COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 255 of 2015

B E T W E E N

DONNA VASYLI
Appellant

AND

REGINA
Respondent

REGINA
Appellant

AND

DONNA VASYLI
Respondent

BEFORE: **The Honourable Dame Anita Allen, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Ms. Justice Crane-Scott, JA

APPEARANCES: **Ms. Clare Montgomery, QC with Mr. Murrio Ducille and Ms. Michaela Ellis, Counsel for the Appellant**

Mr. Garvin Gaskin, Director of Public Prosecutions with Mr. Neil Brathwaite, Assistant Director of Public Prosecutions, Mr. Floyd Moxey and Ms. Rosalee Ferguson, Counsel for the Respondent

DATES: **29 June 2016; 25, 26 July 2016; 25 July 2017**

Criminal appeal – Murder – Character evidence – No case submission – Circumstantial evidence – Provocation – Unlawful harm – Identification – Video identification – DNA evidence – Confession - Prejudicial effect outweighs probative value - Retrial

On the morning of 24 March 2015 Philip Vasyli was found dead in his Old Fort Bay home. There were no signs of forced entry and his wife, the appellant, was reportedly the last person seen with him alive. She was subsequently charged with his murder. The case was based totally on circumstantial evidence.

In addition to there being no signs of forced entry, the appellant told police that the surveillance cameras at her home were not working, but the evidence revealed that they were; the deceased's

blood was found on two dresses, a blue one and a multi-coloured one, purportedly belonging to the appellant – one the police found her in, the morning they informed her of her husband's death (the blue one), the other was found in the closet of the room the appellant spent the night in (the multi-coloured one). The appellant claims to have left her husband at home, alive, and spent the night at her daughter's house. She fervently denied killing her husband.

Following a trial before a judge and jury the appellant was convicted of her husband's murder and sentenced to twenty years' imprisonment, less the time she previously spent on remand. She appealed on six grounds.

Held: appeal allowed; case remitted to the Supreme Court for retrial (Crane-Scott, JA dissenting), respondent's cross appeal dismissed

per Allen, P:

Before the jury was evidence that the appellant told the police on one occasion that the clothing she had on that evening was the clothing she wore at her daughter's house (blue nightdress and white robe); and on another occasion told them she wore a pink and white Bahama Handprint outfit that evening. The evidence also was that a multi-coloured dress found in her daughter's closet had the deceased's blood on it, with no explanation as to how the blood got there. Therefore, we have the appellant purporting to have worn two different outfits that evening, none of which include the multicolored dress the Crown suggests she wore and then placed in the closet at the Lilypond; and the evidence of the appellant that the surveillance cameras at the house were not working.

Indeed, if the jury accepted that the recorded footage was from the house; that it was the appellant on the tape; and that she did not have on either a blue night dress and white robe, or a pink and white Bahama Handprint out fit as she told the police, it would be evidence from which the jury could infer that the appellant lied about the clothing she wore that night; and about the functionality of the cameras as well. Notwithstanding the prosecution's evidence in this regard, the defence did not challenge or provide a reason for the alleged lies, and in those circumstances, the jury was possibly left with the impression, as suggested by Counsel for the prosecution, that the appellant lied about her clothing and the functionality of the cameras to conceal the murder of her husband. Consequently, given the reference to it by the Crown in its closing address; and the reliance by them on the lies of the appellant as proof of guilt, there was clearly a danger that the jury might regard the lies of the appellant as probative of her guilt.

These circumstances ought to have attracted a Lucas direction by the learned judge on the significance of lies; and there is no doubt that he was under a duty to so direct the jury. In my view, his failure to do so was an irregularity which substantially affected the merits of the case; and I would remit the matter for retrial to the Supreme Court on the authority of Reid v R (1978) 27 WIR 254. As to the need for a good character direction, I agree with Isaacs JA that such a direction need not have been given by the trial judge for the reasons stated by him.

Hunte and another v State 40 BHRC 633 applied
Mcgreevy v Director Public Prosecutions [1972] NI 125 applied
R v Burge and Pegg (1996) 1 Cr App Rep 163 applied
R v Coutts [2006] UKHL 39 applied

R v Duffy [1949] 1 All ER 932 considered
Reid v R (1978) 27 WIR 254
Rolle v. Regina [2016] 1 BHS J. No. 139 applied

per Isaacs, JA:

The appellant argued that though evidence of her good character in the legal sense had not been raised, her good character in the moral sense had been and that, that was sufficient for the judge to give a good character direction. She says that in the circumstances of this case, a good character direction was clearly material as it impacted upon the issue of her credibility and propensity to commit such an offence. Having reviewed the law it was determined that a good character direction need not have been given by the Judge inasmuch as such evidence as was led in the trial "demonstrated nothing more than the quality of a relationship"; and did not raise directly or inferentially the good character issue.

The judge, in summing up stated, that there was little or no issue of provocation arising from the evidence. Indeed, the theory of the crime put before the jury by the Crown and left for their consideration by the Judge, suggested the appellant was provoked to do as she is alleged to have done. Thus, the Judge ought to have directed the jury on the issue of provocation in the terms of section 304 of the Penal Code. The failure of the Judge to leave the issue of provocation with the jury deprived her of an opportunity to be found not guilty of murder; although she may have been found guilty of manslaughter.

With respect to whether there should be a retrial; "the interest of the public in The Bahamas that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge"**,** as in this case where the Judge did not leave manslaughter as a possible verdict for the jury to consider, leads me to conclude that an order for a retrial would be in the interests of justice; and would not, in my view, amount to an error of principle in the exercise of the power under s. 13(2) of the Court of Appeal Act.

Bhola v The State of Trinidad and Tobago [2006] UKPC 9 considered
Brown v The State of Trinidad and Tobago [2012] UKPC 2 considered
Cordell Darrell Farrington v Regina No. 30 of 2006 considered
DPP v Selena Varlack, Privy Council Appeal No. 23 of 2007 considered
Delancy v The Attorney General SCCrimApp No. 19 of 2012 mentioned
Edmund Gilbert v The Queen, PC Appeal No. 25 of 2005 mentioned
Lewis v The Attorney General SCCrApp No. 19 of 2014 mentioned
Jagdeo Singh v The State of Trinidad and Tobago [2006] 1 WLR 146 mentioned
Jamal Glinton v R SCCrim App No. 113 of 2012 mentioned
Jerome Bethell v Regina SCCrimApp No. 19 of 2013 mentioned
Kemp v Regina No. 201 of 2012 mentioned
R v Butterwasser [1948] 1 K.B. 4 considered
R v Galbraith [1981] 1 W.L.R. 1039 applied
R v Hunter (Nigel) and Others [2015] EWCA Crim 631 considered
R v Jabber [2006] EWCA Crim 2694 considered
Reid v R (1978) 27 WIR 254 applied
Teeluck v The State of Trinidad and Tobago [2005] UKPC 14 applied
Thompson v The Queen [1998] AC 811 considered

Per Crane-Scott, JA:

The appellant was charged with the murder of her husband in circumstances where there were no eye witnesses to the deceased's killing, the time of death was not established and the prosecution case was wholly circumstantial. Unlike Balson v. The State [2005] UKPC 6 where the circumstantial evidence was overwhelming and a good character direction could not possibly have affected the jury's verdict, the same cannot be said of this case. The appellant was undoubtedly of good character and, based on the authorities, ought to have had the benefit of a Vye direction to the jury containing both limbs. I am unable to say with the necessary level of confidence that a good character direction would have made no difference in this case. Put slightly differently, and given the inconclusive state of the circumstantial evidence, I am unable to say that a jury properly directed, in relation to both the credibility and propensity limbs of the appellant's good character, would inevitably have returned the same verdict. In short, in the absence of the good character direction, the appellant's conviction cannot be regarded as safe.

In my view, the judge incorrectly approached the task which lay before him on the no-case submission, choosing instead to abdicate the task of evaluating the strength of the evidence and the meaning of unexplained facts, to the jury to decide. While recognizing that the Crown's case was wholly circumstantial and correctly adverting to dicta in McGreevy v Director of Public Prosecutions [1973] 1 WLR 276, R v Galbraith [1981] 1 WLR 1039 and Director of Public Prosecutions v Selena Varlack [2009] 4 LRC 392the trial judge failed to make the required assumptions in relation to the Crown's case, or to himself scrutinize the evidence to determine whether even accepting all the evidence for the prosecution and drawing all inferences most favourable to the prosecution which were reasonably open to be drawn, a reasonable mind could reach a conclusion of guilt beyond reasonable doubt given all hypotheses consistent with the appellant's innocence which were reasonably open on the evidence.

The authorities show that in a circumstantial case (as this was) the judge is required to approach the no-case submission by assuming that the jury will draw such of the inferences as are reasonably open, as are most favourable to the prosecution. Thereafter the judge should consider whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and in so doing, reject any competing inferences consistent with the accused's innocence as being not reasonably open on the evidence. Apart from identifying the unexplained facts on the prosecution case as he saw them, the judge failed to conduct any evaluation of the inferences favourable to the prosecution which would be reasonably open to the jury. Nor did he attempt to consider whether a reasonable jury could find the appellant guilty on the evidence, notwithstanding the competing hypotheses, preferring instead to leave the various unexplained facts for the jury to decide.

Had the learned judge looked at the evidence in the round as suggested in R v. P [2008] 2 Cr App R 68 with a view to determining as suggested in McGreevy, Varlack and Moore (above), whether the proved facts were such that they excluded every reasonable inference from them save the inference of guilt sought to be drawn by the prosecution, the judge, would in my view, undoubtedly have ruled that there was no evidence on which a jury properly directed could convict. Simply put, at the close of the prosecution case, the case fell squarely in limb 1 of Galbraith and the judge was duty bound to withdraw the case from the jury's consideration

As to whether a retrial should be ordered, in my view, it is obvious that this case falls nowhere close to that extreme of the continuum described in Dennis Reid v The Queen [1980] A.C. 343 where it can confidently be said that the evidence against the appellant at the trial was so strong that any reasonable jury if properly directed would inevitably have convicted the appellant and where, the more appropriate course would have been to apply the proviso and dismiss the appeal instead of ordering a new trial.

On the contrary, while the circumstances of this case are not on all fours with those in Reid, the case, in my view, is one which falls somewhere between the two extremes. In short, this is a case where like Reid, the prosecution should not be given another chance to cure evidential deficiencies in its case against the appellant. I am satisfied that despite the seriousness of the offence, the prevalence of murders in this jurisdiction and the interest of persons in this community in knowing that persons who are guilty of serious crimes are brought to justice and should not escape it, the evidence against the appellant is so weak and inconclusive that it is not in the interests of justice to order a new trial and I decline to do so.

Andre Birbal v Regina SCCrApp 18 of 2011mentioned
Balson v. The State [2005] UKPC 6 considered
Barrow v. The State [1998] UKPC 16 mentioned
Bhola v. The State [2006] UKPC 9 mentioned
Campbell v. The Queen [2010] UKPC 26 mentioned
Dennis Reid v. The Queen [1980] A.C. 343 applied
Director of Public Prosecutions v. Selena Varlack [2009] 4 LRC 392 applied
Edmund Gilbert v. The Queen [2006] UKPC 15 mentioned
Eversley Thompson v. The Queen [1998] AC 811mentioned
France & anor v. The Queen [2012] UKPC 28 applied
Jagdeo Singh v. State of Trinidad and Tobago [2006] 1 WLR 146 mentioned
Jamal Glinton v. Regina, SCCrApp No. 113 of 2012 mentioned
Kenyatta Lewis v. The Attorney General SCCrApp No. 19 of 2014 mentioned
McGreevy v. Director of Public Prosecutions [1973] 1 WLR 276 applied
Navardo Johnson v Regina SCCrim App No. 38 of 2015 mentioned
Nigel Brown v. State of Trinidad and Tobago [2012] UKPC 2 applied
Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1 mentioned
R v Aziz [1996] AC 41mentioned
R v. Galbraith [1981] 1 WLR 1039 applied
R v. Glen Michael Moore, unreported, 20th August 1992 considered
R v. Hunter et al [2015] EWCA 631 distinguished
R v. P [2008] 2 Cr App R 68 mentioned
R v Vye [1993] 3 All ER 241 mentioned
Simmons and Greene v. The Queen [2006] UKPC 19 mentioned
Teeluck v. State of Trinidad and Tobago [2005] 1 WLR 242 applied
Woolmington v. D.P.P. [1935] AC 462 mentioned

J U D G M E N T

Judgment delivered by the Honourable Dame Anita Allen, P:

1. Just over two years ago, in March 2015, Philip Vasyli was found dead in the Tumbi Umbi home he and his wife, Donna Vasyli, the appellant, shared in the gated community of Old Fort Bay. Following an investigation, the appellant was arrested and charged with the murder of her husband. She was tried before Sr. Justice Stephen Isaacs and a jury where she was found guilty and thereafter convicted and sentenced to twenty years' imprisonment.

2. The undisputed evidence before the court was that on the evening of 23 March 2015 the Vasyli's entertained guests, namely, Myles and Jody Pritchard who arrived at the Vasyli residence after 3pm that afternoon and into the evening. Also at the home that afternoon was the Vasylis' housekeeper Nicolaza Quintana (Nicolaza).

3. Upon their arrival at the Vasyli home, the Pritchards were greeted by the appellant who immediately told them that Mr. Vasyli, in his drunkenness, had fallen down the stairs and sustained injuries to his back. Apparently, Mr. Vasyli had hit some picture frames on his way down and the broken glass from those frame resulted in the injuries.

4. Mr. Pritchard (Pritchard), in his statement indicated that when he saw Mr. Vasyli he was bareback with a bloody paper towel rolled up. Pritchard further tells that Nicolaza cleaned up Mr. Vasyli's wounds, at the appellant's direction, and once the wounds were cleaned up he went upstairs to lay down. Thereafter, the appellant's nephew, Mitchell Matthew (Matthew) came over and the four of them talked and drank. Matthew had been visiting from Australia since 4 March 2015 and was scheduled to travel back home on 24 March 2015.

5. At about 4pm Nicolaza left, later, at about 6 or 6:30pm the Pritchards left and then about 15 minutes later Matthew left leaving the appellant and Mr. Vasyli alone in the home. What happens thereafter is where the stories of the prosecution and the defence diverge.

6. The prosecution alleges that this is when the appellant murdered her husband while the defence alleges that the appellant, at that time, walked twelve minutes away to her daughter's guest house.

7. Nevertheless, at 7am on the morning of the 24 March 2015 Alejandro Quintana (Alejandro), the Vasylis' gardener / handyman arrived at work and saw a knife on the patio with blood on it; thinking someone had cut themselves he picked it up and put it on the patio table. He then noticed a pool of blood on the ground and started knocking at the doors but when he got no answer he used his emergency key to enter the home. It was then that he found Mr. Vasyli, dead, on the kitchen floor.

8. Alejandro went in search of the appellant and when he did not find her in the home he jumped in his vehicle and drove five minutes to the Vasylis' daughter's house, the Lily Pond. According to Alejandro, once he arrived at the Lily Pond he knocked on the door at which time Lauren Vasyli-DeGraaf (Lauren) and her husband, Quinton DeGraaf (Quinton) opened the door. He told them what happened to Mr. Vasyli and Lauren ran to the guest house at the Lily Pond to tell her mother, the appellant. Thereafter, Lauren and the appellant came downstairs and the appellant hugged Alejandro and told him to calm down.

9. The appellant, Quinton and Alejandro then drove back to Tumbi Umbi, the scene of the crime, stopping at Old Fort Bay (OFB) Security on the way. They arrived at Tumbi Umbi along with the OFB security officers, Marvin Brown (Brown) and Cassius Powell (Powell), and waited on the police to arrive.

