Privy Council Appeal No 23 of 2007

Director of Public Prosecutions *Appellant*

v.

Selena Varlack *Respondent*

FROM

THE COURT OF APPEAL OF
THE BRITISH VIRGIN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 1st December 2008

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Carswell**]*

1. The respondent Selena Varlack was on 12 June 2006 convicted, after a trial before Joseph-Olivetti J and a jury, of the murder of Tristan Todman (described in the indictment as Tristan Todman Industrious) on the night of 29-30 August 2004. She and her co-defendants Lorne Parsons and Clinton Hamm, who were also found guilty, were sentenced to imprisonment for life. They appealed to the Eastern Caribbean Court of Appeal (Alleyne CJ Ag, Barrow and Rawlins JJA), which dismissed the appeals against conviction of Parsons and Hamm but allowed the respondent's appeal, on the ground that the trial judge should have ruled

at the close of the prosecution evidence that there was no case to answer and withdrawn the case from the jury. The Director of Public Prosecutions appealed by special leave to the Privy Council against the Court of Appeal's decision in respect of the respondent. Petitions brought by Hamm and Parsons for special leave to appeal were dismissed by the Board.

2. The body of Tristan Todman was found about 7.30 am on 30 August 2004 in his car at the end of an isolated dirt track in the mountains of the island of Tortola in the BVI. He had been shot seven times and his body was hanging out of the front passenger door of the car. The keys were in the ignition in the "on" position, the gear lever was in "Drive" and the engine was still warm but not running. Empty bullet cases were found in and near the car and bullet fragments were later recovered from his body. The probable time of death was never clearly established.

3. The prosecution case was that the murder was carried out some time after 10 pm on the night of 29-30 August in the execution of a joint enterprise to which Parsons, Hamm, Mario Pemberton and the respondent were parties. The evidence against each of the defendants was circumstantial. It tended to establish Parsons' possession of the murder weapon, an Uzi pistol, and to prove that a car which was driven on that evening by Hamm was seen parked at or about 11.30 or 11.45 pm on the night of the murder on a lonely road at the other end of the dirt track, a short distance from the place at which Todman's body was found. The judge found that Parsons and Hamm each had a case to answer, which conclusion was upheld by the Court of Appeal. She acceded to the submission of no case at the close of the prosecution evidence made on behalf of Pemberton, and at the end of the case he was acquitted by the jury on the charge of keeping a firearm without a licence.

4. The prosecution case against the respondent was that she was used as a lure to get Todman to go to a meeting place on the mountain road, where he was to be murdered. It was based largely on evidence of telephone calls made between the defendants, from which the prosecution sought to draw the inference that she knew and agreed to the plan to kill Todman. It was claimed that she was instrumental in getting him to travel into the mountains and tipped Hamm off by telephone when he left her apartment for the meeting.

5. The prosecution assembled detailed evidence at trial of the significant number of telephone calls made between Hamm, Parsons and the respondent in the space of nine days from 25 August to 2 September 2004. Expert evidence was called to place the general area in which the caller and the person called in each case were located, by identifying the

location of the telephone relay stations that processed the telephone calls. The calls were summarised in paragraphs 10 to 15 of the judgment of Barrow JA in the Court of Appeal:

> "[10] .... In a period of some five months before 25th August 2004 there were sixteen telephone calls between Parsons' mobile or home telephone and Hamm's mobile or home telephone. On 25th August 2004 there were three calls by Varlack from a neighbour's telephone to Hamm's mobile telephone, and one call from Parsons' home telephone to Varlack's neighbour's telephone. These calls were all within the space of 6 minutes. On the following day there was one call from Parsons' home telephone to Hamm's home telephone.
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> [11] On 28th August 2004, in less than an hour beginning at 7:15 in the morning, Varlack called Hamm three times and Hamm called Varlack five times. That evening Hamm called the deceased at the latter's home and later Parsons called Hamm.
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> [12] On 29th August 2004, the last day the deceased was seen alive, in the morning Hamm made three calls, two to the work place and the third to the home of the deceased. Varlack called three times to the deceased's home telephone, apparently reaching him once.
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> [13] That evening, at 8:49 Varlack telephoned from the neighbour's home and spoke with Hamm on his mobile phone. At 9:31 the deceased made his final telephone call: it was to Hamm's mobile. Three minutes later Hamm used his mobile telephone, from an East End location, and spoke with Parsons on his mobile telephone. Five minutes later Hamm again telephoned Parsons on his mobile. Twenty minutes after that call (at 9:58) Varlack, from another neighbour's telephone, called Hamm on his mobile. Hamm was still in the area of East End. Less than a minute after that, Hamm telephoned Parsons, who was in the Road Town area of Tortola, on his mobile. Five minutes later, at 10:04, Hamm telephoned Varlack at the same neighbour's home. The final call that night was at 10:57 when Hamm called the telephone company's balance check number.

> [14] The following morning, the morning that the body was discovered, Hamm telephoned for Varlack twice and in the afternoon Varlack telephoned Hamm. On the next day, 31st August 2004, Hamm and Varlack each telephoned the other a number of times, Parsons and Hamm each telephoned the other a number of times and Parsons telephoned Varlack twice. On 1st September 2004, after the police interviewed Varlack, Parsons telephoned Hamm twice and Varlack telephoned Hamm twice.
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> [15] At 4:11:33 and at 4:11:37 in the morning of 2nd September 2004, after the Uzi firearm was recovered from Parsons' mother's jeep, Varlack telephoned Hamm."

It was submitted on behalf of the prosecution that the timing of some of these calls was significant in relation to several matters which occurred, both before and after the killing.

6. The respondent and Todman had been in a sexual relationship and had cohabited at her apartment until some time within a period of two weeks before Todman was killed, when he left and commenced a relationship with Kishma Martin. It was alleged by the prosecution, but denied by the defendants, that the respondent had begun a relationship with Hamm when Todman left. The respondent averred in her written statement to the police that the estrangement was a ruse planned by Todman and herself to enable Todman to take advantage of Ms Martin's beneficence. On 29 August 2004 Todman called at the respondent's apartment, which was a few minutes' drive from the scene of the murder, about 9.30 pm, stayed a short time and left shortly before 10 pm. At 9.58 pm the respondent used a neighbour's telephone to call Hamm on his mobile telephone. At 9.59 Hamm called Parsons, then at 10.04 called the respondent at her neighbour's house. The respondent claimed that Todman returned a little while later, then they made love and he stayed until about 11.45 pm. Evidence was given, however, by one neighbour, Mrs Tasha Potter, that up to the time when she went to bed at 11 pm or thereabouts she did not hear his car return, although it had a distinctive sound. Another neighbour Mr Allison Punt stated that he returned home a few minutes before 11 pm, but did not remember seeing Todman's car at the respondent's apartment.

7. On the morning of 30 August 2004 Sergeant Arthur went to the respondent's apartment and told her that Todman had been found dead in a car up the mountain. She went with him to the police station, where she met Todman's mother Carla and his brother Austin. When Carla and

Austin asked the respondent if she knew where the scene of the killing was, she replied that she did not. They then set off along with the respondent to find the scene. In the course of the journey Austin, who was driving, started to make a left turn, whereupon the respondent told him that he had taken a wrong turn. The prosecution relied on this as showing knowledge on the respondent's part of the place of the killing, but the defence suggested that it might be explained by the fact that some instructions had been given to Carla at the police station about finding it, which it was possible the respondent could have heard.

8. Later that day the respondent indicated that she wanted to talk to Inspector Charles. She was taken to see Inspector Alexis Charles, whereas she had intended to talk to Inspector Marlon Charles, but she proceeded to make an oral statement. She said that Todman had become involved in selling drugs and owed money to some others. He had moved out of her apartment because he could not afford to pay the rent, their intention being that a cousin could then stay and contribute to it. He had come to her apartment about 9.30 pm and asked her for jugs of water for a car up the hill which was overheating. He returned about 15 minutes later and stayed until 11.45 pm, at which time he left, taking a pillow and a fan with him. The respondent telephoned Hamm at 6.45 pm that evening and had a conversation lasting 2 minutes and 22 seconds.

9. Shortly after midnight on 2 September 2004 police officers stopped a vehicle towing a boat on a trailer. Pemberton was driving the vehicle, with Parsons in the front passenger seat. When the vehicle was searched an Uzi pistol was found under the passenger seat, and another pistol was subsequently found in the boat. It was proved in evidence that the Uzi pistol was the weapon used to kill Todman.

10. The respondent was interviewed by Superintendent James on 4 September 2004. She asked why Parsons and Pemberton had been given bail on the firearms charge. After Supt James had explained the reasons, she said "I just hope Mario not involved". When asked what she meant she replied "I hope Mario not involved in killing Tristan, because I would kill him myself", adding that she would poison him. She then made a long written statement, typing most of it herself. In that statement she elaborated on Todman's drug dealing activities and his financial position and repeated her account of his taking water for a car between 9.30 and 10 pm on the evening of 29 August, returning a few minutes later and staying until a few minutes before midnight. The prosecution argued that it could be regarded as showing guilty knowledge on the respondent's part that not only did she know about the arrest of Pemberton and Parsons, but knew about the finding of the guns and linked that with Todman's murder by speculating about Pemberton's involvement in the

killing. They also suggested that it was significant that she telephoned Hamm at the unsocial hour of 4.11 am on the night that the Pemberton and Parsons were arrested and the Uzi pistol was found. The defence suggested that she might have heard about the finding of the guns from friends or relations in the police, but no evidence was given by or on behalf of the respondent that this was the source.

11. On 17 September 2004 the respondent telephoned Superintendent James and asked to see him. When they met she stated that the previous day three masked men had called on her at her apartment, held a gun to her head and asked her for the rest of Todman's cocaine. She also volunteered that on 29 August between 11 am and midday she had used Clyde Potter's mobile telephone to try to call Todman at his place of work at the fire station and had also called him at home. Records proved, however, that the only telephone call that day to the fire station was from Hamm's mobile telephone, and that the only mobile telephone call recorded between 11 am and midday to the apartment where Todman was living was also from Hamm's instrument.

12. Superintendent James saw the respondent again on 7 December 2004, said that he wished to ask her further questions and cautioned her. After a couple of questions she refused to answer without her lawyer being present. Superintendent James informed her that she would be arrested on suspicion of murder and left the room, whereupon she snatched the record of interview, crumpled it, chewed it up and threw it into the wastepaper basket.

13. There was no evidence that the respondent was present when Todman was killed. The case against her was that she was part of the joint enterprise to which the other three defendants were parties, that he would be lured to the meeting place, where it was contemplated that he would or might be killed. This was evidenced, the prosecution argued, by the pattern of the telephone calls, allied to her behaviour after the murder. It was submitted that the evidence was sufficient to establish that she knew of the plan for a meeting between Todman and one or more of the respondent's co-defendants and, further, that she knew and accepted that a possibly lethal attack might be mounted on him there. The defence case was, in summary, that even if it might be inferred from the evidence that the respondent knew that Todman was to meet Hamm, it could not be established that she knew the true purpose of the meeting. That meeting, it was argued, could have been connected with some transaction such as drug dealing, and it was a step too far to infer that it might involve a lethal attack on Todman.

14. Submissions of no case were made to the trial judge at the end of the prosecution evidence on behalf of each defendant and their counsel applied to the judge to have the case against their clients withdrawn from the jury. The judge gave a reserved judgment in writing, in which she acceded to the application in respect of the murder charge against Pemberton but rejected all the other defence submissions. At the outset she set out the governing principle in determining applications of no case, based on *R v Galbraith* [1981] 1 WLR 1039 and *Labrador v R* (BVI Criminal Appeal No 10 of 2001). The essential statement of the law for present purposes is a sentence from the judgment of Lord Lane CJ in *Galbraith* at page 1042:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".

This has long been regarded as a canonical statement of the law, and was so accepted by both parties to the appeal before the Board.

15. The judge reviewed the prosecution evidence and stated her conclusions in respect of each defendant. When it came to the respondent's case she said at paragraphs 68-9 of her ruling:

> "68. ... The concept of joint unlawful enterprise is such that once there is evidence that Varlack participated in a joint unlawful enterprise which contemplated the death of or which resulted in the death of the victim and the death was an event which she could have foreseen as a probable consequence of the unlawful enterprise then she is deemed to have committed the offence. See section 20 of the Criminal Code and Archbold op. cit. para 18-15.
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> 69. True, each act attributed to Varlack on its own proves nothing by itself but when taken together and viewed within the framework of the Crown's case, I have no doubt that the Crown has established a compelling prima facie case against her based on circumstantial evidence. The questions raised by her Counsel on the reliability or otherwise of the Crown's

> evidence and the inferences to be drawn from it and the weight to be given to it are all matters for the jury. The evidence, albeit circumstantial, is not so tenuous neither has it been so discredited as to warrant the case being taken from the jury. The evidence is such that a reasonable jury properly directed might on one view of the evidence convict. The no case submission accordingly fails."

16. Of the four defendants, both Parsons and Pemberton gave evidence, but neither implicated the respondent. Hamm did not give evidence or call witnesses. The respondent elected not to give evidence, but called one witness, Zebelon McClean, whose testimony was directed to establishing that the relationship between Hamm and the respondent was platonic.

17. The judge discussed the issues with counsel before the commencement of the closing speeches, and decided against giving a good character direction in respect of the respondent. She said that she did not consider that the course of the questioning had raised good character, and that in any event she would have exercised her discretion against giving a direction, on the ground that the respondent had said in her statement that she connived at Todman's deceiving and taking advantage of Kishma Martin.

18. The judge went on to give the jury her directions on the law and the evidence. Mr Knox QC, counsel for the respondent, submitted that the directions in relation to joint enterprise were misleading and constituted a material irregularity which made the conviction unsafe. She started by quoting from section 20 of the Criminal Code of the British Virgin Islands 1997:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such unlawful purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such unlawful purpose, each of them is deemed to have committed the offence."

She went on (Record, pages 1788-89) to give the jury directions on what constitutes joint enterprise, telling them that they must find

> "that they were engaged in this joint plan and that the death of Todman was a consequence of the plan and they could

> have foreseen that death or serious bodily harm would result from the carrying out of the plan."

She continued:

> "Now your approach of the case should, therefore, be as follows: if you look at the case of any of the Defendants, you are sure that with the intention I mentioned he committed the offence on his own or took some part and committed it with others, he is guilty. So before you can convict any of the Accused to make each one of them liable for the acts of the others, you must be satisfied that they agreed to commit the crime in question or had a common purpose to commit it or it was a probable consequence of the unlawful purpose of which they were involved with the unlawful enterprise; and, secondly, that what each did was part of what had been agreed that they would do a part of that common purpose or that it was done in furtherance of that common purpose.
>
> So essentially what I am saying and finally you must also remember that according to this doctrine of joint unlawful enterprise, it is not only the person who inflicts the fatal blow who is criminally responsible. Everybody is in it together. They are deemed to accept the acts of the other, and they are equally responsible whether they actually held the gun and shot Todman or not. In the presence of what I call a secondary Defendant which is somebody who doesn't hold the gun and shoot at the scene, is not required to ground responsibility. If they do between them in accordance with the agreement all the things necessary to constitute the crime, then they are all equally guilty of it provided the crime does not go beyond the understanding of arrangement if each realize that in carrying out the plan, the unlawful plan, there was a real risk of physical injury being done to Mr. Industrious in the course of that plan, and each participated in whatever way with that knowledge, then in law each will have taken to have adopted the acts of the others and they are responsible for them even if he or she did not desire the death of Mr. Industrious."

19. The Court of Appeal allowed the respondent's appeal on the ground that the judge should have withdrawn her case from the jury at the end of the prosecution evidence. Barrow JA, with whose judgment the other members concurred, accepted at paragraph 29 that it was open to

the jury to infer that the respondent's telephone call to Hamm at 9.58 pm on 29 August 2004 was to advise him that Todman was on his way to meet him. He continued, however, in paragraph 30:

> "That underlying inference shows the second inference asserted by the Director to be a foundation of sand. The second inference was that Parsons, Hamm and Varlack planned the murder and that the telephone calls between the three, both before and after the murder, showed this. That is a leap. If the telephone calls that were made between Hamm and the deceased do not show that the deceased planned to be murdered, only that he planned to meet, how could the telephone calls that Varlack made to and received from Hamm (and the one call from Parsons three days before) show that Varlack planned to murder the deceased and not just for he and Hamm to meet?"

He pointed out that the respondent's statements to the police about Todman's drug involvement "would have provided fertile ground for the jury to suspect and speculate about the purpose of the meeting". He added, at paragraph 31:

> "Whatever the purpose, it was as likely that Varlack was a party only to that purpose as that she was a party to murder."

Nor did he consider that it was open to the jury to draw an inference as to Varlack's knowledge of the crime, which could have come from a source or sources other than participation in an agreement to commit it. The same applied to her consciousness of guilt, upon which the prosecution placed some emphasis. That could be as referable to guilt for unintentionally setting up Todman to be killed as to guilt for intentionally doing so.

20. The case for the appellant before the Board was that the Court of Appeal had failed to apply the correct test when considering whether the judge should have withdrawn the respondent's case from the jury. They had, as the Director of Public Prosecutions submitted in a cogent argument, substituted their own view of what inferences could properly be drawn rather than focusing on those which a jury could legitimately draw.

21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that

evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.

22. The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:

> "It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence arc reasonably open on the evidence ... He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reaonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence...
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all

> inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in *R v Jabber* [2006] EWCA Crim 2694, where Moses LJ said at paragraph 21:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

Cf *R v Van Bokkum* (unreported) 7 March 2000 (EWCA Crim, 199900333/Z3), para 32; *R v Edwards* [2004] EWCA Crim 2102, paras 83-5; Blackstone's *Criminal Practice,* 2008 ed, para D15.62.

23. The judge held that the evidence was such that a reasonable jury might convict. The Court of Appeal held, on the other hand, that because it was in their view as likely that the respondent was a party only to a purpose which did not involve contemplation of the killing of Todman, there was "no basis but speculation on which to ascribe to Varlack participation in one as opposed to the other" (para 31). They did not apply the test of determining what inferences a reasonable jury properly directed might draw, as distinct from those which they themselves thought could or could not be drawn.

24. Their Lordships consider that the Court of Appeal were in error in this respect. The trial judge correctly approached the submission of no case by reference to the test whether a reasonable jury properly directed might on one view of the evidence convict. When one applies this principle, it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. The judge was in their Lordships' opinion

justified in concluding that a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the respondent. They were clearly entitled to draw the inference that the respondent telephoned Hamm in order to inform him that Todman had set out along the mountain road. In determining whether this was with knowledge that he might meet with lethal force at the rendezvous, they were entitled to place in the scale the antecedent and subsequent facts. They could also have had regard to a number of possibly significant facts:

- her denial that she knew Parsons, although she had had telephone conversations with him before and after the killing;
- her claim that her acquaintance with Hamm was casual;
- her apparent knowledge of the place where the body was located;
- her untrue statement about telephoning Todman from Clyde Potter's mobile telephone on the morning of 29 August;
- her apparent linking of the finding of the guns and Todman's murder;
- her telephoning Hamm at 4.11 am on the night Parsons and Pemberton were arrested and the Uzi was found;
- her account of the visit from masked gunmen;
- her bizarre destruction of the interview note on 7 December 2004.

They could also have disbelieved her account of Todman returning to her apartment after 10 pm on 29 August. They could justifiably have treated these matters as indicia of guilt. Once it is accepted, as their Lordships consider it must be on the evidence adduced, that it was reasonably possible for the jury to accept the guilty inference and reject all possible innocent ones, then the submission of no case had to be rejected. Their Lordships accordingly consider that the decision of the Court of Appeal on this issue cannot stand.

25. Mr Knox submitted that even if the Board were to find that the Court of Appeal was in error in holding that the case against the respondent should have been withdrawn from the jury, the conviction was unsafe in two other respects, arising from the judge's directions on joint enterprise and the lack of a good character direction. He criticised the directions on the ground that, although they did refer to the requirement of agreement on the part of each defendant to the common purpose, they defined that purpose in misleading terms. He criticised in particular the reference to the probable consequence of the unlawful purpose, submitting that it may have conveyed the impression that the jury could convict if they found that Todman's death was a probable consequence of the respondent's actions, even if she did not herself subjectively foresee or intend this. The reference to the probable consequence is a reflection

of the content of the Criminal Code, which has been quoted above. Their Lordships do not accept that the direction which incorporated that reference was misleading. The judge repeated at several points in her direction that it was a necessary ingredient that the defendant under consideration agreed, or realised that there was a real risk that Todman might be killed and participated in the plan with that knowledge. When the passage dealing with joint enterprise is read as a whole, their Lordships consider that it made it sufficiently clear to the jury what they had to find before convicting the respondent. They would only add, for the guidance of trial judges, that it is desirable that directions on this area of the law should be carefully prepared and kept as simple and clear as possible.

26. The final issue is that of the refusal of a good character direction. It is now well established that in any case where the defendant is of good character, in the sense of having no criminal convictions, he or she must have the benefit of an appropriate direction, covering both credibility and propensity: see the summary of the applicable principles in *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, 2430-31, para 33. The respondent did not give evidence, although she made a largely self-serving written statement, which removed much of the need for a direction relating to her credibility. That leaves the element directed towards propensity, that a person of good character is less likely to commit a crime, especially a grave crime such as that with which she was charged. The judge declined to give a good character direction because of the respondent's conduct, in that she said that she connived at Todman's liaison with Kishma Martin, contracted for the purpose of exploiting her generosity. This in itself, though reprehensible behaviour, would not have been enough to warrant depriving the respondent of a good character direction, though it could have been tempered by some appropriate comment. The same applies to the rather more serious aspect for present purposes, that the respondent's defence involved suggesting an inference that she may have been contacting Hamm on the evening of 29 August to arrange or confirm a meeting in connection with Todman's drug dealing. It would have been legitimate for the judge to make some comment about the respondent's criminal propensity, but their Lordships do not consider that a good character direction should have been withheld altogether, since that propensity by no means necessarily extends as far as demonstrating a propensity to murder.

27. That is not, however, the end of the matter. It has been emphasised by the Board in a number of recent cases that the critical factor is whether it would have made a difference to the result of the case if a good character direction had been given: see, eg, *Bhola v The State* [2006]

UKPC 9, (2006) 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood. Their Lordships consider, looking at the trial as a whole, that it would have not made sufficient difference to the trial to alter the verdict.

28. The appellant accordingly has succeeded in his appeal against the decision of the Court of Appeal setting aside the respondent's conviction and the respondent has not succeeded on any of the other issues on which she sought to attack the conviction. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the respondent's conviction restored.