



JUDGMENT

**(1) Anneth Livingston (2) Ramone Drysdale
(Appellants) v The Queen (Respondent)**

From the Court of Appeal of Jamaica

before

**Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Carnwath**

**JUDGMENT DELIVERED BY
LORD REED
ON**

22 OCTOBER 2012

Heard on 25 April 2012

RAMONE DRYSDALE

Appellant
Fiona Horlick

(Instructed by Reed Smith
LLP)

Respondent
James Dingemans QC
Navjot Atwal

(Instructed by Charles
Russell LLP)

ANNETH LIVINGSTON

Appellant
John Perry QC
James Mehigan

(Instructed by Dorsey &
Whitney (Europe) LLP)

Respondent
James Dingemans QC
Navjot Atwal

(Instructed by Charles
Russell LLP)

LORD REED:

1. On 10 April 2003 the appellant was convicted at the Home Circuit Court of Kingston, Jamaica of the murder, on 13 April 2000, of Shirley Playfair. She was tried and convicted with two other defendants, Ramone Drysdale and Ashley Ricketts. It was alleged that a fourth person, Dwayne Williams, who absconded before trial, was also party to the joint enterprise to murder. The appellant, Drysdale and Ricketts were all sentenced to life imprisonment. It was ordered that the appellant should not be eligible for parole before the expiry of 60 years. The corresponding periods in respect of Drysdale and Ricketts were set at 55 and 45 years respectively.

2. On 31 July 2006 the Court of Appeal refused the applications of the appellant and Drysdale for leave to appeal against their convictions. Their applications for leave to appeal against sentence were allowed in respect of the minimum terms they were to serve before becoming eligible for parole, which were reduced to 35 years. Ricketts' conviction for murder was quashed and a conviction for manslaughter was substituted, with a sentence of 20 years' imprisonment. The appellant subsequently obtained permission from the Court of Appeal to appeal to Her Majesty in Council. Drysdale applied to Her Majesty for special leave to appeal. His application was heard at the same time as the appellant's appeal, and was refused.

The evidence

3. The deceased was a partner in a firm of attorneys. The appellant had worked for her as a secretary for about 17 years. The evidence disclosed that at about 12 noon on 13 April 2000 a blue Datsun 120Y taxi, driven by Ricketts and carrying Drysdale and Williams, drove to the building where the firm's offices were situated. Drysdale and Williams entered the offices and cut the deceased's throat. They then returned to the taxi. As they were driving away, the taxi was stopped by the police and the occupants were arrested. Drysdale was wearing a blood-stained shirt. A shirt taken from Williams was found to be stained with the deceased's blood. Knives recovered from Drysdale and Williams were also stained with her blood.

4. The firm's offices were on the upper floor of a two storey building. They were accessed from the ground floor by stairs, which led to an entrance with a glass door. Beyond the entrance was a reception area where the receptionist and four secretaries,

including the appellant, had their desks. The secretaries' desks were grouped together in the centre of the reception area. The receptionist's desk was in a corner to the right of the entrance, beyond an area where there was seating for visitors. The door to the deceased's office was to one side of the receptionist's desk. To the other side there was a door giving access to a balcony which overlooked the front of the building. To the left of the entrance there was a photocopier and, beyond it, a bathroom, a lunch room, and a number of offices.

5. Sonia Burke worked for the deceased as a secretary. She gave evidence that, when the incident began, she was working at her desk in the reception area. The appellant and the receptionist, Hope Dell, were also at their desks. Two people entered and went over to the appellant's desk. Shortly afterwards Miss Burke heard a scream. She saw Miss Dell go towards the deceased's office, then run towards the lunch room. Miss Burke ran after her to the lunch room. The appellant and Verna Richards were already in the lunch room, together with the office manager, Cleopatra Graham (also known as Mrs Grier), and another secretary, Lisa Thompson.

6. Mrs Richards also worked for the deceased as a secretary. She gave evidence that she was in the lunch room with Mrs Grier and Miss Thompson when the incident began. She heard a scream. When she heard a second scream, the appellant was standing in the doorway of the lunch room, holding the handle of the door. Mrs Richards forced her way past the appellant into the reception area. There she saw a man wringing a knife into the deceased's neck. She turned and ran back towards the lunch room. Before she got there, she felt someone grab her by the neck. She pitched forwards and the grip on her neck was released. She did not see the person who had held her. As the door to the lunch room was closed, she went into one of the offices, bolted the door behind her and telephoned the police. She later attended an identification parade, where she identified Drysdale as the man she had seen wringing the knife in the deceased's neck.

