JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 180/99

BEFORE: **THE HON MR JUSTICE DOWNER, J.A.**
THE HON MR JUSTICE BINGHAM, J .A.
THE HON MR JUSTICE SMITH J.A. (AG.)

EATON DOUGLAS V THE QUEEN

Terrence Williams and Alexander Williams for the appellant

Mrs Sonya Wint-Blair, Crown Counsel (Ag.)
for the Crown

May 28, 29, 30, and October 8, 2001

SMITH, J A. (AG):

On the 14th October 1999, the appellant Eaton Douglas was convicted of non-capital murder in the Manchester Circuit Court before Pitter, J. and sentenced to life imprisonment. Leave to appeal was refused by a single judge. This court has treated the application for leave as the hearing of the appeal.

The indictment averred that on the 7th day of January 1998, in the parish of Manchester, Eaton Douglas murdered Rosetta Williams.

The Crown relied on circumstantial evidence. For the purpose of this appeal it is necessary to state in some detail the evidence on which the Crown's case rests. The deceased was the owner/driver of a white Toyota Corolla motor

car. She lived in Knockpatrick Gardens, Manchester. Miss Carol Linton who was a tenant of the deceased, occupied a part of the house where the deceased lived. The deceased whose husband had died, lived with her 14 year old grandson and her 3 year old granddaughter Celsorie. On Wednesday 7th January 1998, Miss Linton left for work leaving Mrs Williams (the deceased) and her granddaughter at home. About 11:00 a.m. the same day, Ms Carla Moncrieffe, a bar operator of Freckleton Hill, Spauldings, saw the deceased's car parked in an open lot situated in front of the bar. This lot was owned by one Mr. Simpson. Ms Moncrieffe went out and returned about 3:00 p.m. The car was still there. She has seen cars parked there before so she did not make any alarm. About an hour later whilst she was sweeping she saw a baby girl sitting on the top of the car. Of course, this held her attention. She spoke to customers. She approached the baby, spoke to her and took her off the car. Ms. Moncrieffe took the baby to Mr. Simpson and spoke to him. Together they took the baby to the police station and made a report. The police went with them to the spot where the car was. The police opened the trunk of the car. Ms. Moncrieffe testified that she saw a piece of clothing covered with blood and she ran screaming.

Mr. George Simpson, a farmer from Spaulding testified that about 10:00 a.m. on the 7th January 1998, when he returned from his field he noticed a white Toyota Corolla motor car parked on his land – an open lot. He paid it no mind, he said, because people usually park their cars there. One of the windows of

this car was down. Later that same day Ms. Moncrieffe visited him. She had a baby with her. They spoke and thereafter took the baby to the police station. The police returned to the scene with them. He saw the police open the trunk of the white Corolla motor car. In the trunk the dead body of a woman was seen.

Detective Inspector Guy Wiltshire, attached to the Manchester Criminal Investigation Branch, gave evidence that on the 7th of January 1998, about 4:00 p.m. he received a report and consequently went to an open lot along the Spauldings – Frankfield main road. There he observed a white Toyota Corolla motor car. The front and rear windows to the right side of the car were down. Inside the trunk of the car he saw the body of a female adult – about 67 years old. He contacted Detective Corporal Larmond, the Senior Crime Officer for Area 3 Division. He also contacted Superintendent Douglas Lawrence and Ms. Sharon Brydson, the government analyst, and gave them instructions.

The following day, that is the 8th January, with others, he went to the home of the appellant at 1 Upper Mount Nelson Boulevard, Mandeville. There he saw the appellant and one Basil Heath. He observed what appeared to be blood stains on the jamb of a door at the back of the house. He asked the appellant how blood stains got on the door jamb. The appellant, he said, replied that "it is likely to be blood from meat that he handled from food that he prepared for his dog."

He told the appellant he was investigating the death of Mrs Rosetta Williams and that he had received information that the deceased Williams had visited his premises to collect rent. He testified that the appellant informed him that he was acting as agent for someone to collect rent and to pay it over to the deceased who would issue receipts. It is his evidence that the appellant handed him some seven receipts; these were admitted into evidence as Exhibit 7.

Superintendent Douglas Lawrence was contacted and he went to the Spauldings Police Station about 4:30 p.m. on the 7th January 1998. There he saw a white Toyota motor car registered 8002 BG. In the trunk of this car he saw what appeared to be blood stains.

On the 8th January about 6:00 p.m. he went with a party of policemen to a house situated at 1 Mount Nelson Boulevard. There he saw the appellant Eaton Douglas and another man – Basil Heath. The appellant told him that he occupied the house alone and that Heath was just visiting from Clarendon. He observed what appeared to be bloodstains on sections of a door at the back of the house. He observed that a concrete section of the yard immediately behind the house appeared to have been recently washed. Both men, the appellant and Heath, were taken to the Mandeville Police Station. Later that same day the appellant was taken to the office of Deputy Superintendent Lawrence who cautioned him and then proceeded to question him.

