

FACTS

2. Estella Scott Roberts celebrated her 33rd birthday with her family on the 8th October 2008. Notwithstanding that, friends invited her to celebrate that achievement on Friday the 10th of October 2008 at a celebratory dinner at the Deckers Restaurant on West Bay Road. This was a party of six of her closest friends.

3. The group met at the Deckers Restaurant at about 8:30 p.m. and apparently had a successful party with the usual excitement and happiness that accompany such an occasion. Kathryn Powell, a member of the group brought souvenir birthday confetti which Estella liked to collect. In fact Estella placed some of the confetti in her handbag.

4. As the learned Chief Justice described in his judgment, Estella, "as one might expect of a young successful executive woman, was fashionably dressed for the occasion, wearing special items of jewellery including her diamond wedding band and designer shoes." In her handbag she had a Cayman National Bank debit card. She carried two Blackberry cell phones along with a headset and two earpieces.

5. The celebration ended at about 11:15 p.m. The group of friends left the restaurant together and walked out to the curbside of the West Bay Road, where they stood chatting for a while. Thereafter they left to the adjacent parking lot where their vehicles were parked.

6. They left in their separate vehicles. Estella was left behind. Her vehicle was parked to the rear of the car park. She was last seen by Rochelle Smith, a member of the party group, walking towards the rear of the car park furthest away from the West Bay Road and an area which was in darkness.

7. Estella reached her car, but from that moment was thrown into a period of obvious terror causing pain and suffering from which she never survived.

8. She was forcibly attacked by two men, who were apparently in waiting. She was violently restrained and taken away in her car, driven by one of these men into the isolated "beaches" of the North of the island, into the Barkers area.

9. There she was raped, by both men, robbed of her possessions, and eventually killed and her body incinerated in her car.

10. Estella, not having returned home from the party, her husband Rayle Roberts, (in his witness statement) explained how he raised an alarm, by calling her friends and then subsequently the Police. The search to find her then began.

11. On the morning of the 11th October, her shoes, one scoured with drag marks, was discovered at the parking-bay where her car had been parked the night before.

12. Her friends joined in the search; they had received word from Cable and Wireless where Estella worked, of cell site activity registered by her mobile

phone from the Barkers area in the early morning of the 11th October. As a result, the search moved to the Barkers area.

13. Their search had to be abandoned when their vehicles became bogged down in the muddy dyke road which criss-crosses the area.

14. As a result, Marine Park Enforcement Officer Nicholson, who regularly patrols the Barkers area, was called in to assist in the search. He discovered the burnt shell of Estella's car, containing the charred and shrunken remains of her body. It was then 12:30 p.m. on the 11th October 2008.

15. Her body had been burnt beyond recognition. It was, however conclusively identified later by DNA comparison.

16. Her friends determined to assist in the investigation, returned to the Barkers area, the next day, Sunday 12th October. They went to the site where the burnt shell of her car had been discovered.

17. This was at the end of the dyke network called the Mangrove Buffer Road, which terminates in a dead end behind the dyke canal, at the rear of the housing development called "The Shores".

18. The learned Chief Justice sums up the evidence of the description of the area well:

"At the point where the Mangrove Buffer Road ends, one can proceed to the other side of the canal by walking by a foot path but only after climbing over a wire fence. Beyond that fence and the canal was a mound of vegetation and a buffer of trees which had to be crossed before reaching unto the Shores Development proper."

19. The group of friends made observation in the area where the burnt shell of the car had been discovered.

20. Rochelle Smith, one of the group, saw confetti, of the same type that Estella had placed in her handbag on the night (10th October 2008) of the dinner party. Further along the path towards "the Shores" was found a set of head phones like those Estella used with her Blackberry cell phones. Kathryn Powell retrieved the set of headphones which was later handed over to the police.

21. The group of friends noticed fresh marks of marl left by a footprint along with fresh scratch marks, on the post about four feet above the surface of the pathway, indicating that the fence had been crossed recently.

22. They continued the search throughout the Barkers area. They returned on the 13th October. In those two days they discovered several items.

23. Their attention was first taken by what appeared to be "fresh" or "brand new" duct tape strewn about the thick overgrowth alongside the road. Some of this was balled up and apparently discarded in the bushes, and some were found hanging from the branches.

24. In the same clump of bushes, on the 13th October, was found hanging a used condom, one end of which was stuffed back into the torn wrapper from which it had apparently been taken.

25. All the things discovered as also the location in which they were found were documented and photographed by the Scenes of Crime Officers Codner and Thornley.

The burnt shell of the car was secured and searched, by the investigators, both at the site and at the Police Forensic Garage to which it was taken.

26. The two front seats of the car were reclined as far back as they could at some point before the car was burnt and were found in that position.

27. The deceased's diamond wedding band was also recovered.

28. From among the burnt debris both at the site and from within the burnt vehicle were discovered pieces of evidence which pointed to the vehicle having been set on fire after being splashed with an accelerant such as gasoline. From the downspout of the gas tank, a burnt piece of paper was recovered and from within the vehicle, the burnt remnants of a plastic gasoline container. On the

16th October Mr. Harvey Meshall, Forensic Fire Investigator, found the remnants of the ring cap of a gasoline container among the burn debris on the ground at the Mangrove Buffer Road site. He concluded that all possible accidental causes of the fire were eliminated and that a burnt pattern on the external body work of the car, as well as other areas of origin of the fire, showed that accelerant had been spattered on the vehicle before it was lit.

29. Police investigations later revealed that on the night of the 10th October, two men had been seen loitering about the area of the car park during the night. Descriptions given by persons who purportedly saw the two men, though not clear enough to identify either defendant, was sufficient to match that of the appellant Henry.

30. By the 15th October 2008, the police had received further information of relevant cell phone activity from Cable and Wireless, relative to the deceased's cell phones. It was that of a Blackberry cell phone that had been officially issued to her as an employee of the company (bearing identification number imei #358-281-012-099-740 and subscriber number 926-1500) had registered on the network as making calls by use of a SIM card which was designated by Cable and Wireless for a different cell phone, one which had been issued with the subscriber number 939-1539. By that means, it was discovered that her Blackberry cell phone had been registered as making calls to another Cable and Wireless cell phone number 925-5821 registered to a Mr. Seaford Miller.

31. Further investigations revealed that Mr. Seaford Miller (who testified at the trial), was the employer of the appellant Henry. The call log of Mr. Miller's cell phone 925-5821 indicated that calls from 939-1539 were made to that number. Mr. Miller confirmed that the number 939-1539 belonged to his employee, the appellant Henry.

32. In the presence of one of the investigating officers Inspector Evans, and at his request, Mr. Miller, on the 25th October 2008, telephoned the appellant Henry, who answered, and confirmed his location to be at a work site on the South Church Street area.

33. The information as to the appellant Henry's location was immediately passed on to Acting Chief Superintendent Marlon Bodden, who accompanied by two other officers, drove immediately to the given location at South Church Street.

34. There Supt. Bodden accosted Henry, identified himself to him, and asked to see his (Henry's) cell phones. The appellant Henry produced two phones from his person, one, a gold Blackberry Curve and, the other, a Samsung cell phone.

35. Of significance in this appeal, when asked at the Central Police Station later that day to account for his possession of the Blackberry phone, the appellant Henry stated that he had bought it less than a month before, "from a youth wthey me know but not by his name." He later retracted this account in a

cautioned statement he gave on the 27th and in a full cautioned interview on the 28th October 2008. On the 25th October, Supt. Bodden having managed to unlock the gold coloured Blackberry cell phone by a password (12345678) given by Henry, keyed in a code supplied by Cable and Wireless and immediately there was displayed on the screen the imei # 356-281—012—099-740 thus identifying the phone as one of the two which had been issued to Estella Scott Roberts.

36. Henry was then arrested by Supt. Bodden on suspicion of theft and handling stolen goods. When cautioned, he replied: "What I will do is try to find the other guy so that you can speak to him too."

37. On the 25th October Henry's apartment was searched, and a Dell laptop computer, which had also been issued to Estella Scott Roberts, by her employer Cable and Wireless, was found hidden in a compartment above the entrance door.

38. Items of his clothing were then also taken by Det. Sgt. Joseph Wright. A white Econoline Ford Panel Van which Henry used for his garden maintenance work with Mr. Seaford Miller was parked nearby his house. It was searched by Sgt. Codner and taken to the Central Police Station for safe keeping.

39. Henry was required to give a buccal swab for DNA comparison and was kept in custody on the 25th October.

40. For three hours, between 7:55 p.m. and 10:50 p.m. on the 26th October 2008, the appellant Henry voluntarily submitted to an interview by Det. Insp. Livingston Bailey and Det. Cons. Angella Scarlett.

In it, he elaborated upon and maintained throughout, the account he had first given upon being accosted on the 25th October, of how he had come into possession of Estella Scott Roberts' Blackberry cell phone. He also said that he had bought the laptop computer for \$500.00 "from the same guy name 'Ricky' " from whom he said he had bought the phone and whom he described in extensive detail.

41. On Monday the 27th October Supt. Bodden received word, through Det. Sgt. Angella Scarlett, and later that day, again through Det. Sgt. Wright, that the appellant Henry wished to speak with him.

The message received from Det. Sgt. Wright was that the appellant Henry wanted to take Supt. Bodden "to show him where the other guy that was along with him lived."

The appellant Henry wished to be taken in a "tinted vehicle and this was arranged. Det. Sgt. Wright and Det. Cons. Campbell were detailed to accompany Supt. Bodden and the appellant Henry.

