GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.11 OF 2001

BETWEEN:

EDMUND GILBERT

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Lloyd Noel and Mr. Anselm Clouden for the Appellant
Mr. Hugh Wildman for the Respondent

2002: July 3; 4;
November 25.

JUDGMENT

[1] **REDHEAD, J.A.**: Edmund Gilbert, popularly known as Bishop Edmund Gilbert, was a Minister of the Baptist faith for the past thirty-two years. He is a Retired Civil Servant having worked as a Tax Collector for the Government of Grenada for thirty-six years.

[2] He was charged with and convicted on 12th December, 2001 for the murder of fifteen year old Robby Ann Jeremiah. At a separate hearing to determine sentence on 17th December, 2001 the Appellant was sentenced to death by hanging.

[3] The Appellant now appeals to this Court against his conviction. Seven [7] grounds of appeal were filed on behalf of the Appellant. For the purpose of this appeal I think it is convenient to combine Grounds 1 and 2.

[4] It was contended on behalf of the Appellant that the learned trial Judge erred in elaborating on a simple direction on intent and that he failed to give adequate directions to the jury on intention to murder as outlined in section 12 of the Criminal Code and as explained in **Tench v R** [1992] 41 WIR 103.

[5] The learned trial Judge at pages 8 and 9 of the record stressed that it was for the prosecution to prove that the Appellant had the necessary intention to kill at the time of committing the alleged offence.

[6] He explained what is meant by intention and illustrated this by examples.

[7] At page 16 of the record the learned trial Judge told the jury:

> "So, if also you come to the conclusion when you examine all the evidence and you feel sure in your mind that the accused on that morning on that night did kill the deceased you must still consider whether he did kill the deceased intentionally because the pathologist's evidence tends to show that there was some struggle there was some sign of that and in that way it also showed that the deceased was strangled to death.
> The inference may well be that the accused did not intend to kill, might not have intended to kill, might have been a question where arising out of a struggle death resulted. So you also have to consider if you form the view from the circumstantial evidence that the accused did kill Robby Ann you will have to consider whether it was intentionally done. Because if it were not intentionally done that would not amount to murder, it would be merely manslaughter."

[8] And at page 17 the learned trial Judge continued:

> "If you come to the conclusion, however, that he killed Robby Ann, but he did not kill her intentionally, then that killing amounts to no more than manslaughter, and that is open to you. If you feel the accused on that night, did not set out to kill but was concerned about Robby Ann calling `up his name', spreading things about him and he wanted to get her to stop it and a struggle ensued and death occurred it is open to you to return a verdict of guilty of manslaughter.

[9] At the end of the summing up on page 56 of the record the learned trial Judge reminded the jury that if they come to the conclusion, that the appellant killed Robby Ann but he did not intend to kill her then that verdict should be manslaughter.

[10] In my opinion, the learned trial Judge was gratuitously generous to the Appellant because apart from adequately stressing that for the prosecution in order to establish murder must prove that the Appellant, if he killed Robby Ann, intended to kill her at the time of the killing, went much further than he was required. He told the jury if they concluded that the Appellant wanted Robby Ann to stop calling his name and that an argument or struggle ensued and death occurred it was open to them to return a verdict of guilty of manslaughter.

[11] The Appellant made a statement from the dock. That was not part of his case. His defence was a straight denial. His defence was an alibi. He was not there. It was not part of the prosecution's case either. There was no evidential basis for this generosity.

[12] Learned Counsel for the Appellant Mr. Clouden, in support of his contention on ground I relied on **Regina v Woolin** [1999] 1 Cr. App. R. 8 and **Tench v R** [1992] 41 WIR 103.

[13] In **Woolin** the Appellant lost his temper and threw his three-month old son on a hard surface. The son sustained a fractured skull and died. The Appellant was charged with murder. The prosecution did not contend that the Appellant desired to kill his son or cause him serious injury. The issue was whether he had the intention to cause the child serious injury.

[14] In summing up to the jury the learned trial Judge told them, inter alia, that if they were satisfied that the Appellant must have realized and appreciated that when he threw the child that there was a substantial risk that he would cause injury to it, then it would be open to them to find that he had intended to cause injury to the child and they should find the offence of murder proved.

[15] The Appellant was convicted. The Court of Appeal dismissed his appeal. On appeal therefrom to the House of Lords.

[16] Held, inter alia, allowing the appeal that where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty [barring some unforeseen intervention] as a result of the Defendant's actions and the Defendant appreciated that such was the case. The decision was one for the jury to reach upon a consideration of all the evidence. The use of the phrase "virtual certainty" was not confined to cases where the evidence of intent was limited to actions of the accused and the consequence of those actions. Thus, in the instant case the Judge by using the phrase "substantial risk" had blurred the line between intention and recklessness and hence between murder and manslaughter and as that misdirection had enlarged the scope of the mental element required for murder it was a material misdirection. Accordingly, the conviction for murder would be quashed and a verdict of manslaughter substituted.

[17] In **Tench**, the Appellant had a row with his father and while the father was asleep struck him two blows to his head from which he died. The Appellant was charged with murder. At his trial he pleaded legal insanity. Evidence was given by a psychiatrist who had seen the Appellant eight months after the incident. He stated that the Appellant was mentally retarded and could not appreciate the full consequences of his acts. He said that he could not however speak as to the Appellant's sanity at the time of the incident. Other evidence called at the trial suggested that the Appellant was a normal person and was not mentally retarded. The learned trial Judge did not direct the jury on the possibility of bringing in a special verdict under section 1020 of the Criminal Code [guilty but insane]. The learned trial Judge also failed to mention the subjective test in relation to section 71 and her emphasis on the objective test in relation to section 72 gave the impression that the requisite intent for murder was objective, also she failed to direct the jury in relation to the degrees of probability in the context of sections 71 and 72 [of the Criminal Code of St.

