Hilary Term
[2020] UKPC 8
Privy Council Appeal No 0018 of 2018

JUDGMENT

The Queen *v* Vasyli (Appellant) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Kerr
Lord Carnwath
Lady Black
Lord Lloyd-Jones
Lord Hamblen

JUDGMENT GIVEN ON

2 March 2020

Heard on 15 January 2020

Appellant	*Respondent*
Clare Montgomery QC Joanna Buckley (Instructed by Simons Muirhead & Burton LLP)	Thomas Roe QC (Instructed by Charles Russell Speechlys LLP)

LORD HAMBLEN:

1. At about 7.00 am on 24 March 2015, Mr Philip Vasyli was found dead on the floor of the kitchen in the guest house of his home at Ocean View Drive, Old Fort Bay, a gated community in the Bahamas. He had suffered a single stab wound on the left side of his neck. His wife of 34 years, the appellant, Mrs Donna Vasyli, was arrested and charged with his murder later the same day.

2. The appellant's trial took place in the Supreme Court of the Commonwealth of the Bahamas before Mr Senior Justice Stephen Isaacs, sitting with a jury, between 7 September and 1 October 2015. On 1 October 2015, the appellant was convicted of murdering her husband. On 10 November 2015, the appellant was sentenced to 20 years' imprisonment, reduced by five months spent on remand.

3. The appellant appealed against conviction and sentence to the Court of Appeal of the Commonwealth of the Bahamas. On 25 July 2017, the Court of Appeal (Allen P, Isaacs JA, Crane-Scott JA) unanimously quashed the appellant's conviction. A majority of the Court (Allen P and Isaacs JA) ordered a retrial, while Crane-Scott JA dissented, finding that a retrial would not be in the interests of justice.

4. On 3 August 2018, the Court of Appeal (Isaacs JA, Crane-Scott JA, Sir Hartman Longley P) granted the appellant final leave to appeal to the Privy Council in relation to the order for a retrial.

5. The appellant contends that the order for a retrial was wrong in law on the grounds that:

(i) The Court of Appeal failed to provide the appellant with an opportunity to make submissions regarding a retrial;

(ii) Allen P failed to examine the overall strength of the case against her; and

(iii) The case against the appellant was unsustainable.

6. The respondent accepts grounds (i) and (ii) and that the Court of Appeal's reasons for ordering a retrial therefore cannot stand. The respondent contends, however, that the appellant had a case to answer and that in all the circumstances the appropriate

relief is that the Board should order a retrial. Both parties agree that the Board should address the issue of whether there was a case to answer. The issues which arise on the appeal are therefore:

(i) Whether there was a sustainable case against the appellant;

(ii) If so, whether the Board should order a retrial or remit the matter to the Court of Appeal.

The outline facts

7. The appellant had been married to Mr Vasyli for 34 years. They had lived in the Bahamas for many years and resided together at a property in Ocean View Drive, which consisted of a main house, adjacent to which there was a guest house.

8. On 23 March 2015, the appellant and her husband entertained guests at their home. Prior to their arrival, Mr Vasyli had been drinking and fell down a flight of stairs sustaining superficial cuts to his back. The guests left between approximately 6.00 and 6.45 pm.

9. The appellant subsequently spent the night at the home of her daughter, Ms Lauren de Graaf, and was seen there by her nephew, Mr Mitchell Matthew, at around 9.00 or 9.10 pm.

10. At about 7.00 am on 24 March 2015, Mr Vasyli was found dead on the floor of the kitchen in the guest house by Mr Alejandro Gomez Quintana, the gardener/handyman. There was a single stab wound on the left side of his neck, which appeared to have been caused whilst Mr Vasyli was on the patio outside the kitchen. The door to the patio had been locked and Mr Vasyli's blood stains were on the internal door handle which operated the lock. Mr Quintana touched Mr Vasyli's leg and arm, both of which were covered in blood, and also picked up the knife, which appeared to have caused the wound, from the patio floor.

11. The appellant was informed of Mr Vasyli's death by Mr Quintana. She hugged him and told him to calm down. She then returned to Ocean View Drive with her daughter and Mr Quintana and waited for the police.

