JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 176/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

ORVILLE MURRAY
v.
REGINA

Delano Harrison Q.C. for the Appellant

Miss Gaile Walters, Acting Crown Counsel for the Crown

February 6,7,8, and April 8, 2002

WALKER, J.A.

On October 10, 2000 in the Home Circuit Court, Kingston, before McCalla J sitting with a jury the appellant was convicted on two counts of an indictment which charged him with murder. On the first count he was charged with the murder of Michael Allen on December 28, 1996 and on the second count with the murder of John Scott on December 30, 1996. Both Allen and Scott were shot during the same incident on the former date, but whereas Allen died instantaneously Scott

survived for two days finally succumbing to his injuries on the latter date. Following these convictions the appellant was sentenced to death.

The case for the prosecution rested substantially on the deposition evidence of Carlos Allwood. Allwood had given viva voce evidence before the Resident Magistrate at the preliminary stage of these proceedings but could not be found to testify at the trial. In his evidence Allwood said that between 5:00 p.m. – 5:30 p. m. on December 28, 1996 he was at home on his verandah facing the gate to the premises. So positioned he was 24 feet to 25 feet away from the gate. At this time his son, Michael Allen and John Scott were conversing among themselves at the gate.

According to Allwood just then "Nothing nuh happen other than dem man (referring to the two defendants) just come up and shoot up di youth dem (referring to Allen and Scott) and my son nearly dead too". Concerning the two defendants Allwood said "I know dem long time". Referring specifically to the present appellant Allwood said:

> "One of dem and four of my son a family. Ricie... (The witness points to the accused in dock wearing a checkered shirt, who was Orville Murray) I only know him as Ricie. I know Ricie from baby growing up, long time, I can't count how much years. He lives at Gem Road. His father name Bump. Since I have known Mr. Murray, otherwise called Ricie, I see him every day as long as a nuh - a Texton Lane every day me see him".

He saw the appellant "from head to toe". He saw both defendants, each of whom was armed with a gun, firing shots at Allen and Scott. That incident lasted "for a short, little time, not long" which he estimated to be about 5 seconds. A third man, who was also carrying a gun, was in company with the two defendants. That third man, a stranger to Allwood, fired no shots during the incident.

The defence presented was one of alibi. The appellant said that he did not go to the premises of Carlos Allwood on the day in question, and did not shoot, or shoot at, either Allen or Scott at the gate of those premises on that day. He testified of ill-will on the part of Carlos Allwood towards him. That animosity stemmed from the fact that the appellant had refused to sell drugs for Allwood who was, himself, a dealer in drugs. Allwood had expressed an intention to get rid of the appellant saying "me (meaning the appellant) fi dead because me a stop him from eating food because I am an informer". The appellant further testified that he was a person of unblemished character and a member of a youth club which counselled young people "fi do the right thing and try to say things, to say good things to the youths dem so that they can go learn a skill or something".

On appeal it was argued on behalf of the appellant, firstly, that the prosecution failed to prove a nexus between the man, John Scott, who was shot on December 28, 1996 and the man of the same name who

died in the University Hospital on December 30, 1996. It was submitted that as far as the case for the prosecution went the man who was shot on the former date was taken to "a hospital at Cross Roads" which was not the University Hospital. Now it is a notorious fact of which judicial notice may be taken that the University Hospital is not located at Cross Roads. But, that notwithstanding, the answer to this submission is simple enough. In the first place it must be noted that there was no issue here at the trial. Furthermore, there was the uncontradicted evidence of Mavis Anderson, the mother of John Scott, that having received information she went to the University Hospital on December 29 where and when she saw her son in the Intensive Care Unit. She returned to that institution on the following day at which time she viewed the dead body of her son. On January 3, 1997 she attended a post mortem examination at which time she identified Scott's dead body to a doctor. For the prosecution Dr. Ramjit gave evidence that he performed that post mortem examination and he opined that the cause of death was severe blood loss and bowel injury secondary to a gunshot wound to the left buttock. From this evidence the inescapable inference to be drawn, and which the jury obviously drew, was that at some time between December 28 and 29, 1996, and for whatever reason, John Scott was transferred from the hospital at Cross Roads to the nearby University Hospital where he died. We found no merit in this ground of appeal.

