IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCR2015/006
BB Criminal Appeal No 9 & 10 of 2013

BETWEEN

VINCENT LEROY EDWARDS
RICHARD ORLANDO HAYNES **APPELLANTS**

AND

THE QUEEN **RESPONDENT**

Before the Honourables **Mr Justice Saunders**
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Mr Andrew O. G. Pilgrim, QC and Mrs Angella Mitchell-Gittens, Ms. Carol-Ann Nico Best, Mr. Lesley T. Cargill, Ms. Chamika J.O. Carrington, Ms. Rashida R. Edwards and Ms. Kamisha N. Benjamin for the Appellants

Mrs Donna C. B. Babb-Agard, QC and Mr Alliston Seale for the Respondent

JUDGMENT
of
The Honourable Justices Saunders, Wit, Hayton,
Anderson and Rajnauth-Lee
Delivered by Mr. Justice Anderson

and

JUDGMENT
of the Honourable Mr. Justice Saunders

Delivered
on the 25th day of July, 2017

JUDGMENT OF THE HONOURABLE MR. JUSTICE WINSTON ANDERSON

Introduction

[1] The following question of critical importance arises for decision by this Court in this appeal: given the provisions of the Evidence Act of Barbados, may a person charged with an offence be properly convicted in circumstances where the only evidence against him is an unacknowledged, uncorroborated, oral confession allegedly made to investigating police officers whilst in police custody but which he denies making?

[2] This question arose in the context of a charge of murder in the following manner. For five days during May and June 2013, the appellants, Vincent Edwards and Richard Haynes, were tried in the Supreme Court of Barbados before Worrell J and a jury for the murder of Damien Alleyne. The Crown conceded that the only evidence linking the appellants to the murder was the alleged oral confessions made by them separately to police officers. The accused men denied making the incriminating statements. On June 6, 2013, both accused were convicted of murder and sentenced to suffer death as mandated by the Offences Against the Person Act Cap 141. Appeals against their conviction and sentence were dismissed by the Court of Appeal on July 9, 2015. This appeal before us is solely concerned with whether their conviction ought to stand.

Background

[3] Damien Alleyne was killed around 10:00 p.m. in the evening of August 11, 2006. Some 15 minutes earlier he had left the residence of his girlfriend, Sasha Griffith, at Rosemount, Deacons, St Michael. Sasha heard explosions which sounded like gunshots. She became concerned and dialled Damien's cellular phone. He answered his phone and as a result of what he said and how he sounded, she went to look for him. She found him not far from her residence lying on the road. He appeared to be dead. The police were summoned and commenced investigations. The Police Public Medical Officer, Dr Andrew Murray, arrived minutes after 12:00 midnight and pronounced Damien dead. A post mortem examination performed by Dr Stephen Jones concluded that the deceased had died from gunshot injury to the chest. Two pieces of lead were retrieved from his body.

[4] The police continued investigations. Sometime in 2006, Vincent Edwards was taken into custody. He was interviewed and released without being charged. On July 19, 2007 (almost a year after the shooting death of Damien Alleyne) Vincent Edwards and Richard Haynes were separately taken into custody and interviewed. Two days later, on July 21, 2007, they were both charged for the murder of Damien Alleyne.

Supreme Court

[5] At the trial, the Crown conceded that the only evidence against the appellants was oral statements which the police ascribed to the accused during separate interviews conducted in accordance, it was alleged, with Rule 3 of the Judges' Rules. The learned judge allowed the police officers to refresh their memories and to read aloud the alleged confessions from their notebooks without objections from defence counsel.

[6] The verbals attributed to Vincent Edwards were recounted as follows. On July 19, 2007, at about 10:00 a.m., Station Sergeant 943, Vernon Moore, in the presence of Sergeant 595, Christine Husbands, interviewed Edwards at the Glebe Police Station. Edwards was cautioned. He was told by the police that they had received information that he had assisted in the murder of Damien Alleyne. Edwards said, 'When I hear wunna had "Cabbage" [Richard Haynes] I tell myself if wunna come back for me he talk'. He explained that 'Damien [the deceased], he thief my cycle and one of the block guns so we shoot he.' He also said that, 'If Cabbage didn't talk I wouldn't be here again. Me and "Cabbage" is who shoot he.' The officers said that they asked the appellant if he wanted to give a written statement to which he said, 'Yes, but let me talk with my lawyer first.' He later met with an attorney-at-law. The written interview was subsequently read to the appellant and he was asked to sign the record of the interview. The officers said that Edwards refused to sign upon the advice of his attorney. Station Sergeant Moore gave evidence that he carried out an investigation in relation to the statements made by the accused about his motorcycle. The officer said that his investigations revealed that a motorcycle had been reported stolen by Edwards and that that motorcycle was in police custody at the Black Rock Police Station.

