

Gilbert v.R. (Grenada) [2006] UKPC 15 (27 March 2006)

Privy Council Appeal No 25 of 2005

Edmund Gilbert

Appellant

v.

The Queen

Respondent

FROM

**THE COURT OF APPEAL OF
GRENADA**

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

Delivered the 27th March 2006

Present at the hearing:-

Lord Hoffmann
Lord Woolf
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

*[Delivered by **Lord Woolf**]*

The appellant was no doubt a respected and well-known figure in Grenada. He had been a Senior Tax Collector and a Bishop of one of the Island's Baptist churches. He was tried for the murder of a 15 year old girl called Robby Ann Jeremiah. He was convicted on 12 December 2001 before Sylvester J and a jury on the 17 December 2001 imposed the death penalty. He appealed against his conviction to the Eastern

Caribbean Court of Appeal (Grenada) and on the 23 November 2002 that court (Byron CJ, Redhead and Georges JJA) dismissed his appeal against conviction and sentence. The present appeal is brought with special leave which was granted by the Board on the 27 July 2004.

On the appeal he was represented by Miss Montgomery QC and Mr Julian Knowles. At the outset of her submissions Miss Montgomery made it clear that the central point of the appeal was whether the judge was under a duty to give a direction as to the appellant's good character and if he was under such a duty as to the effect of his failure to give such a direction. The appellant also complains about:

- (i) the judge's failure to warn the jury that they should ignore anything that they might have heard or read about the case in the media,
- (ii) the judge being wrong to allow a witness, called Aleccia Victor who was aged 17, to give evidence that she had had a sexual relationship with the appellant and seen him slap the deceased,
- (iii) the judge's directions about telephone calls which were made early on the morning of the day when the deceased's body was found,
- (iv) misdirecting the jury on how it should approach the appellant's alibi,
- (v) the judge's failure to direct the jury correctly as to the possible partiality of a juror.

In addition, the appellant submits that the sentence of death was unlawfully imposed because he was sentenced to death by the jury and not by the judge. That this should not have happened is accepted by Mr James Guthrie QC who appeared on behalf of the respondent.

The Facts

The body of the victim was found at a place in Grenada called "True Blue" at about 7.00am on the morning of 1 February 2001. Earlier that morning, at 5.29, a Constable Gill, who was at the CID Office received a telephone call to the effect that the victim was "on top of the hill in True Blue lying down." When the Constable asked whether she was dead, the voice answered, "may be." The Crown contended that this call was made

by the appellant to Police Headquarters and then re-routed to the CID Office. If the telephone call was made by the appellant, this would be inconsistent with the appellant's case that he knew nothing about the strangling of the victim.

In addition to that telephone call, the Crown also called evidence from a Sandra Hinds who said that at around 7.30am, two hours later, she saw the appellant near to a telephone box. There was also evidence that two calls had been made from the appellant's mobile phone at 7.58 am and 8.00 am to the Police Headquarters. Those calls were received by another Officer who stated that the caller said that there was a body of a dead girl on True Blue. Sarah Hinds saw the appellant at around 7.30 am. She noticed that he had a mobile phone with him and asked him why he was using a callbox. He replied that it was because it was cheaper. On the 1 February 2001 the appellant was said to have taken a gold chain to a jeweller and asked for it to be incorporated into an item that he had previously ordered. The chain was identified as belonging to the victim by Aleccia.

Aleccia gave evidence after the objection to her doing so had been overruled, that she was the victim's best friend. She stated that she had had sexual relations with the appellant three times prior to the 31 January 2001. She also described seeing the appellant slapping the victim on several occasions and said that he had told her that he and the victim had had sexual relations. On two of the occasions on which Aleccia contended she had sexual intercourse with the appellant, she said that this had occurred at the place where the victim's body was found. Furthermore, Aleccia said that on the 1 February 2001, when she had called the appellant on his mobile phone to ask where the victim was, he had told her to go to a "burial home."

It was suggested to Aleccia during her cross-examination that she had told the victim's grandmother, Anita Jack, that the murder had been committed by three other men. It was suggested that the three men had taken her and the victim to a house where each of the men had had "sex" with the victim in front of Aleccia. It was alleged that she had then told Anita Jack that the men had killed the deceased by among other things, striking her with a piece of wood on the back of her head with such force that "one eye was coming out." They had then taken the deceased body and dumped it at True Blue. The men had also threatened her that if she talked "it would be her turn next."

Aleccia denied this had happened and denied that she had told Anita Jack anything of the sort suggested. Anita Jack was called as a witness. She

confirmed that Aleccia had given this account of the events. She also said that the victim had sometimes run away from home. The Crown were allowed to treat Anita Jack as a hostile witness. She had not given this account to the magistrate who conducted the preliminary inquiry as to the appellant's responsibility. It was denied by Inspector Bunbar, who originally arrested the appellant at Anita Jack's home, that Anita Jack had told him about the three men.

In due course a post mortem was carried out. The cause of death was strangulation. There was no evidence of an injury which would be compatible with deaths being caused in the manner which was suggested during the cross-examination of Aleccia.

A submission of no-case was made and rejected. The appellant made an unsworn statement from the dock. He described how he was 60 years of age and a Minister of Religion for the past 32 years. He also described his work as a tax collector for 36 years. So far as his relationship with the victim was concerned, he contended it was no more than that of "a father and pastor" he was "merely assisting the family in trying to stabilise her with her wild sexual activities." He said that on occasion he had gone with her family to try and find her, but she had been abused by 11 bus drivers and conductors. The chain that was produced in evidence was not one which he had taken to the jeweller. He called his wife to support his alibi. The mother of the victim, the daughter of Anita Jack gave evidence that she was present on 4 February when Aleccia came to Anita Jack's house and told them she had been killed by the three men.

The failure of the judge to give the jury a direction as to the appellant's good character.

We were referred to a considerable number of authorities as to the obligation of a trial judge in relation to a defendant of good character. The authorities make it clear that there is a considerable consensus as to what are the responsibilities of a trial judge when directing a jury as to the significance of a defendant being of good character.

However, the position is made more complicated if defending counsel does not ensure that the judge clearly understands whether the defendant is relying upon his good character. The general rule as to counsel's responsibility was clearly set out in *Thompson v The Queen* [1998] AC 811. *Thomson* was an appeal from a judgment of the Court of Appeal of St Vincent. The judgment was delivered by Lord Hutton. At p 844 Lord Hutton stated:

“In the course of the trial the defence led no evidence in relation to the good character of the defendant. The defendant’s written case on the appeal to their Lordships’ Board advanced the submission that the defendant had no previous convictions and, notwithstanding that no evidence was led on this matter by the defence, the trial judge should (in the absence of the jury) have inquired whether or not the defendant had a good character, and on learning that he had, should (in accordance with *Reg v Vye* [1993] 1 WLR 471 and *Reg v Aziz* [1996] AC 41) have directed the jury that they should take the defendant’s good character into consideration in assessing both the truthfulness of his account to them and whether he was likely to have committed the offence.

It was submitted that this duty, which it was suggested lay on the judge, was analogous to the duty of the judge to direct the jury to consider a possible defence arising on the evidence upon which defence counsel had not relied, and it was further submitted that the duty was particularly incumbent on the judge where the accused faced a charge of murder carrying the death penalty.”

Lord Hutton having referred to the fact that unknown to counsel the appellant had one previous conviction, continued:

“However, if it is intended to rely on the good character of the defendant, that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution: see *per* Lord Goddard CJ in *Rex v Butterwasser* [1948] 1 KB 4, 6. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge. The duty of a judge to bring to the attention of the jury a possible defence not relied on by defence counsel is not analogous, because that duty only arises where evidence which gives rise to that defence has been given in the trial and is before the jury.”

We would firmly endorse Lord Hutton’s approach. This must be qualified, however, in relation to the cases where counsel defending the appellant at his trial had been guilty of what has been described as serious misbehaviour or ineptitude. The position in that situation was dealt with

by the Board in *Teeluck and John v The State* (2005) UK PC 14; [2005] 1 WLR 2421 where the Board at para 39 said:

“There may possibly be cases in which counsel’s misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel’s conduct of the case according to some scale of ineptitude: see *Boodram v The State* (2002) 1 Crim App 103, at para 39; *Balson v The State* (2005) UK PC 2 and cf *Anderson v HM Advocate* (1996) JC 29.”

Again we endorse this approach. [We omit any mention of paragraph 34 (ii) of *Teeluck* which deals with the effect of a failure to give a direction as this was qualified in *Bhola v. The State* (Trinidad and Tobago) (2006) (No to be inserted)]. However, in this case, Miss Montgomery rejected any reliance on ineptitude of the counsel who appeared in the court below. She did not herself appear in the court below, but junior counsel who did so, has sworn an affidavit in which he states:

“that at the trial we did not specifically raise the issue of the Accused’s good character because in his Statement from the Dock he did put his Character in issue, and the whole Case of the Prosecution was centred around the fact that he was an Archbishop of his Church and from that position he was in breach of the trust of his congregation.

That in addition thereto, the jurisprudence on the issue of Good Character Direction was barely evolving in the OECS and Eastern Caribbean Supreme Court and because of whom the accused was at the time both Counsel felt enough had been said or elucidated in the evidence to raise the issue. The issue was mentioned in our address to the jury and was a ground of appeal in the Court of Appeal.”

Unfortunately, that affidavit was only sworn on 19 January 2006 and was only served on the respondent on 20 January 2006 and so, with the hearing of this appeal being on the following Monday, the respondent had little opportunity to obtain instructions. In these circumstances, Mr Guthrie was not prepared to accept the contents of Mr Knowles’ affidavit. Furthermore, Mr Guthrie points out that the trial judge

expressly asked counsel at the conclusion of his summing up whether they wished him to add anything and the response was, “nothing My Lord.”

The appellant did, however, raise the lack of a direction as to his good character in the Court of Appeal. In the Court of Appeal Redhead JA in giving the judgment of the court, distinguished those cases where there had been a failure on the part of counsel such as *Sealey and Healey v The State* [2002] UKPC 52; (2002) 61 WIR 491, by pointing out that in all those cases the appellants had given sworn testimony and therefore the issue of the reliability of the appellants evidence against that of a prosecution witness was a live one. In contrast, it was suggested that as the appellant in this case had given no evidence but instead made a statement from the Dock different principles apply and in these circumstances there was no obligation on the judge to give a character direction.

Before us Mr Guthrie did not seek to uphold the decision of the Court of Appeal on that basis. Rather he sought to do so on the facts of the case. He contended they made it clear that the absence of a direction did not affect the outcome and therefore the validity of the conviction.

Mr Guthrie’s approach was one which we would adopt. We suggest that the starting point must be that it is the task of the judge to give, at least, such directions as are necessary to ensure that the defendant has a fair trial and the jury received the directions necessary to enable them to reach a just result.

Normally this will mean a direction should be given by the judge setting out the relevant principles. Lord Taylor of Gosforth CJ in the case of *Yye* [1993] 1 WLR 471, at p 479 stated;

“(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.”

Lord Taylor emphasised that the principles “normally” require a direction. *R v Aziz* [1996] 1 AC 41 explains how what Lord Taylor said should be

viewed. Lord Steyn, in a speech with which the other members of the committee agreed, stated the position in the following words at p 50:

“It has long been recognised 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.”

Later Lord Steyn at (at p. 53D) added:

“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 to 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 LR 205 and *Reg v Zoppola-Barraza* [1994] Crim LR 833.

That bring 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 *Iye* [1993] 1 WLR 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 *Iye*, the judge may in his discretion dispense with them.

Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which may be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions.”

I would only add two comments to this common sense approach, which is particularly relevant on this appeal. The first is that if a judge has a residual discretion it follows that there can be circumstances where a conviction can be upheld if a judge omits to give a direction due to oversight and secondly the circumstances where this can be the position are not necessarily as rare as was once thought (see Lord Brown’s judgment in *Bhola* supra paragraph 17).

Here the whole of the defence case started with the unlikelihood of a person who had Mr Gilbert’s responsibilities engaging in the conduct on which the prosecution relied. Furthermore, it must have been apparent to the jury the difference in status of the appellant and the 17 year old Aleccia who gave critical evidence against him. In these circumstances, it is understandable why a trial judge might decide not give a character direction. Counsel for Mr Gilbert did not draw attention at the trial to the fact that no such direction had been given. Nonetheless, it would have been preferable if such a direction had been given because, as Miss Montgomery contends, this was a case where it must have been obvious that the defendant was relying on his good character and so a situation in which usually a direction in accordance with *Iye* should be given, even if this would be as a matter of caution.