Secondly, the appellant complained on a ground which was framed as follows:

> "That the learned trial judge failed, insuperably, to warn the jury not to consider, as corroboration of his Preliminary Inquiry evidence of identification of the Appellant, a previous statement (left for the jury's deliberations) of sole identifying witness, Allwood, consistent with that Preliminary Inquiry evidence".

Reference here was to portions of a written statement which was given to the police by Carlos Allwood. Those extracts were tendered in evidence by counsel for the appellant ostensibly to show inconsistencies between what the witness said in that statement and the evidence contained in his later deposition. This is how the judge dealt with this aspect of the case in her summation to the jury:

> "Counsel for Orville Murray tendered in evidence after the foundation was laid... and I had referred to that earlier on and told you that the law allowed him to do that. You will recall that certain portions of the statement that Carlos Allwood had given was tendered in evidence. Those sections Mr. Foreman and members of the jury, were placed before you as inconsistent statements that Mr. Allwood had made and you will recall that counsel for both accused persons submitted that they were material discrepancies and that in the absence of the witness those discrepancies were fatal to the prosecution case because you were not able to assess the demeanour of Mr. Allwood in order to determine his credibility and reliability. You will recall also that crown counsel in her submissions before you said that those discrepancies were not material and that they were not central to the issues which you have to decide in the case.

> Now, if you were to find, Mr. Foreman and members of the jury, that those portions of the statement of Mr. Allwood placed before you are inconsistencies, if you were to find contradictions in them – and as I have said, it is a matter for you – if you were to find that they were serious, Mr. Foreman and members of the jury, now, in the absence of the witness you would have to ask yourself, Mr. Foreman and members of the jury, whether in the absence of any explanation from the witness or the absence of evidence as to which is correct, whether it would be safe for you to rely on the deposition of Mr. Allwood and whether or not you could feel sure of the correctness of the identification that he has made in respect of these two accused persons".

Nowhere in this passage, or for that matter in her summing-up , did the judge mention the word "corroboration" or otherwise lead the jury erroneously to think that anything contained in the tendered portions of Allwood's police statement was capable of corroborating his deposition evidence. There was, in our opinion, no danger of the jury doing so and, accordingly, no need for the judge to have given a special warning in that regard.

Thirdly, it was argued that the trial judge erred in law in permitting the reception into evidence of the deposition of Carlos Allwood who was the sole prosecution eye-witness. The deposition was admitted in evidence pursuant to s.31D(d) of the Evidence (Amendment) Act, 1995 which provides as follows:

> "**31D.** Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of

> which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a) ...
> (b) ...
> (c) ...
> (d) cannot be found after all reasonable steps have been taken to find him; or
> (e) ...

In order to lay a proper foundation for the reception of this evidence the prosecution called three witnesses in the persons of Detective Corporal Edgar Graham, Thelma Pargo and Detective Sergeant Carl Malcolm. It is necessary to examine in some detail the evidence of these witnesses in order to determine the sufficiency or otherwise of the endeavours of the prosecution to locate the witness Allwood. Detective Cpl. Graham was the investigating officer in this case. He said that a written statement was taken from Carlos Allwood who afterwards attended court and gave viva voce evidence at a preliminary enquiry. Subsequently he had occasion to take Allwood into custody on a bench warrant for the purpose of giving evidence at a court of trial. That was on January 25, 1999. On that occasion the case was not tried and Allwood was released on bail by the court. Since that time, and up to the time of giving evidence, he had not seen Allwood again, and this despite numerous efforts, of which he gave details, to find the elusive witness. Those efforts included checks over an extended period of time at the witness' known address and repeated

enquiries made of Allwood's common-law wife, Thelma Pargo. Finally Det. Cpl. Graham went to the extent of causing an advertisement to be placed in the Sunday Gleaner newspaper, a publication of the widest circulation within this country, in an effort to trace the witness. A copy of that advertisement was tendered in evidence. It reads:

> "Urgent. Will Carlos Allwood whose last known address is Lot 94 Orian Drive, Christian Meadows in St. Catherine, or anyone knowing the whereabouts of this person, please contact the Office of the Director of Public Prosecutions or Detective Corporal Edgar Graham at the following addresses: Office of the DPP, P.O. Box 633, Tower Street. Telephone (876) 922 –6321 –5. Detective Corporal Edgar Graham, Marine Police Headquarters, Newport East, Kingston 15. Telephone (876) 923-9728".

The evidence of Thelma Pargo, Allwood's common law wife of 18 years was most revealing. It reads in part:

> "**Q.** Your name is Thelma Pargo?
>
> **A.** Yeah.
>
> **Q.** And you presently live in the Kingston – and you presently live in the parish of St. Catherine?
>
> **A.** (nods head).
>
> **Q.** Now, Miss Pargo, Do you know a Mr. Carlos Allwood ?
>
> **A.** Yes.
> HER LADYSHIP: You have to speak so we can hear you.
>
> **Q.** You know him by any other name?

A. Johnny.

Q. Now, who is Mr. Allwood to you?

A. My husband.

Q. And how long have you and Mr. Allwood been together?

A. From '82'

HER LADYSHIP: Is that 1982?

WITNESS: 1982.

Q. Now, Miss Pargo, up until 1994, where did you live?

A. I lived at Texton Road, go to and from.

Q. In 1994, did you go anywhere?

A. I have a next house and I go there.

Q. And this house is in the parish of St. Catherine?

A. Yes.

Q. Now, Miss Pargo, when was the last time you saw Mr. Allwood?

A. 'Bout late March, to April.

Q. Of what year?

A. This year.

Q. Have you seen him since?

A. No.

Q. Do you know where he may be?

A. No.

Q. Have you been able to locate him?

A. No.

Q. Have you tried to locate him?

A. I don't know where to locate him.

Q. You don't know where...?

A. Where he is.

Q. Have you made contact with him in anyway?

A. The last time him call me, ma'am.
MISS NOSWORTHY: M'Lady, I am unable to hear her.

A. The last time mi hear from him a inna June, mi never tek nuh specific date at di time.

Q. The last time you heard from him...?

A. About inna June or so. Mi never really tek nuh specific date of the time.

Q. Last year or this year?

A. This year.

Q. By what means did you hear from him?

A. On the phone.

Q. Did you call him or did he call you?

A. Him call.

Q. Did you try to find out where he was?

A. Is a man whey nuh tell mi him private life."

Det. Sgt. Malcolm gave evidence to the effect that on three occasions he visited a particular address in search of Carlos Allwood, all to no avail. It was on the basis of the foregoing evidence, which was accepted by the judge, that Allwood's deposition was admitted in evidence at the trial. On that evidence it is clear that exhaustive efforts were in fact made to locate Carlos Allwood. On their part the two police officers could hardly have been expected to do more than they did. As for Miss Pargo, who on the face of it was the closest person to Allwood, she had not the slightest clue as to the whereabouts of the man. In the circumstances we think that the judge was correct in her decision to admit the deposition in evidence.

Fourthly, the complaint was made that the trial judge's directions to the jury as to how they should treat the deposition evidence of Carlos Allwood were inadequate. Having admitted the evidence of Allwood, it was, of course, incumbent on the judge to warn the jury that they had not , themselves, had the benefit of hearing it tested in cross-examination, and that they had to take such a disadvantage into consideration when determining how far they could safely rely on that evidence. It was undoubtedly the duty of the judge to warn the jury that deposition evidence was not necessarily of the same weight as evidence which had been tested by cross-examination before them: see ***Barnes, Desquottes and Johnson v R*** [1989] 37 W.I.R. 330; ***Henriques and Carr v R*** [1991] 39