The questions and answers were taken down in writing on a foolscap sheet of paper. Inspector Whiltshire and Sgt. Faulknor were present. The

appellant was invited to read the recorded questions and answers and to add, alter or correct any of the answers. He asked that someone read them for him. This was done. He then signed the document indicating that the answers were true and that he gave them of his own free will. His signature was witnessed by Inspector Wiltshire and Sgt Faulknor. The document containing the questions and answers were received in evidence as Exhibit 1. In Exhibit 1 the appellant stated that the house where he lived at 1 Upper Mount Boulevard was owned by the deceased's sister. The deceased collected the rent from him on behalf of her sister. He had known the deceased for about 3 years. The following are some of the questions and answers:

"**Q.** When last did you see Miss Williams?

A. Yesterday Wednesday the 7th January 1998.

Q. Where did you see her?

A. She came by the house.

Q. About what time yesterday you saw her?

A. When I last look on the clock it was nine o'clock. It was long after that she came there, maybe minutes to ten.

Q. Does anyone else stay at the home with you?

A. No sah only sometimes friends come there and visit.

Q. What did you do after the lady came to the house and left?

A. I finish bathe then left to Clarendon.

Q. Where in Clarendon did you go?

A. Alexandria where my mother and father live.

Q. Did you see your mother and father?

A. Yes sah I saw them and spoke to them

Q. When did you come back to Mandeville?

A. Today 8th January 1998, I reach home after midday.

Q. Where you travel to go to Alexandria yesterday?

A. Via May Pen.

Q. What did you do when you came back today from Clarendon?

A I had some dirty shirts. I wash them out and my friend Basil Heath who came back with me from Clarendon help me rinse them out. They were not really dirty, they were just mildew.

Q Who came with her and how did she come?

A. She took a baby with her and she came in a white car.

Q. Where did you stay and give her the rent?

A. Inside the house in the hall.

Q. Did you get a receipt?

A. Yes sir.

Q. Where is the receipt?

B. I gave it to the police.

Q. How much did you pay her?

A. Fourteen Thousand Dollars and she brought the receipt.

Q. Did you speak to Miss Williams before yesterday?

A. I spoke to her Tuesday 6.1.98 and she told me she would come and collect it Wednesday 7.1.98 so I went and collect the Fourteen Thousand Dollars from Lorna for the rent.

Q. How long did Miss Williams spend at the house?

A. Long enough to check the money; about two minutes.

Q. Was anyone else at the house when she came?

A. No sah I was alone."

Mr. Basil Heath the friend of the appellant was called as a witness by the prosecution. He is a self-employed furniture maker from Alexandria District, in Clarendon. He knew the appellant from school days for over 10 years. He said the appellant was his friend and church brother. He testified that on Wednesday, the 7th January 1998, some time after one o'clock the appellant came to him in Alexandria District. The appellant was wearing short pants and a T-shirt.

The following morning they left Clarendon and went to the appellant's house in Mandeville. According to Mr. Heath, the appellant gave him some dirty pants to "brush". The appellant washed a white T-shirt and white merino, Mr. Heath rinsed them. Those he said, were not worn by the appellant the day before. Permission was sought and granted to treat Mr. Heath as a hostile witness. He was cross-examined by crown counsel on the statement he admitted giving to the police on Friday, (the 9th January 1998). He admitted that in that statement he said:

> "When Dougie (that is the accused) came to my house on Wednesday, 7th January 1998, I noticed that he was dressed in a short brown pants and a black T-shirt and a white crepe. Among the clothing I washed for Dougie, the black T-shirt I saw him in the day before I only rinsed it as he had washed it himself also the brown short pants he was wearing with the black ganzie, I only brushed out the dirt spot from same."

The witness told the court that what he told the police in his statement was the truth. He said he had never seen the appellant drive.

He was cross-examined by Mr. Alexander Williams for the defence. He said it was not the first time he was asked by Eaton (the appellant) to wash clothes for him. They socialize, he said, and when Eaton visited him they "sleep on the same pillow."

If believed, the combined evidence of Detective Corporal Donovan Larmond, a crime scene technician and photographer and that of Detective Sergeant Aston Ramsarod a finger print expert would establish that the thumb print of the appellant was found on the inside of the top edge of the right front door glass of the deceased's car.

Mrs Sherron Brydson who holds a Masters Degree in Forensic Science, and is a Government Analyst attached to the Forensic Laboratory also gave evidence. It is her duty to examine, analyse, and identify physical evidence such as body fluids including blood and semen, and hair fibres etc.

On the 9th January 1998, she went to a dwelling house at 1 Upper Mount Nelson Boulevard, Mandeville. She examined the scene and collected evidence in the form of blood samples.