[7] The verbals attributed to Richard Haynes were narrated as follows. On July 19, 2007, in consequence of information received, Sergeant 1125, Vernon Farrell, accompanied by Police Constable 1233, Curtis Murray, went to Rosemont Deacons Farm, St Michael, where they saw Haynes lying in a motor car. Upon being cautioned Haynes said, 'that is why I should have stand down in St Vincent after wunna hold "Roy" [Vincent Edwards] because I wouldn't be in this now.' Haynes was arrested and taken to the Glebe Police Station. He was reminded of his right to consult with an attorney-at-law but he stated that, 'I going to talk with wunna about what happen. I ain't got to get no lawyer to tell wunna what I know about that scene.' When asked about Damien Alleyne he said that 'He won't stop taking up people things that is why he get killed. He had something that didn't his.' He said that Damien Alleyne 'come 'bout the place, a gun get thief, and "Roy" cycle end up in the police station through he.' In relation to the shooting he said, 'The men from the "Red Sea" real cruel and they might do me something if I tell wunna, but I ain't taking all the blame for that scene…I mean when the same boy get shoot. I did there but another man shoot too'. He told the officers that the other man was "Roy", that is, Vincent Edwards. He also stated that he only fired at Damien Alleyne to scare him and that Edwards fired more shots than he did, with the intention to kill the deceased. Haynes also refused to sign the statement recorded by the officers after speaking with an attorney. Station Sergeant Vernon Farrell gave evidence that his investigations revealed that Haynes went to St Vincent sometime after the shooting.

[8] At the close of the prosecution's case, Mr Pilgrim QC made a no case submission. He argued that the Crown's case was too weak to be left to the jury as it was based solely on the alleged oral statements of the defendants which were uncorroborated and unacknowledged. He lamented the fact that the Government of Barbados had been slow to proclaim section 72 of the Evidence Act (sometimes referred to as, "the Act") which requires the use of video or sound-recordings whenever an accused gave a confession. He submitted that in the face of such a weak statutory framework, it was the duty of the trial judge to guard against unreliable evidence and to withdraw a case from the jury where the only evidence was an unacknowledged, uncorroborated and disputed confession.

[9] In response to Mr Pilgrim QC's submission, the learned judge held that although he might have his own views as to whether the problems outlined by Mr Pilgrim QC were a cause for concern, this kind of evidence was acceptable under the Evidence Act. In his opinion, the Act required that the matter be left to the jury to determine, as a matter of fact, whether the confession had been made, subject to the safeguard of a warning to the jury pursuant to section 137 of the Act. He held that until Parliament amended the legislation, it was not for the courts to usurp the fact-finding function of the jury.

[10] Following this ruling, the appellants made unsworn statements from the dock disputing that they had made confessions to the police. Mr Pilgrim QC stressed this point in his closing address to the jury, arguing that this had been a case of police collusion against the appellants. The trial judge warned the jury on numerous occasions that the evidence may be unreliable because the confessions could have been fabricated. Despite this, within approximately one hour, the jury returned a unanimous guilty verdict. The judge sentenced the men to suffer death. They appealed to the Court of Appeal.

Court of Appeal

[11] The appeals were heard by Sir Marston Gibson CJ, and Justices of Appeal Sherman Moore and Sandra Mason, and were dismissed by the court in a judgment delivered by Moore JA. That judgment rejected the argument of Mr Keith Scotland that the appellants had been tricked into making the oral statements. The court observed that the only objection made by experienced and competent criminal defence lawyers Mr Pilgrim QC and Mrs Mitchell-Gittens at the trial had been that the appellants did not make the oral statements attributed to them. There had been no allegation of any impropriety on the part of the police, any breach of the Judges' Rules, or any oppression by the police. As there was no evidential basis for alleging impropriety and breach of the Judges' rules, and as this was "also inconsistent with the defence put by the Appellants at their trial",[1] they were entirely without merit.

[1] *Edwards and Haynes v The Queen BB* 2015 CA 13 (CARILAW), [32].

[12] We pause here to say that we accept the submission made to us by Mr Pilgrim QC that the argument of Mr Scotland was meant to be an alternative to the principal contention that the accused did not make the oral statements attributed to them. The primary defence appears to have been that the accused had not given the incriminating verbal admissions; however, if the Court of Appeal was not minded to disturb the finding of the jury on this point, the secondary defence was that the accused had been tricked into making the statements contrary to the rules of practice and the Judges' Rules.

[13] The Court of Appeal went on to find that the judge had not erred in refusing to uphold the appellants' no-case submission. In the court's view, the circumstances fell squarely within the dictum of Lord Lane CJ in *R v Galbraith*[2] as the issue in dispute concerned a decision on the reliability of witnesses which was within the province of the jury. Neither could the judge be faulted for not giving adequate directions or appropriate warnings to the jury. Several passages from the transcript demonstrated that the judge, in compliance with section 137 of the Act, had been at pains to tell the jury that the statements might be unreliable because they were not signed or otherwise acknowledged in writing by the appellants and could have been fabricated by the police and that they should exercise caution when considering the oral statements. The warning had been sufficient.

