Privy Council Office
Judicial Committee

Privy Council Appeal No. 76 of 1998

John Earl Baughman

Appellant

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF ANTIGUA

AND BARBUDA

_____

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 25th May 2000

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Present at the hearing:−

Lord Slynn of Hadley

Lord Hutton

Lord Hobhouse of Woodborough

Lord Millett

Sir Andrew Leggatt

*[Majority Judgment delivered by **Lord Hobhouse of Woodborough**]*

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On Saturday 27th May 1995, Valerie Baughman, the wife of the appellant, fell some 99 feet to the ground below from the roof of the Royal Antiguan Hotel, Antigua. She was killed outright. She and the appellant were from Illinois USA. They had been married for only four years; she was not his first wife. They had come for a short holiday in Antigua and Barbuda, re−checking into the hotel only two days earlier, and were due to leave again on the 28th May. The police were not satisfied with the explanation which the appellant gave of how his wife came to fall from the roof and he was charged with her murder. The appellant's explanation was that she stumbled and fell over an unguarded parapet about 16" high. The prosecution case was that he pushed her over.

In March and April 1996, the appellant was tried before Redhead J. and a jury. The jury found him guilty of murder. He appealed against his conviction to the Court of Appeal contending that evidence had been improperly admitted and that the summing up was biased and defective. In reserved judgments delivered on 15th September 1997, the Court of Appeal, Bryon C.J., Satrohan Singh J.A. and Matthew J.A., dismissed his appeal. Matthew J.A. held that in some detailed respects the summing up was defective and, by implication, that these deficiencies amounted to a material irregularity; he applied the proviso concluding:−

> "Despite the deficiencies in the summing−up to which I have referred above, I am of the view that the Prosecution had made a strong and persuasive case that the Appellant had murdered his wife. I am of the view that had the Jury been properly directed they would inevitably have returned the same verdict of guilty of murder."

The only other reasoned judgment was that of the Chief Justice. Despite the fact that he opened his judgment by stating that he agreed with the conclusion of Matthew J.A. and said that he wished to explain why he held the view that it was an appropriate case to apply the proviso, the thrust of his judgment was that he did not accept that the legitimate criticisms of the summing up amounted to material irregularities in the trial. Having referred to certain features of the evidence given at the trial and the arguments of the appellant, he said, using words which also accurately describe the hearing before their Lordships' Board:−

> "In short, I have formed the view that the criticisms of the summing up which were very eloquently and forcefully argued by learned counsel for the Appellant demonstrated no more than minor deficiencies which did not affect the justice of the case."

He concluded:−

> "I was satisfied that the Jury had ample evidence to support their verdict. The deficiencies in the summing up which Counsel for the Appellant succeeded in demonstrating were minor and it is inconceivable that a Jury properly directed would have come to any other verdict."

Satrohan Singh J.A. unsurprisingly felt it unnecessary to choose between the two approaches and contented himself with concurring in the dismissal of the appeal. The criticisms did not affect the safety of the conviction.

The appellant has with special leave appealed to their Lordships' Board against the dismissal of his appeal by the Court of Appeal.

The prosecution case at the trial gained only limited support from the physical evidence. The injuries on Mrs. Baughman's body were considerable but did not assist to answer any disputed question. The position where the body was found, a lateral distance of 14 feet out from the side of the building did support the prosecution case. If she had simply fallen without being propelled in some way, how did she come to have landed so far out? The prosecution called a Mr. Lewis, a civil engineer to explain to the jury the mathematics of the speed at which a falling body accelerates towards the ground and the need for the initial application of a measurable horizontal force before the start of the fall to achieve the horizontal displacement. She would only take 2.48 seconds to fall the full distance and the horizontal speed imparted would have to be about 3.8 mph. This made an accidental fall improbable.

One of the grounds of appeal before their Lordships and before the Court of Appeal was that Mr. Lewis should not have been allowed to give this evidence. It was argued that he lacked the necessary expertise and, it seems, that the evidence was in any event irrelevant and inadmissible. This ground of appeal was rightly rejected by the Court of Appeal. The limited evidence which Mr. Lewis gave was clearly within his expertise and went to a question which was relevant and upon which the jury required expert assistance. The jury would need to consider what the significance was of the position where the body fell to the acceptance or rejection of the appellant’s explanation.