> Sample No. 1 was fibres from a brown smudge on the wall by the western doorjamb of the sitting room. The smudge was on the outer wall at the rear of the building approximately five (5) feet from the ground. It was found to be human blood in origin and blood type 'O'.
>
> Sample No. 2 was grass taken from the ground outside about two (2) metres west of the western door of the sitting room to the rear of the dwelling house. Human blood was present. The blood type was not determined.
>
> Sample No. 3 was of soil taken from the ground approximately two (2) metres west of the western door of the sitting room. Blood was present. It was human in origin.
>
> Sample No. 4 was another sample of soil taken from the same area. Human blood was present.
> Samples Nos. 5 and 6 were controlled samples of soil and grass taken from the ground approximately 2.5 metres west of the western door of the sitting room.
>
> Sample No. 7 was of fibres taken from the groove on the ground between the northern edge of the driveway and the southern edge of the carport. Human blood was present.
>
> Samples Nos. 8 and 9 were taken from the front of the house. The blood was canine in origin.
>
> The human blood found in samples 2 and 7 was present in serosanguineous stains i.e. the bloodstains were diluted with water.

Mrs Brydson states:

> "It is my opinion that blood from the individual or individuals was at the western section or rear of the dwelling house. The western grill door was open and

> blood from the injured group or individual was transferred on to the wall by the western door jamb. Efforts were made to obliterate or remove bloodstains from the carport. The injured dog/dogs was/were at the front of the dwelling house on the landing."

It was also her opinion that the injured person had group 'O' type blood. She also testified that on the 8th January 1998, she examined the motor car in which the body of the deceased was found. Blood was present on the trunk lid of the car, on the rear bumper, and there was a large volume of unclotted blood in the trunk. Samples were taken and analysed. It was human blood – group 'O'. From observations, she formed the opinion that a recently injured group 'O' individual was placed inside the trunk of the car and was in the trunk for an extended period. This extended period could be a day. She examined a pair of shorts and a black T-shirt which were taken from the home of the appellant. No blood was detected on them. Miss Brydson also examined a sample of blood taken from the deceased and found it to be group 'O'.

In Jamaica, she said, 52% of the population have group 'O' type blood. It is her evidence that she cannot say that the human blood found at Woodlawn came from the person who was in the car trunk. She conducted a DNA test but got no result.

The post mortem examination of the body of the deceased was done on the 13th January 1998, by Dr Derrick Lidford. The doctor testified that the deceased's neck was broken and there was a four-inch deep cut to the mid back of the head. He formed the opinion that death was due to asphyxia caused by a

broken neck, due to trauma. In his opinion, the four-inch deep cut was caused by a blunt instrument. The body was identified to the doctor as that of Rosetta Williams by Angella Bennett, the sister of the deceased. So testified Detective Corporal Michael Norman who knew the deceased for over 8 years and who was at the post mortem examination.

The appellant gave evidence on oath. He knew the deceased Rosetta Williams. He said that on the 7th January 1998, some time after 9:00 a.m. the deceased and a little girl came to his house. The deceased had telephoned him before to say that she would be coming for the rent. He said he went to May Pen the day before to collect the rent from his pastor who used to pay his rent. He heard when the deceased's car arrived. He opened a grill and went out to her. He handed over the rent -$14,000.00 to her. She counted it and gave him a receipt. After she got the money she left. Later that day he locked up the house and went to Alexandria in Clarendon. He returned home the following day – the Thursday. Later that same day, he was visited by a police officer including Superintendent Lawrence and Inspector Wiltshire. The latter asked him when he last saw the deceased. He told him Wednesday when she came to collect the rent. He said the Inspector asked if he got receipt from the deceased. He told him yes and he gave him some receipts.

During cross-examination he said he was not working at the time. The deceased was inside the living hall when he gave her the money. He followed them outside and held the dogs whilst they went into the car. He showed the

Court a receipt dated 5th December 1997, as that he received from the deceased on the 7th January 1998. He was preparing meat for the dogs that morning before the deceased arrived. According to him probably when he was chopping the dog meat, blood splashed on the wall. He denied killing Mrs. Rosetta Williams.

GROUNDS OF APPEAL

Counsel for the appellant was granted leave to argue four (4) Supplementary Grounds of Appeal.

(1) That the learned trial judge was wrong to have dismissed the submission of no case to answer, or, that the verdict was unreasonable having regard to the evidence.

(2) That the learned trial judge misdirected the jury on the evaluation of the circumstantial evidence.

(3) That the learned trial judge failed to fully or properly direct the jury on the issue of lies told by the accused.

(4) That the learned trial judge erred in permitting the previous statement of a crown witness to be tendered in evidence.