Appeal to CCJ

[14] On August 19, 2015, the appellants sought leave to appeal to this Court on the grounds that: (a) the mandatory death penalty as the punishment for those convicted of murder was unconstitutional as it was inconsistent with section 15 of the Constitution which provides that no person should be subjected to torture or inhuman or degrading punishment or other treatment; and (b) the conviction of the appellants should be set aside as the trial judge erred in allowing a conviction for murder based solely on un-initialled statements which were disputed.

[15] On November 19, 2015, we granted special leave to appeal but ordered that the question of the constitutionality of the mandatory death penalty should be remitted to the Court of Appeal for that court's consideration. The appellants were

[2] [1981] 1 W.L.R. 1039; [1981] 2 All ER 1060.

subsequently allowed to proceed with their appeal to us on the issue of the validity of their convictions.

Issues to be determined by this Court in these proceedings

[16] Counsel for the appellants submit that the decision of the Court of Appeal ought to be reversed and the convictions of the appellants overturned as unsafe and unsatisfactory for two main reasons:

a) the Justices of Appeal erred in law when they allowed the convictions for murder to stand based solely on un-initialled, disputed oral statements allegedly made while in police custody when they should have held that this required the trial judge to accept the submission of no case to answer; and

b) the trial judge erred in law when he failed to adequately direct the jury as to the dangers and deficiencies in relying on the oral statements allegedly made by the appellants and allegedly written down contemporaneously by the police officers in their official police notebooks.

[17] This judgment considers and decides the case on ground (a). Ground (b) is considered in a separate concurring opinion by Justice Saunders.

Was the judge required to accept the no-case submission?

[18] Mr Pilgrim QC argued that the judge was obliged to have accepted the no-case submission and to have withdrawn the case from the jury. Relying on *Galbraith*, Counsel contended that where the only evidence against the accused was the disputed, uncorroborated and unacknowledged oral admissions allegedly made to investigating police officers, the "inherent weakness" of the case necessarily meant that the jury could not properly convict on it. Counsel urged the Court to accept that Barbados was lagging behind in terms of its approach to oral statements in the sense that "every other regional jurisdiction and every Commonwealth jurisdiction that I am aware of" had in place either provisions for a recording, in terms of audio or video, or the presence of a Justice of the Peace during the course of interrogation or at least at of the recording of the statements. Counsel cited the specific cases of Dominica, St Vincent and the Grenadines, and St Kitts and Nevis, noting that the

latter jurisdiction "requires the same audio and video recording that was spoken of in our sections 72 and 73 of our Evidence Act which was promulgated in September of 1994 without the inclusion of those provisions." Given this weak statutory framework in Barbados, Counsel argued that the judge had a duty to guard against the danger of unreliable evidence going to the jury.

[19] Mrs Donna Babb-Agard, QC for the Crown objected to these submissions. She argued that there was sufficient evidence, based on all the legal principles, for the case to have gone to the jury. The Evidence Act provided for certain warnings to be given to the jury where the Crown was relying on oral statements which were not initialled by the accused person. Where such warnings were given, it was a matter for the jury to decide whether the evidence of the oral statements were nonetheless credible and sufficient for conviction. She stressed that there was no law in Barbados that a person could not be convicted or a case could not go to the jury because the Crown was relying wholly on oral statements.

[20] There is a long line of cases decided at common law that support the decision of the judge to send the case to the jury. *Galbraith* was itself a case concerned with the conviction of the offence of affray and sentence of four years' imprisonment but there is no reason in principle why the test it sets out ought not to apply equally to convictions for murder where the penalty is death. We agree, as did the courts below, that an adequate test for acceptance of a no-case submission was that laid down in *Galbraith* by Lord Lane where he said:

> "How then should the judge approach a submission of 'no case'? (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 Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's 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 on 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."[3]

[21] It could reasonably be argued that, leaving aside consideration of the Evidence Act, the test in *Galbraith* supports sending on the case against the appellants to the jury; there was *some* evidence of the appellants' guilt and the strength or weakness of that evidence depended on the view to be taken of the reliability of the witnesses for the Crown. Although the alleged confessions were the sole evidence against the accused men, there is support at common law for the case to continue. *Francois v The State*,[4] a case concerning a conviction for murder, is apposite. The case for the prosecution was substantially based on circumstantial evidence, an alleged oral confession and an alleged written confession. The appellant's defence at trial had been one of an alibi and that the confessions were fabricated. On appeal, the Court of Appeal of Trinidad and Tobago expressed the view that a person could be convicted even where the sole evidence against that person was an oral confession provided that some word of caution was given to the jury.