12. The appellant was arrested for murder on the morning of 24 March 2015 by Officer Jermaine Knowles.

The trial

13. The trial commenced on 7 September 2015. Mr Garvin Gaskin (acting DPP) and Mr Neil Braithwaite (assistant DPP) appeared for the respondent. The appellant was represented by Mr Elliot Lockhart QC, Mr Murrio Ducille and Ms Michaela Barnett-Ellis.

14. The prosecution called evidence from a number of witnesses, including a pathology expert, Dr Caryn Sands. A number of statements and reports were read into the record, including four DNA reports of Ms Samantha Wandzek. There was an unsuccessful defence application to exclude the evidence of Officer Jermaine Knowles.

15. The prosecution case closed on 23 September 2015. The following day the defence made a submission of no case. On 28 September 2015, the judge handed down a written no case decision, ruling that there was a case to answer.

16. On 29 September 2015, the defence called evidence from Dr Rochelle Knowles, a dermatologist, and Mr Jeffrey Simmons, a meteorologist. In addition, the record of the interview of Mr Matthew was read into the record. The appellant did not give evidence. The defence case was based on the appellant's formal interviews under caution and cross-examination of the prosecution evidence.

17. Closing addresses for defence and prosecution were made on 30 September 2015. The judge gave his summing up on the morning of 1 October 2015. The jury retired at 12.44 pm and returned a verdict of guilty at 4.57 pm the same day.

The appeal

18. The appellant appealed against conviction on the following grounds:

(i) Good character direction: the judge should have given a good character direction as to credibility and as to propensity to commit the offence charged.

(ii) The evidence: the judge wrongly ruled that the appellant had a case to answer. The judge also failed to summarise the defence case and evidence accurately in summing up.

(iii) Inferences: the judge misdirected the jury on the law and evidence in connection with the drawing of inferences and the use of circumstantial evidence,

and specific directions not to speculate should have been given in relation to certain unexplained facts or unproven details.

(iv) Evidence of Officer Jermaine Knowles: the judge erred in law in admitting the evidence of Officer Jermaine Knowles and, once admitted, he failed to give the jury any adequate direction as to how the jury should approach this evidence.

(v) Unlawful harm: the judge directed the jury that they had to be sure that the appellant was not acting in reasonable self-defence or under provocation, but then failed wrongly to give any further direction as to the legal ingredients of those defences or the evidence in support of them.

(vi) Identification: The prosecution stated in its closing address that the jury could identify the appellant and her clothing in video footage. The judge should have directed them to ignore this statement in the absence of evidence. If the jury were to be permitted to consider it, the judge should have given a direction on video identification and on the significance of lies.

19. The Court of Appeal quashed the appellant's conviction on various grounds as follows:

(i) The judge failed to give a *Lucas* direction (*R v Lucas (Ruth)* [1981] QB 720) on the significance of lies in relation to the identification evidence. The judge was under a duty to do so as there was an obvious danger that the jury might regard lies by the appellant as probative of her guilt (Allen P and Isaacs JA).

(ii) The judge failed to leave the issue of provocation to the jury, depriving her of an opportunity to be found not guilty of murder although she might have been found guilty of manslaughter (Isaacs JA).

(iii) The judge failed to give a good character direction when one was required (Crane-Scott JA).

(iv) The judge erred in rejecting a no-case submission and the verdict was unreasonable and not supported by the evidence (Crane-Scott JA).

20. Allen P concluded that the appeal should be allowed by reference to an aspect of ground (vi) in that the judge ought to have given a *Lucas* direction because "the jury

was possibly left with the impression, as suggested by Counsel for the prosecution, that the appellant lied about her clothing and the functionality of the cameras to conceal the murder of her husband" (para 44).

21. Agreeing with Isaacs JA, but without adding anything, Allen P rejected ground (i), the absence of a good character direction, and ground (iii), concerning the direction on inferences. The appellant's other grounds were not dealt with by Allen P. She said nothing about ground (v). She also said that, "[a]s the matter is being remitted for retrial, I make no further pronouncements on grounds (ii) and (iv) which call for an examination of the evidence" (para 50).

22. As regards the retrial, Allen P said that "for the reasons indicated by Isaacs JA in his judgment, I would remit the matter to the Supreme Court for retrial on the authority of *Reid v R*" (para 49).

23. Isaacs JA agreed with Allen P about ground (vi), the need for a *Lucas* direction. He rejected ground (i), the complaint about the lack of a good character direction. He also rejected ground (ii), the contention that the appellant had had no case to answer. Isaacs JA also concluded that the judge had been wrong not to leave to the jury the possibility that the appellant had killed her husband after having been provoked to lose her self-control, such that she was guilty only of manslaughter (ground (v)).

24. On the question of whether there should be a retrial, Isaacs JA (with whose reasoning about this Allen P agreed) set out at length what Lord Diplock had said in *Reid v The Queen* [1980] AC 343 concerning the principles to be applied. Adapting what was said in *Reid v The Queen* he said at para 137:

> "Nevertheless, 'the interest of the public in [the Bahamas] that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge' as in this case, where the Judge did not leave manslaughter as a possible verdict for the jury to consider, leads me to conclude that an order for a retrial would be in the interests of justice; and would not, in my view, amount to an error of principle in the exercise of the power [to order a retrial]."

25. Crane-Scott JA said that she agreed with Allen P that ground (vi) "has merit", but for her part she would have held that the appellant had no case to answer. She would also have allowed the appeal on ground (i), the failure to give a good character direction. She did not address the other grounds.

26. On the question whether to order a retrial, Crane-Scott JA also directed herself by reference to *Reid v The Queen*. She said at para 226:

> "I am satisfied that despite the seriousness of [this] offence, the prevalence of murder in this jurisdiction and the interest of persons in this community in knowing that persons who are guilty of serious crimes are brought to justice and should not escape it, the evidence against the appellant is so weak and inconclusive that it is not in the interests of justice to order a new trial and I decline to do so."

Issue (i) - Whether there was a sustainable case against the appellant

The Law

27. The power to order a retrial is conferred upon the Court of Appeal by section 13(2) of the Court of Appeal Act which provides that:

> "Subject to the provisions of this Part of this Act the court shall, if it allows the appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit."

28. The respondent accepts that if the Board was to conclude that there was no case to answer it would not be in the "interests of justice" for there to be a retrial.

29. This is made clear by the decision of the Board in *Reid v The Queen.* That case concerned an appeal from the Court of Appeal of Jamaica. The defendant had been convicted of murder in a case which depended upon identification evidence. The Court of Appeal quashed the conviction, holding in effect that the jury's verdict was unreasonable and not supported by the evidence. A retrial was ordered (by majority) under section 14(2) of the Judicature (Appellate Jurisdiction) Act (which is in the same terms as section 13(2) of the Court of Appeal Act). The Board allowed the appeal.

30. In giving the judgment of the Board, Lord Diplock said that it would be wrong in principle to order a retrial in a case in which the evidence adduced by the prosecution at the original trial was insufficient to justify a conviction by any reasonable jury properly directed. He stated as follows at p 348E-G:

> "It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some mis-direction of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under section 14(2) of the Judicature (Appellate Jurisdiction) Act."

31. In reliance upon this passage, Ms Clare Montgomery QC for the appellant submitted that even if the Board was to conclude that there was a case to answer, the opportunity provided by a retrial in the present case for the prosecution to make good evidential deficiencies in its case means that to order a retrial would be wrong in principle and contrary to the interests of justice. In the Board's view the unfairness of the prosecution having a second chance arises where the evidence adduced at the first trial was insufficient to amount to a case to answer and this is what makes it wrong in principle for there to be a retrial. If there was a case to answer and the conviction is set aside on the grounds of the trial judge's handling of the trial or mis-directions in the summing up, there is nothing inherently unprincipled or unfair about a retrial affording an opportunity for the prosecution to put forward further or different evidence, an opportunity also provided to the defence.