42. They all assembled in the vehicle at the rear of the Central Police Station with Supt. Bodden at the wheel. As they were about to go, the appellant Henry started to speak. Supt. Bodden cautioned him, but he nevertheless continued.

Supt. Bodden wrote at his dictation. The appellant Henry signed the record after it was read over to him. That statement was admitted into evidence without objection.

43. This statement started with an apology to Supt. Bodden for having lied to him before, implicitly about the cell phone and the laptop.

It contained an admission to being involved in the abduction and rape of the deceased and to having stolen her laptop and cell phones. It then emerged for the first time that the deceased may have had a second cell phone with her on the night of the 10th October. He then denied having been involved in the actual killing. He attributed this to the "other guy" in these terms:

"Yeah, it is not me alone. And to be honest it really wasn't my idea, it was the other guy idea to get rid of the lady. Me tell him say that not right. But he said if he didn't get rid of her police would find him ... Both of us was together by Deckers. We just hanging around out by the front and then he called me and said come now, come now. Then I realized that he ran and hold the lady. And when he hold the lady I said to him what this for? And he said just easy and co-operate with him. Then he go into the vehicle me get into the vehicle and then he carry away the lady. The two us was in the vehicle and then he carried the woman

down into the bush and him have sex with her and me have sex with her too. And then him moved away the vehicle ... somewhere else and him kill her before he light the vehicle. He wrapped something around her and put a bag over her head and tape it. And he did it till she dead and him light the vehicle. Him get pieces of paper, put it in the gas tank and take it out and then him light it."

44. He proceeded to explain his taking of the deceased's laptop and cell phones and then said:

"I am willing to show you where Prinston live. That's the guy that I was with that killed the lady. It look like something what him plan because I don't see the reason why him do that ..."

45. After the taking of this statement, the officers set off with the appellant Henry in search of the "other guy" whom Henry said is named Prinston. Some three (3) hours later that evening at about 6:30 p.m. the appellant Ricketts was accosted by Supt. Bodden and the other officers, after he was seen riding a bicycle as the appellant Henry had anticipated, in Central George Town.

46. The appellant Ricketts was then arrested on suspicion of murder, and invited by Supt. Bodden, in the presence of Sgt. Wright to give a statement in Supt. Bodden's office at the Central Police Station.

The responses given by the appellant Ricketts were subsequently ruled inadmissible in the trial on the *voire dire*.

47. On the 28th October the appellant Ricketts was again interviewed, under caution by Det. Insp. Livingston Bailey in the presence of Sgt. Wright. The record of this interview was admitted into evidence in spite of objections as to its voluntariness. We will return to this later, as this formed an important ground of appeal of the appellant Ricketts.

48. The responses given by the appellant Ricketts, if accepted, would amount to an admission to the killing of the deceased. Ricketts, however, throughout the trial and on oath during the *voire dire* denied making the admissions to the police.

49. After he was arrested on the evening of the 27th October the appellant Ricketts was taken by the police to his apartment with a search warrant for the search of his apartment. There they discovered a Blackberry cell phone, separated from its battery, each in separate pockets of a shirt hanging among other clothing in his closet.

This cell phone turned out to be the second of the two which had been issued by her employer to Estella Scott Roberts. Significantly, when the phone

was examined by PC Alvan Boxwell, it was discovered to have nine (9) photographs some of which were identified as one of the deceased and four (4) of her family's dog, Morphens.

50. Also from the closet in Ricketts' apartment, the police recovered a navy blue peak cap, emblazoned on the front with a very distinctive motif of a chinese dragon in yellow, red and silver; a short-sleeved blue denim shirt with a prominent white red and black label on the right sleeve; as well as a pair of brown and white loafer type shoes.

51. In the meantime the investigations had proceeded in other directions.

On Thursday 16th October 2008, the deceased's debit card had been obtained by PC John Orville Williams from the Cayman National Bank and handed over to Officer Codner. It had been recovered the day before on the 15th October at 1:20 p.m. by Judy A. Rivers, an officer of the bank, from the bank's Automatic Teller Machine (ATM) at the Texaco garage on Eastern Avenue.

This card had last been used by the deceased on the 10th October 2008 at 3:34 p.m. to pay for services at "Tips and Toes Ltd." Bay Shore Mall, Church Street, George Town.

52. Bank records, however showed that it was again used within what must have been only a few hours of her death.

On the 11th October 2008 at 6:19 a.m. the Bank of Butterfield ATM located at Bay Shore Mall recorded a debit card bearing her number 4546-1102-6396-0006 as having been inserted in the machine. The transaction was not completed and the card was returned to the user.

53. Only minutes later, between 6:29 a.m. and 6:31 a.m. four separate attempts were made to use her card at the Cayman National Bank ATM located on Elgin Avenue, George Town, only about half-mile or so away from the Bay Shore Mall. On the first of these attempts, the incorrect password identification number (PIN) was entered and the transaction was refused.

54. On each of the three subsequent attempts, although the correct PIN was entered, the transactions were refused, either because of the amount requested (i.e. \$5,000) being in excess of the daily limit or because the wrong account was prompted, or a combination of both those factors.

55. After the fourth attempt, the user, whose deliberate but futile efforts had been captured on the CCTV of the Elgin Avenue Branch, retrieved the card, gave up and left.

Finally, on the 15th October 2008 at 12:11 a.m. the card was inserted into the ATM at the Texaco garage on Eastern Avenue. When an invalid PIN was entered and the user requested a withdrawal of CI\$5,000 from the unauthorized "savings account" the transaction was declined. The user twice more entered the invalid PIN and in keeping with bank protocol, the ATM then captured the

card. It remained secured within the ATM until recovered by Ms. Rivers at 1:20 p.m.

56. The CCTV footage of the activity of the ATM location at Elgin Avenue Branch in the early morning of the 11th October 2008 was recovered by Det. Sgt. Julian Lewis of the RCIPS on the 24th October 2008.

The data recorded by the CCTV system had been stored by the Bank's DVR Computer Security System. A DVR exact copy was transported by Det. Sgt. Lewis on the 25th October to forensic video and image analyst, Marla Englander Carroll of Plantation, Florida, USA.

57. In her evidence at the trial, Ms. Carroll presented photographic side-by-side comparisons of the images recovered from the CCTV DVR with those from the photographs taken by Officer Codner during the search of the appellant Ricketts' apartment.

58. The comparison showed exact matches as between the navy blue peak cap, shirt and loafers worn by the person shown on the CCTV footage attempting to use the deceased's ATM card between 6:29 a.m. and 6:31 a.m. on the 11th October 2008 at the Elgin Avenue Branch, and those items of clothing recovered from the apartment of the appellant Ricketts.

59. In any event, the appellant Ricketts during his evidence under cross-examination at the trial, admitted that he is the person shown wearing those

items of clothing in the Bank's CCTV DVR. He nevertheless continued to deny that he had made any of the other admissions recorded in his cautioned interview of the 28th October, 2008. He maintained also that he had attempted to use the debit card at the behest of the appellant Henry, who told him he had found the card.

60. Further investigations revealed the following –

- (i) DNA extracted from the inside and outside of the used condom recovered from the beach access road in Barkers on the 13th October, produced identical matches with DNA recovered from the buccal swab of the appellant Henry and from the bodily remains of the deceased.
- (ii) Further analysis also showed conclusive DNA matches as between blood from the remains of the deceased and several spots of blood and scraping of skin cells recovered from a pair of long jeans pants belonging to the appellant Henry. These pants were obtained by the police from Henry's apartment only when the appellant Henry offered to produce them, because, it seems they had been missed during the police search of his apartment.

61. On arrest, both appellants were found in possession of other phones. Phone records obtained of those phones showed regular contact between them in the period leading up to the 10th October, 2008 and thereafter. Additionally,

the telephone of the appellant Henry, on examination, had a number of images of a sexual nature. One of these appeared to have been taken at 43 minutes past midnight on the 11th October 2008. It is of a woman's private area.

62. Both men were charged on the 29th October, 2008 with the murder of the deceased.

63. In summary, the prosecution relied on the following evidence in proof of its case –

1. **Henry**

(i) The evidence of his recent possession of the Blackberry phone identified as belonging to the deceased.

(ii) Evidence of possession of the laptop identified as belonging to the deceased.

(iii) Evidence as to his DNA and that of the deceased in the condom found in the Barker's area.

(iv) Evidence as to the blood and DNA of the deceased found on his pants found at his house.

(v) Statements made by him orally and in writing to the police:

(a) Oral Statement to the ACS Marlon Bodden on the 25th October 2008.

(b) Record of interview given to the DCI Livingston Bailey on the 26th October 2008.

- (c) Oral Statement made to ACS Marlon Bodden on the 28th October 2008.
- (d) Record of Interview given to ACS Marlon Bodden on the 28th October 2008.
- (vi) Evidence of contents of his personal cell phone.
- (vii) Evidence of connection with, and contact with Ricketts.

2. **Ricketts**

- (i) Evidence of recent possession of CNB debit card of the deceased on the morning of the 11th October 2008.
- (ii) Evidence of his possession of a cell phone with a picture of and information relating to the deceased – a phone which belonged to the deceased.
- (iii) Evidence of connection and contact with Henry.
- (iv) Record of Interview given to DI Livingston Bailey on the 28th October 2008

On the background of these facts the appellants nevertheless filed and argued several grounds of appeal.

Appeal of Henry

64. Ground 1 complained that the learned Chief Justice failed to direct himself in accordance with the directions set out in *R v Lucas* (1981) QB 720.

These directions were set out in the cited case in respect of the Crown's reliance on lies told by the accused as corroboration of an accomplice who testified for the Crown.

