ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

Criminal Appeal No.15 of 1996

BETWEEN:

JOHN EARL BAUGHMAN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron - Chief Justice (Ag.)
The Hon. Mr. Satrohan Singh - Justice of Appeal
The Hon. Mr. Albert N.J. Matthew - Justice of Appeal (Ag.)

Appearances:

Mr. G. Watt and Mr D. Hammilton for the Appellant
Mr. C. Cumberbatch, Director of Public Prosecutions, for the Respondent

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1997: June 11, 12 and 13;
September 15.

Criminal Law - Murder conviction - Death sentence - Inconsistencies between testimony and previous statements of key prosecution witness (an eye-witness) - Defence that deceased's death was accidental - Insurance policy taken out by appellant on deceased's accidental death a year prior to deceased's death - Question of motive - Whether the evidence supported a view that the deceased slipped and fell, or rather, that she was deliberately pushed and landed 99 feet to her death - Whether alleged deficiencies and imbalance in the trial judge's summing up were significant and of a material nature - The effect of, and legal directions regarding, lies by an accused - **R v Lucas** (1981) applied - Competency of certain witnesses to testify as expert witnesses - Whether there was need to give the directions called for in **R v Platt** [1981] CLR 332 - Application of proviso to S. 40 of the *Supreme Court Act.* Appeal dismissed.

J U D G M E N T

BYRON, C.J. (Ag.)

I have read the judgment of *Matthew J.A* and agree with the conclusion he reached. I want to explain why I hold the view that this is an appropriate case to apply the proviso. I was not convinced, that the summing-up was imbalanced. I thought that the learned trial judge put the defence fairly, clearly and strongly to the Jury. While I agree that the case largely depended on the fortuitous circumstance that Philbert Jackson was on his balcony and virtually caught the Appellant in the act and his testimony was therefore important enough for the Judge to direct the Jury to treat it with especial care in the light of the fact that there were areas of his testimony which were inconsistent with his previous statements I thought that in the context of this case the inconsistencies were minor and peripheral. On the other hand there were factors which supported the reliability of his testimony, not the least being the

fact that he came forward at once and was the person who raised the alarm by telephoning the Hotel to tell them what he had seen, and he was totally unconnected to the Appellant and the Deceased.

The issue of the "lies" was important because it formed part of the circumstantial evidence in the case. However, the error of the Judge which has been pointed out by *Matthew J.A.* was in my view minimised by his overall treatment of the subject. I also agreed with *Matthew J.A*. that the criticisms of the treatment of the expert evidence were diffused by the nature of the evidence itself and the fact that there was evidence to support the ruling that their professional qualifications allowed them to give evidence of their opinions on the matter they did. In short, I have formed

the view that the criticisms of the summing up which were very eloquently and forcefully argued by learned counsel for the Appellant demonstrated no more than minor deficiencies which did not affect the justice of the case. I would therefore like to recount the circumstantial evidence which provided convincing support for the conclusion reached by the Jury.

The Appellant was the husband of the Deceased and they were vacationing together in Antigua and Barbuda. They were scheduled to leave Antigua on May 28, 1995. On the day before, that is May 27, the Deceased met her death. It was the Prosecution's case that the Appellant pushed her off the roof of the eight floor Royal Antiguan Hotel and that she fell 99 feet to her death. The Appellant contended that they were romancing and the Deceased was trying to pick up a love note he gave her which had fallen to the ground when she accidentally slipped and fell off the roof. The Prosecution presented the Appellant as a calculating person who prepared the stage for pushing the Deceased off the roof and for covering up his crime. The Appellant presented himself as a loving and devoted husband who was grief-stricken over his wife's accidental death.

1. The son of the Deceased gave evidence that his mother as afraid of heights and that it was highly improbable that under normal circumstances she would venture onto the roof of the hotel. On the other hand there was evidence that the Deceased, who was not normally a drinker, had heavily imbibed alcoholic beverages on the day of her death.

2. The son also testified that the marriage was only about five years old and had been deteriorating. From the background of his lifelong knowledge of her, he gave evidence of the way they behaved to each other, over that five year period, from which he drew that conclusion. Counsel for the Appellant criticized the conclusion as not following from the behaviour that was described, but the evidence was there and also the conclusion. On the other hand the Appellant gave evidence and called witnesses, consisting of taxi-

driver and hotel staff, to show that during the vacation, which lasted about a week up to her death, they behaved like lovers.