W.I.R. 253. In the instant case the judge gave the appropriate warning and repeated it again and again during the course of her summing-up. At the very commencement of her charge to the jury the judge gave the following directions:

> "Mr. Foreman and members of the jury, I will tell you straight away that in most criminal trials witnesses come before you, especially witnesses as to fact, they give evidence and are cross-examined and you are able to assess the demeanour of a witness in such cases.
>
> Generally, evidence given at a Preliminary Enquiry is not relevant to a trial except in certain specified situations. In this particular case, the deposition of Carlos Allwood has been admitted in evidence as Exhibit 4 and you heard the circumstances in which it was taken, which I will allude to at a later time, but I must tell you that it is pursuant to the provisions of the Evidence Act that the Prosecution has placed this evidence before you. And likewise, Mr. Foreman and members of the jury, the Defence, on behalf of Mr. Murray, Dr. Williams, has also placed before you portions of a statement and in that regard the foundation was also laid to say that that statement was given by Carlos Allwood and it is also pursuant to the Evidence Act that that has been done. In other words, in both cases, the law allows it. But I must tell you right away, Mr. Foreman and members of the jury, that deposition evidence is not evidence which carries the same weight as evidence which has been tested before you in cross-examination and you must take this into consideration when evaluating its credibility and reliability".

At a later stage the judge returned to this theme in giving the following directions:

> "And you will also have to consider, and I cannot over-emphasize, that the sole witness on whom the Prosecution relies for identification has not given evidence before you which has been tested by cross-examination for you to assess the demeanour of that witness".

Still later, and immediately before the jury retired to consider their verdict, they were directed in the following terms:

> "So at the end of the day, Mr. Foreman and members of the jury, bearing in mind the warning which the law says in all cases of identification I should give you, and I have already given you that warning of the inherent dangers of identification, and if you consider the evidence of Mr. Allwood in light of the limitations to which I have already alluded - the lack of opportunity of seeing him in the witness – box and his evidence not being tested under cross-examination before you in order to give you an opportunity to see how his evidence survived this form of challenge, you consider all those matters, Mr. Foreman and members of the Jury – everything considered- then you should only act on Mr. Allwood's evidence if taking those matters into account you nevertheless feel sure that that is reliable evidence. It is only in those circumstances it would be open to you, Mr. Foreman and members of the jury, to convict the accused persons on this indictment. If you have any doubt then you will have to acquit in each case.
>
> Mr. Foreman and members of the jury, will you please retire and consider your verdict to say whether Orville Murray or Loyest Lee Blythe or any of them is guilty or not guilty on any of these two counts on this indictment which charges them with the offence of murder".

Finally, in response to the jury's request for further assistance after their initial retirement the judge gave the following directions:

> "Now, as regards the position regarding the strength or otherwise of the deposition versus a statement to the police, the general rule in the courts, Mr. Foreman and members of the jury, is that evidence is usually given on oath from the witness-box. Then, you have the opportunity to see the witness for yourselves and to judge the witness's evidence accordingly. There are certain circumstances where a witness is unavailable and the statement of that witness is read out. This is such a case where the deposition of the witness has been read in respect of Mr. Allwood and it becomes evidence in the case that you can consider, but as Mr. Allwood did not come to court this evidence, in the sense that the deposition has been admitted, has certain limitations and I have alluded to them before. You do not have the opportunity of seeing him in the witness-box and sometimes when you do see a witness you get a much clearer idea of whether that evidence is honest and accurate.
>
> In addition, I told you that even though at the preliminary enquiry there would have been an opportunity for that evidence to be tested, and crown counsel has suggested to you that that evidence was tested to some great extent at the preliminary enquiry, nevertheless, as has been submitted by defence counsel, the preliminary enquiry was not a trial and so every question need not have been asked. This is the trial and the evidence contained in the deposition has not been tested here before you under cross-examination and therefore you have not had the opportunity of seeing how the evidence would have survived that form of challenge. Therefore, when you are considering the deposition you consider it in light of those limitations but you could act on it, if having taken those matters into account, that is, the

> limitations to which I have alluded, you are nevertheless sure that that evidence is reliable."