Lord Lane Chief Justice in giving the judgment of the Court spoke the following words, which now forms the basis of this ground of appeal. He said:

"To be capable of amounting to corroboration the lie told out of Court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realization of guilt and a fear of the truth."

65. Then Lord Lane stated the words which have now become necessary in appropriate cases when Judges are addressing juries:

"The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behavior from their family. Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated that is to say by admission or by evidence from an independent witness."

The underlined words have now become the classic directions in appropriate cases.

66. The case of *R v Goodway* [1994] 98 Cr. App. R. 11 extended the principles adumbrated in the *Lucas* case.

Taylor LCJ had this to say:

"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.

In a later passage, citing the case of *Richens* with approval the learned Chief Justice stated:

"In *Richens, Broadhurst* was again cited and it was argued that the obligation on a judge to give a *Lucas* type direction was governed by the broad proposition and was not confined to corroboration in identification cases. At page 51 I said:

'It is little surprising that most of the decided cases on lies, and most of the learning in standard text books are directed to the significance of lies as potential corroboration (see in particular *Lucas* (1981) 73 Cr. App. R.). In principle the jury are invited to regard or there is a danger that 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. It will be recalled that an analogous warning is required in relation to alibi evidence which the jury may conclude as false'."

67. Then the learned Chief Justice concluded:

"In our view there is no reason in principle or logic for drawing a distinction between corroboration and identification cases, and any other case in which lies may be relied upon in support of prosecution evidence. Accordingly we consider Mr. Marshall Andrew's broader proposition is sound and that a *Lucas* direction should be given, save where it is otiose as indicated in *Dehan*, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt."

68. The learned Chief Justice in that passage made it absolutely clear that the *Lucas* type direction is required in all cases where the prosecution relies on the lies of the accused in support of its case or where the evidence is such that a jury may use the lies of the accused to conclude that he is guilty of the offence.

69. In the passage per *Dehan* (1969) NZLR 763 cited also with approval by the learned Chief Justice in *Goodway* (supra) a possible qualification on the giving of a *Lucas* type direction is in our view appropriately stated. It is a citation from the judgment of North, P., at page 765 as follows:

“We think that it follows from the cases we have cited, that where lies constitute an important element in the chain of proof put forward by the Commissioner, a clear direction from the trial judge is necessary. We do not say that in every case in which lies are put forward in aid of the Crown’s case ‘to reinforce the other evidence’ it is always necessary for the trial judge to give any specific form of direction. How far a direction is necessary will depend upon circumstances. There may be cases where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic.”

70. In our view one cardinal rule arises from the cited cases; that is that the requirement to give a *Lucas* type direction arises only in circumstances where the lies are relied upon by the prosecution in proof of its case or where, the absence of the *Lucas* type direction to the jury, may result in the jury using that evidence to convict the accused.

71. It is undisputed that the learned Chief Justice in the instant case, did not use words to suggest either explicitly or implicitly that he directed himself in accordance with the principles set out in the cited cases. This was a trial by judge alone, and consequently the danger of a jury incorrectly acting on the evidence of lies told by the appellant Henry did not arise. Nevertheless, where a direction in law is necessary in the consideration of a verdict in the case, the learned trial judge sitting without a jury, though presumed to know the law, must signify by his words in his judgment that he was aware of the principle and that he correctly applied those principles to the case upon which he adjudicates.

72. The issue in this ground of appeal must therefore be, whether the circumstances of this cases necessitated a *Lucas* type direction.

73. The appellant answers that question in the affirmative and points to two passages in the learned Chief Justice's judgment from which he says that it can be inferred that the learned Chief Justice relied upon the lie of the appellant in coming to his conclusion of guilt.

74. These passages appear at paragraphs 176 and 177 of the judgment of the learned Chief Justice. They read as follows:

"para. 176. That the exercise, was some three hours of interview, I feel compelled to conclude as Mr. Fortune, Q.C., and Miss Richards, Q.C., submitted

is a clear indication of the defendant Henry's capacity for concocting self-serving statements.

Para. 177. One is well advised then to approach his confession statement (that made under caution to Supt. Bodden in the back of the unmarked car on the 27th October and that made in the cautioned interview on the 28th) with circumspection."

75. These passages immediately followed the passages hereunder set out:

"para. 174. An assessment of the evidence in relation to the defendant Henry should begin with his first contact with the police as the case in relation to him so heavily depends on his statements to them, Henry having elected not to give evidence in Court."

76. "para. 175. His first account when confronted by Supt. Bodden on the 25th October 2008, was to the effect that he had bought the Blackberry cell phone (by then using the subscriber number 939-1539) from a 'youth' whom he knew but did not know his name. Then having been taken into custody at the Central Police Station, he replied when arrested and cautioned for theft and handling as already

mentioned above, to the cryptic effect that he may have been involved with another guy, but without indicating the nature of that involvement. Next, on the 26th October in his first full cautioned interview he gave, over the course of the same three hours, the more elaborate story about having bought the Blackberry cell phone and the laptop computer from the imaginary person named 'Ricky'."

77. In response to this complaint, Ms. Richards, Q.C., the learned Solicitor General, argued that the principle in the case of *Lucas* (supra) is not applicable to the instant case, as the lies told to the police on the 25th and 26th October 2008, were not relied on "as corroboration or as supporting evidence by the prosecution or by the learned Chief Justice."

78. The learned Solicitor General contended that the learned Chief Justice's referring to the lies as a clear indication of "Henry's capacity for concocting self-serving statements" was a reference to the appellant Henry's capacity to lie and "thus to his credibility" and not a finding that the lie was supportive of the guilt of the appellant.

It was entirely appropriate, she submitted, against the background of the appellant's apology for lies told previously, that the further statements made by the appellant be treated with circumspection and with care. In fact, the learned

Solicitor General submitted, that over paras. 178 to 224 the learned Chief Justice carried out a detailed and careful assessment of the statement of the appellant Henry to the police on the 27th October and of the record of interview of the appellant Henry dated 28th October 2008, and on important matters set out the basis for rejecting or accepting the appellant Henry's explanations. She further submitted that the learned Chief Justice at no time in his judgment, in the course of his analysis, demonstrates that he was relying on the lie told by the appellant as support for his conclusion of the appellant Henry's guilt. Nor could there be a danger that the earlier lies might have been used in support of guilt, in light of the specific statement by the learned Chief Justice that the effect of these lies "was to view the statements following with circumspection."

79. We agree with the submissions of the learned Solicitor General. Contrary to relying on the lies of the appellant to come to his conclusion, the learned Chief Justice did a detailed analysis of the evidence, particularly the content of the statements of the appellant, before rejecting the exculpatory parts of those statements.

References will be made to the learned Chief Justice's analysis from which it becomes obvious that he came to his conclusion based on his analysis of the evidence rather than in reliance on the fact that the appellant Henry had told lies in relation to his possession of the cellular phone and the computer.

Before doing so, however, it would be appropriate to indicate another passage of the learned Chief Justice's judgment upon which the appellant relies in support of this ground of appeal.

This occurred at a time when the learned Chief Justice was examining the appellant's statement to determine whether he should accept the appellant's assertion in his statement that he had withdrawn from the common design before the deceased was murdered by the appellant Ricketts, and that he took no part in that enterprise.

80. Having done so, the learned Chief Justice made the following impugned statement:

"I note, moreover, the pronounced lack of truth in the suggestion that his accomplice wished to get rid of her for fear of himself as distinct from themselves, being caught by the police.

This is itself a clear enough insight into the prevaricating state of mind of this defendant – even while he assured his interviewers that he spoke nothing but the truth – but seeking only to exculpate himself."

81. This statement by the learned Chief Justice related to his finding in relation to whether the appellant spoke the truth in the statements in which he

described the events of the night and the activities of himself and his accomplice. It was obviously not a reference to the admitted lies which the appellant had spoken to the police.

82. This is also demonstrated by the passage immediately following the impugned passages. In the latter passage, the learned Chief Justice stated:

"I also note here the inconsistency between the two accounts that given in the statement in the police car on the 27th and that in the interview on the 28th about the location where the deceased was killed. On the 27th the location was given as the second location, but on the 28th it was given as the first location."

This clearly speaks to the fact that the learned Chief Justice, far from relying on the admitted lie in support of his conclusion, came to his finding based on his analysis of the statement in terms of whether he could accept the account given by the appellant.

83. In our view, this was a case, in which although the appellant admittedly told lies, the prosecution did not rely on those lies either to prove its case, or in support of its case. Nor can we come to the conclusion, for which the appellant contends, that the learned Chief Justice relied upon the lies told by the appellant, in coming to his verdict of guilt. On the contrary his examination of the evidence which we have been privy to, being a trial by judge alone, demonstrates clearly

that he relied on the other evidence in the case, (which we have already set out), and his examination of the credibility of the appellant based on the statement and interview given to the police, in coming to his conclusion.

We therefore conclude that the circumstances of this case as it relates to the appellant Henry, did not require a *Lucas* type direction and consequently this ground of appeal must fail.

Ground 2

84. "The Learned Judge failed to direct himself in relation to the issue of propensity by reason of the defendant's good character and to the bearing his good character can have on exculpatory statements or answers given by him to the police or others."

85. The cases of *R v John Vye*, *R v Frederick James Wise*, *R v Malcolm Stephenson* (1993) 97 Cr. App. R. settled the principles which ought to be applied – in cases where the accused gives evidence of his good character. In that case heard in the Court of Appeal of England, Lord Chief Justice Taylor delivering the judgment of the Court, summarized the following principles to be applied in such cases:

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, where 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.

