REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL
PORT OF SPAIN

CRIMINAL APPEAL NO. 4 OF 2009

BETWEEN

RICKY RAMLOCHAN **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM:
Paula-Mae Weekes, J.A.
Alice Yorke-Soo Hon, J.A.
Nolan Bereaux, J.A.

APPEARANCES:

Mr. Ravi Rajcoomar for the Appellant
Ms. Honoré-Paul for the State

DELIVERED BY: Alice Yorke-Soo Hon, J.A.

DATE DELIVERED: 29th July, 2010

JUDGMENT

INTRODUCTION

1. On 22nd December, 2008 the appellant, along with Vishwanath Kadil, was convicted of the offences of Robbery with Aggravation, Kidnapping, False Imprisonment and Demanding Money with Menaces. He was sentenced to ten (10) years hard labour on the first count, twelve (12) years hard labour on the second, twelve (12) years hard labour on the third and four (4) years hard labour on the fourth, the sentences to run concurrently. The appellant has now appealed his convictions. Three grounds of appeal were filed on his behalf but at the hearing, counsel withdrew grounds two and three and only pursued the first ground.

PROSECUTION CASE

2. On Monday 17th March, 2003, Ramjewan Tirbonie (the virtual complainant) boarded a private taxi registration number PAP 324 at Chaguanas to go to his home at Felicity. There were three men in the car – the driver, the appellant, who sat in the front passenger seat, and Kadil, who was seated in the back seat.

3. The driver drove past the virtual complainant's destination and proceeded to the Felicity Dump. There the appellant, armed with a cutlass, came out of the car and took the virtual complainant's watch. The driver emptied the virtual complainant's brief case, searched his pocket and took his cell phone and $9.00 in cash. The driver, Kadil and the appellant then took the virtual complainant to a cane field where they bound his hands and feet. The appellant asked the virtual complainant for his address and the telephone number at his house. He also asked him for his wife's name and her telephone number. The appellant and the driver then left Kadil with the virtual complainant in the cane field for about one and a half hours. Before leaving, the driver gave Kadil, who was then holding a knife to the virtual complainant's throat, instructions to cut his throat if he moved. They subsequently returned to the cane field and told the virtual complainant to expect a phone call from his wife. His wife did call and she told him that someone had

called and wanted $80,000 "to bring him" but that she did not have the money. The virtual complainant then told the men that he did not have that money. The appellant threatened to kill the virtual complainant if he did not get the money by midnight and told him that they had reduced the demand from $80,000 to $30,000. The virtual complainant told the men that if they let him go he would give them $40,000.

4. The virtual complainant was then taken to Usine St. Madeline where they all spent the night in the car. The next morning the appellant and the driver left the virtual complainant with Kadil. Upon their return the driver said "*like this wife don't like him we will have to kill him"*. The men then took the virtual complainant to Republic Bank, Princess Town. They accompanied him into the bank where the virtual complainant discovered that his account balance was $68.22. The men then took him back to the car park and had him sit in the car. About an hour later the virtual complainant spoke with his daughter, Usha, by cell phone. Usha told him that the money was transferred to his account. They all returned to the bank and the virtual complainant withdrew $40.00. The driver then gave the virtual complainant a slip to withdraw $30,000 and instructions to go to a certain teller. That teller directed him to another who told him that he could only withdraw $5,000. The virtual complainant then asked to see the manager. Shortly afterwards police officers entered the bank and apprehended Kadil and the driver and took them to the Princess Town Police Station along with the virtual complainant. The appellant, who was not at the bank at the time, was arrested while on his way to charge the virtual complainant's cell phone. He too was taken to the Princess Town Police Station.

CASE FOR THE APPELLANT:

5. The appellant gave evidence. He denied the commission of any of the offences alleged. He said that on 17th March, 2003 he went to Kadil's home and there he met the driver. The driver spoke to him and Kadil and then they all went into a car where they met the virtual complainant and they all proceeded to a bar in Montrose. There the virtual complainant told them that he was having financial problems and wanted to stage his own kidnapping in order to get money from his wife. The appellant tried to

discourage him from this course since it would lead to "trouble". They spent the night in the car at Usine St. Madeline.