7. Mrs Richards also gave evidence that she had previously given a deposition at committal proceedings ("the preliminary enquiry") held on 14 September 2000, at which four people were in the dock: the three defendants at the trial and Williams. According to her evidence at the trial, she recognised Williams as someone she had seen in the office about a week before the murder. He came inside the office and went over to the appellant. He spoke to her for more than ten minutes before leaving. Mrs Richards claimed to have seen him again on a later occasion before the murder, when he came to the staircase leading up from the ground floor. The appellant went to the staircase and spoke to him. Mrs Richards claimed to have seen Williams for about ten seconds on that occasion. She claimed to have informed Crown counsel at the preliminary enquiry, Christopher Townsend, and two other persons present on that occasion, Mr Nelson and Miss Linton, about her identification of Williams. No statement had however been taken from her in

relation to her identification of Williams, and this evidence was introduced at the trial without prior notice to the defence.

8. Marjorie Falconer was a legal secretary who worked for another partner in the firm. According to her evidence, she was in the bathroom when she heard a scream. When she left the bathroom, she saw Mrs Richards coming towards the deceased from the direction of the lunch room, and a man then holding Mrs Richards by the hand. The deceased was standing with both hands at her neck, which was bleeding. Miss Falconer went back into the bathroom, where she remained until the incident was over. She later identified the man at an identification parade. Other evidence established that the man whom she identified was Williams.

9. A deposition which Miss Dell had given at the preliminary enquiry was read to the jury. In it, she explained that visitors were supposed to speak to her first, but did not always do so. When the incident began, she was working at her desk, and Miss Burke and the appellant were working at theirs. Two men entered the office and went straight to the appellant's desk. They spent one or two minutes at the appellant's desk, then went into the deceased's office. Seconds later, the deceased screamed. The appellant was then at the photocopier. When the deceased screamed a second time, the appellant ran towards the lunch room. Miss Dell ran to the door of the deceased's office, and saw the men trying to remove the deceased's hands from the front of her neck. Miss Dell then ran after the appellant to the lunch room, where she joined the appellant, Mrs Richards, Mrs Grier and Miss Thompson. Miss Burke ran to the lunch room behind her.

10. Edward Griffiths was a police inspector who conducted two identification parades. At the first, held on 15 April 2000, Drysdale was a member of the line-up. He was identified by Mrs Richards, but not by the other witnesses who viewed the parade, who included the appellant and Miss Falconer. At the second parade, held on 19 April 2000, Williams was a member of the line-up. He was identified by Miss Falconer, but not by the other witnesses who viewed the parade, who included the appellant and Mrs Richards.

11. Gladstone Grant was a police superintendent who attended at the scene of the murder about an hour after it had occurred. The appellant was at her desk, using a computer. She was not crying. She appeared normal. Some other members of staff were crying.

12. Mr Townsend had acted as Crown counsel at the preliminary enquiry. Williams had been present. Mr Townsend was not asked whether he had been made aware of any identification of Williams by Mrs Richards.

13. There was in addition forensic and other evidence linking Williams to the murder.

14. The appellant gave evidence. She stated that she did not know her two co-defendants. Nor did she know the third man who had appeared in the dock at the preliminary enquiry. She denied that that man had come to the office and spoken to her during the week preceding the murder. Immediately before the murder, the deceased was on the telephone, and asked her over the intercom to bring her a copy of the registered title of a property. The appellant had been about to photocopy the deed when two men had appeared at her desk, which was directly in front of the entrance. She asked the men to take a seat, and went over to the photocopier. The men were then behind her, and she did not see what they did. She heard screaming from the direction of the deceased's office, and saw Miss Dell running towards her, screaming that the police should be called. The appellant ran to the lunch room where the other women were. Mrs Richards, Mrs Grier and Miss Thompson were there. Miss Dell and Miss Burke joined them soon afterwards. She did not block anyone entering or leaving the lunch room. She then left the lunch room and saw the deceased walking across the reception area towards the entrance. She had her hands round her neck and was bleeding. The appellant rushed to Mrs Grier, who had gone on to the balcony and was shouting that murderers were coming down the stairs. She asked Mrs Grier to help her to get the deceased to a doctor. Mrs Grier was the only person who had a car that day. Mrs Grier did not leave the balcony. The appellant returned to the reception area and found that the deceased had gone. She then collapsed on a sofa. She was nervous and confused, and was crying. The police arrived and took the deceased to hospital. The appellant herself was taken to a doctor. On her return to the office, she used her computer to save the work she had been doing before the incident, and to close down the system. She had been unable to identify anyone at the subsequent identification parades.

