[2011] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 156/2007

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

MELODY BAUGH-PELLINEN v R

Robert Fletcher and Miss Stacey Bushay for the appellant

Miss Kathy-Ann Pyke and Mrs Paula Archer-Hall for the Crown

3, 4 November 2010 and 8 July 2011

MORRISON JA

Introduction

[1] The appellant and Mr Marvin Stewart were jointly charged with the offence of murder and were tried before Daye J and a jury in the Circuit Court Division of the Gun Court, held at Duncans in the parish of Trelawny, at a trial which took place between 4 and 17 December 2007. At the close of the case for the prosecution, the Crown offered no further evidence against Mr Stewart, who was accordingly discharged. However, on 17 December 2007, the appellant was convicted of the offence of murder and sentenced on that same day to imprisonment for life. The trial judge stipulated that the

appellant should serve 21 years in prison before becoming eligible for parole. On 21 December 2007, the appellant applied for leave to appeal against her conviction and sentence and on 8 December 2009 the application was considered and granted by a single judge of this court.

The prosecution's evidence at trial

[2] The appellant was indicted for the murder of her husband, Mr Timo Pellinen, on 1 October 2005. Mr Pellinen died as a result of having received two gunshot wounds to the head and neck, resulting in cranium cerebral damage and injury to the left neck blood vessel, accompanied by blood loss. The expert evidence was that, given the extent of his injuries, death would have been immediate.

[3] In the late evening of 1 October 2005, the appellant and the deceased were travelling together in a motor car driven by the appellant along the Harmony Hall main road in the parish of Trelawny, en route from the Donald Sangster International Airport in Montego Bay to Ocho Rios. Shortly after the appellant brought the car to a stop on the soft shoulder of the road at a dark and lonely point along the way, the deceased was shot and killed by an unknown man, who subsequently made good his escape. The prosecution's case against the appellant was based on a combination of circumstantial evidence, two written statements made by her to the police and certain oral statements allegedly made by her to Miss Michelle Howard, during a period when they were both incarcerated in a cell at the Stewart Town Police Station.

[4] At sometime after 10:00 p.m. on the day on which the deceased was killed, which was a Saturday, Sergeant Jacqueline Green-Denton, who was at that time assigned to the Duncans Police Station, was on patrol in the area in a marked police vehicle. She was accompanied by other police personnel. In response to a telephone call from the police station, Sergeant Green-Denton and her team proceeded to a particular section of the Harmony Hall main road to a point about three quarters of a mile from the junction of the road and the Duncans bypass. There, she saw the body of a white male lying on the ground in a pool of blood which appeared to have come from a wound behind the man's left ear. Just ahead of the body on the soft shoulder of the road was a stationary Toyota Corolla motor car, the engine of which was running and the headlights and the radio were on. Both the driver's door and the front passenger door were open, but there was no-one in the car itself.

[5] At this point, Sergeant Green-Denton's attention was attracted to someone running towards her from a distance of about three to five chains away. That person turned out to be the appellant, who approached the police party crying out "God no mek him dead now, do God". When asked who she was by Sergeant Green-Denton, the appellant identified herself as the wife of the person lying on the ground and gave her name as Melody Baugh-Pellinen. She was crying and, in the sergeant's words, "hyperventilating". Sergeant Green-Denton tried to console her, before asking her what had happened, to which the appellant said this:

> "We were coming from airport in Montego Bay…because I want to pee-pee I stopped to do it here…When I stopped, I felt something hit into the back of the vehicle. Me and my

> husband got out to go look at the damage. He was talking to a man who came from the car that hit us. This man looked like an Indian. I ran off because I know something was going to happen. As I run off I heard a loud explosion. I didn't look back. I just ran straight down into the bushes. I stayed there and called the police emergency number and the police told me not to come out until I see a blue light flashing and that's why me come out now."

[6] Sergeant Green-Denton then asked the appellant why she had stopped at this particular section of the road, where, in the sergeant's words, "the place was pitch black". Further, whether there had been anyone else in the assailant's vehicle, and whether she had run off into the bushes because she had felt threatened. The appellant, in Sergeant Green-Denton's words, "refused to answer" any of these questions, but when next asked in whose car she and the deceased had been travelling, she answered, "Is a friend of mine own", adding, when asked about the friend's whereabouts, that she had "left him in Kingston to pick him up tomorrow". At this point, Sergeant Green-Denton, observing that the appellant immediately displayed what she described as "an 'oopsish' look…as if she had made a mistake" or said something that she should not have said, asked her the question again, to which the appellant then said that, "I left him in Kingston to do business and "he will tek a bus go home". At Sergeant Green-Denton's request, the appellant produced the documents for the car as well as some form of identification and volunteered that the plan had been for her to spend the weekend in Ocho Rios with the deceased. When she was asked why her friend had allowed her to drive by herself to Montego Bay, the appellant's answer was

that it was because "him know I can manage m'self. I know the road and I know the area well".

[7] While Sergeant Green-Denton tried to question her further, the appellant kept answering two telephones which were in her possession, "in hushed tones", and on four such occasions when the sergeant tried unsuccessfully to take a message for the appellant, the phones went dead as soon as she came on the line. As a result of this, Sergeant Green-Denton took custody of both telephones. She also retrieved from the left inner jacket pocket of the deceased a "burgundy looking" billfold, in which there were a passport, a travel itinerary and a quantity of cash, made up of US$2,020.00, J$200.00, £10 and €40. These items were all handed over to Detective Corporal Horace Bond, who was also on the scene, and the appellant was eventually taken to the Duncans Police Station.

[8] At the police station, a statement was in due course (on 2 October 2005) taken from the appellant by Detective Corporal Bond and at the trial this statement was admitted in evidence without objection as exhibit three. This is the appellant's statement as it was recorded by Corporal Bond:

> "Name: Melody Baugh-Pellinen. Age 24: Date of Birth: 4th/ 10/79:
>
> Occupation: Business women [sic]: Address: 77 Lyssons Road, St. Thomas. Tell: 849-9388.
>
> States: I know Timo Jusha Pellinen, he is my husband. I know him for more than three years. He is from Finland. He lives at 2B Nato Paco, Helsinki, Finland. We have been married for two years.

On Saturday the 1st of October 2005, 1:00 p.m. I drove from Lyssons, St. Thomas en route to the Donald Sangster International Airport in Montego Bay, St James. The car I drove is a black 1999 Toyota Corolla "L" Touring Station Wagon motor car, registered 6393 EP and owned by one Marvin Stewart, of 4 Phillips Avenue, Lyssons, St. Thomas. I was alone.

About 8:00 p.m. later that same day, I arrived at the Donald Sangster's International Airport. My husband arrived on an Air Jamaica Flight, which landed about 8:30 p.m. He did not carry any luggage as he was always against travelling with luggage.

We both boarded the car, that I drove and our first stop was at an Essso Service Station in Ironshore, Montego Bay, where my husband bought cigarettes and spring water.

We gain [sic] boarded the car 'I was the driver as we intended on going to Ocho Rios in St Ann to stay at the Jamaica Inn Hotel. I drove for some distance and upon reaching a section of the Highway in Trelawny, I felt an urgent need to pee. I told Timo that I wanted to pee and he told me to pull over. I put on my left indicator and pulled to the soft shoulder of the said high-way, before the car came to a dead stop I felt and heard a bump in the rear. I looked through my rear view mirror and saw two head lamps which were on. I stopped the car and come out [sic]. I went to the rear of the car that I was driving and realized that it was a car that had hit the rear. This car was not of a dark colour.

A man of clear complexion, medium built curly hair, like Indian, dressed in a white shirt, jeans pants and appeared to be in his late twenties to early thirties came from the left side of the car. I am not sure if it was from the front or the rear door. We were both looking at the damage that was done to my car, when Timo came out and joined us. I did not see anything in this man's hand. The damage was minor and I was about to walk off to pass urine when I heard a loud explosion like a gunshot, this explosion was next to me. I then become fearful and ran in the direction that my car faced. The headlamps on my car were still on the bulb, the engine was running. Whilst running I heard about one or two more explosions. I continued running up the road for some distance, then I turned to my left and ran into some nearby bushes. I then used my cell phone to

> call the police. I remained inside the bushes until I saw the police flashes and I came out of the bushes walked back to where my car was parked and saw Timo lying on his back on the roadway behind the car, blood was coming from the region of his neck and he appeared to be dead. The car that had bumped into my car was not there, neither was the Indian man.
>
> If I should see this man again, I will be able to identify him as I got a good look at his face with the assistance of the headlamps from his car that were on, as we were together for more than a minute. I do not know if Timo had any money on him, I cannot say if he was robbed.
>
> On Sunday 2nd day of October, 2005 I gave this statement to the police at the Duncans Police Station. The Declaration was read over to me and I indicated that I understood the meaning. The statement was read over to me and I signed both statement and declaration as true and correct.
>
> This statement, consisting of 1-3 pages, each signed by me is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution, if I have wilfully stated in it, anything which I know to be false or not believe to be true.
>
> Taken down by me at the Duncans Police Station. The declaration was read over by the maker who indicated that she understood the meaning. The statement was made by the maker who signed both statements and declaration as true and correct. H.B Det Cons. #
>
> The 2nd day of October, 2005."

[9] Later that same day, 2 October 2005, Detective Corporal Lenroy Arnett was directed to "record a comprehensive statement from [the appellant] in respect to the murder of [her] husband". This statement, which was also admitted in evidence at the trial (as exhibit four), again without objection, was in the following terms:

“Melody Baugh states: I am a female 24 years old and I am a businesswoman who operates a bar at my home which is situated at No. 77 Lyssons Road in the parish of Saint Thomas.

I was born on the 4th day of October, 1979, at Lyssons District in the aforesaid parish. My telephone numbers are 8499388 or 4665603.

I was grown up [sic] at Lyssons District with Grand Aunt whose name is Ina Baugh, now deceased and at the age of about seven years old I attended the Lyssons Primary School and during this period my mother, whose name is Vivienne Johnson, was also living at Lyssons District with me.

At the age of 12 years old I graduated from Lyssons Primary School in St. Thomas and I went to Yallahs Comprehensive High School for four years where I graduated at the age of sixteen years of age.

After leaving school I received a job in Kingston at Woolworth Store where I was employed as a sales clerk, where I worked for two and a half years, after which I came back to St. Thomas, where I worked as a shopkeeper at my mother's shop in Lyssons District.

Occasionally I would work with one Mr. Davis, who is a certified electrical engineer. Mr. Davis is still living in St. Thomas in a district known as Button Bay. I was also able to get a job in a bar at Portmore in the parish of St. Catherine. I cannot remember the name of the community that the bar was located.

About the age of nineteen I returned to St. Thomas and I did not work for a short period and at the age of twenty years of age my cousin, whose name was [sic] Sharon Ogilvie and who is living in London, England sent a plane ticket for me and I went to London for one month and I came back to Jamaica at my home in St. Thomas.

About one year after, I went back to London to visit my cousins during which time I saw and met an elderly white man who gave his name as Timo Pellinen. He was fifty-two years of age and I was twenty-two years of age. Both I and Timo got intimately involved and he told me that he had divorced his previous wife after which I came back to Jamaica.

Whilst in Jamaica both myself and Timo conversed via telephone very often and Timo also came to Jamaica for the first time in January of year 2003 and both of us stayed at an hotel in Ocho Rios known as Sand Castle for about three weeks after which Timo left to Finland where he is living.

In May of the year 2003 I went to Finland where I spent about three months with Timo during which time both of us got married on the 29th day of August, year 2003 and I returned to Jamaica in the early part of September of 2003.

Since our marriage my husband had made several visits to Jamaica during which time we stayed at Lagoons Apartment in Montego Bay. Both of us also went to St. Lucia together on vacation. Timo is a doctor by profession. He is the owner of a golf store in Finland. He is the owner of a two-bedroom flat which is attached to an apartment in Helsinki State,
Finland. He drives and own [sic] a Mercedes Benz in Finland.

Timo operates his savings at Nordia Bank in Finland where both of us have a joint account. In addition Timo gave me a United States account Master Card which able me to access cash from his account whenever I need it. However, I only use this card to purchase goods.

Both myself and Timo have two accounts at the National Commercial Bank in St. Thomas. Both of us agreed that I will be migrating from Jamaica to live in Finland sometime in the month of November, year, 2005. As a result of our planning I sold my red 1998 Rav 4 jeep in July of this year for the sum of Six Hundred and Fifty Thousand Dollars to a lady who I know from St. Thomas as Isha. This vehicle was previously bought for me by my husband for my 23rd birthday.

Since the last three months I knew that my husband was supposed to be coming to Jamaica on the 1st day of October, 2005. As a result I contacted the Jamaica Inn Hotel in Ocho Rios where I made a reservation for me and my husband and on the 1st day of October, year 2005, about 12 midday, I borrowed a black Toyota Torino motor-car from a friend of mine who I know very well as Marvin Stewart . When Marvin gave me the car I was dressed in a blue jeans pants and a red blouse and when I get the car I went into Kingston with Marvin into

the car and I left him downtown Kingston and I drove straight to Montego Bay where I only stopped once on the highway to urinate, after which I went straight to the Donald Sangster's International Airport in Montego Bay.

I reached the airport about 8:30 p.m. and about twenty minutes after I reached the airport I received a phone call from Timo to say that he is inside of the airport and he will soon be coming out. I received this phone call from Timo on my cell phone which bears the number 849-9388.

I waited for about another twenty minutes and I saw Timo came out of the airport and I escorted him to my car and we drove to the gas station at Ironshore where Timo went and purchased some cigarettes and I drove away after Timo came back into the car.