A second expert witness, Mr. Workman, was also called at the insistence of the appellant to give evidence on the same point but his evidence merely strengthened that of Mr. Lewis. He confirmed that, if the body had fallen without any lateral impetus being applied, it would have fallen closer to the building and landed on a 9' wide metal platform about 10' above the ground. This platform formed part of a fire escape on the outside of the building bounded by a metal railing. This railing was to feature in a statement made by the appellant from the dock at the trial. He had not mentioned it earlier. In re−examination Mr. Workman said that the requisite lateral force *could* have been a push, implicitly accepting that it could also have been something else.

The prosecution case had to rely upon circumstantial evidence. But this included the evidence of a Mr. Philbert Jackson who had happened to be sitting outside his apartment in sight of the hotel and to have a pair of binoculars with him. His attention was drawn to the hotel when he heard Mrs. Baughman scream. He saw the immediate aftermath of whatever it was caused Mrs. Baughman to fall. He was a very important witness. His credit was attacked; the jury had to decide whether to accept his evidence. The other circumstantial evidence was less powerful and directed more to rebutting the appellant’s explanation and showing that he had lied. The prosecution, as they were entitled to, sought to establish that the appellant had told lies in attempting to persuade the police that the fall was an accident. The prosecution submitted to the jury that he had lied to cover up his guilt. As to his motive, the prosecution case was that he had grown tired of his wife and wished to collect $200,000 insurance on her life.

A notable feature of the trial was that the appellant elected not to give evidence. He chose instead to make an unsworn statement from the dock. The defence case, apart from its attack on the prosecution witnesses, had to be derived from what the appellant said in this statement and had said in interview. The prosecution did not know in advance whether the appellant was going to give evidence at the trial and consequently a number of the witnesses were called by the prosecution primarily to give evidence which would contradict explanations which the appellant had given in interview and could be expected to repeat on oath if he himself gave evidence. The appellant's submissions before the Court of Appeal and their Lordships' Board were largely directed to criticising the probative force of this evidence as if it stood alone and was not essentially rebutting in character.

In order to understand the course of the trial and the significance of the evidence called by the prosecution it is necessary first to summarise the account given by the appellant in interview. He said that his relationship with his wife was warm and loving. They had discovered the staircase which led from the 8th floor of the hotel where their room was to the roof and had on a number of occasions gone up there together in order to enjoy the view. On the morning of the 27th they went to the pool together. After lunch, his wife went back to the pool. She was rather depressed. She had a number of drinks both before and after lunch but he did not because he had a tummy upset. He went off to a shop to buy a newspaper and on impulse bought a pack of greetings cards. He went back to the hotel room and wrote up two of the cards with love messages for his wife. He put one on her pillow and the other in a small plastic bag which he took with him.

Having rejoined her at the pool, the appellant and his wife went back to their room at about 5.00 p.m. She found the card on her pillow. They then went up to the roof.

> "We walked up the stairs either side by side or may be I was one step ahead but we were holding hands. When we reached the tile area on the roof we stepped out on the tiles and I think we glanced at the hill to look for the goats. It was a very short time before I pulled the card out of my pocket and I started to hand it to Valerie and she reached for it and I think it hit the side of her hand and it fell. It didn't fall straight down it kind of fell at an angle may be a foot and a half in front of us and we both started to pick it up and 'am well' in order to pick it up you had to take a short step as it was not right at our feet, so as she went forward her foot and either one was slightly on the edge of the other or may be she did not lift her foot up and it did not slide very well. Valerie was wearing slippers. Well her body was going forward and her foot did not go far enough so she lost her balance and she stumbled forward and took a step or two in trying to regain her balance and she just went right off the roof.
>
> Ques. What else happened after that?
>
> Ans. I ran down the stairs and I saw Valerie lying on the ground. She was not moving and her legs looked all broken up. She appeared to be unconscious or dead.

Ques. Before Valerie went off the roof did she say anything?

Ans. When Valerie bent over to take up the card she said honey but she did not say anything else before she went over. When she was in the air going down she screamed.