10. Officer Jermaine Knowles (Officer Knowles) who was on patrol in the Oakes Field area received information from the Police Control Room with reference to a homicide in OFB and he proceeded thereto. Once there he was taken to the Vasyli residence where he was met by Quinton who took him to the guest house at Tumbi Umbi. He inquired of Quinton as to the name of the deceased and whether he lived alone. Quinton identified the deceased as Mr. Philip Vasyli and told Officer Knowles that Mr. Vasyli did not live alone, but with his wife who was in the main house.

11. At the main house, Officer Knowles testified that he saw the appellant wrapped up in a sheet crying and shaking and upon identifying himself the appellant, according to Officer Knowles, stated that she and her husband had a fight that night. Officer Knowles then cautioned and arrested her with reference to murder. He further testified that while the appellant was saying she had a fight with her husband that night another lady, later identified as Lauren, came into the bedroom and whispered something into her mother's ear at which time the appellant stopped speaking.

12. While the appellant was in custody she was interviewed twice, in the presence of her attorneys. During these interviews she, inter alia, emphatically denied killing her husband, did not recall making the above-mentioned statement to Officer Knowles and indicated that the surveillance cameras at her Tumbi Umbi home were not working.

13. During the trial the appellant exercised her right to remain silent and, therefore, her case was gleaned from her Records of Interview (ROI) and through the cross-examination of prosecution witnesses by her counsel.

14. She indicated that on the evening of the 23 March 2015 her guests left, her nephew Matthew left (leaving her and the deceased at the home alone) and then she left the home

and walked twelve minutes to her daughter's guest house at the Lily Pond. She claims to have gone straight into Lauren's guest house, without seeing Lauren that evening.

15. Matthew was scheduled to return to Australia the following day so he left the Vasyli residence to have dinner at Lauren's house and to finish packing. Through his record of interview, on 29 March 2015, he indicated that after dinner in Lauren's main house he returned to Lauren's guest house, where he was staying, and saw the appellant in the guest house. He estimated the time to be around 9pm or 9:10pm.

16. The appellant called two witnesses, namely, Dr. Rochelle Knowles who testified that the marks seen on the appellant's arms were the result of laser treatments, previously received. Her second witness was meteorologist Jeffery Simmons who testified as to the time the sun rose and set on the 23 and 24 March, 2015 and also what time dusk ended on 23 March 2015.

17. Following just over four hours of deliberation, the jury unanimously found the appellant guilty of the murder of her husband. She was subsequently sentenced to twenty years imprisonment less the five months previously spent on remand, awaiting trial.

18. Following her conviction, the appellant filed a Notice of Appeal on 10 November 2015. She subsequently filed an Amended Notice of Appeal on 31 May 2016 and she relies on the following grounds:

> **"1. Good character: The conviction for murder is unsafe and unsatisfactory. Good character was raised and the Learned Trial Judge should have given a good character direction as to credibility and as to propensity to commit the offence charged.**
>
> **2. The evidence: The verdict is unreasonable and cannot be supported having regard to the evidence. The Learned Trial Judge erred in law when he ruled that the Appellant had a case to answer, wrongly stating that he was not minded to "exercise discretion" in favour of the defendant on the basis that "there were a number of facts that remain unexplained". The particular facts relied on by the Learned Trial Judge (that the guest house was locked when the body was found and the finding of blood on a multi-coloured dress) were not sufficient to establish a case to answer. The Learned Trial Judge also failed to summarise the defence case and evidence accurately in summing up.**

3. Inferences: The Learned Trial Judge misdirected the Jury on the law and evidence in connection with the drawing of inferences and the use of circumstantial evidence suggesting that it was sufficient if an inference or circumstance could reasonably be drawn. Specific directions not to speculate should have been given in relation to certain unexplained facts or unproven details. This was an error of law and an irregularity substantially affecting the merits of the case.

4. The evidence from Officer Jermaine Knowles: The Learned Trial Judge erred in law in admitting the evidence. He also failed wrongly to exclude the evidence on the grounds that its prejudicial value far outweighed its probative value. Once admitted he failed to give the Jury any adequate direction as to how they should approach this evidence.

5. Unlawful harm: The Learned Trial Judge directed the Jury that they had to be sure that Donna Vasyli was not acting in reasonable self-defence or under provocation. He failed wrongly to then give any further direction as to the legal ingredients of these defences or the evidence in support of them. The verdict is therefore unsafe and unsatisfactory.

6. Identification: The Prosecution stated in its closing address that the Jury could identify the Appellant and her clothing in video footage. The Judge should have directed them to ignore this statement in the absence of evidence. If the jury were to be permitted to consider it the Judge should have given a direction on video identification and on the significance of lies. This was an error of law and an irregularity substantially affecting the merits of the case.

7. Sentence: the sentence of 20 years imprisonment was unduly severe having regard to the Appellant's character and the inferences the Learned Trial judge drew as to the circumstances of any offending."

19. As to the need for a good character direction, I agree with Isaacs, JA that a good character direction need not have been given by the trial judge for the reasons stated in his judgment.

20. At ground three of her appeal, the appellant complains against the misdirection of the judge on the law and the evidence in connection with the drawing of inferences and the use of circumstantial evidence. The impugned direction was as follows:

> **"You have heard a lot from prosecution as well as from the defence about circumstantial evidence. This case is one based on circumstantial evidence. Sometimes you are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from an eyewitness who actually saw the defendant commit a crime. If there is a video recording of the incident, or crime which plainly demonstrates guilt, or if there is reliable evidence of the defendant herself having admitted it or confessing, these would all be good examples of direct evidence against her.**
>
> **On the other hand, it is often the case that direct evidence of the crime is not available. And the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and to the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.**
>
> **Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the prosecution relies in proof of its case, is reliable and whether it does, in fact, prove guilt.**
>
> **Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. Putting it another way, if the circumstances point to two equal conclusions, then you can't be sure.**
>
> **You should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculating in a case amounts to no more than guessing or making up theories**

without good evidence to support it and neither the prosecution, the defence nor you should do that.

I'll add, circumstances may point to one conclusion, but if one circumstance is not consistent with guilt, it breaks down the whole thing. You may have all the circumstances consistent with guilt, but equally consistent with something else. That too is not good enough. What you want is an array of circumstances which point to a conclusion and to all reasonable minds to that conclusion only." [Emphasis added]

21. He continued:

> **"My next particular direction is with regard to drawing inferences. You have heard me mention that word a number of times. A case that is based on circumstantial evidence requires you to draw inferences or to reach conclusions. Now, having ascertained the facts which have been proved that you accept to your satisfaction, you are entitled to draw reasonable inferences from those facts to assist you in coming to a decision. Where direct testimony is not available to prove the offence charged, for instance, an eyewitness, you are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. You are entitled to draw inferences from proven facts, if those inferences are quite inescapable, but you must not draw inferences unless you are quite sure it is the only inference which can reasonably be drawn. In other words, you may be able to draw an inference that's not quite reasonable, you can discard that. You must draw inferences that can reasonably be drawn."**

22. Relative to the direction on circumstantial evidence, considering the following passage by Lord Morris of Borth-y-Gest from the case of **Mcgreevy v Director Public Prosecutions** [1972] NI 125, I can find no fault in the judge's direction:

> **"In my view, it would be undesirable to lay down as a rule which would bind judges that a direction to a jury in case where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not**

> **convict unless they are satisfied of guilt beyond all reasonable doubt."[Emphasis added]**

23. Further, support for this position is found locally in the case of **Rolle v. Regina** [2016] 1 BHS J. No. 139 where I stated that:

> **"My understanding of the position as stated in McGreevy (above) is that there is no rule of law that a judge in a criminal trial in which the prosecution relies on circumstantial evidence, is obliged to give any special formulation such as was given in R v Hodge (above); Teper v R (above); or R v Onufrejczyk (above). What is important is that the trial judge carefully directs the jury that they must weigh all the evidence, and should not convict unless they are satisfied beyond a reasonable doubt that the guilt of the accused has been proved." [Emphasis added]**

24. With respect to the judge's direction on the drawing of inferences and the use of circumstantial evidence, it is trite law that cases based on circumstantial evidence require inferences to be drawn from the circumstances provided. Indeed, Archbold Criminal Pleading Evidence and Practice 1997 paragraph 10-3 states:

> **"…in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence." [Emphasis added]**

25. Nevertheless, the appellant complains that the judge ought to have gone further and direct the jury not to speculate in relation to unexplained facts or unproven details. In light of the extract from the summation, at paragraphs 20 & 21 herein, it is difficult to see how this ground could be sustained on appeal. In no uncertain terms the judge explained circumstantial evidence and told the jury of its significance; he explained circumstantial evidence in relation to the standard of proof required; he explained the difference between circumstantial evidence and speculation and he told the jury that they should not speculate about theories. For all intents and purposes, the direction was impeccable. Ground three, in my view, therefore, must fail.

26. As previously noted, ground 6 complained that:

"6. Identification: The Prosecution stated in its closing address that the Jury could identify the Appellant and her clothing in video footage. The Judge should have directed them to ignore this statement in the absence of evidence. If the jury were to be permitted to consider it the Judge should have given a direction on video identification and on the significance of lies. This was an error of law and an irregularity substantially affecting the merits of the case."

27. The video footage being referenced by this ground is the evidence from the surveillance cameras that was put in by Detective Sergeant Freeman Johnson. Officer Johnson testified that on 24 March 2015, based on information received, he proceeded to the Vasyli residence. When he got there he disconnected the Network Video Recorder that had previously been installed in the home and took it back to the Central Detective Unit (CDU). There, he downloaded the images to CDU's forensically clean computer and burnt the images from the NVR onto CD's which were signed, dated and marked for future identification. He then testified as follows:

"Q. Now sir, are you able to say whether that equipment was working at the time you checked it?

A. Yes. At the time prior to me disconnecting the equipment, I checked it and it was in good working order. The date and time coincided with the current date and time.

…

Q. Mr Johnson, you have indicated that you have two discs – well, three discs?

A. Yes, I have three discs.

Q. Could you tell us what the first one contains?

A. The first disc contains the video footage of the residence, and it shows activity at the residence. The second disc shows the same thing, activity at the residence, up to the time 19:40 when all the cameras went black.

Q. So the first disc shows up to what time?

A. This is 17:46 to 19:20

Q. And the second disc?

A. 19:20 to 19:45 and on.
Q. And you also indicated that you had another disc?

A. This disc was taken from these. This is a copy that was edited from these, for shortcut, just showing any additional stills.

…

Q. Are you able to show us sir, 18:27; that is 6:27?

A. Yes, I am able to show 6:27.

Mr. Brathwaite: My Lord, we'd ask that the witness show that particular time period.

The Court: Yes, go ahead.

The Witness: This is 18:27 playing. If you look to the corner of the screen you would see <u>two persons</u> walk up (indicating).

Mr. Brathwaite: Thank you.

Q. Could you show us 18:39, please?

A. You will see that <u>two persons</u> walk out (indicating).

Q. And can you now show us 18:43?

A. And <u>two persons</u> walk up (indicating).

Q. Thank you, sir. You also indicated that you had still images?

A. Yes, sir. This the still of the scene in which you saw <u>the person</u> walking up. This is the still of a male walking out. This is the still of the <u>two persons</u> walking up.

The Court: Can you point to them on the screen.

The Witness: (Indicating). And this is the still of a male walking out that occurred around 18:58. And all taken from the same footage just viewed.

Q. Is that it, sir?

A. That is it, sir?

28. Officer Johnson was not cross-examined.

29. During an interview with the police, the appellant told them:

"Q.19. My information is that your home is equipped with surveillance cameras how long have you had them?

A. 19. We have a few but they are not working."

30. As to her evidence of what she wore that night, she told the police in her ROI on 25 March:

"Q. 32. What did you do with the clothing you wore after you stabbed your husband?

A. 32. I did not stab my husband but the clothing I had on that evening was the clothing I wore to my daughter's place was the same clothing when I was told what happen to my husband. That was the clothing that the police took from me." (The blue night dress and white robe were taken from the appellant by the police)

31. Moreover, in a later interview, on 28 March, the appellant was asked, and she answered:

"Q.13. What was the clothing you wore at your home when the Pritchards visited you?

A. 13. Bahama hand print white with pink flowers and white t-shirt. They all in Laurens room or they be on a shelf but I think they all in Laurens room."

32. In those excerpts from the appellant's interviews with the police, we have the appellant purporting to have worn two different outfits that evening; and the appellant further saying that the cameras at the house were not working.

33. In his closing to the jury, Mr. Brathwaite told the jury:

> **"The surveillance footage is important not only because it shows that she is not being truthful about whether it works or not; but also because of what it shows. There are a number of clips which we say are relevant. One of those clips -- and you will have the evidence with you. You can look at them. But, in one of those clips at 18.27.19 and the way it's noted on the clip itself is 2015/03/23, which is the date. 18.27.19 at one minute and 39 seconds into the clip, you could see two women walking up. What is clear from the clip is that one of those women has dark hair. Well, we know the defendant does not have dark hair. So, the only reasonable inference is that the defendant is the other person. What is also interesting about that clip, when you look at it, is that the person in that clip is wearing a multicolored dress. We say, just like the one that is in evidence before. Just like the one that is found in Lauren's home that very night. Well, it's found three days later when that home is searched. But that's the dress, that we say, based on the evidence she was wearing. What is also important is when we look at the interview, she is asked about the interview firstly what she was wearing that night. She said that she was wearing the blue dress. That's the dress that she was arrested in. She was asked in the next interview, "What were you wearing while the Pritchards were there?" And she said she was wearing a white Bahama print – A Bahama, white with pink flowers and a white T-shirt. That's in the interview. It's clear from the surveillance footage that there is no white in sight. Nothing white. She is lying but what she's wearing. That's also why we say the surveillance footage is important and the interview is important; because she is lying for a reason. She is lying because she knew what she did to her husband."**

34. In summing up, relative to the video evidence, the judge directed the jury in this way:

> **"Now, there was Officer Freeman Johnson. He produced a video from the security cameras on the outside of the home. Of significance in his evidence is**

that at 6:27, two persons entered the home. Well, he used the 24-hour clock, 18:27, I am converting it to six, which is 6:27 p.m., two persons entered the home. At 6:39, two persons left the home. At 6:43 two persons entered the home. At 6:58, a male walked out. That was his evidence.

You've heard views expressed by both sides. But that is the evidence. You saw the video. It was decidedly not very clear. It was difficult to make out even when the persons were walking in, much less who they were, or what they were wearing."

35. On appeal, the defence argued that the judge should have directed the jury to ignore the statement of the prosecutor, or if the jury were to be permitted to consider it, the judge should have given a direction on video identification and lies.

36. As I understand it, the video was a recording of what was occurring on the premises where the murder allegedly happened at the times indicated; and consequently tended to show the movements of persons at the scene of the crime, and was therefore something connected with the investigation of the crime.

37. The video was also admitted for the purpose of showing that what the appellant told the police about the functionality of the cameras on the date and times in question; and what she told them about the description of the clothing she wore at the relevant time, were untrue.

38. According to Criminal Evidence (Third Edition) by Richard May at paragraphs 2-32 to 2-35, a recording which shows something connected with the investigation of a crime is admissible, and:

"The tape will then speak for itself and may be shown in court without comment. It will be for the jury to determine what weight to give the evidence and what inferences to draw from it. A witness may not, of course, give his opinion that what he saw on a video recording amounted to the commission of a crime: that is a matter for the jury to decide. Once a tape is admitted into evidence any question relating to its interpretation is ultimately for the tribunal of fact i.e. the jury…to determine. It is for them to decide what the tape reveals, e.g. whether the activities shown amount to the commission of an offence or whether the offender shown is the defendant. It is also for the tribunal to decide what weight to give the evidence shown and what inferences to draw from it. As a general rule, no evidence is admissible

to explain the tape and it is produced and played or shown to the court without comment. In most cases no other evidence is needed and none should be given."