[22] Similarly, the Australian case of *McKinney v R*[5] held that where the only evidence connecting the appellants to the offence (breaking and entering) was the signed police record of an interview with them, a special warning as to the potential unreliability of evidence was warranted. *McKinney* was therefore not strictly a case on unsigned admissions but the majority was of the view that it was essentially the same since "a signature will not reliably corroborate a disputed confessional statement made by an accused while held in police custody."[6] The court in *McKinney* also accepted the dictum in the earlier case of *Carr v The Queen*[7] that the "mere fact that the evidence against the applicant consisted solely or substantially of police evidence of a disputed oral confession" which was not signed or otherwise acknowledged by the applicant did not of itself provide a basis

[3] ibid.
[4] (1987) 40 WIR 376.
[5] (1991) HCA 6, [1990-1991] 171 CLR 468.
[6] ibid [15] and [16].
[7] [1989] LRC 244, (1988) 165 CLR 314.

for interference by an appellate court since the credibility of the evidence was "a question to be determined by an adequately directed jury at the trial."[8]

[23] These cases all pre-date the Evidence Act of Barbados. The position at common law must now be read in the light of the fact that the Act was specially enacted "*to reform the law relating to evidence in proceedings in courts*…"[9] As we stated in *Clarence Sealy v The Queen*,[10] the Act "applies standards that are more stringent than the common law, compels the judiciary to be guided by fresh approaches and requires the executive to make available to the police new technologies."[11]

[24] In the present case, Counsel for the appellants argued that application of section 73 ought to have resulted in the withdrawal of the case from the jury. Although they were not argued, and although they relate to the issue of the admissibility of evidence, it would also appear that sections 71, 77, and 116, concerning the exclusionary rules on admissions or confessions, could also be relevant as indicating the kind of evidence that is inappropriate to support a conviction.

Section 73

[25] Counsel for the appellants placed express and great emphasis on Section 73, arguing that the provision so impugned the quality of the unacknowledged 'verbals' as to have made the case too weak to go to the jury. It is worth quoting the provision in full, which provides as follows:

> "(1) Where an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official is not admissible in criminal proceedings to prove the contents of the question, representation or response unless the defendant has, by signing, initialling or otherwise marking the document, acknowledged that the document is a true record of the question, representation or response.
> (2) In subsection (1), "document" does not include a sound recording or a transcript of a sound recording."

[8] ibid at 262.
[9] See the Long Title to the Evidence Act 1994, Chapter 121 of the Laws of Barbados (Evidence Act). Emphasis added.
[10] [2016] CCJ 1 (AJ).
[11] ibid. [72]

[26] Section 73 does place the admissibility of *documents* recording unacknowledged verbal admissions by investigating officials into a special category. Except in the circumstances covered by subsection (2) (i.e., sound-recordings or a transcript of a sound-recording) such documents are not admissible. However, it is the *spoken* word and not the document that is the evidence; section 73 merely prevents the unsigned document of oral admissions being adduced into evidence to prove the contents of the oral questions, representations and responses. The section does not proscribe admission of the oral admissions or confessions themselves. The matter is put beyond doubt by section 137 (1)(d)(ii) which contemplates that oral evidence of an unsigned or unacknowledged record of official questioning of an accused may be admitted into evidence provided the judge gives an appropriate warning to the jury of the potential unreliability of such evidence.

[27] This Court has affirmed the admissibility of evidence of disputed oral admissions[12] and has given precise guidance on how a judge should treat with applications to refresh memory and to read aloud from unsigned written records of such admissions.[13] If the oral admissions are inadmissible, no warning pursuant to section 137 is ever necessary; the oral admissions are simply excluded. If, however, the admissions are admissible, then the warning contemplated by section 137 is not relevant at the stage of the no-case submission but rather is given later during the judge's summing up of the case to the jury.

[28] What *is* relevant at the no-case submission stage is for the judge to consider, in light of the clear scheme of the Evidence Act, whether the incriminating oral statements, previously admitted, are themselves sufficient to send the case to the jury. In other words, there is, apart from the exercise of the discretion to permit the police officer to refresh his memory and to read aloud from his notebook, a separate decision for the judge to make. That decision is whether, on its entirety the evidence against the accused (inclusive of any verbals admitted) satisfies the test laid down

[12] *Julian Francis v The Queen* [2009] CCJ 9 (AJ); *Clarence Sealy v The Queen* [2016] CCJ 1 (AJ).
[13] ibid. The factors include the context within which the 'verbals' were made, whether proper procedures were followed, the presence of independent corroborating evidence other than that of a 'back up' police officer and whether the police were engaging in a subtle ploy to impress the jury by requesting to read aloud from the document. The judge need not expressly state that he considered these factors.

in *Galbraith*. Specifically, the judge should consider whether there are electronic or other independent means of verifying that the admission was in fact voluntarily made; whether the confession contains materials that only the perpetrator of the crime would know; whether there is other evidence that corroborates aspects of the confession; whether there is some other evidence tending to show that the accused committed the offence. These are mere examples and do not exhaust the category of material considerations.