6. At about 8.00 a.m. the following morning they went to Republic Bank, Princess Town where the virtual complainant withdrew $40.00 for lunch. The virtual complainant gave his cell phone to the appellant to get it charged. He left with the phone and saw two cars pull up on either side of him. He saw the driver and Kadil in the back seat of the car. He was arrested and taken to the Princes Town Police Station.

Ground 1

A material irregularity occurred in the course of the trial that impacted upon the fairness of the proceedings in particular, counsel for the defence failed to put before the jury evidence of the appellant's good character. Such evidence in the circumstances of his case being material to the presentation of the appellant's case.

Submissions

7. Mr. Rajcoomar for the appellant submitted that the appellant had no previous convictions and since credibility was an issue, the appellant having testified and denied the account given by the prosecution, a good character direction was critical. It was the duty of counsel to ensure that the direction was given. The failure of defence counsel to discharge that duty led to an unsafe conviction resulting in a miscarriage of justice. He added that although by the appellant's own admission, he was involved in criminal conduct he was still entitled to the direction, in a modified version, in keeping with the principles of fairness and a balanced summation.

8. Mrs. Honore-Paul, for the respondent, submitted that the judge could not be faulted. There was no evidence placed before the jury of the appellant's good character by which such a direction would have been warranted. Even if the evidence had been led, the appellant having admitted to dishonest conduct, a good character direction would be an affront to common sense.

THE LAW

Duty of Defence Counsel.

9. In **Thompson vs The Queen** [1998] AC 811 PC (St. Vincent), the defence led no evidence in relation to the good character of the defendant. It was submitted to the Board that the defendant had no previous convictions and despite the fact that no evidence was led, the trial judge should in the absence of the jury inquire whether the defendant was of good character, and in learning that he was, should in accordance with **R v Vye** [1993] 1WLR 471 and **R 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 and whether he was likely to have committed the offence. It was further submitted that this duty, which was being suggested lay on the judge, was analogous to the duty of the judge to direct the jury to consider possible defences arising on the evidence upon which counsel had not relied. Lord Hutton in delivering the judgment of the Board stated at page 844-845 as follows:

> *"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 Lord Goddard CJ in **R v Butterwasser** [1948} 1KB 4,6). Their Lordships are of the 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"*

10. Lord Hutton's approach was endorsed by Lord Wolf in **Edmund Gilbert vs the Queen** [2006] UKPC 15 who also highlighted the danger of not adhering to the rule. At paragraph 21 he states as follows:

"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 the 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 two previous convictions recorded against him, does not mean that he inevitably is of good character. That is why it is good practice for the judge, where there is doubt as to the position, to raise the matter with counsel".

11. In **Teeluck v The State** [2005] UKPC 14 the Privy Council established guidelines in relation to the good character direction. Among them, the Board reiterated that a defendant's good character must be raised by direct evidence from him or given on his behalf by eliciting it in cross examination of prosecution witnesses. The duty of raising the issue is to be discharged by the defence and if it is not raised, the judge is under no obligation to raise it.

12. In the instant matter, counsel for the prosecution reminded the judge that he had not given the full character direction. The judge at page 33 lines 23-25 said in response:

"I myself had thought about it, but you see there must be a minimum amount of evidence to trigger it".

Counsel for the defence made no response, not even a last ditch effort, it having been brought to his attention, (assuming that it slipped him earlier), to then raise the issue.
We endorse the approach by Lord Hutton in **Thompson vs the Queen** (supra). The onus remains on the defence to raise the issue of good character. Once evidence of it is adduced it becomes the duty of the judge to direct on it. If there is no evidence then there is no duty on the judge to raise it and consequently no responsibility on him to direct on it. We are therefore of the view that it was counsel's duty to raise the issue of the

appellant's good character. Counsel having failed to do, the judge was correct to reject the invitation by counsel for the prosecution to give such a direction. There was no evidence to "*trigger it*". If the defence intends to rely on the good character of the accused that issue must be raised by the accused calling evidence of it or by putting questions on that issue to witnesses for the prosecution.