86. However, two years later in the House of Lords in the cases of *Reg. Appellant v Aziz Respondent*, *Reg appellant v Josun Respondent*, *Ryma Appellant v Yonganci Respondent* (1955) 3 WLR 53, (1995) AC 41, their Lordships through the speech of Lord Steyn, considered a challenge in respect of principles laid down in the case of *Reg v Sharp (Colin)* (1988) 1 WLR 7 regarding defendant's statements which contain both admissions and exculpatory assertions as also in *Reg v Vye* (supra) regarding direction to be given by trial judges to juries in respect of evidence of good character of defendants. In doing so the learned Law Lord explained the broad approach to be taken in applying these principles. In para. 5 (a) of his speech, he stated an approach with which we agree. He said:

"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 behavior similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of given 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: *R v H* (1994) Crim. L.R. 205 and *Reg v Zoppla – Barraza* (1994) Crim. LR 883."

"That brings me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. The residual discretion of a trial judge to

dispense with character directions in respect of a defendant of good character is of the more limited variety.

Prima facie the directions must be given and the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with **Vye** (supra) and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with **Vye**, the judge may in his direction dispense with them. (Emphasis added)

This passage convincingly makes the point that the principles set out in **Vye** (supra) are not absolute, and recognize that there may be cases in which in the exercise of his discretion, the trial judge may dispense with such directions.

87. This principle also gets support from the Privy Council case of **Jagdeo Singh v State of Trinidad and Tobago** (2005) UKPC 35 from which it is necessary only to state the following passage from the headnote as reported:

“... that the omission of a good character direction on credibility was not necessarily fatal to the fairness of

the trial or to the safety of conviction since much might turn on the nature of and the issues in the case, and the other available evidence; that the ends of justice were not generally served by the laying down of hard, inflexible rules from which no departure might ever be tolerated."

88. In the instant appeal, it is an accepted fact that the appellant Henry, before the trial on this indictment, had pleaded guilty on a separate indictment to the offences of Abduction, Robbery and Rape, all violent crimes committed in the same incident that eventually led to the murder which forms the subject of the indictment in this case.

89. In order to avoid the obvious argument that the appellant having pleaded guilty could not be considered as of good character, as advanced by the Crown in this appeal, the appellant seeks support in the case of ***R v Rachel Mane Teasdale*** (1994) 99 Cr. App. R. 80. In that case, however, the charges, to one of which ***Teasdale*** had pleaded guilty, were charges in one indictment one of which was a lesser offence (count 2) to that in count 1.

90. The ***Teasdale*** case came up for consideration in the case of ***R v Challenger*** (1994) Crim. LR 202 in which the appellant C was charged with

three (3) counts of possession with intent to supply cannabis. Having entered pleas of guilty to simple possession, he claimed at trial for the remaining two offences that the trial judge should give a full character direction and contended, relying on *Teasdale* (supra), that the judge was in error. In dismissing the appeal, the Court of Appeal held:

“**Teasdale** held that a person who had pleaded guilty to an offence in the indictment should be entitled to a full character direction. *Teasdale* had been charged on ground 1 with causing ‘GBH’ with intent and, on count 2 with unlawfully causing ‘GBH’. She pleaded guilty to the second count. Following conviction on count 1, the judge ordered that the plea of guilty on count 2, be vacated. The decision was to be confined to the particular circumstances existing in that case, and the court was not saying that it was implicit in the Lord Chief Justice’s judgment in *Vye, Wise Stephenson* (1993) 1 WLR 471 that a full character direction had to be given where the defendant had pleaded guilty to one or more counts in an indictment and was being tried on other counts in the same indictment or had pleaded guilty to one indictment but was then tried on another indictment to which he had,

on the same court appearance pleaded not guilty. Once a person had pleaded guilty to an offence he ceased to be a person of good character and the full character direction become inappropriate unless the offence to which he had pleaded guilty was an alternative to that on which he was being tried and the facts were such that if his conviction on the greater offence was brought home then his guilty plea on the lesser offence had to be vacated so that there was no conviction. In a case in which the jury was not told of the guilty plea it would be misleading to direct them that the defendant was of good character in any other circumstances. In such cases, they might well, having returned a verdict and then heard the defendant being dealt with for this offences to which he had pleaded guilty, feel considerable resentment if the judge had given a full character direction."

91. In our view, once the appellant pleaded guilty to the offences, of abduction, rape and robbery, he was no longer a person of good character, and consequently was not entitled to good character directions. It would be a contradiction in itself for the learned Chief Justice, knowing that the appellant had confessed to the violent crimes of abduction, robbery and rape to direct

himself on the basis of the appellant's "good character" and given the nature of the offences to which he had pleaded, it would be unrealistic to expect the learned Chief Justice to treat the appellant as some-one who did not have the propensity to commit the crime for which he was being tried. In so far as the appellant's credibility is concerned, the learned Chief Justice in fact accepted the account given by the appellant, but found that legally, even on his own account, the appellant was nevertheless criminally liable for the offence.

We agree with counsel for the respondent that in those circumstances, the appellant's credibility in that regard was not in issue.

92. In any event, we find that the appellant, by his own admission not being a person of good character, was not entitled to good character directions, and consequently conclude that the learned Chief Justice did not fall into error in omitting to give those directions. In the circumstances of this case, in our view, it would be unrealistic to expect the learned Chief Justice to give such self-directions in the face of the knowledge that the appellant was in fact not a person of good character.

For those reasons, this ground also fails.

93. **Grounds 3 and 5** were argued together. They read:

"3. That the Learned Judge erred in his interpretation and application of the principles of *R v Powell v English* (1999) 1 AC 1 to this case.

...

5. That the Learned Judge erred in finding proven that the Appellant had embarked upon a joint enterprise that rendered him criminally responsible for the killing of the deceased."

94. Two principles were adumbrated in the case of ***Powell, English*** (supra) which can be gleaned from the headnote of the report (supra). They are:

(1) it sufficed to found a conviction for murder for a secondary party to have realized that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm;

(2) that where one party departed completely from the concerted action of a common design by forming an intent to kill involving the use of a weapon and acted in a way no party to the common design could suspect, the other parties were guilty neither of murder or manslaughter.

95. To put this ground of appeal in proper perspective, having outlined the principle adumbrated in the ***Powell and English*** case (supra), some detailed reference must be made to the appellant's cautioned statement to determine

whether the approach by the learned Chief Justice in his treatment of its contents was wrong.

96. We begin where the following question was asked by the Acting Chief Superintendent Marlon Bodden –

“Q. Mr. Henry I will now give you an opportunity to explain to me if you wish, what you know. What do you know?

A. Alright, first in the evening he come by mi house, and him ask me what me up to so I said me a cool out, and him sey him a go pon the road, and me say mi nah do nothing, so me can ride with him, so me go pon my bicycle and he go pon his bicycle, so we ride out and my bicycle tire had start to look a way so I went to the gas station out-by Eastern Avenue Texaco. When I pump it, it look like it had a slow leak, so it end up that I carry it back by mi yard at the Swamp, so after I drop off the bicycle I looked to see if I could get another bicycle but could’nt get any so I just walked out because I didn’t had any intention to go far. I walked go back out a road because he was out there a wait pon mi.

He ride him bicycle while I walk and we end up by the other gas station near Kentucky. When we reach at the gas station we buy something to drink, I don't quite remember what we buy still u nuh. From the gas station him say lets go down by the O Bar or Go Bar what you call it. When we go down to the Go Bar we de de for a while but we never go inside though and then left from de so and we end up a Royal Palms, he tow me on him bicycle go Royal Palms. We were over Royal Palms fi a while and true no pay to go in we buy a drink there. I was drinking Dragon and he was drinking Red Bull. He was saying that Royal Palms look boring so he said lets go out on the road.

Q. You keep referring to him, who is him?

A. Prinston.

Q. What's Prinston's full name?

A. You know I don't know it, I only know him as Prinston.

Q. So you both were bored at the Royal Palms, did you both go anywhere else?

A. We leave from Royal Palms because he sey this was too boring fi him, so when we leave from Royal Palms him sey we a just walk pon the road. We leave the bicycle at Royal Palms. We come out of Royal Palms and take the left towards West Bay, so walking up the road now him stop up by the bar de, mi not even know the name of the bar still. Him sey look like the whole place dead. We was on the road side standing on the side walk which would be the side walk nearest to the bar, not the side that would be towards West Bay. Standing there him walk off and him say come in.

Q. What time did you both leave Royal Plams?

A. You know sey me never really check pon the time, I would say about after nine so

...

Q. So what happened next?

A. I just heard when Prinston said come in, so when him say come in me say what happen, me just see him a walk fast a go towards a lady which mi never know what him up to, so the

lady go into her vehicle now and by the lady fi go inna her vehicle, before she could a do anything else him on to her, him hold her, the vehicle never start when me reach up there the lady de a make noise before mi reach.

So when mi reach now mi say wha happen, him say cool no man soon talk to you.

It's like before mi reach him and the lady a deh struggle. The lady was in the vehicle and he was struggling with the lady. So I know that him have a lady that him a talk to that is a Caymanian, so I was wondering if a she and they have a little fiction, but me no really know her, and how mi know sey him have when him a talk to that is Caymanian, him did tell me about her, say him have this woman weh him a talk to weh married so I figure out so is probably she, cos me hear them talk pon the phone several time so a so me know him have a lady weh him a talk to weh a Caymanian.