[29] If there is an electronic recording of the confession or independent corroborating evidence of guilt, the judge may elect to send the case on to the jury whether or not the accused refuses to initial or sign the document that contains the disputed verbals. If neither is present, the judge may properly hold that the confession, whilst admitted into evidence, is so shorn of support that, standing by itself, is not a proper basis for conviction. The trial judge may therefore withdraw the case from the jury. What the judge cannot do, consistent with the reformatory nature of the Evidence Act, is to move in a straight line from finding the oral statements to be admissible to the conclusion that the case must therefore go to the jury.

[30] In the present case, there were no eyewitnesses, no finger prints, no DNA evidence, no other forensic evidence. The only evidence linking the appellants to the murder were the unacknowledged and disputed oral admissions allegedly made to the police whilst in police custody. There was no electronic or video recording of the giving of the verbals. There was no independent corroboration of guilt. We do not consider that the evidence given concerning the motorcycle in police custody at the Black Rock Police Station, or regarding Haynes' visit to St Vincent sometime after the shooting, falls into the category of independent corroboration of guilt as was the case, for example, in *Sealy*. Further detective work would appear to have been warranted in this case.

[31] The absence of electronic verification of alleged verbal admissions and the absence of corroborative evidence of guilt have both been sources of serious concern for the legislature and the judiciary. At the second reading of the Evidence (Amendment) Bill, 2014 which would mandate sound and video recording of

interviews of persons in police custody, concerns were raised by Barbadian parliamentarians over the reliability of unacknowledged and unrecorded verbal admissions given to police whilst in custody and the impact of such unreliability on the constitutional right to a fair trial. The three judgments of this Court in *Sealy* were unanimous that the integrity of the criminal justice system would be considerably enhanced by the electronic recording of oral confessions and that it was time to replace the policeman's notebook with electronic recording devices. Convictions based on disputed oral admissions in the absence of independent corroboration have often been judicially recognized as being particularly problematic. In *Frankie Boodram v The State*,[14] Sharma CJ stated that because oral admissions are so difficult to prove (especially where policemen have collaborated with one another) such verbals posed "a particular danger to the judicial process."[15]

[32] The case of *R v McKenzie*,[16] which was not cited to us in argument, is nevertheless instructive. McKenzie appealed his conviction for manslaughter and arson. The main issue on appeal was whether his alleged confession revealed special knowledge of facts which could have been known only by the killer. He argued that the verdicts were unsafe and unsatisfactory because the unsupported confession allegedly made to the police was wrongfully admitted as the Crown had conceded that he suffered from a personality disorder, was mentally abnormal and there was psychiatric evidence admissible for the jury to assess his capacity. Lord Taylor CJ, delivering the judgment which he said was consistent with the principles set out in *Galbraith*, held that where (a) the prosecution case depends wholly upon confessions; (b) the defendant suffers from a significant degree of mental handicap; and (c) the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them; then the case should be withdrawn from the jury.[17] *McKenzie* was cited in *Devon Calliste v R*[18] and the Eastern Caribbean Supreme Court held that it could be relied upon and applied where the three criteria set out by Lord Taylor CJ had been met.

[14] Criminal Appeal No. 17 of 2003.
[15] ibid at p.13 and 14.
[16] (1993) 96 Cr App Rep 98.
[17] ibid.
[18] (1994) 47 WIR 130.

[33] The fact that the accused suffers from a mental or personality disorder is certainly an additional factor in weighing the evidential value of his confession, especially where such evidence is the sole, or substantially the sole, basis for convicting that person. But we do not consider such a disorder to be necessarily decisive. Where there is independent corroborating evidence of guilt, the oral admissions of even the mentally handicapped may be sent to the jury for ultimate determination; where there is no such evidence, the disputed confession of even the most sane among us may not withstand a defence submission that the case should be withdrawn from the jury.

[34] In the present case, because there was no electronic verification of the alleged confessions by the accused and there was no independent corroborating evidence of their guilt, we have concluded, with some reluctance, that the convictions of the appellants cannot stand; that on its entirety, the evidence was such that the case ought not to have gone to the jury.

Sections 71, 77, and 116

[35] We would add that this conclusion garners indirect support from sections 71, 77 and 116 of the Evidence Act. These are provisions that inform the judge's decision to admit evidence of the confession or admission and would therefore have been spent at the time of the no-case submission. However, in this case, there is no indication that these provisions were specifically argued before or considered by the judge in deciding whether to admit the disputed verbals; and they are analogously relevant in giving a strong indication of the kind of evidence which the legislature regarded as inappropriate to support a conviction in a case such the present.