Ques. In what position was Valerie when she went over?

Ans. She stumbled forward and went over the top.

Ques. In what direction was Valerie facing when she went over the top?

Ans. She was facing the hill with the houses over looking the hotel. She went over at an angle little to the right.

Ques. Where was Valerie standing in relation to the area where she fell when you attempted to give her the card?

Ans. I don't know. May be about 4ft to 5ft from the edge.

Ques. At the time when you observe Valerie stumbling did you say anything?

Ans. I was picking up the card. We were both picking up the card.

Ques. How far away you were from her when she started stumbling?

Ans. Next to her, side by side, facing the hill where the houses are and she was on my right side.

> Ques. What happened to the card which you said drop?
>
> Ans. I had picked it up and I think I dropped it again. I picked it up again before I ran down the stairs."

In his statement from the dock, the appellant added to this account:−

> "… as I was coming up, picked up the card, she was falling over the side of the roof. She seemed mid air and she disappeared from my sight because of the wall. I went to the edge of the roof. I don't know how far it was when I saw her going over. I dropped the card again. I saw her falling further and further away. I saw her hit the railing of the fire escape. There was also a second scream before she hit the railing. When she hit the railing, I saw her body flipped. Then she hit the ground."

He had not mentioned seeing the body hit the railing until he made this statement; it was made after the expert evidence had been given about how the body would fall. However it raised fresh difficulties for him. The evidence was that the body would have only taken $2^1/_2$ seconds to fall the whole way to the ground yet he was able to get to the edge of the roof in time to see it hit the railing of the platform $10^1/_2$ feet above the ground. There was also the evidence of Mr. Philbert Jackson.

Mr. Jackson was called by the prosecution. He had been standing with a pair of binoculars on the front balcony of his house. He had a good view of among other things the hotel on the side from which Mrs. Baughman fell. His attention was drawn to the incident by hearing her scream. Thus he did not see what preceded her fall but he did see what followed. In the statement which he gave to the police the following day, he described seeing someone falling from a height to the ground. Then he looked at the roof of the hotel and saw a man pacing about who then went and looked over the southern side of the roof and then ran down the external steps to where the body was.

Two days later Mr. Jackson amplified his statement giving more detail of what he had seen. He confirmed that when he first saw the woman she was already falling from the roof of the building.

> "She was just about the same level with the roof but she was in the air. She was falling backwards with her buttocks pointing down and her feet hunched to the level of her chest. [He described her clothing.] At the time I saw the woman falling, the man was standing on the roof facing the direction in which the woman was falling. I cannot say how far from the edge of the roof he was standing."

At the trial, Mr. Jackson gave similar evidence saying that he saw a woman falling backwards − at the level of the edge of the roof: she looked as though she had just gone over the edge. The judge rightly told the jury: "The evidence of Philbert Jackson is very important". The defence challenged the veracity of his evidence both at the trial and on the appeals. The

suggestion was that he had not seen what he claimed and that he had made it up. The damning part of his evidence was that she was falling backwards but it was also inconsistent with the statement of the appellant that he had been at the roof edge in time to see his wife hit the railing. No reason was shown why Mr. Jackson should have lied. It was a matter for the jury and they must have believed him.

Another salient aspect of the evidence was the appellant's story about the card. The prosecution called the shop assistant who had sold the packet to him. This had been on the day before the death of Mrs. Baughman, not the day of her death as the appellant had said. They both came into the shop not just him. She was able to identify the card in question as having come from her shop.

Following the appellant’s initial explanation to the police of what had happened on the roof, the detective looked for the card on the roof. He told the appellant that he could not find it. The appellant then produced it from his pocket still wrapped in its transparent plastic bag. This again raised a question about the appellant's account which counsel was not able to resolve: either he had attempted to give it to his wife without removing it from the bag or else, when he picked it up before leaving the roof, he had put it back in the bag before going down to see what had happened to his wife.

On the Monday 29th May the detective took the appellant to the roof and got him to demonstrate what he said had happened. The place where he indicated that they had been standing was about 6 to 7 feet from the edge and where the card fell was about 4 feet from the edge. The appellant said: "I handed her the love card and it dropped. Both of us went down to pick it up and she stumbled, went forward and fell over the top".

These were the most important parts of the evidence and there can be no criticism of the fair way in which the judge summed them up to the jury. Mr. Watt for the appellant submitted to their Lordships as he did to the Court of Appeal that Mr. Jackson's evidence was so inherently incredible that the judge should have directed the jury to disregard it as a recent invention. This submission was clearly unsound since the substance of Mr. Jackson's evidence at the trial was the same as that he had given in his more detailed witness statement made only three days after the incident.

The other evidence given at the trial was less clear. There was evidence each way concerning whether the body of Mrs. Baughman had hit the railing. Two employees at the hotel gave evidence of hearing a noise which suggested that it had. The detective's examination of the railing could find no physical evidence that it had. The son of Mrs. Baughman by an earlier marriage gave evidence that his mother was frightened of heights and was only a moderate drinker. This evidence cast doubt upon the account which the appellant had given in interview and raised questions about how it was that an excessive quantity of alcohol was found in the blood of Mrs. Baughman after her death. There was also a conflict between the evidence of the son and that of the appellant as to whether the state of the appellant's relations with his wife were as warm as he said they were. In this the appellant had the support of other witnesses including a taxi−driver, Mr. Roberts, who said that they seemed to have a good relationship.

The fact that the appellant had insured his wife's life and stood to gain $200,000 from her accidental death was proved by evidence and not disputed. However it was done through an employee scheme available to the appellant and not without

more suspicious, although it did give him an additional motive. Similarly, there can be little doubt that at the trial excessive attention was paid to the question whether the appellant had made a claim on the policy. It was not clear on the evidence that he himself had made the claim as opposed to someone in his employer's organisation. The appellant was under arrest in Antigua. The address used for the claim was not the appellant's home address. But, in any case, given that the policy existed and that the appellant said that the death was accidental, the making of a claim was in itself not suspicious; it is what one would have expected an innocent man to do. It may be thought that the failure to make a claim would be more suspicious.

Another feature which was suspicious but gave rise to no unequivocal inference was the curious story of the changing of the locks at the house where the appellant and his wife lived immediately before they had left for their holiday. (This may have had a connection with the use of a different address in relation to the insurance.) However it seemed clear that the appellant gave a lying explanation of this to her son and to the police. The significance of this aspect of the evidence was that it provided one of a number of instances where there was strong evidence that the appellant had lied giving rise to an inference that he was doing so in order to conceal his guilt.

The case against the appellant at his trial derived from the evidence of Mr. Jackson and the detective. It was supported by the evidence concerning the card and the inference which could properly be drawn from the lies which, on the evidence, the appellant had told. This level of proof was not rebutted by any sworn evidence from the appellant. It was a strong case. The jury were entitled to find the appellant guilty.

The summing up was overall fair. The only sustainable criticisms which can be made of it are minor. They were recognised by the Court of Appeal.

To take the judgment of Matthew J.A. first: he criticised a suggestion by the judge that the jury should ignore the demeanour of the appellant in the dock, the invitation by the judge to consider why, if she was not an excessive drinker, Mrs. Baughman had drunk as much as she did on the day of her death, and the failure of the judge to remind the jury of the evidence of the taxi−driver and the shop girl that the couple seemed to be in love.

Byron C.J. said that he was not convinced that the summing up was unbalanced. On this basis, there would have been no need for him to go on and discuss the application of the proviso. He did not accept that there were any misdirections. He said that the criticisms of the summing up very eloquently and forcefully argued by counsel for the appellant "demonstrated no more than minor deficiencies which did not affect the justice of the case". His actual view was, therefore, that there was no material irregularity.

However, Byron C.J. went on to consider the application of the proviso. He reviewed the evidence in the case. He said: "In fact the only conclusion to draw from the evidence is that the deceased was pushed off the roof by the appellant". "It is inconceivable that a jury properly directed would have come to any other verdict".

Matthew J.A. also reviewed the evidence. Having done so, he too concluded that "had the jury been properly directed they would have inevitably returned the same verdict of murder".

