EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRAP2012/0005

BETWEEN:

JAY MARIE CHIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC, with him, Mr. D. Raimon Hamilton for the Appellant
Mr. Anthony Armstrong, Director of Public Prosecutions, with him, Mrs. Shannon Jones-Gittens for the Respondent

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2016: October 25;
2017: April 5.

Criminal appeal – Murder – Good character direction – Failure of trial judge to give jury good character direction – Lucas direction – Whether trial judge failed to properly direct jury on lies – Circumstantial evidence – Motive – Whether trial judge failed to adequately direct jury on circumstantial evidence and comments made by prosecution on possible motive for killing – Whether conviction rendered unsafe as a result – Whether sentence of life imprisonment unduly severe

The appellant, Jay Marie Chin ("Jay Marie"), had maintained a close relationship with her ex-husband Raymond Chin even after they were divorced; they continued to enjoy each other's company and behaved as though they were still a couple. Jay Marie owned the store Jay Chin's Variety Store in Antigua, and Raymond was known to frequent the store. On 28th November 2009 at around 5:00 p.m., Raymond was shot repeatedly and killed inside the variety store. There were no eyewitnesses to the shooting and the prosecution's case at trial was based entirely on circumstantial evidence. Jay Marie disputed that at the

time of the shooting she was present inside the store. The Crown presented several witnesses who were in the vicinity of the store at the time of the shooting. They testified that they had heard what sounded like a series of gunshots, at which point several of them continually observed the store up until only Jay Marie emerged from it, holding a mobile phone and indicating that Raymond had been murdered. The witnesses gave evidence that at no point did they see anyone apart from Jay Marie come out from the variety store, between the time the shooting began and the time when she exited the building. Jay Marie maintained that she was in a toilet/bathroom located at the rear of the building which housed the store at the time of the shooting and that it was someone else who had killed Raymond, an unknown individual in a "black hoodie". The variety store had only one door through which persons could enter and leave. The store windows were heavily barricaded. Jay Marie had no previous convictions, and even though she had elected not to give evidence on oath, she had provided the police with statements in which she denied that she was the person who shot Raymond.

At trial, defence counsel did not invite the court to give directions on Jay Marie's good character and the trial judge did not give the jury a good character direction. Furthermore, during cross-examination of the defence witnesses, prosecuting counsel sought to establish that Jay Marie had a motive for committing the crime, namely to benefit from an insurance policy, even though the prosecution led no evidence to substantiate that allegation. Counsel also made this suggestion during the prosecution's closing address. The trial judge addressed the prosecution's comments both during the cross-examination of the witnesses and in his summation to the jury. The Crown had asked the jury to accept that Jay Marie had lied when she said that it was an unknown man in a "black hoodie" who had shot Raymond. Jay Marie maintained her innocence throughout the trial.

Jay Marie was found guilty of murder and was sentenced to life imprisonment. She appealed her conviction and sentence, contending that the conviction was unsafe and ought to be set aside. She argued that the learned trial judge erred in: failing to direct the jury on good character; failing to properly direct the jury on lies and circumstantial evidence; and in failing to adequately direct the jury to disregard the prosecution's comments on the insurance policy. In relation to sentence, Jay Marie contended that the sentence imposed by the trial judge was unduly severe.

Held: dismissing the appeal and affirming the conviction; ordering that the sentence of life in prison be varied to a sentence of 25 years in prison; and that Jay Marie should serve a minimum of 20 years before her sentence can be reviewed by the Court, that:

1. On the issue of giving a good character direction, the first general rule is that a direction on the defendant's good character is to be given where a defendant has a good character and has testified or made pre-trial statements (credibility limb). The second general rule is that a direction as to the relevance of good character to the likelihood of a defendant's having committed the offence charged is to be given whether or not he has testified or made pre-trial answers or statements (propensity limb). A defendant who has no previous convictions or cautions recorded against him or her is entitled to both the credibility and propensity limbs of the good character direction. Although Jay Marie was entitled to a good

character direction and none was given by the judge, such a failure does not automatically render the verdict unsafe. In the case at bar, the circumstantial evidence that was led by the prosecution was very compelling, coherent and cogent and it all pointed to Jay Marie as the shooter. Accordingly, this failure of the trial judge did not render her conviction unsafe.

R v Hunter [2016] 2 All ER 1021 applied; Gilbert v R [2006] UKPC 15 applied; Mark France and Rupert Vassell v The Queen [2012] UKPC 28 applied; Bally Sheng Balson v The State [2005] UKPC 2 applied.

2. In cases where the Crown relies on circumstantial evidence, there is no inflexible rule that requires a trial judge to give any formulaic direction on circumstantial evidence. In these cases, no duty rests on the judge in addition to directing the jury that they could only convict if the prosecution has proved the case beyond a reasonable doubt. In the present case, the learned judge's summation was fair, careful and balanced. The judge brought home to the jury that they must consider all of the circumstantial evidence and that they could not find Jay Marie guilty unless they were satisfied of her guilt beyond a reasonable doubt. While it is accepted that there were different parts of the summation in which the judge could have or should have said things differently, the omissions were minor and not sufficient to undermine the safety of the conviction. It is therefore an unfair criticism to assert that the judge did not properly direct the jury on how they should assess the circumstantial evidence.

Daniel (Marlon), Archibald (Curtis), Garcia (Anino) and Marshall (Curtis) v The State (2007) 70 WIR 267 applied; McGreevy v Director of Public Prosecutions (1973) 57 Cr App R 424 applied; Daniel Dick Trimmingham v The Queen [2009] UKPC 25 followed.

3. Notwithstanding that the trial judge, rather than giving a full Lucas direction, gave a modified one in that he omitted to tell the jury that if they are of the view that Jay Marie told lies and that they are proved to have been told through a consciousness of guilt the lies may support the prosecution's case against her, that omission on the judge's part could have only been favourable to Jay Marie. It could not have prejudiced her. In no way could or did the learned judge's failure to give the full Lucas direction render the conviction unsafe.

R v Lucas [1981] QB 720 cited; R v Burge and Pegg [1996] 1 Cr App R 163 cited.

4. The fairness of the trial was not impacted by the inappropriate comments of prosecuting counsel concerning the insurance policy since the trial judge dealt with these comments adequately. What an appellate court is required to do is not second guess the trial judge but examine all the circumstances and seek to determine whether or not the judge's treatment of the evidence and trial rendered the conviction unsafe. In the case at bar, the learned trial judge quite properly and appropriately corrected the improper comments of the prosecution during its cross-

examination and closing address and in so doing nullified any effect they may have had during the summation. Therefore, the judge cannot be justifiably criticised since there was nothing unfair in the trial as a consequence of his treatment of the prosecution's comments.

5. The learned trial judge received evidence in mitigation in favour of Jay Marie which clearly indicated that she was industrious and hard working in addition to having shared a close relationship with Raymond even post-divorce. In addition, she had no previous convictions and at the date of the sentence she had spent time in custody. In the circumstances, the sentence of life in prison was excessive; a term of 25 years in prison is an appropriate substitute for the sentence imposed by the learned trial judge, with a review of this sentence to be done on Jay Marie's completion of a period of 20 years.

JUDGMENT

Introduction

[1] BLENMAN JA: The appellant, Mrs. Jay Marie Chin ("Jay Marie"), was convicted of the murder of her ex-husband, Mr. Raymond Chin ("Raymond"), and sentenced to life imprisonment. She has appealed against both the conviction and sentence. The appeal is strenuously resisted by the Crown.