Ground 1 – (a) No-case Submission

Mr. Terrence Williams submitted that the Crown's evidence taken at its highest was such that a jury, properly directed, could not properly convict on it. He relied on **R v Galbraith** 73 Cr App. R. 124. He contended that the Crown had failed to show that the circumstantial evidence pointed unequivocally to the guilt of the appellant because of other competing rational possibilities. The fact

that the deceased had group 'O' type blood and group 'O' type blood in drops were found at the appellant's residence is not conclusive, he argued, because 52% of the population of Jamaica or 1.2 million Jamaicans have group 'O' type blood.

He also submitted that the evidence that the fingerprint of the appellant was found in the deceased's car is not cogent because there was no evidence of recency or that the appellant had no previous lawful contact with the car. For those submissions he sought support from **R v Court** (1960) 44 Cr. App. R. 242 **R v Rosenbog et al** (1975) 23 WIR 443 and **Bullock v The State** (1988) 41 WIR 276.

Mrs Wint-Blair for the Crown likened the evidence relied on by the prosecution to "strands in a cable". She contended that the following strands taken cumulatively constitute a strong prima facie case:

(1) The presence of human blood type 'O' on the rear wall of the appellant's residence by the western door jamb.

(2) The deceased had blood type 'O'.

(3) The explanation given by the appellant to the police on interrogation that when he chopped meat for the dogs blood could have got on the door jamb.

(4) The presence of serosanguineous stains on the car port and surrounding areas.

(5) The clothes the appellant was wearing on the 7th January, were washed the following day with the help of his friend.

(6) The appellant admitted in the Question and Answer that the deceased with her granddaughter, visited his residence about 9:00 a.m. on the 7th January 1998, to collect rent and that he was alone when she came.

(7) Car was seen in open lot in Spauldings around 11:00 a.m. on 7th January. Body of deceased was found in trunk in pool of blood.

(8) The thumb print of the appellant was found on the inside of the right front door glass of the deceased's car.

(9) The same day the accused left for Alexandria which is beyond Spauldings and returned the following day.

Now the presence of the appellant's thumb print on the inside of the window glass of deceased's car gives rise to the inference that the appellant was in the car. There is no evidence in the case to suggest that the appellant had legitimate cause to be in the deceased's car. The condition of the appellant's home on the 7th January, indicated that someone with group 'O' type blood was injured whilst there and that efforts were made to obliterate the blood stains from the car port. The absence of any trace of blood on the inside of the car suggested that the deceased was injured outside the car and placed inside its trunk. From the evidence of Miss Carol Linton and the interrogation of the appellant the inference may be drawn that the deceased was killed between 9:00 a.m. and 11:00 a.m. on the 7th January 1998.

This evidence coupled with admission of the appellant that the deceased came to his residence about 9:00 a.m. on the 7th January, is in our view presumptive evidence of the appellant's involvement in the crime. The finger

print evidence in particular is very telling. The criterion to be applied by the trial judge on a no-case submission is whether there is material on which a jury could without irrationality be satisfied as to guilt. If there is, the judge is required to allow the trial to proceed – see **Ellis Taibu v R** (1996) 48 WIR 74 applying **R v Galbraith** (1981) 1 WLR 1039.

Accordingly, we are satisfied that the trial judge was right to allow the case to go to the jury.

(b) – <u>Verdict unreasonable</u>

In this regard Mr. Terrence Williams contended that the verdict was unreasonable having regard to the evidence. In his submissions, counsel often referred to the verdict as being unsafe. Section 14 (1) of the Judicature (Appellate Jurisdiction) Act provides:

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ..."

The provision is identical to s. 4(1) of the old Criminal Appeal Act 1907 of the U.K. which was repealed and replaced successively by the Criminal Appeal Act 1966 and 1968 and amended by the Criminal Appeal Act 1995.

Prior to the 1995 Act, s. 2 of the 1968 Act provided that the Court should allow an appeal if they thought that the conviction was unsafe and unsatisfactory.

The 1995 Act states that the Court of Appeal shall allow an appeal against conviction if they think that the conviction is unsafe. The historical position in the U.K. should be borne in mind when reference is made to the decision of the Court of Appeal or the House of Lords in this regard.

In this jurisdiction there is no such ground as "the verdict is unsafe and unsatisfactory" or "the verdict is unsafe." The test for whether a conviction is unsafe is a subjective one. As **Lord Kilbrandon** in **Stafford v DPP** (1974) A.C. 878 at 912 said, each member of the Court asks himself, "Have I a reasonable doubt or perhaps even a lurking doubt that this conviction may be unsafe?" Earlier in **R v Cooper** (1969) 1 QB 267 the Court of Appeal had said that the question for each appeal judge (in U.K.) is "Do the circumstances of the case leave me with lurking doubts causing me to wonder whether justice has been done?"

This is certainly not the law in this jurisdiction. The 1907 Act is still relevant here and of course the decisions based on that Act. It is of no moment that members of this Court feel some doubt as to the correctness of the verdict – see **R v Simpson** 2 Cr. App R. 128, **R v Crook** 4 Cr. App. R. 60.

Arguing this ground is not without difficulty. Indeed in his submissions counsel for the appellant found himself rehashing the submissions he had made in respect of the "no case to go to jury" ground. The reason for this, is obvious. Where an accused has not adduced credible evidence which challenges the evidence led by the prosecution "on which a jury would without

irrationality be satisfied of guilt," it is, only in exceptional circumstances if at all, that a complaint that the verdict is unreasonable or cannot be supported having regard to the evidence will be successful.

Counsel for the appellant was in this dilemma because the appellant's evidence in his attempt to explain the alleged presence of human blood on the door jamb in his house was clearly not credible. Also the fact that there was no attempt to answer the expert's evidence of the presence of the appellant's thumb print on the inside of the front door window glass of the deceased's car in which the deceased body was found, made it an uphill task for counsel to argue this ground.

In order to succeed, the appellant must not only show that the verdict was against the weight of the evidence. The verdict must be so against the weight of the evidence as to 4 be unreasonable or insupportable – see **Aladesuru v R** (1956) A.C. 49; 39 Cr. App. R. 184. It is even not sufficient merely to show that the case against the appellant was a weak one: **R v McNair** (1909) 2 Cr App R. 2. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them and it was not intended by s. 14(1) of the Judicature (Appellate Jurisdiction) Act nor is it within the functions of a court composed as a Court of Appeal that such cases should practically be retried before the court. The court will set aside a verdict on this ground on a question of fact alone only where the verdict was obviously and palpably wrong – see **R v Hancox** 8 Cr App. R 193, **R v Joseph Lao** 12 JLR

1238 and **R v Pickersgill** (unreported) RMCA 28/2000 delivered 7th June 2001. This ground must fail.

Ground 2 : Misdirection on Evaluation of Circumstantial Evidence

The burden of appellant's contention is that the trial judge's directions in this regard are unfairly favourable to the Crown. The effect of the evidence is overstated and the jury were not reminded of other equally possible and rational conclusions.

To illustrate the complaint counsel referred to the following passage in the transcript. At pages 199-200:

> "Now the prosecution is saying the circumstantial evidence and those bits of evidence come in particular from the expert witnesses. You heard from the Government analyst Miss Brydson who tells you when she went to 1 Woodlawn Avenue, the home of the accused she saw blood. Blood was on the door jamb to the back of the house. Blood was on the carport and blood was in the surrounding area and she tells you that this blood is group 'O' blood. She also tells you that she did a sample of the blood taken from the deceased and that test showed the deceased to be a person who has the blood type "O". The accused man admits himself that the deceased was present with him at the house, that he was alone with her. The prosecution is further asking you to say that the blood found on the premises of the accused is the blood coming from the deceased."

Counsel takes the trial judge to task for not telling the jury that the fact that the appellant admits that the deceased was at his house on the day of the murder "does not mean much as there is no evidence of when the blood was deposited." In this passage the trial judge reminded the jury of certain aspects of the

evidence and how the prosecution was asking them to view the evidence. We certainly do not think that it was the duty of the judge to tell the jury that the appellant's admission "does not mean much." It is clearly for the jury to decide.

A trial judge has no duty to analyse the strength or weakness of each "strand" of the mass of evidence on which the prosecution relies. In **Shepherd v The Queen** (1990) 170 C.L.R. (Australia) 573 at 580 Dawson J. said:

> "Indeed the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

What is important is that the judge gives clear and adequate direction on circumstantial evidence. We find no merit in this complaint.

The complaints in respect of many of the passages referred to by counsel are also without merit because in these the trial judge was merely reminding the jury of the prosecution's case. For example the following directions at p. 202 were criticised as being unfairly favourable to the Crown:

> "He (the fingerprint expert) took samples of the accused man's fingerprints and his fingerprints were identical to those found on the window pane. So the prosecution is saying this is very strong evidence that he was in the car, and the prosecution is asking you to draw the inference that he is the man who after having killed the deceased, drove this car down to Spauldings – because he tells you he went to Alexandria, which is beyond Spauldings. These are matters you have to consider because the prosecution is asking you to put all these together, the blood coupled with his fingerprints in the car, as circumstances which the prosecution says, these lead to the conclusion, the inescapable matter, that he is the person who committed the act."

It is clear as can be that the judge was reminding the jury of the prosecution's case. He also reminded them of the arguments of appellant's counsel. At p. 231 the trial judge told the jury:

> "But says he (the fingerprint expert) there is no accurate way of measuring how old a fingerprint is. He can't say how old this latent fingerprint is on the car. And counsel was asking you to say that it could have gotten there any other time that the accused might have come in contact with it but you are not to speculate because he is saying he didn't drive the car he did not touch the car."

We cannot accept as valid the complaint that the learned trial judge was unfairly favourable to the Crown.

Another complaint is that the judge misdirected the jury by telling them that circumstantial evidence is without blemish. However, when this direction is seen in its proper context there can really be no serious objection to it.

At p. 198 whilst defining and explaining circumstantial evidence the judge said:

> "An eyewitness may sometimes be mistaken, mistaken about an act or may be influenced by grudge or spite. Circumstantial evidence is free from all these blemishes."

It is counsel's contention that such a direction can do nothing but to cause the jury to drop their guard. In the circumstances of this case we are firm in the view that the criticism is baseless.

The appellant further complains that the judge usurped the functions of the jury. The following excerpt from the summing up was cited by counsel as an example of such usurpation:

> "If you accept that both thumb prints are identical and that they both belong to the accused, and if you accept the evidence of Det. Corporal Larmond as he demonstrated how the fingerprints could have been left there, then you will come to the conclusion that indeed it was the accused who drove away this car with the body in it to where it was found."

During cross-examination Corporal Larmond was asked to demonstrate how in his opinion the fingerprint that he found on the inside of the door glass could have gotten there. He said:

> "If you are sitting in the car and you hold the glass to shut the door, this would be the position."

Detective Larmond had earlier in his evidence indicated where on the glass the thumb print was found and where the smudged fingerprints on the outside of the door glass were.

It was in light of this demonstration that the trial judge gave the above impugned direction. Had the trial judge said "... then you <u>may</u> come to the conclusion ...", there could be no complaint. We do not think that by using the word "<u>will</u>" that the learned trial judge was usurping the functions of the jury. He fairly left it to the jury to decide whether or not they would accept the "fingerprint evidence" and the evidence of Larmond as to how the prints might have got on the window. In **<u>Mears v. R</u>** [1993] 42 W.I.R. 284 their Lordships were of the view that it was difficult to see how a judge could usurp the jury's

function short of withdrawing in terms an issue from the jury's consideration. However their Lordships stated that comments which fall short of such usurpation might nevertheless be so weighted against a defendant at trial as to leave the jury little real choice other than to comply with what were obviously the judge's views or wishes (page 289). We do not think that the trial judge was imposing his decision on the jury or that he was using them "as something akin to a vehicle for his own views." A fair reading of the passage would certainly not give that impression.

We have given careful consideration to the complaints of counsel for the appellant in respect of the various passages to which we were referred. We are of the view that the trial judge apart from giving the **Hodge** direction, scrutinized the evidence and left it to the jury to decide whether there was "an array of circumstances which point to only one conclusion and to all reasonable minds that conclusion only, namely, the guilt of the accused."

We do not share the view of counsel for the appellant that the directions were overly and unfairly favourable to the prosecution. It is true that the learned trial judge indicated his opinion very freely, but there was no danger of the jury being overawed by them. In our view, unlike the directions in **Byfield Mears** (supra) it cannot be said that in this case the trial judge had "diluted or destroyed" any cogent point favourable to the appellant. The learned trial judge said nothing to devalue the evidence of the accused. It is certainly not for the judge to leave every inference to the jury. He has a duty to leave reasonable

inferences. He must tailor his directions to meet the facts. Taking the summing up as a whole we are satisfied that the appellant had the substance of a fair trial. This ground must also fail.

Ground 3 - Direction as to Lies

The directions complained of are at pages 207 and 242 of the transcript. At p. 207 the judge when reviewing the prosecution's case said:

> "And you will recall the evidence coming from, I think it was Detective Wiltshire that when he spoke to the accused pointing out the blood on the wall, he told them that he was cutting meat and that is how the blood got there, but this was no blood from any meat. Miss Brydson tells you that it was human blood. These are matters you will have to answer."

Later on when the learned trial judge was reviewing the evidence of the appellant he told the jury:

> "He says 'I chop meat. When I chop the meat (speaking about the meat for the dog) blood splash on the wall.' Now why is he telling you that? Is he then giving an excuse, making up an excuse for the blood as seen then by the police officer? But Miss Brydson tells us that that this is not any blood from any meat, it's human blood, in fact group 'O'. If you accept what Miss Brydson says why is he lying? Is it an effort to remove all suspicion from him?"

The burden of counsel's contention is that it was unfair to ask the jury to consider the appellant's evidence in this regard as a lie. Alternatively, counsel argued that a **Lucas** direction [(1981) 73 Cr. App. R. 159] was required – **R v Burge and Pegg** (1996) 1 Cr. App. R 163 and **R v Gary Goodway** (1994) 98 Cr. App. R. 11.

Mrs Wint-Blair for the Crown conceded that the trial judge should have given the **Lucas** direction. However she asked this Court to apply the proviso as the judge's failure to do so could not have caused any miscarriage of justice.

In the **Gary Goodway** case (supra) Lord Taylor C.J. said at p. 15:

> "It is well established that where lies told by the defendant are relied on by the Crown or may be relied upon by the jury as corroboration where that is required or as support for identification evidence, the judge should give a direction along the lines indicated in **Lucas** (1981) 73 Cr. App. R. 159, 162. (1981) QB 720. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour" (Emphasis supplied)

In our view the **Goodway** case is not helpful to the appellant as the so called lie was not relied upon by the prosecution as corroboration or as support for identification evidence. In **Burge and Pegg** (supra) the Court of Appeal through Kennedy, L.J. in dismissing an appeal in relation to the requirement for a **Lucas** direction had this to say at p. 172:

> "Our second reason for concluding as we do involves some consideration of recent decisions of this Court. We start with **Goodway** (1994) Cr. App. R. 11, (1993) 4 All E.R. 894, in which the Court was considering lies told during police interviews. In that case counsel for the appellant and the court accepted that a **Lucas** direction should be given whenever lies are relied upon by the Crown and might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility. In giving the judgment of this Court, the Lord Chief

Justice referred to what he had said in **Richens** (1994) 98 Cr. App. R. 43, 51, namely that:

> '... the need for a warning along the lines indicated is the same in all cases where the jury are invited to regard, or there is a danger they may regard lies told by the defendant or evasive or discreditable conduct by him as probative of his guilt of the offence in question.'

The added emphasis is ours because the point we wish to make is that a **Lucas** direction is not required in every case in which a defendant gives evidence even if he gives evidence about a number of matters and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering. In **Goodway** this Court cited with approval, the New Zealand case of **Dehar** (1969) NZLR 763 in which the court said:

> 'How far a direction is necessary will depend upon circumstances. There may be cases ... where the rejection of the explanation give by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic.' "

In adopting words used by Professor Birch in the Criminal Law Review (1994) 683 the learned Lord Justice went on to say:

> " ... our view is that the direction on lies approved in **Goodway** comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt. Normally the prosecuting counsel will have identified and sought to prove a particular lie on a material issue which is alleged to be explicable only on the basis of a

> consciousness of guilt on the defendant's part. This is as Professor Birch says, a very specific prosecution tactic, quite distinct from the run of the mill case in which the defence case is contradicted by the evidence of the prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict the defendant's account is untrue and indeed deliberately and knowingly false."

Kennedy, L.J. then (at p. 173) cited with approval the following passage in the judgment of the court in **Liacopoulos and Others** (unreported) August 31 1994:

> " ... where a jury, as is so frequently the case, is asked to decide whether they are sure that an innocent explanation given by a defendant is not true where they are dealing with the essentials in the case and being asked to say that as a generality what this defendant has said in interview about a central issue, or agreed in evidence about a central issue is untrue, then that is a situation that is covered by the general direction about the burden and standard of proof. It does not require a special **Lucas** direction."

In addressing the recent tendency in appeals to complain that there has been no direction or no adequate direction as to lies, the Court identified four circumstances in which a **Lucas** direction is required:

> "**1** Where the defence relies on alibi"-

See also **R v Harron** (1996) 2 Cr. App. R. 487. The direction is not necessary in every alibi case see **R v Patrick** (1999) 6 Archbold News 3.

> "**2.** Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration if 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 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 referred (in (3) above), the judge reasonably envisages that there is a real danger that the jury may do so."

We are of the view that the judgment of the English Court of Appeal in **Burge and Pegg** (supra) is very helpful and instructive.

In the instant case where the prosecution relies on circumstantial evidence, we are inclined to think that the **Lucas** direction is not required. As we have said before "the probative force of a mass of evidence may be cumulative making it pointless to consider the degree of probability of each item of evidence separately."

It is true that there is a natural tendency for a jury to think that if an accused is lying it must be because he is guilty and accordingly to convict him without more. Consequently it is the duty of the judge to tell them that this is not necessarily so. However, if on proved facts two inferences may be drawn about the accused person's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. The jury must take into account all the circumstances

including the lie in considering whether the guilt of the accused is established beyond reasonable doubt. In such a case the telling of a lie is advanced not as an admission of guilt but as one piece of evidence among others from which the jury is invited to find facts adverse to the accused. See Lord Devlin's remarks in **Broadhurst v R.** (1964) 1 All ER 111 at 119-120, (1964) AC 441 at 457.

Also a **Lucas** direction is not required where as in this case the evidenceor a statement of the defence is contradicted by the evidence of the prosecution witness making it necessary for the prosecution to invite the jury to find that such statement or evidence of the accused is false. Such a direction would in those circumstances confuse the jury. Indeed in **Burge and Pegg,** Kennedy, L.J at 173C said:

> "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."

Generally the jury is directed that the accused should not be convicted merely because he had told a lie. Indeed, lies told by an accused, on their own, do not make a positive case of any crime – **Strudwick** (1994) 99 Cr. App. R. 326 at p. 331. The learned trial judge directed the jury in this way:

> "You cannot convict unless you reject his alibi. If you accept his alibi then it would be a complete answer to the charge and you would have to acquit him. If you find his alibi is a false one, then you would reject it. But that does not in itself entitle you to convict him. If you reject his alibi, if you find that at the relevant time, that is to say between 9:00 and 10 o'clock, 12:00, 1:00 o'clock, between 9:00 and 11:00 he was

> between his house and where the car was found, that he was not at Alexandria.
>
> If you find he was there if you don't believe, then you will still, have to look back on the prosecution's case, look to see whether the prosecution has satisfied you. Because sometimes an accused man might give an alibi, convenient alibi and that is only done to bolster up a defence or perhaps for any other reason."

The jury must have understood that they should not convict the appellant merely because they had rejected his evidence. The learned trial judge made it quite plain to them that the burden remained on the prosecution to prove his guilt.

For the reasons which we have set out no **Lucas** direction was required in relation to what the appellant said when asked about the bloodstains on the wall.

Ground 4 – The reception in evidence of written statement of Crown witness

The appellant complains that the trial judge allowed the prosecution to rely on the contents of a previous statement of the witness Heath. The prosecution was allowed to treat this witness as hostile. He was cross-examined to show that he had earlier made a statement which was inconsistent with his evidence. A part of the witness' statement was put in evidence. Before this was done, however, the trial judge had asked the witness:

> **"Q.** And what you gave the police when you gave that statement, were you speaking the truth?
>
> **A.** Nothing but the truth."

In his summing up the learned trial judge reminded the jury of Mr. Heath's evidence and then told them:

> "So Mr. Foreman and members of the jury you will have to decide whether you can accept any part of this man's evidence because what he was giving was inconsistent with what he had said; but when he tells you that what he told the police the day before that that was the truth, then if you believe that then you may accept that evidence and in fact you treat that evidence as you deem fit."

Counsel for the appellant relies on **R v Sydney Golder** (1960) 45 Cr. App. R. 5 for his submission that the learned trial judge erred in receiving the previous inconsistent statement as evidence upon which the jury can act. In that case the Court through Parker L.C. J. at p. 9 said:

> "A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit, and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein."

Then at p. 11 the Lord Chief Justice concluded:

> "In the judgment of this Court when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial, should be regarded as unreliable; they should also be directed that the previous statements whether sworn or unsworn do not constitute evidence upon which they can act."

However the **Golder** case can be distinguished in that the adverse witness did not admit when cross-examined by counsel who called her, that her earlier statement was true. In **R v Pestano** (1981) Crim L.R. 397, it was held

that it was permissible to put to an adverse witness his previous statement with a view to giving him an opportunity of saying whether or not having been reminded of that, he did or did not regard what he had previously said to be the truth and what he said in the witness box to be wrong. The Court in that case also held that the evidence was for the jury to consider subject to a proper warning from the judge as to the weight, if any, which could be attached to it.

In **R v Maw** (1994) Crim L.R. 841 the Court said:

> "Having decided to treat a witness as hostile, the witness could not only be cross-examined but could be cross-examined on previous statements made. The effect of doing so, if it showed an inconsistency between the evidence he was giving and the previous statement, was simply to undermine or destroy his credibility. It did not make the statement part of his evidence (See **Golder** (1960) 45 Cr. App. R. 5). The primary effect of the exercise was to discredit the witness, whom the Crown would then be unable to place before the jury as a witness from whose evidence they should convict. In some cases the situation was not as stark as that and each case depended on its own facts. If the witness as in this case, chose to adopt and confirm some of the contents of his prior statement then to that extent what he said became part of his evidence and, subject to the jury assessing his credibility and reliability, it was capable of being accepted."

In our view where a hostile witness admits that his previous statement contained the truth, it would appear to be unobjectionable in principle for the judge to direct the jury, that provided they approached his evidence with caution they could act upon his admission. It would be for the jury to decide whether to reject his entire evidence or to accept those facts which he has confirmed. This

flexible approach seems to have found favour with their Lordships in **R v Governor of Pentonville Prison** ex parte **Alves** (1993) A.C. 284 H.L. per Lord Goff at p. 291.

In the instant case the prosecution in accordance with the proper procedure took the intermediate step of inviting that witness to refresh his memory. It was only when this failed that the judge permitted him to be treated as hostile.

In the circumstances we are of the view that the direction of the learned trial judge to which we have already referred was adequate.

CONCLUSION

We have carefully considered all the alleged mis-directions complained of by counsel for the appellant and are of the view that the appellant has not been deprived of the substance of a fair trial. Accordingly the appeal is dismissed. The conviction and sentence are affirmed. Sentence is to run from 14th January, 2000.