Upon reaching the Duncans and Harmony Hall highway I felt that I wanted to urinate. As a result I turn my indicator to the left and I slowed down my vehicle and went on the soft shoulder of the road and before I was able to come out I felt a small impact and I looked through my rear-view mirror and I saw a vehicle stop behind me with both headlights on. As a result I came out of the car alone and I went to the rear of my vehicle and I observed that the impact was slight and no damages was done to my vehicle and the man in the vehicle which was parked behind me also came out of his vehicle and both of us agreed that no damage was done to either vehicle and shortly after my husband opened the front passenger door and he came out of the car and came to the rear of the vehicle and was examining the vehicles and I suddenly heard about three explosions which sounds like gunshots and I ran into some nearby bushes where I also heard another gunshot sound.

I then contacted 119 and reported the incident to the police who came about thirty minutes after and I waited until I saw the lights from the police vehicle flashing before I came out of the bushes and report the incident to the police.

The area that I had stopped to urinate is very dark and lonely and when I came out of my vehicle I only saw one man who came out of the car that hit me from behind. I did not look into the vehicle to see if there was any other person sitting into the

car. I did not see who fired the shots because whilst my husband and the other man was standing at the rear of our car I turned around in an attempt to go and urinate and this was when I heard the explosions. I am positive that if I should see this man again I would be able to identify him because the car lights were on and I could see his face easily. He is of light brown complexion, about five feet nine inches tall, medium built. He was wearing a white shirt and jeans pants. He was driving a white colour car but I am not able to say what type of vehicle the man drove.

At the point where I saw the police lights flashing and I came out of the bushes and I walked towards the car I saw several vehicles and persons and I looked on the sidewalk and I saw my husband lying in a pool of blood and I was told by a police officer who was on the scene that my husband was dead.

Is there a certificate on that?

Okay. The certificate says -- the statement is signed and dated. The certificate: Given voluntarily by me this 2nd day of October, year 2005, at the police Area 1 Headquarters. Same was read over to and by me who signed to its correctness. Signed and dated.

This statement consisting of eight and a half pages, each signed by me is true to the best of my knowledge and belief, and I made same knowing that if it is tendered in evidence I shall be liable for prosecution if I have wilfully stated in it anything knowing it to be false or do not believe it to be true. Signed and dated.

This foregoing statement consisting of eight and a half pages were recorded by me and was read over to and by the maker who indicated to me that she understood same. The declaration was also read over to and by her who signed both statement and declaration as being true and correct to the best of her knowledge and belief. Signed by me and dated."

[10] Detective Inspector Clive Brown also went to the scene on Harmony Hall main road on the evening of 1 October 2005. He was the person who made arrangements

for the body of the deceased to be removed and the contents taken from the deceased's pocket were also handed over to him by Corporal Bond (and admitted in evidence at the trial through him, as exhibit five). At the trial, he gave evidence as to the general geography of the area in which the deceased's body was found. Inspector Brown told the court that the distance from the Donald Sangster International Airport to the Esso gas station at Ironshore was about a mile and a half, a distance which could be covered by car in five to eight minutes. From that same Esso gas station to the point on the Harmony Hall main road where the deceased was killed was a distance which could be covered "at average speed" by car in about 25 minutes. Between those two locations, the area along the roadway was developed, with several malls, bars, hotels, restaurants and other businesses. Between nine and 10 at night, some of those businesses would normally still be open and on weekends they would usually have extended hours of opening. There was, however, "a lonely spot" along the roadway, between the intersection of the Duncans main road and the highway, "to where the incident took place and beyond".

[11] The appellant was subsequently moved from Duncans to the Falmouth Police Station and then to the Stewart Town Police Station (apparently because there was no female lock-up in Falmouth), which is where she was on 5 October 2005. There, the appellant found herself sharing a cell with Miss Michelle Howard, who had been taken into custody by the police in connection with a completely unrelated investigation. Neither of these ladies knew each other before, but when the appellant observed that

Miss Howard was crying, she asked her what was wrong, whereupon, Miss Howard testified at the trial, the following dialogue ensued between them:

> "A. I said to her they have me here regarding to my boyfriend because they said that his friend by the name of - my boyfriend's friend, by the name of Thorpe, was shot and killed in Falmouth so they wanted him for questioning and he wasn't at home.
>
> Q. Hold on. Hold on. So after you related to her why you were there in the cell what happened next? After you related to her did she say anything to you?
>
> A. I continued to talk to her.
>
> Q. You continued to talk to her in relation to what?
>
> A. The same, about my boyfriend problem.
>
> Q. Now after you related your boyfriend problem to her did you -- did she say anything to you?
>
> A. She was crying.
>
> Q. Yes.
>
> A. She was crying and then she said to me not to worry because she is in the same position as I am.
>
> Q. Now when she told you not to worry as she was in the same position as you were, did you say anything?
>
> A. I asked her what she is here for.
>
> Q. Yes? She respond? [sic]
>
> A. She started crying and shaking her body and bogging [sic] her head against the wall and she was just there crying.
>
> Q. Bumping?
>
> A. Yes, sorry, yes.

MISS SMITH: I crave your indulgence.

Q. Now when you saw her doing that did you say anything to her?

A. No she, she said to me that she is in the same position as I am and, when she told her boyfriend not to kill the man and the boyfriend went ahead and kill the man and she told him not to kill him yet."

[12] Miss Howard told the court that the appellant then told her that her boyfriend's name was Marvin and that "the man" to whom she had referred was her husband, who "had given her everything and…also made a will for her". The appellant also told her, Miss Howard said, that "her husband wanted her to come to Finland to live but Marvin did not want her to go". During the course of this exchange between herself and the appellant, Miss Howard continued, the appellant's aunt came to visit her and she was able to overhear a discussion between them in which the question of money to pay lawyer's fees came up. Miss Howard said that at that point she heard the appellant's aunt instruct her "not to talk to anyone, the lawyer say not to talk anyone [sic] about what happened and the lawyer would be coming down the following day also". At this point Miss Howard testified, acting, it appeared, in accordance with the instructions she had received from her aunt, the appellant fell silent and no further conversation took place between them. Sometime after 11:00 p.m., Miss Howard was taken from the cell by police officers and transported back to the Falmouth police station in a police vehicle.

[13] The following day, having returned to her home in Montego Bay from Falmouth the night before, Miss Howard heard a radio news report of the murder of a man from

Finland, involving persons with the names Melody and Marvin. As a result of hearing this report, and encouraged by a friend who was visiting her at home at the time, Miss Howard went to the Freeport Police Station in Montego Bay and made a report about her conversation with the appellant in the cell at the Stewart Town Police Station the evening before. At the trial, despite extensive and vigorous cross examination by the appellant's counsel, Miss Howard did not deviate significantly from her account of what had happened at Stewart Town, disagreeing forcefully with the suggestion which was put to her that no such conversation had taken place.

[14] On 19 October 2005, Detective Inspector Brown arrested and charged the appellant and Marvin Stewart with murder and conspiracy to murder. The following month, Detective Inspector Brown and Detective Corporal Arnett travelled to Finland in furtherance of the investigation of this matter, where they met Mr Janne Pellinen, the son of the deceased, who also gave evidence at the trial. Mr Pellinen confirmed that the appellant and his father had been married since 2003 and that, although they had not lived together, they had each visited the other, in Jamaica and in Finland respectively, on a few occasions since their marriage. Mr Pellinen's evidence was that at the time of his death, his father had been supporting the appellant financially and, in Mr Pellinen's view, his father's "spending of money was getting out of hand". His visit to Jamaica in October 2005 had been with a view to having the appellant return to Finland with him on a permanent basis.