From the above it will be seen that the need to give the appropriate warning with regard to the deposition evidence was ever present to the mind of the judge who was at great pains to properly discharge that duty. Indeed, the fact of the matter is that the jury retired initially with the warning ringing in their ears. Upon their return for further assistance they were again reminded of it before they eventually reached their verdict. We, therefore, find no merit in this ground of appeal.

On yet another ground the appellant complained that his co-defendant having been acquitted by the jury, the guilty verdict returned against him was inconsistent with that verdict. This was so, it was argued, because the evidence of the sole eye-witness, Allwood, was "materially indistinguishable" and his credibility "indivisible" as respects the identification of both defendants at the trial and their participation in the criminal acts described by the witness. In ***R v Eric Taylor*** [1977] 25 W.I.R. 486 this court considered the question of inconsistent verdicts rendered by a jury in a trial of persons jointly charged. The headnote to that case reads as follows:

> "The appellant was charged jointly with five others on an indictment containing alternative counts for larceny of motor vehicles and receiving stolen motor vehicle parts and accessories. The charges arose out of the finding at a garage of a number of motor vehicles and motor vehicle parts some of which were

> subsequently identified as stolen. Detective Corporal Gardener gave evidence of seeing all the accused except A.G working at the garage and at the close of the prosecution's case A.G. was acquitted. In respect of the other five accused Detective Corporal Gardener said he saw the appellant working on an engine which was later identified as stolen, C.N. and B.E.. welding a station waggon, parts of which were later identified as stolen but he could not say precisely what A.W. and H.T. were doing. He also admitted seeing a motor cycle on the premises, and said that when questioned the appellant said he had bought the engine. C.N. and B.E. admitted being employed at the garage but denied knowledge of the cars being stolen. A.W. and H.T. said they had taken a motor cycle to the garage to be repaired and the appellant said he was at the garage waiting for the owner to get a savings pan. The magistrate acquitted A.W. and H.T., but convicted the other accused.
>
> **Held:**that the verdicts were not inconsistent because although Detective Corporal Gardener was the key witness for the prosecution his evidence against the acquitted defendants was clearly distinguishable from that against those convicted and the credibility of a witness was indivisible only where the evidence of that witness against each accused was materially indistinguishable.
>
> Appeal dismissed".

In delivering the unanimous judgment of the court Kerr, J.A. affirmed the following principles of law, (at [p. 489):

> "1. That although several persons may be jointly charged the evidence against each one must be considered independently and in arriving at a verdict regard should be had to the totality of the evidence as it affected each accused.

> 2. That it is open to a magistrate or jury to accept in whole or in part a witness' evidence. Indeed it would not be consonant with good sense in every case to reject the whole of a witness' testimony, notwithstanding that he has been clear in certain matters merely because he might have been uncertain or imprecise about others".

In the present case the credibility of the sole eye-witness, Allwood, was not, by any means indivisible, nor could the evidence against the two defendants be said to have been materially indistinguishable as between them. Allwood's evidence was that he saw both defendants at the same time and in the same circumstances, and had known both of them previously. But there were distinguishing features about the witness' knowledge of the men. Perhaps of greatest significance was Allwood's evidence of the extent of his knowledge of the defendants. Allwood said he knew the appellant far better than he knew the appellant's co-defendant. He knew the appellant "from baby growing up" and the appellant gave evidence that he was 28 years of age at the time of his trial. Furthermore, the appellant was a family member, being a cousin of four of Allwood's sons. All of this was undisputed evidence. On the other hand Allwood said that the appellant's co-defendant had been known to him for "around 2 years" prior to the incident and that he had seen him on occasions prior to the incident. But this was evidence that was hotly disputed, it having been suggested to Allwood (but denied by him) that

he had never seen the appellant's co-defendant prior to the day of the incident. Allwood's evidence also showed that he could not recall what clothing the defendant was wearing at the time of the incident. This was a part of the evidence which, in all probability, might have weighed heavily with the jury when they came to consider the defendant's case in the context of a defence of alibi. In the circumstances of the present case the judge was obliged to give to the jury appropriate directions incorporating the principles adverted to by Kerr J.A., in ***Taylor's*** case (supra). This the judge did by directing the jury in the following terms:

> "And may I also say, Mr. Foreman and members of the jury, that you must consider that both accused persons are being tried together, but you must consider the case against and for the accused on each count separately. You must consider each account separately and the case against and for each accused separately on each count."

And also in terms:

> "As judges of the facts, it is your duty to say what evidence you believe, or what evidence you disbelieve, what facts you, the jury, find proved, because it is open to you to believe all that a witness tells you or to disbelieve all that a witness tells you. You may also believe a part of what a witness tells you and disbelieve a part remembering always that you are the sole judges of the facts in the case and it is your verdict that is asked for ."

Having been given those directions it was open to the jury, depending on what view they took of the totality of the evidence as regards each of

the two defendants, to find different verdicts in respect of each of them. Quite conceivably, they must have been satisfied with Allwood's identification of the appellant, but not so with his identification of the other man. Hence the different verdicts which they returned.

Lastly, it was argued "that the learned trial judge erred in law in directing the jury in terms plainly suggesting that the appellant's evidence of his hitherto good character redounded to his benefit only as respects the issue of credibility". In the present case such evidence as there was of the appellant's good character came entirely from the appellant, himself. It was to the effect that he had no previous criminal record and was up until the time of his incarceration a member of a youth club which promoted rectitude in all things. The most recent authority which treats with this subject matter, and to which our attention was drawn by Crown Counsel, is the judgment of the Judicial Committee of the Privy Council in ***Langton (Kervin) v The State*** [2000] 56 W.I.R. 497. The headnote to that case reads:

> "The appellant, a man of unblemished character had been seen entering the deceased's house with the deceased. The deceased was seen to emerge from the house and screaming was heard. The appellant was seen to pursue the deceased and to stab her three times with a knife; the injuries inflicted were not fatal. The appellant followed the deceased into another house and her body was later found with a different knife protruding from her chest. The appellant surrendered to the police and voluntarily made a written statement in which he

admitted stabbing the deceased, and subsequently taking a knife off her and using that to stab her again; no details were given of anything said or done by the deceased. The appellant was charged with murder. At his trial he gave evidence that when he arrived at the deceased's house she started cursing him and being abusive about his daughter (from an earlier relationship of the appellant's). She pulled out a knife from beneath the bed and said that the appellant was not leaving. She advanced wielding the knife in front of his face, and he seized the knife. His hand was bleeding. He acknowledged that he got angry and when she ran away he gave chase, disarmed her, and turned her knife upon the deceased. He added that he had not been able to control his anger. In her summing-up to the jury the trial judge observed that the appellant's written statement was basically silent as to provocation. The judge made no mention of the appellant's good character. The appellant was convicted of murder and his appeal to the Court of Appeal was dismissed. On further appeal,

Held: advising that the appeal be allowed (and a verdict of manslaughter be substituted), that the appellant's good character went both to his credibility and to his propensity to commit the offence charged; good character was particularly important to his credibility as the appellant had relied solely upon his own testimony in support of his plea, and in relation to propensity the jury should have been reminded that they could take account of the fact that a man of good character might be unlikely to indulge in very serious violence without first having been provoked; the jury had not been given an appropriate direction on good character and the omission was so serious as to vitiate the verdict".

In ***Langton*** the Board approved the earlier decision of the English Court of Appeal in ***R v. Vye*** [1993] 1 W.L.R. 471. In ***Vye*** the court was concerned with the scope of a judge's duty in regard to directions to a jury on the relevance of evidence of a defendant's good character. Having reviewed earlier authorities on the subject, the court (per Lord Taylor of Gosforth C.J.) set out in summary form the following principles at p. 479 of the report:

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

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

> "Lord Taylor of Gosforth C.J. started his judgment by saying that the issues debated in ***Reg v Vye*** [1993] 1 W.L.R. 471 would at one time not have been regarded as arguable. I would add that in recent years there has been a veritable sea-change in judicial thinking in regard to the proper way in which a judge should direct a jury

> on the good character of a defendant. It has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. Hence there has been a shift from discretion to rules of practice. And ***Vye*** was the culmination of this development".

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

> "A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with ***Vye*** in a case where the defendant's claim to good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to

> give directions in accordance with ***Vye.*** I am reinforced in thinking that this is the right conclusion by the fact that after ***Vye*** the Court of Appeal in two separate cases ruled that such a residual discretion exists: ***Reg. v. H.*** [1994] Crim. L.R. 205 and ***Reg.v. Zoppola-Barraza*** [1994] Crim. L.R. 833.
>
> 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*** [1993] 1 W.L.R. 471 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 discretion dispense with them.
>
> Subject to these views, I do not believe that it is desirable to generalize about this essentially practical subject which must be left to the good sense of trial judges."

In the present case the judge did take account of, and refer to, the appellant's evidence of his good character, but, unfortunately, she did so in giving a direction which was flawed. In a summing-up, which was otherwise careful and commendable, she omitted to direct the jury that such evidence went also to the appellant's propensity to commit the offence with which he was charged. The direction was given in these terms:

> "Mr. Foreman and members of the jury, there is just one other thing to which I wish to allude in respect of the Defence, Orville Murray, and it is this, that in deciding whether the Prosecution has made you feel sure of the guilt of Murray, you should have regard to the evidence that he gave, that he had no previous convictions, because what he is saying by that is that he is a man of good character. Of course, good character cannot, by itself, provide a defence to a criminal charge, but you should take it into account, in his favour, in considering the weight you should attach to it, you bear in mind that it was made by a person of good character and that that would support his credibility and relates to the confidence you may have as to its truthfulness or to whether you can believe him."

The jury should have been told that the evidence went both to the appellant's credibility and to his propensity to commit the offence charged. But, misdirection though there was, we are satisfied that there has been no miscarriage of justice occasioned thereby. The prosecution mounted a credible case in proof of double murder perpetrated in broad daylight by the appellant. The central issue in the case was one of identification as to which the judge's directions were impeccable. Not surprisingly, those directions were not subject to any complaint on this appeal. The defence was one of alibi which was, quite obviously, rejected by the jury. We feel able to say that the jury would necessarily have reached the same verdict against the appellant had they been correctly directed on the aspect of his evidence of previous good character. In the circumstances we consider this to be a proper case for

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

Accordingly, on this application we grant leave to appeal and treat the hearing of the application as the hearing of the appeal. The appeal is dismissed and the appellant's convictions and sentence affirmed.

Finally, before parting with this matter we would, for the sake of clarity, say pointedly that we take the current law on the subject of the relevance of evidence of a defendant's good character to be as propounded in ***Vye*** and applied in **Aziz** and ***Langton***. Especially would we commend for the attention of trial judges that part of the headnote to the decision in ***Aziz*** which reads:

> **"Held,** dismissing the appeals, that a defendant with no previous convictions who had testified or made pre-trial answers or statements containing admissions as well as self-exculpatory explanations was prima facie entitled to a good character direction going both to credibility and propensity, although the judge, in giving such a direction , had a residual discretion to add words of qualification concerning other proved or possible criminal conduct of the defendant which had emerged during the trial, so as to place a fair and balanced picture before the jury; that in the limited case where the defendant's claim to good character other than his lack of previous convictions was so spurious that it would make no sense to give the general character direction, the judge could dispense with the direction in its entirety; and that, accordingly, since none of the three defendants had been given good character directions

> extending to both credibility and propensity, the Court of Appeal had correctly quashed their convictions".

It follows from what we now say that previous decisions of this court in the line of ***R v Patrick Watson*** (unreported) SCCA 89/1997 delivered November 16, 1998 should no longer be followed.