3. Evidence was adduced that in the year before her death the Appellant used facilities at his workplace Honeywell Corporation to take out an insurance policy which included $200,000.00 on his wife's accidental death. Ms Williamson, an employee of the insurance brokerage firm dealing with that policy gave evidence that she received notification of claim for the death of the Deceased on behalf of the Appellant on 8th June, 1995, less than two weeks after her death and while the Appellant was in custody under suspicion for her murder, from a benefit representative of the Appellant's employers.

   The address to which she sent the claim forms as directed was not the matrimonial address of the Appellant and the Deceased, but another address in the same city where they lived. No explanation of this was offered on the evidence to rebut the inference of the insurance money being a motive, and the premeditation evinced by the arrangements for a new address to which the claim forms were to be sent.

4. After news of her death reached the family they entered the matrimonial home and were struck by the fact that her bunch of house keys were still in the house, but the keys could not fit the locks on the entrance doors to the house. Attention was drawn to the fact that the Appellant when asked about this circumstance by her son, admitted that he had changed the locks shortly before leaving on vacation but gave various stories at different times which raised the issue that he was lying about the reasons for changing the locks. It was contended by the prosecution that by lying about conduct which could have been innocuous the Appellant invited the inference that he was covering up conduct which pointed to his guilt.

5. The coincidence that Philbert Jackson was on the balcony of his house which overlooked the roof of the hotel created an eye witness. Jackson's evidence was that he heard a scream and when he looked in the direction from which it came he saw a woman going over the roof backwards, her breasts were pointing up and her legs were pointing up. The Appellant in his statements maintained that the Deceased had bent to pick up a love note that had dropped as he was giving it to her, slipped and fell over the roof, adding that as she fell from view she said "honey". Jackson's evidence was

capable of rebutting the Appellant's allegation that she fell over as she was picking up the note on the rationale that if that was so she would have fallen forward and not backward as Jackson said. Additionally the scream rebutted the alleged use of the word "honey" as she went over. That evidence was advanced as indicating that she screamed in fear as the Appellant pushed her over the roof and that going over backwards was more consistent with being pushed than with falling after a slip. The Deceased's son also testified that when the Appellant was giving him an account of the incident on the night it occurred he had indicated that he would not like to know what her last words were. One could easily draw the inference that the evidence of "honey" was obviously given to support the loving relationship he was seeking to establish but it was highly unlikely to be believed by anyone. There were two other witnesses who gave evidence of hearing the scream in circumstances which support the evidence of Jackson and contradicts the account of the Appellant.

6. Jackson also testified that after he saw the body of the woman on the ground, he yelled and saw a man standing facing the edge of the roof over which the woman had fallen. It was his evidence that only after he screamed the man reacted by putting his hands on his head and pacing back and forth. Then he ran down the fire escape to the ground.

7. The evidence of the physical conditions on the roof, that it was dry, not slippery and there was a wall about sixteen inches high, reduced the likelihood of any one believing the Appellant's account of how the Deceased went over the roof.

8. The Prosecution called two engineers to give opinions that the position of the Deceased's body on landing on the ground some fourteen feet from the hotel was consistent only with her having been pushed and not falling free, although one of them qualified his opinion to the extent that if the body had hit the fire escape his conclusions would be annulled. There was evidence that after the scream there was a sound as if the body had hit the fire escape. Against this background the Appellant said in court that he saw the Deceased fall and saw her hit the fire escape. In his previous statements including long interviews with the police where his descriptions were very detailed he never said that. The Prosecution pointed to this as being designed to provide a false but convenient cover-up, that was consistent with a possible theory from one of the engineers and the evidence of the sound.

The totality of this evidence demonstrated that the explanation given by the Appellant of the Deceased's slipping and falling over the roof was untrue, because of the physical condition of the roof itself and the testimony of Jackson that the Deceased went over backwards which rebutted the concept of slipping and falling over. In fact the only conclusion to draw from the evidence is that the Deceased was pushed off the roof by the Appellant. The Appellant's reliance on the evidence that during the vacation he and the Deceased were having a loving relationship and therefore he would not have killed her was contradicted by the testimony of her son who testified that they were not getting on.