[15] During the morning of 2 October 2005, Mr Pellinen received a call and a voice message on his mobile phone. He did not recognise the number from which the call was made, but he did notice that it was from abroad. He retrieved and listened to the message on his voice mail, but could not identify the voice, which was "very blurry" and "kind of hard to hear". He explained that he was in the tram-car at the time and that, despite listening to the message twice, he was only able to discern that the voice "sounded alarmed", which led him to think that something was wrong. He then got off the tram-car and tried to return the call to the number from which the call had come until, in due course, he finally got through. The call was answered at the other end by a woman, who spoke to him, and then someone else (whom he identified as the appellant, whose voice he knew, having spoken to her "many, many times") came on the line. In response to his enquiry whether his father was alright, the appellant told him that his father was dead. He then asked the appellant what had happened, to which she responded that "a man come and shot him".

[16] Some time after his father's death (and after his funeral service had been held in Finland), Mr Pellinen visited his father's apartment in Helsinki for the purpose of going through his papers and other belongings. Among the papers, he found what he described as a "marriage settlement agreement", which appeared to have been signed by his father and the appellant and witnessed. Subsequently, by this time accompanied by Detective Inspector Brown and Detective Corporal Arnett, Mr Pellinen also visited the Nordia Bank in Helsinki, where, in the presence of bank officials, he gained access to his

father's safety deposit box. Among the several documents which he found in the box, was what appeared to be his father's last will and testament, duly signed by his father and witnessed by two persons, whose signatures he recognised as those of two of his father's "work colleagues".

[17] Copies of the marriage settlement agreement and the will were handed over to the two Jamaican detectives and certified copies were in due course admitted as exhibits at the trial. The marriage settlement agreement, which appeared on its face to have been signed and dated 29 August 2003, which was the same date on which the appellant and the deceased were married, provided among other things that, in the event of divorce, neither party would be required to pay any maintenance to or expenses for the other. Further, that neither party would be entitled to property of the other which was acquired before the marriage or by way of inheritance or gift. The will, which was written in the Finnish language, was translated into English at the trial by Mrs Mervi Murray, a native of Finland, who at the time of trial had lived in Jamaica for 25 years and was, in her words, "knowledgeable in the English language". By that will, which was dated 16 February 2005, the deceased bequeathed all his possessions to the appellant. These possessions were listed and included his apartment in Helsinki and its contents, a Mercedes Benz motor car, stocks and shares and cash in two named accounts at the Nordia Bank. The will also stated that there were two copies of it, one copy "being in the possession of my wife Melody Baugh-Pellinen and the other is held at the office of Nordia Bank at Gyldenin Street in the safety deposit box, number 55".

[18] Miss Keisha Miller, who had been a reservations clerk at the Jamaica Inn Hotel in Ocho Rios in 2006, also gave evidence for the prosecution. She stated that on 16 November 2005, at the request of the police, she had checked the hotel's computer system for reservations in the names of the appellant and the deceased and had found no trace of those names. However, she did say in cross examination that at that time of year occupancy levels at the hotel were "about thirty percent" and there would have been room for members of the public coming to the hotel without reservations, though the front desk would in due course enter the information in the reservations system.

An unsuccessful no case submission

[19] That was the case for the prosecution, at the end of which counsel for the prosecution told the court that she would be offering no further evidence against the appellant's co-accused, Mr Marvin Stewart, who was accordingly dismissed from the case. A submission of no case to answer was then made on behalf of the appellant by Mr George Traille, who appeared for her at the trial. That submission was made on the ground, firstly, that the circumstantial evidence relied on by the prosecution, far from pointing "in one direction and one direction only", which is what was required in order to ground a conviction on such evidence, was pointing "east, west, north and south and whatever points may be in between". Secondly, that the statements in writing taken from the appellant and put into evidence as part of the Crown's case against her, were both exculpatory statements, in which she gave a detailed description of the person who had, on her account, shot the deceased. Thirdly, the appellant's reaction, as narrated in evidence by Sergeant Green-Denton, when she saw the deceased's body

lying on the ground when she came onto the scene ("do God, don't mek him dead, now. Do God"), was a spontaneous one, into which nothing could be read. And lastly, as regards Miss Howard's evidence, even assuming for the sake of argument that the appellant did say what was attributed to her by the witness, there was nothing in that conversation to implicate her in the killing of the deceased, given that what the appellant was reported to have said was she had "told Marvin not to kill the man **yet"** (emphasis supplied), which did not connote a present intention to kill the deceased.

[20] After hearing the Crown's response, in which it was submitted that there was "a preponderance of circumstantial evidence" of the appellant's participation in the killing of the deceased, the true effect of which was a matter for the jury to decide, Daye J ruled that there was a case to answer. The learned judge considered, in agreement with the prosecution (and applying ***R v Galbraith*** [1981] 1 WLR 1039), that it was for the jury to decide what inferences might properly be drawn from the items of circumstantial evidence relied on by the Crown and from the statements attributed to the appellant by Miss Howard while they were both in police custody at the Stewart Town Police Station.

The defence

[21] The appellant made a brief unsworn statement in her defence. She told the court that the two statements that she had given to the police were "the truth, nothing but the truth" and that she loved her husband and he loved her and that she did not kill him. As regards Miss Howard's account of what had happened in the cell at the Stewart

Town Police Station, the appellant denied that any such conversation had taken place between them.

The summing up and the verdict

[22] The learned trial judge then summed up the case to the jury, in great detail, leaving the matter to them on the basis that, on the evidence, there were only two possible verdicts open to them, guilty of murder or not guilty of murder. The jury, after retiring for just short of an hour, returned a unanimous verdict of guilty of murder and the judge, having heard evidence from two witnesses and submissions from counsel in mitigation of sentence, imposed a sentence of imprisonment for life, with the stipulation that the appellant should not be eligible for parole before she had spent 21 years in prison.

The grounds of appeal

[23] On 8 October 2009, the appellant's application for leave to appeal against her conviction and sentence was allowed by a single judge of this court. When the appeal came on for hearing before us on 3 November 2010, counsel for the appellant, Mr Robert Fletcher, who did not appear at the trial, sought and was granted permission to argue the following supplemental grounds of appeal (in substitution for the grounds originally filed by the appellant herself):

1. The learned trial judge erred in not accepting the no-case submission either in the terms submitted by counsel or by his own discernment that enough evidence did not exist for the matter to be left to the jury.

2. The verdict is unreasonable having regard to the evidence.

3. The learned trial judge failed to assist the jury in properly assessing the elements of the chains of circumstantial evidence.

4. The learned trial judge erred in admitting the will of the deceased.

5. The learned trial judge erred in not alerting himself to the prejudice to the accused that arose from the presence of the alleged boyfriend of the accused at the trial and advising the jury in the strongest terms not to allow this fact to influence their decision.