Background

[2] Jay Marie and Raymond shared a relationship for several years which eventually culminated in their marriage. Initially, their marriage appeared to be harmonious and they had a very close relationship. For reasons unknown, they eventually divorced. However, they continued to have a close relationship which included enjoying each other's company. In fact, even though they were only recently divorced, shortly before the incident they had travelled together from Miami to Antigua and Barbuda. When he was in Antigua and Barbuda it appears that himself and Jay Marie operated as if they were a couple even subsequent to their divorce. Jay Marie owned Jay Chin's Variety Store which was located at upper Church Street, St. John's Antigua and Raymond frequented Jay Chin's Variety Store. On 28th November 2009 around 5:00 p.m., he was shot several times and killed while he was inside of Jay Chin's Variety Store. The indisputable evidence indicated that at the time of the shooting Jay Marie and Raymond were present at

the store. Jay Marie in her statements to the police maintained that she was outside in a toilet/bathroom located at the rear of the building which housed Jay Chin's Variety Store, when Raymond was shot and killed.

[3] The Crown's case was based entirely on circumstantial evidence since there was no eyewitness to the shooting. The Crown led evidence through several witnesses who testified to having heard what sounded like "explosions" or a volley of gun shots coming from within Jay Chin's Variety Store and seeing Jay Marie come from inside of the store (out of which the shots emanated) and that she was speaking on her cell phone. It is noteworthy that the store had only one point of exit and entrance and the windows were heavily barricaded. Within a few seconds of the shooting, several persons gathered on the scene of the shooting and no witness testified to having seen anyone leave Jay Marie's Variety Store other than Jay Marie, neither did they see anyone running away from the crime scene. Two of the Crown's witnesses testified that Jay Marie had reported to them that she was at the back of the store when an unknown man wearing a hoodie and dressed in black (whilst she was in an outside bathroom) shot and killed Raymond.

[4] The Crown had asked the jury to accept that Jay Marie told lies when she said that it was an unknown man in "a black hoodie" who had shot Raymond. However, the main thrust of the Crown's case was based on circumstantial evidence through its witnesses that led the jury to only one conclusion namely that Jay Marie was the shooter.

[5] As alluded to earlier, several defence witnesses testified to the fact that Jay Marie and Raymond shared a very loving relationship. This appeared to have persisted even after their divorce. Importantly, Jay Marie had no previous convictions and even though she elected not to give evidence on oath she had provided the police with statements. In addition, she made a statement from the dock in which she stated that for the 'eight and a half years being with Raymond Chin I never had violence. I never had no kind of violence whatsoever. … We did our shopping

together. We did everything together.'[1] There is no doubt that she was entitled to have the benefit of a good character direction. Then defence counsel who appeared on her behalf did not invite the Court to give directions on good character and the judge did not give a good character direction.

[6] During cross-examination of the defence witnesses, Crown Counsel who then appeared questioned some of the witnesses with a view to establishing that Jay Marie had a motive to shoot Raymond, namely, that she stood to benefit from an insurance policy. Also, during the prosecution's closing address, Crown Counsel who then appeared at the trial, suggested that Jay Marie had a motive for committing the offence and spoke about some "insurance policy". The trial judge addressed the prosecution's comments both during the cross-examination of the witnesses and in his summation to the jury. However, it is asserted that the judge did not go far enough.

[7] Throughout the trial, Jay Marie maintained her innocence. She was convicted by the jury and the judge sentenced her to life imprisonment after the plea in mitigation was made on her behalf.

[8] I now turn to the grounds of appeal.

Grounds of Appeal

[9] Learned counsel who then appeared on behalf of Jay Marie filed a number of grounds of appeal asserting that the conviction was unsafe and should therefore be set aside. He also challenged the lawfulness of the sentence. Learned Queen's Counsel Mr. Dane Hamilton replaced counsel on the record and he sought and obtained the leave of the Court to amend the notice of appeal so as to include the following two grounds:

(a) The learned trial judge's directions on lies and the evidence capable of grounding this allegation were inadequate; and

[1] Record of Appeal Vol. III, p. 849, lines 9-11 and 25, and p. 850, line 1.

(b) The learned counsel failed to apply for a good character direction and the failure of the judge to direct the jury on good character rendered the conviction unsafe.

[10] In my view, the original grounds of appeal together with the amended grounds of appeal can be crystallised as follows:

(a) the learned judge failed to direct the jury on good character which resulted in the trial being rendered unsafe;

(b) the learned judge failed to properly direct the jury on lies;

(c) the learned trial judge failed to adequately direct the jury on circumstantial evidence;

(d) the learned trial judge failed to adequately direct the jury to disregard the prosecution's comments on the insurance policy;

(e) the conviction is unsafe and unsatisfactory;

(f) the sentence of life imprisonment that was imposed on Jay Marie was unduly severe and unlawful in all of the circumstances.

[11] During the appeal, Mr. Hamilton, QC focussed on the first four grounds of appeal set out above: good character and lies together with the important grounds that the learned trial judge failed to properly direct the jury that they should have disregarded the prosecution's comments in relation to the insurance policy and that the learned trial judge failed to properly direct the jury on how to deal with circumstantial evidence. Mr. Hamilton, QC indicated that the general ground of appeal which addressed the safety of the conviction would be dealt with and subsumed in the four grounds. Learned Queen's Counsel Mr. Hamilton helpfully indicated that the main thrust or plank of the appeal was the judge's omission to give the good character direction. I propose to address the grounds of appeal

utilising the same chronology as learned Queen's Counsel Mr. Hamilton.

Ground 1 – Failure of the learned judge to give the jury a good character direction

Appellant's Submissions

[12] Learned Queen's Counsel Mr. Hamilton complained that since Jay Marie had a good character there was a duty on defence counsel who appeared in the lower court to bring this to the judge's attention in order for a good character direction to be given. Counsel failed to do so and the judge did not give a good character direction. Mr Hamilton, QC quite properly pointed out that it was not until she had been convicted and during the sentencing phase of the trial that defence counsel addressed the judge on the fact that Jay Marie had a good character which he said was obvious based on the evidence. He underscored the fact that persons who knew Jay Marie testified to her good character and also that persons who knew Jay Marie and Raymond testified to the loving relationship which they shared. Mr. Hamilton, QC referred this Court to the submissions of then counsel who, during the sentencing phase of the trial, said that Jay Marie 'is obviously a person … of exemplary character. She is industrious, hard working [sic] and exemplary character [sic] up until the day when the jury found her guilty of this offence.'[2] Mr. Hamilton, QC reminded this Court that the good character direction consists of two limbs, namely: credibility and propensity. He also reminded the Court that the two leading cases on good character are R v Vye[3] and R v Aziz.[4] He also said that in the Privy Council decision of Singh v The State[5] which is a decision from Trinidad and Tobago, Lord Bingham stated:

> "The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no

[2] See Record of Appeal Vol. IV, p. 1101, lines 13-17.
[3] [1993] 3 All ER 241.
[4] [1995] 3 All ER 149.
[5] [2005] UKPC 35.

departure may ever be tolerated."