The evidence went far enough to paint a picture of a cynical and calculating man who had taken out an insurance on the Deceased's accidental death, and before the vacation had changed the locks on the matrimonial home and within days of the Deceased's death had arranged for the insurance brokers to begin processing the insurance claims through an address that was different to the matrimonial address, and after he realised that he was seen by Jackson told lies to cover up his crime. I was satisfied that the Jury had ample evidence to support their verdict. The deficiencies in the summing up which Counsel for the Appellant succeeded in demonstrating were minor and it is inconceivable that a Jury properly directed would have come to any other verdict.

For these reasons I concur with the decision to confirm the conviction and sentence.

C M DENNIS BYRON
Chief Justice (Ag.)

I concur.
Justice of Appeal

MATTHEW J.A.(Ag.)

John and Valerie Boughman aged 53 and 55 respectively were married for approximately four years when they arrived in Antigua on May 12, 1995 from Illinois, in the United States of America, for a vacation at the Royal Antiguan Hotel. After spending a few days in Antigua they left for Barbuda on May 22, 1995 and returned to the hotel on May 26, 1995. They were scheduled to leave Antigua on May 28, 1995 but on the day before, that is on May 27, 1995, Valerie met her death after falling from the roof of the eight floor hotel to the ground, a height of 99 feet. Dr. Lester Simon, the Government Pathologist, examined the body on June 2, 1995. He listed 19 injuries and concluded that death was due to multiple fractures of the body including the spine, skull and ribs with lacerations to the heart and aorta caused by heavy impact with the ground. He said death would have been instantaneous.

On the afternoon of May 27, the couple who had lodged on the eighth floor of the hotel went on to the roof as they had done before and the main issue in this case is whether Valerie met her death by an accidental fall or whether she was deliberately pushed over by the Appellant.

On an indictment preferred by the Director of Public Prosecutions on January 5, 1996 the Appellant was tried before *Redhead J*, as he then was, and a Jury and on April 4, 1996 a verdict of guilty of murder was returned by the Jury and the Appellant was sentenced to death by hanging.

The Appellant has appealed to this Court on the grounds that there had been several misdirections by the learned trial Judge on the issues of:

1. Lies by the Appellant.
2. The evidential value of the testimony of the witness Philbert Jackson.
3. The competence of certain witnesses to give expert testimony.
4. Motive for the killing.
5. Imbalance in the summing up generally.

<u>Lies by the Appellant</u>

Learned Counsel for the Appellant submitted that the learned trial Judge misdirected the Jury as to the proper treatment in law of lies allegedly told by the Appellant and/or failed to adequately and properly direct the Jury as to the effect of lies in law as it relates to the guilt of the Appellant in the context of the case.

There were two circumstances in the case where it was suggested that the Appellant had lied. One was with regard to the changing of the locks to his home

in Illinois just before he left for Antigua and the reasons for his doing so. The suggestion is that he gave different reasons for changing the locks to his son-in-law, Victor Delaurier. The other circumstance which gave rise to the suggestion that the Appellant had lied relates to the Appellant seeing his wife Valerie fall and strike the fire escape. In the statement of the Appellant to the Jury he said he had seen the Deceased when she hit the fire escape. It was suggested that was a lie having regard to where he said he was standing and the time it would take the body to reach the ground and having regard to the fact that the police had questioned him in detail concerning that and he had made no mention of seeing the Deceased fall.

As the learned trial Judge told the Jury that was a very important part of the case for the defence because so far as what one of the experts called by the Prosecution, *B.T.Lewis*, told the Jury, if the Deceased struck the fire escape on her way down, then as far as his theory that the wife was pushed from the top of the hotel, that theory would be null and void. The learned trial Judge told the Jury they may well come to the conclusion that the statement he gave was tailor made to fit into what was given in evidence and they may very well come to the further conclusion that he deliberately lied about that.

As regards the changed locks the learned trial Judge referred to the fact that Victor Delaurier and his sister on entering their mother's house after learning of her death had found a bunch of keys on the dresser but the keys could not fit in the lock on the door. So they came to the conclusion that the lock had been changed. The Judge invited the Jury to draw the inference that the key which was found on the dresser must have been the key for the old lock so they could come to the conclusion that the question of losing the key for the old lock must have been a lie.

In his directions to the Jury the learned trial Judge told them that lies by

themselves cannot be evidence of guilt but if they found that the lies were deliberate, that the lies relate to material issues, that the motive for the lies was a realization of the fear of the truth and that the statement was clearly shown to be a lie, they could act.

Learned Counsel for the Appellant submitted that the directions were defective. I agree. What was missing in the directions is that the Jury were not *"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"* as was told in **R v Lucas 1981 2 ALL E.R. 1008 at 1011.**

This Court has referred to and adopted the **Lucas** direction in at least two cases in recent times:
Criminal Appeal **No.5 of 1994: Joseph Vitalis Solomon v The Queen**;
and Criminal Appeal **No.10 of 1995: Cardinal Williams v The Queen**.

In his attempt to support the Judge's directions the learned Director of Public Prosecutions referred to two passages in the summing up where the learned trial Judge told the Jury even if they come to the conclusion that the Accused told them nothing but lies from the dock they must not convict him merely for telling lies. In my judgment far from being supportive of the **Lucas** directions these seem to be inconsistent with them.

Evidence of Philbert Jackson

This witness at the material time lived in an apartment on a hill which looks down on the Royal Antiguan Hotel. The distance from the apartment to the hotel was estimated as between 100 and 200 yards. Jackson gave evidence before the Jury that on Saturday, May 27, 1995 about 5.00p.m. he was sitting down in front of his apartment when he heard a sharp scream like that of a woman

coming from the top of the Royal Antiguan Hotel. He said when he heard the scream he removed the pair of binoculars which he was using at the time and he caught a glimpse of a woman falling off the roof. He said he got a chance to see the entire body which was that of a female. Her breasts were pointing up, her legs were pointing up and she had on a pair of black pants. He said he then left his porch and went towards the bottom of the hill and looked down and saw a woman lying down. He yelled something and then noticed a man standing on top of the roof on the same level that the

woman fell off. The man was just standing there and facing towards the same edge. He said after he yelled the man reacted to the woman falling. The man

put his hands on his head and he started pacing back and forth. He later saw the man running down the fire escape towards the ground.

When he was cross-examined he admitted that he had given several accounts of the incident and he admitted that there were differences in the various accounts he had given.

Learned Counsel for the Appellant submitted that the learned trial Judge misdirected the Jury on the evidential value of the testimony given by the witness Philbert Jackson whose evidence the veracity and accuracy of which was challenged by the Defence and the Judge further misdirected the Jury when he instructed them without more that previous statements given by the witness were not evidence, thereby giving rise to an inference by the Jury that they were to be disregarded and ignored.

When the learned trial Judge was giving general directions on discrepancies at the beginning of his summing up he particularly drew the attention of the Jury to the challenge of the Defence to some of the testimony given by Philbert Jackson and told them he would deal with that later in the

course of his summing-up. Indeed he dealt with the evidence of Philbert Jackson later on.

He asked them to analyse Jackson's evidence carefully. He specifically brought to their attention the fact that when Jackson gave the police his statement he did not say to them he caught a glimpse of someone falling off the roof and he left for their consideration whether or not Jackson was making up the story and whether he had any reason for doing so.

In his general directions to the Jury on how to assess the evidence of witnesses the learned trial Judge told them that if they found a witness was truthful, but mistaken, they may accept the part of his or her testimony which they find to be truthful and reject the rest. However, if they found a witness deliberately lied to them, particularly on important issues, they should reject the whole testimony of that witness because truth was not divisible.

In view of the fact that the learned trial Judge found that the evidence of Philbert Jackson was very important he ought to have gone on to direct them that if they found he had made inconsistent statements at other times and places that could affect their acceptance of the evidence which Jackson gave on oath.

Nevertheless I have perused the record and I am unable to see any material inconsistency in the different versions of the incident as given by Philbert Jackson that would cause one to discredit the evidence given by him before the Jury.

Competence of Expert Witness

The Prosecution called two witnesses to give expert testimony. The first was Bernard Theodore Lewis, a civil engineer, who is employed as Director of Public Works for the Government of Antigua. He holds a Bachelor of Applied Science in Civil Engineering from the University of Waterloo in Canada since

1970. He has been Director of Works since August 1993. The learned trial Judge after hearing objections and replies by Counsel for either side ruled that the witness was competent to give evidence. Lewis determined that the time taken for the body to leave the edge of the roof of the hotel to the ground, a height of 99 feet, was 2.48 seconds. His evidence was to the effect that the body was pushed and that is the explanation for it being found a horizontal distance of 14 feet from the base of the hotel. Under cross-examination, Lewis

stated that if the body fell on the rail before reaching the ground it would make his calculations null and void and it would also affect his opinion of horizontal force.

The other expert witness for the Prosecution was Warren Workman, a civil and structural engineer. Workman confirmed the height of the building to be 99 feet and the body being found 14 feet away from the building. Workman's evidence was that *"if the body fell without any lateral force the free falling body would have fallen within the distance of the stairs"*. He said finally on re-examination:

> *"I said that for the body to have ended up 14 feet horizontal force would have to be applied. The horizontal force could have been a push"*.

The Defence called as a witness civil and structural engineer, Oliver Farquar Graham Davis, whose evidence was that Workman's qualification is similar to his qualification and in his knowledge "*nothing in kinematics dynamics allow you to give evidence of falling objects*". In short, his evidence was to the effect that neither Lewis nor Workman was competent to give the evidence that they did.

Several grounds of appeal were raised pertaining to the competence of Lewis and Workman to give the evidence that they did and their evidence as it related to the Deceased falling on to the staircase or rails.

In the fourteenth edition of **Phipson on Evidence at paragraph 32-37** it is stated that:

> "The competence of the expert is a preliminary question for the Judge and is one upon which in practice, considerable laxity prevails. Though the expert must be `skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility."

The same view is expressed in footnote 9 of paragraph **83 of Vol. 17** of the fourth edition of **Halsbury's Laws of England**.

Davis did not give expert evidence. He disqualified himself to give such evidence. And there is no inconsistency between the evidence of Lewis and Workman, the latter simply going further than the former in saying that even if the Deceased hit the rail or stairs it would not rest on the ground 14 feet away from the building unless there was horizontal force applied to it from the beginning of its fall. In the circumstances I am of the view that there was no need for the directions called for in **R v Platt 1981 Criminal Law Review page 332** for there was no conflict in the evidence given by the experts.

Motive for the Killing

This relates to an insurance policy which was issued to Honeywell Corporation where the Appellant last worked. The Prosecution has advanced the theory that the motive of the Appellant in killing his wife was to recover the sum of $200,000 to which he would be entitled if the wife died accidentally. The Director of Public Prosecutions has submitted that this is significant in that the policy was effected just one year before death at a time when the Parties were not getting on. The theory is advanced by the allegation that on June 8, 1995 the Appellant notified the Corporation of the death of the Deceased because he had a particular interest in so doing.

Learned Counsel for the Appellant in his grounds of appeal on this issue stated that the learned trial Judge erred in law when he invited the Jury by his various observations to speculate on the reasons for certain actions of the Appellant adduced by the Prosecution which actions were not proven to be relevant or to be insidious and in particular in his treatment of the evidence pertaining to the taking out of the insurance policy by the employees of Honeywell Corporation and whether in fact the Appellant made a claim in respect of the policy.

Learned Counsel conceded that the learned Judge rightly pointed out to the Jury that the policy was a group policy beneficial to either spouse but Counsel submitted where he went wrong was when he indicated that a claim was made by the Appellant when the evidence is far from clear and also because of the fact that the Appellant was lodged at Her Majesty's Prison in Antigua on June 8, 1995.

In his directions on the matter the learned trial Judge stated that the evidence is that no one else is entitled to the insurance benefits on the death of the Deceased so that if claim forms are sent out the Prosecution is asking the

Jury to draw the unmistakable inference that they must have been sent out by the Appellant since no one else can benefit from the insurance but the Accused.

The learned Director of Public Prosecutions drew attention to the fact that because the Appellant was in prison did not mean he could not communicate to the outside world for, in fact, he had communicated to the Deceased's son on the night of the death though it is true to say that on that day the Appellant was secured in a room at the hotel and not yet at Her Majesty's Prison in Antigua.