The submissions

[24] As regards ground one, Mr Fletcher submitted that at the end of the case for the prosecution, the minimum standard of evidence required to allow the matter to be left to the jury had not been reached. It "cannot be", Mr Fletcher submitted, that "the Prosecution may bring any sequence or number of unexplained events and by merely doing so the matter is to be cumulatively left to a jury to decide if they lead to a reasonable conclusion". In the instant case, it was therefore submitted, the evidence of the appellant's alleged admission in the Stewart Town Police Station lock-up; the absence of any evidence of who had actually killed the deceased; the fact that the deceased's wallet had been left intact by his assailant; the absence of a hotel reservation at the Jamaica Inn in the name of either the appellant or the deceased; and the evidence concerning the contents of the deceased's will, "individually and cumulatively" fell short of the minimum standard of evidence required as a matter of law. Each of the items of circumstantial evidence relied on by the Crown was "individually weak" and they had not become stronger by them having been

accumulated into a chain. Mr Fletcher also relied on these submissions in support of ground two (verdict unreasonable having regard to the evidence).

[25] As regards ground three (judge's directions on circumstantial evidence), Mr Fletcher submitted that, having left the matter to the jury, it was incumbent on the trial judge to have alerted the jury "in the most cogent terms" that there were weaknesses and gaps in the case for the prosecution. In respect of ground four, Mr Fletcher's submission was that it was doubtful whether the deceased's will could be prayed in aid to prove the truth of its contents without the production of either the original or a probated copy, while, in respect of ground five (the prejudicial effect to the appellant of the presence of her supposed boyfriend at the trial), Mr Fletcher was content to say that the ground spoke for itself.

[26] Miss Pyke for the Crown, as was to be expected, took issue with Mr Fletcher's submissions in every respect. On ground one, she submitted that, as a matter of law, there is no requirement that every element of the series of facts relied on by the prosecution must be strong or by itself establish guilt beyond a reasonable doubt. The value of circumstantial evidence, it was submitted, is that "it is inherently comprised of elements, or in other words, a series of facts that cumulatively, are capable of supporting an inference of guilt", whether or not the elements, taken by themselves, necessarily compel a finding of guilt. In support of these submissions, Miss Pyke, in a detailed skeleton argument, very helpfully referred us to a number of decisions of this

court and of other courts in the Commonwealth, to some of which it will be necessary to make reference in due course.

[27] In all the circumstances, Miss Pyke accordingly submitted, the evidence in the instant case, taken as a whole, was cogent and convincing and presented "a compelling picture of the Appellant as a willing participant in a common design to kill the deceased…"The learned trial judge had therefore come to the correct decision by calling upon the appellant to answer to the indictment, it being a matter for the jury to decide what inferences could properly be drawn from the evidence. The case therefore fell squarely within the principles of ***Galbraith*****.**

[28] Moving on from these submissions to ground two, Miss Pyke submitted that the verdict of the jury was amply supported by the evidence, which showed that the appellant had much to gain from the death of her husband and that she had been present at the scene of the murder, aiding and abetting in the implementation of the plan by making him accessible to the killer, when she stopped at "a very dark and lonely place en route from the airport". On ground three, Miss Pyke submitted that the judge gave full and thorough directions on the circumstantial evidence, relating it to the question of common design and taking care to direct the jury as to the burden of proof in this regard. He also gave full directions on the drawing of inferences, pointing out those that were available on the evidence, both in support of the prosecution's case and the case for the appellant. As regards ground four, Miss Pyke submitted that the judge had ruled correctly in admitting the deceased's will into evidence, as it was both

relevant and admissible as tending to confirm and support the credibility of Miss Howard's evidence that the appellant had told her that the deceased had given her everything and had made a will in respect of which she was the beneficiary. And finally, on ground five, Miss Pyke's submission was that the presence of the appellant's alleged boyfriend at the trial could have occasioned no prejudice to the appellant in the circumstances.

[29] Miss Pyke's submissions provoked a further 34 paragraphs of submissions from Mr Fletcher in reply. However, these were in the main, if not actually repetitive of the earlier submissions, reiterations of points already made, in the context of Miss Pyke's submissions. Therefore, with the greatest of respect to Mr Fletcher, whose ever thoughtful approach is fully deployed in the reply, we do not propose to rehearse these submissions for the purposes of this judgment, as we consider that all the issues which arise on the evidence were fully ventilated in counsel's original submissions to us.

Ground one (the no case submission)

[30] We were referred by counsel to a number of authorities, a brief consideration of some of which may be helpful. Firstly, on the nature of circumstantial evidence, in ***Shepherd v R*** [1991] LRC (Crim) 332, a decision of the High Court of Australia to which we were referred by Miss Pyke, Dawson J defined circumstantial evidence (at page 337) as "evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts…[i]t is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved" (see also Cross on Evidence, 12th edn, page 30: "any fact from the existence of which the

judge or jury may infer the existence of a fact in issue"). In his judgment in ***Shepherd*** (at page 347), McHugh J referred to Lord Simon of Glaisdale's telling observation in ***Director of Public Prosecutions v Kilbourne*** [1973] 1 All ER 440, 462, that such evidence "works cumulatively, in geometrical progression, eliminating other possibilities".

[31] In ***Shepherd,*** the High Court therefore went on to reject decisively the proposition that, in a case resting upon circumstantial evidence, the jury might only properly draw an inference of guilt upon facts, or individual items of evidence, proved beyond reasonable doubt. As McHugh J put it (at page 347), the true position is that "If an inference of guilt is open on the evidence, the question for the jury is whether the inference has been proved beyond reasonable doubt – not whether any particular fact has been proved beyond reasonable doubt". (See, to similar effect, a judgment of the Court of Appeal of New Zealand in ***Thomas v R*** [1972] NZLR 34.)

[32] On the question of the criteria against which a submission of no case to answer should be assessed in a case in which the Crown relies on circumstantial evidence, both counsel appear to be agreed that the governing authority is still ***Galbraith,*** although they naturally disagree on its application to the facts of the instant case. In that case, as will be recalled, Lord Lane CJ stated the position in this way (at page 1042):

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence,

> taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[33] In ***Director of Public Prosecutions v Varlack*** [2008] UKPC 56, Lord Carswell characterised Lord Lane CJ's statement in ***Galbraith*** as the "canonical statement of the law", and observed that the underlying principle of the case, which is that "the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases…concerned with the drawing of inferences" (para. [21]). Lord Carswell then went on (at para. [22]) to cite as an accurate statement of the law the following passage from the judgment of King CJ in the Supreme Court of Australia in ***Questions of Law Reserved on Acquittal*** (No 2 of 1993) (1993) 61 SASR 1, 5:

> "It follows…that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence…He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge,

> there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. 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."

[34] In the light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt.