32. Ms Montgomery further submitted that the question which the Board has to consider is not simply whether there was a case to answer, but whether having regard to all the evidence at trial it was sufficient to support a conviction. In this connection Ms Montgomery sought to rely on the following passage in *Reid v The Queen* at p 349H:

> "Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced *at the trial* was insufficient to justify a conviction by a reasonable jury even if properly directed." (emphasis added)

33. This passage has to be read together with the earlier part of the judgment at p 348 cited above, where the Board sets out the position in principle. It is clear that the Board is there referring to the evidence adduced by *the prosecution* and whether *that* evidence was "insufficient to justify a conviction by a reasonable jury" which had been properly directed – ie the no case to answer test. This is similarly borne out by Lord Diplock's comparative reference in the passage relied upon by Ms Montgomery to "the instant case". In *Reid v The Queen* the evidence which was found to be insufficient was the prosecution identification evidence. It is further borne out by Lord Diplock's statement at p 347G that "the only direction that the judge could properly have given to the jury was that on the state of the evidence before them the defendant was entitled to be acquitted." In other words, the judge should have directed that the jury acquit because on the prosecution evidence there was no case to answer. It is again borne out by Lord Diplock's references at p 349B to "the inadequacy of the prosecution's evidence" and at p 350E to the "strength of the case presented by the prosecution". Finally, Ms Montgomery's submission would involve the court trespassing into the territory of the jury. It is a fundamental principle that the jury should not be usurped as the finder of fact. For all these reasons the Board rejects Ms Montgomery's submission. Even if there may be occasional cases where a broader approach is appropriate, there is no justification for that in the present case given the limited nature of the defence evidence at trial and that there is no suggestion of important fresh evidence. The relevant question to be considered is therefore whether there was a case to answer on the basis of the evidence adduced by the prosecution at trial.

34. It is common ground that this involves the application of the test set out in *R v Galbraith* [1981] WLR 1039, 1042, and a consideration of whether "the prosecution evidence, taken at its highest, was such that the jury properly directed could not properly convict upon it".

35. Since this is a case which depended upon circumstantial evidence, it is also appropriate to have regard to the guidance provided by the decision of the Board in *Director of Public Prosecutions v Varlack (British Virgin Islands)* [2008] UKPC 56. In that case the Board approved the following passage from the judgment of King CJ in the Supreme Court of South Australia in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, at p 5:

> "If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were

> drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

The prosecution evidence

36. The respondent contends that the following facts were either undisputed or capable of being accepted by a reasonable jury.

37. The appellant and Mr Vasyli, who had been married for 34 years, lived together in a house at Ocean View Drive, Old Fort Bay, a gated community by the sea. No one else lived with them.

38. Mr Vasyli had an alcohol abuse problem and sometimes abused prescription drugs and took cocaine. He had, in the past, been verbally and physically abusive towards the appellant. On 3 November 2013, the appellant had called the police because of this. The appellant and Mr Vasyli had separated numerous times but had always ended back together. Mr Vasyli had been physically or verbally abusive towards the appellant as recently as one month before his death.

39. At about 3.50 pm on 23 March 2015, Mr Vasyli fell down the stairs when drunk, cutting his back on the glass in picture frames as he fell. Later that afternoon the appellant and Mr Vasyli entertained guests, Mr Myles and Mrs Jody Pritchard and the Vasylis' nephew, Mr Matthew. The women drank wine and the men drank beer.

40. Mr Vasyli appeared to be very drunk. The appellant had to tell him to pull his pants up because they were falling down; she was upset with him. In interview she said she was upset with him more than arguing with him and was speaking to him as one would to a disobedient child.

41. The Pritchards left first. According to Mr Pritchard, the appellant did not appear angry or disturbed. It appeared to Mr Pritchard, who had known Mr Vasyli for years, as if it was a "normal drunk day" for him.

42. Mr Matthew departed soon afterwards, leaving Mr Vasyli and the appellant alone together from approximately 6.00 to 6.45 pm. Mr Matthew went to the home of Lauren, the Vasylis' daughter, a few minutes' walk away. He later saw the appellant there, at about 9.00 or 9.10 pm. The appellant said in interview that she had left at about 7.30 pm to go to Lauren's house.

43. Mr Vasyli was discovered early the next morning, on the floor of the kitchen at the Vasylis' house, dead from a stab wound to the neck that had severed a subclavian artery.

44. The kitchen gave onto a covered patio, through some patio doors. Mr Quintana, the gardener, who had found the body, had arrived at the house via the patio and had found blood and a bloody kitchen knife there. He had then had to open the locked patio door with his emergency key in order to get into the kitchen where the body was lying.

45. The knife appeared to be from a set of kitchen knives in a block in the kitchen.

46. There was a great deal of blood on the patio, there was blood on the outside and inside door handles of the patio door, and there was blood in the kitchen.

47. None of the doors to the house showed any sign of having been damaged or tampered with. Although there were many valuables in the house, nothing had been stolen. Mr Vasyli's body bore no defensive injuries.

48. Officer Knowles, the first officer on the scene that morning, saw the appellant lying on a bed, shaking and crying. His evidence (though this was challenged on behalf of the appellant) was that the appellant said to him that she and her husband had had a fight that night.

49. Small amounts of Mr Vasyli's blood were found on the groin area of the blue dress the appellant was wearing when encountered by the police on the morning of 24 March 2015 and on the front, right sleeve cap of a multi-coloured dress found in the room where she had spent the night (these findings of blood were challenged on the appeal).

50. The gated community in which the Vasylis lived had security personnel, who did not notice any intruder that night, although it was possible to get access to the house by going around the entrance gate, or from the sea.

The prosecution case

51. Against that evidential background, the prosecution's case was that the appellant murdered her husband after their guests left and before she went to her daughter's home. The case was based on circumstantial evidence, considered as a whole, which included:

(i) The appellant and Mr Vasyli had been left alone on the evening of the incident;

(ii) The knife which appeared to inflict the wound was one of a set of knives kept in the kitchen;

(iii) The abusive nature of the relationship between the appellant and Mr Vasyli;

(iv) The lack of evidence of any intruder or disturbance within the house or of any defensive injuries;

(v) The presence of Mr Vasyli's blood on the blue dress worn by the appellant on the morning of 24 March 2015 and on a multi-coloured dress which was found in the room where the appellant had spent the night;

(vi) The location of Mr Vasyli's body in the locked house shared with the appellant.

52. In addition, the prosecution relied on Officer Knowles's evidence that, after his arrival at Ocean View Drive, he was shown into a bedroom where the appellant was lying on a bed, crying and shaking, and that, after he identified himself as a police officer, the appellant told him that she and her husband had had a fight the previous evening.

53. They also relied on the fact that the appellant told the police that the surveillance cameras at Ocean View Drive were not working. However, footage was retrieved from those cameras until shortly after 7.30 pm, which at one point showed two persons walking near the guest house and one of those persons wearing a multi-coloured dress. In his closing address, counsel for the prosecution suggested that the appellant lied about her clothing and the functionality of the cameras to conceal the murder of her husband. It was this evidence which the Court of Appeal considered required a *Lucas* direction. Such a direction would mean that the evidence could be relied upon, but subject to the cautionary considerations set out in the direction.

54. Mr Thomas Roe QC for the respondent submitted that this tapestry of evidence had to be considered in its entirety. It was necessary to look at the whole evidential picture, not isolated aspects of it. If that is done, he submitted that there was plainly a sufficient evidential case for a properly directed jury to convict upon. Subject to the specific evidential points raised by the appellant, the Board agrees.

The appellant's case

55. On behalf of the appellant Ms Montgomery contended that there were four fatal weaknesses in the prosecution case, which individually or collectively meant that there was no case upon which the jury could properly convict. These were:

(i) DNA evidence in relation to three glasses found on the wooden table on the patio, including that belonging to an unknown male, which undermined the prosecution case that the appellant was the last and only person to see Mr Vasyli alive ("the blue glass man issue").

(ii) Evidence of the pathologist, Dr Sands, from a photograph of Mr Vasyli's body taken at around 1.15 pm on 24 March 2015, which meant that it was more likely than not that he had died 14 to 16 hours previously, and that the appellant was not at Ocean View Drive at the material time ("the time-line issue").