Q. So what happen next?

A. The lady weh him a talk to was struggling and Prinston pulled a knife and when him pull the knife them still a struggle because I didn't know what a go on, I ask him what happen but him say him soon talk to mi. The lady was still struggling when him have the knife in him had. During the struggle the lady get a cut in her hand middle, it was a long knife Prinston had. When the lady get the cut she keep calm and she was crying and then Prinston told me fi go inna de vehicle, same time I go inna de vehicle and same time Prinston dropped back the driver's seat and then him push her over, because she had on the seat belt, which that was the only thing she get to do when she go inna the vehicle. So when me go inna the vehicle him jump inna the vehicle, fi her head was back toward the back seat and her legs were behind the steering wheel some way, the seat belt was wrapped around her same way and she was crying, she was saying 'you guys

don't kill me' which I turn to her and said, don't worry yourself.

Q. So what happen next?

A. Prinston was around the steering, I was around the back where her head was, her feet was right at the drivers seat like down to the pedal. She was like pinned between the two seats and I was holding her head, like rest mi hand pon her. She was'nt screaming or anything cos after she get the cut she was just crying.

Q. Tell what happened next?

A. Well we drive out the parking lot, Prinston was driving, when we drive out the parking lot and come on the main road and by time we pass the bar headed towards West Bay about three Radio car, I mean three marked police cars, turned into the bar area not the area where we were, this would be the area nearer to the little golf thing. So headed on to West Bay mi still a ask him what happen and him sey mi not fe worry mi self him nah do her nothing. After said and done mi realise that, like him nah no the lady.

Sametime the lady said to me sey, ease mi hand off a her because she cant breathe good, so I ease up mi hand off a her and she was still crying and a sey, 'we na fi do her nothing' so I was saying to her na worry yourself we na going do you anything. Which I didn't know that him had the intention fi do her something.

Q. What else happened?

A. While driving down to West Bay, when him turn down to Papagallo Road, I ask him where him a go, and him say relax yourself nah man no worry about nothing. So me myself did start worry too, but at the same time mi say me done inna the vehicle a ready so me inna it aready. So him drive go down inna the bush. Prinston stop, take her out of the vehicle and him tie up her hand.

Q. What was used to tie up her hands?

A. Him use a Cable and Wireless T shirt because she had a lot of Cable and Wireless hat and so and then him start tape up her mouth, which the tape him had inna him pocket, I think him had

on one shorts with some big pocket and then him pull off her underwear and him start have sex with her, now before him take off her underwear him start have sex with her from backway, which mi did come out of the vehicle and de de when him did start tape up her mouth and them me move away and go urine before him start have sex with her. When mi come back I see when him take off her underwear and put her fi lay down, him use one a dem thing weh use as sun viser and then him have sex wither a ground. She never really fight or anything, she only keep saying don't kill me. I was there looking into the vehicle, not looking for anything special. When him finish have sex with her, he come and digup the vehicle, meaning searching up the vehicle and I was asking what this all about, what this fah, him sey nothing really, so him just keep on digging and digging.

Q. Did you have sex with her?

A. Yes, I was the last one, and him go back again and have sex with her, I was the last one to have sex with her.

Q. During the time that you were having sex with her tell me what happened?

A. Well, him was there looking inna the vehicle same way, him was there looking inna the trunk and then after I finish have sex with her him ask her for her card number.

Q. What was the lady reaction while you were having sex with her?

A. She never fight or nothing unah.

Q. You said that the lady had a cut in her hand middle, was she bleeding a lot?

A. Yeah, yeah she was bleeding.

Q. Tell me about that, what you or Prinston did to help her bleeding hand?

A. Well we never really do nothing me gave her a piece of napkin or paper towel or weh you want call it.

Q. Did this lady continue to complain about the cut?

A. No she never complain, when I give her the tissue she like put it between her hand (demonstrated) and like put it between here, it was a very big cut too.

Q. Mr. Henry would you like to take a break at this time to go to the bathroom or have a drink of water?

A. Yes I would go to the bathroom.

Note: At 2:50pm interview stopped to allow Mr. Henry to use the bathroom

Note: Interview commenced at 2:55 after return from the bathroom

Q. At the time when you had sex with this lady did you use a condom?

A. Yes sir

Q. What did you do with the condom afterwards?

A. I throw it away

Q. Where?

A. in the bush in the area where we had sex with her,

Q. Did you ejaculate or in street terms cum?

A. Yes sir

Q. to your knowledge, and as you said Prinston had sex with her also, did you see him use a condom?

A. Yes sir

Q. Where did the condoms come from?

A. Him did have the condoms on him you nah

Q. So you asked Prinston for a condom or you had condoms on you also?

A. No, I asked him for a condom and him gave it to me. It was two different Condoms him give me

Q. Did you see what Prinston did with his condom?

A. No sir, him did suppose to throw it somewhere in the bush but mi no sure

Q. During sex, did you or Prinston have oral or anal sex with her?

A. No sir

Q. What happened next after sex?

A. After sex him carry her to the sea and let she wash off

Q. This lady mouth was taped up right, and her hands was tied with the T shirt correct?

A. Yeah, but her hands was released when she went into the sea, and then him make she put

on back her underwear and then him use a tie strap and tie back her hand them.

Q. Where did the tie strap come from?

A. Him did get it out of him pocket, because it look like a some tie strap me I did give one long time, one time him did beg me fi get tie strap for him to do something

Q. What happen next?

A. Him tape up her hand and when him tape up her hand him put her inna the vehicle, I didn't help him with that but I followed him go to the sea. Him put her back inna the vehicle which part her head did de, behind the drivers seat, then him lock her up inna the vehicle, she couldn't hear anything and then him say to me, oy him have to get rid of her because she was going to the police and would witness to everything, before he even put her into the vehicle and she was begging for her life she was saying that she have two child, I don't remember about the first one but the last one I think she was saying that the last one was

either 4 or 4 months. This was before he even put her inna the vehicle. So me and him was reasoning out side and him sae 'boy him have to get rid a her' so I was telling him that that not a good idea because she have two child and we can still go a jail, them time deh I was thinking about my son. So Prinston say boy him aga still have fi get rid a her, so I say boy mi nah help you because it's up to you and in a the first place him shouldn't start it. Him go inna the vehicle and him use the tape and put more tape around her, but mi nah now if him a tape up her nose a what but mi know it a up top him de a put the tape. Him go inna the trunk fi a bag and put the bag over her head, tie it and he put more tape over the bag, and then she was there struggling but her hands was tape up and she was there struggling. The trunk was open then he lock down the trunk, I turn away and walk like mi a go walk out the road, because we had turn down inna one track that had take to the beach. Then Prinston turn

the vehicle and stop by me and I got into the vehicle and then he drive to the other location.

Q. Explain what happened next?

A. Him drive go to the other location and came out of the vehicle and take out the two phone, two Blackberry, which one a dem did drop inna the water, that what she said before she dead, then I took the laptop, search her hand bag take the credit cards, and him did find money inna the bag, less than a hundred dollars US, him take 40 and I take 40 it was 80 US and then him lock up the vehicle, him take a piece a paper and him push it inna the gas tank and then him put it inna the vehicle and light it.

Q. Did you or Prinston check to see if this lady was dead?

A. To be honest I never really check you nah, cos when him pick me up before we went to the other location and when the vehicle was driving, when I look at her she never really look like she was alive.

Q. So the vehicle was light afire, who light the fire?

A. Prinston light the fire, him smoke so him always have a lighter pon him

Q. Did you or Prinston add any fuel to the fire?

A. No sir

Q. Did you both stand and watch the vehicle burn?

A. When him light the fire I had already move away from the vehicle

Q. Was the fire burning intensely?

A. As far as I could see yeah, it was a lot of paper inna the vehicle and when he was searching the vehicle he scattered them all bout.

Q. What happened after that?

A. When him light the vehicle him wait until it catch up good and then him walk away, and then when he reach to me now we start walk.

Q. Where did you both go from there

A. We go over a little barb wire weh was in front the vehicle. When we past the barb wire Prinston think that it was a main road but I realised it wasn't because I had walked ahead of

him and climbed over the heap of dry bush and then we end up having to go through some bushes. When we go through the bushes we end up right back at the long stretch where you have a Digicel pole by the road a Papagallo and then we stayed right out a the Digicel pole until about after 5:30 – 6:00 am”

Application of Learned Chief Justice of the Principles in Powell and English

97. In considering this issue in his judgment the learned Chief Justice said:

“Although having pleaded guilty to the abduction and rape of Estella Scott Roberts on a different indictment, his defence to this indictment is first, that he was never party to any agreement to kill her or to do her serious bodily harm and, even if it might be found that he did join in the criminal enterprise at some stage realizing that she could have been seriously harmed he made his withdrawal from it expressly known to his accomplice before she was killed.

Where there is a secondary party involved in a joint enterprise realizing or foreseeing that in the course thereof the principal offender might use force with intent

to kill or cause bodily harm – the secondary party will also be guilty of murder if the principal does kill with the specified intention.

But if the principal offender goes beyond the scope of the joint enterprise (that is does an act resulting in the killing not foreseen by the secondary party as (under Cayman Law)) a probability, the secondary party is not guilty either of murder or manslaughter.

As stated by the Privy Council in the *Queen v Chan Wing Sui* (1985) 80 Cr. App. R. 117, to be guilty under the accessory principle, mere foresight is not enough, in order to be guilty the secondary party must have foreseen an act of the type which the principal offender committed as a possible (in Cayman probably) incident of the common unlawful enterprise and must with such foresight still have participated in the enterprise. In this case from the defendant Henry's asserted point of view, the act of killing or doing serious bodily harm to the deceased by the accomplice was not something he foresaw."