The test which the Court of Appeal applied was a proper one. Byron C.J. and Matthew J.A. took into account the limited deficiencies in the summing up which they considered had been shown to exist and then asked whether, if there had not been these deficiencies, it was certain that the jury would still have arrived at the same conclusion. It cannot be said that the Court of Appeal applied too low a test. On the evidence given at the trial their conclusion was fully justified. The deficiencies in the summing up did not relate to those matters which were the most central to the prosecution case, the evidence of Mr. Jackson and the story of the card. Therefore their Lordships are of the opinion that the Court of Appeal were right to dismiss the appeal and conclude that the deficiencies in the summing−up did not affect the inevitability of the jury’s verdict.

Before their Lordships’ Board, counsel for the appellant subjected the discussion of the evidence in the judgments of the Court of Appeal to a close critical examination. As will already be apparent, their Lordships think that there was force in a number of these criticisms. For example, disproportionate importance appears to have been placed upon the evidence regarding the making of a claim upon the life insurance policy and the changing of the locks. Their Lordships have accordingly felt justified in reconsidering the application of the proviso in this case and, having done so, have come to the conclusion that it was correctly applied.

The substance of what has occurred on this appeal is that the appellant has sought through the eloquence of his counsel to achieve a review of the whole of the evidence given at the trial by their Lordships’ Board as a second tier Court of Appeal. That is not the function of this Board. (*Lee Chun−Chuen v. The Queen* [1963] A.C. 220.) No error of law has been shown. On the most favourable view of the appellant's argument, all that he has shown is that there *might* be room for more than one view as to the strength of the prosecution case and the applicability of the proviso. The division of opinion among their Lordships is further evidence of this. In their Lordships' judgment this is not the case but even if it were that is not an adequate ground of appeal to their Lordships' Board. Such an exercise of judgment was the function of the Court of Appeal. An appellant on an appeal to this Board needs, in the absence of some new evidence or argument not considered below, to show some error of law or of principle by the Court of Appeal. That has not been shown here. The arguments advanced have simply been a repetition of factual arguments advanced unsuccessfully in the Court of Appeal.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Dissenting judgment delivered by **Lord Slynn of Hadley**

and **Lord Hutton**

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We are unable to agree with the majority judgment that this appeal should be dismissed. Whilst the Crown case was a strong one in a considerable number of respects we consider that the Court of Appeal erred in its application of the proviso and that in the particular circumstances of this case it would not be right for this Board to apply the proviso.

The Crown made the case to the jury that the motive for the murder was that the appellant was unhappy in his marriage and wanted his wife dead so that he could receive the $200,000 payable on her death under the group insurance scheme of the company which employed him.

It is therefore apparent that an important matter for the jury to consider was whether the appellant was happy in his marriage or whether there was antagonism between him and the deceased. The Crown called Victor Delaurier, a son of the deceased by her first marriage, to give evidence that for the year and a half before his mother died the relationship between her and the appellant appeared to be very stressed. He said that there were:−

> "… fights at social gatherings, i.e. verbal arguments that would escalate into a lot of tension. The fights were not a single time, most of the time it would start off with something small then it would escalate into larger fights for reasons unknown to me. This took place over the last year and a half before she died. The last incident took place a couple of months prior to my mother's death, we – my mother, the Accused, my wife and myself went out to dinner. The Accused was driving at the time faster than the speed limit and weaving in and out of traffic. My mother asked if he would slow down. He ignored her and continued to speed. She then asked him again to please slow down. We were not in a hurry. At that point he stopped and he told her not to tell him how to drive and if she wanted to drive he would pull up by the side of the road. She responded that she just wanted him to slow down. He responded to her to be quiet and again if she wanted he would pull up by the side if she wanted to drive. My wife and I then tried to change the subject.
>
> My relationship with the Accused was good. We often watched basketball games together in the family room. We got along well."

We observe that the son's account of the argument over the speed at which the appellant was driving and his reaction when the deceased criticised him would appear to fall short of showing real antagonism between the couple.

The appellant called as a witness, Keith Roberts, a local taxi driver who drove the appellant and the deceased soon after they arrived in Antigua. He said in his evidence:−

> "They were staying at the hotel approximately 2 weeks. I drove them about 5 times in the first week. I took them to a tour of Nelson's dockyard, Shirley Heights, along the South West course. That was one day. That tour took approximately 6 hours. We had lunch at English Harbour. I had lunch with them. At the end of the tour I took them back to the hotel. They always had a good relationship in my presence. They never disagreed on any

> place or they did (sic) in my presence. They seemed to be very much in love. They made me jealous. I made that comment before. They were mostly holding hands. Whenever they went places they were always close.
>
> I took them on a tour on the north side of the island. Fort James, Dickenson Bay, Hodges Bay, Devils Bridge, Long Bay snorkeling and lunch. They were the same people. I took them into St. John's many times. I usually leave them and pick them up. I transported them one day to the Airport to go to Barbuda. They were quite excited. I told them I have never been to Barbuda.
>
> Two days later I saw them at Royal Antiguan Hotel in the lobby. They were checking in at the front desk. I spoke to them. Mr. Boughman [sic] said he did not like Barbuda. Shortly after, I took them into St. John's. They seemed the same to me. I never saw a change in their relationship. It was a Thursday I saw them checking in back at the Hotel. It was a Thursday before the incident. The following day I took them back to St. John's. It was about 11:30 a.m. They looked just the same, no change. I did not take them back to the hotel that day. I work at the Hotel at nights sometimes. I can't recall driving them at night.
>
> I never say [sic] them at the hotel, just when they hailed me, I saw them. Mr. and Mrs. Boughman seemed to be very happy together."

This was important evidence for the defence, but in his summing up, which in the main was full and careful, the judge dealt with this evidence very briefly and merely said:−

> "Keith Roberts told you that these people appeared to him to be very much in his [sic] love to the point that they made him jealous. You will make what you will of that."

In the appeal to the Court of Appeal one of the grounds of appeal was that the judge failed properly, adequately and fairly to put the case for the appellant to the jury. This ground of appeal was upheld by the Court of Appeal. The leading judgment was given by Matthew J.A. He stated:−

> "Counsel submitted that the Judge made a number of comments or observations some of which invited speculation from the Jury. One such example was where the learned trial Judge told the Jury that the Appellant at one stage appeared to be crying and whether it was genuine or simulated they had no means of knowing but even if they found that it was genuine they should not allow that to influence their decision one way or another. It seems to me that the learned trial Judge was here telling the Jury that they should ignore the demeanour of a genuine witness.

> Another example pointed out was where the learned trial Judge told the Jury they may well wonder why the Deceased drank so much on the day of her death if they found that she only occasionally had a glass of wine. Here again it seems to me the Jury were being invited to speculate.
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> Learned Counsel for the Appellant stated further that when the trial Judge dealt with the defence of the Appellant he said nothing about the way the couple got on at the hotel and other places in Antigua as had been given in evidence by Kathleen Morton, a witness for the Prosecution and by Keith Roberts the taxi driver who drove them around and who was of the view that the couple seemed to be very much in love.
>
> I am of the view that there is merit in that submission."

Matthew J.A. then turned to consider whether the Court of Appeal should apply the proviso contained in section 40 of the Eastern Caribbean Supreme Court Act which provides:−

> "(1) The Court of Appeal on any such appeal against conviction shall subject as hereinafter provided allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:
>
> Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

Matthew J.A. stated:−

> "To decide that question the Court must try to determine whether it can with certainty be said that had the Jury been properly directed they would inevitably still have convicted the Appellant of the offence of murder."

Having considered the evidence the learned Justice of Appeal concluded that the court should apply the proviso and it is clear that Byron C.J. and Singh J.A. concurred in that decision to apply the proviso, and the appeal was dismissed.

Byron C.J. stated:−

> "I have read the judgment of Matthew J.A. and agree with the conclusion he reached. I want to explain why I hold the view that this is an appropriate case to apply the proviso."

Singh J.A. stated: "I concur".

In *Lee Chun−Chuen v. The Queen* [1963] A.C. 220, 231 Lord Devlin, giving the judgment of the Board, said:−

> "Their Lordships apprehend that the Board will not put itself in the position of the first appellate court and review every exercise of the proviso as a matter of course. If the relevant factors have been considered and weighed by that court, the Board will not repeat the process in order to adjust the balance according to its own ideas. But if the process employed by that court is defective in that it has made a wrong approach to the problem or considered irrelevant factors or given them a weight that is gravely out of proportion to their true value, the Board will disregard the finding of the appellate court and approach the matter anew."