[36] Section 71 is concerned with the reliability of confessions and specifies that such evidence is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected. For this purpose, it is not relevant whether the actual confession was true or untrue. The judge is simply concerned to consider, among other things, the

nature of the questions, the manner in which they were put, and the nature of any representation made to the person questioned.

[37] We do not consider that section 71 impugns evidence that is the product of sharp or skilful questioning by the police. Such questioning is standard fare for good detective work and is a necessary bulwark against the cunning of the criminal mind. Section 116 grants a discretion to the judge to exclude evidence that was obtained illegally, improperly or in consequence of an impropriety. But astute and tactical questioning by itself does not suggest that a confession elicited thereby was obtained illegally or improperly.

[38] Section 77 provides that in criminal proceedings, where evidence of a confession is adduced by the prosecution and, having regard to the circumstances in which the confession was made, "it would be unfair to an accused to use the evidence, the court may refuse to admit the evidence; or refuse to admit the evidence to prove a particular fact." The question of fairness was considered by this Court in *Francis* and *Sealy* in the related but different context of permitting a police officer to refresh his memory and read aloud from his notebook. The legislative preoccupation with the fairness of the trial process is relevant to the present context because fairness is anchored to certain broad and fundamental constitutional considerations. Even a guilty defendant is entitled, before being found guilty, to have a trial which conforms with at least the minimum standards acceptable for a criminal trial: *R v Hanratty*.[19]

[39] For all of the foregoing reasons, we conclude that under the criminal justice system of Barbados, it is not permissible for a person charged with an offence to be convicted of that offence in circumstances where the only evidence against him is an unsigned and otherwise unacknowledged and uncorroborated confession which the prosecution allege was made to investigating police officers whilst in police custody but which he denies making. Something more is required either in the way independent verification that the admission was actually and voluntarily made, or

[19] [2002] EWCA Crim 1141.

in the way of other evidence that independently corroborates or otherwise points to the guilt of the accused.

[40] At the time of the no-case submission, the learned judge offered the view that as the evidence was admissible, he had no discretion in the matter and was required to send the case on to the jury. In this respect, the judge erred grievously. Had he properly applied his mind to the discretion to halt the trial, he should have concluded that in all the circumstances of the case it would not be fair for the accused to be convicted on this type of evidence alone. We agree that the no-case submission ought to have been accepted and the case withdrawn from the jury. The convictions must therefore be quashed.

[41] A necessary consequence of the quashing of the convictions is that the issue remitted on November 19, 2015 to the Court of Appeal, i.e., to assess the constitutionality of the death penalty, and which has not yet been heard, necessarily falls by the wayside.

[42] We consider it appropriate to end by emphasizing that nothing said in this judgment is in any way intended to cast a slur on the integrity or propriety of the Royal Barbados Police Force or of the police officers who served the Crown in this case. There is no evidence that the officers involved acted in any way inconsistent with the high traditions of professionalism and probity of the Force. The problem was that the evidence garnered by the police was not of the kind that could properly serve as the basis for the convictions.

JUDGMENT OF THE HONOURABLE MR. JUSTICE ADRIAN SAUNDERS

[43] A new Evidence Act, modelled on an Australian draft, was passed in Barbados in 1994. Its purpose was *to reform the law* relating to evidence in proceedings in courts. The Act contained many important features. So far as the Criminal Law was concerned, its underlying scheme sought to counter what is known as "verballing", that is, the attribution of oral confessions by the police to accused persons. One of the Act's principal aims was to improve the evidential integrity of admissions by suspects and the chief method for achieving this was to sound-record police interviews of them.

[44] Having enacted what at the time was modern, progressive legislation, a decision was made to suspend the critical sections of the Act that required sound-recording. The ostensible reason was that Barbados lacked the material resources to equip its police stations with the necessary recording devices. Over 20 years later, these sections of the Act remain suspended.

[45] The suspension of these provisions severely distorts the effective operation of the Evidence Act and impedes fulfilment of many of its noble goals. Sound-recording puts an end to false complaints of police misconduct during official questioning of suspects. Public trust and confidence in the Royal Barbados Police Force is therefore promoted with the use of this technology. Audio or video recording of interviews also eliminates the need for what lawyers refer to as a *voir dire*, that is, the holding of a mini trial within a trial in order to determine the voluntariness of a confession. *Voir dire* hearings are held in the absence of the jury. They can sometimes last for several hours, sometimes days. They retard the progress of the main trial and frustrate jurors who must passively await their outcome. *Voir dire* hearings contribute immensely to delays and the accumulation of backlog in the criminal justice system.

[46] In *Sealy*[20], we addressed the issue of oral confessions and gave some guidance to judges on how to deal with them. Unfortunately, the present case was tried before our decision in *Sealy* was given. In his separate concurring opinion in *Sealy*, Anderson J addressed the desirability of ending the suspension of the sections that mandate sound-recording of official police interviews with suspects. The original excuse for the suspension is no longer tenable. The State can hardly claim today that it lacks the resources to outfit police stations with recording devices. Indeed, a large percentage of the population now owns and carries around on their person Smart Phones that routinely audio and video record all manner of events. Other Caribbean states with fewer resources than Barbados require their police officers to sound-record official interviews with suspects. These states are enjoying the benefits that automatically flow from embracing this initiative. Guilty pleas are up.