98. Then the learned Chief Justice in a direct reference to *R v Powell, R v English* (supra) stated:

"The conclusion may, however be otherwise, if the use of a deadly weapon by the secondary party was foreseen, even if the principal used a deadly weapon of a different type to the one contemplated."

The learned Chief Justice then makes a direct reference from the judgment of Lord Hutton (page 30)

"... if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa."

99. In our view, the principles that the learned Chief Justice derived from the case of ***Powell and English*** are correct. We are supported in that opinion by the statement which fell from their Lordships after a detailed examination of the cases dealing with this particular issue.

"My Lords, I recognize that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that in one's view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder on the party

who actually carries out the killing, it is sufficient to constitute mens rea on a secondary party. But the rules of the common law are not based solely on logic, but relate to practical concerns and in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs.

As Lord Salmon stated in *Regina v Majewski* (1997) AC 443, 482e in rejecting criticism based on strict logic of a rule of the common law,

‘this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic’.

In my opinion there are protocol considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chang Wing-Siu v The Queen* (1985) AC 168 and which prevail over considerations of strict logic. One consideration is that referred to by Lord Lane CJ in *Regina v Hyde* (1991) 1 QB 134, 139, where he cited with approval the

observation of Professor Smith in his comment on

Regina v Wakely:

‘If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A with the requisite intention, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realizes may involve murder.’”

100. We cannot however leave this complaint, without making reference to the peculiar facts in the instant case. The appellant Henry relates a series of events occurring during the course of the incident, which when considered in detail, suggest that he separated the attack on the deceased into two incidents. He first relates the circumstances, under which the deceased was raped, then refers to a statement made by his accomplice which signified an intention on the accomplices’ part to kill their victim. For ease of reference that part of his statement is set out hereunder:

“Him tape up her hand and when him tape up her hand him put her inna the vehicle, I didn’t help him

with that but I followed him go to the sea. Him put her back inna the vehicle which part her head did de, behind the drivers seat, then him lock her up inna the vehicle, she couldn't hear anything and then him say to me, oy him have to get rid of her because she was going to the police and would witness to everything, before he even put her into the vehicle and she was begging for her life she was saying that she have two child, I don't remember about the first one but the last one I think she was saying that the last one was either 4 or 4 months. This was before he even put her inna the vehicle. So me and him was reasoning out side and him sae 'boy him have to get rid a her' so I was telling him that that not a good idea because she two child and we can still go a jail, them time deh I was thinking about my son. So Prinston say boy him aga still have fi get rid a her, so I say boy mi nah help you because it's up to you and in a the first place him shouldn't start it. Him go inna the vehicle and him use the tape and put more tape around her, but mi nah now if him a tape up her nose a what but mi know it a up top him de a put the tape. Him go inna the trunk fi a bag and put the

bag over her head, tie it and he put more tape over the bag, and then she was there struggling but her hands was tape up and she was there struggling. The trunk was open then he lock down the trunk, I turn away and walk like mi a go walk out the road, because we had turn down inna one track that had take to the beach. Then Prinston turn the vehicle and stop by me and I got into the vehicle and then he drive to the other location.

Q. Explain what happened next?

A. Him drive go to the other location and came out of the vehicle and take out the two phone, two Blackberry, which one a dem did drop inna the water, that what she said before she dead, then I took the laptop, search her hand bag take the credit cards, and him did find money inna the bag, less than a hundred dollars US, him take 40 and I take 40 it was 80 US and then him lock up the vehicle, him take a piece a paper and him push it inna the gas tank and then him put it inna the vehicle and light it."

101. In our view this was one incident, one plan, to commit crimes of violence upon the deceased, that is to say, abduction, rape and robbery, in the course of

the commission of which, and in furtherance of those crimes a decision is made to kill the deceased, for the purpose of avoiding being subsequently identified as the persons who committed those crimes. It is apparent that the learned Chief Justice understood the defence in this light, as he spent some time analyzing the evidence that came from the cautioned statement of the appellant Henry, in order to determine whether he could conclude that the content indicated a genuine withdrawal by the appellant Henry from the common design, or as he put it "the legal issue of countermanding and withdrawal from a joint criminal enterprise."

102. This was not a case in which the action of the accomplice was done without express communication by the accomplice to the appellant of his intention to take the life of their victim. Whereas, before the communication, it could be concluded from the evidence that given all the circumstances, the appellant must have foreseen that grievous harm would befall their victim, on his own account, the appellant revealed that during the course of the "common enterprise", the accomplice expressed that he was going to kill the victim. Hence, the question arose, as to whether the appellants expression that 'he was not in that' was by itself a withdrawal at that stage from the enterprise.

103. We agree with the learned Chief Justice's approach to the evidence in order to determine the liability, if any, of the appellant for the murder of the deceased.

The Crown submitted that "as distinct from some of the cases referenced" the important feature of the instant case is, on the appellant Henry's account, the fact of the discussion between the two men prior to the killing. In light of this the question then became not limited to whether the appellant Henry could have foreseen an act by his accomplice which is said to have gone beyond the agreed enterprise, but whether, with full knowledge that the plan was to kill, he remained a party to the enterprise. We agree.

104. This led the learned Chief Justice to determine that question, which resulted in a detailed examination of the appellant's account to decide whether the appellant had effectively withdrawn from "the common enterprise". In doing so, he correctly looked at the appellant's subsequent conduct. He was apparently guided by the following dicta to which he made reference.

In ***R v O'Flakerly; Ryan and Toussaint*** (2004) 2 Cr. App. R. 20 CA:

"... to disengage from an incident a person must do enough to demonstrate that he is withdrawing from the joint enterprise; ultimately that is a question of fact and degree, account being taken, inter alia, of the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the action said to constitute the withdrawal; in the case of assistance it is not an essential pre-requisite of an effective withdrawal that

reasonable steps should have been taken to prevent the crime. ...”

105. It is appropriate to rehearse the learned trial judge’s findings in relation to the appellant Henry’s participation in the common enterprise. On evidence which clearly supports his finding the learned Chief Justice found that:

“The defendant Henry acted from the very onslaught in concert with his accomplice. He continued even after he was aware of the presence of the knife and that his accomplice would, if necessary, inflict serious injury upon their victim, to assist in overpowering and subduing her. Having gagged and tied her up with duct tape which they must have planned in advance to use, they acted in concert in the sexual assault upon her.

I find beyond reasonable doubt that the defendant Henry had embarked upon a joint criminal enterprise in which he was aware, at the very least, that really serious bodily injury would probably be inflicted upon his victim and continued thereafter nonetheless sexually to assault her, after she had been gagged and bound.”

106. It is on that background that we must consider also the learned Chief Justice's treatment of the evidence in relation to the issue as to whether the appellant Henry had effectively withdrawn from the common enterprise.

This is how the learned Chief Justice dealt with that issue guided as we have earlier stated by the principles stated in the referenced case. He said:

"In the cover up that followed, the defendant Henry could hardly have been a more willing participant. In the rest of his narrative he sought to give the impression that he was ordered back into the vehicle and driven to the dead end of the Mangrove Buffer Road where it was burnt by his accomplice acting alone, but there are a number of clear indicia of his willing participation in the continuing chain of events.

These indicia which also goes to the state of mind at the relevant time, have helped to inform my conclusion that he had not in any way, let alone in the manner contemplated by the law, sought to withdraw from the criminal enterprise before the deceased was killed. In the first place, he showed none of the remorse that one would expect about the final terrible fate of his victim. Instead he had the presence of mind to elicit the PIN number from her bank ATM card before she was killed

which literally at the crack of dawn he was involved in using to access her account. He described how he elicited the number in this way in answer to a question about the card during his interview:

'yeah we did get her PIN number from her you nuh, she just give it freely, but before she give we the PIN number she said 'if she gave me the PIN number you guys going kill me same way. I turned to her and say no we not going to kill you, just give we the PIN number.

...

We see further in his interview the account that it was not until after the deceased had been killed and they had driven her car with her body in it to the end of Mangrove Buffer Road, that Henry himself searched 'her handbag' and took what he described as her credit cards. His accomplice he said, also searched the handbag and found money which he shared with Henry. But it is obvious that this account of having found her credit cards at that point in time does not accord with them having already elicited the PIN

number. Otherwise why would they have needed the number before the card was found."

107. Then in concluding that the appellant Henry had made no attempt to "countermand or withdraw from the criminal enterprise", the learned Chief Justice also relied on the subsequent conduct of the appellant Henry. The following is how he dealt with this:

"The further evidence of his subsequent conduct only serves to reinforce this conclusion.

From his own statement, it also appears that after he and his accomplice had ransacked and searched the car, with Henry taking one of the two Blackberry phones, the laptop computer, a camera and some of the money, he waited and watched while his accomplice set the car on fire with the victim in it. And although he claimed to have moved away, he also said he waited until his accomplice caught up with him and he remained with his accomplice, according to Henry at the Digicel pole until about 5:30 – 6:00 a.m.

Henry's persistent attempt to access the laptop during the course of the next day also betrays the

absence of any feelings of remorse. And finally and perhaps most telling and damning if all, are the photographic reminders which he chose to keep of the terrible ordeal to which he had subjected his victim, leading to her cruel death.

On the overwhelming weight of the evidence, I find that the defendant Henry was a willing participant in the plan to abduct and rape Estella Scott Roberts by the use of force and with the realization that she would in all probability suffer serious harm. While I must accept in his case, that it was his accomplice who actually suffocated her, I find that he made no attempt to countermand or withdraw from the criminal enterprise when his accomplice declared the intention to kill but instead by his presence and behavior giving at least tacit encouragement; continued thereafter in the criminal enterprise without any sense of remorse but with the intention instead to profit from the crime.

