Trinity Term

[2021] UKPC 16

Privy Council Appeal No 0012 of 2017

JUDGMENT

Clarke and others (Appellants) v The State (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones

Lord Leggatt

Lord Burrows

Lord Stephens

Lady Rose

JUDGMENT GIVEN ON

28 JUNE 2021

Heard on 5 May 2021

Appellants	Respondent
Michael Birnbaum QC	Rowan Pennington-Benton
(Instructed by Herbert Smith Freehills LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD LLOYD-JONES:

1.

Vivian Clarke, Pernell Martin and Steve McGillvery ("the appellants") appeal to the Judicial Committee of the Privy Council against the decision of the Court of Appeal of Trinidad and Tobago dismissing their appeal against conviction for manslaughter.

The Facts

2.

On the evening of 26 November 2005 Samdaye Rampersad was kidnapped at gunpoint near her shop in Mendoza Lane, Petit Bourg, Trinidad and Tobago. On 5 January 2006 Nigel Roderique took police to her burial place, a shallow grave in a cashew field at Claxton Bay. Although she had suffered severe

physical injury in life, the cause of death was asphyxiation and suffocation secondary to live burial, but a broken back was found to be a contributory factor.

3.
Between 1 May 2009 and 31 July 2009 at the Port of Spain Assizes nine men stood trial for her murder before Narine J: Phillip Boodram, Kervin Williams, Mario Grappie, Ricky Singh, Roger Mootoo, Bobby Sankar and the three appellants.

4.
Roderique was the principal witness for the prosecution. His account was that on 25 November 2005 at Prans Garden, Boodram, Williams and Grappie met Roderique and two other men. Boodram said that one Rampersad owed him money. He wanted Rampersad’s mother (Samdaye Rampersad) kidnapped to pressure him to pay the debt. He instructed Clarke and others to have the mother brought to him, but not harmed. Roderique gave Clarke two guns. On the evening of 26 November 2005 Clarke called Roderique to say, “The bread is in the oven” (the pre-arranged signal that the kidnap had taken place). Martin and McGillvery then delivered Samdaye Rampersad to a village by Bobby Hill.

5.
Roderique said that all the other defendants (but not the appellants) were present on 27 November at the cashew field. There, Mrs Rampersad was assaulted by Boodram, Singh and Mootoo and appeared to have died. Mootoo, Williams and Grappie then buried her in the field.

6.
McGillvery made a written caution statement to the police saying that he had been asked to take part in a kidnapping but had refused. McGillvery was in a different car at the time of the kidnapping. He knew about the kidnapping but did not take part. McGillvery did not challenge the statement, which was admitted into evidence.

7.
Martin and Clarke were alleged to have made oral statements to the police during caution interviews, admitting participation in the kidnapping only. The interview notes were admitted into evidence. Through cross-examination it was put by Martin that the interview notes were fabricated, that he had not been cautioned and that the notes had been pre-written. Through cross-examination it was put by Clarke that he had been tricked into signing the interview notes and that some of their contents were untrue.

8.
Before giving police any information about the Rampersad murder, Roderique had been questioned about one Nigel Allen. Allen went missing on 7 December 2005 and was found dead on 19 December 2005. On 16 December 2005 Roderique made a detailed statement alleging that Allen and two other men had kidnapped him and held him for several days. However, in later statements of 20 and 21 December 2005 he admitted both the falsity of that account and his involvement in the killing of Allen. On 22 December 2005 he was charged with the murder of Allen. At the time of the appellants’ trial he had not been tried for the Allen murder.

9.
On 13 May 2009 Narine J ruled that defence counsel were not entitled to cross-examine Roderique on the content of any of the three statements concerning Allen, although they could elicit and put to

Roderique the bare fact that he made the statement to police on 16 December 2005 which he later admitted was untrue.

10.
Roderique was then cross-examined. Roderique accepted that he had been charged with the murder of Allen and that he had made the statement of 16 December 2005. Roderique denied that the statement of 16 December 2005 was false, claiming that he had been forced to sign the later statements of 20 and 21 December 2005. He had never said the things in those later two statements.

11.
Narine J summarised the prosecution case to the jury as one of joint enterprise. Although the appellants had not been present when the injuries were inflicted to Mrs Rampersad or her burial in the cashew field, they had been involved in her kidnapping and production to others who later assaulted and killed her.