[13] Mr. Hamilton, QC referred the Court to the well-known case of Teeluck and Another v R.[6] He also pointed out the well-known case of Smith v R[7] in which Lord Carswell said that '[i]t is the duty of defence counsel to ensure that the Defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe'.[8] Mr. Hamilton, QC also relied on Sealey and Another v The State[9] in which the Board said that '[t]he underlying question must always be whether the defendant was deprived of his right to a fair trial because the effect of the conduct which is complained of was that his defence was not put to the court. An unexplained omission of evidence of good character bears directly on that issue, as a defendant is entitled to the benefit of his good character as part of his defence'.[10] Mr. Hamilton, QC submitted that since the credibility of Jay Marie and her propensity to do such an act were put in issue it required the judge to give a good character direction and none was requested nor was given. Mr. Hamilton, QC reminded the Court that apart from the fact that Jay Marie had a good record, the witnesses Charmain Brown, Louisa Brown-Matthew and Shena Lake testified that Jay Marie and Raymond shared a close and loving relationship. Mr. Hamilton, QC stated that in Sealey the Board held that there are 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. He therefore urged this Court to hold that the failure of the then attorney to request that the judge give a good character direction which resulted in none being given, rendered Jay Marie's conviction unsafe and it should therefore be quashed.

[14] To buttress this argument further, Mr. Hamilton, QC also referred this Court to the

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[6] [2005] UKPC 14.
[7] [2008] UKPC 34.
[8] At para. 30.
[9] [2002] UKPC 52.
[10] At para. 41.

recent decision of the Court of Appeal of England and Wales in the case of R v Hunter[11] in which the full bench of the Court reviewed the judgments on good character in an effort to bring clarity and consistency to the various decisions. Mr. Hamilton, QC pointed out that there the Court of Appeal held:

(a) The general rule is that direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements (credibility).

(b) The general rule is that a direction as to the relevance of good character to the likelihood of a defendant having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or has made pre-trial answers or statements (propensity).

Mr. Hamilton, QC posited that going forward the court need only refer to Hunter since it has reviewed all of the previous authorities.

[15] Mr. Hamilton, QC, however, acknowledged that it is law as recognised by Hunter that not every failure by a judge to give a good character direction is fatal. Much depends on the facts of the case. He nonetheless maintained that the case at bar was clearly one in which the judge's failure to give a good character direction was fatal.

Respondent's Submissions

[16] The learned Director of Public Prosecutions, Mr. Armstrong, acknowledged that defence counsel did not invite the trial judge to give a good character direction and the trial judge did not give one. The point of departure for the Crown however was that this omission was not fatal to the safety of the conviction. Mr. Armstrong opined that Hunter cannot properly be regarded as the locus classicus on the issue of a good character direction bearing in mind that there are other highly

[11] [2016] 2 All ER 1021.

persuasive Privy Council decisions including Bally Sheng Balson v The State[12] which emanates from the Commonwealth of Dominica and to which this Court must have regard. In any event, Mr. Armstrong submitted that Hunter did not in any way seek to undermine the Board's decision in Balson and in any event it would have been impossible for that to occur. In fact, he says that Hunter did not adopt any different position from Balson. Even though Mr. Armstrong agreed that it is not in every case that the trial judge's failure to give a good character direction would be fatal and much will turn on the coherence and cogency of the other evidence before the court, he said that the case at bar is a classic one in which the Crown presented overwhelming circumstantial evidence which was cogent and coherent and the failure to give a good character direction could not be fatal. In support of this proposition he told the Court that this case was a simple one and that there was no eyewitness to the crime. However, the Crown led overwhelming evidence through several witnesses who heard the shots and saw Jay Marie alone exiting the building from which the shots rang out. The fact that Jay Marie had a good character could have in no way impacted the cogency and coherence of the other available evidence in the case, asserted Mr. Armstrong. He therefore maintained that a good character direction would have made no difference.

[17] In further support of his argument, Mr. Armstrong referred the Court to Privy Council decision in Mark France and Rupert Vassell v The Queen.[13] He specifically referred to pronouncements of Lord Kerr at paragraph 45 where His Lordship, citing passages from the case of Nigel Brown v The State,[14] said: 'It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction'.

[18] The learned Director of Public Prosecutions, Mr. Armstrong, underscored the point that where the evidence is so cogent and coherent, it is safe to conclude that even if the good character direction was given it would not have a difference – the case

[12] [2005] UKPC 2.
[13] [2012] UKPC 28.
[14] [2012] UKPC 2.

at bar he said is such a case. In passing he also referred the Court to another decision of the Board in Gilbert v R,[15] a decision which emanated from Grenada in which it was held that failure to give a good character direction where one ought to have been given was not fatal to the safety of the conviction.

[19] More importantly, Mr. Armstrong pointed out that in Mark France and Rupert Vassell Lord Kerr examined a number of earlier authorities including Bhola v State[16] and Jagdeo Singh v State of Trinidad and Tobago[17] in which it was accepted that where there is a clash between the credibility of the prosecution and defence witnesses much may turn on the other evidence in the case. The learned Director of Public Prosecutions Mr. Armstrong submitted that there was no miscarriage of justice in the case at bar due to the failure of the judge to give a good character direction. He relied on the pronouncements by the Board in Nigel Brown v The State in which it was held that failure of counsel to adduce evidence of good character can bring about an unsafe verdict. It should not be automatically assumed however, that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel. There might well be reasons that defence counsel decided against that course. But in the absence of an explanation from counsel as to why he did not raise the issue of the defendant's good character, it is necessary to examine whether the lack of a good character direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction ought to have been given. Mr. Armstrong was adamant that the learned judge's failure to give a good character direction did not render the conviction unsafe.

[20] Mr. Armstrong pointed out that the other evidence in addition to the circumstantial evidence was very strong and cogent so that the omission to give a good character direction was of no significance. In this regard, he said that the physical layout of the locus in quo which the jury visited and where it stands in relation to

[15] [2006] UKPC 15.
[16] [2006] 4 UKPC 9.
[17] [2006] 1 WLR 146.

where the witnesses for the Crown were when they heard the gunshots and saw Jay Marie come out of the store were powerful. He reminded the Court that the variety store had only one entrance and exit and not one of the several witnesses who were observing that store saw anyone other than Jay Marie alight from Jay Chin's Variety Store immediately after the gunshots rang out. Mr. Armstrong reminded the Court of the evidence of several witnesses for the Crown, namely: Regan Allen who on the day in question was inside of his jeep parked on Church Street about 25-30 feet away from the entrance of the store. He was waiting for his wife Cheryl Allen who had left to purchase rice pudding from a nearby vendor on Independent Street when he heard the gunshots less than a minute after his wife had exited the jeep. His wife quickly came back into the jeep then he heard a second volley of gunshots and realised that they were coming from inside Jay Chin's Variety store. He quickly drove past the store in a westerly direction and from his rear view mirror he focussed on the door of the store. He then stopped his vehicle at the west end of church street less than a minute. Mr. Regan Allen said he kept looking at the store with the hope of seeing someone come out the store but no one other than Jay Marie did. In fact, when he heard the first volley his focus was inside the store and also when he drove past it the door was open and he saw nothing. He did not see anyone in a black hoodie or black clothing.

Cheryl Allen, a sergeant of police and the wife of Regan Allen, told the court that she was with her husband that afternoon. She got out of the vehicle to purchase rice pudding and as soon as she was going across Independence Avenue she heard gunshots. She immediately returned to her husband and spoke to him, during which time she heard more gun shots. She entered the vehicle and her husband drove down the street and she kept looking back in the rear view mirror when she saw a lady come off the gallery (veranda). She added that while driving down Church Street after hearing the gunshots she was looking at the store to see if anyone would run out from the store but saw no one.