The case made by the Crown against the appellant was a case based on circumstantial evidence and we are of opinion, with great respect to the Court of Appeal, that the approach which that court took to the assessment of the circumstantial evidence was flawed and erroneous so that its decision to apply the proviso was taken on an erroneous basis.

In *McGreevy v. Director of Public Prosecutions* [1973] 1 W.L.R. 277 the House of Lords, whilst holding that a trial judge was under no duty to give a special direction to a jury in respect of circumstantial evidence, recognised at page 284 that there were a number of judgments and textbooks which gave guidance as to the proper approach to the assessment of circumstantial evidence. One such judgment was that of Lord Goddard C.J. in *Reg. v. Onufrejczyk* [1955] 1 Q.B. 388 when, in dealing with the situation where in a murder case no corpse had been found, he said at page 394:−

> "… it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only."

To the same effect was a statement in *Taylor on Evidence* 12th ed. (1931) vol. 1, pp. 67−67, para. 69 where referring to circumstantial evidence it is said that after the facts sworn to are proved a further and highly difficult duty remains for the jury to perform:−

> "They must decide, not whether these facts are consistent with the prisoner’s guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused."

We consider that the error in the approach of the Court of Appeal was that whilst there was evidence which could lead to the conclusion that the appellant had deliberately pushed his wife off the roof, there were other possible explanations for some of the evidence relied on by the Crown which could lead to the conclusion that the appellant had not formed the plan to kill her and that the fall was an accident.

In their judgments Byron C.J. and Matthew J.A. referred to a number of pieces of evidence which (*inter alia*) they considered pointed to the appellant's guilt and they placed particular emphasis on the appellant's entitlement to the insurance monies payable on the death of his wife. Byron C.J. said:−

> "The evidence went far enough to paint a picture of a cynical and calculating man who had taken out an insurance on the Deceased's accidental death, and before the vacation had changed the locks on the matrimonial home and within days of the Deceased's death had arranged for the insurance brokers to begin processing the insurance claims through an address that was different to the matrimonial address."

Matthew J.A. said:−

> "… I think it can safely be assumed that the Appellant either gave or was privy to the address on record to which the claim form was sent following upon the notification of the Deceased's death. The clear inference arises that the Appellant did not intend to return to his normal Illinois address but to the other address on record to attend to the claim form while at the same time making it more difficult for the Deceased's relatives, in particular her daughter, who had a key to the former lock to their home to gain entry. Once it can be inferred that the Appellant intended to attend to a claim form for insurance purposes consequent upon death of the Deceased the motive becomes obvious."

We consider that it was not a necessary inference from the evidence of the official of the firm of insurance brokers that the appellant was instrumental in notifying her firm on 8th June 1995 of his wife's death, and that he did not intend to return to the house where he lived with his wife after the vacation but intended to go to the other address at Limon Avenue to attend to the claim form. We consider that it is a reasonably possible inference that the appellant was not responsible for the notification of the death of his wife to the insurance brokers, and that when he did not return to work as expected after his vacation someone in the company where he worked learnt of the death of his wife and arranged for notification of the death to be given to the insurance brokers. Again, there was no evidence whether the appellant had ever lived at the address in Limon Avenue and there was no evidence as to how and when that address was given to the insurance brokers, and it seems to us to be a reasonably possible inference that the address at Limon Avenue was an old address of the appellant which had been given quite innocently to the insurance brokers. Therefore we consider that the Court of Appeal erred in failing to recognise that the evidence about the insurance monies was not inconsistent with the innocence of the appellant.

Matthew J.A. referred to the fact that the deceased was "loaded with alcohol" and said:−

> "There is evidence that Valerie was not near the edge of the roof. The Appellant himself stated that she was four to five feet away from the edge when he attempted to give her the love card and he said he was next to her, side by side when she started stumbling. It seems to me that such a person in the condition of the Deceased in her attempt to pick up

> the love card would in all probability fall to the ground immediately below her and would not reach as far as the edge of the roof."

