JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 200 of 2003

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

VIRIS CHRISTIE

V

REGINA

Patrick Atkinson, Mrs. Valerie Neita-Robertson and Miss Carolyn Reid-Cameron for the Appellant

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions and Mrs. C. Williamson-Hay, Deputy Director of Public Prosecutions (Ag.) and Miss Natalie Ebanks for the Crown.

November 5, 6, 7, 2007 and June 12, 2008

HARRISON J.A:

1. Viris Christie was convicted in the Home Circuit Court in 2003 of the murder of Natasha Stevens, before Beckford, J and a jury following a trial which lasted several days. On November 3, 2003 she was sentenced to life imprisonment with a specification that she would not be eligible for parole before serving thirty-five years. The single judge who dealt with her application granted her leave to appeal against conviction. We heard submissions over a number of days and reserved our decision. This is the judgment of the Court.

The case presented by the prosecution

2. The appellant was a member of the Jamaica Constabulary Force and was attached to the Criminal Investigation Branch Division (C.I.B.), Portmore, in the parish of St. Catherine. In 1998 she was married to a Nigerian national called "Confidence". This was a "business marriage".

3. The appellant's colleague and good friend, Corporal Sandra Harris, testified that she had known the appellant close to 13 years. She said that the appellant told her that someone by the name of Natasha kept telephoning her house in the early mornings and that this was disturbing her sleep. She spoke to her husband about the calls but discovered subsequently, that Natasha was one of his girlfriends. She obtained the telephone number for Natasha and called her. Her husband was not too happy about this and had spoken to her about the telephone calls she had made to Natasha. They removed from where they were living and went to live at a complex along Paddington Terrace, St. Andrew. The telephone calls continued nevertheless. They therefore decided to separate and her husband moved out of the apartment.

4. Harris said the appellant told her sometime in 1999 that she had found out where Natasha worked and that she had planned to go there to "bus her ass" but she discouraged her from doing so.

5. Detective Inspector Barrington Campbell was the appellant's supervisor. He said that she was a Detective Constable, but she was not assigned a firearm due to the general shortage of firearms within the South St. Catherine Division. It was normally the practice that officers attached to

the C.I.B. would be issued a firearm to keep and carry, on and off duty, until he or she was transferred to some other division. It was also the policy of the force that when an officer discharged his firearm, whether on or off duty, he was required to make a report, first verbally, then subsequently submit a report in writing to his supervisor and the Commissioner of Police within twenty-four hours of any discharge.

6. Inspector Campbell said that he was able to locate a firearm and on Friday the 13th day of August, 1999 he instructed the appellant to attend on Detective Sergeant Bent at the Stadium Police Station in order to collect a 9 mm Browning semi-automatic pistol containing nine (9) rounds of ammunition. On the same day the appellant went to Detective Sergeant Bent and the firearm and rounds of ammunition were handed over to her. The firearm bore the serial number 245NV57875. She subsequently returned to Portmore Police Station with the firearm and rounds and handed them over to Inspector Campbell who noted the serial number, type of firearm and number of rounds in a firearms' register. The firearm and rounds were thereafter officially assigned to the appellant on a "keep and care basis".

7. On September 20, 1999 Inspector Campbell said he reported for work and had seen the appellant at the station. He left work at about 6:00 p.m. but no report was made to him by the appellant about her discharging the firearm on the 19th September. He saw the appellant again on the 21st September. They went on road block duty and returned to the station at about 5:30 p.m. Up to that time, she made no report to him that she had to discharge her firearm or that it was lost or mislaid.

8. At about 7:00 a.m. on the 21st September 1999 Sergeant Kermit Fairweather said he went to the Causeway in St. Catherine. On arrival, he observed the body of a female lying face down in a pool of blood and appeared to be dead. The body was clad in a pink merino and a pair of black panties, and had what appeared to be gunshot wounds. He cordoned off the area and called Deputy Superintendent Robinson who arrived at the scene shortly thereafter. The body was identified at Madden's Funeral Parlour by a Dr. Fitzroy Mallet as Natasha Stevens. He had known the deceased since 1995 and both of them had become good friends. He had last seen her alive three (3) days before her body was found.

9. Sergeant Fairweather searched the area and found five 9mm spent shells. Two were found on the ground beside the head of the deceased. Two were also found on the ground just below the feet and the other one was found in a cross beam of the bridge which was about 5 ft above the body.

10. Sergeant Fairweather said he examined the body of the deceased and noticed that a bullet was protruding from the neck. He removed it, placed it in an envelope, sealed and labelled it. He said that he had removed the bullet because if this was not done it would have fallen out and probably get misplaced. The five spent shells were also placed in an envelope which was sealed and labelled by him.

11. The police photographer was summoned to the scene and he took photographs. After photographs were taken of the body, it was turned over in order to reveal the face.

12. There seems to have been some discrepancy between the evidence of Sergeant Fairweather and Deputy Superintendent Robinson regarding the stage at which the bullet was seen in the neck and who had removed it. Robinson testified that it was when the body was turned over and the employees of Madden's Funeral Parlour were about to remove the body that he saw the protruding bullet. He said that Sergeant Fairweather was then standing beside him and he Robinson gave Fairweather certain instructions regarding the bullet.

13. The bullet which was removed from the neck was never tested for blood samples or for particles of flesh and it had been removed before the pathologist arrived on the scene. Sergeant Fairweather agreed under cross-examination that the proper procedure was for the undisturbed body to be presented to the pathologist. He was also aware that the pathologist could have done a post-mortem examination on the scene. It was contended by the defence that the bullet which was removed from the neck was "planted" by the police.

14. Constable Delroy Woodstock testified that on the 21st September 1999, at about 7:45 p.m. he was travelling in his private motor car along Lady Musgrave Avenue, in the parish of St. Andrew, when he heard a police transmission. This caused him to proceed to 65 Paddington Terrace. On his arrival at the premises, he spoke to a security guard who made a report to him. He entered the premises and saw the appellant lying on the ground in a pool of blood. Corporal Uquhart who had also visited the scene said however, that he had seen the appellant lying on the floor of the garage.

15. Constable Woodstock said he observed a 9 mm Browning pistol lying on the ground in close proximity to the appellant's head and had taken possession of the pistol. He was unable to say if the firearm was loaded and neither did he examine it for a serial number. On the arrival of other police officers, he handed over the firearm to Detective Corporal Urquhart who said he found two live rounds in the firearm chamber. He searched the premises for spent shells but none was found. He made a note of the serial number that was on the firearm and it was 245NV57875. This was the said firearm which was assigned to the appellant. It was admitted into evidence and marked Exhibit 1.

16. The appellant was placed in a police car and taken to the University Hospital where she was admitted.

17. On September 22 1999, Detective Corporal Urquhart took the firearm and rounds of ammunition to the Forensic Laboratory for testing.

18. Sergeant Lorne Rhoden who was also a good friend of the appellant, testified that she had given him moral support when his father died. He had met her husband and had unreservedly told her that he was against "business marriages". He recalls that on the 21st September 1999 he was on his way home when he heard a police transmission. This caused him to turn around and he proceeded to the University Hospital where he saw the appellant lying on a stretcher in the emergency section. He was however, unable to speak to her. He made several visits to the hospital and on September 30, he had a conversation with the appellant. She had asked him to check out how long it would take gunpowder residue to be removed from someone's hand. He

asked her why she had asked him this question and she told him that sometime before she was shot and injured, some "guys" had "dissed"" her and she had to fire a few shots at them. He said he made no attempt however to check out the question she had asked him.

19. Corporal Harris had also testified that she was watching the news on television on the 21st September 1999, when she heard a news item concerning the appellant. She had visited her at the hospital on several occasions and on one of her visits the appellant told her that the body of Natasha was found under the Causeway in Portmore, St. Catherine, but she did not know anything about that incident. Harris said she had also told her that she did not know where her firearm "turn" so anything could have happened during that time. It was suggested to Harris during cross-examination, that she had put "her own spin" on what the appellant had innocently told her but she denied this. It was also suggested to her that she was deliberately telling a lie on the appellant but she also denied this suggestion.

20. Superintendent Fred Hibbert, a ballistic expert, testified that he had approximately twenty-six years experience in the study of projectiles and firearms. He said that he had received two un-expended rounds and the firearm (exhibit 1) for ballistic examination and had test fired one of the bullets. Exhibit 3, the bullet which was retrieved from the neck of the deceased, was also examined by Superintendent Hibbert. He observed that one side of the bullet was flat and he formed the opinion that it had hit a hard surface such as board, iron, bone or any other hard material. He had also

received two envelopes from Detective Sergeant Fairweather which contained some spent shells. He made comparisons between the firearm (exhibit 1) and the cartridges. It was his opinion that the spent shells were discharged from the firearm which was assigned to the appellant.

21. On September 30, 1999, Dr. Ere Seshaiah, a Consultant Forensic Pathologist, attached to the Ministry of National Security, performed the post-mortem examination on the body of Natasha Stevens at Spanish Town Hospital Morgue. The body was identified to him by her brother Michael Stevens.

22. The body measured 5 feet 11 inches in height and weighed 180 lbs. On external examination he observed that the deceased had bite marks on the left buttock. He also found seven gunshot wounds on the body six of which he described as "through and through" which meant that the projectile entered the body and thereafter exited.

23. An entry gunshot wound was found on the outer aspect of the left arm which travelled through superficial tissues and exited on the left side of the chest. The second was a "through and through" gunshot wound on the right wrist joint and it had entered on the back and exited on the front. No gunpowder residue marks were found on the body. There were also three entry gunshot wounds on the back right side of the trunk which had travelled through underlying tissues and entered the thoracic cavity with a corresponding exit wound on the upper left side of the chest. Two corresponding exit wounds were present on the left side of the neck. The lungs, the trachea and vital blood vessels on the neck were injured. These

wounds had an upward trajectory which meant that they went upward and exited higher up on the body. Dr. Seshaiah described the trachea as comprising of hard tissue and that there was minimal damage to it. Dr. Davidson, a witness called by the defence said on the other hand, that the trachea was made of soft tissue.

24. Another gunshot wound was found on the left buttock. It had entered underlying tissues and the abdominal cavity and exited on the right side of the body. No gunpowder marks were found in the vicinity of this injury. There was also a grazing gunshot wound on the buttock.

25. There was also a muscle deep laceration on the left side of the deceased's face in front of the ear and a 3 x 2 cm deep laceration on the left side of the chin.

26. In Dr. Seshaiah's opinion, death was due to multiple gunshot wounds. He opined that anyone who received those injuries would have died within fifteen minutes. Dr. Davidson, a Clinician who was called as a witness by the defence, was of the opinion however, that death would have been immediate. Dr. Seshaiah was also of the opinion that the absence of gunpowder marks on the body meant that the muzzle of the gun was about 2 feet or more from the deceased when it was discharged. Dr. Seshaiah agreed under cross-examination that it was his responsibility as the person performing the post-mortem examination to remove any projectile which may have caused injury to the body. He also agreed that if a projectile was found he would have sent it off to the Forensic Laboratory for testing.

27. On October 1st 1999, Sergeant Fairweather, Superintendent Gause, Deputy Superintendent Robinson, Superintendent Benjamin, Assistant Commissioner Ellis and other police officers, returned to the crime scene. A further search was made of the area and a warhead and fragment of a bullet were found. The war head was found about three feet from where the head of the deceased was found resting on the ground under the bridge. According to Fairweather, the fragment was found "some distance" below where the feet were resting. These additional items were photographed and placed in an envelope which was sealed and labelled. They were also taken to the Forensic Laboratory for testing.

28. A number of questions were put to the appellant during the course of the investigations and her answers were recorded. These questions were asked by Deputy Superintendent Gause on Tuesday October 12, 1999 in the presence of the applicant's Attorney at Law, Arthur Kitchin, Deputy Superintendent Calvin Benjamin, Deputy Superintendent Robinson, and Detective Corporal Henry. The appellant had bandages on and a cast was on her hand. She was told that if she experienced any discomfort she could end the interrogation at any time she wished.

29. Deputy Superintendent Gause told her that he had intended to question her in relation to the murder of Natasha Stevens and that she could likely be charged for that offence. The appellant signed the caution which was written on a sheet of foolscap paper and this was witnessed. She was asked about thirty-one questions and responded to these questions. Both the questions and answers were recorded on the said foolscap paper and she signed as well as her Attorney at Law and the police witnesses. Gause

testified that there no threats, inducement, pressure or any force used in order to get the appellant answering the questions.

30. Questions 23-25, 29 and 30 along with the respective answers are reproduced here. They are set out below:

> "23. Question - Have you at all times had this Firearm in your possession up until the time you were shot and injured 21st of September, 1999?
>
> Answer – No.
>
> 24 Question - Tell us when are the times that this is not so?
>
> Answer - I don't remember the time, but on several occasions it may be left in the drawer or sometimes if I am going to take a nap in the barracks room or so.
>
> 25. Question - Are you aware of your responsibility when you are entrusted with a firearm in terms of keep and care?
>
> Answer – Yes.
>
> ...
>
> 29. Question - During the time you had the firearm in your possession, did you have any reason to discharge same?
>
> Answer – Yes.
>
> 30. Question - When and in what circumstances?
>
> Answer – I decline to answer."

31. The appellant was arrested and charged with the offence of murder on the 15th October 1999. When she was cautioned she made no statement.

The Defence

32. In her defence, the appellant made an unsworn statement from the dock. She said she had met Osagieodiase, a Nigerian national, in 1996. He was a computer analyst. They became friends and got married on the 6th May

1996. It was a business marriage but she said it was good for her because she was able to obtain a United States visitor's visa. They began living together in 1998 but he still had his girlfriends and she had her male friends. They shared the rent and food bills. In 1998 they decided to separate because it was no longer convenient for them to live together. She was annoyed over the late telephone calls he would receive at nights. She recalled an incident where she had to "tell off" one of her husband's lady friends who was rude to her on the telephone.

33. She said that Corporal Sandra Harris was her friend but they were not that close. She said that Sandra Harris had lied when she testified about her saying that she was going to "bus" Natasha's "ass". She said that she did not know anyone by the name of Natasha, and had never met her. She agreed that Harris and Rhoden had visited her at hospital and had told her "all sort of things" because someone as well as the police wanted to "set her up". She became suspicious because her husband had a key for her apartment and knew where she kept her gun and spent shells that she collected whenever she went on target practice.

34. She reported for work on the 20th September 1999 and had left work at about 6:00 pm. She gave a woman corporal a lift to Half-Way-Tree and then went to pick up a male friend, Linton Lewis, who spent the night with her at her apartment. They left the apartment together the following morning at about 6:00 a.m. and she dropped him off at his workplace. He was called as a witness in support of her alibi. She said she reported to work, left for court and eventually left work at about 7:00 p.m. She went home and when she

arrived at her apartment she saw a man with a gun which he pointed at her. She pulled her firearm and fired at the man. The man shot at her and she was hit. She had sustained gunshot injuries in the chest, left elbow and left thigh.

35. She ran towards a security guard who was on the premises; held on to him and told him to shoot the gunman after she handed him her gun. She then collapsed and said she knew nothing more until she regained consciousness in hospital. She said she did not know who had shot her.

36. The appellant also said that it was Sergeant Bent and not Inspector Campbell who had given her the firearm and that the rounds were not counted when she was assigned the firearm. She went to target practice at times and the rounds were replaced with those given to her by her colleagues. She recalls however that she had been assigned seven rounds.

37. She also said that on the 19th September 1999, she was driving her motor car and was on her way home. It was late at night and some boys tried to block the road. She had to "fire some shots at them" but she did not report the incident to the police. She said that one of the rounds fell in the car. She searched for it but did not find it. She said, "I know I should have five rounds, but I fired my gun when the gunman attacked me. I cannot account for my gun after I had been shot."

38. The appellant called eight witnesses in support of her case. The first was Dr. Davidson, a Clinician and Public Health Practitioner. He was of the opinion that because the trachea was made of soft tissue, it could not have caused the kind of deformity which was seen on the bullet that was removed

from the neck of the deceased. He was further of the opinion that the damage to that bullet was more consistent with it passing through hard tissue such as bone, a wall or some hard object.

39. Jason McKay, a forensic investigator since 2002, testified that as a forensic investigator he was able to reconstruct crime scenes. He was not allowed however, to testify in relation to the reconstruction of the crime scene in this case. He said he was also trained in the area of ballistics. He was familiar with the 9mm Browning pistol and was of the opinion that if a person was standing in front of a concrete wall and was shot from behind resulting in a "through and through" wound, he would have expected to see blood "splatter marks" on that wall.

40. Rohan Anderson a security guard who worked at the Freezone which is in close proximity to where the body of the deceased was found, testified that he was on duty during the night of September 20, 1999. His hours of work were from 10:00 p.m. to 6:00 a.m. the following day. He said that at about 2:30 a.m. he heard angry voices coming from the vicinity of the Causeway. He climbed up on to the roof of a canteen and saw a parked car. It was about six chains away from the Causeway. He remained there for about ten minutes and then called his supervisor. The police were also called and when they arrived he made a report to them. He said he did not hear any gunshots during that night.

41. Superintendent Wint gave good character evidence on behalf of the appellant. He said that the appellant had worked directly with him between 1999 and 2000. He found her to be an ardent worker, helpful, disciplined and

of good character. The learned trial judge in directing the jury said the witness had spoken of the appellant's good character and positive qualities and that was evidence they should take into account when they come to consider the case presented against her.

42. The other witnesses called by the defence included Sergeant Lloyd Crawford the supervisor of Constable Pearson, the police photographer. Constable Pearson had died shortly before the trial had commenced. He had taken photographs of the crime scene and had placed them in an album. Kenneth Ferguson, Crown Counsel in the Office of the Director of Public Prosecutions, was called in respect of the photograph album that was tendered in evidence as an exhibit at the preliminary enquiry. This album was also tendered in evidence at the trial.

The Grounds of Appeal

43. The original grounds of appeal were abandoned and leave was granted to argue six supplemental grounds of appeal. They are:

> GROUND 1
>
> The Learned Trial Judge erred in law in failing to leave the issue of manslaughter for the jury's consideration.
>
> GROUND 2
>
> The Learned Trial Judge erred in law in failing to give adequate or any directions on the significance and/or relevance of the Appellant's good character and in particular, the Appellant's propensity to commit the offence charged.
>
> GROUND 3
>
> The Learned Trial Judge failed to adequately put forward the defence's case and to assist the jury in their analysis and assessment of the defence thus prejudicing the Appellant's case.

GROUND 4

The Learned Trial Judge misdirected the jury on the matter of the unsworn statement when she directed that:

(a) it was not evidence;

(b) that they were to discount the unsworn statement and to elevate the evidence of the prosecution witnesses because the prosecution evidence was sworn testimony;

(c) that they were to give the unsworn statement less weight as it was unsworn.

Thereby undermining the Appellant's defence and causing significant prejudice.

GROUND 5

The Learned Trial Judge prevented the Defence from putting forward it's case to the jury by ruling that:

(a) the Defence could not tender the Post Mortem Report as an exhibit; and

(b) that the Defence could not call an expert to testify concerning a reconstruction of the crime scene as that was a matter for the jury.

That these rulings resulted in the Appellant not receiving a fair trial.

GROUND 6

The conduct of Counsel for the Crown during the course of the trial so departed from good practice that the Appellant was denied a fair trial.

IN THE ALTERNATIVE the Learned Trial Judge erred in allowing Counsel for the Crown to make comments prejudicial to the Appellant and in failing to give directions on these matters. Thus rendering the Appellant's trial unfair.

Ground 1

44. Mrs. Neita-Robertson for the appellant, submitted in respect of this ground that there were provocative acts sufficiently close to the time of death to warrant the trial judge leaving the issue of manslaughter for the jury's consideration. The evidence she said, revealed that the appellant had been receiving telephone calls late at night from a woman who was apparently a girl friend of her husband. Miss Llewellyn, Senior Deputy Director of Public Prosecutions, submitted however, that no evidence had been adduced in the trial which could have formed an evidential basis for the learned judge to have left the issue of legal provocation. We agree with these submissions and hold that there was no evidence of words spoken or conduct on the part of the deceased which could have caused the appellant to have lost her self control. In ***Robert Smalling v Regina*** Privy Council Appeal 45 of 2000 delivered 20th March 2001, Lord Bingham of Cornhill said at page 5:

> "(2) Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose his self- control and act as he did. This principle was laid down by Lord Devlin, giving the advice of the Board ***in Lee Chun-Chuen v The Queen*** [1963] AC 220, 231-234, recently applied by the House of Lords in ***R v Acott*** [1997] 1 WLR 306, 310-311 where Lord Steyn said:
>
> > "In the absence of any evidence, emerging from whatever source, suggestive of the reasonable possibility that the defendant might have lost his self-control due to the provoking conduct of the deceased, the question of provocation does not arise.....If in the opinion of the judge, even on a view most favourable to the accused, there is insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self – control, there is simply no issue of provocation to be considered by the jury ..."

> Thus the defence must be one which a reasonable jury properly directed could accept, and it must be disclosed by the evidence. The jury should not be distracted by directions to consider hypotheses which lack any factual substantiation in the evidence, since that is an invitation to speculate.
>
> (3) If there is evidence fit for the jury's consideration that the defendant was provoked to lose his self-control and kill the deceased, the judge must leave the defence of provocation to the jury and not withdraw it on the ground that a reasonable jury could not properly find that the provocation was enough to make a reasonable man act as the defendant did. This submission is fully supported by the language of the relevant statutory provision applicable in Jamaica, quoted below, and by authoritative expositions of the same provision in other jurisdictions: ***R v Davies*** (Peter) [1975] QB 691 700*;* ***R v Camplin*** [1978] AC 705, 716; ***Logan v The Queen*** [1996] AC 871; ***R v Acott***, above".

45. We therefore find no merit in the submissions made by Mrs. Neita – Robertson. We are satisfied that there was no need for the learned judge to have directed the jury on the issue of manslaughter. Ground 1 therefore fails.

Ground 2

46. Counsel submitted that the directions on good character of the appellant were deficient because although the learned judge had directed the jury how they should consider her good character, she had failed to specifically direct the jury on the relevance of the propensity of the appellant to commit the crime.

47. In ***R v Vye*** [1993] 1 W.L.R. 471 the English Court of Appeal was concerned with the scope of a judge's duty in regard to directions to a jury on the relevance of evidence of a defendant's good character. Having reviewed

earlier authorities on the subject, the court (per Lord Taylor of Gosforth C.J.) set out in summary form the following principles at p. 479 of the report:

> "(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements.
>
> (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements.
>
> (3) Where defendant A of good character is jointly tried with defendant B of bad character, (1) and (2) still apply."

48. In the later case of ***R v Aziz*** [1995] 3 W.L.R. 53, a decision of the House of Lords, in the course of delivering a judgment which reflected the unanimous view of their Lordships' House, Lord Steyn said (at p. 60) with reference to the decision in ***Vye***:

> "Lord Taylor of Gosforth C.J. started his judgment by saying that the issues debated in ***Reg v Vye*** [1993] 1 W.L.R. 471 would at one time not have been regarded as arguable. I would add that in recent years there has been a veritable sea- change in judicial thinking in regard to the proper way in which a judge should direct a jury on the good character of a defendant. It has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. Hence there has been a shift from discretion to rules of practice. And ***Vye*** was the culmination of this development."

49. In considering the correct approach to be adopted by the trial judge when dealing with the relevance of evidence of a defendant's good character Lord Steyn went on to say in his judgment at p. 62:

> "A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with ***Vye*** in a case where the defendant's claim to good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with Vye. I am reinforced in thinking that this is the right conclusion by the fact that after ***Vye*** the Court of Appeal in two separate cases ruled that such a residual discretion exists: ***Reg. v. H.*** [1994] Crim. L.R. 205 and ***Reg.v. Zoppola.Barraza*** [1994] Crim. L.R.833.

50. In the present case, the judge did direct the jury to take account of the appellant's good character but, unfortunately she did so in giving a direction which was flawed. She ought to have directed them on whether the appellant had the propensity to commit the offence with which she was charged. The direction was given in these terms:

> "The next witness for the Defence is Superintendent Wint, and he said the accused was a member of the JCF, and in 1999 and March 2000 he said he worked with the accused directly and she was a an ardent worker and possesses typing skills and was an asset to his office. She was a person with discipline and an ardent worker, somebody who volunteered in getting a job done. He knew her of good character and when asked, "Do you find her to be a person whose words you can take on a matter of importance?" and he replied, "I think so." Not yes or no. He said when he heard she was being investigated for involvement in murder he was somewhat surprised because of the person who he knew and considered her to be.

> When he was cross-examined he said that Inspector Campbell was the accused's immediate supervisor and in respect of issuing a firearm that would be Detective Campbell's responsibility. He said she was not yet appointed to detective and he was not saying that she was not all that efficient and was not able to work on her own. He said he would not be able to comment on the accused attitude if she was aroused by jealousy. He said the accused never told him she was married that he heard it from other sources.
>
> You have heard from the witness that the accused is of good character and has positive qualities, but that cannot by itself provide a defence to a criminal charge, but it is evidence which you should take into account in her favour.
>
> Although the accused has chosen not to give evidence before you, she did, as you know, give answers to questions and answers put to her by the police. In considering those questions and answers, you decide what weight you give it. You should bear in mind the evidence of her good character and decide what weight you should give to it. You should bear in mind that the answers were given by a person of good character, and take that into account when deciding whether you can believe them. You bear in mind that the Superintendent could only speak to the accused's good character on the job, but you have evidence of Linton Lewis that she was kind and listened to him and gave him good advice. You also have Sergeant Bell who told you how good she was to him on the death of his father sorry, Sergeant Rhoden, I beg your pardon, Sergeant Rhoden, on the death of his father. "

51. We feel obliged to say however, that the omission of a 'propensity' direction, in the summing-up of a case in which the accused was entitled to such, is not necessarily fatal to the fairness of a trial or to the safety of a conviction. See ***Bhola v The State*** Privy Council Appeal 26/05 delivered 30th January 2006, (2006) 68 WIR 449. Each case must depend on its circumstances, the criterion being whether a properly directed jury would

inevitably have convicted the accused. We will return to the outcome of this ground at a later stage of the judgment.

Grounds 3 and 4

52. Leave was granted for the appellant to argue these two grounds together. They are:

> "3. The Learned Trial Judge failed to adequately put forward the defence's case and to assist the jury in their analysis and assessment of the defence thus prejudicing the Appellant's case.
>
> 4. The Learned Trial Judge misdirected the jury on the matter of the unsworn statement when she directed that:
>
> (a) it was not evidence;
>
> (b) that they were to discount the unsworn statement and to elevate the evidence of the prosecution witnesses because the prosecution evidence was sworn testimony;
>
> (c) that they were to give the unsworn statement less weight as it was unsworn.
>
> Thereby undermining the Appellant's defence and causing significant prejudice."

53. The learned trial judge, in her directions to the jury (at pp.1215 - 1217) how they should approach the unsworn statement of the appellant said:

> "Now the accused gave a statement from the dock. She was not subjected to cross-examination. She could have done one of three things. She could have remained silent. She could have given evidence from the witness box and be cross-examined and she could have made an unsworn statement. I must tell you that the statement from the dock is not evidence which could have been tested by cross-examination. An accused's absence from the witness box cannot provide evidence of anything but when assessing the quality of the evidence you may take into consideration the fact that it was uncontradicted by any evidence

> coming from the accused. Nevertheless, you must take into account what she has said and give it such weight as you think fit in coming to your conclusion as to whether or not she is guilty on this indictment.
>
> -The whole purpose of cross-examination is to ferret out conflicts in the evidence and to provide material that the truth has not been spoken.
>
> You may perhaps be wondering why the accused has elected to make an unsworn statement. It could not be because she had any conscious objection to taking the oath since if she had, she could affirm. Could it be that she was reluctant to put her evidence to the test of cross-examination? If so, why? She has nothing to fear from unfair questions because she would be fully protected from these by her own counsel and by the Court. It is exclusively for you to make up your mind whether the unsworn statement has any value aid if so what weight should be attached to it. It is for you to decide whether the evidence from the prosecution has satisfied you of the accused's guilt beyond a reasonable doubt. Further, in considering your verdict, you should give the accused's unsworn statement only such weight as you think it deserves."

54. Counsel also referred the court to the directions at page 1173 where the judge said:

> "Now Mr. Foreman and Members of the Jury, there is no evidence before you as to when the accused got married. In her statement to you she said she got married in 1996 so that is not evidence".

And at pages 1184 – 1185 where she said:

> "... But, remember, in her statement, the accused said as soon as she was shot, she pulled her firearm and fired. You remember that is what she said to you in the statement. So, up to the 21st of September, she had her firearm with her. I am sorry.
>
> The accused, in her statement to you, said that as soon as she had been shot, that's on the night of the twenty-first, she pulled her firearm and fired. That was her statement, not evidence, her statement".

55. Counsel submitted that the above directions had the effect of nullifying the defence which included alibi and other issues such as another person having a motive to kill the deceased.

56. It was also argued that the directions in relation to the number of rounds which the appellant said she had discharged on the night of the 19th September, had the effect of withdrawing from the jury, a full and fair consideration of that part of her statement which was of critical importance to the appellant's defence. Mrs. Neita-Robertson argued that the importance of this evidence is that the Crown sought to prove that the appellant was issued with 9 rounds; the deceased had received 7 gunshot injuries and that the appellant's firearm was recovered with 2 live rounds. She argued that the appellant sought to offer an explanation in her statement for the absence of the other rounds of ammunition and that the weight in relation to this particular piece of evidence was important. The judge she said had directed the jury that that portion of her statement was not evidence and was only a statement.\

57. This Court has repeatedly said that if the trial judge feels it appropriate to comment on the fact that an accused elected to make an unsworn statement from the dock, the judge should faithfully adhere to the guidelines laid down by the Privy Council in ***Director of Public Prosecutions v Walker*** (1974) 21 WIR 406, although they should be tailored to fit the facts of the particular case. It therefore becomes necessary again to repeat what the Board said. Lord Salmon who delivered the judgment of the Board said at p. 411:-

> "There are, however, cases in which the accused makes an unsworn statement which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

58. In this case, the appellant made a statement from the dock denying that she had killed the deceased and that she had an alibi. There was also the assertion by the defence that there was a conspiracy on the part of some police personnel and/or persons unknown and the possibility of the planting of incriminating evidence, to wit: the bullet falling out of the neck of the deceased.

59. Miss Llewellyn submitted that the transcript does not reveal any evidence of a conspiracy or planting of the bullet, with this we agree. The

judge was quite generous to the defence when she nevertheless left these assertions for the jury to consider. The learned judge did not "parrot" (to borrow a phrase from Carey J.A in ***R v Cedric Gordon*** SCCA 109/89 delivered January 15 1990; (1990) 27 JLR 446) the language of Lord Salmon but plainly, this was the sort of case in which the guidelines in ***Walker's*** case are applicable. We therefore find no merit in grounds 3 and 4 and they also fail.

Ground 5

60. This ground was drafted as follows:

> "5. The Learned Trial Judge prevented the Defence from putting forward it's case to the jury by ruling that:
>
> (a) the Defence could not tender the Post Mortem Report as an exhibit; and
>
> (b) that the Defence could not call an expert to testify concerning a reconstruction of the crime scene as that was a matter for the jury.
>
> That these rulings resulted in the Appellant not receiving a fair trial."

61. It was contended by Mrs. Neita-Robertson in respect of this ground that the combination of rulings by the trial judge, effectively deprived the defence of putting forward their case adequately and in the circumstances the trial was not fair. She placed emphasis on the rulings with respect to the tendering into evidence of the post-mortem examination report of Dr. Seshaiah and the evidence in relation to Jason McKay, the forensic investigator.

62. We turn first to the complaints regarding the post-mortem examination. At page 409 of the transcript of the evidence, whilst Dr. Seshaiah was under cross-examination, defence counsel requested to see his notes from which he had refreshed his memory. She was given the post-mortem examination report and she observed that there were diagrams attached to the report which the doctor had prepared and relied on. Counsel then applied to the court to have the report and diagrams attached, to be admitted into evidence. The learned judge ruled that she would not accede to the request for the report to be admitted but ordered that the diagrams should be admitted into evidence.

63. Counsel in this Court, submitted that the issue as to the time of death was important since Dr. Davidson said death would have been instantaneous and Dr. Seshaiah said it would have occurred within fifteen minutes. The ruling she said, not to allow the report to be tendered in evidence had deprived the defence of the full effect of Dr. Davidson's evidence and had instead relegated it to a hypothetical situation thereby preventing Dr. Davidson from criticizing the evidence of Dr. Seshaiah.

64. Mrs. Neita-Robertson also submitted that the appellant did not receive a fair trial in view of the judge's ruling that a reconstruction of the crime scene by Jason McKay the forensic investigator, was not permissible since that was a matter for the jury. She argued that McKay's evidence of the reconstruction would have been important because the defence contended at all times that the deceased was not shot where the body was found. She contended that if this were so, or if there was any doubt, it would mean that the spent shells

and fragments of bullets would have been planted on the scene. She said that this would be an important part of the defence. Five spent shells were found on the 21st September; 1999, the post mortem examination report which was prepared on the 30th September, 1999, indicated the number of gunshot injuries found on the body of the deceased, and there was the subsequent finding of two more spent shells on the 1st October. She submitted that this was an attempt by the prosecution to account for the nine rounds that were assigned to the appellant.

65. She further submitted that McKay had videotapes of how a 9mm was fired as well as charts he had prepared and that these materials would certainly support his findings. She argued that there was the absence of photographs on the Crown's case and although they were tendered into evidence by the defence, they were unable nevertheless to cross-examine the Crown witnesses on them. In the circumstances, she submitted that the judge's rulings had severely restricted the defence being presented.

66. We are of the view that the trial judge's summation when analyzed, reveals that her treatment of all the issues which arose from the evidence available, was fair and balanced. The rulings in no way impacted negatively on the ability of the defence to present their case and we believe that there was no accompanying miscarriage of justice.

67. It is a fact that the person who had compiled the photograph album had died and Constable Fairweather did say that he did not know of the photographs. We agree with Miss Llewellyn, she having submitted that the Crown could not have put in any of the photographs but the defence certainly

had the opportunity of taking Constable Fairweather through individual photographs.

68. Furthermore, it cannot be discerned from the evidence that MacKay had visited the scene on the morning that the body was found. Neither did he say that he was privy to seeing what was on the scene. We are therefore of the view, that his evidence could have been self serving or was asking the jury to speculate. We conclude therefore that the rulings did not affect the appellant receiving a fair trial. This ground of appeal also fails.

Ground 6

69. This ground of appeal was argued by Miss Reid and it states as follows:

> "6. The conduct of Counsel for the Crown during the course of the trial so departed from good practice that the Appellant was denied a fair trial.
>
> IN THE ALTERNATIVE the Learned Trial Judge erred in allowing Counsel for the Crown to make comments prejudicial to the Appellant and in failing to give directions on these matters. Thus rendering the Appellant's trial unfair." (sic).

70. It is our view, that this ground of appeal was argued somewhat half-heartedly. One would have expected that some evidence, whether in the form of an affidavit from Counsel in the trial below, or a production of the transcript with the address by Counsel for the Prosecution, would have been produced to this Court. Counsel for the defence submitted nevertheless that the comments that were made by counsel were inappropriate and that the judge should have given specific directions on them. As we have said before, this Court did not have the benefit of seeing the specific complaints. It may be

useful however, to say a few words in relation to the conduct of a prosecutor during the course of a trial and especially during his or her closing speech to the jury.

71. The headnote in ***Boucher v R*** (1954) 110 Can CC 263 put it:

> "The duty of Crown Counsel is to be impartial and excludes any notion of winning or losing. He violates that duty where he uses inflammatory and vindictive language against the accused or where he expresses a personal opinion that the accused is guilty or states that the Crown investigators and experts are satisfied as to his guilt. Such language and opinions cannot help but influence the jury and colour their consideration of the evidence and amounts to a miscarriage of justice ..."

72. In ***Johnson v R*** (1996) 53 WIR 206 the Court of Appeal of Jamaica was concerned with a complaint that Crown counsel had -

> "made "improper and unfounded allegations" against defence counsel on numerous occasions during the trial which were of such character and frequency as to prejudice the fair trial of the appellant."

The Court of Appeal said (at p 215), allowing the appeal, that:

> "Counsel must not cast aspersions or make improper imputations as to the integrity of the opposing counsel, unless in the most extreme circumstances, and then only in the absence of the jury. Such conduct emanating from prosecution counsel in the presence of the jury creates prejudice in the minds of the jury and inhibits a fair and impartial trial."

73. In ***Randall v R*** [2002] UKPC 19, 60 WIR 103, Lord Bingham of Cornhill, giving the advice of the Board, said (at pp 108, 109, paragraph [10]) that: "The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice" and quoted with approval from ***Boucher v R*** He continued:

> "... (iii) While the duty of counsel may require a strong and direct challenge to the evidence of a witness, and strong criticism may properly be made of a witness or a defendant so long as that criticism is based on evidence or the absence of evidence before the court, there can never be any justification for bullying, intimidation, personal vilification or insult or for the exchange of insults between counsel. Any disparaging comment on a witness or a defendant should be reserved for a closing speech.
>
> (iv) Reference should never be made to matters which may be prejudicial to a defendant but which are not before the jury."

74. Finally, in ***Mantoor Ramdhanie, Deochan Ramdhanie, Toolsie (Patrick) and Gresham (Ken) v The State*** [2005] UKPC 47 their Lordships sitting in the Privy Council held inter alia, that when prosecuting counsel's final speech follows that of defence counsel; the standards expected of prosecuting counsel are not dependent upon the compliance of defence counsel with the rules governing conduct of the defence.

75. We repeat for emphasis that there was no evidence before this court which could place Counsel for the Prosecution in the instant case, in any of the categories referred to above. We find no merit in this ground and it also fails.

Conclusion

76. The prosecution case depended, it is plain, on circumstantial evidence and we are of the view that the learned judge made it clear to the jury what circumstantial evidence really was and what their approach to such evidence should be. Not surprisingly, the directions on circumstantial evidence were not subject to any complaint on this appeal.

77. Counsel for the prosecution submitted and we agree, that the circumstantial evidence against the appellant was very strong. Counsel highlighted the following areas of evidence:

> "(i) The prosecution had provided evidence of motive through Corporal Harris.
>
> (ii) There was also evidence that the firearm that was assigned to the appellant was the weapon that had inflicted the fatal injury. It was assigned to her with nine rounds of ammunition and when it was picked up by Constable Woodstock from beside her at the Paddington Terrace premises, it only had two live rounds in it. The prosecution had led evidence that five spent shells were found at the scene on the 21st September. A further search was carried out on the 1st October when a warhead and fragment of a bullet were found in close proximity to where the deceased's body was found.
>
> (iii) The ballistic expert had also concluded after an examination of the cartridges and firearm that the spent shells were discharged from the firearm that was assigned to the appellant.
>
> (iv) There was the evidence of Sgt. Rhoden who had said that the appellant had asked him on September 30, 1999 how long would gunpowder residue remain on the hand.
>
> (v) No report was made by the appellant to Sergeant. Campbell that she had discharged her firearm prior to September 21, 1999."

78. We are further of the view, that though there was misdirection on good character, we are satisfied that no miscarriage of justice was occasioned thereby. The defence of alibi was quite obviously rejected by the jury. We feel able to say that the jury would necessarily have reached the same verdict against the appellant had they been correctly directed on the aspect of her evidence of previous good character. In the circumstances we consider this

to be a proper case for us to apply the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act, and we do not hesitate to do so.

79. The appeal is therefore dismissed. The conviction and sentence are affirmed and sentence should commence as of the 3rd February, 2004.