15. In cross-examination, the appellant stated that, when the incident began, she had been working on her computer, amending an agreement for the sale of property. The deceased had been on the telephone to Peter Milligen, the attorney acting on the other side of the transaction. The deed which the appellant had been asked to copy was the registered title of the property being sold. Once she had copied the deed, she was to take it to the deceased. When she got to the lunch room, Mrs Richards was seated there. The appellant accepted that the deceased had lent her money to buy a car. She had bought a Datsun. In an exchange to which the trial judge appears to have attached particular significance, she was cross-examined on her evidence that she had asked Mrs Grier to

help her to take the deceased to a doctor. In reply to the question, “To the doctor or to the hospital?”, she answered, “To the hospital, doctor, same difference”.

16. Evidence was led on behalf of the appellant from a number of witnesses. Mrs Grier said that she was in the lunch room with Mrs Richards and Miss Thompson when screams were heard. Everyone rushed to the door. Mrs Richards rushed out first, with Mrs Grier very close behind. She did not see the appellant trying to prevent anyone from leaving the lunch room. The deceased was standing in the reception area, holding her neck. She was bleeding. Mrs Grier ran out to the balcony and started screaming for help. The appellant was holding on to her and crying out to her to help the deceased. Mrs Grier remained on the balcony. She saw one of the murderers emerge from the building and enter a car. In cross-examination, Mrs Grier confirmed that visitors did not always go directly to the receptionist but sometimes spoke first to one of the secretaries. The appellant had rushed into the lunch room just before the persons there rushed out. Mrs Richards was heading out as she was heading in, and there was a little commotion.

17. Mr Milligen gave evidence, and confirmed that he had been speaking to the deceased on the telephone when the incident occurred. They had been discussing an agreement for the sale of land.

18. Evidence was also given by Michael Gordon, a press photographer who had gone to the offices shortly after the murder. He had seen the appellant. She was crying.

19. Finally, in relation to the evidence, Vinnette Forrester, a justice of the peace who had known the appellant for more than 20 years, gave evidence as to the appellant’s good character.

20. As will be apparent from this summary of the evidence, the case against the appellant depended upon the evidence of Mrs Richards that she had identified Williams at the preliminary enquiry, on 14 September 2000, as a person who had spoken to the appellant at the office on two occasions during the week preceding the murder, five months earlier: evidence which might be thought to be undermined by Mrs Richards’ failure to identify Williams at the identification parade held on 19 April 2000. It was only if that evidence was accepted, and the inference was drawn that the appellant and Williams were associated with one another, that the other evidence upon which the Crown relied might be regarded as being incriminating: that is to say, the evidence that the murderers had gone initially to the appellant’s desk; Mrs Richards’ evidence that the appellant had blocked her way out of the lunch room – evidence which appeared to conflict with the evidence of Miss Burke and Miss Dell that they had joined the appellant

and Mrs Richards in the lunch room, and with the evidence of Mrs Grier; the evidence that the appellant had attempted to bring Mrs Grier away from the balcony; the evidence that the appellant had not been visibly distressed in the aftermath of the murder but had continued working; and the evidence that the appellant had not identified Williams at the identification parade.

The present appeal

21. The Court of Appeal granted leave to appeal on the following grounds:

1. Identification
 - a. Is it permissible for a witness at trial of three accused for murder to give evidence of the conduct and identification of a fourth accused who was not before the court?
 - b. Is it permissible for another witness at trial to testify about the appellant's previous association with the fourth accused who is not before the court and was only identified at committal proceedings?
 - c. If the answer to (a) and (b) is yes, would failure to give the jury a *Turnbull* direction on identification for both (a) and (b) cause a grave miscarriage of justice?

2. Non-disclosure

Would leading evidence at trial which was in the possession of the prosecution showing the appellant's previous association with an accused who is not before the court and who was only identified at committal proceedings without disclosing that evidence to the defence cause a grave miscarriage of justice?

3. Good Character

Where an accused gives evidence of good character and calls a witness in support would a failure to give the jury appropriate directions on the trustworthiness and propensity of the accused amount to a grave miscarriage of justice?

22. The Board observes that it is doubtful whether leave ought to have been granted, since the decision of the Court of Appeal does not appear to be one which “involves a point of law of exceptional public importance”: Judicature (Appellate Jurisdiction) Act 1962, section 35. The Court of Appeal had been invited to grant leave on the ground that the appeal involved points of law of general public importance; but that is not the correct test. There is however no cross-appeal on this ground, and in any event the Board would

have advised Her Majesty, in the particular circumstances of this case (as they will appear), to grant special leave to appeal if that had been necessary.

23. The appellant also sought and was granted permission to argue the following additional grounds:

1. That the summing-up, both in its tone and content, is unbalanced and involves comments which have denied the appellant the fair trial to which she was constitutionally entitled.
2. The Court of Appeal's contention that proper inferences can be drawn leading to proof of her guilt is not sustainable given the legal difficulties with each piece of evidence from which the inferences can be drawn.

24. Shortly before the hearing of the appeal, the appellant also applied for permission to introduce new evidence, in the form of an affidavit from Mr Townsend. In his affidavit, Mr Townsend stated that he did not recall Mrs Richards indicating to him at the preliminary enquiry that she recognised Williams, and that, if that had happened, he would have given instructions to the police for further statements to be taken and a copy given to the defence. The application to have this evidence received was opposed on behalf of the respondent, on the basis that it had come too late to permit necessary investigations to be made. The Board considered that it was not necessary in the interests of justice that the additional evidence should be admitted.

25. There is considerable overlap between the matters covered by the grounds of appeal. Rather than go through the grounds one by one, it appears to the Board that the principal issues can most conveniently be discussed under three headings: the directions as to identification; the directions as to good character; and the summing-up of the evidence.

The directions as to identification

26. As previously noted, Mrs Richards' evidence that she recognised Williams at the preliminary enquiry, as someone who had met the appellant at the office during the week prior to the murder, was of critical importance. In relation to this evidence, the trial judge directed the jury:

“Defence counsel says, if Mrs. Richards saw Williams at Half Way Tree, how is it she never saw him at the identification parade, but the Inspector told you that the identification parade was in respect of a murder suspect. She never said she saw Williams on the day of the murder. That's not her evidence, you know. And the identification parade, in respect of Williams, is in respect of the murder of Mrs Playfair, so, what you make of that? Mrs Richards only saw one man and she had already identified that man that she said was the accused, Drysdale, so when she goes to court at Half Way Tree and she sees Williams, she says to herself, but I remember him and she not only say it to herself, she said it to Crown counsel. She said it to another attorney who is there, but Madam Foreman and members of the jury, you know we are Jamaicans, you know how things go when people don't want to hear you they don't hear you when you are telling them anything, so it's a matter for you. Because she says she told them, nobody pays her any mind. And she says to you, I saw him come by to Mrs. Livingston the week before the boss was murdered and she tells several people.”

At the conclusion of her summing-up, the judge was invited by the Crown to give a warning in respect of Mrs Richards' identification of Williams, but declined to do so.

27. Two aspects of these directions are important. First, the judge makes a number of comments which appear to diminish the significance of legitimate points which had been made on behalf of the defence. Counsel for the appellant had drawn attention to the fact that Mrs Richards had not identified Williams at the identification parade held six days after the murder: a fact which might be thought to weaken the reliability of her purported identification of him, for the first time, five months later. The judge correctly points out that the purpose of Mrs Richards' attending the identification parade was to identify the murderer, not to identify someone she had seen at the office in the days leading up to the murder; but that might be thought not to be a complete answer to the point made by the defence, since it might equally be said that the purpose of Mrs Richards' attending the preliminary enquiry was to give her deposition, not to identify someone she had seen at the office. The jury might have thought that a further weakness in Mrs Richards' evidence was the absence of any corroboration of her claim that she had reported her identification of Williams to Crown counsel and other persons present at the preliminary enquiry. The judge however produces her own explanation for that: Mrs Richards told these people, but they are Jamaicans; they did not pay attention.