39. At paragraphs 2-36 and following, the editor of Criminal Evidence (above) suggests that there are exceptions to the above rule, and gives examples, such as where an eyewitness himself made the video, he is entitled to produce it, and to describe what he saw by reference to it; similarly experts may give evidence about matters in their field of expertise shown on the tape; and in the case of a dispute as to identity, an identifying witness who knows a defendant may identify him on a recording.

40. In the present case, there was no dispute of identity, indeed Officer Johnson did not purport to identify the appellant on the tape, and the defence did not cross-examine him as to the identity of any person on the tape. Consequently, it was for the jury to determine what the tape revealed, whether one of the persons seen on the tape was the appellant, and what inferences to draw from what they saw on the tape. In these circumstances, the learned judge had no obligation to give any specific direction on video identification. He simply commented, and properly so, that the video was not very clear; and it was difficult to make out when the persons were walking in, who they were, or what they were wearing. Indeed, he properly left the interpretation of the tape to the jury.

41. As previously noted, before the jury was evidence that the appellant told the police on one occasion that the clothing she had on that evening was the clothing she wore at her daughter's house when she was told what happened to her husband (blue nightdress and white robe); and on another occasion told them she wore a pink and white Bahama Handprint outfit that evening. The evidence also was that a multi coloured dress found in her daughter's closet at the Lilypond had the deceased's blood on it, with no explanation as to how the blood got there.

42. The appellant is therefore purporting to have worn two different outfits that evening, none of which include the multicolored dress the Crown suggests she wore and then placed in the closet at the Lilypond. There was also the evidence before the jury that the appellant told the police (extracted above) that the surveillance cameras at the house were not working.

43. Indeed, if the jury accepted that the footage was from the house; that it was the appellant on the tape; and that she did not have on either a blue night dress and white robe, or a pink and white Bahama Handprint outfit, it would be evidence from which they could infer that she lied about the clothing she wore that night; and about the functionality of the cameras as well.

44. Notwithstanding the prosecution's evidence in this regard, the defence did not challenge or provide a reason for the alleged lies, and in those circumstances, the jury was possibly

left with the impression, as suggested by Counsel for the prosecution, that the appellant lied about her clothing and the functionality of the cameras to conceal the murder of her husband.

45. Consequently, given the evidence; the reference to it by the Crown in its closing address; and the reliance by them on the lies of the appellant as proof of guilt, there was clearly a danger that the jury might regard the lies of the appellant as probative of her guilt.

46. An appropriate starting point relative to lies by the accused is the case of **R v Lucas** [1981] QB 720 where Lord Lane CJ stated:

> **"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."**

47. Later, in the case of **R v Burge and Pegg** (1996) 1 Cr App Rep 163 it was determined that a Lucas direction:

> **"…was not required to be given in every case in which a defendant had given evidence, even if the jury might conclude that some of that evidence might have contained lies. <u>The warning should only be given where there was a danger that the jury might regard their conclusion that the defendant had lied as probative of guilt of the offence which they were considering."</u>** [Emphasis added]

48. Kennedy LJ in **Burge and Pegg** summarized the cases in which such a direction might be required**:**

> **"…the circumstances in which, in our judgment, a Lucas direction is usually required. There are four such circumstances but they may overlap:**
>
> **1. Where the defence relies on an alibi.**

2. **Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.**

3. **<u>Where the prosecution seek to show that something said, either in our out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.</u>**

4. **Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so."** [Emphasis added]

49. These circumstances ought to have attracted a Lucas direction by the judge on the significance of lies; and there is no doubt that the learned judge was under a duty to so direct the jury. In my view, his failure to do so was an irregularity which substantially affected the merits of the case. I would therefore allow the appellant's appeal relative to ground six and for the reasons indicated by Isaacs JA in his judgment, I would remit the matter to the Supreme Court for retrial on the authority of **Reid v R** (1978) 27 WIR 254.

50. As the matter is being remitted for retrial, I make no further pronouncements on grounds two and four which call for an examination of the evidence; ground seven was abandoned at the hearing. Further, based on my disposition of the appeal the respondent's cross-appeal on sentence stands dismissed.

The Honourable Dame Anita Allen, P

<u>Judgment delivered by the Honourable Mr. Justice Isaacs, JA:</u>

51. I have read the judgment of the President and agree with her reasoning and conclusion that the jury ought to have been given a Lucas direction. In my view additional grounds exist that warrant a re-trial. The following are my reasons for the same.

52. On 24 March 2015 the gated community of Old Fort Bay was rocked with the news of the apparent murder of Philip Vasyli; and later by the revelation that his wife, the appellant, was the alleged murderer.

53. Donna Vasyli had been married to Philip Vasyli for 34 years. The couple hailed from Australia but had lived in the Bahamas for many years. She was 54 years old and Philip Vasyli was 58. They resided in a house at Ocean View Drive, Old Fort Bay. The property consisted of a main house adjacent to which there was a guest house. The Vasylis' daughter, Lauren, lived a five minutes' drive away from her parents with her husband, Philip Degraaf.

The Trial

54. The appellant was tried in the Supreme Court before Sr. Justice Stephen lsaacs (the Judge) and a jury for the offence of Murder, contrary to section 291(1)(b) of the Penal Code.

55. I have adopted the account of the Crown's case at the trial from their submissions in this appeal. It is as follows:

> **"1. On Monday 23rd March, 2015, Donna Vasyli and the deceased, her husband Philip Vasyli, entertained two guests at their home at Old Fort Bay, New Providence. Prior to the arrival of the guests, Philip had been drinking, and had fallen down a flight of stairs, sustaining superficial cuts to his back. Those injuries were cleaned by the housekeeper, Nicolaza Quintana. The guests eventually left, leaving the Appellant and her husband alone at the home. The following morning, Alejandro Quintana, the handyman, arrived at the home shortly after 7:00a.m. to begin work. Upon his arrival, he noticed blood on the porch, and a bloodstained knife. He used his key to open the door, and discovered Philip on the floor in the kitchen, dead. Alejandro then went to the nearby home of Lauren Degraaf, the daughter of the Vasylis, where he informed her that her father was dead. Lauren then called her mother, the Appellant, who had slept at her home that night, and they all went to the home of the Vasylis and remained there until the police arrived.**
>
> **The initial officer on the scene, Police Constable 478 Jermaine Knowles, testified that he arrived at the Vasyli's home and saw the body of the deceased on the kitchen floor. He then ascertained that the deceased lived at that address with his**

wife, the Appellant. Knowles stated that he was shown into a bedroom where the Appellant was lying on a bed, crying and shaking, and that after he identified himself as a Police Officer the Appellant stated that she and her husband had a fight last night. He cautioned her, and she repeated that she and her husband had a fight last night. Knowles further testified that Lauren, the daughter of the Appellant, whispered something to her mother, after which nothing further was said. Knowles arrested and further cautioned the Appellant. An autopsy was conducted on the body of the deceased, and it was concluded that he died as a result of a single stab wound to the neck/shoulder area. The wound was almost six inches deep, and travelled back to front, left to right and downward. The Pathologist also testified that there were no defensive injuries.

Following the arrest and interview of the Appellant, the clothing that she was wearing, which included a blue nightgown, was taken and submitted for forensic analysis. During a subsequent search of the room in which the Appellant had spent the night of the murder at her daughter Lauren's home, a multi-coloured dress was also recovered and submitted for forensic analysis. DNA analysis revealed that the blood of the deceased was on both the nightgown and the multi-coloured dress. DNA analysis, which was stipulated by the defence, also revealed that the DNA of the Appellant was on the multi-colored dress found in the closet of the room in which she spent the night at her daughter's home.

According to the evidence of the investigating officer, Detective Inspector Michael Johnson, all of the locks at the home were in good working order, and there was no evidence of an intruder. The blood-stained knife appeared to be one of a set of knives that were kept in the kitchen. There was also evidence that expensive items were in the home, but they were not disturbed. There was also evidence that the Old Fort Bay community was gated, with full-time security, and that the beach at the rear of the home of the Appellant was patrolled at night by two security officers. There were no reports of any disturbance that evening. The Appellant was interviewed twice in the presence of her attorneys, and told officers that the deceased was drunk that evening, and that after the guests had left she was alone with her husband. She also indicated that the deceased had

been verbally and physically abusive as recently as one month prior to his death. She denied stabbing the deceased, and claimed that she left shortly before sunset and walked to her daughter's home, where she spent the night. She also claimed that the surveillance cameras at the home were not working. However, footage was retrieved from those cameras up to shortly after 7:30p.m., which showed at one point two persons walking near the guest house. One of those persons wore a multi-colored dress.

The Prosecution relied, in proof of its case against the Appellant, on circumstantial evidence, inclusive of the location of the body in the locked home shared with the Appellant, the fact that the murder weapon was one of a set in the home of the Appellant, the fact that the Appellant and the deceased had been left alone at the home on the evening of the incident, the lack of any evidence of an intruder or any disturbance inside the home, the lack of disturbance of expensive items within the home, the presence of the blood of the deceased on the multi-coloured dress found in the room where the Appellant spent the night, and the blue dress worn by the Appellant at the time of her arrest on the morning that the body was discovered."

56. I gratefully adopt also, the recitation of the appellant's case at the trial which is as follows:

"The Appellant remained silent, but called two witnesses, and tendered into evidence the Record of Interview of a third. The first witness, Dr. Rochelle Knowles, testified that marks on the backs of the hands of the Appellant were as a result of laser treatments. The second witness, Jeffrey Simmons, a Meteorologist, testified that sunset on the evening of the incident was at 7:22p.m. and that dusk ended around 7:45p.m. The third witness, whose Record of Interview was tendered, was Mitchell Mathew, the nephew of the Appellant, who stated in that document that he was at the home of the Appellant that evening, and saw the deceased in a drunken state. Mitchell further indicated that he left the Appellant and the deceased there, along with their guests, Jody and Myles Pritchard, and returned to the home of Lauren Degraaf, where he was staying, and had dinner with Lauren and her husband, Philip. Mitchell further indicated that he went to the guest room above the

garage, where he was staying, and saw the Appellant in that room at about 9:00p.m. or 9:10p.m. He did not know when she had come there.

Through her interviews, and the cross-examination, the defence case was also a denial of having killed the deceased, and a denial of having told Officer Knowles that she and her husband had a fight. The Appellant stated in her interview that after the departure of the guests, she and the deceased were talking, and that she left after 7:00p.m. and walked to Lauren's home, where she spent the night. The defence also demonstrated that the front of the home could be accessed despite a gate, and that the rear of the home was accessible by sea and stone stairs from the beach."

57. The trial concluded with the conviction of the appellant of murder on 23 August 2015. On 13 October 2015 the Judge conducted a sentencing exercise during which he heard from a Probation officer and the submissions of Counsel. He made his sentencing remarks and imposed a sentence of twenty years' imprisonment, less the five months the appellant had spent on remand.

The Appeal

58. On 10 November 2015 the appellant filed a Notice of Appeal against her conviction and sentence. The respondent filed an appeal of their own on 12 November 2015 against the sentence of twenty years' imprisonment which had been imposed on the appellant by the judge, due to its leniency.

59. On 31 May 2016 the appellant filed an Amended Notice of Motion. The new grounds were as follows:

"1. Good character: The conviction for murder is unsafe and unsatisfactory. Good character was raised and the Learned Trial Judge should have given a good character direction as to credibility and as to propensity to commit the offence charged.

2. The evidence: The verdict is unreasonable and cannot be supported having regard to the evidence. The Learned Trial Judge erred in law when he ruled that the Appellant had a case to answer, wrongly stating that he was not minded to "exercise discretion" in favour of the defendant on the basis that "there were a number of facts that remain unexplained". The particular facts relied on by the Learned Trial Judge (that the

guest house was locked when the body was found and the finding of blood on a multi-coloured dress) were not sufficient to establish a case to answer. The Learned Trial Judge also failed to summarise the defence case and evidence accurately in summing up.

3. Inferences: The Learned Trial Judge misdirected the Jury on the law and evidence in connection with the drawing of inferences and the use of circumstantial evidence suggesting that it was sufficient if an inference or circumstance could reasonably be drawn. Specific directions not to speculate should have been given in relation to certain unexplained facts or unproven details. This was an error of law and an irregularity substantially affecting the merits of the case.

4. The evidence from Officer Jermaine Knowles: The Learned Trial Judge erred in law in admitting the evidence. He also failed wrongly to exclude the evidence on the grounds that its prejudicial value far outweighed its probative value. Once admitted he failed to give the Jury any adequate direction as to how they should approach this evidence.

5. Unlawful harm: The Learned Trial Judge directed the Jury that they had to be sure that Donna Vasyli was not acting in reasonable self-defence or under provocation. He failed wrongly to then give any further direction as to the legal ingredients of these defences or the evidence in support of them. The verdict is therefore unsafe and unsatisfactory.
6. Identification: The Prosecution stated in its closing address that the Jury could identify the Appellant and her clothing in video footage. The Judge should have directed them to ignore this statement in the absence of evidence. If the Jury were to be permitted to consider it the Judge should have given a direction on video identification and on the significance of lies. This was an error of law and an irregularity substantially affecting the merits of the case.

7. Sentence: The sentence of 20 years imprisonment was unduly severe having regard to the Appellant's character and the inferences the Learned Trial Judge drew as to the circumstances of any offending."

Ground 1: The Learned Trial Judge should have given a good character direction as to credibility and as to propensity to commit the offence charged.

60. Counsel for the appellant, Ms. Clare Montgomery, Q.C. submitted that the Judge ought to have given a "good character" direction to the jury. Inasmuch as he failed to do so, the appellant was denied the benefit of such a direction which may have caused the jury to take a different view of the Crown's case. Hence, the conviction of the appellant is unsafe and should be quashed.

61. There has been a gradual development in the law related to "good character" directions to a jury. It has evolved through the decisions of appellate courts with certain propositions being advanced as essential to the process of a fair trial. In **Teeluck v The State of Trinidad and Tobago** [2005] UKPC 14, Lord Carswell stated:

> **"and what might have been properly regarded at one time as a question of discretion for the trial judge has crystallised into an obligation as a matter of law"**.

62. His Lordship continued at paragraph 33 to set forth a series of propositions:

> **"(i) When a defendant is of good character, ie, has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: Thompson v R [1998] AC 811, [1998] 2 WLR 927, following R v Aziz [1996] AC 41, [1995] 3 All ER 149, and R v Vye [1993] 3 All ER 241, [1993] 1 WLR 471.**
>
> **(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: R v Fulcher [1995] 2 Cr App Rep 251 at 260, [1995] Crim LR 883. 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: R v Kamar, Times, 14 May 1999.**
>
> **(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.**

(iv) Where credibility is in issue, a good character direction is always relevant: Berry v R [1992] 2 AC 364 at 381, [1992] 3 All ER 881; Barrow v The State [1998] AC 846 at 850, [1998] 2 WLR 957; Sealey and Headley v The State [2002] UKPC 52 at para 34, [2003] 3 LRC 269.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: Barrow v The State [1998] AC 846 at 852, following Thompson v R [1998] AC 811 at 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: Thompson v R, ibid."

63. **Teeluck** established that an accused person had to raise the issue of his good character and that there was a duty on his lawyer to ensure that this was done. Proposition (ii) that if the good character direction **"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"** does not present an entirely accurate state of the law, however, a fact readily accepted by Ms. Montgomery.