13. Having determined that defence counsel was at fault in not raising the issue of the appellant's good character, the next question which falls to be determined is whether such omission resulted in any unfairness to the appellant. It is not disputed that the appellant was a man of good character in the sense that he had no previous convictions. Counsel's failure at trial stage ought not to deprive the appellant once and for all of the benefit of the good character direction. It is now for us to determine whether he was indeed entitled to it. In his defence the appellant admitted to possible criminal conduct (obtaining money by false pretences), in that he was part of a conspiracy, together with the virtual complainant, to stage a kidnapping in order to obtain money from the virtual complainant's wife. The question which therefore arises is whether in circumstances where a person admits to criminal conduct or to an act of dishonesty, he forfeits absolutely his right to a good character direction. In order to determine this issue a review of the authorities is necessary.

14. In **Zoppola – Barrazza** [1994] Crim LR 833 Z was convicted of the importation of cocaine. He gave evidence to the effect that he had on a number of occasions smuggled gold and jewels into the country to avoid the payment of duty and VAT. He was treated as a person of good character and the jury was directed on the first limb of the **Vye** direction, that is, his credibility, but not his propensity. On appeal he argued that he ought to have had the benefit of both limbs of the direction. It was held that it was wrong to treat the defendant as a man of good character and that he was fortunate in obtaining a first limb direction at trial. Z had repeatedly stated that he was operating an illegal scheme to deprive Customs and Excise of duty and VAT. The court found that it was an affront to common sense to hold that such a person was entitled to the same direction as those who can truly be considered as being of good character.

15. In contrast, in **R v Durbin** [1995] 2CR App R 84 the defendant was convicted for the importation of 875 kilos of cannabis. In an interview and in evidence, he admitted being engaged in smuggling goods other than drugs across Europe. The trial judge considered him as a person of good character but he refused the direction because a similar direction could not be given in respect of the co-accused. His appeal was allowed on the ground that having been considered a person of good character he should have been given the direction, albeit modified, to take into account his particular circumstances.

16. **Zoppola – Barrazza** is distinguishable from **Durbin** because in the former, the dishonest smuggling was independent of the charge, whereas in **Durbin** the admitted dishonesty was tied to the events which were the subject of trial. In the latter, the defendant was entitled to be treated as being of previous good character and a direction full or modified ought to have been given. The court then laid down the law as follows (91-92):

> *1. Where the defendant is of previous good character, then he is entitled to the good character direction (both limbs if his credibility is in issue, the second limb only if it is not), notwithstanding that he may have admitted telling lies in interview (R. v Kabariti (1991) 92 Cr.App.R.362) and may have admitted other offences or disreputable conduct in relation to the subject matter of the charge, as we hold here (contrast Zoppola-Barrazza and R. v Buzalek and Schiffer [1999] Crim. L.R. 116). In such cases, however, the terms of the direction should be modified to take account of the circumstances of the case, including all facts known to the jury, either as regards credibility or propensity, or both.*

2. *Where the defendant is not of absolutely good character, the trial judge has a discretion as to whether or not to give a "good character" direction, and if so in what terms, but he cannot properly decide not to do so, and in unqualified terms, if the blemishes can only be regarded as irrelevant, or of no significance, in relation to the offence charged (Herrox, and contrast Zoppola-Barrazza).*

3. *By the same token, there will be cases where the defendant is not of absolutely good character but where the only proper course is to give a qualified direction in suitably modified terms, assuming of course that the fact of previous conviction or other character blemish is known to the jury. This is likely to mean that careful consideration will have to be given to the distinction between the two limbs of credibility and propensity.*

4. *Character, bad or good, is not simply a matter of the presence or absence of previous convictions, nor is it the same as reputation though the one may be evidence of the other.*

5. *In all cases where the qualified direction is given, we consider it essential that it should be in realistic terms, taking account of all the facts as they are known to the jury. The jury should not be directed to approach the case on a basis which, to their knowledge, is artificial or untrue."*

17. A few months later came the case of **R v Aziz** [1995] 2Cr App R 478 but **Durbin** was not there considered. The appellant who had no relevant previous convictions and **Y and T** who had no previous convictions were all convicted for the fraudulent evasion of VAT by the creation of false invoices. They all admitted to acts of dishonesty in relation to the matters charged. The House of Lords held that a two-limb, albeit modified, **Vye** direction ought to have been given in the case of all three. Lord Steyn in delivering the lead opinion noted that **Vye** was "the culmination of a development from discretion to rules of practice" and that a judge was obliged to give a good character direction because fairness requires it. In considering whether and how a defendant can lose his good character by reason of criminal behaviour in the absence of conviction, Lord Steyn recognized that that "was a complex problem where generalizations are hazardous". He suggested the following approach at pages 488 – 489.

> *"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: R. v H. [1994] Crim. L.R. 205 and R. v Zoppola-Barraza [1994] Crim. L.L. 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 R. v Vye 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."

18. The case of **R v Gray** [2004] 2 CR App R.30 demonstrates the development of the law in relation to this aspect of the good character direction. At the date of trial, the appellant was eighteen (18) years old and volunteered that when he was seventeen (17) he had been convicted of driving with excess alcohol and without licence or insurance. No good character direction was given. On appeal he contended that he was entitled to a full good character direction. His appeal was allowed. After reviewing the authorities the court stated the following principles at paragraph 57:

1. *The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified (Vye, Aziz).*

2. *If a defendant has a previous conviction which, either because of its age or its nature, may entitle him to be treated as of effective good character, the trial judge has a discretion so to treat him, and if he does so the defendant is entitled to a Vye direction (passim); but*

3. *Where the previous conviction can only be regarded as irrelevant or of no significance in relation to the offence charged, that discretion ought to be exercised in favour of treating the defendant as of good character (H, Durbin, and, to the extent that it cited H with apparent approval, Aziz.) In such a case the defendant is again entitled to a Vye direction. It would seem to be consistent with principle (4) below that, where there is room for uncertainty as to how a defendant of effective good character should be treated, a judge would be entitled to give an appropriately modified Vye direction.*

4. *Where a defendant of previous good character, whether absolute or, we would suggest, effective, has been shown at trial, whether by admission or otherwise, to be guilty of criminal conduct, the prima facie rule of practice is to deal with this by qualifying a Vye direction rather than by withholding it (Vye, Durbin, Aziz); but*

5. *In such a case, there remains a narrowly circumscribed residual discretion to withhold a good character direction in whole, or presumably in part, where it would make no sense, or would be meaningless or absurd or an insult to common sense, to do otherwise (Zoppola-Barrazza and dicta in Durbin and Aziz).*

6. *Approved examples of the exercise of such a residual discretion are not common. Zoppola-Barrazza is one. Shaw is another. Lord Steyn in Aziz appears to have considered that a person of previous good character who is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged would forfeit his right to any direction (at 53B). On the other hand Lord Taylor C.J.'s manslaughter/murder example in Vye (which was cited again in Durbin) shows that even in the context of serious crime it may be*

crucial that a critical intent separates the admitted criminality from that charged.

7. *A direction should never be misleading. Where therefore a defendant has withheld something of his record so that otherwise a trial judge is not in a position to refer to it, the defendant may forfeit the more ample, if qualified, direction which the judge might have been able to give (Martin).*

CONCLUSION

19. In light of the authorities discussed above, we now turn to this appeal. We note that the appellant's admission was in relation to the subject matter of the trial. It was the appellant's account that he assisted the virtual complainant to stage his own kidnapping in order to obtain money from his wife. This apart, the appellant's character was unblemished. This case is therefore significantly different from **Zoppola – Barrazza** where the admitted criminal conduct existed prior to and was independent of the charge. In the instant case, the admitted conduct was tied up with the charge itself.

20. In the circumstances, we are of the view that the appellant's admission did not deprive him of the right to a good character direction. This case falls neatly into the four corners of the principles set out in **Durbin**, **Aziz** and **Gray.** The appellant, being of previous good character, would have been entitled to a good character direction notwithstanding that he had admitted possible criminal conduct in relation to the subject matter of the charge. The terms of the direction would have had to be modified to take into account this admission.

21. Applying Lord Steyn's approach in **Aziz**, rules of practice must ensure that an accused person has a fair trial and fairness requires that where appropriate, the judge should direct the jury on good character because it is evidence of probative significance. The absence of such direction, whether by fault of defence attorney or otherwise, constitutes a material irregularity which resulted in unfairness to the appellant and this appeal must succeed.

We therefore allow the appeal and quash the convictions and sentences.

22. In determining whether to order a retrial we refer to the guidelines set out in **Reid v R** [1978] 27WIR (254). There, the Privy Council stated that among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of the offence; the expense and length of time involved in a fresh hearing; the ordeal suffered by an accused person on trial; the length of time that will have elapsed between the offence and the new trial; the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; and the strength of the case presented by the prosecution. The court *"was loath to embark upon a catalogue of factors"* and warned that one of the dangers of such a catalogue is that it may come to be treated as exhaustive when *"the recognition of the factors relevant to the particular case calls for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal"*.

23. In considering the factors relevant to this particular case, we are of the view that the circumstances of its commission are quite serious for the virtual complainant's life was under threat. This type of offence is also quite prevalent. However, the offence took place in 2003, some seven years ago and took more than five years to be brought to trial. We also note that although a ransom was requested, it did not materialize albeit due to the timely intervention by the police. We do not consider the prosecution case to be particularly strong and in the circumstances neither the appellant nor the State should be put through the expense of trial.

When looked at in the round, *"the collective sense of justice and common sense"* that dictates that a retrial would defeat the ends of justice and fairness.

Before departing, although the instant matter is not affected by the provisions of the Evidence Amendment Act 2009 (the trial having taken place in December 2008 prior to the coming into effect of the Act) we think it necessary to offer some guidance to trial judges with regard to S15K (1) (a) 2 which provides as follows:

> (1) Reference to evidence of a person's bad character is to evidence of or a disposition towards, misconduct on his part, other than evidence which:
>
> (a) has to do with the alleged facts of the offence with which the accused is charged;
>
> (2) for the purpose of this section and sections 15L to 15W, "Misconduct" includes the commission of an offence or other reprehensible behaviour.

By virtue of S15K(1) (a) evidence of a person's bad character includes misconduct on his part which has nothing to do with the alleged facts of the offence with which he is charged. Misconduct includes the commission of an offence or other reprehensible behaviour. Using the instant facts as an example, evidence of the appellant's admitted possible criminal conduct was tied up with the alleged facts of the offence for which he was charged, therefore such conduct was not evidence of bad character. However, the jury would have been entitled to factor in such evidence (which was before them by way of the appellant's evidence), in determining what weight they were going to attach to his good character and therefore a modified good character direction would have been appropriate.

24. By contrast, where the evidence of misconduct is evidence other than evidence which has to do with the alleged facts of the offence with which an accused is charged, such evidence constitutes evidence of his bad character. In those circumstances if the accused were a person of previous good character by virtue of having no previous convictions, he may forfeit his right to any good character direction since to give him such a benefit would amount to an *"affront to common sense"*.

P. Weekes
Justice of Appeal

A. Yorke-Soo Hon
Justice of Appeal

N. Bereaux
Justice of Appeal