28. Secondly, and more importantly, the judge does not give the jury a *Turnbull* direction in respect of this evidence. In relation to this matter, the Court of Appeal acknowledged that such a direction was desirable, but concluded that the directions were nonetheless adequate for three reasons. First, a *Turnbull* direction had already been given

in relation to Mrs Richards' identification of Drysdale, and a jury could not have failed to appreciate that such directions were applicable to identification generally. Secondly, Mrs Richards claimed to have seen Williams at the office for a period of ten minutes, which would be different from observation while an offence was being committed. Thirdly, the jury had been directed to consider whether they accepted Mrs Richards' evidence in relation to this matter.

29. Notwithstanding the various factors referred to by the Court of Appeal, the Board considers that a *Turnbull* direction was essential. This evidence formed a crucially important aspect of the case against the appellant. Although, as the Court of Appeal noted, Mrs Richards claimed that Williams had spent ten minutes in the office, there was nevertheless a question as to whether she could reliably identify a visitor to the office five months after the event, particularly when she had seen Williams on a police line-up during the intervening period. Equally although, as the Court of Appeal noted, the judge had given the jury detailed directions concerning the need for caution when considering Mrs Richards' evidence as to her identification of Drysdale, that does not appear to the Board to be a complete answer in the circumstances of this case.

30. The Board notes in the first place that that direction had been given at a much earlier stage in the summing-up (in the transcript, some 125 pages earlier), and that many other issues had been dealt with during the intervening period. The judge did not remind the jury of the direction, or direct them that it applied equally to Mrs Richards' identification of Williams. More importantly, that direction had, quite properly, been tailored to the particular circumstances in which Mrs Richards had seen one of the murderers and, two days later, had identified Drysdale as that person. The judge had correctly and cogently drawn to the attention of the jury the particular factors which might bear upon their assessment of the reliability of that evidence: for example, whether the fact that Mrs Richards had seen the man wringing his knife in the deceased's neck might have imprinted the scene on her memory. A direction tailored to the factors affecting the reliability of Mrs Richards' claimed identification of Williams in the dock at the preliminary enquiry, five months after she claimed to have seen him in the office, was equally necessary. Such a direction would have been materially different in its terms, and would have directed the jury's attention to the specific matters bearing upon the reliability of that identification.

The directions as to good character

31. As the Board has explained, evidence was led from Mrs Forrester as to the appellant's good character. The judge reminded the jury of this evidence, and directed

them that good character was relevant to their assessment of the credibility of the appellant's evidence:

“Now, in deciding whether the prosecution has made you sure of the defendant's guilt you must give weight to good character. You have heard that she is a legal secretary, and that she has attained the age of forty having committed any offence (sic). Given that weight, as with any person of good character, it supports her case that she is telling the truth.”

32. This direction was criticised on the basis that it did not refer to the bearing of good character upon the likelihood of the appellant's having committed the offence charged: in this case, the brutal murder of an employer for whom she had worked for seventeen years and with whom, according to the evidence, she was on friendly terms. The Court of Appeal rejected that criticism on the ground that the judge had previously reminded the jury of Mrs Forrester's evidence that the appellant's reputation was not that of a person given to violence. That was however the evidence of a witness, rather than a direction underpinned by the authority of the judge's office, and it related to reputation, not propensity.

33. More importantly, in a case in which the appellant's credibility was of central importance, the effect of the direction was undermined by repeated comments, almost sarcastic in tone, referring to the appellant's loyal service. Three passages will suffice to convey the flavour of these comments. The first is concerned with the appellant's evidence that she ran to the lunch room when she heard screaming:

“She is at the photocopier when Mrs Playfair screams the first scream - she is an employer who is good to her, she is the good friend of her employer, 17 years of loyal work and she does not look.”

The second passage is concerned with the appellant's evidence that, when she saw the deceased bleeding, she went to the balcony to fetch Mrs Grier, as she was the only person who had a car. The judge told the jury:

“Mrs Playfair is seen in the office. She is holding her neck with one hand and she is saying to this loyal employee, this is the evidence of the loyal employee, she is making a gesture to open the door and what does this loyal employee do, she goes past her.”

The third passage concerns an answer the appellant gave in cross-examination:

“You know you have to look at how she answered the questions you know. You heard her when crown counsel said hospital or doctor, she said hospital, or doctor, same difference. Remember these are the things you have to look at. These are the things you look at. I note them in my notebook; you remember them. These are the things, same difference, that is how she talks about her employer of 17 years, who she said helped her to buy a Datsun motorcar, that is her evidence, Madam Foreman and members of the jury, it is a matter for you.”

34. These comments (and others of a similar tenor) were liable to undermine the character of the appellant in the eyes of the jury. The implication, in effect, was that the appellant’s behaviour, and her evidence, were not consistent with her claim to be a loyal employee or good friend of the deceased.

The summing-up of the evidence

35. The judge’s summing-up was interspersed with comments upon the evidence. That is perfectly appropriate in itself, but it is important that the comments should be impartial and based upon the evidence. In the present case, however, some of the comments appear to the Board to have fallen short of that requirement. The Board has already noted some examples: the comments upon Mrs Richards’ evidence that she had reported her identification of Williams at the time, and the repeated references, almost sarcastic in tone, to the appellant’s loyalty to the deceased.

36. The judge also introduced issues, in her comments upon the evidence, which had no basis in the evidence. It will suffice to mention the most egregious example. It concerns the appellant’s evidence that the deceased had lent her money to buy a car. In that regard, the judge stated:

“She agreed that her employer assisted her to buy a Datsun motor car. You remember what the getaway car was. Her employer helped to buy her a motor car, that’s the evidence, that’s the evidence, Madam Foreman and members of the jury, that her employer helped her to buy a car and it was put to her, a Datsun motor car and she said yes.”

It was no part of the Crown case that the taxi driven by Ricketts was the appellant's car, and there was no evidence to support that suggestion. At the conclusion of her directions, the judge was invited by the Crown to correct the suggestion that there was a connection between the taxi and the car owned by the appellant. The judge however declined to do so.

37. Having read and re-read the transcript of the summing-up, the Board is unable to avoid the conclusion that the directions failed to maintain a fair balance between the appellant and the Crown. Collectively, the comments of the trial judge resulted in a summing-up which was weighted against the appellant. The Board is also satisfied that the summing-up introduced issues adverse to the appellant which did not form part of the Crown's case against her, the most serious of which was the suggestion that she had provided the murderers with their getaway vehicle.

Conclusions

38. For the foregoing reasons, the Board has concluded that the directions to the jury in respect of the case against the appellant were deficient in omitting to direct the jury upon the matters relevant to their assessment of the identification evidence given by Mrs Richards, and in omitting to direct the jury as to the relevance of the appellant's good character to her propensity to be a participant in murder. The Board also considers that the summing-up of the evidence lacked the necessary balance and introduced material which was prejudicial to the appellant. There were weighty issues to be considered and the appellant was entitled to have impartial directions given to the jury about them. The cumulative effect of these deficiencies is that the defence case was not put before the jury in a fair and balanced way. Contrary to the submission of the respondent, the Board finds it impossible to conclude that if the jury had been properly directed in relation to these matters the appellant was nevertheless bound to have been convicted. It is unnecessary in the circumstances to examine the other matters raised in the grounds of appeal. Those which the Board has discussed are sufficient in themselves to render the appellant's conviction unsafe.

39. The Board will humbly advise Her Majesty that the appeal should be allowed. Before determining the terms of the appropriate order which the Board should advise Her Majesty to make to give effect to this conclusion, the Board invites written submissions on the question whether there should be a remit to the Court of Appeal to consider whether a retrial should be ordered, and on the question of costs, within 28 days. If the prosecution does seek a retrial, the Board invites it to indicate in broad terms upon what evidential basis, bearing in mind the Board's conclusions on this appeal.