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[20] [2016] CCJ 1 (AJ)

Trials take a shorter time. The failure to render the Evidence Act whole and properly operational does no favours to the criminal justice system in Barbados.

[47] This case epitomises the seriousness of the issue. The two appellants have been charged with murder. The sole evidence against them is, in each case, a confession said to be made orally, voluntarily, during an interview by the police, with only police officers present. If these confessions were indeed volunteered and had been audio or video recorded, the accused would have been hard pressed to challenge them in court. Much time, effort and expense would have been spared. This case would have long been concluded. But here we are, more than ten years after the men's arrest, still having a debate over what the police allege the men supposedly said.

[48] It is an unusual and most worrying thing when a disputed, un-acknowledged confession, allegedly made orally, at a police station, during a formal interview, with only police officers present, with nothing to corroborate its content, is proffered in court as the sole basis for convicting someone of murder. The Evidence Act[21] gives a trial judge a broad discretion as to the manner in which such evidence should be treated. The problem here is that the judge in this case did not appreciate that he had any such discretion to exercise in this matter. This naturally had a huge impact on his approach to the admissibility of the evidence and the no case submission that was later made by counsel for the men. Since it is by no means obvious that if the judge had exercised his discretion his rulings would have been the same the conviction cannot be sustained. In these circumstances, with the majority, I agree that the judge should have upheld the no case submission.

[49] This does not at all suggest that evidence of an un-acknowledged oral confession can never be placed before a jury. Section 137 of The Evidence Act assumes that there will be circumstances when this will be the case. When such a confession is properly left with the jury, the Act obliges the judge, when summing up, scrupulously to comply with certain requirements if so requested by the Defence.

[21] See sections 71, 77, 116

We dealt with this matter in *Sealy* and all that was said there[22] fully applies to this case.

[50] Section 137 states that the judge, in his summation, has to do three things. Firstly, the judge must warn the jury that such evidence may be unreliable. Secondly, the judge is obliged to inform the jury of matters that may cause the evidence to be unreliable. Thirdly, the judge must warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. Trial judges usually comply with the first and third requirements. But some tend to fall short in relation to the second, perhaps because the full breadth of its scope is misunderstood. Interestingly, while all three requirements are important, the second is probably the most critical. Why? Because it obliges the judge to provide the jury with the essential rationale for the first and third.

[51] Reputable studies[23] have been done to demonstrate that the normal human response to a request generates significantly greater compliance if a reason is given for the request. It is not enough to tell jurors that an unacknowledged oral confession is potentially unreliable, or that jurors must exercise caution when treating with such confessions. Even when one warns at length about the unreliability and need for caution, these admonitions will have less than their intended effect if the jury are not given in full the reasons why the confession may be unreliable. To inform the jury that they must exercise caution because the oral statements may be unreliable does not give jurors enough assistance. What really helps is to tell the jury about the matters that underpin the potential unreliability and need for caution.

[52] Why is such evidence potentially unreliable? Why should the jury exercise caution when treating with this evidence? What are these "matters" that the second requirement references? Each case will produce its own peculiar set of matters to which the trial judge must be alert. These matters are infinite and so it would be futile to attempt to catalogue them here. But there are some that are likely to be

[22] at paras [101] to [104]

[23] See for example – "The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction" by Ellen Langer, Harvard University, Journal of Personality and Social Psychology, 1978, Vol. 36, No. 6, 635-642

constant. They arise out of the circumstance that the jury are called upon to assess the truthfulness of the confession in the context of an adversarial system. The jury, un-schooled in the science of fact finding, must decide whether the police officer(s) or the suspect is telling the truth about what was said in the police station. This boils down to a credibility contest and one of the relevant "matters" is that, usually, this contest plays itself out on a field that is not level.

[53] The playing field is uneven because the accused is at a disadvantage. The police officers are practised witnesses. They are persons in authority. At the police station they confront the accused on their terms, at their place of work, with their colleagues around to "back up" whatever they may say in court. The accused at the station is usually alone, confined, with no friend, attorney or independent person present to support his contention of what transpired. When the case reaches the court, the accused is in a prisoner's dock as the police officer is permitted (unfortunately so by some judges), in the presence of the jury, to whip out an official notebook and confidently read from it, as sworn truth, what he himself has written there. The accused of course may have truly volunteered the confession and, at the trial, might be seeking, dishonestly, to recant what was dutifully and accurately recorded by the police officer. It is also possible that the confession may not have been made at all, or that something said by the accused is being significantly embellished by the police.