(iii) The fact that there was no satisfactory evidence of Mr Vasyli's blood on the appellant's clothing. In any event, an innocent blood transfer could not be discounted to explain the presence of Mr Vasyli's blood on the blue dress worn by the appellant on the morning of 24 March 2015 and on the multi-coloured dress which was found in the room where the appellant had spent the night ("the blood evidence issue").

(iv) The fact that the patio door was locked from the inside, which supported the defence theory that Mr Vasyli had been attacked on the patio by an unknown assailant and had sought refuge inside the kitchen ("the locked door issue").

The blue glass man issue

56. When DC Stubbs arrived at the scene, he noticed that on the patio table were a small, blue glass and two wine glasses. A swab taken from the rim of the small, blue glass was subjected to DNA analysis. This indicated that it had on it the DNA of a male whose profile did not match that of the appellant, Mr Vasyli, Mr Matthew or Mr Quintana, all of whose profiles had been obtained by the police for comparison purposes. The profile of Mr Pritchard had not been obtained.

57. It was submitted that this evidence suggests that there was a third person present on the evening of 23 March 2015. It was said that the fact that beer bottles were found in the bin indicated that the detritus from the earlier visit had been cleared away. Reliance was also placed on the SOCO officer's analysis of the scene that there were

three people present. This was a hypothesis consistent with innocence which could not reasonably be excluded.

58. This was the principal ground upon which Crane-Scott JA held that there was no case to answer, stating that:

> "It is undisputed that at the close of the prosecution case, the DNA Report … effectively placed three persons, namely the appellant, the deceased and an unknown male at the residence at some point in time on the date the deceased met his death. This proved fact seriously eroded the prosecution theory and needed to be explained by evidence." (para 201)

> "… The failure by the police investigators to obtain a sample of Myles Pritchard's DNA for comparison purposes was, in my view, a fatal flaw in the Crown's case. It essentially 'blew a hole' in the main plank of the case against the appellant, effectively undermining the prosecution's theory that the appellant and the defendant were the only ones present at the Vasyli residence at the material time." (para 203)

> "… the Crown had, in the end, failed to establish that all-important and foundational fact from which an inference of guilt could be drawn, namely, that as the appellant and the defendant were the only ones present at the Vasyli residence at the material time, it was she who had stabbed him to death." (para 204)

59. There were, however, a number of countervailing considerations for the jury to consider. As Ms Montgomery accepted, there was no evidence of an intruder. It was suggested that the blue glass man could have been a guest, but there was no evidence that any guest was due or expected or of anyone being signed in at the front gate. Nor was there any evidence from the CCTV or the security patrol of anyone being seen entering or leaving the property or any other trace of a person being at the property. It was not accepted that the fact that beer bottles were found in the bin showed that the earlier detritus had been cleared away. Mr Pritchard could have drunk beer from the glass. The male DNA found could have been that of Mr Pritchard or left by a visitor from an earlier occasion. In addition, the hypothesis that an unknown male, having arrived later, took a knife from the kitchen and murdered Mr Vasyli, and, before or after the crime, had taken the blue glass from inside, drunk from it and then added it to the detritus left on the table from the earlier gathering or, if it was already there, picked it up from the detritus and used it was so inherently implausible as to be capable of rejection by the jury.

60. These were all matters for the jury to weigh up and evaluate. In the Board's view, taking the evidence as a whole, the blue glass man as murderer was a hypothesis which a jury could reasonably exclude.

The time-line issue

61. During the course of her evidence, Dr Sands was shown a photograph of Mr Vasyli taken at around 1.15 pm on 24 March 2015. She was asked about the position of the right arm in the photograph and she said that it was likely that there was some rigor mortis in that extremity as it was upright against gravity rather than flaccid.

62. In an earlier part of her evidence she had been explaining about the onset and peak of rigor mortis and was asked about the time period for onset. She replied as follows:

> "On average, it depends on factors. It depends on temperature. It depends on temperature, activity. But on average, it takes approximately two to four hours for rigor mortis to be noticeable, for you to appreciate rigor mortis; and then it peaks at about 12 hours. And again, that's just an average.
>
> What I mean by 'peak' is that, if you imagine a curve, it starts, it goes up. Say, four hours you notice it and in the next 12 hours it peaks to the point where you can break - what we call break the rigor.
>
> …
>
> If, after 12 hours, on average, you then break it, it will no longer return because it has already reached its peak. Without breaking it, once it has reached its peak it will dissipate anyway. It will soften as time goes on, and then other things start to come into play."