This is a reasonable inference, but it is not the only inference which is reasonably possible. We think that a person who was drunk and who stumbled when bending down to pick up a card which she had dropped might be more liable to stumble a few steps than a person who was sober.

Matthew J.A. referred to the actions of the appellant after the deceased had fallen from the roof. He said:−

> "… Philbert Jackson in his evidence stated that it was after he yelled that the Appellant reacted to the woman falling. He said before that the Appellant was just standing there. If the Jury believed Jackson that the Appellant, after the Deceased's fall, only remained standing on the roof and only reacted after Jackson did, this would indicate the unlikely behaviour of a man whose loving wife had accidentally fallen over the edge of the roof of a hotel.
>
> There is a partial similarity with the evidence of Avon Simon, the Duty Manager of the hotel. He said that he was on the second floor of the hotel when he heard a scream. Then he ran downstairs. He was stopped by one of the housemen who spoke with him. He went to the back of the hotel outside where he saw a fat lady lying on the ground. He then saw the Appellant standing on the fire escape and he was looking over and when Simon looked up he moved off. From that evidence it is evident that the Appellant had made no hurry to see what was taking place on the ground. And that as I said is indeed strange behaviour."

Again, this is a possible inference, but we think that it is not the only inference which is reasonably possible. If the deceased had fallen from the roof accidentally, the shock for the appellant might have been such that he did not immediately react, and when coming down the fire escape the appellant may have stopped to look over at his wife's body on the ground. Moreover if the appellant had planned to push his wife off the roof it would appear to be a reasonably possible assumption that he would have planned to behave in such a way after the fall as would convey to an onlooker his horror and distress at what had happened.

Byron C.J. and Matthew J.A. referred to the deceased's scream. Byron C.J. said:−

> "… the scream rebutted the alleged use of the word 'honey' as she went over."

Matthew J.A. said:−

> "Having regard to the condition of the Deceased at the time in question, it seems to me that an accidental fall would not be accompanied by such a sharp or loud scream. The scream would be more consistent with the Deceased recognising the imminent danger that was to befall her."

A loud scream would be consistent with the realisation by the deceased that her husband was pushing her off the roof, but in our opinion it would also be consistent with the realisation by the deceased that she had lost her balance and was falling off the roof and with her saying "honey" before she fell.

Therefore we are of opinion that the Court of Appeal erred in the approach which it took to assessing parts of the circumstantial evidence, because it failed to recognise that those parts did not lead only to the conclusion that the appellant was guilty but that it was reasonably possible to view them as consistent with his innocence.

Accordingly, as Lord Devlin stated, it is for the Board to consider whether it is proper to apply the proviso. The test for the application of the proviso is whether if a reasonable jury had been properly directed they would inevitably have convicted. In giving a proper direction to the jury the judge would have had to tell them that:

(1) It was quite normal for a person employed by a company, such as the appellant, to have taken out insurance of $200,000 on the life of his wife and they should bear in mind that the appellant joined his company's insurance scheme in the first half of 1994. In addition they were not entitled to infer that the appellant caused notification of his wife's death to be sent to the insurance brokers on 8th June 1995, and they were not entitled to infer that there was anything sinister in the insurance brokers having the address of Limon Avenue. Therefore they should be slow to infer that the appellant was motivated to kill his wife in order to recover the $200,000 in insurance monies.

(2) That in deciding whether the appellant had a motive for killing his wife because he was unhappy in the marriage they should (whilst bearing in mind that the appellant's attitude towards, and his conduct with, his wife during the taxi journeys may have been a contrived artifice) give very careful attention to the evidence of the taxi driver, Keith Roberts, that the appellant and the deceased always had a good relationship in his presence and that they seemed to be very much in love, and the jury should weigh that evidence against the evidence of the deceased's son Victor Delaurier, that for a year and a half before the death there had been verbal fights and that the relationship appeared to be very stressed.

Having regard to these points, and whilst recognising the strength of the points validly made by the Crown in reliance on other parts of the evidence, we are not satisfied that a reasonable jury would inevitably have convicted. Accordingly we would humbly have advised Her Majesty that the appeal should be allowed and the conviction quashed and the case remitted to the Court of Appeal to consider whether a retrial should be ordered.

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