Lucia]. The jury found the Appellant guilty of murder and he appealed against his conviction.

[18] Held, substituting a conviction for manslaughter for that of murder:

[1] that the jury had clearly concluded from the evidence that the Appellant was not mentally retarded to the point of legal insanity at the time of the incident. Accordingly, the failure of the learned trial Judge to direct the jury adequately as to the possibility of bringing in a special verdict under section 1020 was not fatal to his conviction.

[2] that the subjective test of intent predominated in sections 71 and 72 and it was a serious misdirection to have left the jury with the impression that the requisite intent for murder was objective.

[3] that although the defence of legal insanity had not been made out to the jury's satisfaction, they might have accepted evidence of the Appellants mental retardation as affecting his foresight of the probable consequences of his acts. Accordingly, the learned trial Judge ought to have directed them on the degrees of probability envisaged by sections 71 and 72.

[20] Sections 12[2] and 12[3] of the Grenada Criminal Code to which Mr. Clouden referred, correspond to Sections 71 and 72 of the St. Lucia Criminal Code.

[19] The instant case is quite dissimilar to **Tench** and **Woolin** and is not one of the `rare' cases where the simple direction on intent is not enough. It is also beyond doubt that what was held under the third limb in **Tench** bears absolutely no relevance to the case at bar.

[20] The first and second grounds of appeal are therefore dismissed. I now deal with ground 5 of the appeal.

[21] Under this ground [5] it was contended on behalf of the Appellant that the learned trial Judge erred in not giving a "good character direction".

[22] Learned Counsel Mr. Clouden in his skeleton arguments submitted that it is settled law that where there is any doubt as to whether both limbs of the character direction apply, or whether it is thought that it may be necessary in the particular circumstances to modify a "character direction", it is desirable to canvass the proposed direction with Counsel before closing speeches. He argued that this was not done in the case at bar.

[23] In support of this argument learned Counsel referred to **R v Durbin** [1995] 2 Cr. App. R. 154.

[24] Mr. Clouden argued that the Appellant had put his character in issue. The Appellant in his defence made an unsworn statement from the dock. In that unsworn statement the Appellant said inter alia:

> "Allecia Victor, her evidence against me is a clear cut pre-fabricated Anansi story about sexual activities with her and paying her money to keep secret. I believe that was done deliberately to ridicule, slander and damage my character, hence the reason why she was kept in hiding over the last 9 months."

[25] Learned Counsel contended that the Appellant by making the above statement put his character in issue and that his client being of good character, he had no previous convictions, the learned trial Judge was under an obligation to give a character direction.

[26] In **Eversley Thompson v The Queen** [1998] A.C. 811 at page 844 Lord Hutton in delivering the opinion of the Board said:

> "In the course of the trial the defence led no evidence in relation to the good character of the defendant. The defendant's written case on the appeal to their Lordships' Board advanced the submission that the defendant had no previous convictions and, that notwithstanding that no evidence was led on this matter by the defence the trial Judge should [in the absence of the jury] have enquired whether or not the defendant had a good character and on learning that he had, should [in accordance with **Reg v Vye** [1993] 1 WLR 477 and **Reg v Aziz** 199 6 A.C. 41] have directed the jury that they should take the defendant's good character into consideration in assessing both the truthfulness of his account to them and whether he was likely to have committed the offence.
>
> It was submitted that this duty which it was suggested lay on the Judge was analogous to the duty of the Judge to direct the jury to consider a possible defence arising on the evidence upon which defence Counsel had not relied and it was

further submitted that the duty was particularly incumbent on the Judge where the accused faced the charge of murder carrying the death penalty…..

….if it is intended to rely on the good character of the defendant, that issue must be raised by calling evidence or putting questions on the issue to witnesses for the prosecution……..Their Lordships are of the opinion that where the issue of good character is not raised by the defence in evidence the Judge is under no duty to raise the issue himself. This is a duty to be discharged by the defence and not by the Judge. The duty of the Judge to bring to the attention of the jury to a possible defence not relied on by defence Counsel is not analogous, because that duty only arises where evidence which gives rise to that defence has been given in the trial."

[27] **Terrance Barrow v The State** [1998] 2 WLR 957 lays down the proposition that when the issue of a defendant's good character is distinctly raised by the defence in the course of the trial, the failure of the trial Judge to give a good character direction is a serious misdirection.

[28] At page 959 Lord Lloyd of Berwick said:

"It should have been obvious that Mr. Clarke was called to give character evidence, and not as a witness of fact. Yet nowhere does the Judge give a conventional direction as to the relevance of good character. Nowhere does he mention the fact the defendant had no previous convictions".

[29] In **R v John Vye** [1993] 97 Cr. App. R. 134 the headnote reads in part:

"where the defendant had given evidence the Judge is required to direct the jury about the relevance of the good character to the credibility of the defendant [the "first limb" of a character direction]…….
In so directing the jury, the following principles are to be applied:
a direction as to the relevance of the defendant's good character to his credibility was to be given where he had testified and made pretrial answers to statements……."

[30] At page 138 the Lord Chief Justice said:

"Clearly, if a defendant of good character does not give evidence and has given no pretrial answers or statements, no issue as to his credibility arises and a first limb direction is not required."

[31] I refer to the case – **Kizza Sealey and Marvin Healey v The State**, Privy Council Appeal No.98 of 2001 from Trinidad and Tobago. Both Appellants were charged with the murder

of Don Christopher Prescott by stabbing him to death. They were each found guilty and sentenced to death. Their appeal to the Court of Appeal were dismissed. The Privy Council by a majority remitted their case to the Court of Appeal to consider whether a new trial should be ordered.

[32] The defences at trail of both of the Appellants were alibis. Both Appellants were known to Corporal Ronald Holder. They lived neighbourly to him. He saw them almost everyday and he had seen them earlier that morning of the incident. Corporal Holder gave convincing evidence to the jury that as he drove his car on that morning he noticed about four men making movements on the pavement at his side of the road. They were about an arms length away from each other.

[33] At first, he could not recognize them but when he was two car lengths away or 12 feet away he notice the Appellants Healey looked towards his car and said "officer" when [he] Holder was about three to five feet away from him. Both Appellants then ran off along Independence Square passing about two to three feet to the left of his car.

[34] When he reached the spot where the other two men were, he saw bloodstains on their upper clothes. After staying there for about a minute or two, he drove off around the block in search of the Appellants, but he could not find them. Each of the Appellants at their trial gave evidence on oath.

[35] One of the issues raised before the Court of Appeal and the Privy Council was the failure of the Appellants' Counsel to raise their good character. Both Appellants swore affidavits in which they stated that at the time of the trial they had clear records and they so informed their leading Counsel.

[36] Lord Hutton writing the opinion for the majority at page 14 said:

> "In the present case the fact that the Appellants did not have the advantage of a good character direction was not due to the fault of the trial Judge…**Thompson v The Queen** [1998] A.C.811,814. Whilst it is only in exceptional cases that the conduct of defence Counsel can afford a basis for a successful appeal against conviction there are some circumstances in which the failure of defence Counsel

to discharge a duty, such as the duty to raise the issue of good character which lies on Counsel … can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice – **R v Clinton** [1993] 1 WLR 1181. In **R v Kamar The Times** 14 May 1999 Henry L.J. said:

> "This case involved the jury in weighing the reliability of the evidence of a husband and wife. The wife was known to have psychiatric problems. The nature of the threats to kill charge meant that the Appellants conduct in the marriage were admissible to show that he intended his threats to his wife to be taken seriously…"

[37] At page 317 paragraph 34 Lord Hutton said:

> "Therefore the crucial question was one of credibility as between Corporal Holder and the two Appellants were the jury satisfied beyond reasonable doubt that Corporal Holder was telling the truth and the two Appellants were not – that Corporal Holder was not lying and that the Appellants were? This was the very issue on which a direction as to credibility and propensity based on good character might have been of considerable importance. The importance of credibility may vary depending on the factual issue in dispute between the prosecution witness and the accused in a particular case, but where the issue in dispute is fundamental to the question of the guilt or innocence of the accused, then when it relates to non-participation in the crime charge or the consent or to some other defence, their Lordships consider that the good character direction is an important safeguard to the accused."

[38] The instant case is distinguishable from the case of **Sealey v Healey** and the authorities referred therein. In all of those cases the Appellants had given sworn testimony and therefore the issue of the reliability of the Appellants' evidence against that of a prosecution witness was a live one. This is not the case.

[39] The Appellant in the instant case gave no evidence. He made a statement from the dock. He made no pretrial statements. Inspector Dunbar testified that when he told the Appellant in the presence of his lawyer that he [Inspector Dunbar] would like to question him about the death of Robby Ann. Inspector Dunbar said that the Appellant was advised by Mr. Clouden not to answer any questions.

[40] Inspector Dunbar said that he questioned the Appellant and he made no answer. In my considered opinion therefore the learned trial Judge was under no obligation to give a good character direction. This ground of appeal also fails.

[41] It was argued that the Appellant, when he was asked questions about the murder of Robby Ann remained silent. He refused to answer any questions from the police officers. Learned Counsel argued that placed a positive duty on the learned trial Judge to direct the jury that they should not draw an adverse inference from his remaining silent or his refusal to answer questions.

[42] In Archbold 2001 at paragraph 15-404 the learned authors wrote:

> "where it is open to the jury to draw an adverse inference, the Judge should identify the relevant facts in respect of which such an inference is open to the jury, then the Judge should specifically so direct them. [**R v McGarry** [1999] 1 Cr. App. R. 377]."

[43] The Appellant was cautioned. He was told by the caution that he was not obliged to say anything. If therefore he exercised his right to say nothing, no sensible jury could draw an adverse inference from his remaining silent.

[44] In my judgment, therefore, the Judge was not obligated to direct the jury that they should not draw any adverse inference from his remaining silent.

[45] This ground of appeal also fails.

[46] Under ground 4 it was argued on behalf of the Appellant that the learned trial Judge admitted irrelevant evidence of a highly prejudicial nature. Having received such evidence learned Counsel contended that the learned trial Judge had a special responsibility to direct the jury either to disregard it or how to treat it.

[47] Learned Counsel referred to the evidence of Allecia Victor who was 17 years old, at the time of the trial. She testified that she was a member of the Appellant's church, so too was the deceased. She described the deceased as her best friend. She said on oath that on Christmas Eve 2001 she was at the Spice Island Mall. Robby Ann was there speaking to one Fabian. She said that the Appellant drove up in his vehicle, slapped Robby Ann 2 or 3

times and then drove off. Robby Ann then returned to school. She, Allecia Victor returned to school also. The Appellant came to the school and he again slapped Robby Ann twice.

[48] She said in her evidence that she went to the Grand Anse Cemetry as a result of a call which she got from the Appellant. On her arrival at the Cemetry she met the Appellant who asked her if Robby Ann had told her anything about him. She told him yes. He then said he then told her he did not know why Robby Ann was going around calling his name.

[49] She said on oath that the Appellant told her that he and Robby Ann used to have sexual intercourse. She then said that she got into the Appellant's vehicle and he drove to Grand Anse bus stop.

[50] The Appellant got out of the van at Grand Anse. He had $150.00 between the bus seats. She took it. He came back and was searching for the money. She allowed him to search. She said nothing. He gave her another $150.00. She took it and went to the store and shopped.

[51] She gave evidence that she used to call the Appellant on his cell phone. She gave the number as 407-4505 which she said the Appellant gave to her. At that time they had a sexual relationship.

[52] She testified on oath before the learned trial Judge and jury:

> "Before 31st January, 2001 I had sex with Mr. Gilbert three times. The places where I had sex – Mama's Lodge, a place on Lagoon Road and twice at True Blue as soon as you enter in the road at True Blue and going to the next road off the Coast Guard area"

[53] The prosecution says this is exactly the same place where the body of Robby Ann was found.

[54] She also testified that on 1st February, 2001 at about 4.00 pm as a result of what she had heard she called the Appellant on his cell 407-4505 and spoke to him. She asked him

where is Robby Ann. He asked her why she was asking him about Robby Ann, if she wanted to know, visit Otway. Otway is a funeral home.

[55] Learned Counsel, Mr. Clouden, in his skeleton argument submitted that this piece of evidence was of such a nature that a jury might reasonably have concluded that the Appellant had taken the deceased to the same place in True Blue for a similar purpose.

[56] Learned Counsel also submitted that the evidence was not probative of the offence with which the Appellant was charged because there was no evidence that the Appellant had sexual intercourse with the deceased at True Blue or at all. He contended that the admission of the evidence had a highly prejudicial effect since the Appellant was not charged with the commission of a sexual offence.

[57] In my judgment the evidence is very relevant and admissible. The prosecution was based solely on circumstantial evidence. The evidence was relevant to show opportunity.

[58] The Appellant is a man of about sixty years old. He is a Minister of religion – Bishop in his church. Allecia Victor testified that she was a member of the Appellant's church. He was in a manner of speaking, her spiritual guide. She was only 17 years old. She testified that the deceased, her best friend was also a member of the Appellant's church, her spiritual guide. She testified before the jury that she had sex with the Appellant at, among other places, True Blue, where the body of the deceased was found. Her evidence, if believed, showed, in my view, an elderly man who was the spiritual adviser of two young girls, one gives evidence on oath that the Appellant was having sexual relationship with her, and admitted to her that he had a sexual relationship with the deceased. Allecia Victor's evidence that she and the Appellant had sexual intercourse at a particular spot in True Blue, the very area where the body of the deceased was found, if Victor's evidence is believed then it means that the place where the body was found, was a place known to the Appellant.

[59] Ground 4 is dismissed.

[60] Mr. Noel, learned Counsel for the Appellant argued under ground 7 that the learned trial Judge failed to put the Appellant's case fairly and that the summing up was unbalanced.

[61] Learned Counsel referred to the record at page 19 where the learned trial Judge stated:

> "I was going to say, because Ms. Hinds saw the accused at a telephone booth, and, therefore the whole idea is that the first call may have been originated from a cellular phone and having gone into the pool, its identity was lost or it could have originated from a telephone booth. And I say this because later on two calls came from the accused's cellular phone. So the prosecution is asking you to infer that all these calls were made by the accused and he didn't disclose his name and asking you to say, well why he did not. Was he hiding something? The defence on the other hand is asking you to infer that the 5:28 am call came from a policeman to CID as it is a police who killed Robby Ann."

[62] Mr. Noel contended that this passage was grossly misleading and a grave misdirection. The issue here is was the learned trial Judge justified in making the comments – "the whole idea is that this first call may have been originated from a cellular phone and having gone into the pool its identify was lost, or it could have originated from a cellular phone or a telephone booth". And having made that comment, did it prejudice the fair trial of the Appellant?

[63] There was evidence that a calls were received at the CID office on 1st February 2001. Jason Gill, Detective Constable testified that on that day at 5.00 am he was on diary duty when one of the phones rang number 4403921. It rang at 5.29 am. He answered the telephone. Continuing his evidence, he said:

> "someone spoke on the phone it was a heavy male voice. I said good morning CID office, how may I help you. [The voice said] officer, the police looking for a girl name Robby Ann Jeremiah. She is on top of the hill in True Blue lie down. I asked if she is dead or what. The person responded "maybe". The phone went `dead'."

[55] Then Reginald Sylvester Detective Constable testified that:

> "on 1st February 2001 he was stationed at CID office St. George's. He was the diarist from 8.00 am to 4.00 pm on that day. At about 7.57 am he was at the front desk the telephone number 4403921 rang. He answered the telephone. A male voice answered on the other end. "Officer, there is the body of a dead girl on top

> of the hill in Mont Toute. Detective Constable said he asked who is speaking. The person said `that is not important'. The telephone line went dead."

[56] Detective Constable Sylvester said that about two minutes later the said telephone rang again. He answered it, a male voice similar to that which called before said "Officer it is not Mont Toute hill it is a hill in True Blue". The phone line then went dead.

[57] Colin Cross the General Manager of Cable and Wireless gave evidence that on 1st February 2001 a call was made at 7.58 am to 440-3921 from telephone number 407-4505. That number is a mobile phone or a cellular phone. Another call at 7.59 to 440-3921and that call originated from the same telephone. That telephone was registered to Bishop Edmund Gilbert up to 1st February 2001 and was in working order. He also testified that he had information of a call being made to telephone 440-2266 at 5.28 am. The record shows a transferred call to CID 440-3921. The call was received on 440-2266 and was transferred to 440-3921.

[58] In a letter from Mr. Colin Cross to Commissioner of Police [C62] in his final paragraph thereof he stated:

> "As stated in an earlier correspondence, the call made to 440-3921 at 5.28 am on 1st February 2001 was made from telephone number 440-2266, registered in the name of the Royal Grenada Police Force. I have examined our call records and I am unable to trace details of any calls made to 440-2266 between 00.00 and 07.20 on 1st February 2001."

[59] Mr. Michael Joseph, Engineer at Cable and Wireless testified that "on the telephone switch records all calls. Every call that is made is recorded."

[60] The state of the evidence is that Colin Cross according to the record, said quite unequivocally:

> "I also have information of a call being made to telephone 440-2266 at 5.28 am. The record shows a transferred call to CID 440-3921."

[61] Significantly, both Detective Constables Jason Gill and Reginald Sylvester testified that calls were made to the CID at 5.29 am, 7.57 am and about 7.59 am on the 1st February

2001 by a male voice. Detective Sylvester said that the voice that spoke at 7.57 am was similar to the voice that spoke at about 2 minutes later. Both Detectives Sylvester and Gill testified that on each of the three occasions the caller began his conversation by saying "officer". They also testified that on each occasion the caller refused to disclose his identity. The last two calls at 7.58 am and 7.59 am were traced to the Appellant's cellular number. What is significant in my opinion is that the Appellant reported to the police his cellular phone was missing on 2nd February 2001. He also denied making any telephone calls to the police on 1st February 2001 or at all. This is what the Appellant said to the jury in his statement from the dock:

> "I made no phone calls to the police on the morning of 1st February 2001 or no time at all. I discovered my cellular phone was missing at around 7.00 pm in the afternoon, hence the reason a report was made on 2nd February 2001."

[61] Yet significantly again, in my view, when he was giving an account of his movements in his statement from the dock, he said:

> "As customary at 5.00 am [on 1st February 2001] I was out of bed…….. I arrived at the church at 5.20 am. That was the morning of the 1st February. I left the church at around 7.20 am on an errand into Frequente. I did stop at a pay phone. This was customary, it is a habit of mine according to the length of time I will speak with the person."

[62] It is interesting in my view the reason he gave to the jury for using the pay phone. If he had had to use a telephone on the morning of 1st February 2001 it is more than likely that if his cellular phone was missing then he would have discovered that.

[63] Sandra Hinds testified that at about 7.30 am on the morning of 1st February 2001 she saw the appellant using the public telephone. He gave her a lift in his vehicle. There was an exchange between her and the Appellant in relation to his making a telephone call that early in a public telephone booth. According to Sandra Hinds the Appellant said "look me cellular phone". He had a cellular phone in his hand. She then told him if you have a cellular phone, why go into the phone booth? He told her the phone booth is cheaper.

[64] If Hinds' evidence is to be believed it is quite clear that the Appellant had his cellular phone up to about 7.30 am on 1st February, 2001. The calls made to CID at 7.58 am and 7.59

am and traced to his cellular there is every justification for saying that the jury could properly infer that he made those calls. Further having regard to the striking similarity in the pattern of all three calls originating from the same source, there was therefore nothing wrong in the learned trial Judge telling the jury that the first call may have originated from a cellular phone or it could have originated from a telephone booth. The Appellant himself said in his statement from the dock that he made a call from a pay phone.

[65] I therefore do not consider this to be a misdirection.

[66] As part of his contention that the summing up was unbalanced, Mr. Noel complained about the treatment of the evidence of Hollis Benjamin by the learned trial Judge.

[67] Hollis Benjamin, police constable testified that on 31st January 2001 at about 3.22 pm he was walking along Halifax Street in St. Georges when he observed the Appellant parked in front of Bryden and Minors Stationery Department. He told the Court that the Appellant was sitting in his vehicle. He saw the deceased leaning up against the van speaking to the Appellant.

[68] The learned trial Judge at page 14 of the record told the jury:

> "so the prosecution is saying that he, the accused, was seen with the deceased on the afternoon of the 31st January 2001 and that the day after the deceased's body was found he turned up at a jeweler with her chain. And it's on that issue you are being asked to infer that the accused is the killer."

[69] I shall return to the issue of the chain later in this judgment.

[70] The learned trial Judge at page 32 of the record referring to the evidence of Hollis Benjamin said:

> "But what is significant about that bit of evidence is that it was not, denied by the defence. No cross examination to suggest that Hollis Benjamin was not speaking the truth. Wasn't suggested to him that that's a lie, so, therefore you have to take it as uncontroverted evidence that in fact the policeman Hollis Benjamin did see the accused and the deceased on 31st January 2001. That is uncontroverted evidence, because the accused said from the dock it was not Robby Ann, it was

> another person. I think the name was Lynette Gilbert or something like that. But you see that was not put to Hollis Benjamin."

[71] The record in fact shows that the Appellant said that the last time he saw Robby Ann Jeremiah was on Monday 29th January 2001 standing at a bus stop near to the treasury yard at about 7.30 am.

[72] The Appellant in his statement from the dock said he left work on 31st January 2001 at 4.15 pm. He went to Granby Street when he got to Kentucky Restaurant Lynnette Griffith came out of the restaurant with a box of KFC in her hand. He stopped in front of Bargain House on Halifax Street. He then left and continued his journey arriving at the church at 5.00 pm.

[73] Inferentially the Appellant is saying that if Hollis Benjamin saw him speaking with anyone with a box of KFC on 31st January 2001 on Halifax Street it could not have been the deceased but Lynette Griffith and the time could not have been 3.22 pm but after 4.15 pm.

[74] I make the observation that Dr. Hubert Daisley Professor of Pathology, who carried out the postmortem examination found multiple abrasions on the body of the deceased. He gave manual strangulation as the cause of death. Then Dr. Hubert Daisley said this:

> "The contents of the stomach were partly digested, white meat, corn cob and there was dice starch food – white meat like chicken, turkey."

[75] Having regard to the fact that Constable Hollis Benjamin said that she was seen with a box of KFC that maybe significant.

[76] The learned trial Judge at page 50 of the record said: " if you believe that the pastor, the details he gave from 5 o'clock, his movement from work to church and back until 5 am the morning, if you believe that story and if you believe that the accused was not in the company of Robby Ann that afternoon and that night if he was in his church and at his home, then you must find him not guilty."

[77] The Appellant in his statement from the dock said on Wednesday 31st January he left work at 4:15 pm and went to Granby Street where he met Lynette Griffith. He spoke to her for a while then left for his church. He arrived at the church at 5:00 pm. At the church he met his biological sister, Veronica Hinds. Later in the afternoon he was joined by Lynette Griffith who arrived at around 5:30 p.m. He was doing a programme for her on the Computer- Church Dedication.

[78] The Appellant told the jury he transported Lynette to her home at 7:45 p.m. He returned to the church where he conducted a bible class which started at 8 p.m. and concluded at 9:15 p.m. He said that he then transported the other members to their respective homes. He then returned to the church and left the church 9:15 pm to 9.30 pm. He returned to the church about 5 minutes to 10:00 pm, set the printer on and left for home. He said that he arrived at his home at 10:05 pm and never left.

[79] The Appellant told the Jury that as is customary at 5:00 a.m. he was out of bed. He arrived at the church at 5:20 a.m. He left the church at around 7:20 a.m. or thereabout on an errand to Frequente. The Appellant confirmed that he did give Sandra Hinds a ride to her home and that she did annoy him but he denied cursing her as she had testified. He arrived at work at 7:50 a.m.

[80] The prosecution's theory is that Robby Ann Jeremiah was murdered between the late afternoon of 31st January, 2001 and the early hours of 1st February, 2001.

[81] Dr. Trevor Friday examined the body on 1st February, 2001 at 7:30 a.m. He said when he closely inspected the body she could have died sometime before because rigor mortis had set in. The doctor explained:

> "rigor mortis is a process the body goes through after death according to the temperature. If it is hot rigor mortis sets in quicker".

[82] If Hollis Benjamin's evidence is to be believed then of course Robby Ann Jeremiah would have been alive on 31st January 2001 up to about 3:22 p.m. From the telephone call received at CID at 5:28 on 1st February 2001 it can be safely inferred that by 5:28 a.m. on

that date she was already dead. Taking the argument to its logical conclusion, on the assumption that Constable Hollis Benjamin's evidence is to be believed, when the doctor inspected the body at 7:30 a.m. on 1st February 2001, time of death would have occurred at the maximum of about sixteen hours, that is from 3:22 pm on 31st January to 7:30 a.m. on February 2001. However, unfortunately Dr. Friday was not more specific as to the time of death.

[83] Mr. Noel contended in his arguments that the learned trial Judge linked the evidence of Hollis Benjamin seeing the accused talking to the deceased at 3:22 pm that afternoon to the appellant in the company of Robby Ann that night when there was no such evidence.

[84] The problem with this submission is that it presupposes that the death of Robby Ann occurred on the night of 31st January 2001. There is no evidence as to the actual time of death. Hollis Benjamin testified that he observed the Appellant in conversation with the deceased on Halifax Street in St. Georges on 31st January 2001. The Appellant denied this. Hollis Benjamin said after he passed them, they were there for about 10-12 minutes. Thereafter Hollis Benjamin could not say what happened.

[85] The Appellant gave a different account, he said that he left work at 4:15 p.m. on the 31st February 2001 he journeyed to Granby Street. He then saw Lynette Griffith coming out of KFC with a KFC box in her hand. He stopped, spoke with her then he drove to his church arrived there at 5:00 pm.

[86] In my opinion therefore it cannot be said that the learned trial Judge linked the evidence of Hollis Benjamin seeing the Appellant talking to the deceased at 3:22 pm to the Appellant being in the company of Robby Ann that night.

[87] On the question of imbalance Mr. Noel, learned Counsel also referred to the manner in which the learned trial Judge treated the evidence of on Onitha Jack and Barbara Ann Williams for the defence as compared to Inspector Earl Dunbar, witness for the prosecution.

[88] Onitta Jack's evidence in examination in chief was, to my mind, straightforward. She testified that Robby Ann Jeremiah was her granddaughter. She lived with her from the time she was a baby up until the 30th January, 2001. She said she saw Robby Ann Jeremiah at her home on 30th January at about 3:30 p.m.

[89] However, in a lengthy cross examination she said among other things that Robby Ann Jeremiah ran away from her home eight times. She said in cross examination:

> "From 19th January, 2001 she was living at my home at Woodlands. She lived with me at the time up to 30th January, 2001…..
> The last time she ran away from my home was the 19th January, 2001.
> After 19th January 2001, the next time I saw her was 30th January 2001. She came home about 3:30 p.m. That is (sic) the last time I saw Robby Ann alive……. On the occasions when she ran away I went in search of her. My son Robert, her father, Barbara Ann, my daughter and Mr. Gilbert the Pastor of my church. In the period 19th January, 2001 and 30th January 2001 I went to St. Georges in an address in Lucas Street in St. Georges at that address Andy lived there. My daughter Barbara Ann Jack and I met Mr. Gilbert and asked him to go with me. The three of us went I met Andy (sic) brother. Andy was not there……. I asked Andy for Robby Ann he replied to me……..:
>
> > In December police brought Robby Ann to my home….when they brought her in January, she had a chain around her neck."

[90] The deposition was then put to her. Continuing her evidence under cross examinations, she said:

> "I did say to the Magistrate I know today is 1st March she ran away on 19th February 2001 when she came from school. I could not concentrate I meant January.
>
> When the policemen brought Robby Ann home she was wearing a chain. It was not a chain I knew belong to Robby Ann. I only knew Robby Ann had a baby chain that I brought for her…. I burst the chain form Robby Ann's neck and gave it to the policemen. After the incident with the chain Robby Ann remained living with me up to January 2001."

[91] She then gave a lengthy narrative of what Allecia Victor told her of being in the company of Robby Ann the night she was killed. She related to the jury that Allecia Victor told her that two men had sex with Robby Ann that night. After they had sex with her one of them took a plank and struck her behind her head she was bleeding through her nose mouth and

ears. The men took her up put her into a vehicle and threw her outside of the vehicle at True Blue. Alicia Victor denied ever saying anything like that to Onitha Jack

[92] The Pathologist Dr. Hubert Daisley who performed the autopsy testified that there was no evidence of any trauma to the back of the head or neck.

[93] When Onitha Jack was challenged by learned Counsel for the Crown that she did not say any of these things to the Magistrate, she insisted that she did. The deposition was then read to her. She then said:

> "I did not get anytime to speak about it to the Magistrate."

[94] I have quoted extensively from the evidence of this witness in cross-examination to indicate how, in my view, that evidence was unreliable and conflicting. Moreover she was deemed a hostile witness. Notwithstanding this the learned trial Judge read to the jury the whole story told to Onitha Jack as she testified was told to her by Allecia Victor. The learned trial Judge did however in dealing with Barbara Ann's testimony tell the jury:

> "that the daughter's story was in keeping with the mother's - they both live together and that they were entitled to draw any inference they want with regard to the fact that they seem to corroborate each other."

[95] The important issue is did the learned trial Judge have the right to make the comment and give the direction which he did to the jury? In my judgment the learned trial Judge did nothing wrong. Neither did he compromise the fairness of the trial by telling the jury that they are entitled to draw any inference they want with regard to the fact that Onitha Jack and Barbara Ann who live together, corroborate each other.

[96] Finally with reference to the learned trial Judge's summing up in relation to Onitha Jack's and Barbara Ann's evidence, Mr. Noel, learned Counsel for the Appellant contended that the learned trial Judge's comments were challenging the jury to see if the evidence was real or true.

[97] In my judgment, there could be no serious complaint about this because this is the function of the jury.

[98] In my Judgment there could be nothing wrong with the direction given by the learned trial Judge to the jury referred to at paragraph 76 of this Judgment.

[99] I now turn to the question of alibi.

[100] Mr. Noel in his skeleton arguments argued that although the learned trial Judge told the jury that it was for the prosecution to disprove the alibi learned Counsel contended "But as he went on and on about the possible falsehood of the Appellant's statement and the possible impact". Mr. Noel then went on to submit that the learned trial Judge confused the jury. On the one hand, and more or less to conclude the alibi was false. He pointed out that the learned trial Judge had told the jury at page 50 of the record "they come here and make up a story, an alibi".

[101] At page 50 of the record, the learned trial Judge began by reminding the jury that the defence has nothing to prove. He went on to tell the jury that:

> "he [Appellant] tells you that he was at home, but there is no obligation to tell you where he was even if he was not at home he has no obligation. It is for the prosecution to disprove his alibi. So even if you do not believe his alibi, if you conclude his alibi is false, that is to say, that it isn't true, that does not by itself let me repeat, if you conclude that the alibi which has been set up is false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account in assessing the entire evidence against the accused because sometimes an alibi is invented and has nothing to do with guilt of the accused. They come and make up a story, an alibi."

[102] In my view it is not a fair criticism for learned Counsel to pick out one sentence or line from a summing up and to criticize the Judge by saying that the learned trial Judge was inviting the jury to conclude that the alibi was false. The summing up must be looked at as a whole.

[103] In Archbold 2002 paragraph 4-402 the learned authors state:

> "The jury should 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 a disgraceful

behaviour. A similar direction as to false alibi should be routinely be given. [**R v Lesley** [1996] 1 Cr. App. R.30."

That is what the learned trial Judge did in my opinion.

[104] At page 51 of the record the learned trial Judge went on to instruct the jury as follows:

> "In the defence when Counsel addressed you he said that if the prosecution does not negative the alibi it is admitted……..I am directing you to disregard that statement. It does not follow, if an alibi is not negative that it is admitted. Counsel did not say by whom, but, I am saying you are to examine all the facts surrounding the alibi. As I have said before, if you believe it then you may act on it. If you do not believe then you may reject it. But rejecting the alibi does not entitle you to say the accused is guilty."

[105] In my judgment the learned trial Judge was meticulous in putting all the issues regarding alibi and he was scrupulously fair in his direction on alibi to the jury. I therefore agree with Mr. Wildman that this ground of appeal is without merit and it is therefore dismissed.

[106] I deal with the allegation by learned Counsel that the learned trial Judge did not follow the directions required where the prosecution relies completely on circumstantial evidence.

[107] There is no misdirection in the summing up, since at a criminal trial with a jury, in which the case against the accused depended wholly or substantially on circumstantial evidence, there was no duty on the learned trial Judge to give the jury a special direction. **McGreevy v DPP** [1973] 1 W.L.R. 276.

[108] See also **Henry v The State** [1986] 40 W.I.R. 312.

[109] This submission has no merit and is therefore dismissed.

[110] Finally, I deal now with ground 9. Under this ground learned Counsel contended that the learned trial Judge wrongly rejected a submission of no case to answer.

[111] As I have said above the only evidence the prosecution relied on was circumstantial. So far as the prosecution was concerned a vital link in the chain of circumstances was the evidence that the Appellant was on the very morning of the deceased's death turned up at a jeweller with a chain which belonged to the deceased. There was much controversy about that chain.

[112] One Demlyn Murray alias "Dumpling" who was then an inmate at Her Majesty's Prisons. Mr. Noel argued that the rejection of this evidence by the learned trial Judge was a "denial to allow the defence case to be put in rebuttal – in violation of section 9 of the Evidence Act Cap 92".

[113] Mr. Wildman, rightly in my view, argued that section 9 does not create an exception to the hearsay rule.

[114] Onitha Jack testified that in December 2000 the police brought Robby Ann to her home. She testified that Robby Ann had a chain around her neck then. She [Onitha Jack] burst the chain and gave it to the police.

[115] Whatever Demlyn Murray was able to say about the chain could be of no evidential value. He could not give relevant testimony in relation to the chain because ASP Joseph had not taken the chain to the prisons and shown it to Murray. In light of the evidence of Allecia Victor who said she saw the deceased wearing a chain which she identified as the chain shown to her by Sgt Dunbar. The evidence is that same chain was handed over to him by ASP Joseph who recovered it from LaGuerre.

[116] In my considered opinion, therefore, in light of what I have already said, whatever evidence given by Murray in reference to the chain must be irrelevant.

[117] The defence for example denied strenuously that the chain presented in court as the chain of the deceased was the one handed over by the Appellant to the jeweller. The defence

also disputed that the deceased had that chain at the time of her death. Lastly, the defence contested the origin of the chain.

[118] Livingstone La Guerre testified before the learned trial Judge and jury that on 1st February 2001 between 1:00 pm and 2:00 pm the Appellant came to his shop. He is a jeweler. The Appellant gave him a chain and asked him to use it in a chain for him.

[119] La Guerre said that the Appellant had visited him in his shop before, in December 2000 when he and the Appellant had a discussion. On that occasion the Appellant told him that he wanted to order a chain. He told the Appellant that the gold chain would cost $300 but if he had any gold it would cost him less.

[120] He said that the next time he saw the Appellant was on 1st February when he brought the gold chain to him. Mr. La Guerre said on oath the chain the Appellant gave him was a "figaro" a chain with three small links and one big link.

[121] He also said in cross examination "The catch or hook mechanism [on the chain] was bad".

[122] There was a join on the chain. La Guerre testified that on Sunday 4th February 2001 ASP Joseph came to his home and he handed over the chain to him. He placed a tape with his initial on the chain.

[123] A chain was tendered in evidence at the trial and he identified the chain as the one handed over to him by the Appellant.

[124] Allecia Victor testified that on Saturday 27th January 2001 she was in the company of Robby Ann. She observed that Robby Ann had a gold chain around her neck. She described the gold chain as a chain with small links. She spoke to Robby Ann about the chain. She said it was the first time she had seen Robby Ann wearing that chain. Allecia Victor testified that on 4th February 2001 Sgt. Dunbar showed her a chain with small links

she said it was the same chain she saw Robby Ann was wearing. She identified the chain that was tendered in evidence as the one which Sgt. Dunbar had shown to her.

[125] The defence sought to establish that the chain handed to La Guerre by the Appellant could not be the chain worn by the deceased. Firstly by the Appellant himself denying that was the chain he handed to La Guerre. He said that the one he gave to La Guerre had a perfect "catch" with a bronze joining. Secondly, the defence sought to introduce evidence of the chain through Onitha Jack and through evidence of a conversation which ASP Anthony.

[126] The case as I have said is based solely on circumstantial evidence. There is the evidence of the telephone calls, two of which were traced to the Appellant's cellular phone, the caller giving information of the body of the dead girl, without revealing his identity. There is evidence from Sandra Hinds that at 7.30 am on 1st February the Appellant had his cellular phone. There is evidence that he reported to the police that his cellular phone was missing at about 7.00 pm on 2nd February. The evidence of Allecia Victor which if believed establishes that the Appellant knew the location where the body of Robby Ann was found. The evidence of Allecia Victor coupled with that of Livingston LaGuerre if accepted by the jury shortly after Robby Ann's murder, the Appellant turning up at the jeweller's shop with her chain. These bits of evidence in my view when put together establish beyond doubt the guilt of the Appellant.

[127] The appeal is dismissed. The conviction and sentence are affirmed.

Albert Redhead
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Ephraim Georges
Justice of Appeal [Ag.]