12.
On 31 July 2009 the appellants were convicted of manslaughter. The jury disagreed about the other defendants, save for Sankar who was acquitted. On 15 September 2009 the appellants were each sentenced to 30 years hard labour.

13.
The appellants appealed. The grounds of appeal were that the manslaughter convictions were inconsistent with the failure to agree on other defendants, especially Boodram; that the Judge misdirected the jury as to joint enterprise and foreseeability; that he was wrong to leave manslaughter to the jury on the basis of foresight of harm less than serious physical harm; and that the failure to conduct an identification parade for McGillvery was a material irregularity. No point was taken in relation to the judge's ruling concerning Roderique's statements. On 28 July 2011 the Court of Appeal of Trinidad and Tobago dismissed their appeal against conviction (Cr App Nos 28 – 30 of 2009).

14.
At a second trial before Holdip J in 2011, the jury failed to reach agreement once again in relation to Boodram, Williams, Grappie, Singh and Mootoo. During that trial, on 29 September 2011, Holdip J considered an application by the defence to cross-examine Roderique with respect to the contents of the three statements he gave in respect to the Allen matter. In response to the application, the prosecution accepted that the defence could cross-examine on the contents of the three statements and the surrounding circumstances of how they were procured, but that the questioning should "not go too deeply into the contents". Holdip J agreed "that to allow extensive cross-examination into the details of the Nigel Allen statements would thereafter derail the trial". However, Holdip J gave a ruling which permitted cross examination of Roderique on matters which Narine J had ruled inadmissible, in particular the gist of his statements about Allen insofar as they went to credit.

15.
In or about March 2017 Boodram, Williams, Grappie, Singh and Mootoo were convicted of manslaughter at a third trial. They were each sentenced to 28 years imprisonment.

16.
On 18 April 2016, while the third trial was taking place, Roderique pleaded guilty to the murder of Allen on the basis of the felony murder rule.

17.
On 27 January 2017 the appellants Clarke and Martin applied for permission to appeal to the Judicial Committee of the Privy Council. The grounds of appeal included, in addition to a challenge to Narine J's ruling on cross-examination of Roderique (Ground A), alleged unfairness caused by the prosecution's delay in relying on joint enterprise and misdirection in respect of manslaughter and joint enterprise. On 8 February 2018, the Judicial Committee granted permission to appeal on Ground A only. On 1 March 2019, the appellant McGillvery applied for permission to appeal to the Judicial Committee, adopting Ground A as advanced by Clarke and Martin. Permission was granted on 10 April 2019.

The issues

18.
The issues on this appeal are:

(1)
Was the ruling of Narine J on the permitted scope of the cross-examination of Roderique one which he was entitled to make?

(2)
If the ruling was wrong in law, has there been a miscarriage of justice?

19.
Section 44(1) of the Supreme Court of Judicature Act (Act No 12 of 1962) provides:

"The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Roderique's statements concerning Nigel Allen

20.
Roderique had convictions for possession of cocaine for the purposes of trafficking, assault and possession of ammunition. He was arrested on 15 December 2005 in respect of the disappearance of Nigel Allen. Allen's body was found in a shallow grave within walking distance of Roderique's home on 19 December 2005. Roderique made statements about the Allen matter on 16, 20 and 21 December 2005 and was charged with that murder on 22 December 2005.

21.
In his statement of 16 December Roderique stated that Allen had phoned him on 7 December at 5.30 and visited him at his home for about an hour. Allen told him he should "organise my money". The next morning (8 December) Allen came again at 7.30 am driving a white B15 "PBS" car with two Spanish looking men, one short and fat with a Muslim looking beard and the other skinny and tall. They then drove to Grand Couva with 11 blocks of weed. He described the route. Roderique dropped out and hid the blocks of weed. Allen and the two men then left with $13,000 which Roderique had given them.

22.

The next morning (9 December) Allen picked him up in the same B15 and gave him $500. At around 6.00 pm Allen and the two men picked him up again. Whilst driving Allen accused him of setting up someone to steal the weed. The Spanish man took out a gun and “stuck it to my head down between the front and back seats”. They then drove. He gave details of the route. They took him into a house with his head covered with a jersey. He was tied to a chair with his hands extended outwards. He was not fed for the rest of the day. On the Saturday (10 December) he heard Allen’s voice talking to the two men and was fed a burger morning and evening. On the Sunday (11 December) he almost escaped by freeing the string on his hand and noted that the room was 12 x12 feet with a boarded-up window. The thin man ran into the room, beat him with a cutlass on his back, bored both his ears with an ice pick and put wire in them and tied him back up. The same man burnt him on his body with cigarettes. He was not fed at all on the Sunday. Monday (12 December) “passed as normal”. On the Tuesday (13 December) he was fed twice with burgers and on the Wednesday (14 December) with “doubles”. He was not tied up but was held at gun point.