64. She produced the cases of **Bhola v The State of Trinidad and Tobago** [2006] UKPC 9 and **Jagdeo Singh v The State of Trinidad and Tobago** [2006] 1 WLR 146, to illustrate occasions where a failure to give the direction in circumstances where there was plainly a need for one did not necessarily prove fatal to the fairness of the trial or inevitably lead to a quashing of the conviction of the appellant in each case.

65. In **Brown v The State of Trinidad and Tobago** [2012] UKPC 2 the appellant was convicted of entering the home of a couple and attacking them thereby causing injuries to the husband from which he later died. At his trial the issue of his good character was not raised although as the Court of Appeal and the Privy Council concluded it should have been made the subject of a direction by the judge to the jury. Nevertheless, both appellate courts were satisfied that given the strength of the evidence it was unlikely that the direction would have affected the outcome of the trial. They declined to set aside the verdict of the jury for that reason; although the Privy Council remitted the case back to the Trinidad and Tobago Court of Appeal for consideration of the safety of the conviction based on fresh medical evidence which related to the appellant's fitness to plead.

66. Mr. Gaskin contended that the issue of the appellant's good character was not raised. It was his view that the indications of good character mentioned by Ms. Montgomery demonstrated nothing more than the quality of a relationship; and if as contended for by the appellant her good character could be demonstrated by inference then so could evidence of her bad character be shown.

67. He pointed to that portion of the appellant's videotaped record of interview with the Police where she described her husband as a **"disgusting disobedient child"**. He also referred to e-mails which came to the attention of the Judge during a voir dire on their admissibility in the trial to go to motive, where vituperative expressions were used by the appellant toward one Lisa Lugo, a woman who may have been involved in a relationship with the deceased. He submitted that the Judge was entitled to give consideration to all of these matters when he came to decide whether a good character direction should be given.

68. Mr. Gaskin submitted that there was no obligation on the Judge to leave such a direction with the jury because there was no evidence led during the trial necessitating its mention by the Judge. He argued that it was the responsibility of the appellant to lead evidence of her good character and to seek for the direction to be made. He relied on the cases of **Edmund Gilbert v The Queen**, PC Appeal No. 25 of 2005, **Lewis v The Attorney General** SCCrApp No. 19 of 2014 and **Bhola** (supra) to support his position.

69. The headnote in **Gilbert** reveals:

> **"The applicant, a tax collector and bishop in the Baptist Church, was convicted of the murder of a 15-year-old girl and sentenced to the death penalty. His appeal against that conviction and the sentence to the Eastern Caribbean Court of Appeal (Grenada) was unsuccessful. He appealed to the Privy Council; the central issue on the appeal against conviction was whether the judge had been under a duty to give a direction as to the applicant's good character and, if he was under such a duty, the effect of his failure to give such a direction.**
>
> ***Held* – The appeal would be dismissed. It was the task of the judge to give such directions as were necessary to ensure that the defendant had a fair trial and that the jury received the directions necessary to enable them to reach a just result. Where the issue of good character was not raised by the defence in evidence, the judge was under no duty to raise the issue himself: that duty was to be discharged by the defence**

> **and not by the judge. That had to be qualified in cases where counsel defending the applicant at his trial had been guilty of serious behaviour or ineptitude. If a judge had a residual discretion, it followed that there could be circumstances where a conviction could be upheld if a judge omitted to give a direction due to oversight. Further, the circumstances where that could be the position were not necessarily rare. In the instant case, it would have been preferable for such a direction to have been given because it was obvious that the defendant was relying on his good character and, according to established authority, a direction as to the relevance of the applicant's good character to his having committed the offence charged was to be given whether or not he had testified or made pre-trial answers of statements. Although the defendant had not formally put his character in issue, the inference that he had done so was very strong and the trial judge ought to have asked whether the applicant had intended to do so before deciding whether or not to give the usual direction. However, in the circumstances, the absence of a good character direction was neither fatal to the fairness of the trial or the safety of a conviction. The question of sentence would be remitted to a trial judge sitting alone."**

70. Although the Privy Council held that there was a duty on the defence to raise the issue of good character to make it a live issue for the judge to consider, the clear message is that this can be done by inference. However, the case is authority that even if the direction is not given its absence is not necessarily fatal to "**the fairness of the trial or the safety of a conviction"**.

71. In **Lewis** (supra) the complainant alleged that in the early morning hours of 25 September 2012 she accepted a ride in the appellant's truck. He drove to her destination, her church, but no one was there. The complainant alleged that the appellant then drove her to a deserted area where he tried to grab her vagina, shouted profanities and hit her in her head while the appellant alleged that the complainant tried to steal his wallet. At his trial and on being cross-examined he was asked by the Crown why he did not report the matter to the police, the appellant testified that he had never been arrested and wanted to speak to his attorney beforehand. The appellant was found guilty of assault with intent to rape. The appellant appealed alleging, inter alia, that the judge failed to give an adequate good character direction.

72. Allen, P. speaking on behalf of the Court found that the trial judge had been overly generous to the appellant by giving a good character direction to the jury. In the course of

her judgment the learned President relying on such cases as **Thompson v The Queen** [1998] AC 811, **R v Butterwasser** [1948] 1K.B. 4, **Gilbert** (supra) and **Teeluck** (supra) observed that: She concluded:

> **"Consequently, in circumstances such as the present, in which there was no such evidence before the jury, and the appellant's Counsel, failed to raise it, the learned judge was overly generous in giving the direction."**

73. As indicated, the law relating to good character direction has evolved and this is at no place better demonstrated than in the case of **R v Hunter (Nigel) and Others** [2015] EWCA Crim 631 where the UK Court of Appeal traced the development of the law relating to the direction by reference to a number of cases; among which was **Vye**. At paragraph 11 to 13 appears the following:

> **"(c) Vye, Wise and Stephenson**
>
> **11. Lord Taylor returned to the subject of good character directions in the conjoined appeals of Vye, Wise and Stephenson. The appellant Vye was convicted of rape. The trial judge made no reference to the fact that Vye had no previous convictions until prompted and then only reminded the jury of the fact that the defendant was of good character. He made no mention of its relevance to credibility or propensity. Wise was convicted of dishonesty offences. He too was of previous good character in the sense that he had no previous convictions and no other misconduct was alleged or proven against him. The judge under the then understandable impression that a direction as to propensity was "optional" gave only the credibility limb. Stephenson was convicted of a drugs offence. He had previous convictions for burglary and drugs. One of his co-accused with whom he was tried was a man of good character. Stephenson complained of the effect of the good character direction for the co-accused upon him. The court focused on three issues, only the first two of which are strictly relevant to this judgment.**
>
> > **a) Whether the first limb of the good character direction (as to credibility) is required where the defendant does not give evidence but relies on exculpatory statements to the police or others.**

b) Whether the second limb of the direction (the propensity to offend in the way charged) is discretionary or obligatory.

c) What course a judge should adopt where co-defendants have different characters.

12. As to the first category the court declared that where a defendant has a good character and relies upon exculpatory statements made in or out of court, he is entitled to both limbs of the direction whether or not he gives evidence.

13. As to the second category, at page 139 Lord Taylor said this:

> **'We have considered the whole spectrum of the situations likely to face the trial judge. At one extreme there is the case of an employee who has been entrusted with large sums of money over many years by his employer and, having carried out his duties impeccably, is finally charged with stealing from the till. There a second limb direction is obviously relevant and necessary. At the other extreme is a case such as Richens where the defendant, charged with murder, admits manslaughter. It might be thought that in such a case a second limb direction would be of little help to the jury. The defendant's argument that he has never stooped to murder before would be countered by the fact that he had never stooped to manslaughter before either. Nevertheless, there might well be a residual argument that what was in issue was intent and he had never shown any intent to use murderous violence in the past.**

We have reached the conclusion that the time has come to give some clear guidance to trial judges as to how they should approach this matter. It cannot be satisfactory for uncertainty to persist so that judges do not know whether this Court, proceeding on a case by case basis, will hold that a "second limb" direction should or need not have been given. Our conclusion is that such a direction should be given where the defendant is of good character…

> **Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish to indicate, as is commonly done, that good character cannot amount to a defence. In cases such as that of the long serving employee exemplified above, he may wish to emphasise the "second limb" direction more than in the average case. By contrast, he may wish in a case such as the murder/manslaughter example given above, to stress the very limited help the jury may feel they can get from the absence of any propensity to violence in the defendant's history. Provided that the judge indicates to the jury the two respects in which good character may be relevant, i.e. credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case.'"**

74. In the same vein that the law relating to a good character direction has moved beyond its early development so has the requirement that it must be raised by the accused person; and that this can only be done in the legal sense, that is to say, through the introduction of evidence that the accused has no prior convictions. Ms Montgomery advanced the proposition that such evidence may come in the form of the accused person's conduct. She submitted that from the evidence of Myles Pritchard and Nicolaza Quintana, whose statements were read into the record, and here I paraphrase, a picture appeared of a woman who had for many years endured the vicissitudes of marriage to an alcoholic and abusive husband but who yet retained the capacity for compassion and care toward that husband when he fell and injured himself the very night she is alleged to have killed him. This Ms Montgomery submits redounded to her good character.

75. Mrs. Quintana said in her statement:

> **"The only small arguments I would hear is when she would tell him to stop drinking because it was bad for his health. Otherwise to me their relationship was good."**

76. Her statement, when combined with that of Myles Pritchard's that:

> **"Donna took us into the guest house and I saw Phil in the kitchen. Phil was dressed in a dark colour swim trunks and he was bareback and had paper towel rolled up and I could see a lot of blood on it. Phil then said that he had fallen down the steps and I saw a wounded area from under his left shoulder blade down his back to his waistline. It was bruised and there**

was several lateral horizontal cuts on his back. I could tell that Phil was intoxicated because of his speech arid movement. Phil stated that he had fallen down the steps. He made that comment several times. Donna said to him, that she would get something to help clean up his wounds. The housekeeper whom I didn't know was there also. She was mediurn built about 40 years old, olive complexion, that is not white and not black but of a slightly darker than white colour and she was trying to help Phil clean up his wounds at Donna's direction. The wound got cleaned and Phil sat down with us as Donna was encouraging him to drink some water."

according to Ms Montgomery, was sufficient to raise the issue of the appellant's character for the Judge to give the direction.

77. In **Bhola** (supra), a case relied on by Mr. Gaskin, Lord Brown of Eaton - under - Heywood said at paragraph 14:

"[14] Subsequent to the Court of Appeal's decision the Board has several times had to consider the correct approach to take in cases where, whether through counsel's failure or that of the trial judge, no 'good character' direction has been given although plainly the appellant was entitled to it. Amongst the Board's more recent decisions (all in 2005) are *Bally Sheng Balson v The State of Dominica* [2005] UKPC 2, 65 WIR 128 , *Brown v R*[2005] UKPC 18, 66 WIR 238 and *Jagdeo Singh v The State* [2005] UKPC 35, p 424, *ante*. In *Balson's* case the Board said, at para [38]:

> **'[T]heir lordships are of the opinion that a "good character" direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a "good character" reference might have been of assistance, are wholly outweighed by**

> **the nature and coherence of the circumstantial evidence.'"**

78. The judge did not give a good character direction in respect of the appellant. It was, according to the Defence, clearly material in the trial as it impacted upon the issue of her credibility and to the issue of her propensity to commit such an offence.

79. In my judgment, in the circumstances of this case, a good character direction need not have been given by the Judge inasmuch as such evidence as was led in the trial "demonstrated nothing more than the quality of a relationship"; and did not raise directly or inferentially the good character issue.

80. That is not sufficient, however, to make the conviction safe. I must consider the further question, whether there was other compelling evidence led by the Prosecution upon which a jury could properly convict.

2. The evidence: The verdict is unreasonable and cannot be supported having regard to the evidence.

81. I have reduced the evidence upon which the prosecution relied at the trial to five bullet points. I address each in its turn in much the same manner as Counsel for the appellant did.

Blood Evidence

82. The evidence led at trial through the witness was that there was a significant amount of blood at the scene of the crime. Blood was seen not only on the floor of the patio but on the awning above it.

83. Mr. Alejandro Quintana, a gardener who worked for the Vasyli's said in his statement:

> **"When I got there at the breakfast area which is a patio with a top, I saw a black handle steel blade knife on the patio with blood on it, so I picked it up and put it on the table that was next to it. I picked it up because I thought that someone had just cut themselves. I then noticed quite a bit of blood on the patio in the-area where the knife was. It looked like it was sprayed on the ground."**

84. Mr. Quintana also stated that when he went by Lauren's house some five minutes away and reported what he had found, **"Mrs. Vasyli then hugged me and told me to calm down."** Ms Montgomery suggests that inasmuch as Mr. Quintana held the bloody knife, it is possible he got blood on him and that blood could have been transferred from him to

the appellant when she hugged him. That may explain the traces of blood on the blue dress but not on the multi-coloured dress.

85. There was scant blood on the items of clothing collected from the appellant: the multi-coloured dress she is alleged to have worn the night in question and the blue dress she was wearing the morning after.

86. Ms. Montgomery suggested that the traces of blood on the multi-coloured dress may have come from the deceased when he injured himself earlier in the day after falling down the stairs. The statement of Nicolaza Quintana revealed the deceased had cut himself at around 3:50pm and she had to assist him in cleaning and bandaging his wounds. She said:

> **"I noticed that, he had blood on the back part or his shirt which I realize had come from the broken glass in the picture frame."**

87. The statement of Myles Pritchard revealed:

> **".. Phil kept saying that he wanted to lie down in bed and Donna told him no. And that he should put a towel on the floor and lie down because of his possible bIeeding and he said no, that doesn't sound comfortable and eventually Donna instructed the maid to put some towels on the bed and eventually Phil walked upstairs unassisted - Donna, Jody arid I continued talking …"**

88. The evidence of the Police officers who visited the crime scene suggests that there were bloody items, e.g., gauze, towel, mat, bed sheet and pillow case in the master bedroom and bathroom. There was from all accounts, blood on the patio, on an awning, in the kitchen and in the master bedroom. The probability of an innocent blood transfer from the deceased to clothes worn by the appellant at the time of the get together with the Pritchards and/or at the time she returned to the home the next morning could not be discounted.

89. Further, there was no evidence led by the Crown as to the possible manner of blood transfer onto the clothes, e.g., by rubbing against a bloody surface or item or by spray or splatter. This aspect of the Crown's case needed to be addressed carefully by the Judge in his direction to the jury as innocent contact could have been a reason for the presence of the deceased's blood on the appellant's clothes. Nevertheless, the presence of the deceased's blood on the appellant's clothes is a matter for the jury to consider.

DNA

90. Ms Montgomery attacked the Prosecution's hypothesis that the appellant had been the last and only person to see the deceased alive by adverting to the DNA evidence adduced during the trial in relation to the three wine glasses found on the wooden table on the patio. Her submission was that in addition to the traces of DNA said to belong to the deceased on one glass and the appellant on another, there was the DNA of an unknown male on the third glass. Ms Montgomery called this person "Blue Glass man"; and it was this evidence which, combined with other matters, undermined the Prosecution's case against the appellant.

91. The clear inference from the submissions is that it could not be said with any certainty that the appellant was the last person to see or be with the deceased. This one circumstance then was sufficiently strong to destroy the circumstantial case advanced by the Crown.