Valerie Williamson who represented the insurance broker gave evidence that her firm administered insurance to large corporations and one such corporation was Honeywell. She said John and Valerie Baughman both had coverage and John was the one employed with Honeywell. She said in the event of accidental death the Appellant would stand to benefit $200,000. She said her firm received notification of a claim on June 8, 1995 from a benefit representative who worked at Honeywell Corporation.

It cannot be denied that there is no direct evidence that the Appellant

was the one who caused the notification of death to be made to Ms. Williamson's firm on June 8, 1995.

Under cross-examination Ms. Williamson said that in the course of her duties when she receives a notification of death she contacts the beneficiary and sends forms to be completed. She said in respect of Baughman, a claim form was sent to an address on record. That address is not the place where the couple lived before they left for Antigua.

Learned Counsel for the Appellant made the additional submission that no claim was ever made in respect of the policy for a notification of death is not a claim.

I agree with the submission by learned Counsel that to arrive at a motive which can give rise to an intent to cause death there ought to be strong and convincing evidence. It behoves me to look at the evidence in that respect. The Appellant's lie as regards the changing of the locks taken in isolation may seem to be quite equivocal but it may well present a different picture when related to other facts in the case. It will be remembered that the Deceased's son painted before the Jury quite a different picture of the relationship between the Deceased and the Appellant than what the Appellant and other witnesses in Antigua portrayed and the Jury were entitled to believe the story that impressed them the more.

Then I think it can safely be assumed that the Appellant either gave or was privy to the address on record to which the claim form was sent following upon the notification of the Deceased's death. The clear inference arises that the Appellant did not intend to return to his normal Illinois address but to the other address on record to attend to the claim form while at the same time making it more difficult for the Deceased's relatives, in particular her daughter, who had a key to the former lock to their home to gain entry. Once it can be

inferred that the Appellant intended to attend to a claim form for insurance purposes consequent upon death of the Deceased the motive becomes obvious.

Imbalance in the summing-up

One of the grounds of appeal was that the learned trial Judge erred in law when he failed properly, adequately and fairly to put the case for the Appellant to the Jury.

Counsel submitted that the trial Judge made a number of comments or observations some of which invited speculation from the Jury. One such example was where the learned trial Judge told the Jury that the Appellant at one

stage appeared to be crying and whether it was genuine or simulated they had no means of knowing but even if they found that it was genuine they should not allow that to influence their decision one way or another. It seems to me that the learned trial Judge was here telling the Jury that they should ignore the demeanour of a genuine witness.

Another example pointed out was where the learned trial Judge told the Jury they may well wonder why the Deceased drank so much on the day of her death if they found that she only occasionally had a glass of wine. Here again it seems to me the Jury were being invited to speculate.

Learned Counsel for the Appellant stated further that when the trial Judge dealt with the defence of the Appellant he said nothing about the way the couple got on at the hotel and other places in Antigua as had been given in evidence by Kathleen Morton, a witness for the Prosecution and by Keith Roberts the taxi driver who drove them around and who was of the view that the couple seemed to be very much in love.

I am of the view that there is merit in that submission.

Application of the Proviso

I now wish to consider whether the Court should apply the *proviso* to **Section 40** of the **Eastern Caribbean Supreme Court Act, Chapter 143**, and dismiss the appeal on the ground that despite the misdirections referred to above no miscarriage of justice had actually occurred.

To decide that question the Court must try to determine whether it can with certainty be said that had the Jury been properly directed they would inevitably still have convicted the Appellant of the offence of murder.

This necessitates looking at the case for the defence and the case for the prosecution. In his unsworn statement which the Appellant elected to give before the Jury he stated that the relationship between himself and his wife was very close, very warm and very lovable and during the 52 years that they had lived together they had taken trips outside of the United States of America eight times. He gave an explanation as to how the Deceased came to her death. He said while they were on the roof they were looking at each other with his left shoulder towards the hill and her right shoulder towards the hill. He said he pulled out a love card out of his pocket to give to the Deceased and as she went to take it her hand hit the edge of the card and the card landed 2 feet away. It seems both of them then sought to pick up the card from the ground. He said he did not know if her left slipper was on top of the edge of her right slipper or if her right slipper had a lot of friction with the tile for some reason or if she stubbed her toe on a loose tile but when he was coming up with the card she was already stumbling with her weight forward. He heard her say "honey" and as he was coming up and had picked up the card she was

falling over the side of the roof. The cumulative effect of the case for the Appellant is that he was very much in love with his wife and he would never throw her over the roof and she in fact fell over accidentally.