[35] The various items of circumstantial evidence upon which the prosecution relied in the instant case appear to be as follows:

(a) the fact that the appellant, who was the driver, chose to make a stop at a very lonely section of the highway, ostensibly for the purpose of relieving herself, having passed along the way, and in relatively close proximity to the point at which she eventually stopped, several business establishments, which would usually have been open for business at the material time and where, presumably, she might have been able to access bathroom facilities;

(b) the fact that the deceased had journeyed to Jamaica with the intention of having her return to Finland to reside permanently with him, after a period in which, on Mr Pellinen's evidence, the deceased's spending on the maintenance of a long distance marriage had gotten "out of hand";

(c) the fact that, by the terms of the marriage settlement agreement signed by the parties upon their marriage on 29 August 2003, the appellant would not be entitled to any payments or other monetary settlement from the deceased in the event of a separation and dissolution of their marriage;

(d) the fact that, by the terms of what appeared to have been the deceased's last will and testament, the appellant would be, in the event of his death, the sole beneficiary of his estate;

(e) the fact that the deceased's valuables (which included a quantity of cash and his passport) were not taken from him by his assailant, thus suggesting that robbery was not the motive for the attack on him or his killing;

(f) the fact that the appellant was herself unharmed during the attack and that, on her evidence, the gunman had approached the deceased directly, shooting him in his head;

(g) the fact that the appellant told Sergeant Green-Denton that she had fled the scene even before the gunman fired a shot, because, in her words, she knew that "something was going to happen";

(h) the fact that the appellant had originally told Sergeant Green-Denton, when asked about the whereabouts of the friend whose car she was driving, that she had "left him in Kingston to pick him up tomorrow", although her evidence was that she was slated to spend three weeks with the deceased before leaving with him for Finland;

(i) the fact that the appellant, after appearing to Sergeant Green-Denton from her demeanour to have considered that she had said the wrong thing, had amended her previous answer at (h) above, saying instead that "I left him in Kingston to do business and he will take bus go home";

(j) the fact that the appellant was seen by Sergeant Green-Denton speaking on her two cellular phones "in hushed tones";

(k) the fact that, Sergeant Green-Denton, having taken the phones from the appellant, when one of them rang again, the person at the other end of the line hung up; and

(l) the fact that, despite the appellant having said in one of her statements that she had made reservations for herself and the deceased at the Jamaica Inn Hotel, the hotel itself had no record of any such reservations in the name of either the appellant or the deceased.

[36] It appears to us that, had the case for the Crown rested solely on these items of circumstantial evidence, it would have been difficult to argue that the no case submission ought not to have been allowed. We fully accept that, as the authorities make clear, what is important for these purposes is what necessary inference can be drawn from the whole of the evidence in the case, bearing in mind, as Dawson J said (at page 338) in ***Shepherd***, that "the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately". However, it seems to us to be impossible to say that the various items of evidence listed in the foregoing paragraph, even read together and cumulatively, could give rise to an inference that the appellant was implicated in the deceased's murder in any way. It is true that some parts of that evidence might have been thought to be puzzling, to say the least (for instance, the fact that the appellant chose a very dark and lonely spot in the road for a comfort stop, having passed on the way several far more suitable places where she might have been able to use the facilities without too much trouble). And there are also others which might even be

seen as suspicious (such as the imprecision and contradictory nature of the appellant's responses when asked about the whereabouts of the owner of the car in which she and the deceased had been travelling). However, that evidence by itself, taken as a whole, could not, in our view, support an inference that the appellant was part of a common design to murder the deceased.

[37] But in this case, the Crown relied not only on these items of circumstantial evidence, but also on the statements allegedly made by the appellant to Miss Howard during their conversation in the police lock-up at the Stewart Town Police Station on 5 October 2005. It seems to us that, as Daye J observed in his reasons for disallowing the no case submission, the statement attributed to the appellant by Miss Howard, that is, that the appellant had told her boy friend not "to kill the man yet", was clearly capable of implicating her in a plan to kill her husband. That statement was in our view also capable of suggesting that, as was submitted to the judge on the appellant's behalf, and as the judge also accepted, even if there had been such a plan at some point, the appellant was, by the use of the word 'yet', disassociating herself or withdrawing from the plan. Daye J considered that this was a matter for the jury to resolve, this plainly being a case in which, "on one possible view of the facts", as Lord Lane CJ put it in ***Galbraith*** (at page 1042), "there [was] evidence upon which a jury could properly come to the conclusion that the defendant [was] guilty". This is how the judge expressed his conclusion on the no case submission:

> "Where we have at the end of the Crown's case such a position, the question is, is there evidence to go to a jury, or is this evidence to go to a jury? The crown is relying on this statement plus the surrounding circumstances which the crown classify [sic]

as failing in circumstantial evidence. The statement plus the circumstantial evidence are matters which are properly within the provinces of a jury. It is for the jury to assess the statement and it is for the jury upon being directed properly, directed [sic] how to treat circumstantial evidence. It is the jury who must state if they are satisfied so that they feel sure that the circumstantial evidence points to one conclusion only. Applying Galbraith I find that that portion of the practice direction of Lord Lane which said, 'Where on one possible view of the facts there is evidence upon which a jury would properly come to the conclusion that the defendant is guilty. Then the judge should allow the matter to be tried by the jury. On one possible view of the facts the jury could say, that the accused is guilty. That is so, it is my duty to allow the case to be tried by the jury. Galbraith case is in harmony with practice direction of Lord Parkers', on how to treat no case submissions.

And I refer to this aspect of the practice direction in the case as follows: 'If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal, if compelled to do so, would at that stage convict or acquit but whether the evidence is such that a reasonable tribunal might convict'. And on the evidence of the prosecution at this stage, a reasonable tribunal, putting the entire evidence together of the Crown, statements, including the circumstances which had been led by the prosecution, a reasonable tribunal might convict; and if they might convict, then there is a case to answer.

There are issues for the tribunal of credibility about the maker or the giver of the evidence that, that this statement, that the statement was made. There are issues about reliability of that witness. But as Galbraith says, matters of reliability and credibility of a witness are matters that are within the province of a jury. The pieces of circumstances are matters the prosecution relies on, are matters which the jury, as judges of the facts, will have to weigh and assess and apply the standard of proof, whether they are satisfied so that they are sure that the pieces of circumstantial evidence that the prosecution relies on which include, also, the statements given by the accused, whether those, together, satisfy them that the accused although not the person who fired any shot that killed the deceased, they have to decide whether she is a party to a common design or joint enterprise. Also, they have to decide on the totality of what

> the prosecution has presented, including the words or oral statements made by her; what is the scope of the common design if they found that there was one; if there is sufficient substratum of primary facts from which a jury might draw the inference "A", that the accused, Melody Baugh-Pellinen, was a party to a common design or joint enterprise to kill her husband. B, that the scope of that common design did involve the intention to kill her husband and "C" that she assisted in the carrying out of that agreement and therefore she is connected to the death of her husband, even though there was some other person that fired the gun that led to the gunshot injuries which resulted in the death of the deceased. Accordingly, I hold that Melody Baugh-Pellinen, has a case to answer to the charge -- of this charge of the murder of her husband, Timo Pellinen."

[38] In our view, the learned trial judge was entirely correct in ruling that issues relating to the reliability and the credibility of Miss Howard, as well as the inferences to be drawn from her evidence, together with the surrounding circumstances in general, were matters to be weighed, assessed and determined by the jury, in the light of proper directions from the judge, and applying the appropriate standard of proof. It naturally follows from the above discussion that we think that ground two, which challenges the jury's verdict as being unreasonable having regard to the evidence, must fail as well, the totality of the evidence in the case having been, in our view, such that a jury, properly directed, might reasonably have convicted upon the strength of it.

Ground three (the judge's directions on circumstantial evidence)

[39] As regards the proper directions to a jury on the subject of circumstantial evidence, ***McGreevy v Director of Public Prosecutions*** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in such cases by holding that such evidence would be amply covered by the duty of the trial judge to

make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. Delivering the leading judgment of a unanimous House of Lords, Lord Morris of Borth-Y-Gest said this (at page 510):

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."

[40] There is therefore no rule requiring a special direction in cases in which the prosecution places reliance either wholly or in part on circumstantial evidence. This was confirmed by this court in ***Loretta Brissett v R*** (SCCA No. 69/2002, judgment delivered 20 December 2004) and ***Wayne Ricketts v R*** (SCCA No. 61/2006, judgment delivered 3 October 2008), in both of which ***McGreevy*** was cited with approval.

[41] In his directions on this point in the instant case, the learned trial judge started out by giving the jury general, and perfectly accurate directions on the question of

inferences. Thus the jury were told that "certain matters in a case cannot be proved by direct evidence…Certain matters in a case can only be proved by inference from other proven facts and it is for that reason why you are entitled to draw reasonable inferences". But, the jury were also told, before "you draw any inference in a case…the inference must be reasonable, and…the inference must be inescapable".

[42] After indicating to the jury that "the prosecution is relying upon circumstantial evidence or evidence which we say can be drawn inferentially", Daye J then gave a general direction on the nature of circumstantial evidence in the following terms:

> "Now, circumstantial evidence consists of this, that when you look at all the surrounding circumstances, you find such a series of unexpected coincidences that as a reasonable person you say your judgement compels you to one conclusion. So you have to look at a series, to see if there is a series of undesigned unexpected coincidences on the evidence and undesigned, that as a reasonable person you're compelled to one conclusion, that the accused is guilty of the offence.
>
> Circumstantial evidence can sometimes be conclusive, but it must all be closely examined, if only because evidence of this kind maybe fabricated to cast suspicion on another. By fabricating we mean planned, put together. Joseph commanded the steward of his house, 'Fill the men's sacks with food, as much as they can carry, and put each man's money in the mouth of his sack. Put my cup, the silver cup, in the mouth of the sack of the youngest, and his money for the grain.' When the cup was found there Benjamin's brothers hastily assumed that he must have stolen it. It is also necessary before drawing inferences of the accused's guilt from circumstantial evidence to be sure there are no other co-existing circumstances which would weaken or destroy the inference. That is how you approach circumstantial evidence.
>
> The circumstantial evidence must point to one conclusion. If it does not point to one conclusion it means that the evidence

> presented by the prosecution has not met the standard of proof so that you feel sure of the accused's guilt. In considering circumstantial evidence bear the following in mind: Circumstantial evidence consists of inferences to be drawn from surrounding circumstances, there being an absence of direct evidence. I direct you that if on an examination of all the surrounding circumstances you find such a series of undesigned and unexpected coincidences that as reasonable persons you, in your judgement, is compelled to act in one conclusion and two, that all the circumstances being relied on point in one direction and one direction only; and three, that if, that if the evidence falls short of that standard, if it leaves gaps, if it is consistent with something else, then the test is not satisfied. What you must find is an array of circumstances which points to one conclusion and that conclusion only. The facts must be inconsistent with any other rational conclusion. That is the approach and that is the test that you must apply in law to circumstantial evidence in this particular case and we are going to look at the evidence in the case."

[43] Turning to the actual evidence in the case, the learned trial judge then pointed out to the jury that there was no direct evidence of a plot or a plan between the appellant and any other person. Rather, there was the indirect evidence of the appellant's account of the circumstances in which the deceased was shot and "inferential evidence that she was in [sic] party to the common design of the killing of her husband and so we will have to look at the evidence to see if there is any inferential evidence and if we accept it". The learned trial judge also told the jury that of importance "to the question of drawing an inference to establish this common-design or joint enterprise, are the words that [the appellant] used to the witness, Michelle Howard". He reminded the jury to bear in mind that the appellant's case was that she did not say what she is alleged to have said to Miss Howard at all, so that was the first thing they had to decide, "the prime fact". Then, secondly, they would have to ask

themselves what is the meaning of the words attributed to the appellant by Miss Howard and, finally, consider whether "those words lead to a conclusion that there was an agreement between her and persons to kill her husband on the 1st of October 2005".

[44] The learned trial judge then spent some time going over with the jury the actual words which the appellant was alleged to have spoken to Miss Howard. In particular, he invited the jury to consider the significance, if any, of Miss Howard's evidence that the appellant said that she had told her boyfriend "not to kill the man yet", particularly in the light of the contention of the defence that, even if the appellant was found to have used those words (which she denied), and even if the words were capable of giving rise to an inference that she was party to a plan to kill her husband, they had been qualified in terms of the actual timing of the act by her use of the word 'yet'. The learned trial judge told the jury that that was evidence from which, if they accepted it, they could draw an inference "that there was what we call a common design or a joint enterprise… to commit…[the offence of]…murder", and that the appellant was a party to that agreement. However, he left it to them to determine the meaning to be given in the context to the word 'yet' and whether, in not delaying the killing of the deceased, the actual perpetrator may have departed from the scope of the common design.

[45] Daye J then sought to pull together the various strands of all that he had already told the jury in the following passage towards the end of the summing up, which we cannot avoid quoting in full:

> "It is for your consideration, Mr. Foreman and members of the jury, to decide. Was there the agreement? Was the plan

executed? Was Timo Pellinen killed? If the answer is yes, which plan on the totality of the evidence and would not challenge the next considering you have to ask was Mrs. Pellinen present? There is no dispute that she was present. What you have to ask is was she present and encouraging, intentionally encouraging and play an active part in the killing of her husband. You have to decide if her actions now of stopping on the highway in Trelawny, her actions of running away and leaving her husband alone. (3) the act of another car bumping into the back of her car. (4) whether the fact that there was no damage done to the car agreed by them and whether the reason she gave for stopping to urinate constitute action on her part from which you can draw a reasonable inference, which must point in one direction that she encouraged the principal, aided and abetted. That is what you have to decide.

Now, you have to look at her all the circumstances I point out to you earlier at the scene and ask yourselves, in the light of all of those circumstances of the statement given, if you accept it as true, whether her actions were a failed action. Whether her actions to stop was not innocence. You would have to look at it and ask yourselves were all of these actions a part of a series of undesigned coincidences, that point in the direction that she was a party to the killing of her husband that night, bearing in mind all the circumstances. That is what you have to ask yourselves and if your answer is yes, that she was part and she was present and her actions was acting which would mean that you would have to reject that her actions has been merely coincidence or innocence.