92. Mr. Gaskin's riposte to "Blue Glass man" is that the unknown DNA could only have belonged to the one male individual who was said to have been at the residence and whose blood was not tested, namely, Myles Pritchard. This may be an assumption open to the jury but as the onus of satisfying the jury of the appellant's guilt rested on the Crown and there being no reason proffered as to why Myles Pritchard's blood was not tested to exclude him as a donor, as had been done with others present that afternoon, the Prosecution could not rely on the speculation that he was the donor of the unknown DNA.

93. Moreover, it was revealed Myles Pritchard was drinking beers and a number of beer bottles were found at the scene. There was nothing to suggest he drank his beer from a wine glass and for the jury to so conclude would have been the result of speculation on their part. This factor could not inure to the strength of the Crown's case.

94. I find that the evidence of the presence of an unknown male's DNA on the wine glass does raise a question about the soundness of the Prosecution's case against the appellant. That DNA of the unknown male adds a wrinkle to the example used by Mr. Gaskin in his opening speech to the jury, to wit, if a cat and a mouse are placed under a room and you later enter the room and find only the cat then the inference is the cat ate the mouse. This is a reasonable inference for two reasons. First, cats are known to eat mice. Second, there being no other predator in the room, the irresistible conclusion is that the cat ate the mouse.

95. The inference is destroyed or weakened however, by the introduction of another cat in the room. If there were two cats either may have devoured the mouse. Also, if there is an open door through which the mouse could have escaped one could not say with any certainty that he was eaten by the cat. The presence of "Blue Glass man" had to be

considered by the judge to determine what effect, if any, that evidence had on the Crown's circumstantial case when he came to consider the no case to answer submission at the close of the Crown's case.

96. If he concluded this circumstance did not fatally weaken the Crown's case and the case must continue, then his directions to the jury on this point during his summing up should have disclosed the apparent flaw in the circumstantial case.

Video Discs

97. While listening to Ms Montgomery's submission, I remarked that the Crown had mentioned the contents of the video discs reproduced from surveillance cameras at the Vasyli home without apparently having a witness speak to those contents beforehand. I have read the transcript and I am satisfied that the evidence of the contents and stills was in fact put before the jury through the evidence of Police officer Stubbs.

98. However, the nub of the appellant's complaint remains, that is, the judge ought to have warned the jury about the danger of comparing the still and video images with the appearance of the appellant in court particularly because the images were not very clear.

99. At page 607 of the record the Judge told the jury:

> **"You saw the video. It was decidedly not very clear. It was difficult to make out even when the persons were walking in, much less who they were, or what they were wearing."**

100. The Judge ought to have gone further to admonish the jury not to rely on their own view of who is represented in the video inasmuch as no witness testified as to the pictured individuals' identities; and for them to do so would be to speculate.

Bloody Footsteps

101. Evidence was led of footsteps found in the blood on the floor of the patio; and that they were between size 101/2 to 11. Evidence was also led that when the officer searched the master closet he saw men's size 11 shoes and he saw size 101/2 women's shoes.

102. At page 601 of the record the Judge told the jury:

> **"When he was re-examined, he spoke of shoes inside the house where he said were size 10 female and size 11 male. Those factors are matters for you to determine what you make of them, because there is no evidence that was given as to who those shoes belonged to, or indeed what size shoes the defendant actually wears."**

103. This direction by the Judge appears to invite the jury to draw an inference from the officer's evidence. The tenor of the Judge's direction left it to the jury to speculate about who the size 101/2 footsteps belonged to, an exercise they ought to have been advised to avoid.

Rigor mortis/Time line

104. A circumstance appearing to militate against the Crown's circumstantial case arises out of the evidence relating to the state of rigor mortis of the deceased's body. The Crown's theory of the case was to the effect that the appellant killed her husband before she repaired to her daughter's house. A difficulty with that theory is that the appellant said in her statement that she had gone to her daughter's house about 7:30pm. Further, by 9:00pm or 9:15pm the appellant is seen by Mitchell Matthew at the Degraafs' house.

105. Photographs were taken of the deceased's body around 1:00pm on 24 March 2014. One of the photographs taken about 1:15pm, depicts his body with his arms raised which according to Dr. Caryn Sands, the pathologist and a Crown witness, indicates that rigor mortis had not yet broken. She went on to describe how the condition sets in two to four hours after death. It peaks at about 12 hours, and it softens after that. Her opinion is unchallenged. This would mean therefore that more likely than not, the deceased met his death around fourteen to sixteen hours before 1:15pm.

106. The argument proffered by Mr. Gaskin that the doctor's term "break" did not mean an immediate softening but a gradual process is not discounted. Dr. Sands' evidence is found at pages 383-4 of the record:

> **"A. "Rigor mortis." is a post mortem finding. A finding after death, which is the stiffening of muscles. It is due to a depletion of ATP, which is something we make once we're aIive, and then once we die, it deplete. It is required for oxygen, required for muscle movement. What happens in muscles after death, without that, is that they stiffen. And rigor mortis has an onset, it has a peak, and it has where it dissipates.**
>
> **So once the muscles stiffen, it doesn't matter if it's gravity or against gravity it will stay stiff, usually in the position that it was in at the time it started.**
>
> **And you said it has an onset and a peak?**
>
> **Yes. Most postmortem changes have an onset time, an. average time and you have where you start to see the changes, and then**

Rigor mortis has where you would actually lose the stiffening. As time goes on, the stiffening will actually disappear.

So, what time period would you say is the onset?

On average, it depends on factors - It depends on temperature. It depends on temperature, activity. But on average, it takes approximately 2 to 4 hours for Rigor mortis to be noticeable, for you to appreciate Rigor mortis; and then it peaks at about 12 hours. And again, that's just an average.

What I mean by "peak'' is that., if you imagine a curve, it starts, it, goes up. Say, 4 hours you notice it and in the next 12 hours it speaks to the point where you can break - - what we call break the rigor.

So if this were to - - this is the easiest muscle to show you (indicating) . If this were to tighten, and if anywhere along that upward slope I were to straighten it, the rigor would come back because it hasn't reached its maximum yet.

If, after 12 hours on average, you then break it, it will no longer return because it has already reached its peak. Without breaking it, once it has reached its peak it will dissipate anyway. It will soften as time goes on, and then other things start to come into play."

107. The doctor speaks to the average situation but in the absence of any specificity as to the conditions present in this case, , e.g., temperature and activity, that is all which has been left for the jury's consideration.

108. The statement of Mitchell Matthew reveals that he saw the appellant at the Lily Pond house around 9:00 – 9:15 pm. This statement was not controverted by the Prosecution. The Prosecution did not lead evidence to suggest that the appellant left the Degraaf residence once she was seen there by Mitchell Matthew. The clear inference is that the appellant could not have been at her home at the material time and could not have inflicted the fatal blow to the deceased. However, as noted above, the medical evidence suggests the deceased could have been killed fourteen to sixteen hours before his body was discovered. These were matters for the jury to consider.

The Appellant's Statement

109. Complaint was made about the Judge's decision to allow the statement of the appellant allegedly made to Officer Knowles when he first saw and spoke to her in the bedroom of the Vasyli house. His evidence was that the appellant spontaneously offered, **"I had a fight with my husband last night"**.

110. The gist of Ms Montgomery's submission that the alleged statement is equivocal and more prejudicial than probative appears to have as its support the observation of the Judge at page 266 of the transcript where he remarked to Mr. Gaskin:

> **"THE COURT: No, I don't think we're talking in circles. Saying "I had a fight with my husband" is different from saying "I stabbed my husband"."**

111. In setting out his reasons for allowing the Crown to lead evidence of the statement, the Judge stated at page 275:

> **"What is important are the circumstances in which the statement was made. The defendant was at her daughter's house, and quite possibly would have been the last person to see her husband, Phillip Vasyli alive some hours before. It really is part and parcel of a single event and certainly has some probative value that can speak to the state of mind of the accused, and it may relate to the intent, if the issue arises eventually. The prejudicial effect does not outweigh the probative value. <u>Had the statement been more remote in the timing, the answer would be different</u>. In this case, the statement ought to be left to the jury. That is my decision." [Emphasis added]**

112. It appears the Judge considered the time when the statement was made to be the deciding point for its admission as a part of the Crown's case. While this may be relevant if the concern was whether the statement formed a part of the res gestae, it was not the gravamen of the appellant's complaint. It seems that the concern laid in the equivocal nature of the statement, that is, the very difference recognised and mentioned by the judge at page 266.

113. Ms Montgomery's further complaint about the statement pertained to how the judge treated it in his summing up to the jury. The judge mentioned the statement at page 607 of the transcript but did not go further and direct the jury on the very issue he had earlier identified, that is, whether the fight was verbal or physical. Still, if the statement was made by the appellant to Officer Knowles as the Crown alleged in circumstances

where her husband has been found suffering from a stab wound, it would have been for the jury to decide whether or not it meant the appellant had stabbed the deceased.

114. Having considered the various aspects of the Crown's evidence, it cannot be said that the jury would not inevitably have concluded the appellant was responsible for the injury inflicted to the deceased; and which resulted in his death.

Ground 2: The Verdict is Unreasonable and Cannot be Supported Having Regard to the Evidence/Wrong not to Accede to No Case To Answer Submission/ Failure to Summarise the Defence Case and Evidence Accurately

115. This ground encompasses three distinct complaints, to wit, the Judge should not have let the case go to the jury due to the tenuous evidence; and having done so he failed to put the Defence's case adequately; and the jury were wrong to convict on the basis of such weak evidence.

116. At the close of the Crown's case Mr. Lockhart made a no case to answer submission on the basis that the evidence against the appellant was weak; I would add, at best. The Judge dismissed the application. He said at page 501 of the transcript:

> **"In the instant case, there are a number of facts that remain unexplained. The case for the prosecution may eventually prove to be weak, but that is a matter for a jury to decide, just as it is a matter for the jury to give meaning to the unexplained facts; that is, the blood of the deceased on the blue dress and on the multi-coloured dress; and the locked door with the deceased inside the home alone."**

117. Ms. Montgomery submitted that the Judge erred in leaving the Crown's case to the jury. She cited the case of **Jamal Glinton v R** SCCrim App No. 113 of 2012 in support of this ground. Glinton merely reiterated the dicta found in **R v Galbraith** [1981] 1 W.L.R. 1039 and repeated in **Kemp v Regina** No. 201 of 2012. Lord Lane said in **Galbraith**:

> **"How then should the judge approach a submission of 'no case'?**
>
> **(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.**
>
> **(2) The difficulty arises where there is some evidence but it is**

of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

> **(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.**
>
> **(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.**

It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

118. The appellant seems to rely on (2)(a) of Lord Lane's proposition in **Galbraith**.

119. The Judge should have heeded the view expressed by King, CJ in Questions of Law Reserved on Acquittal (No. 2 of 1993) (1993) 61 SASR 1, 5 which was endorsed by Lord Carswell in **DPP v Selena Varlack**, Privy Council Appeal No. 23 of 2007 - a case cited by the Judge in his ruling - when speaking on how a judge was to approach a submission of no case:

> **"He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond a reasonable doubt, and therefore exclude any competing hypothesis as not reasonably open on the evidence. …**
>
> **If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to**

> **answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."**

120. In **R v Jabber** [2006] EWCA Crim 2694, Moses LJ said, inter alia, at paragraph 21:

> "**The correct test is the conventional test of what a reasonable jury would be entitled to conclude."**

121. There were competing hypotheses in this case. The Defence relied on Blue Glass Man and the time for rigor mortis to peak; but there was on the Crown's reliance on the admission by the appellant of a fight, blood on the appellant's clothing and no evidence of forced entry. The matters disclosed on the Crown's case, to paraphrase Lord Carswell, "**if accepted, [may be]** ***capable*** **of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and [may be]** ***capable*** **of causing a reasonable mind to exclude any competing hypotheses as unreasonable."** The Judge's statement that, **"The case for the prosecution may eventually prove to be weak"** discloses nothing more than his view that the jury may ultimately find the Crown's case less than compelling

Ground 5: Unlawful harm: The Learned Trial Judge directed the Jury that they had to be sure that Donna Vasyli was not acting in reasonable self-defence or under provocation. He failed wrongly to then give any further direction as to the legal ingredients of these defences or the evidence in support of them. The verdict is therefore unsafe and unsatisfactory.

122. At page 595 of the transcript the Judge stated:

> **"In this case, there is <u>little</u> or no issue of provocation arising from the evidence. But the prosecution, nevertheless, has the burden of proving that the killing was unprovoked in order to prove the offence of murder." [Emphasis added]**

123. If there was a **"little .. issue of provocation arising from the evidence"**, it was the duty of the trial judge to identify it; and to explain the legal definition of "provocation" to the jury in terms similar to those used by Allen, Sr. J in **R v Cordell**

Farrington; and approved by this Court in **Cordell Darrell Farrington v Regina** SCCrimApp. No. 30 of 2006. Allen, Sr. J explained provocation in the context of section 304 of the Penal Code.

> **"According to your Lordships in Munroe v The Attorney General [20131 2 BHS J No. 95 at paragraph 18, "On principle if there is evidence of provocation it becomes a live issue and the judge should leave the issue to the Jury to determine whether in fact there was provocation even as in this case, it was inconsistent with the Defendants claim that he did not kill the deceased..." In those circumstances, it is submitted that the Learned Trial Judge was under no duty to provide further directions on issues which did not arise on the evidence, and would only serve to confuse the issues."**

124. Mr. Gaskin submitted that the Judge was correct not to leave the issue of provocation for the jury's consideration because there was no evidence led on which to ground such a direction. This submission is inconsistent with the position taken by the Crown during the trial.

125. In his address to the jury Mr. Brathwaite explained the circumstances the Crown relied on in proof of their case against the appellant. At page 566 of the transcript he told them:

> **"The next circumstance is the nature of the relationship. We have had a lot of talk this morning about this "loving relationship". Well, not so.**
>
> **The relationship was abusive. That comes from Donna Vasyli herself. She says, when she was interviewed by the police, that he was abusive; that in Miami, I think it was, she called the police for him. She was asked, when was the last time he was abusive towards her in the interview. She says, a month before. That evidence also comes from the statement of Myles Pritchard; because Myles Pritchard said that he was told byDonna that she had called the police for phillip before.**
>
> **Myles Pritchard also says in his statement that because of the nature of that relationship, they had actually broken up on numerous occasions, but that they ended up back together. So this is not any loving relationship. This is an abusive relationship.**

We say that that is another circumstance for you to consider."

126. At page 571 of the transcript Mr. Brathwaite drew the jury's attention to the evidence of Officer Jermaine Knowles about the fight the appellant said she had with her husband that night and the effort of the Defence made to say **"fight could mean anything**". Mr. Brathwaite then said:

> **"Donna Vasyli, herself, explained the difference between a fight and an argument. In the record of interview she says, "No, it wasn't really a fight. It was more like an argument." She knows the difference between a fight and an argument. She used the word "Fight" to Knowles. That is the word she used, and that's what was meant - - "a fight", not an argument."**

127. The jury was then left with the Crown's case that the relationship between the appellant and her husband was not loving but abusive; and at the material time, they had a fight, not an argument.

128. In his directions to the jury the Judge read from the appellant's record of interview with the Police. At page 608 of the transcript appears the following:

> **"Question 15. My information is that you and your husband were in the area of the kitchen near the door that leads to the patio where the table and chairs are. You were very upset over the embarrassment he caused you, so you got this black handled knife and you stabbed him in the neck. What do you say to that? Absolutely, positively not."**

129. The above references then could be the "little" evidence of provocation mentioned by the Judge. I am satisfied that the theory of the crime put before the jury by the Crown and left for their consideration by the Judge, suggested the appellant was provoked to do as she is alleged to have done. Thus, the Judge ought to have directed the jury on the issue of provocation in the terms of section 304 of the Penal Code.