I am satisfied so that I am sure that he is guilty of the offence of murder as laid in the indictment against him."

108. We have set out in some detail the learned Chief Justice's analysis and conclusions upon the evidence to indicate that he gave indepth consideration to the legal issues which arose, and to the evidence that was before him. There was overwhelming evidence, against the appellant Henry even in the absence of his cautioned statement and interview. That evidence has already been referred to, but that in addition to the statements made by the appellant created a very strong case against him. We are satisfied that the complaints made by the appellant Henry cannot be sustained, and that his conviction was safe, and supported by overwhelming evidence.

His appeal is therefore dismissed.

Appeal of Ricketts

109. Counsel for the appellant Ricketts, first attacked the allegation that Ricketts was the accomplice of the appellant Henry, and among other things which will be dealt with later, based this assertion on the time factors relating to calls made from a cell phone which was taken from the deceased. This, counsel submitted pointed to the involvement of someone other than the appellant Ricketts with Henry in the murder of the deceased.

110. This contention was based on the matching of the sequence of events as between 6:31 am on the 11th October 2008 when Ricketts was certainly (as proven by the evidence and his own admission) present at the Elgin Avenue Branch ATM- and 7:00 am when the deceased's Blackberry phone (then bearing subscriber number 926-1500 which was recovered from the appellant Henry was located in the area of the North West Point cell site just west of Pappagallos.

111. Counsel urged that the appellant Ricketts could not have been with that phone at that location at 7:00 am while having been at Elgin Avenue Branch at 6:31 am the two locations being some eight (8) miles apart. This difficulty, he submitted was compounded by the fact that the phone was tracked as having returned to George Town moving south along the West Bay Road at 7:18 am and 7:30 am arriving within range of the George Town Central Cell site at 7:34 am.

112. The appellant Ricketts, on that basis contends that these circumstances points to the involvement of someone else other than Ricketts, who on his own account travelled north arriving at work at Dive Tech by "minutes after 8 am".

In answer to this contention, the Crown submits that the appellant could have gone back to the Northwest location in the 29 minutes which represents the difference in time between being at Elgin Avenue (6:31 am) and the telephone being located at the Northwest location (7:00 am).

113. In our view, these contentions amount to nothing more than speculation, and are not based on any evidence from which the conclusions contended for, can be drawn. The evidence against the appellant Ricketts depended to some extent on his cautioned statement, which was admitted into evidence after a challenge to its admission. That statement discloses a clear and unambiguous admission by him of his involvement in the murder of the deceased. It is apparent, that in a reference to the evidence in the case, the learned Chief Justice concluded on this issue as follows:

“These are aspects of this case which are unexplained or which at least seem to be improbable. But I must note immediately, that none of them is such, as to my mind, to preclude the full and clear ascertainment of the nature of the involvement of either defendant in the events of the 10th to 11th October 2008.”

114. In the face of the overwhelming evidence against the appellant Ricketts, we cannot fault the learned Chief Justice for dealing with this issue in the manner in which he did. This ground fails.

Admissibility of cautioned interview

115. We turn now to the challenge by the appellant Ricketts to the admission by the learned Chief Justice of the cautioned interview given by him to the police in the afternoon of the 28th October 2008, some 17 days after the murder.

116. In that interview, the appellant stated inter alia:

Q. What else happened in the parking lot at Deckers?

A. While we were standing in the parking lot me and Kirk, we saw a brown skin lady wearing a dark dress. She come inside the parking lot by Deckers and went inside her car.

Q. What kind of car did the lady go in?

A. A dark colour Ford SUV.

Q. What happened next?

A. Kirk and I rushed towards the lady's car then we opened the doors and tell her to get into the back seat. She began to scream and started wrestling, then we eventually get inside the car and drove to West Bay. I drive the lady car and Kirk was in the back seat with the lady. When we were driving out of Deckers parking lot I saw two police cars drive in near the bar area. So we turn down West Bay Road and turn off where they build the new Foster's Supermarket, that is the road in front of the Supermarket. We drive by some place call Pappagollos on a lonely marl road. We then went on a little sand track about twenty feet from the

beach and stopped the vehicle. Then we came out of the car and take out the lady and we tied her up with some duct tape and tie strap. Kirk did the duct tape and I did the plastic strap. Kirk had the duct tape and the plastic tie strap in his pocket because he told me when we were walking that he had it. Then we started to search up her car and we find a laptop, about \$120.00 US in her purse and two Blackberry cellular phones. Kirk also find a credit card in her purse, I believe it was a Cayman National card. Then we put her back in the car and went further down the road. We drove for about a mile or so down the road then we stopped."

- Q. After you drive down the road for about a mile and stopped, what happened next?
- A. I find a garbage bag on the back of her car which Kirk used to put over head to suffocate her. We suffocate her by tying the bag over her head until she stopped moving. So she stopped moving and I realized that she was dead. Then I light the vehicle with the same paper inside the vehicle.

Before we left we watched it until it blaze up. Then we went over the fence and walk through some wood land near some canal and stayed by one of the Digicel or Cable and Wireless tower and take a little nap until morning. Then we started walking in the morning until we see a bus and we take it to Royal Palms to collect our bicycles.”

The interview continued with the appellant being asked and answering questions numbering 55.

117. At trial the appellant challenged the admissibility of this “cautioned interview,” on the basis that he did not give a statement to, or answer questions by, the police, and that the content of the “statement interviews document” was all concocted by the police. It therefore became a question of fact, for the learned Chief Justice to decide whether the allegation of the appellant was true in fact. In the voire dire which was held the appellant Ricketts testified and was cross-examined by the learned counsel who appeared for the Crown. At the end of which, the learned Chief Justice gave reasons for accepting the evidence of the investigating officers and rejecting that of the appellant. As a result, the statement was admitted into evidence.

118. As recorded in the judgment of the learned Chief Justice in coming to his conclusion, the appellant had argued before him that “what is written in it as his

answers were contrived and concocted by officers Bailey and Wright from information which they had put to him seeking to implicate him, which he did not accept but which they used against him by recording answers that he did not give."

119. The learned Chief Justice in a detailed judgment "entirely reject [ed] these allegations and hold them to be untrue." He found both officers Wright and Bailey to be witnesses of truth and was "most impressed" with the fairness of Insp. Bailey's demeanour as a witness. Then he said (of Insp. Bailey),

"I did not get the impression of his testimony being, as Mr. Fortune, Q.C., described it – a contrived and polished performance; rather I was impressed from the different reason of his complete lack of hesitancy in his responses and his obvious belief in the importance of fairness in his treatment of defendants under interrogation by interview."

120. The learned Chief Justice, though relying on the witness' demeanour pointed to "objective indicia" in arriving at where the truth lay.

He pointed to what he described as six considerations:

- (i) The interview took place the day after his arrest when the defendant would have had time to reflect upon what he wished to say or do. The

defendant agrees that he was prewarned about the interview, was refreshed by lunch being provided before it began (although he says he continued to eat after the interview) and was offered regular breaks and refreshment throughout. It is also significant that the interview took place after he had signed the custody record the evening before, evidencing that he had chosen not to request the services of a lawyer.

- (ii) His signature and initials were placed by him without threat of force at many places throughout the record of interview, including as acknowledging the caution and as having been twice reminded of his right to an attorney at law beginning of the interview.

The certificate at the end was written also by the defendant himself and signed by him. This was after he had read over the entire transcript of the interview, as the certificate itself explains.

Indeed the defendant agreed in cross-examination that no threat of force was ever used towards him by the officers.

- (iii) The defendant Ricketts was inconsistent and contradictory in his evidence as to the reasons why he signed, initialed and certified the record of interview. First in examination-in-chief, he suggested that he had signed because, although he did not utter what the officers had written, they had, assured him, variously, that the interview was "not relevant" that although what they had written was not what he had said that he was just assisting with the police investigation.

Implausible though it may seem that he would have believed the officers, he also went on to allege in his evidence, even more implausibly, that Insp. Bailey has told him that, 'if I agree to it, he would probably let me go; ... that he would not charge me for the crime.'

And, further, when he still refused to sign, that he was told that if he did not, he would spend

the rest of his life in jail and his son (whose picture he claimed the officers brandished before him on his own cell phone) "would grow up calling some other man Daddy."

The learned Chief Justice found that from the record of the interview itself which the appellant admitted to having read over, that by signing it, he must have known that he was signing to an admission to the offence of murder and so "the consequence of his signature was likely to be exactly that which he says the officers had promised would not happen."

- (iv) Having observed the defendant Ricketts testify on the voire dire, particularly under cross-examination, it is clear that he is quite intelligent, deliberate and not easily intimidated. This impression of him was instructive in assessing his evidence.
- (v) There was also a suggestion that Insp. Bailey and Sgt. Wright would have already known the information disclosed in the interview, such as to

have enabled them to invent the answers attributed to the defendant. While I do not conclude that the information in the answers attributed to the defendant in the interview was not or could not otherwise have been known to the officers, I do conclude that the nature of the questions and the actual and logical flow of the answers recorded as having followed from them, are entirely inconsistent with the defendant's allegations that the questions and answers were contrived and concocted by the officers. In this regard, I believe the record of interview speaks for itself, beginning in particular with question number 6 which simply invites the narrative of the defendant thus:

Q. 6 "Mr. Ricketts take your time and tell me everything you know about the incident with Mrs. Estella Scott Roberts which occurred between Friday 10th October and Saturday 11th October 2008?"