23.

On the Thursday (15 December) he was given a burger in the morning. He was put in a white wagon at about 7.30 pm. He knew the time because he heard the TV news report. He described what he had heard two other men who were present say. He was placed in the wagon to lie down in the back seat. They drove for about half an hour. He escaped by running and hiding in a cane field for five hours. He then ran to a housing settlement where he sought help. A police car picked him up. He was seen by a doctor at Couva Health Facility and then taken to the police station.

24.

Roderique initialled seven corrections to the original of this statement and signed each page at the bottom. At the end he stated, “I am giving this statement of my own free will”.

25.

In three passages in his subsequent statements of 20 and 21 December Roderique admitted that his statement of 16 December was false.

26.

On 21 December Yusuff Rahim Mohammed JP affixed his stamp to the original statement of 16 December and certified as follows:

“I certify that I spoke to Ryan Nigel Roderique on the 21/12/05 at the Homicide Office about a statement made at the Couva police station 16/12/05 in connection with a matter concerning Nigel Allen. Ryan Nigel Roderique confessed that this statement is not correct and he is prepared to change same. This is in the presence of his common law wife Denise Phillip, acting corporal Granger [?] 11810 and 12385 PC Simon. I do certify and confirm. I will sign same of own free will, Nigel Roderique. 21/12/05.

Signed and dated 21/12/05 by Denise Phillip, Louis Granger [?] and [illegible] Simon.”

The application to cross-examine Roderique on his statements concerning Nigel Allen

27.

The trial judge, Narine J, was faced with a very delicate situation. The prosecution case against all the defendants depended to a very large extent on the evidence of Roderique which required to be approached with extreme caution on a number of grounds. In particular:

(1)
Although not charged in respect of the killing of Mrs Rampersad, Roderique was on his own account deeply implicated in those events;

(2)
Roderique had been charged with the murder of Allen and faced trial on a capital offence;

(3)
Roderique had made a statement to the police in relation to the investigation of the killing of Allen in which he alleged that he had been kidnapped by Allen but had later retracted that statement.

As a result, Roderique would have had a number of reasons to give false evidence against the defendants in the Rampersad trial, including to reduce his culpability in respect of the Rampersad killing and to obtain favourable treatment in respect of the Allen killing where he was at risk of conviction for murder and being sentenced to death. In these circumstances it was essential that the jury in the Rampersad trial was placed in a position fairly to evaluate the quality of Roderique's evidence. In addition, while seeking to secure a fair trial for the defendants, Narine J was also anxious not to prejudice the position of Roderique in the Allen trial and not to allow the trial before him to be diverted into satellite issues. The judge's decision must be evaluated against this background.

28.
When Roderique was cross-examined by Mrs Elder SC on behalf of Boodram he denied that he took any part in the kidnapping or burial of Mrs Rampersad. It was then put to him that he was involved in the killing of Allen, which he denied. At that point the judge heard legal submissions in the absence of the jury. The judge expressed his concerns that Roderique might incriminate himself. Mrs Elder then developed the grounds on which she wished to cross-examine. She explained that she wished to cross-examine him on the basis that he was an accomplice in the killing of Mrs Rampersad and on the basis that he had made an admission of misconduct. He had admitted being involved in the murder of Allen. Roderique had made his statement concerning the killing of Mrs Rampersad shortly after he had been charged with the murder of Allen. She wished to cross examine him to show bias or partiality. She also referred to similarities between the circumstances of the two killings. She maintained that it was the modus operandi of Roderique falsely to implicate persons in killings in order to extort money. She further maintained that the evidence of the Allen killing showed propensity. In addition, she wished to cross-examine Roderique to show misconduct in that he had faked his own kidnapping, informing the police that he had been kidnapped by Allen, but had later withdrawn that story admitting it was false. This would demonstrate that Roderique was capable of great deception. She also submitted that by admissions in his evidence at the preliminary hearing in the Rampersad case he had waived his right to invoke the privilege against self-incrimination in respect of the Allen murder. When argument was resumed the next day, Mrs Elder stated that she wished to cross-examine Roderique on his pending charge of murder and on the false statement he made with regard to his kidnapping.