If you reject that, then, if you say that she was present encouraging with intent, and with intent to encourage the killer and she was not the person who pull the trigger of that gun, she would be guilty of aiding and abetting a party to a common design, joint enterprise. She would be guilty.

Now, whenever you consider her actions to see if it leads to an inference that she was encouraging the person or the persons who fired the shot, it must point in one direction, and therefore, you have to look at the whole circumstances at that time.

On the case there are circumstances which arise which could weaken that inference which you have to look at and decide if you find it so. It is not that difficult, you will have to decide that. Now, the first circumstance that you would have to look at is, comes from the evidence of Detective Denton-Green. When she saw the accused, running to her, the accused said, "God, no mek him dead now -- Do God". That is the reaction, the first reaction that she got from the accused. Now that is a statement that could weaken the inference that she intended or wanted her husband to die in the sense that she was a part of a plan and intended to kill him. It could also mean that when she saw his condition she didn't want him to die; but it is a factor you have to look at because as judges of the fact you have to look at all the possible inferences because the inference must point in one direction and one conclusion and the statement, you have to ask yourself was it for real or was it just a strategy in the circumstances. That's one.

Two. You have to look at the fact that…I am talking about circumstances that weaken the inference -- that she, when she went into the bushes she stated consistently and it has not been challenged or disputed that she used her cell phone and called the police. In one statement she said she called emergency. In the other statement she says she called 119. The same thing. You have to look at that to see if that is conduct of somebody who was part of a plan. And she even went on to repeat that she got certain instructions, not to come out until she saw the lights flashing and when she reached to the officer, Denton-Green, she said 'That is the reason why I come out because I got those instructions.' Right?

Thirdly, you have to look at the fact that ahm, the moment her husband was killed shortly after, the son got a phone call. So she reported the matter immediately to the son abroad. She reported it. All of that you have to look at in assessing her conduct and the inference that must point to one conclusion and of course, the officer said she was crying.

Crying can mean that the somebody is sorry for what happened. It doesn't mean that the person was never involved but you still have to look at it because that is a possible inference that arises from the evidence and you must be satisfied to the standard proved. You must be satisfied of

the standard of proof that the evidence points to one conclusion only. So these are factors that you must consider when you look at the inference you can draw that weakens the inference. Also, you have to look at her immediate and consistent denial of any involvement in the death of her husband.

Of course, again, all of those circumstances you are to look at against the background of the statement if you accept it is true, because if you accept the statement is true then it could throw a different complexion and a different light on all of what went on on the night, her actions and conduct and reaction on that night of the first of October, two thousand and five.

Then you must also look at her statement, unsworn statement. She said she loved her husband and he loved her. It appears that he loved her. He gave her everything. You are to decide if she really loved him. Ahm, one of the, part of the statement that was given to the witness was that...Let me cite it correctly to you...that she said, Miss Baugh told her in the Stewart Town Police Station was this: She said she told me that man was her husband. She said her husband had given her everything. So this is the knowledge of the Will and he also made a Will for her and she told Marvin not to kill the man yet. She said before that her husband wanted her to come to Finland but Marvin did not want her to go. So that is another motive that the prosecution is putting forward because the reality is Mrs. Baugh-Pellinen was faced with a situation that although she was married to this man abroad, on the statement given she said she still had a boyfriend here, one Marvin and she really was visiting the husband who lived abroad and he was visiting her sometime. So, the prosecution is saying that she, her loyalty wasn't really toward the husband or going to Finland. Her loyalty was really out here. These are the factors, Mr. Foreman and members of the jury, that you need to look at, I outlined to you and you are to assess [sic] separately and accumulatively [sic], the entire evidence and see if you are satisfied that you feel sure that the prosecution has satisfied, discharged the burden of proving that Mrs. Baugh-Pellinen is the person who murdered her husband on the basis of a common design, joint enterprise and that you are satisfied so that you feel sure."

[46] Having completed the summing up, the learned trial judge then asked counsel on both sides if there was anything further that they wished him to tell the jury, to which Mr Traille for the appellant, supported by Crown counsel, suggested that the jury might benefit from an explanation of what "exactly" could amount to a withdrawal from the common design, he having already told them that the appellant's alleged use of the word "yet" could mean that she was withdrawing from the common design. The learned judge accordingly obliged, adding the following to all that he had already said:

> "HIS LORDSHIP: Well, withdrawal from a common design, would mean that you must do some action to show that you are not a party to it. For example say to the person, if you have the power to do that, you are not involved; or you must, ugh, do something to intervene between the time that any action is done pursuant to that. Right? That, basically, is what we call withdrawal. If you want specific directions you can tell me.
>
> **MR. TRAILE:** No, m'Lord.
>
> **HIS LORDSHIP**: So you have to consider whether by the use of the word and also by her actions on the night in question, whether she had, if you find that there was this agreement to kill her husband, whether she had withdrawn from that plan or execution of that plan. That is for consideration.
>
> So there are just two possible verdicts in this trial. It is either guilty of murder or not guilty of murder. There is no issue of provocation and manslaughter. There is no issue of self-defence. Simply, if you do accept she was a party, that you feel sure, to a common design to kill her husband. So it is now open to you to retire and consider your verdict.
>
> Is there anything else?
>
> **MISS SMITH:** No, no, m'Lord.
>
> **MR. TRAILE**: We are grateful for small mercies."

[47] By the end of the day, in our view, the learned trial judge had told the jury everything that could and needed to be said on the issue of circumstantial evidence. His directions on the issue, as indeed his conduct of the trial, were careful, clear and in every respect scrupulously fair to the appellant. We would therefore dismiss ground three.

Ground four (the deceased's will)

[48] We think that it is fair to say that Mr Fletcher's approach to this ground was somewhat diffident, his submission having been, it will be recalled, that it was doubtful whether the deceased's will could be prayed in aid to prove the truth of its contents without the production of either the original or a probated copy. No authority was cited for this suggestion and it seems to us that, as Miss Pyke submitted, the existence of a will having been introduced into the case by Miss Howard's evidence of what the appellant had told her, the will itself was relevant and admissible evidence which went tending to bolster Miss Howard's credibility. We are accordingly of the view that this ground must also fail.

Ground five (the presence of Mr Marvin Stewart at the appellant's trial)

[49] As we indicated at the beginning of this judgment, Mr Stewart was originally indicted with the appellant, but was dismissed from the case at the end of the Crown's case, no evidence whatsoever having been led to implicate him. In his submissions, Mr Fletcher was content to allow the ground "to speak for itself", but he did not suggest, and we have been quite unable to identify, what prejudice could possibly have been

caused to the appellant by Mr Stewart's mute presence in the dock for the duration of the Crown's case. We therefore consider that this ground must inevitably fail as well.

Disposal of the appeal

[50] In the result, the appeal is dismissed and the court directs that the appellant's sentence should run from 17 March 2008.