It is true that if Mr Guthrie’s instructions are correct, the defendant may

not have formally put his character in issue, but the inference that he had done so was very strong and the trial judge would have been well advised to have asked Mr Gilbert's counsel whether he had intended to do so, in order to clarify the situation, before he decided he was not going to give the usual direction. The direction would not have been a "charade".

The absence of a direction was, however, of very limited significance. The jury clearly accepted the evidence of Aleccia and rejected the evidence of the witnesses for the defence. The circumstantial evidence, which supported her evidence and the case for the prosecution, was indeed very substantial. The defendant's unsworn statement could not explain the evidence which showed clearly that he had had a relationship with Aleccia. He could not explain the telephone calls. The alternative explanations which were being put forward to explain the victim's death totally lacked any credibility.

In general the summing up was extremely fair and if anything unduly fair there being no comment about the fact that the defendant had chosen a course at the trial which prevented him from being subject to cross examination. It is a situation where any appropriate direction as to the relevance of the defendant's good character is "wholly outweighed by the nature and coherence" of the circumstantial evidence." (See Lord Hope of Craighead in *Balson v The State* (2005) UK PC 6 at para 37.)

In *Singh v The State* (2005) UK PC 35 at p 14 [2006] 1 WLR 146 AT P 156 Lord Bingham said:

"The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a 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."

The absence of a good character direction in this case was neither fatal to the fairness of the trial or to the safety of a conviction.

On this ground of appeal, it only remains to point out that it is still the general rule that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character. If this rule is not adhered to, there is a danger that an unscrupulous defendant will be able to manufacture a ground of appeal based upon the

failure of the judge to give the proper character direction. The fact that a defendant has no previous convictions recorded against him, does not mean that he inevitably is of good character. This is why it is good practice for the judge, where there is any doubt as to the position, to raise the matter with counsel.

Remaining grounds of appeal

As to the remaining grounds of appeal, Miss Montgomery was right to attach limited significance to the other grounds of appeal. The evidence of Aleccia was highly relevant to the prosecution's case. Its admissibility did not depend on whether it was similar fact evidence. Aleccia gave evidence that the appellant made an admission to her that he had had a sexual relationship with the victim. The jury could only properly assess her evidence, if the jury knew what she was saying about her relationship with the appellant. The evidence which the defence relied on which conflicted with Aleccia's evidence underlines the importance of her evidence. If the defendant's character was in issue, as is now contended, so that as a matter of good practice, a character direction was required, then the jury were entitled to know that while he did not have previous convictions, the defendant was having sexual relations with a girl of a similar age to the victim. This is not the sort of conduct one would normally expect of a person of good character in his position. As to the argument over the source of the first telephone call, on examination of the documents relied upon by the defence (the letter of 5 February 2001 on the switch record) were not inconsistent with the prosecution's case. In addition, no attempt was made to exclude the evidence of Aleccia at the trial.

As to the defence of alibi, the summing up is perfectly satisfactory. The question of the possibility of a jury member being biased was investigated with the juror concerned by the judge in the presence of all counsel. She denied that she had said anything about the case to anyone. When the allegation was repeated the judge again investigated. The judge took the appropriate action. In addition, in relation to the remaining grounds of appeal against conviction, the judge gave a perfectly adequate direction in his summing up.

Accordingly, the appeal against conviction is dismissed.

In addition, there is an appeal against sentence. As to the appeal against sentence, there is no dispute that an error was made. The appellant was sentenced to death by the jury following his conviction. This was not in accordance with the practice laid out by the Court of Appeal of the

Eastern Caribbean in *Hughes v The Queen* (2nd April 2001) unreported. In that case, the Board in *Hughes v The Queen* [2002] 2 AC 259 para 52 laid down this was not the proper practice and held that sentencing in capital cases was properly a matter for the trial judge and not for the jury.

Accordingly, the appellant's submission that his sentence to death is unlawful and unconstitutional is made out. The proper course now is for the question of sentence to be remitted to a trial judge sitting alone in accordance with the principles approved in *Fox v The Queen* [2002] 2 AC 284, *Reyes v The Queen* (2002) 2 AC 235 and the *Hughes* case. The appeal should therefore be allowed only to that extent.