29.
Mr Petersen SC for the prosecution made clear that he was not objecting to cross-examination on the basis that Roderique made a false report to the police of his own kidnapping which he then retracted. Furthermore, the prosecution was not disputing that the defence was entitled to cross-examine the witness on all previous conduct and the fact that he had a pending murder charge and that he had given a statement in that matter. At that point the judge observed that he was concerned about "going there at all" because the statements related to a murder trial that had not yet taken place and were untested. After Mrs Elder had given the judge copies of the statements of 16 and 21 December 2005

Mr Petersen reiterated that he did not object to cross-examination to show that Roderique had lied to police about being kidnapped, but reserved his position as to cross-examination on the content of the statement of 16 December in which he had told that lie.

30.

The judge gave a ruling which unfortunately cannot be located and is not before the Board. However, its content can be reconstructed from what occurred subsequently. Mrs Elder asked for clarification of the ruling. Could she deal with the faked kidnapping? The judge said that she could not “go into the contents of the statements”. She could elicit the fact that he gave the statement and later admitted that the contents of the first statement were not true. That was as far as he was prepared to go. She could not elicit the faked kidnapping. Later Mrs Elder summarised the topics on which the judge had permitted cross examination: vulnerability, motive to favour the prosecution and bias. The judge repeated that she could not go into the contents of the statements or the underlying facts of the Allen matter.

31.

Several threads are entwined in Mrs Elder’s application. First, the defence maintained that Roderique had a motive to lie in order to curry favour with the police or the prosecution arising out of his being charged with the murder of Allen or to avoid being charged with the murder of Mrs Rampersad. Narine J allowed the defence to cross-examine Roderique on this basis.

32.

Secondly, the defence sought to rely on similarities between the kidnappings and killings of Allen and Mrs Rampersad. Narine J refused permission to the defence to raise these matters. On behalf of the appellants, Mr Michael Birnbaum QC points to a striking coincidence between Roderique’s accounts, taken as a whole, of the kidnapping of Allen and that of Mrs Rampersad: even though in early December 2005 he had been recruited to kidnap Allen for money, his presence at the planning of the kidnapping of Mrs Rampersad and at her killing only a few weeks later was innocent and unpaid. Two people had been kidnapped at the behest of someone who did not want the victim harmed and yet, shortly afterwards, each had been strangled and buried in a shallow grave not far from Roderique’s home. There was, Mr Birnbaum submits, powerful evidence of a propensity to kidnap and, arguably, of a propensity to kill.

33.

Mr Birnbaum accepts, however, that the judge was right to exclude any comparison between the facts of the two cases, no matter how cogent. He accepts that it would be very difficult, if not impossible, to ventilate at the trial of these appellants similarities between what had actually happened to Allen and to Mrs Rampersad without exposing Roderique to the risk of self-incrimination. Moreover, even if Roderique had waived the privilege against self-incrimination at the preliminary enquiry, as Mrs Elder submitted, he was still entitled to assert it again at the trial of these appellants (R v Garbett (1847) 1 Den CC 236; 169 ER 227). It is therefore conceded on behalf of the appellants that Roderique would have been entitled to assert his privilege against self-incrimination and to refuse to answer any questions based on a comparison of the two killings. Mr Birnbaum accepts that, to that extent, Narine J’s ruling was correct in law, even though he maintains that it unfairly inhibited the defence.

34.

Thirdly, the judge permitted the jury to be told that Roderique had on 16 December made a statement to the police in connection with the Allen investigation and had subsequently retracted it as false in further statements on 20 and 21 December. However, he did not permit the jury to be told anything

about the content of the statement of 16 December ie that Roderique had admitted fabricating an account that he had been kidnapped by Allen. This is essentially the point raised on this appeal.

35.
On behalf of the appellants, Mr Birnbaum submits that Roderique's own signed statements provided a solid basis for the suggestion that he had fabricated the allegation of his having been kidnapped and this issue did not give rise to a risk of self-incrimination. Cross-examination on this basis should have been permitted as going to two issues relevant to Roderique's credibility, namely whether he was capable of inventing elaborate lies and whether he had a bias in favour of the prosecution that might lead him to invent evidence against others in order to secure advantage for himself. He submits that because Roderique had made his false allegation, had retracted it and had confessed to a part in the killing of Allen before he said anything about the murder of Mrs Rampersad, he arguably had a very strong motive to implicate others falsely in order to curry favour with the authorities.

Issues as to credit

36.
At the date of the trial before Narine J in 2009 the common law governed the circumstances in which cross-examination of a witness as to credit was permissible. More recently, the common law rules have been amended by legislation both in Trinidad and Tobago (Evidence Amendment Act 2009) and in England and Wales (Criminal Justice Act 2003).

37.
In R v Edwards [1991] 1 WLR 207 at pp 214-215 the position at common law was stated by Lord Lane CJ as follows:

"Generally speaking, questions may be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of testing his credit.

The limits to such questioning were defined by Sankey LJ in Hobbs v Tinling & Co [1929] 2 KB 1, 50-51:

'The court can always exercise its discretion to decide whether a question as to credit is one which the witness should be compelled to answer … in the exercise of its discretion the court should have regard to the following considerations: "(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies. (2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies. (3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence".

38.
In R v Sweet-Escott (1971) 55 Cr App R 316 Lawton J stated the principle as follows (at p 320):

"Since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence."

39.

In Persad and Jairam v The State [2001] UKPC 2 the Board (at para 14) endorsed the observation of Lord Lane in Edwards (at p 216) that it is impossible and would be unwise to lay down hard and fast rules as to how the court should exercise its discretion. The Board then stated (at para 14) that the misconduct relied upon must, nevertheless, have a solid foundation:

“But it can be affirmed that the alleged misconduct must be misconduct by the witness himself and the misconduct must not be a matter of speculation or doubt, but of probability. Thus it is not proper to raise matters which are merely matters of complaint about the behaviour of the witness where those complaints have not been considered and determined by the appropriate authority established to adjudicate upon complaints. Far less is it proper to question the witness about charges which have been made against him and which have not yet been tried.”

The Board added (at para 16):

“Behind all this is the necessity of securing a fair trial for the accused person consistently with fairness to a witness. It is not fair for a witness to be assailed with unproven allegations of misconduct or with mere suspicions of past malpractice. Nor is it acceptable for the time of the court to be taken up with matters extrinsic to the case in hand nor for the jury to be distracted from the issue before them by inquiries into uncertain and unresolved issues about the earlier conduct of a witness. The investigation of a witness’s reliability in the course of cross-examination must be kept within bounds. It cannot be allowed to degenerate into a ranging and speculative inquiry into any or all of the occasions on which the witness has given evidence in the past.”

40.
At common law, therefore, the judge had a discretion to permit cross-examination as to credit. In exercising that discretion he was required to have regard to whether such questions would seriously affect the jury’s view of the credibility of the witness, to whether the misconduct relied upon had a solid foundation, to the fairness to the witness of permitting such cross-examination and to whether such cross-examination would be a distraction from the real issues in the case. An appellate court may not interfere with the exercise of such a discretion unless it is clearly wrong or wrong in principle.

41.
In the present case Narine J permitted defence counsel to elicit in cross-examination that Roderique had made a statement to the police on 16 December which he had subsequently retracted as false in further statements on 20 and 21 December. The jury were therefore made aware that Roderique had given an account which he later said was false. However, the jury was given no indication as to the content of the first statement or as to its possible significance for the matters they had to consider. So far as they were aware, its content could have been entirely anodyne.

42.
In fact, the content of the first statement was highly material to the assessment of the credibility of Roderique and had the potential to transform the jury’s view of his evidence. So far as the jury was aware, Roderique had made a statement to the police which he subsequently retracted as untrue. If the jury had been made aware of the content of the first statement it would have appreciated that Roderique had given an elaborate account of his having been kidnapped by Allen which he subsequently retracted as untrue. The wealth of detail in which he described his experience of being kidnapped is a striking feature of his account. Moreover, he described the culprits, implicating them in his account to the police which he subsequently accepted was a fiction. The jury, however, was kept in the dark as to the content of the first statement and as a result was prevented from hearing evidence which was capable of showing Roderique as a most accomplished and resourceful liar.

Knowledge of the content of the first statement was capable of adding a new dimension to the jury's understanding of the case.

43.
On behalf of the respondent it is submitted that the jury was already aware that Roderique had been charged with the murder of Allen and that Roderique was clearly implicated in the murder of Mrs Rampersad, the prosecution case having been presented on that basis. As a result, the jury would be bound to approach the evidence of Roderique with considerable caution. In these circumstances, it is suggested, knowledge of the content of the statement of 16 December which was subsequently retracted, could make no difference to the jury's assessment of Roderique's credibility. This, however, does not provide an answer. Roderique's evidence was the main stay of the prosecution case and he was put forward by the prosecution as a witness of truth who was capable of belief. The content of the statement of 16 December was highly relevant to the truthfulness of his evidence.

44.
The judge was clearly and understandably concerned to be fair to Roderique who faced trial for murder. He did not want to create a risk of Roderique incriminating himself in the course his evidence. He was also anxious to prevent a descent into peripheral issues which would distract from the main issues in the trial before him. In fact, however, the matter could have been handled in a way which would not have prejudiced Roderique in his trial and which would only have involved consideration within a limited scope of Roderique's claim that he had been kidnapped.

45.
It was open to the judge to permit counsel to cross examine Roderique on his claim that he had been kidnapped by Allen, on the basis of his statement of 16 December and three discrete passages in his statements of 20 and 21 December which were easily severable from his narrative of the kidnapping and killing of Allen. The three statements clearly provided a reasonable basis for cross examination which could have been directed to Roderique's alleged lies and not his involvement in the murder of Allen. In particular, the retraction of the statement of 16 December had been witnessed by a magistrate. Although the statements of 20 and 21 December included admissions which, if maintained, would incriminate Roderique in the Allen matter and raised the question of voluntariness, Roderique maintaining that he had been "fooled up" by the police who had told him that if he signed the statements he would only be a witness, there would have been no reason to trespass beyond the retraction of the first statement or to cross-examine as to the other contents of the witness statements of 20 and 21 December. This would not have created any risk of Roderique incriminating himself in relation to the murder of Allen.

46.
On behalf of the prosecution, Mr Pennington-Benton submits, however, that, while it could be established that Roderique made inconsistent statements, he denied making the later statements voluntarily. Indeed, that was the position Roderique took in the cross examination which was permitted. Mr Pennington-Benton submits that, as a result, this line of argument on behalf of the appellants leads nowhere. It was obvious that Roderique had given different accounts to the police; he admitted as much but raised a point about inducement. However, this was never followed up and no evidence was led to rebut it. There is a disagreement between the parties on this appeal as to whether it would have been open to the defence to call evidence to rebut Roderique's account. Mr Birnbaum submits that it would have been possible on the basis of a formal admission by the prosecution (section 37A, Criminal Procedure Act 1925 as amended by Criminal Procedure (Amendment) Act 2005), or at common law on the basis that the statements went to an issue of bias (R v Shaw (1888) 16

Cox CC 503; R v Phillips (1936) 26 Cr App R 17; R v Edwards at p 215B-C), or pursuant to section 6, Evidence Act. It is not necessary to go into these matters, which were not fully argued before us, because Mrs Elder made clear that it was not the intention of the defence to seek to call evidence in relation to whether the statements were made voluntarily. Accordingly, Mr Pennington-Benton submits, Mrs Elder got as far as she could within the confines of her self-imposed constraints. However, while it may be correct that Roderique's claims in relation to the involuntary character of the later statements could not have been conclusively refuted at the trial, this fails to take account of the possible effect on the jury of knowledge of the contents of the first statement. That provided compelling evidence supporting the view that Roderique was capable of inventing and perpetrating an elaborate lie in order to save his own skin. If the jury had been asked to believe the account of his having been kidnapped, it certainly cannot be assumed that it would have done so. On the contrary, it is more likely that cross examination on this account would have demonstrated how unreliable a witness Roderique was.

47.
For these reasons, the judge's decision to refuse permission to the defence to cross-examine Roderique on his statement of 16 December was wrong in principle. In order that the jury should be in a position fairly to evaluate Roderique's evidence, it was necessary that they be made aware of the content of the statement of 16 December. In the Board's view, the cross-examination of Roderique was wrongly curtailed. Had the jury been aware of the content of Roderique's statement of 16 December, this might have led them to reject the veracity of his evidence.

48.
As the trial proceeded, the judge's decision had a further consequence. Roderique had claimed in a statement in the Rampersad case that he had seen McGillvery in Sea Lots on 15 December, but in evidence gave a different account, namely that he had seen him between 1 and 6 December. Mr St Clair-Douglas, counsel for McGillvery sought to adduce the fact that according to Roderique's statement of 16 December he could not have seen McGillvery on 15 December, because having been kept captive on that day he went straight into police custody. The judge allowed counsel to ask Roderique whether he was kidnapped at that time provided he could establish it by some means other than the statement he had made, because to go into the statements would be dangerous. With the judge's approval, counsel asked questions of Roderique on the basis that he had been held against his will in one place, then taken to Sea Lots against his will and then somewhere else in Central Trinidad against his will on 15 December. Roderique agreed with all those suggestions. Thus, as Mr Birnbaum QC put it in his written case, the only evidence the jury heard about Roderique's claim to have been kidnapped suggested that it was in fact true, the judge having allowed Mr St Clair-Douglas to adduce from Roderique that the claim was true, having earlier forbidden other counsel to adduce his statements admitting that it was false.

49.
Furthermore, there is a rich irony in the fact that the jury's ignorance of the subject matter of the statement of 16 December and the elaborate detail it provided enabled the prosecution in its closing speech to point to the detail in Roderique's account of the events in the cashew field where Mrs Rampersad was killed as supporting its veracity. This submission would have been substantially undermined had the jury been aware of the content of the statement of 16 December.

Are the convictions of the appellants unsafe?

50.

Section 44(1) of the Supreme Court of Judicature Act provides that the appellate court, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of an appellant, may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. The essential question here is whether we can be satisfied that the jury would still have been bound to convict if the evidence of Roderique had been left entirely out of account.

51.
On behalf of the prosecution Mr Pennington-Benton accepts that, if the evidence of Roderique is left entirely out of account, there is no basis on which he can maintain that the proviso should be applied to uphold the conviction of McGillvery. The Board agrees with this conclusion. However, in the case of Clarke and Martin the prosecution invites the Board to apply the proviso.

Clarke

52.
On 6 January 2006 Clarke was interviewed at the St Clair Police Station by PC Rose. The interview was recorded by PC Bain. The record of the interview stated that upon being told of the investigation and cautioned, Clarke replied, “Officer, I go tell all you all ah know, I was involved in the kidnapping, but ah don’t know nothing about the murder.” According to the notes Clarke said that “a day during the week” he went by “Soldier” at Bird Terrace San Juan. A group of men were talking about a “prophet scene” (sic) concerning the “muffler” who lived to the front of Soldier’s child’s mother. Soldier asked Clarke to organise a car or a gun. He agreed to organise a gun. On Friday, Soldier and some men came for the gun. On Saturday Clarke “went up there”. He saw Fat Man with a Primera or a B15, a white car. Soldier “pulled out first” and then he called about 15 minutes later “and told the fellas ‘come now’”. They left. Then Soldier called him and told him to “patrol the Main Road by Dollar Rescue by the cigarette place and thing”. While he was there, he got a call saying that “The bread in the oven”. He went to Grand Bazaar but then got a call from Soldier telling him to “return to base by he, at Bird Terrace” which he did. He then found out that the woman rather than the man had been taken “because he has access to the money”.

53.
Clarke’s counsel cross-examined PC Rose on the basis that the notes signed by Clarke were not those he had produced in evidence, that they had been restructured to include things he had not said, that he had not been given food and drink at the police station, that he had not been cautioned and that he had been told he could go home if he signed the notes. However, Clarke did not give evidence at his trial, nor did he lead any evidence to support these allegations against the police officers. As the judge pointed out in his summing up, these were simply allegations without any evidential value and the allegations were denied by the police officers.

54.
On behalf of Clarke, Mr Birnbaum points to inconsistencies between the accounts of Clarke and Roderique. Nevertheless, while not admitting the extent of involvement suggested by Roderique, in his interview Clarke clearly accepted his involvement in the kidnapping. The uncontradicted evidence of the witnesses to the kidnapping was that it was a violent affair. It included the use of a firearm which had been supplied by Clarke. Clarke must have known that the kidnapping would be violent and that, should the need arise, a firearm would be used. Furthermore, the independent scientific evidence established the violent death of Mrs Ramparsad in the course of the kidnapping. If a person participates by encouragement or assistance in an unlawful act which all sober and reasonable people would realise carries the risk of some harm (not necessarily serious) to another and death in fact

results he will be guilty of manslaughter. (R v Jogee [2017] AC 387 per Lord Hughes and Lord Toulson at para 96, citing R v Church [1966] 1 QB 59; Director of Public Prosecutions v Newbury [1977] AC 500; R v F(J) and E(N) [2015] 2 Cr App R 5.) The Board has refused the appellants permission to appeal on proposed grounds challenging the judge's directions on homicide including joint enterprise and causation. In the case of Clarke the test for manslaughter stated in Jogee was clearly met.