[54] The jury must navigate these tortuous waters in arriving at their verdict. As in this case, that verdict could have life and death consequences. It is not difficult for the officer to come across as being truthful even in the unlikely event the officer's statements represent a gilding of the lily. On the other hand, even if an accused is being absolutely truthful about his version of the matter, he faces a steep mountain to climb to convince the jury that the officer is being less than truthful. In my view, the second of the three summing-up requirements obliges the trial judge to explain to the jury that it is easier for police officers to lead evidence of admissions that were not in fact made by the accused than it is for the accused to have evidence available to challenge what the police have said. Sober reflection on this circumstance by the jury helps to level the playing field. As I emphasized in

Sealy,[24] this direction is not intended to cast aspersions on the police. The vast majority of Barbadian police officers are, undoubtedly, men and women of high integrity. But it would be naïve to think that the experience in the United Kingdom, for example, where Royal Commissions[25] have accepted that some police officers can be economical with the truth when they believe a suspect to be guilty, is unique to that country.

[55] The judge in this case was fully alive to the need to comply fully with the requirements set out in section 137. Indeed, when counsel for the accused submitted that there was no case to go to the jury, the judge, counsel and the prosecution all took it for granted that if ever there was a case where the section 137 warning requirements needed to be satisfied in full (assuming the submission failed), this was it. And rightly so. In attempting to comply, the judge, commendably, did emphasise to the jury the need for caution and the possibility that the confessions could be fabricated. He stated:

> *"... the notebook is unsigned, and each accused man has vehemently, through their counsel, and also on their own behalf in what they have said, indicated that at no time did they make these statements to the police. But if you find that the police officers are witnesses of the truth, you can still act on the oral statements. What you would have to bear in mind, is the caution which I have to give you and that is, where one has statements which have been recorded from accused persons in police custody, and those statements have been disputed as is the case here, you have to be careful because those statements could have been the subject of fabrication. You would have heard counsel indicate as much to you. Both counsel indicated to you, both counsel for the Defence indicated to you, that this is what this is here, this is the police trying to solve a crime, fabricating oral statements in respect of these accused persons. So you will have to bear the caution in mind. As I told you, the statements may be unreliable and they*

[24] At [104]

[25] See: Cmd. 3297 (1929), para. 272; Cmnd. 1728 (1962), para. 369.

may be unreliable due to the fact that they may be subjected to fabrication and they also may be inaccurate, Mr. Foreman and your members."

[56] In my opinion, these directions did not go far enough. In *Sealy*, at para [110], we set out the appropriate guidelines for trial judges. For the sake of emphasis, the relevant recommended direction is repeated below:

> *… it is not unknown for guilty persons sometimes to make full admissions to the police and then have second thoughts and dishonestly deny having made them. It is also not unknown for police officers to manufacture or embellish evidence against a person whom they believe has committed an offence. It is for the jury to decide whether the alleged admissions were made, and if made, whether they are true and, if so, what weight, or significance, to put on them. It is for the prosecution to prove beyond reasonable doubt that the admissions were made and that they are true. In relation to the first issue, that is, whether the admissions were made, the evidence of the police must be approached with caution. This is because the circumstances in which it is alleged that the admissions were made may make the evidence unreliable*. [At this point the judge should remind the jury in detail what those circumstances were. These must always include the circumstance that ...] ***generally, in the absence of a sound recording or some person independent of the police present at the interview who can confirm that the admissions were made, it is easier for police officers to lead evidence of admissions that were not in fact made by the accused than it is for the accused to have evidence available to challenge what the police have said***. [The judge should also remind the jury of any evidence that corroborates the verbals and which therefore might suggest that they were made by the accused and are true. Where appropriate, the judge should also instruct the jury to…] ***take into account that police officers are generally experienced in giving evidence in court and it is not an easy task to decide whether a practised witness is telling the truth or not. If a witness appears to be confident and self-assured, it does not necessarily follow that the witness is giving honest evidence.*** *If the jury should find*

that the admissions were made, and that they were truthful, then you may take them into account in deciding whether the prosecution has proved the guilt of the accused beyond reasonable doubt." (emphasis added)

[57] The judge's summing up was deficient because it did little to level the scales in the credibility contest with which the jury was faced. It assumed that the scales were even and that the jury merely had to decide whether the verbals were fabricated or were truly given. It failed sufficiently to address "the matters that may cause the evidence to be unreliable". The underlined passages in the previous paragraph were among the crucial matters that should have been referenced by the judge especially as the verbals were the only evidence the Prosecution offered against the accused. I am satisfied that, even if this were a case where the judge had exercised his discretion, and had exercised it properly, to admit the verbals into evidence and, later, to disallow the submission of no case to answer, the conviction would still have had to be quashed because of this deficiency in the summing up.

Order of the Court

[58] We hereby order that the appellants' convictions be quashed.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee