SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.33 OF 2004

BETWEEN:

PATRICK LOVELACE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. J.H. Bayliss Frederick, Mr. Sharaz Aziz and Ms. Vynnette Frederick for the Appellant

Mr. Colin Williams, Director of Public Prosecutions, with him Ms. Sandra Robertson, Crown Counsel for the Respondent

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2006: May 23;
October 9.

JUDGMENT

[1] RAWLINS, J.A.: The appellant, Patrick Lovelace, was convicted and sentenced to death for the murder of Lokeisha Nanton. When the case came for hearing before this Court in February 2006, Mr. Aziz, learned Counsel for Lovelace, raised the issue of the accuracy of the Record of Appeal on an Application to produce the tape recordings taken at the trial. This Court traversed the case to permit Counsel for Lovelace to have a copy of the tapes and for an amended Record to be prepared by mid-April 2006. Nothing materialized from the arrangements that

were made with the court office to copy the tapes. Counsel for Lovelace nevertheless filed new grounds of appeal and the appeal proceeded on them.

[2] The actual Notice of Appeal contained 2 grounds of appeal. The first ground stated that the DNA evidence did not implicate Lovelace. However, this did not appear in the new grounds of appeal which Counsel was permitted to argue. This was a wise omission because the DNA evidence was neutral. It did not implicate nor exonerate Lovelace. It did not point to another person. Ms. Brydson, the DNA Analyst, informed the Court that although her tests revealed the presence of semen and spermatozoa on vaginal swabs taken from Lokeisha and on items of her clothing, the spermatozoa was insufficient and environmental factors had so degraded the semen and spermatozoa that it was not possible to obtain a positive result from them. The decision by the prosecution to call the DNA expert to give the DNA evidence notwithstanding this was in keeping with the procedural guidelines stated by Alleyne, JA, as he then was, in Daniel Dick Trimmingham v The Queen.[1]

[3] The second original ground contained in the Notice of Appeal stated that the defence was not allowed to put its defence adequately at the trial. This ground was modified in ground 6 of the 9 new grounds of appeal which state as follows:

1. The learned trial judge erred in rejecting the no case submission made on behalf of the accused at the end of the prosecution's case.
2. In relation to these proceedings there is no adequate and/or accurate record of appeal, which reflects the true and correct proceedings at first instance.
3. The learned trial judge's directions in law as regards corroboration were confusing and would not have assisted the jury in dealing with the evidence of an accomplice.
4. Having regard to the current record of appeal it can safely be said that there would be a lurking doubt thereby rendering the conviction unsafe.

[1] St. Vincent and the Grenadines High Court Criminal Appeal No. 2003. In Trimmingham, this Court ordered a retrial of a person who was convicted of murder on the ground that the prosecution had abdicated its duty to ensure a fair trial when it did not call the DNA analyst.

5. The learned trial judge by her conduct was likely to or tended to show bias in favour of the prosecution at the early stages of the proceedings.
6. The Defence was not allowed to put or adequately put their defence during the trial having regard to evidence available at the locus in quo.
7. The learned trial judge erred in that she failed to give adequate directions to the jury as regards recognition and Turnbull guidelines.
8. The closing speech made by the Director of Public Prosecutions on behalf of the Queen was unfair and he sought to discredit the Defence by asserting his credibility.
9. The trial judge erred in that she failed to direct the jury properly or at all on the issue of good character.

[4] Mr. Aziz did not pursue ground 7, which related to the Turnbull or identification direction, in the appeal proceedings.

[5] Grounds 2 and 4 raised the issue of the accuracy and adequacy of the Record of Appeal. Mr. Aziz submitted, in effect, that the Record is so inaccurate that it does not permit the defence to properly pursue the appeal. This, he said, was prejudicial to Lovelace's appeal because the material which was necessary to pursue the appeal on grounds 5 and 6, and material showing the behaviour of Ramona Caruth, the only eye-witness produced by the prosecution, that could go to discredit her evidence are not reproduced in the Record.

[6] An examination of the Record does not indicate that the trial judge acted to the prejudice of Lovelace during the trial. There is nothing that shows that the defence was not permitted to put its case in relation to what transpired at the visit to the locus in quo. The Record only shows that the Court rose at 9:30am on 14th December 2004 to visit the locus and that Court resumed at 9:50am. It was announced in Court earlier that morning that Ramona Caruth was not available to attend because the Police did not locate her. The Record does not show that the defence asked the Court to permit them to ask any question as a result of the visit to the locus.

[7] Mr. Williams, the learned Director of Public Prosecutions, insisted that while there are minor typographical errors, they are not of a serious nature to mean that there is no proper Record on which the appeal could proceed. This Court is not in a position to determine whether this is the case or otherwise. I think that there was adequate time within which to amend the Record. Grounds 2, 4, 5 and 6 are therefore redundant. The live grounds are therefore ground 1, the no case submission; ground 3, the directions on corroboration; ground 8, the Director's closing address to the jury and ground 9, the good character direction. First, however, the facts in some detail in order to provide a necessary background against which these grounds will be considered.

The facts

[8] The deceased, Lokeisha Nanton was a 12 year old schoolgirl at the time of her death. She played in the Sion Hill Steel Orchestra. Her mother, Francita Nanton, operated a shop in the vicinity of the place where the band practiced. She last saw Lokeisha alive at about 9:00pm on the night of 1st July 2002, shortly after Lokeisha's band practice. According to the evidence of Yolanda Baptiste, on that same night, she (Yolanda) was with Ramona Caruth, one Shanda and Lovelace at a street party at River Road. They were having drinks when, at about 9:00 o'clock, Ramona left them and returned a few minutes later with Lokeisha. Lovelace bought drinks for them all. Lokeisha left some 15 minutes later. Ramona left with her. Lovelace left some minutes later and did not return until about midnight. Ramona returned about 20 minutes later. Lokeisha did not return. Her nude, lifeless body was discovered early the following morning – 2nd July 2002 – in a yard on the route to her home. Her neck was tied with a piece of shirt to a limb of a mango tree. The body was in a semi-kneeling position. What appeared to be blood was oozing from her nostrils and ears. She died from strangulation. The DNA test and the test by the Pathologist found evidence of violence and recent sexual intercourse.

[9] Ramona's evidence is that when she left with Lokeisha on the night of 1st July 2002, they got into a passenger bus from which they disembarked at the Sion Hill junction. They were walking towards Lokeisha's home when she heard Lovelace calling her. He caught up with them and asked her (Ramona) to "set him up" with Lokeisha. She (Ramona) objected and told him that Lokeisha was under age. Lovelace followed them, grabbed Lokeisha by the throat and dragged her under a mango tree. She (Ramona) fought with Lovelace and pulled Lokeisha's hand to get her away from him. She did not succeed. Lovelace tore off Lokeisha's clothes and had sexual intercourse with her. When he got up off Lokeisha, she (Ramona) noticed that Lokeisha was not moving. After Lovelace threatened to do to her what he had done to Lokeisha, she assisted him to lift up Lokeisha as he tied her to the tree. Lovelace left the scene.

[10] According to Ramona, after Lovelace departed, Lokeisha's hands were still shaking. Lokeisha asked for her (Ramona's) help. She tried to help her, but she was unable to untie the shirt because it was tied tightly. She left Lokeisha hanging and returned to town where she had left the group. Lovelace was there. They went to Slick's Bar. Lovelace bought barbecue for them. Ramona, Yolanda and Shanda had a wining dance contest. Lovelace adjudged Shanda the winner. He subsequently sent Shanda home by taxi. Ramona, Yolanda and Lovelace then went to Yankee's Bar, where she bought drinks for Yolanda and herself with money that Lovelace had given her. Yolanda went into one of her friend's car to sleep. Ramona sat on a bench with Lovelace. They conversed. She was chilly. He gave her a coat which she put on. They left by van together at about 6:00am on 2nd July 2002 and travelled to the house in which Lovelace lived with one Brindsley Peters at Cedars. That day was her 16th birthday and Lovelace gave her gifts. Peters also gave her gifts. She actually went with Peters to the Hotel where he worked with Lovelace to collect 2 of the gifts. She heard of the discovery of Lokeisha's body while she was travelling back to Kingstown by bus that morning.

[11] Ramona said that when she arrived at the Kingston bus terminal, she approached a Police Officer and informed him that she knew about Lokeisha's murder. She gave a statement to the Police, and 4 subsequent statements on various dates in which she implicated some 6 other persons but not Lovelace. She gave different versions of the murder. This, she said, was in an attempt to cover up for Lovelace, because she loved him and was also afraid of him. She remembered his threat at the time when he raped Lokeisha and tied her to the tree. She asked the Police to put her into protective custody because she feared for her life. They did. She was in protective custody at the Montrose Police Station. She only implicated Lovelace in her 6th statement to the Police, which was given on 29th November 2002. At the trial, she said that this statement was truthful, but she had lied in the others.

[12] According to Yolanda, on several occasions since the discovery of Lokeisha's body, Lovelace asked her not to inform the Police that he was with the group on the night of 1st July 2002. She at first promised him that she would not have informed them. However, in the presence of Ramona and Lovelace at the CID on 26th November 2002, she told the Police that he was with the group. Ramona confirmed Yolanda's statement, but Lovelace denied it.

[13] Lovelace opted to give no evidence at the trial. He relied on the written statement that he gave to the Police on 27th November 2002. The statement referred to the confrontation which took place at the CID the day before when Yolanda and Ramona said that Lovelace was with the group. He insisted, in the statement that he was not with the group on the night of 1st July 2002. Whereas in an earlier oral caution statement he said that he was not in Kingstown or at Sion Hill on the night of 1st July 2002, in the written statement he said that he travelled to Kingstown where he was with Trinidadian friends. He said that he was not with the group that included Ramona.

[14] According to Lovelace's written statement, he met these Trinidadian friends at Paradise Inn Hotel at about 7:15pm on that night. They got to Kingstown around 8:30pm. He saw Ramona at River Side sitting on a wall with her boyfriend, "Dembi", for whom he bought a beer. He left "Dembi" and Ramona. He left Riverside at around 10:30pm with his Trinidadian friends and arrived at Slicks 2 Restaurant and Bar at about 10:45pm. There was a dance there. He left the dance at about 2:30am and caught up with his Trinidadian friends on Bay Street. They walked up Huggins Street past Yankee's Bar, up to the Bandstand area in Kingstown and caught a van there at about 4:20am. He arrived at his home in Argyle at 5:10am. He did not go to Cedars where he also lived in the house with Brindsley Peters. He denied that he was ever at Sion Hill with Ramona and Lokeisha on the night of 1st July 2002.

No case submission

[15] A useful starting point is the very succinct statement of principle from the head-note of the judgment of the Privy Council in Taibo (Ellis) v R.[2] It states:

> "On a submission of no case to answer, the criterion to be applied by the judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed."

[16] This statement was made on the authority to R. v Galbraith,[3] the *locus classicus* on no case submissions. In Galbraith, the basic principles were stated thus:[4]

> "If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weaknesses or vagueness or it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on 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

[2] (1996) 48 WIR 74.
[3] [1981] 73 Cr. App.R. 124; 2 All E.R. 1060; 1 WLR 1039.
[4] [1981] 73 Cr. App.R. 124, at page 127.

> taken of a witness's 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 on which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[17] At the end of the prosecution's case, Ms. Frederick, learned Counsel for Lovelace, submitted that the evidence, which the prosecution presented, was so manifestly unreliable and insufficient that the jury could not properly convict on it no matter how well directed. She pointed out that the only eyewitness to the murder, Ramona, the pillar of the prosecution's case, was an accomplice whose evidence was self-serving, inconsistent and unreliable. Ms. Frederick referred to Ramona's many versions of the murder and of her naming of other persons as the perpetrators of the offence before she named Lovelace in her last statement that she gave on 29th November 2003. She asked the judge to note that the last statement was made more than 1 year after Lokeisha was killed and a few months after she (Ramona) left protective custody in August 2002. Ms. Frederick noted that each time that Ramona gave a statement she insisted that the particular version was true, and, additionally, she admitted at the trial that her statements were a mixture of lies and truth. Ms. Frederick also referred to Ramona's demeanour as a witness, evidenced by her "dramatic behaviour" in Court.

[18] Ms. Frederick asked the trial judge to note that there were inconsistencies in the evidence that Ramona gave at the trial, as well as between the evidence that she gave at the preliminary inquiry and at the trial. She noted that the DNA analysis did not link Lovelace to the crime. She therefore urged the trial judge to find that the jury should not be required to sort through the confusion presented by Ramona's evidence in the interest of justice.

[19] The judge dismissed the no case submission on the 2nd limb of the principles stated in Galbraith. She found that the evidence, which the prosecution presented, was not so tenuous or inconsistent that a jury properly directed could

not have properly convicted on it because that evidence made out a *prima facie* case for him to answer. In dismissing the no case submission, she stated:

> "The submissions made by defence counsel speak to the reliability of the witness Ramona Caruth, the consistency of her evidence, whether or not you could rely on what she said and all the circumstances. These are matters that fall within the province of the jury. It is for the jury to determine whether or not based on the fact that she gave ten statements, five statements, whether or not they can trust her based on what she said in court, they can rely on what she is saying, taking into consideration what the other witnesses have said in relation to the matter. The court has to determine whether having listened to all of the witnesses in the matter, the court is of the view or not of the view that the prosecution have established a prima facie case against the accused. I am not of the view that this case is so tenuous, is so inconsistent that a jury properly directed could not properly convict."

[20] Before this Court, Mr. Aziz insisted that the judge should have upheld the no case submission because the prosecution's evidence was exceptionally tenuous. He re-iterated the submissions that Ms. Frederick made before the High Court in some measure. Additionally, he pointed out the many times during her evidence that she either did not know or did not remember or recall events. He asked this Court to note that Ramona failed to appear when she was required to attend the locus with the Court on 14th December 2005 to point out to the jury where events occurred. Mr. Aziz submitted that these matters and the fact that Ramona is an accomplice with an interest to serve, and the last person who was with Lokeisha, make her evidence so unreliable as to undermine the prosecution's case totally. According to Mr. Aziz, these matters raised very serious questions about Ramona's credibility. They also presented a significant amount of "duff" that, on the authority of R. v Shippey,[5] the jury should never have been required to sift through in order to determine the truth.

[21] It is my view that, although the prosecution's case was not strong, the learned judge correctly dismissed the no case submission on the 2nd limb of Galbraith. The prosecution's case was built around the evidence of Ramona, the only

[5] [1988] Crim. L. R. 767.

eyewitness to the murder of Lokeisha. She is an accomplice, who gave several versions of the murder to the Police in which she named other persons as the perpetrators of the murder before she named Lovelace. There are inconsistencies in those statements and between the deposition that she gave at the preliminary inquiry and her evidence at the trial. However, her evidence was that which she gave on oath at the trial. It was within the province of the jury, guided by the directions of the judge, to decide what weight to give to that evidence or whether to believe or to reject it or any part of it. They were entitled to determine whether she was a credible witness, in the light of her inconsistent statements, the inconsistencies in her evidence and her demeanour or behaviour. To this extent the strength or weakness of the prosecution's evidence depended on the view that the jury took of the reliability of Ramona. It was within their purview to convict if, notwithstanding these matters, they believed her evidence at the trial. The learned trial judge therefore correctly permitted that matter to be decided by the jury. She did not err when she dismissed the no case submission. I would dismiss the appeal on this ground.

Corroboration

[22] A judge may warn a jury to exercise caution before convicting on the uncorroborated evidence of an accomplice. However, in England as well as in St. Vincent and the Grenadines, a judge is now under no general duty to warn them that it would be dangerous to convict on that evidence. In England, statute[6] has abrogated the obligatory requirement to warn the jury that it is dangerous to convict on that evidence. R v Makanjuola[7] confirmed that even under the statute, it is a matter of discretion whether a judge, in summing up, ought to urge caution with regard to particular witnesses, including accomplices. The Privy Council confirmed, in R v Gilbert (Rennie)[8], that the approach is the same for Commonwealth Caribbean jurisdictions even in the absence of statute.

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[6] Section 32(1) of the Criminal Justice and Public Order Act, 1994 (U.K.).
[7] [1995] 1 WLR 1348. See pages 1351-1352 of the Judgment.
[8] (2002) 61 WIR 174, on appeal from this Court sitting for Grenada.

[23] In Gilbert (Rennie), the accused was convicted in Grenada for attempted rape, mainly on the uncorroborated evidence of the victim. The trial judge did not give the jury a corroboration direction, or warn them of the danger of convicting on that evidence. There was no statutory provision similar to the English statute. This Court held that the corroboration warning could not be ignored. The Privy Council found, however, that the rule that required a mandatory corroboration warning was merely a rule of practice, which is liable to be re-assessed and reformulated in the light of further experience or research. Their Lordships recommended the practice and guidance set out at in the judgment of Lord Taylor, C.J. in Makanjuola.[9]

[24] The Makanjuola guidance states that the question whether to give a warning or a corroboration direction is within the discretion of the trial judge. If the judge determines that a warning or corroboration direction should be given, the judge should determine the strength and the terms. The strength and terms would depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge may often consider that no warning is required. However, the judge should consider it necessary to urge caution where a witness is shown to be unreliable. In more extreme cases, for example, where a witness is shown to have lied or to have made previous false complaints, a strong warning may be appropriate. The judge may in such cases suggest that it would be wise to look for some corroborating evidence. There is no specific formulation to which the direction must conform and an appellate tribunal should be slow to interfere with the exercise of the trial judge's discretion, since that judge would have had the advantage of assessing the manner and content of the witness's evidence.

[25] In her summation in the present case, the learned judge told the jury that, on her own evidence, Ramona was an accomplice to the murder of Lokeisha. The judge then warned them that it would therefore be dangerous to convict on Ramona's

[9] At pages 1351-1352. See Gilbert (Rennie), at page 185.

uncorroborated evidence. She correctly explained the meaning of 'corroboration' and cautioned them to take care before convicting on her evidence because there was very little, if any, evidence that corroborated Ramona's evidence. She told them that if having heard Ramona's evidence in court they were sure that she had truthfully recounted what happened to Lokeisha and that Lovelace murdered her they could convict him. She told them they could assess whether Ramona's evidence was truthful or reliable from the coincidence of any consistent evidence given by other witnesses. She then repeated, in effect, that if they believed Ramona's evidence, they were not required to find corroboration of it in order to convict Lovelace if her evidence satisfied them of his guilt beyond a reasonable doubt. The judge then went on to point out the inconsistencies in Ramona's evidence to the jury. Having heard these directions they convicted Lovelace.

[26] Mr. Aziz submitted that the directions on corroboration tended to confuse the jury. He said that when the judge told them, on a full corroboration direction, that it was dangerous to convict on the evidence of an accomplice unless the evidence is corroborated, she implanted in their minds that they should look for corroborating evidence before coming to a conclusion of guilt. According to Mr. Aziz, the full corroboration direction was not necessary in this case; just as such a direction is not desirable in a case in which co-defendants give evidence against each other. I must indicate, however, that even in the case of co-defendants, the trial judge still has a discretion as to what warning to give to the jury.[10] According to Mr. Aziz, the judge only exacerbated the confusion in the minds of the jury when she told them that although Ramona is an accomplice, they were not legally required to find corroboration of her evidence in order to convict, and, in addition, that they could have convicted Lovelace if they believed her evidence.

[27] The prosecution's case was built around the evidence of Ramona. She admitted that she lied, and had given previous inconsistent statements. Once the trial judge

[10] It was even suggested in R. v Burrows that it is inappropriate to give any warning in a case where co-defendants run mirror-image "cut-throat" defences.

decided that it was an appropriate case to be sent to the jury, it was certainly within her discretion to give a strong corroboration warning. With respect, the submissions of Mr. Aziz looked at the summation of the learned judge disjunctively. When considered holistically, the judge gave a direction which although not classical, falls within the compass of the warning that she could have given. She might have been overcautious when she told the jury that it was dangerous to convict on Ramona's evidence. However, the formulation that she used was not only within her discretion, it was rather more helpful than prejudicial to Lovelace's case. I would also dismiss the appeal on this ground.

The DPP's closing address to the jury

[28] The general principle is, on the authority of Mohammed v The State[11] and Mantoor Ramdhanie and Others v The State,[12] that in the closing speech to the jury, a prosecutor should not venture into the province of impropriety or unfairness by asserting his or her own personal belief on any aspect of the evidence and thereupon urge the jury to believe that evidence also. A prosecutor should not use language that is vindictive or inflammatory against an accused and should not introduce inadmissible or irrelevant material that could colour the consideration of the evidence by the jury. However, in Alexander Benedetto v The Queen[13] the Privy Counsel accepted the view that was expressed by this Court that a prosecutor's closing speech is to be assessed in the context of the prosecutor's own environment, which permits the prosecutor to speak to the jury in language and a style that the jury understand. Their Lordships accepted that from this perspective there is nothing that prevents a prosecutor from delivering a robust closing speech.

[29] Mr. Aziz complained that the learned Director went beyond the boundary of propriety and fairness when he used language that was vindictive or inflammatory

[11] [1999] 2 AC 111, at 125g and 126a.
[12] [2005] UKPC 47.
[13] [2003] UKPC 27.

against Lovelace and introduced inadmissible or irrelevant material that was prejudicial to him (Lovelace). He referred, in particular, to the following statement:

> "So Mr. Foreman, Ladies and Gentlemen of the Jury, this is the man that Lokeisha would have seen; this is the man that Ramona told you she saw and you know what, Mr. Foreman, Ladies and Gentlemen of the Jury, this is the man who bought for an unsuspecting Lokeisha drinks, I don't want to offend the sensibilities of us Christians, but like the Last Supper, before he committed the heinous betrayal. But that is not quite at the same level, but I am just drawing the sort of indication – before I rape and kill you, I feed you."[14]

It is my view that the words in this passage which are highlighted are irrelevant, unnecessarily emotional and prejudicial even used for the purpose of drawing a reference.

[30] Mr. Aziz also submitted that the learned Director breached the principles in Mohammed and Mantoor Ramdhanie and sought to assert his own personal credibility and exhorted the jury to accept the prosecution's case because he personally believed that it was true. He referred, in particular, to the following statements:

> "Of course the prosecution we here are satisfied that the person who did the act, the person who with malice aforethought caused the death of Lokeisha Nanton was the accused Patrick Lovelace and we are inviting you members of the Jury, Ladies and Gentlemen of the Jury, to come to that very same conclusion that we have come to based on the evidence in this case. Because Ladies and Gentlemen of the Jury it is really for you to have the final say. You are the judges of the facts in this matter. It is for you to say that yes the prosecution has satisfied me beyond reasonable doubt that Patrick Lovelace is the person who assaulted Lokeisha Nanton on that Monday night; that Patrick Lovelace is the person who used Lokeisha Nanton that night; that Patrick Lovelace was the man who abused her on that night; that Patrick Lovelace is the man who killed Lokeisha Nanton and he is therefore guilty of the offence as charged."[15]

> "Mr. Foreman, Ladies and Gentlemen of the Jury, I submit to each one of you, individually, collectively, that once you accept as I have done as reasonable people, men and women of this country, once you accept

[14] Highlight added.
[15] Highlight added.

> all those facts, once you accept them as being the truth, that she know Patrick, she liked him, she cared for him, she been on the scene and all of that – convict the man – that is all you have to do. You accept the truth, you determine what you accept you know. I accept it, I understand it, I believe her. She has said so on oath. She has indicated that, I tell the police all kind of things. She admits that, she ain't deny it, she ain't try to hide it, she ain't try to dodge it. Up front: "I told police all kinds of things whatever was coming to my mind. In some of the statements is a mixture of truth and lies". She acknowledges all of that. What's the problem? What's the problem with that?"[16]

> "She [Lokeisha] spent several days in the stand, and on each occasion every time she go into that witness box you see her take up the Bible and take the oath. I believe she was telling the truth about Patrick Lovelace murdering Lokeisha Nanton and Mr. Foreman, Ladies and Gentlemen of the Jury, I think that you should too. She has explained why she do what she did to the satisfaction of the prosecution and I submit to you, to your satisfaction also because in essence what somebody says here in the witness box is the evidence and we have to understand witnesses in their own social and personal context."[17]

[31] The fact that the learned Director very properly reminded the jury that in the end they are the judges of the facts, did not, in my opinion, obviate or obliterate the prejudicial exhortation to them in the highlighted portions that they should have believed the prosecution's case because he believed it.

[32] Mr. Aziz further submitted that the learned Director breached the principles in Mohammed and Mantoor Ramdhanie by attacking the case for the defence in a disparaging manner. He referred, in particular, to the following statements:

> "But this case to me has introduced what I would call a novel defence to me, a new kind of defence probably unknown in the rules, what I would call a chameleon defence after that famous lizard – it is a slow moving lizard with a long tail and it has a long tongue, big eyes; but the most important feature of the chameleon it's best known characteristic is that it changes colour, it tries to adapt to its environment – that is what the chameleon does. Depend on where it is and so on it has this ability to change its colour and to try to blend in to the environment. So I say that what we have seen in this case is a chameleon defence because of the twist, the turns, the adaptation, the changes and the amendments that we

[16] Highlight added.
[17] Highlight added.

have seen coming from the defence – twists, turns, changes, amendments, adaptations. So like the chameleon the defence has tried to change course, change colour, adapt to the situation as we go along."

"I would like to remind you of those twists, those turns, the adaptations, the changes and the amendments to reinforce my characterization of the chameleon defence and to reassure you that in dismissing his defence and moving on to the prosecution's case and convicting him, you are doing the right thing, the safe thing, the correct thing in law and fact because this chameleon defence started off with Patrick Lovelace saying certain things to the Police and giving certain statements."

"So this chameleon defence is pretty much like what you would have [a] juggler in the circus, juggling balls, you know how these jugglers in the circus, these clowns how they juggle balls, but the essential difference between the chameleon defence that we have seen being run in this case and the circus clown is that the clown in the circus throws up the balls, the oranges or whatever and he catches them, he juggles them but in the chameleon defence what they doing, tossing up several different defences, not with the intention of them catching anything you know, they want one or two or three or all of you grab at one of those defences that they throwing up, so twisting and turning and changing, so they don't want to catch anything that they throw up, they want you Mr. Foreman, Ladies and Gentlemen of the Jury to catch something from that particular defence. That is what we have in this case. So I am saying we have already disposed of the defences – multitude of them – the different things that are thrown at us in the hope that the jury would grab on, like the chameleon long tail or long tongue that "craps" and grab at something, but we don't want to grab at nothing like that, we don't go clutching at straws."

[33] In my view, these statements introduced material that was irrelevant for the purpose of discrediting the case for the defence. This was unnecessarily extended by the following statement in which the learned Director remarked adversely, in a manner of speaking, on Lovelace's right, given by law to exercise his option to say nothing in his defence at his trial and therefore not to be subjected to cross-examination:

"You see Counsel pressed Sgt. James because he realized this is a solid investigator, let me try and ruffle him. You going rough a real cucumber man? And full marks it is a cross-examiner's tool because I tell you Mr. Foreman, Ladies and Gentlemen of the Jury, I too was salivating, waiting for him to only put Patrick Lovelace in the box. Yeah, because you want to get somebody in the box who you could really

> tear to pieces and if you could only shake a professional man who is dispassionate, who is responsible well then it would tend to shake in the eyes of the jury the prosecution's case. So you know, try to set up Sgt. James for the kill."[18]

[34] In the premises, it is my view that the Director's closing speech was more than a robust closing speech that was made in a language that the jury understood. It went further than that which Alexander Benedetto permits and breached the principles of fairness in a closing speech which is forbidden in Mohammed and Mantoor Ramdhanie. I would therefore allow the appeal on this ground.

Good character direction

[35] In keeping with settled practice, at the end of her summation, the trial judge asked Counsel in the case whether there was anything that they wished her to address to the jury. Mr. Williams enquired whether it was necessary to give a "Wilson" type direction. The reference was to a good character direction based on the principles emanating from the judgment of this Court in Harry Wilson v The Queen.[19] The learned trial judge asked whether any evidence was led. She said that this was necessary in order to permit the Court to issue such a direction. Mr. Williams indicated that no evidence was led. The judge then asked the opinion of Mr. Frederick, learned Counsel for the defence. He informed her that he would rather say nothing at all except in another forum. It is quite unfortunate that Counsel deliberately withheld his assistance from the Court when he had a duty to assist the Court unreservedly. In any event, the judge did not give a good character direction.

[36] In Troy Simon, this Court considered the applicable principles on good character direction. I noted[20] that the basic principle on which a court may determine whether an appellant is entitled to a good character direction was summarized in

[18] Highlight added.
[19] St. Vincent and the Grenadines Criminal Appeal No. 15 of 2002 (22nd September 2003).
[20] At paragraph 3 of the judgment.

of Mantoor Ramdhanie and referred[21] to the following statement by Lord Mance in that judgment:

> "Where a defendant's good character is established by evidence (including an admission by the prosecution) or cross-examination, it is incumbent on a trial judge to direct the jury as to its significance in relation to both credibility and the (un)likelihood of the defendant having committed the offence charged: *R v. Vye* [1993] 1 WLR 471 and *R v. Aziz*, cited above. But before a judge is so obliged, the defence must have raised the point "distinctly", establishing the absence of any prior record by evidence or cross-examination: *Barrow v. The State* [1998] AC 846, 852d; *Teeluck and John v. The State* [2005] UKPC 14, para. 33(v). There are however "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 the conviction is unsafe and that there has been a miscarriage of justice": *Sealey and Headley v. The State* [2002] UKPC 52, para. 30; *Teeluck and John*, paras. 38-40. In the last case, the Board issued a reminder that it would not ordinarily entertain a ground of appeal based upon allegations of incompetence by counsel when raised for the first time before the Board", but it entertained such a ground in the case before it "because of the importance of the issue to the appellant John and because, on account of the frankness of his former counsel in furnishing information, [the Board was] in a good position to determine the issue without having to deal with any conflicts of fact" (para.38). The Board went on in para. 39 to say:
>
> > 'There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude: see *Boodram v The State* [2002] 1 Cr App R 103 at para 39; *Balson v The State* [2005] UKPC 2; and cf *Anderson v HM Advocate* 1996 JC 29'."

[37] In Troy Simon,[22] I highlighted 2 points that are relevant to the issue of good character direction. The first point speaks to the obligation of a trial judge to give such a direction where it is triggered by the defence raising the issue "distinctly", by establishing the absence of any prior criminal record by evidence or cross-examination. In this regard I noted that the exception to this general rule is that

[21] At paragraph 14 of the judgment.
[22] At paragraph 4 of the judgment.

the accused will be entitled to a good character direction in the rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused. The second point came by way of reference to Rupert Yearwood v The Queen,[23] in which Saunders JA, as he then was, stated that the authorities underline the principle that the good character of an accused is relevant to his credibility and to the likelihood that he would commit the offence in question.

[38] On these principles, in Troy Simon, I considered the evidence and noted[24] that the record of the proceedings of the trial did not indicate, definitively, that the character of Mr. Simon was raised in any meaningful way by the defence during the trial. Similarly, there is nothing that shows that the defence raised Lovelace's trial. In Troy Simon, I also noted that Counsel for the Prosecution said in his address to the jury that the character of the accused was not in issue and was a matter of speculation. I further noted[25] that the prosecution had antecedents for a Troy Simon, which recorded a previous criminal conviction, but that it was discovered later at the sentencing session that those antecedents were not for Troy Simon, the accused, who in fact had no previous convictions. Notwithstanding that the good character of Simon was not distinctively raised and there was no finding or indication of ineptitude on the part of defence Counsel, this Court held[26] that Troy Simon was a proper case for a good character direction, based on the Harry Wilson case.

[39] In Harry Wilson, Saunders JA noted that the accused had maintained his innocence all along. He noted that it was a case of the word of the accused against the word of the main witness for the prosecution so that the issue of credibility was critical. It was critical because there were discrepancies in the evidence of the virtual complainant. As a result of the failure of the trial judge to

[23] St. Vincent and the Grenadines Criminal Appeal No. 13 of 2002 (29th September 2003).
[24] At paragraph 7 of the judgment.
[25] At paragraph 8 of the judgment.
[26] At paragraph 10 of the judgment.

give a good character direction in these circumstances, a re-trial was ordered. This Court found that the same circumstances existed in Troy Simon and also ordered a retrial.

[40] The same circumstances that were present in Troy Simon are also in evidence in the present case. The issue of credibility was also squarely before the jury in the present case. Ramona admitted on several occasions, at the trial, that she lied in various aspects of the statements which she gave to the Police. It was only in the last statement that she identified Lovelace as the person who perpetrated the murder. She named at least 6 other persons in the prior statements. There were discrepancies between some statements that she made at the preliminary inquiry and statements that she made at the trial. Lovelace has maintained that he is innocent of the crime. The antecedents show that he has no previous convictions. Consistently with Harry Wilson and Troy Simon, a good character direction was necessary in the present case. I would also allow the appeal on this ground.

[41] In summary then, I would allow the appeal on grounds 8 and 9 of the grounds which Counsel for Lovelace were permitted to pursue before this Court. However, it is not possible to tell how a closing speech shorn of the excesses which I found and a good character direction would have influenced the verdict of the jury. Accordingly, I would order a retrial in the High Court at the earliest possible time.

Hugh A. Rawlins
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal