
**Easter Term**
[2017] UKPC 14
**Privy Council Appeal No 0089 of 2015**

# JUDGMENT

# Phillip (Appellant) *v* The Director of Public Prosecutions (Respondent) (St Christopher and Nevis)

## From the Court of Appeal of the Eastern Caribbean Supreme Court (St Christopher and Nevis)

**before**

**Lady Hale**
**Lord Reed**
**Lord Carnwath**
**Lord Hughes**
**Lord Hodge**

## JUDGMENT GIVEN ON

## 16 May 2017

**Heard on 19 January 2017**

| *Appellant* | *Respondent* |
| --- | --- |
| Paul Taylor<br>Jessica Jones<br>Amanda Clift-Matthews<br>Talibah Byron<br>(Instructed by Simons Muirhead & Burton LLP) | Dane Hamilton QC<br>Valston M Graham, Director of Public Prosecutions<br>(Instructed by Myers Fletcher & Gordon) |

**LORD HUGHES:**

1. The appellant was convicted in November 2008 of the murder of his estranged wife, Shermelle. She had been killed on Friday 16 February 2007. His appeal to the Eastern Caribbean Court of Appeal against his conviction was dismissed on 15 March 2012. The present further appeal to the Board was lodged on 9 October 2015, and leave to appeal was granted in March 2016 on three grounds. Before the Board, application has been made to argue further grounds, and to adduce fresh evidence in support of one of them.

2. The appellant and Shermelle lived on Nevis, where both of them worked at the Four Seasons Hotel and Resort complex. They had been separated since May 2006, and had not been in each other's company for something like two months before her death. She lived in the south of the island at Prospect and he at Jessups Beach, approximately eight to nine kilometers away to the north, the other side of Charlestown. On the evening of her death she had been going to a retirement party. She was found dead in her car in the yard of her home, dressed for the party. She had been killed with a knife, clearly as she was about to leave, since the key was in the ignition, and either the violence of the attack, or perhaps her own hand, had activated the alarm, sounding the horn and switching on the hazard flashers. She had spoken to a friend on the telephone at around 6.45-6.55 pm and the alarm was sounding by about 7.20-7.30. Plainly she had been killed sometime between 6.45 and 7.30.

3. In outline, the prosecution case against the appellant consisted of three independent strands, together with a plainly false assertion initially advanced by the appellant and then retracted:

(a) the appellant had demonstrated hostility, violence and possessiveness towards Shermelle; he was plainly resentful that she had left him;

(b) the appellant's red pickup truck was sighted a few yards from Shermelle's home at about 7.20 pm and its number noted by one of the two witnesses who saw it; there was no legitimate reason suggested for it to be anywhere in that area;

(c) DNA matching the deceased was found on both of the appellant's hands after his arrest later on the evening of the murder; he and she had not been in each other's company for several weeks; and

(d) to the first people who spoke to him after the murder was known, the appellant asserted that he had had an argument in a bar with an unknown man from St Kitts who, he believed, would have killed Shermelle because she was an easier target than he himself was; however, when interviewed under caution by the police after his arrest, the appellant abandoned this assertion and, to the question whether he knew anyone who might have had a reason to kill his wife, answered "no".

4. The appellant gave the police an account of his movements on the night of the murder. It was arguably not entirely consistent with other evidence of his movements, but in general it did not assert any positive alibi, save that at around 7 to 7.30 pm he was either driving through Charlestown in search of food to buy or travelling north towards Cotton Ground to visit a woman called Tricia Williams. He did not give evidence at his trial, but told the jury from the dock that he wished to stand on what he had said to the police.