The case for the prosecution is to the contrary. The learned Director of Public Prosecutions submitted that the roof of the hotel had not a sheer edge but that there was a low protecting wall of some sixteen inches before getting to the edge. He observed that there was no evidence of loose tiles and there was no evidence of rain on that day. The visibility was good and the wind was put at 15

knots which was less than a strong breeze.

The case for the prosecution is based on circumstantial evidence built mainly around the evidence of Philbert Jackson, Avon Simon and Warren Workman. Certain assumptions and inferences can readily be drawn from the facts.

Firstly, having regard to the conditions on the day and time in question and with the couple facing each other and the card falling to the ground it seems very unlikely that the Deceased would fall and go over the 16 inch protective wall.

Secondly, the fact that the Deceased's body was found fourteen feet away from the base of the hotel, having regard to the evidence of Workman suggests that her fall to the ground was not accidental.

Thirdly, according to Cheryl Corbyn, the forensic scientist, the Deceased could be said to have been loaded with alcohol. Corbyn found that there was evidence of alcohol in the stomach and contents at the level of 667.27 mg% and in the blood at a level of 93.45mg%. She said the level of 93.45 percent is indicative of some intoxication as the threshold or cut off point is taken at 50mg% i.e. any level above 50 mg% is deemed under the influence. She said

under cross-examination that level of alcohol would affect a person's balance depending on lots of things and she further said Valerie Boughman was way above the level, almost double it. There is evidence that Valerie was not near the edge of the roof. The Appellant himself stated that she was four to five feet away from the edge when he attempted to give her the love card and he said he was next to her, side by side when she started stumbling. It seems to me that such a person in the condition of the Deceased in her attempt to pick up the love card would in all probability fall to the ground immediately below her and would not reach as far as the edge of the roof.

Fourthly, Philbert Jackson in his evidence stated that it was after he yelled

that the Appellant reacted to the woman falling. He said before that the Appellant was just standing there. If the Jury believed Jackson that the Appellant, after the Deceased's fall, only remained standing on the roof and only reacted after Jackson did, this would indicate the unlikely behaviour of a man whose loving wife had accidentally fallen over the edge of the roof of a hotel.

There is a partial similarity with the evidence of Avon Simon, the Duty Manager of the hotel. He said that he was on the second floor of the hotel when he heard a scream. Then he ran downstairs. He was stopped by one of the housemen who spoke with him. He went to the back of the hotel outside where he saw a fat lady lying on the ground. He then saw the Appellant standing on the fire escape and he was looking over and when Simon looked up he moved off. From that evidence it is evident that the Appellant had made no hurry to see what was taking place on the ground. And that as I said is indeed strange behaviour.

Fifthly, there has been an abundance of evidence as to a scream. Philbert

Jackson said it was the scream coming from the top of the hotel that attracted his attention. He said it was a sharp scream like that of a woman. Avon Simon also heard the scream about 5.00p.m. and after he heard the scream he heard as if something had hit the fire escape. And Anderson Benjamin, a houseman at the hotel, also heard a scream and then something hit the metal and fell to the ground. Under cross-examination he said he heard one scream and it was a very loud scream and it was because of that scream he was attracted to what was outside.

Having regard to the condition of the Deceased at the time in question, it seems to me that an accidental fall would not be accompanied by such a sharp or loud scream. The scream would be more consistent with the Deceased recognising the imminent danger that was to befall her. This ties in with

Jackson's description of the manner of the Deceased's fall which suggests that she fell backwards from the roof of the hotel and not in the way suggested by the Appellant in the interview he gave to Assistant Superintendent of Police, Cosmos Marcelle on May 30, 1995.

Conclusion

Despite the deficiencies in the summing-up to which I have referred above, I am of the view that the Prosecution had made a strong and persuasive case that the Appellant had murdered his wife.

I am of the view that had the Jury been properly directed they would inevitably have returned the same verdict of guilty of murder.

I would therefore dismiss the appeal.

A. N. J. MATTHEW
Justice of Appeal (Ag.)