63. She was not asked any questions about how this related to her evidence about the photograph. When she was asked directly whether she had been able to determine the time of death, she replied that she had not.

64. Despite this not being explored in evidence, it was submitted in the appellant's written case that the evidence about the photograph meant that it was more likely than not that Mr Vasyli had died 14 to 16 hours before the photograph showing rigor mortis

at 1.15 pm on 24 March 2015 - ie that he had died between 9.15 pm and 11.15 pm, and therefore at a time after the appellant had been seen at her daughter's house. In oral argument, Ms Montgomery went further and submitted that the relevant period is 12 hours rather than 14 to 16 hours as the onset period is to be included in the time it takes for rigor mortis to peak.

65. The shifting nature of the appellant's case highlights its uncertain evidential base. Whilst part of Dr Sand's evidence could be said to be consistent with Ms Montgomery's submission, Dr Sands also said that after four hours you notice rigor mortis and in the "next" 12 hours it peaks. In any event, all Dr Sands' timings were approximate. She said in terms that it depended on factors, such as temperature and activity, and that she was only talking about "average" times. What the relevant factors were likely to be in Mr Vasyli's case was not considered. Nor was there any exploration of what happens after rigor mortis "peaks".

66. Ms Montgomery also sought to rely on the death certificate which was read into evidence. This was dated 31 March 2015 and was signed by Dr Sands. It stated that to the best of her information and belief the date of death was 24 March 2015. Ms Montgomery submitted that since the document was adduced by the prosecution and read, they could not deny the truth of its contents. This was not a point taken at trial. If it had been, it would no doubt have been explored in evidence. In any event, it was at most a statement of belief as at 31 March 2015, when the precise hour or time of death was not a matter of particular import, and it does not square with the oral evidence Dr Sands gave at trial, which the prosecution is entitled to rely upon. In reply, Ms Montgomery went still further and submitted that the certificate was conclusive evidence as an admission under section 19 of the Evidence Act. The Board rejects that submission. This was not a formal admission under that Act.

67. In summary, the appellant's case on this issue suffers from the fact that it is based on submission and extrapolation rather than evidence. In the Board's view there are so many uncertainties about the evidence of timing that, taking the evidence as a whole, a jury could reasonably exclude the hypothesis that Mr Vasyli was killed after 9.00 to 9.10 pm, times that were themselves approximate.

The blood evidence issue

68. In the appellant's written case it was submitted that one cannot exclude the possibility of innocent transfer of blood onto the blue dress the appellant was wearing on the morning of 24 March 2015 or the multi-coloured dress found in the room where she had spent the night. That possibility arose from the fact that Mr Vasyli had cut himself falling down the stairs earlier in the day on 23 March 2015 and the appellant had treated his wounds, and that the appellant hugged Mr Quintana on the morning of

24 March 2015 after he had touched Mr Vasyli's leg and arm, both of which were covered in blood, and had picked up the knife.

69. A difficulty with this case is that in interview the appellant stated that she had been wearing a white Bahama hand print and a t-shirt during the visit of the Pritchards and Mr Matthew, not either of these dresses. At no stage, moreover, did she state that she was wearing the multi-coloured dress. In addition, it could be said that it was most unlikely that Mr Quintana's hug from the appellant on the morning of 24 March 2015 transferred blood at groin level (which is where blood was allegedly found on the blue dress she said she was wearing that day).

70. In oral submissions, Ms Montgomery sought to mount a more fundamental challenge to the blood evidence. She submitted that there was no satisfactory evidence that the cuttings from the dresses which were subjected to DNA analysis matched the areas where "human/higher primate blood" had been identified and the DNA results themselves do not show whether they come from blood or some other means of transfer. In these circumstances, it was submitted that there was no evidence of Mr Vasyli's blood on the appellant's clothing.

71. This was not the way the case was put at trial. Indeed, at trial it does not appear to have been disputed that there was evidence of Mr Vasyli's blood on the dresses. The issues were the possibility of innocent transfer and probative value.

72. Given that this was not an issue at trial and was not raised in the appellant's written case the Board gave permission for the respondent to make written submissions on the issue and for the appellant to respond. Having carefully considered those submissions, the Board is satisfied that there was evidence upon which it would be reasonably open to the jury to conclude that Mr Vasyli's blood was on the dresses. The identification of "human/higher primate blood" on the dresses was made by a forensic biologist, Ms Felicia Blair. The evidence of DI King was consistent with the cuttings being taken from the areas of the dress in which such blood had been identified. The DNA testing was carried out by Ms Samantha Wandzek, whose reports were read. Although she did not state in terms that what she tested was the part of the dress on which blood had been identified, the jury could reasonably infer that this is what she did. Whilst the DNA result did not identify its source, in all the circumstances it would be open to the jury to conclude that it came from the blood which had been identified.

The locked door issue

73. It was submitted that the fact that the patio door was locked from the inside was inconsistent with an attack by the appellant because Mr Vasyli would have known that

the appellant would know that she could get into the house by going around to the bedroom door, which did not lock.

74. The Board agrees with the respondent that this attributes an improbably considered train of thought to a man under lethal attack. In so far as Mr Vasyli reasoned the matter through at all, as opposed to operating on instinct, he may well have reckoned that locking the door on the appellant was worthwhile even if it only delayed her. In any event, this is very much a jury point.

Conclusion on Issue (i)

75. For the reasons set out above, the Board considers that there was a case to answer. Whether considered individually or collectively, the Board is not persuaded that the four evidential points raised by the appellant preclude or undermine that conclusion. In so concluding the Board has well in mind the burden and standard of proof resting on the prosecution.

Issue (ii) - Whether the Board should order a retrial or remit the matter to the Court of Appeal

76. It is accepted that the usual practice would be for the Board to remit the question of whether there should be a retrial to the Court of Appeal. The assessment of whether there should be a retrial involves a balancing of factors, including local conditions which the Court of Appeal will be better able to identify and assess. As Lord Diplock stated in *Reid v The Queen* at p 346D:

> "… any consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual defendant and the prosecution in the particular case. The weight to be given to these various factors may differ from case to case and depends very much on local conditions in Jamaica with which the Court of Appeal is much more familiar than their Lordships and is better qualified to assess."

77. In the present case, however, it was submitted by the respondent that the Board should itself order a retrial. It was pointed out that the Court of Appeal, having directed itself in accordance with the leading authority of *Reid v The Queen*, has already indicated that it favours a retrial, having had regard to local conditions and the seriousness of the charge of murder. The majority ordered a retrial and the only reason

given by Crane-Scott JA for not so ordering was her conclusion that there was no case to answer. Had she concluded otherwise, it was submitted that it is reasonably clear that she would have been of the same view. In these circumstances, there would be no substantial advantage in referring the question to the Court of Appeal, but much disadvantage in terms of further delay.

78. Whilst the Board recognises the force of these submissions and the undesirability of further delay, the Board is not persuaded that it should exceptionally depart from the usual practice. The discretion to exercise the power to order a new trial rests with the Court of Appeal rather than the Board. Although the Court of Appeal have indicated how they would be likely to exercise that discretion, that was without the benefit of submissions from the appellant. The balancing exercise needs to be carried out by reference to conditions now, rather than at the time of their earlier decision. If a retrial is ordered it would be necessary to make ancillary directions in relation to such a retrial, which the Board cannot do. The Board accordingly considers that the issue of whether there should be a retrial should be remitted to the Court of Appeal, whilst emphasising the desirability that this be dealt with promptly given the delays which have occurred. The Board also wishes to emphasise that since the parties agreed that the Board should determine the question of whether there was a case to answer, which it has done, that issue should not be included in the matters remitted.

Conclusion

79. The Board will humbly advise Her Majesty that the appeal should be allowed, that the Court of Appeal's order of a retrial should be set aside, and that the matter should be remitted to the Court of Appeal for reconsideration of whether there should be a retrial.