*"Bad character" evidence*

5. The principal ground of appeal, for which leave was granted by the Board, related to the evidence adduced by the prosecution of the history of the relationship between the appellant and Shermelle. The evidence of Shermelle's mother and of her friend, Yvonne Glasgow, was that the appellant had over the years exhibited physical aggression and possessiveness towards Shermelle. Between them, these witnesses gave evidence of four incidents. First, in 2003, Mother had seen Shermelle with a swollen arm. She had taxed the appellant with beating her. He had wept and apologised, saying that it would not recur. Second, in February 2006, Yvonne had received a late night telephone call from a distressed Shermelle. She had spoken to the appellant and taxed him with hitting his wife; he had objected that she should keep out of his affairs. The following day Shermelle had a red and swollen ear. Third, a few days after this, Shermelle had come to Yvonne's home at night. They had set off to find her mother, but had been followed for some distance by the appellant in his car. He had forced their car to stop, rushed up, cursing, had removed the ignition key, and had demanded that Shermelle return home with him. There had been a row in which he accused Yvonne and Mother of interfering and damaging the marriage. Shermelle had corrected him to say that the problem in the marriage was that he would not stop hitting and abusing her. The appellant had sought to justify himself by saying that Shermelle had refused to tell him where she was going. At the end of the row he apologised and promised not to hit her again. Then, in May 2006, Shermelle left the appellant, arriving with some possessions at Yvonne's home. Within a few weeks she had moved to the rented house in Prospect where she was eventually killed. The appellant either stayed from time to time with her there or perhaps for a short period lived there, until about November/December when he left and she changed the locks to exclude him. The fourth incident of which evidence was given occurred later in December 2006 when he arrived unannounced and insisted on removing household items to which he laid claim,

including the washing machine, which he disconnected, and even a clothes line, which he dug up. Mother spoke of his hostility to Shermelle on this occasion, which was manifested also by seizing a necklace which she wore and aiming to throw a bottle of water at her, until Mother intervened.

6. The contention of the appellant is now that this evidence was inadmissible because it was mere evidence of propensity to aggressive behaviour. This argument was raised for the first time before the Board. There was neither any objection taken to the evidence at trial, nor any ground of appeal relating to it in the Court of Appeal. Indeed, the appellant now reinforces his inadmissibility argument by adding to it the contention that his conviction is also unsafe because trial counsel culpably failed to take the objection in both those courts.

7. It is of course correct that, absent a statutory provision such as sections 98-113 Criminal Justice Act 2003 in England and Wales, evidence which does no more than demonstrate that the defendant is a violent person will ordinarily be inadmissible: *Makin v Attorney General for New South Wales* [1894] AC 57, as explained recently by the Board in *Myers Cox and Brangman v The Queen* [2015] UKPC 40; [2016] AC 314, paras 37-41. But this was not the present case. The present case is a typical example of evidence which is undoubtedly admissible. The evidence was not simply (or indeed at all) that the appellant was given to outbursts of violence or temper in general. It was that he exhibited persistent hostility towards the deceased in particular, which he expressed in violence to her. Born out of frustration his behaviour may have been, but the evidence showed that he resented her leaving him and bore her active and violent ill will. That went to support the case that it was he, rather than some stranger, who accosted her in her own yard and killed her. It was evidence of motive to harm the particular victim of the offence. Such evidence has always been admissible, certainly where the identity of the killer is the issue. It may also be admissible where the killing is admitted by the accused but the issue is the intention with which it was done, or whether it was provoked, but those circumstances are not this case.

8. This commonplace principle was recognised as long ago as 1910 in *R v Ball and Ball* [1911] AC 47. The issue in that case was whether it was admissible to prove the physically affectionate relationship between the defendants in order to support the charge of incest on the occasions indicted. But in the course of argument Lord Atkinson offered (at p 68) an observation which has been treated ever since as axiomatic and cited for generations in *Archbold's Criminal Pleading* (see currently the 2017 ed at 13-31):

> "Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the

> enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his 'malice aforethought,' in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not."

9. The same point is made by the Board in *Myers* at para 40:

> "Mere propensity to behave badly is to be excluded as unfair. Admission requires justification beyond such mere propensity. An example of such justification is so-called similar fact evidence (which was in question in *Boardman*, and see now *Director of Public Prosecutions v P* [1991] 2 AC 447); in such a case the justification arises because the evidence is sufficiently compelling to have real value in controverting innocent coincidence. **Another example is the kind of case where there has been a course of violent dispute between the defendant and the victim; there the evidence may be admissible (inter alia) to show either who was responsible for the last (charged) occasion, or the intention with which the defendant acted on that occasion, or to explain the reactions of the two parties.** Likewise, in a case of alleged sexual abuse, the history and nature of a relationship said to have been abusive will often be relevant to proving a particular incident charged, even though it also shows prior misbehaviour by the defendant. It is impossible to catalogue every situation in which such justification may be present. But unless it is, evidence of misbehaviour unconnected with the offence charged is not admissible." (Emphasis supplied)

10. For the same reasons, any application to the judge to exclude this evidence as unfairly prejudicial under the principle in *Noor Mohammed v The King* [1949] AC 182, 192 (and see -now- section 123 Evidence Act No 30 of 2011) would have been doomed to failure. There is nothing unfair about proving that the accused has an animus against the particular victim whom he is charged with injuring.

11. It follows that the principal ground of appeal fails, and with it the contention that trial counsel failed, let alone demonstrated flagrant incompetence, in not objecting to the admission of this evidence. Trial counsel in fact approached the evidence correctly. He argued before the jury that the prosecution was simply trying to demonize the appellant, and that relatively minor spats between spouses could not properly be taken as foreshadowing murder.

12. The Board nevertheless draws attention to the importance, where evidence of misbehaviour other than that charged is advanced at the trial, of carefully observing the basis on which it can be considered. Counsel on both sides, as well as the judge, must start with *Makin*. The admission of evidence of this kind must be justified. It is not enough that it is "part of the background". That is too easy a generalisation and fails to distinguish the admissible from the inadmissible. If the accused has previous convictions for violence in bar-room brawls, that might be described by some as part of the background, but it would not make it admissible on a charge of murdering his wife. If the accused has in the past conducted one or more extra-marital affairs, that might be described as part of the background, but that is unlikely to be admissible unless there is, additionally, a proper basis for saying that it is relevant beyond simply showing that he is a bad man. Such a proper basis might exist, but it must be demonstrated, such as, for example, good reason to suggest that he killed his wife in order to further a fresh affair, or that he had been encouraged by a lover to get rid of her, or to rebut untruthful protestations by him of his deep devotion to her. Nor is the facile argument based upon "background" improved by reference to *R v Pettman* (unreported, 2 May 1985), as to which the Board repeats what it said in *Myers* at paras 51-55. Similarly, the easy assertion in some of the written arguments placed before the Board that the evidence in the present case was admissible because it "went to credibility" must be rejected. The appellant did not give evidence, and his credibility was scarcely in issue in the trial. To the extent that it was, because he relied on what he had said to the police, it would not have been open to the prosecution to adduce evidence that he was, generally, an untruthful person. The evidence of past violence to the deceased did not go to his general credibility; it went to show that he bore her ill will and had the motive and inclination to attack her. It was indeed relevant to whether the allegation against him was true, but that is not "credibility".

13. There were times in the present trial when the general rule of *Makin* was not kept as well in sight as it should have been. It was unwise of counsel for the prosecution to assert in opening that the appellant was a man of uncontrollable temper, for that may easily amount to an assertion of general propensity rather than of ill-will to the particular victim; however, in the context used it was clearly part of an outline of the case of ill-will to the deceased. Counsel for the prosecution did, at one or two stages of his final speech, come close to inviting the jury to try the marital rights and wrongs; it was going too far to address the jury in terms asserting that the deceased was a wronged wife, who received humiliation and hurt where she was entitled to love and affection. But that passage was closely followed by an entirely proper and emphatic observation that the history of violence in the relationship did not make the appellant guilty, but did say something about his inclination to use violence on his wife. The Board does not, however, agree that it was illegitimate for counsel to advance the theory that the appellant's state of mind may have been that if he could not have his wife, no one else should; that was a legitimate inference to invite the jury to draw and whether it did so or not was for it to decide.

14. It would also have been better if the trial judge had explicitly set out for the jury what the possible relevance of the evidence of past aggression was. Instead she told them that they had heard quite a lot of "background" evidence, and that that was "not relevant to the offence as convincing you so that you feel sure that he committed it". But this direction was, if anything, rather more favourable to the appellant than a focused direction on the reason for the admission of the evidence would have been, for the latter would have had to explain that the jury should consider whether the historical evidence demonstrated an ill-will towards the deceased which supported the case that the killer was the appellant rather than some unknown person.

*Good character direction*

15. Mr Taylor, for the appellant, realistically did not pursue before the Board the separate complaint that the judge ought to have given a good character direction. No evidence of good character was adduced, nor any request made for such a direction. Moreover, since the Board's conclusion is that the bad character evidence of prior aggression and violence to the deceased was plainly admissible, there could have been no sensible good character direction which did not have to be heavily qualified by reference to the appellant's proved past behaviour. That would simply have emphasised it, to his disadvantage. The Board draws attention to the recent decision of a five judge Court of Appeal (Criminal Division) in London in *R v Hunter (Nigel)* [2015] EWCA Crim 631; [2015] 1 WLR 5367, which underlines the importance of such directions being realistic rather than formulaic or meaningless.

*Sighting the red pickup*

16. Malva Rawlins and her daughter Aquilla gave evidence that they walked past the deceased's home at around 7.15 on their way to choir practice. Both said that her car was in her yard with its hazard lights flashing and its horn blowing. Both said that a little way on they also passed a red pickup, parked with its nose into a side-track. Both gave evidence, to which the prosecution attempted to attach some significance, that the deceased's dog, which usually barked at disturbances, was not barking. Thus far their evidence was similar. Aquilla gave evidence of additional observations. She said that the deceased's car had been moving from side to side and that she heard, indistinctly, a woman's voice. She also said that she recognised the red pickup as that of the appellant (whom both the witnesses knew) and she gave its number.

17. Counsel for the defence elected to challenge this evidence by exposing the differences between the two women. He also suggested that it was improbable that the appellant should park his pickup in an obvious place if he were bent on murder, moreover in a place from which he would have to reverse out. And, most of all, he relied (at no little length) on the fact that Aquilla had said that she could see by street lights

and also by the lights from the house of a Mr Fyfield, whereas Fyfield himself said, in a single unexplored answer, that his own lights were not on that night.

18. It was contended before the Board that counsel culpably failed to cross examine Aquilla by suggesting the possibility of honest error, and likewise failed to develop the defence case on that basis. It is correct that counsel had described Aquilla's evidence about the lights in the Fyfield house as a lie, but taken overall his submissions to the jury were simply that her evidence "fails", or could not be "trusted", and that neither her evidence nor that of her mother could be "accepted". He reminded the jury that counsel for the prosecution had said that Aquilla saw more than her mother, and he summarised his submission as follows: "… my suggestion to you is that Aquilla imagine (sic) more than her mother". It may be that different advocates would have approached the witnesses differently. Some might have elected to pursue the possibility of innocent mistake, for example, as Mr Taylor suggested, by cross examination on Aquilla's knowledge of the registration number and its visibility on the night in question. But counsel's approach was perfectly permissible. There is nothing approaching the kind of flagrant incompetence which can, very occasionally, render a conviction unsafe. Since Aquilla was saying that she knew the vehicle and recognised it, cross examination of the kind now suggested might have carried no little risk of eliciting greater detail of her familiarity with it. The jury was left in no doubt that the evidence was said to be unreliable, especially because of the contradiction by Fyfield about the lights on his house. It may well be that the jury was not, in the end, impressed by this discrepancy, particularly given that everyone agreed that there was other (street) lighting in the place concerned. But the issue of her reliability was squarely before the jury, which saw her and had the opportunity to assess her evidence that she recognised a vehicle known to her.

19. In summing up, the judge essentially recounted the evidence of the witnesses, including Malva and Aquilla Rawlins, largely without comment. She did not separately summarise the evidence of Mr Fyfield, which was largely uncontroversial narration of helping when the victim was found, and thus did not refer to his evidence about his house lights. That was an error of omission. But the emphasis laid by counsel on his lighting evidence had been such that it is quite impossible that the jury could have failed to have the point in mind. Right at the end of the summing up, the judge reviewed the principal arguments which had been put to the jury by counsel, and thus adverted to the defence suggestion that "Aquilla is not a witness to believe, basically". Thereupon, she correctly reminded the jury that the assessment of credibility was a matter entirely for it. She did not, separately, invite the jury to consider also the possibility of innocent mistake. Given the way the evidence had emerged and the line which had been taken with the witnesses, that was not a material error. There was, probably for prudent reason, very little evidence about Aquilla's familiarity with the vehicle, and none about the number of similar red pickups which may or may not have been available on this very small island.

*Fresh evidence*

20. Some eight or nine months after leave to appeal to the Board had been sought and obtained, the appellant tendered for the first time fresh evidence which he applied to the Board to admit. It consisted of statements from the appellant himself and from his two sisters, Ilena and Bonnilyn, together with a report from a well-known English expert in forensic science including DNA analysis.

21. If credible, the evidence of the appellant's sisters would be of dramatic effect. The appellant had been told of his wife's death during the evening by two workmates. He had collapsed and been taken to hospital. The police found him in the emergency ward and arrested him there. Having been taken to the police station, his hands were swabbed, which examination revealed DNA matching the deceased; a random match was extremely unlikely. Now, it is asserted by his two sisters that they were both in the hospital with the appellant when the officer in the case, Corporal Caines, arrived to see him. They assert that they both saw that Caines, who had come from recovering the deceased from her car, was noticeably contaminated with blood. More, they assert that Ilena protested strongly to Caines that he could not deal with the appellant in that condition, because she was concerned about contamination. Clearly, if credible, these assertions would be highly relevant to the possibility of accidental transfer to the appellant of the DNA of the deceased.

22. The Board refused to admit this evidence. It was quite satisfied that it was not credible. Possible contamination by Caines was the principal live issue at the trial in relation to the DNA evidence. He was cross examined at considerable length on the subject. None of the facts now asserted by the appellant's sisters was touched upon. But Ilena says in her recent statement that she told trial counsel all about it only a week or so after the arrest. It is inconceivable that if she had done so, the point would not have been the centrepiece of the appellant's case. Ilena is, and was at the time, a serving police officer with around 20 years' service, over five of them in the CID. She outranked Caines. She very clearly, on her own evidence, understood the significance of what she now says she saw. There could be no possible reason for not advancing her evidence at the trial if it were what she was then saying. It is simply not credible that she would have permitted the trial to continue without her assertions being advanced, and her evidence called. Even supposing that that possibility could be contemplated, it is even less credible that when the appellant was convicted, there was not the strongest possible protest at trial counsel's failure to use damning material. Still less is it believable that when an appeal against conviction was mounted and heard the family should allow trial counsel to continue to act, and once more to ignore potentially vital evidence. Far from what would be expected occurring, the present statements were made for the first time late in 2016, eight years after the trial. It might be added that the statement of Ilena also purports to provide the appellant with an alibi because she asserts that he arrived at the family home at about the same time as she did, shortly after 7 pm, that is to say more or less at the time of the murder, and did not go out for something like an hour. That that

too should appear only at this juncture is a plain indication that it is not credible. Moreover, the timing of Ilena's arrival home, and thus of the appellant's, is directly contradicted by the evidence, given at trial and then no doubt seen as of little importance, of the taxi driver who delivered Ilena and who gave the time as an hour and a half later. There are other differences between the accounts of Ilena and Bonnilyn which are also difficult to explain if both are truthful, even given the passage of time, but the foregoing matters are more than enough to demonstrate that the fresh evidence tendered satisfies neither the requirement that it be apparently credible nor the requirement that adequate explanation be given for it not having been adduced at trial.

23. The appellant's own statement also asserts that he gave factual instructions to trial counsel. As well as supporting the assertion that Ilena protested to Caines at the hospital that he was covered in blood, and that counsel was told of it, the appellant now claims that he gave instructions on some of the past incidents, which he says he denies, and even that he told counsel that Mr Fyfield was himself the owner of a red pickup similar to his own. All these plainly important pieces of information, the appellant says that counsel simply ignored. There could be no reason for counsel not using this kind of information. It is not credible that he was given it, and the remarkable lateness of the claim that he was only serves to underline that conclusion.

24. The expert report now tendered is not, of course, incredible. To the extent that it comments on the risks of contamination assuming the facts as stated by the two sisters, it is accurate but irrelevant once their evidence is rejected. To the extent that it otherwise considers the risks of possible contamination, it is, whilst hypothetical, no doubt broadly accurate, but it would not provide grounds for allowing the appeal and quashing the conviction. Most of it is common sense. The expert rejects the possibilities that the DNA of the deceased could have persisted from the time the appellant and the deceased were last together and/or that it could have derived from items in his possession which she had previously handled, and/or that there was laboratory contamination. That leaves possible contamination via the police. The possibilities of contamination by this route were strongly advanced at the trial, via the cross examination of both Caines and the forensic scientist called by the prosecution, and fully explored. They were there for the jury to assess. Nor is there any reasonable explanation advanced for the failure to put forward further expert evidence, which would clearly have been available, at the time or in the ensuing eight years since the trial. Nor, in any event, did the trial depend entirely on the DNA evidence, powerful though that undoubtedly was. The combination of the other three factors set out at paragraph 3 above, each independent of the other, was telling.

*Conclusion*

25. For all the foregoing reasons, the Board will humbly advise Her Majesty that this appeal should be dismissed.