambassador's conversation with Mr Robateau, the Board does not consider that that evidence should be given weight in considering the application of the proviso. In that situation, there is little to choose between the two appellants, since the crucial evidence against each of them came from the dock identifications by the Crown witnesses. Of course, the evidence of the appellants' disappearance and flight to Mexico soon after the murders is striking indeed. But it is legally significant only when taken along with the evidence on which the Crown relied to show that the appellants had been on the scene and involved in the murders at Bowen & Bowen and, by inference, later that evening. Since the judge failed to direct the jury properly on the approach which they should adopt when considering the key identification evidence, and, in particular, failed to tell them that they required to approach it with great care, the Board cannot affirm that, even if properly directed, the jury would inevitably have reached the same verdicts. The convictions must accordingly be regarded as unsafe.

31. In these circumstances the Board does not require to deal with either of the points raised by Mr Fitzgerald with regard to sentence. But it may be of assistance if the Board comments on the first of these issues. The transcript of the end of the trial shows that Gonzalez J did not follow the guidance given by Conteh CJ in *The Queen v Reyes* 25 October 2002. In particular, he did not give directions in relation to the conduct of the sentence hearing or indicate the materials that should be made available, so that the appellants could have reasonable materials for the preparation and presentation of their cases on sentence.

32. Since Conteh CJ issued his guidance in *The Queen v Reyes*, other Caribbean judges have considered how the vital sentence hearing in a capital case should be approached. In particular, in an appeal to the Eastern Caribbean Court of Appeal from Saint Christopher and Nevis, *Mitcham v DPP* 3 November 2003, Sir Dennis Byron CJ said:

> "When fixing the date of a sentencing hearing, the trial judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner.
>
> The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt."

That guidance was affirmed and applied by Alleyne JA in a subsequent appeal to the same court from Saint Vincent and the Grenadines, *Charles v The Queen* 6 December 2004. The Board considers that both aspects of Sir Dennis Byron's guidance should be applied by courts in Belize and should indeed be incorporated into any future guidance given by the Court of Appeal.

33. The approach to be adopted by a judge when considering whether to impose a death sentence was further discussed in the Eastern Caribbean Court of Appeal by Rawlins JA Ag in *Moise v The Queen* 15 July 2005. He referred to a number of previous decisions where the proper approach had been discussed and continued, at para 17:

> "17. The cases mentioned in the foregoing paragraph establish that the first principle by which a sentencing judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating facts are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.
>
> 18. It is a mandatory requirement in murder cases for a judge to take into account the personal and individual circumstances of the convicted person. The judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those

> exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing judge is fixed with a very onerous duty to pay due regard to all of these factors.
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> 19. In summary, the sentencing judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the judge must consider the character and record of the convicted person. The judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.

34. At the sentence hearing, Gonzalez J appears to have approached the question of sentence on the basis that the death sentence should be imposed in a case like the present unless the defendants had established a reason for not imposing it. He did not, of course, have the benefit of the guidance on the imposition of the death sentence which has been worked out in a series of cases from various Caribbean jurisdictions and which is inconsistent with his approach. Naturally, it is for the Court of Appeal of Belize to provide the necessary further guidance for judges in Belize, as and when the issue comes before the court. Nevertheless, the Board commends the judgments in *Mitcham v The Queen* and *Moise v The Queen* as providing a useful indication of the approach which requires to be taken in order to give effect to the underlying principles of the law on the subject.

35. For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeals should be allowed and the matter remitted to the Court of Appeal with a direction to that court to quash the convictions and to consider whether a retrial should be ordered, the appellants remaining in custody meanwhile.