Jocelyn Clarke who was the rice pudding vendor, also gave evidence for the prosecution. She has been selling rice pudding for over 34 years on Church

Street and Independence Drive. On the day in question at about 5:00 p.m. she was on Independence Drive when she heard the 'pop' which was a shot and she kept hearing the shots that kept coming. She got up from where she was and went to a lamp post and looked down the road (Church Street) at the shop step. She looked behind and saw one Carson Matthew. She then observed that Jay Marie came out of the store with a mobile phone to her ear saying "help!". Ms. Clarke said that she heard about ten shots and that they were fired "straight". When she got to the lamp post no more shots were heard by her. She further stated that when she was looking down Church Street she had a clear view and saw no one running down Church Street. She did not see anyone enter the store.

Carson Matthew, a convicted felon, gave evidence. He said that he was in the stands at the Antigua Recreation Grounds watching a football match at around 4:55 pm when he heard gunshots firing. He then looked in the direction where the shots were fired and kept looking at the building where he heard the gunshots coming from to see if anyone would come out and while looking he saw Jay Marie come out. Before she came out of the building and whilst still looking at it, gunshots were still being fired, he said. Further, he stated that when she came out of the building he noticed that she had a cell phone in her hand.

Jermaine Scotland who is a Corporal of Police gave evidence that he was on sentry duties at Government House which is just inside the gate on Church Street. Whilst there, he was on his phone when he heard three explosions and afterwards, he focussed on the front of the gate whilst still on his phone. He then heard four more loud explosions and made his way to the gate but observed no one running westwards on Church Street. In fact when he reached the gate, he looked in the direction that he heard the shots coming from and saw a lady on a mobile phone on the veranda of the variety store. The lady was Jay Marie. He recalled her saying murder, they shoot him. He said that she came out from the store (on to the veranda).

[21] Mr. Armstrong submitted that the evidence of the above witnesses was very

powerful, cogent and compelling circumstantial evidence against Jay Marie. He maintained that no one except her was seen exiting the store immediately after the shooting, despite her protestations that an unknown man in black jumped over the railings of the veranda and made his way westward. Mr. Armstrong argued that based on the evidence led by the prosecution when the shooting started, Jay Marie would have been inside the variety store. Mr. Armstrong finally submitted that the critical question that was required to be answered at the trial was whether it was Jay Marie who murdered Raymond. He said based on the prosecution's case there was no one else but Jay Marie at the store. Mr. Armstrong was adamant that a good character direction, therefore, though not given, does not undermine the jury's verdict. In this regard, Mr. Armstrong reminded the Court that in Balson, in which the case also turned on circumstantial evidence, the Board held that the strength and cogency of the circumstantial evidence was such that the question of the omission to give a good character direction was of no significance. In fact, at paragraph 38, the Board said:

> "[A] good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder."

[22] The learned Director of Public Prosecutions maintained that all the circumstantial evidence pointed to the conclusion that Jay Marie was the murderer. There was no evidence to suggest that anyone else was in the store that night who could have killed him or that anyone else had a motive for doing so. He advocated that in these circumstances the issues about the appellant's propensity to violent conduct and her credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence. Mr. Armstrong reiterated that the conviction was safe.

General Observations

[23] It has been settled that the trial judge's omission to state or do certain things could be fatal only if it undermines the safety of the conviction. Where a judge falls into error, the appellate court would only hold that the consequence of that error should

result in the quashing of the conviction if the error undermines the safety of the conviction.

[24] In Daniel Dick Trimmingham v The Queen[18] at paragraph 12 the Board said that:

> "There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict."

[25] I am guided by those very helpful pronouncements. The law on the good character direction is settled and this Court has rendered several decisions in which it has enunciated the relevant principles and faithfully applied them. Indeed, in the recent case of Patrick Facey et al v The Queen,[19] the applicable principles were very succinctly and helpfully distilled by learned Justice of Appeal Morrison as follows:

> In Teeluck v State of Trinidad and Tobago,[42] [*[2005] 1 WLR 2421*] it was held (not for the first time) that a defendant who has no previous convictions of any significance is entitled to the benefit of a good character direction from the judge. Such a direction will generally contain two limbs: first, a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character; and second, a propensity direction, that is, that a person of good character is less likely to commit a crime, especially one of the nature with which he is charged. Generally speaking, the defendant's good character must be distinctly raised, either by direct evidence given by and/or on his behalf, and/or by eliciting it in

[18] [2009] UKPC 25.
[19] BVIHCRAP2013/0009 (delivered 18th May 2015, unreported).

> cross-examination of prosecution witnesses. However, in an appropriate case, the failure of counsel to put the defendant's good character in issue may itself, particularly if unexplained, make a guilty verdict unsafe. But it is also well recognised that the omission of a good character direction is not inevitably fatal to the fairness of the trial or to the safety of a conviction."[20]

[26] A close reading of the recent decision of Hunter rendered by the full bench of the Court of Appeal of England and Wales written by the experienced and learned Vice President Lady Justice Hallett equally distills the applicable principles on good character. Justice Hallett's historical review was very comprehensive and went a bit further in seeking to synthesise the relevant decisions of the House of Lords and Privy Council into a coherent and efficient manner. One thing which is clear is that there is absolutely no tension between Hunter and the cases that were decided by the Board. In fact, Lady Justice Hallett clearly accepts the correctness of those principles enunciated in cases such as Bally Sheng Balson v The State, Singh v The State and R v Aziz. Lady Justice Hallett crystallised the general principles that are to be extracted from the authorities, namely a direction on the defendant's good character is to be given where a defendant has a good character and has testified or made pre-trial statements (credibility); there is no point of departure between those authorities and this judgment. The second general rule is that a direction as to the relevance of good character to the likelihood of a defendant's having committed the offence charged is to be given whether or not he has testified or made pre-trial answers or statements (propensity).

[27] A defendant who has no previous convictions or cautions recorded against him or her is entitled to both the credibility and propensity limbs of the good character direction. There is no doubt that Jay Marie was entitled to a good character direction and none was given. However, that is not the end of the matter. It is the law that the failure to give a good character direction where the defendant was

[20] At para. 41. See also: Andre Penn v The Queen (BVIHCRAP2014/0006) (consolidated with The Queen v Andre Penn (BVIHCRAP2015/0002)) (delivered 23rd November 2016, unreported).

entitled to one does not automatically render the verdict unsafe.[21]

[28] Insofar as much reference was made to Hunter, it is helpful to examine it in some detail. Indeed in Hunter at paragraph 40, Lady Justice Hallett indicated that '[t]he principle that there is no inflexible rule that a failure to give a direction will inevitably prove fatal has been followed on a number of occasions by the Board'. The principle has also been judicially recognised by this Court. In Hunter also, Lady Justice Hallett indicated that there are cases in which the failure to give a good character direction in circumstances where one was necessitated proved fatal. She however pointed out at paragraph 46 of the judgment that there is a long line of authorities in which, where there has been a failure to give a good character direction where it should have been given, the court has been known to uphold the conviction on the basis that the failure to give the good character direction did not render the conviction unsafe.

[29] The sole salutary test for this Court is whether the judge's omission to give a good character direction (which it must be recalled was not requested by counsel) undermines the safety of the conviction. In Hunter, Lady Justice Hallett acknowledged that there can be no fixed rule or principle that a failure to give a good character direction is necessarily or usually fatal. It must depend on the facts of the individual case and I totally agree with her observation.

[30] In my view, the factual circumstances in Balson are strikingly similar to the case at bar. In the case at bar, there is not the slightest doubt that the circumstantial evidence that was led by the Crown was very strong, coherent and cogent. The absence of an eyewitness was of no significance. When any assessment of the convincing and unshakable evidence of Regan Allen, Cheryl Allen, Jocelyn Clarke and Jermaine Scotland is made the jury would have been left with no doubt that those witnesses having heard the volley of gunshots emanating from the variety

[21] See: Gilbert v R [2006] UKPC 15; Mark France and Rupert Vassell v The Queen [2012] UKPC 28; Bally Sheng Balson v The State [2005] UKPC 2.

store and seeing Jay Marie alight therefrom with the cell phone, that she was the shooter. Even if one were to leave aside the evidence of Carson Mathew, the Crown provided powerful evidence by the witnesses which pointed clearly to Jay Marie as the person who murdered Raymond. The only issue was whether he was killed by Jay Marie or by an intruder wearing a black hoodie; a good character direction would have made no difference to the result in the case. I can do no more than adopt the very helpful pronouncements of the Board in Balson, namely:

> "In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence."

[31] I have no doubt that the circumstantial evidence that was led by the prosecution was very compelling, coherent and cogent and it all pointed to Jay Marie as the shooter.

[32] Accordingly, I am of the view that the appeal on this ground fails. I turn now to Ground 2.

Ground 2 – The learned trial judge failed to adequately direct the jury on circumstantial evidence

Appellant's Submissions

[33] Learned Queen's Counsel Mr. Hamilton submitted that the learned trial judge's direction on circumstantial evidence was inadequate. He complained that the judge, in giving the directions, ought to have told the jury that no one saw Jay Marie with a gun. He said that most of the witnesses claim to have seen her as the only person exiting the store immediately after the shots were heard with a phone in her hand. Mr Hamilton, QC reminded the Court that this was in most cases mere seconds to minutes after the shots were heard. Mr. Hamilton, QC also asserted there was a duty on the judge to highlight the strengths and weaknesses as established during cross-examination. Mr. Hamilton, QC submitted that given the nature of the case and the evidence adduced, the judge ought to have directed the jury that guilt is the only reasonable explanation of the

facts. He referred this Court to the pronouncement of Cummings-Edwards JA at paragraph 41 of The State v Alfred[22] in which the learned judge stated:

> "The authorities emphasise that in directing the jury in cases dealing with circumstantial evidence, it is desirable for the trial judge to tell the jury that they must be satisfied of the guilt of the accused beyond a reasonable doubt. The jury must be sure that guilt is the only reasonable explanation of the facts they found proved. This is so because even though circumstantial evidence may be conclusive of guilt, it must always be narrowly examined. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ..."[23]

[34] Mr. Hamilton, QC also said that the duty of the trial judge included telling the jury that the variety store and the surroundings were searched and that there was no forensic evidence to link Jay Marie to the shooting. He posited that it was the prosecution's duty to satisfy them that Jay Marie had a gun and was the perpetrator of the crime, so that they were sure that was the only explanation. Mr. Hamilton, QC posited that the judge had a further duty to direct the jury that they have to be satisfied beyond reasonable doubt that there was no other rational hypothesis other than guilt. The judge, he said, ought to have pointed out each and every chain of circumstance. In so far as the judge failed to do so, it undermined the safety of the conviction which should therefore be quashed.

Respondent Submissions

[35] Mr. Armstrong submitted that the judge's direction on circumstantial evidence was complete and adequate. He referred the Court to Daniel (Marlon), Archibald (Curtis), Garcia (Anino) and Marshall (Curtis) v The State.[24] One of the issues that came before the Board was the type of summing-up to be given where there was circumstantial evidence relied on by the prosecution the standard of proof required and whether all possible inferences other than guilt must be eliminated. On this issue Lord Carswell said at page 286:

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[22] (2015) 86 WIR 360.
[23] At para. 41.
[24] (2007) 70 WIR 267.

> "This type of direction is to the effect that the jury must be satisfied that every possible inference but the guilty one can be ruled out before they can accept that guilty inference. It is normally sufficient, as in a case of circumstantial evidence, to direct the jury that they must be satisfied beyond reasonable doubt of the accused's guilt, and it is a matter for the trial judge whether the facts are such as to make a special direction necessary. Their lordships do not consider that the judge was in error in failing to give such a direction in the present case."

[36] Mr. Armstrong also referred this Court to McGreevy v Director of Public Prosecutions.[25] It was held that:

> "In a trial in which the case for the prosecution, or any essential ingredient thereof, depends as to the commission of the act wholly on circumstantial evidence, no duty rests upon the judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the defendant and (b) exclude every possible explanation other than the guilt of the defendant."

[37] At page 431, Lord Morris of Borth-y-Gest said:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a Judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the Judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

[38] Further, Mr. Armstrong said that Lord Morris in a closely reasoned and logical argument expressed himself in this manner:

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[25] (1973) 57 Cr App R 424.

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence, they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that, if a fact which they accept is inconsistent with guilt or may be so, they could not say that they were satisfied of guilt beyond all reasonable doubt."[26]

[39] Mr. Armstrong maintained that when one looks at the learned trial judge's direction to the jury it is replete with him telling them that they must consider all the evidence and that they cannot find the appellant guilty unless they are satisfied beyond a reasonable doubt. Mr. Armstrong said that the learned trial judge however, simply did not only leave it at that but also told the jury the following:

> "Having decide [sic] what evidence you accept, consider whether looking at it as a whole, it drives you to conclude so that you are sure that Mrs. Chin is guilty. And before you reach that point, if you do, you must be satisfied not only that those circumstances were consistent with her having committed the act, but you must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion."[27]

[40] He pointed out that the judge had earlier stated:

> "Circumstantial evidence can be powerful evidence but it needs to be examined with great care to make sure that it does have that effect. You should examine the evidence carefully and decide whether you accept it. If you reject a significant part of the Prosecution's evidence, that will affect how you approach your final conclusion. Consider whether the evidence upon which the Prosecution relies in proof of it's [sic] case is reliable and whether it does prove guilt."[28]

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[26] At p. 436.
[27] See Record of Appeal Vol. IV, p. 1040, lines 17-24.
[28] See Record of Appeal Vol. IV, p.1039, lines 7-15.

[41] Mr. Armstrong pointed out that towards the end, the trial judge told them also:

> "The most important aspect of this case is that the Prosecution must prove to your satisfaction so that you feel sure that it was Mrs. Chin, the accused person, who inflicted the injury to the deceased Raymond Chin and killed him. The Prosecution relies upon the evidence of the various witnesses who say that they hear [sic] gunshots, looked to the Jay Chin shop and see [sic] no one leaving the shop or see [sic] no one in the immediate area of the shop save and except for Ms. Jay Marie Chin."[29]

Discussion

[42] In a case such as the present where Crown relies on circumstantial evidence, there is no inflexible rule that requires a trial judge to give any formulaic direction on circumstantial evidence. I accept the pronouncement of Lord Casrwell in Daniel (Marlon), Archibald (Curtis), Garcia (Anino) and Marshall (Curtis) v The State, that:

> "It is normally sufficient, as in a case of circumstantial evidence, to direct the jury that they must be satisfied beyond reasonable doubt of the accused's guilt, and it is a matter for the trial judge whether the facts are such as to make a special direction necessary. Their lordships do not consider that the judge was in error in failing to give such a direction in the present case."

I am fortified in the view that where the prosecution's case rests on circumstantial evidence, no duty rests on the judge, in addition to directing the jury that they could only convict if the prosecution has proved its case beyond a reasonable doubt, to say that they must not convict on circumstantial evidence, that the facts proved are consistent with the guilt of the appellant and exclude every possible explanation other than guilt of the appellant provided that the judge indicated to the jury that there is no eyewitness and brings home to the jury that the case is based on circumstantial evidence and that the Crown has the duty to prove the case beyond a reasonable doubt, that will suffice.

[43] I am not at all persuaded that there was a miscarriage of justice since when one looks at the summation it was fair, careful and balanced. The judge brought home to the jury that they must consider all of the circumstantial evidence and that they

[29] See Record of Appeal Vol. IV, p. 1041, lines 12-20.

cannot find Jay Marie guilty unless they were satisfied beyond a reasonable doubt. I have no hesitation in concluding that the learned judge properly and fairly put the issues before the jury in a case that was uncomplicated.

[44] I accept the submissions of Mr. Armstrong that throughout the summation the learned judge impressed on the jury that they could only convict if the prosecution has satisfied them beyond a reasonable doubt. While it is accepted that there are different parts of the summation in which the judge could have or should have said things differently, the omissions were minor and not sufficient to undermine the safety of the conviction. In Daniel Trimmingham v R the Board acknowledged that in every case one will find things that should have been said or put differently but the test remains the safety of the conviction. It is an unfair criticism to assert that the judge did not properly direct the jury how they should assess the circumstantial evidence.[30]

[45] Accordingly, there has been no miscarriage of justice and in my view this ground of appeal also fails.

[46] I will now examine the third ground of appeal.

Ground 3 – Direction on lies

Appellant's Submissions

[47] Mr. Hamilton, QC posited that the prosecution presented several witnesses in support of their position that Jay Marie provided different versions as to what had occurred in Raymond's shooting and on that basis invited the jury to conclude that she had lied. In this regard, he highlighted the evidence of Sgt. Cockburn who testified that having received a call from Cpl. Scotland, he ran to the store and enquired of Jay Marie whether there was a shooting and she said yes, her husband was shot. When Sgt. Cockburn asked her who had shot him she said: 'a

[30] See Record of Appeal Vol IV, p. 1040, lines 17-24 and p. 1039, lines 7-15.

man in a black hoodie'. He asked her where was she and she said in the bathroom. Mr. Hamilton, QC also pointed to the evidence of Ms. Eve Bowen-Bird who was the 911 operator who stated that she had received a call around 5:30 p.m. Bowen-Bird told the jury that she was told:

> "I just come from the bathroom, somebody shot my husband and left."

She further said that:

> "Somebody came into the store and asked my husband for his watch and he would not give it to him and he shot him."

[48] Mr. Hamilton, QC pointed out that Ms. Bowen-Bird's evidence was inconsistent with Jay Marie's statements in the interview and from the dock. Learned Queen's Counsel Mr. Hamilton next dealt with the evidence of the convicted felon Carson Matthew who had a very long record of convictions. He said that he was at the Antigua Recreation Grounds ("the ARG"). He heard the gunshots and looked over at the building from where he heard the gunshots coming from to see if anyone would come out of the building. He kept looking at the building whilst the gunshots were being fired. He added that Jay Marie came out of the building and she had a cell phone in her hand. Carson Matthew said that he ran from the ARG to the store and he spoke to Jay Marie and she told him 'gun men just struck me and my husband to give him the watch. My husband refused to give him the watch and he start to shoot my husband'. (Mr. Hamilton, QC pointed out that Mr. Matthew could not have been speaking the truth because by the time he would have made his way over to the building Sgt. Cockburn and Cpl. Scotland would have already arrived there. Queen's Counsel Mr. Hamilton urged this Court to accept that the major thrust of the prosecution's case was that Jay Marie lied. He said that this warranted the judge to give a Lucas direction on lies. He pointed out that the judge did not give the full Lucas direction and the learned judge was under a duty to point out the evidence that was capable of showing that Jay Marie deliberately lied.

[49] Mr. Hamilton, QC posited that if two witnesses gave evidence that is at variance with each other that would amount to inconsistencies and not lies. However, he said that the prosecution, in addressing the jury and during their evidence, put the matter of Jay Marie having lied as a basis to support the offence; they challenged her credibility on this basis. Mr. Hamilton, QC accepted that the learned judge refused to address the fact that lies can be supportive of the guilt of the accused despite the urging of the prosecution. However, he said that the judge should have given the jury the further direction that they must first find that Jay Marie lied deliberately and that she had lied about a material particular in the case and that it was designed to cover up her guilt. Mr. Hamilton, QC submitted that the failure of the learned judge to assist the jury to evaluate the evidence that was capable of amounting to lies coupled with the trial judge's failure to direct the jury fully in accordance with R v Lucas[31] rendered the trial unfair.

[50] Respondent's Submissions

Mr. Armstrong disagreed that the judge did not treat adequately with the matter of lies. Learned Director of Public Prosecutions, Mr. Armstrong, reminded the Court that during the course of the learned trial judge's summation, he told the jury repeatedly that they cannot convict the appellant on lies alone and that lies alone cannot prove the case against her. Mr. Armstrong highlighted that despite the urging of prosecuting counsel that the prosecution is relying on lies as being supportive of guilt and not merely reflective of the credibility of Jay Marie, the trial judge never acceded to this and never gave or fell short of giving a full Lucas direction. Throughout his summation in dealing with the issue of lies, the trial judge treated it as reflecting of Jay Marie's credibility and not as supportive of guilt. Mr. Armstrong pointed out that learned counsel who appeared for the appellant below thought the direction on lies was adequate and so indicated to the judge. Mr. Armstrong submitted the perceived failure of the trial judge to give a full or expanded Lucas direction benefitted Jay Marie rather than harmed her. He did not

[31] [1981] QB 720.

tell the jury that if they conclude that the appellant deliberately told lies then (all other preconditions being present) they may regard them of supportive of guilt.

[51] Furthermore, Mr. Armstrong argued that the trial judge's directions on inconsistencies were clear and correct. The suggestion that the judge equated inconsistencies with lies is firstly, seemingly misplaced and secondly, given far more importance than it deserves. He said that to begin with, the learned trial judge first addressed the issue of inconsistencies separately from that of lies. The judge then went on to examine the suggestion made by prosecuting counsel to the jury to conclude that the appellant told lies to the police and what she said about the incident. From that sweeping survey of the evidence he said the following:

> "So when we go through all of those comments made by Mrs. Chin about the incident, you will see that there are inconsistencies. It can be said that she told lies."[32]

The respondent respectfully sought to argue that it would require a sharp finesse of argument to say that where a person has manifested so many inconsistencies on numerous occasions that they may not be said to be lying.

[52] Mr. Armstrong submitted that in any event the equation of inconsistencies with lies, if any, is not of such a nature as to render the conviction unsafe as the issue of inconsistencies would be a matter affecting the appellant's credibility, whereas lies go to the issue of her guilt and the learned trial judge was very emphatic that the appellant cannot be convicted on lies only.

[53] Mr. Armstrong accepted that the Court of Appeal of England and Wales in the case of R v Gary Michael Goodway,[33] held that whenever the prosecution relies on lies or lies might be used by the jury to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full Lucas direction. In the case of R v Lucas,[34] the following direction was given:

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[32] See Record of Appeal Vol. IV, p. 1056, lines 22-25.
[33] (1994) 98 Cr App R 11.
[34] (1981) 73 Cr App R 159.

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behavior from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."[35]

Mr. Armstrong acknowledged that in this regard, the learned trial judge did not give the full direction but simply left it at the reason why people sometimes lie. Mr. Armstrong reiterated that such a truncated direction was favourable to Jay Marie. This is what the judge said:

> "An accused person may lie for many reasons. And they may be innocent reasons in the sense that they do not denote or indicate guilt. For example, lies to both (inaudible) or true defence to protect someone else to conceal some disgraceful conduct other than the commission of the offence or out of panic or fear or confusion. If you are sure that Mrs. Chin told a deliberate lie, you are entitled to consider how, if at all, that effects your view of her interviews, the occasions where she speaks to other persons and her statements generally. A lie told by the accused whether in an interview or in evidence is capable of affecting your judgment of whether she has in other respects given truthful evidence or not. The weight that you attach to the lie is a matter for you to decide. But what you should not do is decide this case on lies."[36]

[54] Mr. Armstrong adverted this Court's attention to R v Burge and Pegg[37] in which the Court of Appeal gave further guidance as to the circumstances in which to give a Lucas direction and the nature of the direction to be given. At page 173 Kennedy LJ had this to say on the issue:

> "As there seems to be at the moment a tendency in one appeal after another to assert that there has been no direction, or an inadequate direction, as to lies, it may be helpful if we conclude by summarising the circumstances in which, in our judgment, a Lucas direction is usually required. There are four such circumstances but they may overlap:
>
> 1. Where the defence relies on an alibi.

[35] At pp. 162-163.
[36] See Record of Appeal Vol. IV, p. 1057, lines 3-18.
[37] [1996] 1 Cr App R 163.

> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.
>
> 3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.
>
> 4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.
>
> If a Lucas direction is given where there is no need for such a direction (as in the normal case where there is a straight conflict of evidence), it will add complexity and do more harm than good."

[55] Finally, Mr. Armstrong referred this Court to the case of R v Strudwick and Merry,[38] an appeal against a conviction for manslaughter where the Court of Appeal stated that lies, if they are proved to have been told through a consciousness of guilt may support a prosecution's case, but on their own they do not make a positive case of manslaughter or indeed any other crime. The learned Director of Public Prosecutions Mr. Armstrong finally submitted that when one examines the full length of the learned trial judge's directions on this issue he emphatically brought home that point to the jury and effectively ignored the pleadings of the prosecution to treat the lies as a realisation of guilt by the appellant or supportive evidence of guilt. This, Mr. Armstrong maintained, was favourable to Jay Marie and there was no unfairness in the trial. The conviction was safe.

Discussion

[56] Jay Marie's defence was that she did not shoot Raymond but rather it was a man who was wearing a "black hoodie" who shot him. Several of the prosecution witnesses testified to having heard the gunshots and seeing Jay Marie alone alight from Jay Chin's Variety Store. Two of the witnesses, Mr. Roger Allen and Ms.

[38] [1994] 94 Cr App R 326.

Cheryl Allen, specifically said that they were looking to see if anyone would come out of the store having heard the gunshots but saw no one. This is juxtaposed against the fact that there was only one entrance and exit and the windows were barricaded. It falls to reason that the jury may well have thought that Jay Marie was lying in the defence that she had put forward that it was an unknown man in a hoodie that shot Raymond. I have no doubt that this warranted the judge to give the jury a Lucas direction.[39]

[57] It is common ground that the prosecutor requested the judge to give a full Lucas direction. It is common ground that the judge did not give a full Lucas direction but gave a modified one. Indeed, the judge omitted to tell the jury, as he was entitled to do, that if they are of the view that Jay Marie told lies and that they are proved to have been told through a consciousness of guilt, they may support the prosecution's case against her. I fail to see how that omission on the judge's part could have done anything other than helped Jay Marie. It definitely could not have harmed her and in no way could it have prejudiced her.

[58] In my view, one thing that is very clear is the judge's refusal to give the full Lucas direction, even though the prosecutor pressed for this several times and requested the judge to direct the jury that if they are satisfied that Jay Marie told lies this could be an indication of her consciousness of guilt, was very favourable to Jay Marie. It was open to the judge to tell the jury that, all of the other pre-conditions being present, if they were to conclude that Jay Marie told lies, they may regard them as supportive of guilt. In no way could or did the learned judge's failure to give the full Lucas direction render the conviction unsafe. This ground of appeal in my view also fails. I now turn to ground 4.

[39] See R v Burge and Pegg [1996] 1 Cr App R 163 and the helpful pronouncements of Kennedy LJ at p. 173.

Ground 4 – Learned trial judge failed to properly direct the jury to disregard the prosecutor's remark about insurance policy.

Appellant's Submissions

[59] Mr. Hamilton, QC complained that it was improper for the then prosecutor in his closing address to tell the jury that Jay Marie had told her cousin about obtaining benefits from an insurance policy that Raymond held since there was no evidence about this in the trial. He also complained that it was improper for the prosecution to have questioned the witnesses about an alleged insurance policy. Mr. Hamilton, QC said that the judge should have immediately addressed the prosecution's comment to the jury instead of waiting until the summation to treat with it. Mr. Hamilton, QC acknowledged that the judge told the jury, during his summation, that 'there is no evidence whatsoever of any benefits from a policy from Raymond Chin towards Jay Chin. It's been referred to and mentioned in passing by one or two witnesses. But I tell you there is no evidence of the existence of any such policy…'.[40] However, Mr. Hamilton, QC complained that to deal with it during the summation was too late in the day. In addition, Mr. Hamilton, QC submitted that the learned judge should have gone further and told the jury to disregard the comment altogether. He therefore submitted that this is another matter that undermined the safety of the conviction and the conviction should therefore be quashed.

Respondent's submissions

[60] Learned Director of Public Prosecutions, Mr. Armstrong, in his oral arguments took the Court to the transcript and pointed out that the then prosecutor in cross-examining defence witnesses spoke about the alleged insurance policy. However, defence counsel then appearing immediately objected to that line of questioning. To use the words of the learned Director of Public Prosecutions, the trial judge 'nipped it in the bud' by saying '[t]here is no evidence before this Court about anybody [being a] beneficiary [for an insurance policy]'.[41] Further, the learned trial

[40] See Record of Appeal Vol. IV, p. 1046, lines 13-18.
[41] See Record of Appeal Vol. III, p. 884, lines 16-17.

judge indicated immediately: 'Sooner if you are posting that objection. But I will certainly confirm that there is no evidence before this Court of any savings plans or otherwise, absolutely correct'.[42] Mr. Armstrong further argued that the trial judge in the summation adequately addressed the issue of there being no insurance policy. He said that the trial judge told the jury that there was no evidence of motive, no evidence of any insurance benefit from the death of the deceased going to Jay Marie. Further, that there was no evidence of the existence of any insurance policy or the terms of the policy. Mr. Armstrong submitted that the manner in which learned trial judge dealt with this issue was manifestly sufficient to leave the jury with very little doubt that there was no evidence of an insurance policy benefitting the appellant and that was not the motive for the killing. He argued that clearly it was a matter left for the learned trial judge's direction whether to have nipped the comments of prosecuting counsel in the bud or to have uprooted it at the end during his directions to the jury. It is noteworthy the observation of Lord Lowry, in Berry (Linton) v R[43] in treating with a similar complaint that the trial judge ought to have intervened earlier:

> "A third point was that Crown counsel at the trial, Mr Pantry, improperly tried to cross-examine the appellant and also commented to the jury on the appellant's exercise of the right to silence and that the trial judge was wrong not to correct him. About ten hours after the shooting the appellant attended the local police station with his attorney. He was reminded of his right of silence by being cautioned on two occasions within a short time of his arrival and, acting on the advice of his attorney, he remained silent when he might have been expected to explain that the shooting had been due to an accident. Undoubtedly Crown counsel's comment was improper, but when summing up the trial judge said, 'an accused man having been cautioned is under no obligation to say anything. The law gives him that right. You cannot use it adversely against him'. Therefore the real complaint is that the judge did not correct Crown counsel at the time. Their Lordships are satisfied with the course taken by the trial judge and are further satisfied that the adverse effect on the jury from the appellant's point of view was in the end no greater than it would have been if counsel had not made his improper observation. To find the best way in which to correct such an observation and to nullify its effect always poses a problem for the judge because, if he intervenes immediately, the

[42] See Record of Appeal Vol. III, p. 884, lines 24-25 and p. 885, lines 1-2.
[43] (1992) 41 WIR 244 at p. 248.

effect will probably be to emphasise the obvious relevance and cogency of the comment which ought not to have been made."

[61] Mr. Armstrong submitted that the complaint in relation to the insurance policy, given its nature of not being a central issue at the trial and the manner in which the learned trial judge dealt with it, could not have affected the fairness of the trial. Mr. Armstrong said that learned counsel appears to have no issue with the direction given that it 'would have had better impact' if it was done earlier. He opined that Jay Marie's real complaint appears to be one of timing not of substance.

Discussion – Insurance Policy

[62] I agree with learned Queen's Counsel Mr. Hamilton that the comments by the then prosecutor about the insurance policy benefits were unprofessional and improper insofar as the Crown led no evidence to substantiate those baseless assertions. However, quite properly, defence counsel who then appeared on behalf of Jay Marie objected and the learned trial judge quite rightly addressed the matter. I have no doubt that the learned trial judge nipped this improper comment in the bud during the cross-examination of the defence witnesses. What is more, the learned judge did not let matters rest there but quite helpfully in his address to the jury directed them that there was no evidence of motive, no evidence of any insurance benefits from the death of Raymond from which Jay Marie stood to gain. The judge went as far as to say that there was no evidence of the existence of any insurance policy or the terms of the policy. I have no hesitation in agreeing with the learned Director of Public Prosecutions that the fairness of the trial was not impacted by the inappropriate comments of the then prosecutor since the trial judge dealt with them adequately. It is always a matter within the discretion of the judge how to treat with inappropriate or potentially prejudicial comments. In one case it may be better to address it sternly as soon as it raises its head and in another should the judge do that it may serve to amplify the problem.[44]

[44] See the helpful pronouncements in Berry (Linton) v R (1992) 41 WIR 244 at p. 248.

[63] What an appellate court is required to do is not second guess the trial judge but to examine all of the circumstances and seek to determine whether or not the judge's treatment of the evidence and trial rendered the conviction unsafe. In the case at bar, I have no hesitation in concluding that the learned trial judge quite properly and appropriately corrected the improper comments of the prosecution during the cross examination phase and closing address and in so doing nullified any effect they may have had during the summation. Therefore, the judge cannot be justifiably criticised since there was nothing unfair in the trial as a consequence of his treatment of the prosecution's comments. Accordingly, this ground also fails.

[64] For all of the above reasons, there is no basis upon which this Court should interfere with the conviction and I would affirm it.

[65] I now come to address the final ground of appeal.

Ground 5 – The sentence that was imposed by the learned trial judge was unduly excessive and severe.

[66] Jay Marie having appealed against the sentence, it has become necessary for a review to be done of the sentencing phase. The learned trial judge received evidence in mitigation in favour of Jay Marie which clearly indicated that she was industrious and hardworking in addition to having shared a close relationship with Raymond even post-divorce. In addition, she had no previous conviction and was a virgin to the law; this coupled with the fact that at the date of the sentence she had spent time in custody. Yet surprisingly, the learned judge sentenced her to life in prison even in the face of those factors. The learned Director of Public Prosecutions Mr. Armstrong quite properly conceded that the sentence of life in prison was excessive. Indeed, Mr. Armstrong indicated that the Crown was of the view that the Court should substitute a term of years in prison for that of life in prison as the appropriate sentence. He quite helpfully referred this Court to the

Offences Against the Person (Amendment) Act, 2013[45] ("the Amendment Act") which should guide this Court in its determination of the appropriate sentence.

[67] I will briefly examine the relevant law. Section 2 of the Amendment Act provides that section 2 of the principal Act is repealed and the following is to be substituted:

> "Whosoever is convicted of murder shall be sentenced to death or to imprisonment for life or for such lesser term as the court considers appropriate."

[68] Section 6 of the Amendment Act inserts a new section 3B into the Act, subsection (1) of which stipulates:

> "Where a person is convicted of any offence under Part I and Part II of this Act, and sentenced to life imprisonment or to a lesser period of imprisonment, the court may order that the sentence imposed on the convicted person be reviewed by a court of competent jurisdiction after the person has served not less than a period of –
>
> (a) thirty years, where the sentence is for life imprisonment, and thereafter at intervals of five years; and
> (b) twenty years in the case of a lesser term of imprisonment, and thereafter at intervals of three years."

[69] The court must strive for consistency in its sentencing. Jay Marie has been convicted of murder and the conviction is upheld. Given the totality of circumstances and bearing in mind the mitigating factors such as Jay Marie having no previous convictions and the fact that she was industrious and hardworking before the incident occurred, coupled with the fact that the incident occurred in circumstances of what may well have been a crime of passion balanced against the fact that a gun was used to inflict the numerous injuries on Raymond and that he received several gun shots the trajectory of most were from back to front and having taken all of the circumstances of offence and the circumstances of the offender into account, I am of the view that the appropriate sentence for the offence of murder as committed by Jay Marie is 25 years. The sentence is to take effect from the date on which Jay Marie was first remanded into custody.

[45] Act No. 13 of 2013, Laws of Antigua and Barbuda.

[70] I would further order that the sentence of 25 years be reviewed by the court after Jay Marie has served a period of not less than 20 years.

Conclusion

[71] (1) I would dismiss the appeal and affirm the conviction.

(2) I would order that the sentence of life in prison be varied to a sentence of 25 years in prison.

(3) I would further order that Jay Marie Chin shall be brought before the High Court for the review of her sentence on her completion of a period of 20 years.

[72] I gratefully acknowledge the helpful assistance of learned counsel.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal

By the Court

Chief Registrar