The learned Chief Justice then declared acceptance of Insp. Bailey's evidence as to the limited extent of the knowledge he had about the details of

the investigation up until the point in time of the interview. Then the learned Chief Justice continues:

"Previously he knew what Kirkland Henry had had to say in his statement the day before, and from that source alone, it would not have been possible to fabricate several of the answers attributed to the defendant Ricketts in the interview. This would have been the case, in particular, in relation to those several answers identified by Miss Richards, as containing information which is not recorded in any statement as coming from the defendant Henry."

(vi) The reason given by the defendant Ricketts for his failure to have mentioned to the Jamaican Consular Representative Mrs. Elaine Harris, any concerns he may have had about the interview process and the recording of the admissions also defies belief.

121. The learned Chief Justice concluded by indicating inter alia that he was convinced that "the defendant Ricketts had resolved to make 'a clean breast of it'."

122. Then the learned Chief Justice returned to the admissibility of the 'cautioned interview', when he came to give his judgment in the case. He said:

"After careful consideration of all the evidence in the case, the conclusion at which I have arrived is that the correctness of having ruled the cautioned interview to be admissible is reaffirmed. Reasons for that were earlier given in writing and so I do not have to repeat all the earlier findings now."

123. The learned Chief Justice however expressed some other reasons to support his earlier findings. Here is what he said:

"In answer 14 of his interview, the defendant Ricketts, in describing how he and his accomplice killed the deceased, described the use of the garbage bag to suffocate her. This was important information which his interviewers, it is reasonable to accept, could not have known at that time as the defendant Henry's interview was being conducted contemporaneously in another office of the George Town Police Station. Nor was Dr. Hyma's opinion, given in Court that the cause of death was not inconsistent with asphyxiation, apparent from his post mortem report which was available to the police following the post mortem examination on the 13th

October 2008. In that report, the conclusion was given as 'homicide by unspecified means'."

124. The learned Chief Justice then set out the different versions of both appellants, as to what the deceased said in pleading for her life.

125. The learned Chief Justice also relied on the fact that "the allegation of concoction did not fit with the fact that nowhere in Ricketts interview is there any reference to having sexually assaulted their victim."

126. It appears also that when the appellant Ricketts testified in his defence, he gave yet another reason why he signed the cautioned interview in spite of the fact that he did not give the answers which it contained. In answer to his counsel, Mr. Fortune, Q.C., he said that he only became aware that the record of interview contained the concocted incriminating answers after he had been served with the bundle of documents from the Court proceedings. These are the words of the learned Chief Justice,

"... puts the complete lie to the reasons he gave on the voire dire for having signed the record of interview, while being fully aware of the incriminating questions and answers it contained."

127. The learned Chief Justice then concluded:

"Taken with all the other evidence that relates to the voluntariness and fairness of the interviews, I am left in no doubt that the admissions were freely and voluntarily given."

128. Before us, however counsel for the appellant Ricketts sought to convince us that the frequent breaks at intervals facilitated an opportunity to the interviewers to leave the room and visit the room where a statement was simultaneously being taken from the appellant Henry, and by this method gather information in order to concoct answers in the "cautioned interview" of the appellant Ricketts. In our view, there was no evidence upon which such a conclusion could be based, and we conclude that such a finding could only be based on speculation.

129. It was submitted, also, that the length of the interview, as timed, suggests that the written record of questions and answers is less than a complete record of what took place. We have given careful consideration to that submission. It is impossible for this Court to determine, as a fact, what exactly occurred. But it is unnecessary to do so; given that the appellant was content to sign that record as a true record.

130. The learned Chief Justice gave detailed reasons, after the *voire dire* as also in his final judgment for his rejection of the appellant's Ricketts allegation against the interviewing officers.

In particular, the learned Chief Justice who had the opportunity to see and hear the witnesses, and to assess their demeanour, specifically rejected the evidence of the appellant Ricketts in this regard.

131. In addition, he gave sound reasons, based on the evidence for so doing. It would be wrong for an appellate court to substitute its own finding of fact for that of the learned Chief Justice unless some obvious error can be identified, or it can be shown that he came to his conclusion based on mistake in relation to the evidence. We are not persuaded that there is reason to interfere with his finding of fact, or that it can be demonstrated that he did not take proper advantage of seeing and hearing the witnesses who testified before him, which is supported by the evidence. This ground also fails.

Absence of good character directions

132. The appellant Ricketts, like the appellant Henry, complains that the learned Chief Justice did not direct himself as to his good character and submits that consequently his conviction is unsafe and unsatisfactory.

133. During the hearing, the Court was not directed to the evidence showing the good character of the appellant, but nevertheless we consider this contention upon the basis that it appears to have been accepted by both sides that there

was evidence that the appellant Ricketts, was before this incident, a person of good character.

134. We have already examined in detail the law in relation to good character directions and will not rehearse them here. The real issue in relation to this appellant is whether the learned Chief Justice's failure to address that aspect of the case is fatal to the conviction of the appellant.

135. Of relevance to this issue is the following dicta of Lord Lowry, Chief Justice, delivering the judgment of the Court of Appeal in Northern Ireland, from decision of a judge sitting alone, in the case of *R v Thompson* (1977) NI 74.

He said:

"While on the subject I might say a word on the duty of the judge when giving judgment in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial), a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult

or unusual points of law in order that if there it may be seen how his view of the law informed his approach to the facts.”

136. There can be no doubt that in the instant case the learned Chief Justice set out in great detail his appreciation of the evidence and the law and the reasons for his findings. This is in keeping with the cited dicta in the *Thompson* case (supra) which in turn was cited with approval by this Court in *Her Majesty the Queen and Dave Kennedy Whittaker* (unreported) delivered on the 8th December 2009.

137. Nevertheless, we affirm an earlier statement in this judgment, that when it is necessary for a trial judge to consider special questions of law in a case, he should indicate, if not specifically but by using words from which it can be inferred, that in coming to his conclusion, he has considered that special provision of law.

138. It follows then, that if he has omitted so to do, the circumstances of the case has to be examined in order to ascertain whether that failure is fatal to the conviction. If the omission would result in an unsafe and unsatisfactory conviction, then the conviction cannot stand.

139. The question here then is whether the learned Chief Justice's omission to give himself a direction as to the good character of the appellant Ricketts in this case is fatal to the conviction.

140. Of relevance to this issue are passages from the cases of *Balson v The State* (2005) UK PC 6, *Brown (Uriah) v The Queen* (2006) 1 AC 1 and *Sagdeo Singh v State of Trinidad and Tobago* (2006) 1 WLR 146 all cited with approval in the Privy Council case of *Vijac Bhola v Trinidad and Tobago* PC Appeal No. 26/2005 reported at 2006 UK PC 9, 2006 WL 690609.

141. Firstly, Lord Brown of Eaton-under-Heywood speaking for the Board in the *Balson's* case said:

"Their Lordships are of the opinion that a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to support that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent

conduct and his credibility, as to whether a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence.”

142. In the *Brown* case (2006) 1 AC 1 the Board observed at page 38:

“[The jury] had the advantage of seeing and hearing [the appellant] when he gave evidence and of forming their judgment about his apparent credibility from his testimony and demeanour. They also had the evidence of the eyewitness Mr. McKennon and were able similarly to judge his credibility. Their Lordships do not wish in any way to minimize the importance of good character or of the proper direction being given by trial judges. They do consider, however, that in a case of the present type such a direction will be of less significance in assisting the jury to come to a correct conclusion than in other types of prosecution.”

143. In *Jagdeo Singh's* case (supra), where the appellant was a practicing lawyer convicted of corruption, the judge had omitted the credibility limb from the good character direction to the jury. Lord Bingham of Cornhill giving the judgment of the Board said at para. 25:

"The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of the conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated. This was accordingly a case where, depending on the circumstances, the provision in section 44(1) of the Supreme Court of Judicature Act might have been applicable."

144. In view of the reliance on certain dicta from the case of *Teeluck v The State of Trinidad and Tobago* (2005) 1 WLR 2421 the following dicta in the cited case of *Bhola* (supra) at para. 17 are of importance also:

The appellant relies heavily on the series of propositions set out in para 33 of the Board's judgment in of *Teeluck v The State of Trinidad and Tobago* (supra) and certainly it is right to say as para. 33 (iv) of *Teeluck* case does, that 'where credibility is an issue a good character direction is always relevant'. But the trilogy of cases examined above suggests that the statement in paragraph 33(11) of the *Teeluck's* case,

that the direction 'will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial' needs to be applied with some caution. (emphasis added)

145. In the present case the circumstantial evidence against the appellant was strong. Apart from his cautioned interview, he was found with a cellular telephone, taken from the deceased, and was early the following morning attempting to withdraw cash from her account using her ATM card. However, the principal evidence against him is contained in the cautioned interview. The admissibility of this evidence was the subject of detailed examination and analysis by the learned Chief Justice who had the opportunity to see and hear the appellant give evidence and on that basis determine the facts surrounding the taking of his cautioned interview. After that detailed examination, the learned Chief Justice admitted the cautioned interview, which contained a clear admission by the appellant of his participation in the murder. Given his admission and the other evidence connecting him to the murder, we conclude that good character directions would not have had any effect on his conviction, which was inevitable in the circumstances.

146. In coming to this conclusion, we take support from the above cited cases and find that the learned Chief Justice's failure to direct himself in relation to the appellant's good character is not fatal to the conviction.

147. For these reasons we dismissed the appeals of both appellants on the 29th November 2010.

Chadwick P

Forte JA

Mottley JA