130. Section 304 of the Penal Code states:

> **"304. Where on the charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left**

to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

131. The appellant did not testify during the trial but her statement was entered into evidence as a part of the Prosecution's case; and although she denied the suggestion at question 15, it was "evidence" to be considered by the jury which showed the Police's theory of the crime based on their "information".

132. The failure of the Judge to leave the issue of provocation with the jury deprived her of an opportunity to be found not guilty of murder; although she may have been found guilty of manslaughter. In the premises, therefore, I cannot be sure that the appellant's conviction for murder is safe.

Conclusion

133. I am satisfied that the appeal must be allowed because the appellant was deprived of an opportunity to be acquitted of murder by the failure of the Judge to leave provocation with the jury. Thus, the conviction for murder is quashed and the sentence is set aside.

134. In light of my conclusion above, there is no need to address the appellant's other grounds of appeal; nor is it necessary to consider the Crown's appeal against sentence as that must, as a consequence of my decision, be dismissed.

Should there be a Re- trial

135. I considered whether there was evidence on which the appellant could be retried. Lord Diplock in **Reid v R** (1978) 27 WIR 254, stated the principles to be considered during this exercise. Lord Diplock said:

"The interests of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law; it is for the

prosecution to prove the case against the accused. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance eventually between the prosecution and defence during the course of the hearing and in his summing-up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witnesses to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way. It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial: the governing reason why the verdict must be set aside is because the prosecution having to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a re trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third. To do so would, in their Lordship's view, amount to an error of principle in the exercise of the power under s.14 (2) of the Judicature (Appellate Jurisdiction) Act 1961."

136. Those principles were repeated with approval by this Court differently constituted in **Jerome Bethell v Regina** SCCrimApp No. 19 of 2013 and **Delancy v The Attorney General** SCCrimApp No. 19 of 2012.

137. On a re-trial the Crown may very well take the opportunity to make good such deficiencies in its case that can be cured, and, if a second chance, why not a third? Nevertheless, **"the interest of the public in [The Bahamas] that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge"** as in this case where the Judge did not leave manslaughter as a possible verdict for the jury to consider, leads me

to conclude that an order for a retrial would be in the interests of justice; and would not, in my view, amount to an error of principle in the exercise of the power under s. 13(2) of the Court of Appeal Act.

138. Accordingly, I allow the appeal and quash the conviction and sentence; and I order that the case be remitted to the Supreme Court for a re-trial.

The Honourable Mr. Justice Isaacs, JA

Decision delivered by the Honourable Madam Justice Crane-Scott, JA:

Introduction

139. I have read in draft the decisions of the Honourable President and of my brother Isaacs JA respectively who, each for differing reasons, propose that this appeal be allowed, the appellant's conviction and sentence be quashed and a new trial ordered. For completely different reasons and on different grounds than those identified in their decisions I too would also order that the appeal be allowed and that the appellant's conviction and sentence be quashed. However, given the inconclusive state of the evidence against the appellant, it is my view that the interests of justice dictate that this is not an appropriate case to order a new trial. The detailed reasons for my decision now follow.

The Issues raised in the Grounds of Appeal

140. The appellant's several complaints are disclosed in her Amended Notice of Appeal filed on 31 May, 2016. Some 6 grounds of appeal were raised against her conviction. These are fully set out in each of the majority decisions and need not be reproduced in this judgment.

141. As drafted, the 6 grounds raised a plethora of issues which may be distilled to 12 separate issues or questions presented for our consideration as follows:

(i) **Is the appellant's conviction unsafe and unsatisfactory due to the failure of the trial judge to give a good character direction on both limbs?** ***(ground 1);***

(ii) **Did the trial judge err in law in rejecting the defence submission of no-case to answer?** ***(ground 2);***

(iii) **Did the judge fail to summarize the defence case for the jury?** ***(ground 2);***

(iv) **Did the judge fail to summarize the evidence accurately for the jury? *(ground 2);***

(v) **Is the verdict thereby unreasonable and unsupported having regard to the evidence? *(ground 2);***

(vi) **Did the trial judge err in his directions on the law and on the evidence in relation to the drawing of inferences and the use of circumstantial evidence resulting in an irregularity which substantially affected the merits of the case? *(ground 3);***

(vii) **Did the trial judge err by failing to give the jury specific directions not to speculate about certain unexplained facts or unproven details? *(ground 3);***

(viii) **Did the judge err in admitting the evidence of Officer Jermaine Knowles?*(ground 4)*;**

(ix) **Did the judge further err by failing to give the jury adequate directions as to how to approach the evidence of Officer Jermaine Knowles? *(ground 4)*;**

(x) **Is the verdict unsafe and unsatisfactory due to the trial judge's failure to give the jury directions as to the defences of self-defence and provocation? *(ground 5)*;**

(xi) **Did the trial judge err in not directing the jury on how to approach video identification? *(ground 6)*; and finally;**

(xii) **Did the judge err by not giving a direction on the significance of lies? *(ground 6).***

142. Issues (viii) and (ii), seek to impugn two rulings which the learned trial judge made during the course of, and at the close of the prosecution case respectively. The other 10 issues broadly challenge specific aspects of the judge's summing-up and raise questions about the safety of the conviction and the reasonableness of the jury's verdict due to the suggested errors of law and fact identified in the various grounds.

143. It is clear from the draft decision of the learned President that for the reasons set out therein, she finds no merit in grounds 1, 3 or 5 and would allow the appeal on issue (xii) in ground 6. For his part, my brother Isaacs JA, would allow the appeal on issue (x)-ground 5, he having found no merit in either ground 1 or 2.

144. Speaking for myself, while I agree with the learned President that issue (xii) of ground 6 has merit, based on my assessment of the state of the prosecution evidence at the close of the Crown's case, I would allow this appeal on grounds 1 and 2 and more

specifically, on issues (i), (ii) and (v) of the foregoing list. I turn first to issue (i)-ground 1.

Ground 1- Issue (i) - Is the conviction unsafe and unsatisfactory due to the failure of the trial judge to give a good character direction?

145. At the hearing of the appeal, Counsel for the appellant, Mrs. Claire Montgomery, Q.C., submitted that the appellant's conviction is unsafe and unsatisfactory by reason of the judge's failure to direct the jury as to how it should treat the appellant's good character.

146. Counsel for the appellant submitted that the necessity for a good character direction had been drawn to the trial judge's attention during the course of an "off-the-record" meeting which he had held with the parties in his chambers to discuss the contents of his summing-up. According to Mrs. Montgomery, at the said meeting after he had heard from counsel, the judge confirmed that he would give a good character direction, but had subsequently omitted to give one.

147. Mrs. Montgomery then adverted to the presence of two filed affidavits, on the Court of Appeal file, each of which gave conflicting accounts of what had transpired at the meeting which had undoubtedly been held in the judge's chambers, prior to the judge's summation.

148. The first affidavit was that of one Rashif Duncombe, filed on behalf of the Crown on June 27, 2016, in which the deponent, Rashif Duncombe, confirmed the fact of the meeting with the trial judge and quite curiously in my view, asserted that defence Counsel had informed the judge that in the absence of evidence of the appellant's good character, a good character direction ought not to be given.

149. The second affidavit filed on June 28, 2016 was that of Mr. Elliot Lockhart, Q.C., lead Counsel in the court below. In his affidavit, Mr. Lockhart sought to answer Rashif Duncombe's allegations and to refute aspects of the Crown's version of what had transpired at the meeting.

150. Needless to say, in the absence of a formal application by either party seeking leave to adduce further evidence pursuant to rule 24 of the Court of Appeal Rules, we declined to embark on any consideration as to whether the judge had in fact been advised that the appellant had no previous convictions or resolve the dispute of fact raised in the affidavits as to what had actually transpired at the meeting.

151. In the absence of the judge's notes or a verbatim transcript of what had transpired at the meeting, it is difficult to see how we could have determined whether the fact that the appellant had no previous convictions had been drawn to the judge's attention as alleged. In any event, even if the matter had been raised with the trial judge during the course of the "off-the-record" meeting, it could have achieved nothing at that stage since

it is clear from the authorities that a defendant's good character is to be distinctly raised by defence counsel who is under a duty to adduce evidence of it whether by direct evidence from the defendant him/herself; or by evidence given on his/her behalf; or by eliciting it in cross-examination of the prosecution witnesses. [See proposition (iv) **Teeluck** *(below).*]

152. I pause briefly to state the obvious, which is that it is never a good practice for a judge to hold "off-the-record" discussions with Counsel for the parties particularly in adversarial proceedings, unless an official note or, better yet, a verbatim transcript is made. Experience has shown that in the absence of the judge's notes or a verbatim transcript of what is discussed at such a meeting, the judge will undoubtedly open him/herself up to precisely the same kinds of allegations and conflicting accounts as are disclosed in the Duncombe and Lockhart affidavits.

153. Turning to her substantive argument on ground 1, Mrs. Montgomery submitted that the issue of the appellant's good character had been raised before the trial judge by the overall effect of the evidence of two of the stipulated witnesses, Nicolaza Quintana and Myles Pritchard, who both spoke in broad terms of the appellant's positive relationship with her husband to whom she was good, kind and nurturing. According to Mrs. Montgomery, this was evidence of the appellant's absolute good character which entitled her to the benefit of a good character direction on both limbs and the trial judge had erred in not giving the required direction.

154. Referring to paragraph 77 of the decision of the England and Wales Court of Appeal in **R v. Hunter et al [2015] EWCA 631** Mrs. Montgomery, Q.C., sought to convince us that the appellant was a person of "absolute good character" meaning that she was a defendant who had no previous convictions or cautions recorded against her and no other reprehensible conduct alleged. She suggested that the Court of Appeal had clearly stated that it was unnecessary for such a defendant to go further and adduce evidence of positive good character. She submitted that on the authority of **Hunter**, such a defendant is entitled to both limbs of the good character direction.

155. Next, Mrs. Montgomery contended, *inter alia*, that based on the authorities, a defendant, like the appellant, who was entitled to a good character direction but who has been deprived of one, for whatever reason, may nonetheless have his conviction overturned on appeal as unsafe or unsatisfactory, unless the appellate court is satisfied following its own review of the evidence, that a jury properly directed would "inevitably" or "without doubt" have convicted. She contended that it was undisputed that the appellant in this case had no previous convictions and was therefore a person of "absolute good character" for whom such a direction would undoubtedly, have made a difference.

156. In support, Counsel for the appellant, Mrs. Montgomery, cited the following authorities in which the law relating to the good character direction was discussed and explained: **Teeluck v. State of Trinidad and Tobago [2005] 1 WLR 242; Bhola v. The**

State [2006] UKPC 9; Simmons and Greene v. The Queen [2006] UKPC 19; Jagdeo Singh v. State of Trinidad and Tobago [2006] 1 WLR 146; Campbell v. The Queen [2010] UKPC 26; Nigel Brown v. State of Trinidad and Tobago [2012] UKPC 2; Kenyatta Lewis v. The Attorney General SCCrApp No. 19 of 2014 and **R v. Hunter et al [2015] EWCA 631**.

157. In response, Counsel for the respondent, Mr. Garvin Gaskin, submitted that the trial judge in this case was under no duty to give a good character direction as the defence had neither distinctly raised the appellant's good character during the defence case; nor sought to elicit evidence of the appellant's good character during their cross-examination of the prosecution witnesses.

158. Mr. Gaskin submitted, in the alternative and in the event we were to find that the appellant had been deprived of a good character direction to which she had been entitled, that a good character direction on the credibility and propensity limbs would not have assisted the appellant due to the cogency of the circumstantial evidence which the Crown had adduced. He submitted that even if the jury had been given a proper direction on both limbs, it would have made no difference since the jury would inevitably have arrived at the same result.

159. In support, Mr. Gaskin relied on the following authorities: **Edmund Gilbert v. The Queen [2006] UKPC 15; Bhola v. The State** *(above);* **Balson v. The State [2005] UKPC 6; Kenyatta Lewis v. The Attorney General** *(above);* **Eversley Thompson v. The Queen [1998] AC 811; Barrow v. The State [1998] UKPC 16;** and **Teeluck v. State of Trinidad and Tobago** *(above).*

160. The law governing the circumstances in which a good character direction is to be given during the course of a jury trial and the impact on the safety of a conviction of the failure of the trial judge to give the required direction is discussed, considered and explained in numerous decisions not only of the Privy Council but in appellate decisions of the English and Bahamian Courts as well. See in particular **Navardo Johnson v Regina SCCrim App No. 38 of 2015; Kenyatta Lewis v Attorney General SCCrApp 19 of 2014** and **Andre Birbal v Regina SCCrApp 18 of 2011.**

161. Approximately twelve years ago in **Teeluck** *(above),* the Privy Council declared that the principles to be applied regarding good character directions had become clearly settled. The Board further declared that what might properly have been regarded at one time as a question of discretion for the trial judge had crystallized into an obligation as a matter of law. At paragraph [33] of its advice in **Teeluck**, the Board encapsulated some of the principles in a series of four (4) propositions which may usefully reproduced hereunder for purposes of this decision:

> **(i) "When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the**

benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: *Thompson v. The Queen [1998] AC 811*, following *R v. Aziz [1996] AC 41* and *R v. Vye [1993] 1 WLR 471*.

(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having effect in every case in which it is appropriate for such a direction to be given: R *v. Fulcher [1995] 2 Cr. App. R 251, 260*. <u>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</u>: *R v. Kamar The Times, 14 May 1999*. *[emphasis mine]*

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) <u>Where credibility is in issue, a good character direction is always relevant</u>; *Berry v. The Queen [1992] 2 AC 364, 381*; *Barrow v. The State [1998] AC 846, 850*; *Sealy & Headley v. The State [2002] UKPC 52, para 34*. The defendant's good character must be <u>distinctly raised</u> by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses; *Barrow v. The State [1998] AC 846, 852*, following *Thompson v. The Queen [1998] AC 811,844.* It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where a defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v. The Queen ibid*." *[emphasis mine]*

162. Subsequently, in **Bhola v. The State** *(above)*, the Privy Council revised its earlier advice in proposition (ii) of **Teeluck** that it would *"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, and expressly signaled that that portion of proposition (ii) of **Teeluck** *"needs to be applied with some caution"*.

163. Some six years later in **Nigel Brown v The State** *(above*), the Board returned to proposition (ii) of **Teeluck** once again and gave the following further clarification <u>for the</u>

guidance of appellate courts when evaluating the safety of a conviction in cases where a good character direction had not been given at trial:

> **"35. The Board considers that the approach in *Bhola*, if and in so far as it differs from *Teeluck*, is to be preferred. There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* are obvious examples. But there will also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence. It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial. As Lord Bingham observed in *Jagdeo Singh* [2006] 1 WLR 146, para 25, hard, inflexible rules are best avoided in this area."** *[emphasis mine]*

164. I turn briefly to discuss the 2015 English authority of **R v. Hunter et al** *(above),* cited by Miss. Montgomery, which, up to the present time, appears to be the leading English authority on the law relating to good character directions. The case contains a useful review of the development of the law relating to good character directions and a discussion as to how the common law principles have been impacted by statute specifically, the Criminal Justice Act, 2003 (CJA) of England and Wales.

165. In **Hunter**, a specially constituted five judge court of the Court of Appeal of England and Wales Criminal Division sat to consider five appeals, all of which raised the issue of the extent and nature of the good character direction. Before disposing of the individual appeals, the Court took the opportunity to conduct a comprehensive review of the law relating to good character directions (including the approach of the Privy Council on the issue) and reached some general conclusions found between paragraphs [61] and [103] of the judgment.

166. **Hunter** reveals that specific statutory changes which have taken place in England in relation to the admissibility of evidence of bad character, have had an inevitable impact on the approach of English courts to good character directions. After examining the development of the common law relating to good character, the Court of Appeal in **Hunter** observed at paragraphs [74] and [75] that the law has moved on and good

character in England and Wales now means far more than not having previous convictions. By virtue of sections 98 and 101 of the CJA, evidence of an accused's reprehensible conduct once considered inadmissible, is now admissible to prove his propensity to offend or to be untruthful.

167. In the light of these statutory developments which do not apply in The Bahamas at this time, it is clear to me that English authorities on the issue of good character decided after 2003, though generally persuasive, must now be examined with care and mindful always of decisions of the Privy Council on the subject, which are highly persuasive in this jurisdiction and by which we may be bound.

168. The appellant in the present case, by denying, in her pre-trial statements, her involvement in the murder of her husband put her credibility in issue. As it later turned out, the appellant was also a defendant who had no previous convictions. On the authority of **Vye** and **Aziz** and propositions (i), (ii) and (iii) of **Teeluck**, she was, as Mrs**.** Montgomery quite rightly contended, a defendant of good character and, as such, was entitled to the benefit of a standard good character direction to the jury on both limbs.

169. However, as Mr. Gaskin correctly pointed out, the appellant's good character was not distinctly raised by direct evidence elicited from her or given on her behalf, nor was it elicited by the defence at the trial through cross-examination of the prosecution witnesses. Accordingly, in keeping with proposition (iv) of **Teeluck**, the trial judge in this case was clearly under no duty to give the required direction. However, as the cases clearly show, the matter does not rest there.

170. Notwithstanding that the required direction was not given, the task which lies before us on ground 1, in assessing the safety of the appellant's conviction, is to determine whether we can say with the necessary level of confidence whether a good character direction in this case would have made any difference to the jury's verdict.

171. Whether this case is one where it is not possible to conclude with the necessary level of confidence that a good character direction would have made no difference; or whether alternatively, the case is one where the sheer force of the evidence against the appellant in the court below is so overwhelming that the direction could not possibly have affected the jury's verdict, will depend on our conducting: ***"a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."*** [See para 33 of **Nigel Brown** *(above);* and para 46 of **France & anor v. The Queen [2012] UKPC 28**.*]*

172. As will shortly appear from my review of the evidence in relation to issues (ii) and (v) of ground 2, the appellant was charged with the murder of her husband in circumstances where there were no eye witnesses to the deceased's killing, the time of death was not established and the prosecution case was wholly circumstantial. Unlike

Balson v. The State, where the circumstantial evidence was overwhelming and a good character direction could not possibly have affected the jury's verdict, the same cannot be said of this case. The appellant was undoubtedly of good character and, based on the authorities, ought to have had the benefit of a **Vye** direction to the jury containing both limbs. As the transcripts show, she was deprived of the direction as the issue was not distinctly raised before the jury at the trial. As will shortly appear, this was a circumstantial case where the prosecution case against the appellant was severely undermined by the many inferences consistent with the appellant's innocence which were reasonably open on the evidence.

173. If the case were to move beyond the no-case submission stage, a credibility direction was not only highly relevant to the issues before the jury, but was acutely capable of having had some probative value. As to the propensity direction, notwithstanding that the appellant did not give evidence before the jury, her denials contained in her out-of-court statements effectively put her credibility in issue before the jury. In short, this was essentially a case where the fact of the appellant's good character and, in particular, the relevance of her good character to the likelihood of her having committed the offence are patently obvious. It is clear that the appellant was deprived of having both issues placed before the jury for their consideration.

174. In summary, I am unable to say with the necessary level of confidence that a good character direction would have made no difference in this case. Put slightly differently, and given the inconclusive state of the circumstantial evidence, I am unable to say that a jury properly directed, in relation to both the credibility and propensity limbs of the appellant's good character, would inevitably have returned the same verdict. In short, in the absence of the good character direction, the appellant's conviction cannot be regarded as safe; ground 1 therefore succeeds. I turn now to ground 2 and in particular, to issues (ii) and (v).

Ground 2- Issue (ii) Did the trial judge err in rejecting the no-case submission? Issue (v) Is the verdict unreasonable and unsupported by the evidence?

175. Counsel for the appellant, Mrs. Montgomery, Q.C. submitted, *inter alia*, that the trial judge's decision to reject the defence submission of no-case-to-answer was erroneous and unreasonable inasmuch as there was no prosecution evidence capable of leading to the inference that the appellant had murdered her husband. Accordingly, she contended, the appellant's conviction is unsafe, unreasonable and unsupported by the evidence.

176. Mrs. Montgomery submitted that the case against the appellant had been entirely circumstantial. She observed that that while the judge's ruling recognized this, the evidence which he had identified in his ruling (found between pages 494 to 498 of the transcript) as justifying the case going to the jury could not, on a proper direction, have led to a conviction. She drew our attention to what, in her view, were specific flaws in the

judge's analysis of the evidence and pointed to other unexplained aspects of the police investigation and other evidence adduced in the prosecution case at trial which, she said, weakened the inferences of guilt which the Crown sought to have drawn from the evidence as a whole. She suggested that had the judge approached the no-case submission in the manner discussed in the authorities, he would have ruled that there was no evidence on which a jury properly directed could convict.

177. Mrs. Montgomery specifically criticized the trial judge's treatment of two unexplained facts which, she said, underpinned his decision not to uphold the no-case submission. These were firstly, the unexplained presence of the deceased's blood and DNA on two dresses (a multi-coloured dress and a blue nightdress) which police witnesses said had been collected during their investigations; and secondly, the unexplained fact of the deceased's blood and DNA which was found on the inside handle of the locked door which led from the patio area to the kitchen where the deceased's body was found.

178. *The Dresses:* As to the presence of blood on the two dresses, Mrs. Montgomery pointed out that the stipulated report of Forensic Biologist, Felicia Blair (DV-28) had been read into evidence before the jury and established that both dresses had been *"soiled and stained"* with *"no signs of damage"*. However, she pointed out that the Crown had adduced no evidence as to whether the blood on either dress had been in sufficient quantity to be visible to the naked eye, noting that none of the persons who dealt with the dresses saw or remarked on seeing any suspected stain. According to Mrs. Montgomery, the only reason it is known that *"human/higher primate blood"* had been detected on the front right sleeve cap of the multi-coloured dress and *"near the crotch/groin area"* of the blue nightdress was because of the use of chemical re-agents at the Bahamas Police Forensic Science Section which reacted to the presence of blood on the dresses.

179. She suggested that in the absence of evidence as to what the characteristics of the blood on the dresses had been, specifically, whether the blood had been visible, whether it went on dry or wet, whether it was consistent with aerial contact, or may have been brushed off from contact with something else, the deceased's blood on the dresses was not probative of guilt and did not take the Crown's case any further.

180. Mrs. Montgomery submitted that on the state of the evidence at the close of the prosecution case, it was impossible for a jury properly directed to draw the inferences of guilt which the Crown sought to draw from the presence of the deceased's blood and DNA on both dresses, inasmuch as the presence of the deceased's blood on both dresses could equally be explained by the very real possibility of innocent contact or innocent exposure to the deceased's blood which could have occurred having regard to the evidence led. [For evidence of possible innocent contact or exposure to the deceased's blood on both dresses see: (i) (Exhibit DV-11) - Stipulated statement of the Vasyli's maid, Nicolaza Gomez Quintana who told police, *inter alia*, that the deceased had fallen down the stairs in a drunken state in the early afternoon of 23rd March, 2015 sustaining

cuts on his back from the broken glass from a picture frame dislodged during his fall; (ii) (Exhibit DV-12) - Stipulated statement of the Vasyli's friend, Myles Pritchard who told police that on his arrival at the residence in the early afternoon of 23rd March, 2015, he had observed, *inter alia*, the deceased in the kitchen holding a rolled-up paper towel with a lot of blood on it; and (iii) (Exhibit DV-13) – Stipulated statement of the Vasyli's gardiner Alejandro Gomez Quintana, who told police, *inter alia*, that on arrival to work on the morning of 24th March, 2015, he had picked up the bloody knife on the patio floor, touched the deceased's body which he had discovered on the kitchen floor and driven to the nearby home of the Vasyli's daughter. He also told police that on breaking the news to the appellant and her daughter, the appellant had hugged him.]

181. *The locked door*: Turning secondly to the unexplained fact of the deceased's blood on the inside of the door handle of the locked kitchen door, Mrs. Montgomery criticized the judge's view that in the absence of evidence of an intruder this fact lent weight to the Crown's case against the appellant. She contended that the fact that the door between the patio and the kitchen had been locked from the inside actually supported the defence theory that the deceased had been attacked on the patio by an unknown assailant and had sought refuge inside the kitchen where he had locked the door behind him. She drew attention to the fact that Mrs. Vasyli could have gained access to the guest house via the bedroom door; a point the deceased was well aware of.

182. Apart from the foregoing unexplained facts which the judge mentioned in his ruling, Mrs. Montgomery drew our attention to two additional intermediate proved facts not mentioned in the ruling which, in her view, raised reasonable inferences consistent with the appellant's innocence; being inferences which a reasonable jury, properly directed, could not exclude. These intermediate proved facts were: (i) the presence of an unknown male who she referred to as "blue glass man" at the Vasyli residence on the evening in question; and (ii) the rigor mortis evidence and the inconclusive evidence of the time of death.

183. *Blue glass man:* In her oral arguments on appeal, Mrs. Montgomery drew our attention to the fact that the undisputed DNA evidence which had been adduced on the Crown's case linked a small blue glass found on the patio table by Constable Jermaine Stubbs, to an unknown male whose identity had not been determined by police investigators. [See (Exhibit DV-30) - Stipulated DNA Report of Samantha Wandzek dated August 3, 2015.]

184. *Time of Death:* Under this heading Mrs. Montgomery contended that it was incumbent on the learned judge to remind the jury that, "there was no evidence as to time of death and that, given the presence of rigor mortis in the body at 1:16pm on 24 March 2015 and the fact that the rigor did not appear to have been broken when the body was moved into position to be photographed, they could not be sure that Mr. Vasyli had died before the early hours of 24 March 2015, still less that he had died before 7:30pm on 23 March 2015."

185. Mrs. Montgomery contended that taking the Crown's case at its highest and making the assumptions which the Crown sought to draw from the proved facts, a reasonable mind could not exclude all the competing inferences in favour of the appellant, and was therefore incapable of reaching a conclusion of guilt beyond reasonable doubt. In these circumstances, she contended, the judge should have stopped the case and erred in not doing so.

186. Mrs. Montgomery also criticized the judge's observation in his ruling at page 501 of the transcript that he was *"not minded to exercise his discretion in favour of the defendant"*. She submitted that the question whether or not there is a case to answer is not a matter of discretion but a matter of sufficiency of evidence. She contended that if the judge was in doubt as to the sufficiency of the prosecution evidence as his ruling suggested, he was duty bound to stop the case. In support of her submissions Mrs. Montgomery relied on: **R v. Galbraith [1981] 1 WLR 1039; McGreevy v. Director of Public Prosecutions [1973] 1 WLR 276; R v. Glen Michael Moore, unreported, 20th August 1992**; and **R v. P [2008] 2 Cr App R 68**.

187. In response, Director of Public Prosecutions, Mr. Gaskin submitted that at the close of its case, the prosecution had adduced evidence of undisputed facts and circumstances, which if accepted, were, at their highest, capable of producing in a reasonable mind a conclusion that the appellant was beyond reasonable doubt guilty of killing her husband. He drew attention to limb 2(b) of **Galbraith** and submitted that the prosecution case was such that, if accepted, on one view of the facts, a jury properly directed could have found the appellant guilty of the murder of her husband. There was accordingly, in his view, no basis upon which the judge could have withdrawn the case from the jury and so, the judge had not erred in allowing the matter to continue.

188. In his submissions on appeal, Mr. Gaskin stated that the Crown had relied on circumstantial evidence which had included facts such as: the location of the deceased's body which had been found inside the kitchen of the locked residence where the deceased and the appellant both lived; the fact that the murder weapon had been taken from a set of knives found in the kitchen; the fact that the appellant and the deceased had been left alone on the evening before the discovery of the body; the absence of evidence of an intruder or a disturbance of the home or the lack of damage to the locks at the deceased's residence; the presence of blood and the deceased's DNA on the sleeve of a multi-coloured dress found in a closet of a bedroom in the couple's daughter's nearby residence where the appellant had spent the night, together with the presence of the deceased's DNA in the crotch/groin area of the blue nightdress which the appellant had been wearing at the time of her arrest at the Vasyli residence on the morning when the body was discovered.

189. Mr. Gaskin pointed out that the Crown had also relied on the sworn evidence of Police Constable Jermaine Knowles, who testified that upon his having identified himself to the appellant at her residence on the morning of her arrest, she had had been crying and

shaking and had immediately told him that she and the deceased had, had a fight last night. If accepted, this was, he submitted, yet another circumstance from which guilt could be inferred. In support of his submissions on this ground, he relied on the following authorities: **R v. Galbraith** (above); **Director of Public Prosecutions v. Selena Varlack,** (above); **Balson v The State** (above) and **Jamal Glinton v. Regina,** (above).

190. In Mr. Gaskin's view the lack of certainty as to the deceased's time of death was not a weakness in the Prosecution's case. In his view while there may certainly be cases where the importance of the time of death is raised by the evidence; the present case was not one of them. At the hearing he posited that when one considers the totality of the circumstances of the case i.e. the lack of evidence of a break in, the locked door, etc; the absence of evidence as to a time of death was at its highest, an insignificant weakness.

191. In his opening address to the jury at the start of the trial, Director of Public Prosecutions, Mr. Gaskin told the jury that the Crown would lead an interesting array of evidence, both direct and circumstantial. He told the jury that circumstantial evidence is as solid as direct evidence and was no weaker form of evidence.

192. At pages 17 to 18 of the Transcript, Mr. Gaskin then gave the jury the following example of the nature of circumstantial evidence and explained the inference which could reasonably be drawn from the cat and the missing rat:

> **"…there is a school of thought that says, because there is objectivity in circumstantial evidence, that it may be even more potent than direct evidence. Now, let me give you an example: a rat and a cat are in a room. Nobody, nothing else, only the rat and the cat. A few minutes later someone enters the room and you see the cat licking its chops and you see no rat. The reasonable inference is that the cat ate the rat. And so, in those circumstances, nobody saw the cat eat the rat but what someone definitively noted is that the cat and the rat were the only two beings in the room…"**

193. Immediately following the above analogy of "the cat and the missing rat", Mr. Gaskin then told the jury that the Crown would prove that the appellant and the deceased were the only ones present at the Vasyli residence at the material time and that in the absence of evidence of an intrusion, the reasonable inference which should be drawn was that the appellant had stabbed her husband to death.

194. It was therefore an integral plank of the Crown's circumstantial case against the appellant that the evidence which they would adduce would establish beyond reasonable doubt that that the appellant and the deceased were the only ones at home at the time the deceased met his death at her hands. As the authorities clearly show, if at the close of the Crown's case the proved facts did not exclude all other reasonable inferences consistent

with the appellant's innocence, then a doubt would exit as to whether the inference sought to be drawn by the prosecution was correct. In such circumstances, there would be no evidence on which a jury properly directed could convict and the trial judge should have stopped the case.

195. Addressing Mrs. Montgomery's oral submissions at the hearing about the unexplained intermediate fact of the presence of an unknown male, "blue glass man" who the DNA evidence suggested was at the Vasyli residence on the evening in question, Mr. Gaskin submitted that on the Crown's case as led, only two males had been in play, namely, Myles Pritchard and Matthew Mitchell who were the only male guests known to have visited the Vasylis on the afternoon or evening in question. He accepted that Matthew Mitchell had been forensically excluded as a contributor to the major DNA profile on the blue glass while Myles Pritchard's DNA had not been obtained for comparison.

196. He accepted that the evidence of Myles Pritchard had been that he had been drinking beers but pointed out that Myles Pritchard had not stated whether he had drunk beer from the bottle only, the obvious suggestion being that Myles Pritchard may have been the person whose DNA was found on the rim of the blue glass.

197. He submitted that the defence case at the trial had revolved around the theory that the deceased had either been killed by an intruder or failing this, had stabbed himself. He contended that nothing had been said in the court below about the presence of "blue glass man" and accordingly, it was not permissible for the appellant to raise the point for the first time on appeal. In any event, he suggested, that when the facts were analyzed, "blue glass man" was not an intruder, but by implication, was rather, someone who had been an invitee.

198. I pause here to observe the obvious which is that in a criminal trial an accused person has nothing to prove and that notwithstanding any number of defence theories which may be suggested at trial, it is the duty of the prosecution to prove the appellant's guilt. While the defense theory in the court below raised the possibility of an unknown intruder or suicide, the duty nonetheless remained on the Crown to establish beyond reasonable doubt that it was the appellant who had killed her husband.

199. As stated at paragraph 193, Mr. Gaskin, in his opening address, confidently told the jury that the Crown would prove that the appellant and the deceased were the <u>only</u> ones present at the Vasyli residence at the material time and that in the absence of evidence of an intrusion, the only reasonable inference which should be drawn from that fact was that it was the appellant who had stabbed her husband to death.

200. It need hardly be said that if the evidence led below by the prosecution failed to establish that crucial foundational fact, that apart from the deceased, the appellant was the <u>only</u> person who was at home at the material time, then the inference of the appellant's

guilt which Mr. Gaskin sought to have drawn from that fact was one which could not reasonably be drawn.

201. It is undisputed that at the close of the prosecution case, the DNA Report of August 3 2015 prepared by Forensic DNA Analyst, Samantha Wandzek, supported by the cross examination evidence of Jermaine Stubbs found at pg 161 of the transcript, effectively placed three persons, namely the appellant, the deceased and an unknown male at the residence at some point in time on the date the deceased met his death. This proved fact seriously eroded the prosecution theory and needed to be explained by evidence.

202. Simply to suggest, as Mr. Gaskin did on the hearing of appeal that Mrs. Montgomery's "blue glass man" was not an unknown intruder as suggested by the defence but was rather, Myles Pritchard, a guest who had been present at the Vasyli residence earlier in the afternoon, overlooked completely the burden which rested on the Crown, to prove the appellant's guilt by evidence, or alternatively, since this was a purely circumstantial case, by reasonable inferences drawn from proved facts. I can do no better than to recall the following statement of the law, famously penned by Viscount Sankey L.C., over eighty years ago in **Woolmington v. D.P.P. [1935] AC 462** that: "*If, at the end of…., the case, there is reasonable doubt, created by the evidence given by …the prosecution…as to whether the prisoner killed the deceased…the prosecution has not made out the case and the prisoner is entitled to an acquittal."*

203. The failure by the police investigators to obtain a sample of Myles Pritchard's DNA for comparison purposes was, in my view, a fatal flaw in the Crown's case. It essentially "blew a hole" in the main plank of the case against the appellant, effectively undermining the prosecution's theory that the appellant and the defendant were the only ones present at the Vasyli residence at the material time.

204. I am satisfied that Mr. Gaskin's "cat and rat analogy" of which the jury was confidently told in his opening address simply did not hold true at the close of the prosecution case in the court below, since the proved facts established without a doubt that there were in fact two cats present with the rat as opposed to one cat and one rat as Mr. Gaskin had suggested. In short, by failing to adduce evidence in the court below to establish that Myles Pritchard was in fact the unknown male contributor whose DNA was found on the small blue glass on the patio table, the Crown had, in the end, failed to establish , that all-important and foundational fact from which an inference of guilt could be drawn, namely, that as the appellant and the defendant were the only ones present at the Vasyli residence at the material time, it was she who had stabbed him to death.

205. As is well known, the overarching principles governing no case submissions are set out in **R v. Galbraith [1981] 1 WLR 1039**. They are routinely applied in this jurisdiction and were recently restated by this Court (differently constituted) in **Jamal Glinton v. Regina, SCCrApp No. 113 of 2012** in the following terms:

> **"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous nature for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury…"**

206. In 2008, in **Director of Public Prosecutions v. Selena Varlack, [2009] 4 LRC 392**, the Privy Council considered the operation of the **Galbraith** principles to those situations where (as here) the case for the prosecution is circumstantial. Delivering the Board's decision, Lord Carswell, stated at paragraph 21:

> **"21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above, is to be found in the judgment of Lord Lane CJ in *R v. Galbraith* [1981] 2 All ER 1060 at 1062. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences."**

207. At paragraph 22 of the judgment, the Board considered what should be the correct approach of a trial judge when considering a submission of no-case in a circumstantial case. Their Lordships adopted with approval a passage found at page 5 of the judgment of the Supreme Court of Southern Australia in **Questions of Law Reserved on Acquittal**

(No 2 of 1993) (1993) 61 SASR 1. The passage which their Lordships endorsed reads as follows:

> **"…it is not the function of the judge in considering a submission of no-case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence…He is only concerned with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…I would re-state the principles, in summary form, as follows: If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypothesis as unreasonable, there is a case to answer. <u>There is no case to answer only if the evidence is not capable in law of supporting a conviction</u>. <u>In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence</u>."** *[emphasis mine]*

208. In **McGreevy v. Director of Public Prosecutions [1973] 1 WLR 276**, the House of Lords considered the essence of what has to be conveyed to a jury by the trial judge in a circumstantial case where inferences have to be drawn from proved facts. Delivering the judgment of the House of Lords Lord Morris stated at page 285:

> **"In my view, the basic necessity before guilt of a criminal charge can be presumed is that the jury are satisfied of guilt beyond reasonable doubt. This is a conception that a jury can**

> **readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."** *[emphasis mine]*

209. In **R v. Glen Michael Moore, unreported, 20th August 1992**, the English Court of Criminal Appeal expressed an opinion on the manner in which a trial judge should approach his task on a no-case submission where the prosecution case is dependent on circumstantial evidence only. Delivering the decision of the Court, Steyn LJ (as he then was) stated:

> **"It is clear that a judge need not give any special direction to the jury. On the other hand the approach enunciated by Lord Morris is one which may be helpful when he considers, in a case dependent on circumstantial evidence only, whether a submission of no case to answer ought to be allowed, it may be helpful for the judge to address specifically the question whether the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn by the prosecution. If the proved facts do not exclude all other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. If the judge had approached the matter this way, we believe the judge would have ruled that there was no evidence on which a jury properly directed could convict."** *[emphasis mine]*

210. In 2008, in the case of **R v. P [2008] 2 Cr App R 68 (**cited by Mrs. Montgomery) the Court of Criminal Appeal, applying the test in **McGreevy** and referring to **Moore**, advocated the following approach in cases where a judge is considering a no-case

submission in a circumstantial case. Delivering the judgment of the Court, in **R v. P**, Thomas L J stated:

> **"…the correct approach is to look at the circumstantial evidence in the round and ask the question, no doubt employing the various tests that are suggested in some of the authorities, and ask the simple question, looking at all this evidence and treating it with the appropriate care and scrutinizing it properly, is there a case on which a jury properly directed could convict?"**

211. In his ruling on the no-case submission at pages 498 and again at page 501 of the transcript, the judge viewed the unexplained facts, mentioned above, not as competing hypotheses which had weakened the strength of the prosecution case, but as questions of fact for the jury to give meaning to. At lines 15 to 27 of page 501 the trial judge in his ruling reasoned as follows:

> **"In essence there is a case to answer if on one view of the evidence a reasonable jury, properly directed might convict. The fact that another view consistent with innocence could possibly be held does not mean that the case should be withdrawn from the jury.**
>
> **In the instant case, there are a number of facts that remain unexplained. The case for the prosecution may eventually prove to be weak, but that is a matter for the jury to decide, just as it is a matter for the jury to give meaning to the unexplained facts; that is the, the blood of the deceased on the blue dress and on the multi-coloured dress; and the locked door with the deceased inside the home alone.**
>
> **In the circumstances, I am not minded to exercise my discretion in favour of the defendant in this case. There is a case for the defendant to answer. Therefore, the submission of no case to answer is dismissed."**

212. It is obvious from the trial judge's ruling as a whole and particularly from the foregoing extract that the judge incorrectly approached the task which lay before him on the no-case submission, choosing instead to abdicate to the jury the task of giving meaning to unexplained facts. While recognizing that the Crown's case was wholly circumstantial and correctly adverting to dicta in **McGreevy, Galbraith** and **Varlack** *(above)* the trial judge failed to make the required assumptions in relation to the Crown's case, or to himself scrutinize the evidence to determine whether even accepting all the evidence for the prosecution and drawing all inferences most favourable to the

prosecution which were reasonably open to be drawn, a reasonable mind *could* reach a conclusion of guilt beyond reasonable doubt given all hypotheses consistent with the appellant's innocence which were reasonably open on the evidence.

213. The authorities show that in a circumstantial case (as this was) the judge is required to approach the no-case submission by assuming that the jury will draw such of the inferences as are reasonably open, as are most favourable to the prosecution. Thereafter the judge should consider whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and in so doing, reject any competing inferences consistent with the accused's innocence as being not reasonably open on the evidence.

214. Apart from identifying the unexplained facts on the prosecution case as he saw them, the judge failed to conduct any evaluation of the inferences favourable to the prosecution which would be reasonably open to the jury. Nor did he attempt to consider whether a reasonable jury *could* find the appellant guilty on the evidence, notwithstanding the competing hypotheses, preferring instead to leave the various unexplained facts for the jury to decide.

215. Had the learned judge looked at the evidence in the round as suggested in **P** with a view to determining as suggested in **McGreevy, Varlack** and **Moore**, whether the proved facts were such that they excluded every reasonable inference from them save the inference of guilt sought to be drawn by the prosecution, the judge, would in my view, undoubtedly have ruled that there was no evidence on which a jury properly directed could convict.

216. As discussed earlier, had the judge approached the task before him on the no-case submission by carefully scrutinizing the circumstantial evidence led on the Crown's case, he would have concluded that a reasonable mind *could not* reach a conclusion of guilt beyond reasonable doubt because the prosecution evidence established that the appellant was not in fact the only one at home with the deceased at the material as the Crown suggested. Had the judge given careful thought to the matter, he would doubtless have concluded that in order to do so, the jury would have had to reject a competing theory (consistent with the appellant's innocence) that the deceased was in fact killed by the unknown male who was at the residence at some point in time after the appellant had left around 7:30 pm for her daughter's nearby residence to spend the night.

217. As to the evidence adduced by the Crown as to the presence of the deceased's DNA on the two dresses, had the learned judge approached the task before him on the no-case submission by treating the evidence led on the Crown's case with care, he would have similarly have concluded that despite the fact of the presence of the deceased's blood on the dresses, due to the complete absence of evidence as to the characteristics of the stains on each dress or the quantity of blood on each dress, a reasonable mind, properly directed *could not* have reached a conclusion of guilt beyond reasonable doubt, since to reach that conclusion, the jury would necessarily have had to exclude the

evidence led in the prosecution case (once again consistent with the appellant's innocence) which suggested the real possibility that innocent contact or exposure to the deceased's blood could have occurred in relation to both dresses.

218. Given the inconclusive state of the evidence at the close of the Crown's case, I am satisfied that the prosecution evidence taken at its highest, was such that a jury properly directed could not properly convict on it. Simply put, at the close of the prosecution case, the case fell squarely in limb 1 of **Galbraith** and the judge was duty bound to withdraw the case from the jury's consideration.

219. For all the foregoing reasons, I am satisfied that the learned judge erred in not withdrawing the case from the jury under limb 1 of **Galbraith**. I am consequently satisfied that the verdict is unreasonable and cannot be supported having regard to the evidence. Additionally, in view of the state of the evidence, and more particularly, the unexplained presence of "blue glass man" at the Vasyli residence at or around the material time, I have a lurking doubt about the safety of the appellant's conviction which, in my view, is unsafe and unsatisfactory in all the circumstances of the case.

220. I would therefore allow the appeal on this ground as well.

Should a new trial be ordered?

221. In this jurisdiction, the power to order a new trial following the determination of a criminal appeal is located in subsection (2) of section 13 of the Court of Appeal Act, Ch. 52 which states:

> **"(2) Subject to the provisions of this Part of this Act the court *shall*, if it allows the appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, *or*, if *the interests of justice so require*, order a new trial at such time and place as the court may think fit."** *[emphasis added]*

222. In **Dennis Reid v. The Queen** [1980] A.C. 343 an appeal from Jamaica, the Privy Council construed and explained section 14(2) of the Judicature (Appellate Jurisdiction) Act, which is identical in all respects to section 13(2) of The Bahamas Court of Appeal Act, Ch. 52. At pages 349 and 350, the Board offered the following general guidance as to the manner in which the discretion to order a new trial is to be exercised:

> **"…the interest of justice that is served by the power to order a new trial is the interest of the public…that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships**

cannot readily envisage them, it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso…and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The *seriousness or otherwise of the offence* must always be a relevant factor; so may *its prevalence*; and where the previous trial was prolonged and complex, *the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations*. So too is *the consideration that any criminal trial is to some extent an ordeal for the defendant*, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. *The length of time that will have elapsed between the offence and the new trial if one be ordered* may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial. The *strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration* but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to *the nature of the crime*, *the particular circumstances in which it was committed* and *the current state of public opinion*…. On the one hand there may well be cases

> **where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand, it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, *"it is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery."* "** *[emphasis added]*

223. Having determined that this appeal should be allowed and the appellant's conviction quashed, we are required, in keeping with the guidance in **Reid**, to balance the relevant factors and the competing interests and exercise our judgment in determining whether (pursuant to section 13(2)) to direct a judgment and verdict of acquittal on the one hand or whether the interests of justice require a new trial to be ordered on the other.

224. In my view, it is obvious that this case falls nowhere close to that extreme of the continuum described in **Reid** where it can confidently be said that the evidence against the appellant at the trial was so strong that any reasonable jury if properly directed would inevitably have convicted the appellant and where, the more appropriate course would have been to apply the proviso in section 13(1) and dismiss the appeal instead of ordering a new trial.

225. On the contrary, while the circumstances of this case are not on all fours with those in **Reid**, the case, in my view, is one which falls somewhere between the two extremes and quite close to **Reid**, and where it is clearly not in the interests of justice to order a retrial because the prosecution evidence adduced at the trial was not sufficient to justify a conviction by a reasonable jury even if properly directed. In short, this is a case where like **Reid**, the prosecution should not be given another chance to cure evidential deficiencies in its case against the appellant.

226. I am satisfied that despite the seriousness of these offence, the prevalence of murder in this jurisdiction and the interest of persons in this community in knowing that persons who are guilty of serious crimes are brought to justice and should not escape it, the evidence against the appellant is so weak and inconclusive that it is not in the interests of justice to order a new trial and I decline to do so.

Disposition

227. In summary, like the majority, I too would allow the appeal, quash the appellant's conviction for murder together with her sentence and direct a judgment and verdict of acquittal to be entered. In the result, the respondent's cross-appeal is also dismissed. However, for all the foregoing reasons, I would not order a new trial.

The Honourable Ms. Justice Crane-Scott, JA