55.
At the third trial Clarke gave evidence for the defence. He testified that there was a plan to kidnap "the muffler man, the Rampersad man" and to demand a ransom from his family. He was instructed to provide a car and a gun for "Sole". He was only able to obtain a gun which Sole collected from him. On the Saturday Clarke waited at Burke Terrace and later left in Sole's vehicle after receiving a call. He went to Dollar Rescue to make sure there were no police around. After a call from Sole he left for Grand Bazaar to make sure the stretch was clear. After another call from Sole he called Roderique and said, "The bread is in the oven", which indicated that the victim had been taken. The plan changed to kidnap a member of the family, because it was thought that the muffler man would have access to ransom money, but he was only told this when he returned on the Saturday evening. On this account, none of the five defendants in the third trial was involved in the kidnapping. The prosecution argued that Clarke's evidence was a fabrication. All five retried defendants were convicted of manslaughter. Their appeal is now pending before the Court of Appeal.

Martin

56.
On 8 January 2006 Martin was interviewed at Tunapuna Police Station by PC Swanson and Corporal Holder. He was told of the investigation and was cautioned. He is alleged to have said, "Boss, I just a driver and me ent nothing about nobody bury. I just a driver in the snatch." He described a meeting on about the Monday before the kidnapping. The men present were planning "a snatch". All they needed was a driver. They had their guns and the manpower already. The reason for the kidnapping was for ransom. On the Thursday evening, in response to a call from "Sole" or "Soldier" he went to see where the woman victim would be. On the Saturday after 3 pm they got a call. Tall Man, Strong and Spanish were to do the snatching. They made two passes but did not see anyone fitting the description. On the third pass Martin stopped the car and Spanish and Tall Man "braced the crowd" and told everyone to lie down. Strong went for the woman and put her in the middle of the back seat. Martin drove straight out to Claxton Bay and up the driveway. Cat (Roderique) was there and "he carried them up further in the bush with the lady." They stayed about ten minutes and returned without the woman.

57.
Martin was found to have injuries at the police station: a small superficial abrasion to the lower lip, a soft tissue injury to the left shoulder and a very mild post-concussion syndrome. The prosecution case was that he had sustained these injuries when he fell as he tried to evade arrest. At the trial it was put to the police that Martin had been assaulted during and after his arrest and the interview and that he had been induced to sign notes that he had not read containing admissions that he had not made. Martin did not give evidence and there was no evidence to support any of these allegations which were all denied by the police officers.

58.
As in the case of Clarke, Mr Birnbaum on behalf of Martin is able to point to contradictions between the account of Martin in interview and that of Roderique in his evidence. Nevertheless, as in the case of Clarke, Martin gave a full account in interview of his involvement in the kidnapping. Martin, like

Clarke, was aware that the kidnapping was likely to be a violent affair and that, if necessary, guns would be used. The independent scientific evidence established the violent death of Mrs Ramparsad in the course of the kidnapping. As in the case of Clarke, the test for manslaughter stated in Jogee was clearly met.

59.
For these reasons, in the cases of Clarke and Martin the Board has come to the clear view that no substantial miscarriage of justice has actually occurred.

Conclusion on appeals against conviction

60.
Accordingly, the appeal of McGillvery against conviction will be allowed and the appeals of Clarke and Martin against conviction will be dismissed.

61.
The Board invites the prosecution to state whether it seeks an order for a retrial in the case of McGillvery. In that event, the Board will consider further submissions in writing.

Application for permission to appeal against sentence

62.
On behalf of the appellants, Mr Birnbaum invited the Board to hear an appeal against sentence, on the ground that there is a discrepancy between the sentences imposed on these appellants and the sentences imposed on those defendants who were convicted following the third trial. This is not a matter on which the appellants have permission to appeal and the Board declines to hear the proposed appeal.