ANTIGUA AND BARBUDA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

CRIMINAL APPEALS NOS. 5 AND 10 OF 1996

BETWEEN:

MELANSON HARRIS
MARVIN JOSEPH APPELLANTS

V

THE QUEEN RESPONDENT

Before: The Hon. Mr. Justice Satrohan Singh Justice of Appeal
The Hon. Mr. Justice Albert Matthew Justice of Appeal (Ag.)
The Hon. Mr. Justice Odel Adams Justice of Appeal (Ag.)

Appearances: Mr. Clement Bird for the first named appellant
Mr. Gerald Watt for the second-named appellant
Mr. Rex Herbert Mc Kay, S.C., Mr. Cosbert Cumberbatch
DPP and Mr. John Eli Fuller with him for the Respondent

[February 6: 7: March 17: 1997]

Criminal Law - Murder conviction - Death sentence - Murder in the course of a robbery - Eye-witness evidence of accomplice - Second appellant's defence of an alibi - Admissibility of statements given to police by first-named appellant - Allegedly made in circumstances of oppression and contrary to the 1964 Judges' Rules - Claim that appellant was 'interrogated' without being advised of his rights - Alleged inducement by a detective constable to secure appellant's statements - The test of the admissibility of a statement – Ibraham v R (1914) P.C., **The State v de France** (1978) 26 WIR 179, inter alia, cited in support - 'The Judges' Rules are not rules of law but rules of practice drawn up for the guidance of police officers' - Object & scope of the Judges' Rules - What constitutes 'oppressive questioning' - **Francois v The State** (1987) 40 WIR 376, **DPP v Ping Lin** (1975) H.L. cited - Quality of evidence of certain prosecution witness, including a minor - 'Serious' inconsistencies in fourteen year old witness' statements - **Black v R** (1989) 42 WIR 1 (Bahamas C.A.) considered - State v Mootoosammy & Budhoo (1974) 22 WIR 83, **Daken v R** (1964) 7 WIR applied - Alleged irregularity in the Voir Dire held to determine the capacity of the child to be sworn -- Alleged inadequacies and omissions in judge's summing up - Whether trial judge in dealing with accomplice's evidence ought to have addressed that witness' bad previous record - Whether this omission could have resulted in a miscarriage of justice - Alleged failure to adequately deal with certain inconsistencies disclosed in witness' evidence - Whether judge erred in putting first appellant's defence of lack of a common intention to murder to the jury. Appeals dismissed (2:1 majority). Dissenting judgment entered by Honourable Mr. Justice Odel Adams J.A. (Ag.) as regards second named appellant.

JUDGMENT

SATROHAN SINGH J.A.

Sometime during the night of January 27, 1994, Kathleen Maria Cleever, William Thomas Cleever, Ian Trevor Gridland and Thomas Williams, foreigners to the State of Antigua and Barbuda who were holidaying on the yacht Challenger, moored off the coast of and in the territorial waters of the 62 square miles island of Barbuda, were savagely killed on the said yacht after they were robbed of certain of their personal belongings. The robbers, armed with a twelve guage pump action shotgun, surreptitiously in a stolen sunfish, crossed the waters to where they were moored. The robbers entered the yacht and at gunpoint manoeuvred the abovenamed four victims into the yacht's 18' x 16' salon. Then, with rope and tape they tied and taped the hands of the victims, taped their mouths and forced them to sit. They then executed the robbery stealing, inter alia, some Guernsey pound notes, about $1,000 U.S, a BB gun and a scarf. Having completed the robbery, they then cold bloodedly executed the four victims by shooting them at point blank range of about 6" - 8", three of them in their chest and one in his head with their hands still tied and mouths still taped and with the use of the words "No witnesses". And this, despite the pleas of the female victim and her attempt at invoking the mercy of the deity .

On January 29, 1996, the appellants and Donaldson Samuel appeared before **Redhead J** to answer to an indictment filed against them for the offence of the Murder of the aforementioned four people. Upon arraignment, the Director of Public Prosecutions accepted a plea of guilty of Manslaughter from Donaldson Samuel. The two appellants pleaded not guilty to Murder and the trial proceeded.

On February 28, 1996, a mixed jury of nine, convicted the appellants of the offence of Murder and they were sentenced to die by hanging. On the said day, Donaldson Samuel was ordered to serve 15 years imprisonment with hard labour for the offence of Manslaughter. At the trial of the appellants and before he was sentenced Donaldson Samuel testified on behalf of the Crown.

THE CASE FOR THE PROSECUTION:

The case for the Prosecution against the first-named appellant **[Harris]** rested mainly on the eye-witness evidence of Samuel the accomplice, the stolen Guernsey pound notes found in one of his shirt pockets, shot gun pellets, the stolen BB gun, his possession of the stolen

scarf and three statements he gave to the police under caution. In the first two of these statements, applying the modern day concept of joint enterprise, this appellant Harris was confessing to the offence of manslaughter. His evidence before the jury also allowed for a similar conclusion. His third statement however was a confession to Murder. In that third statement he confessed to shooting one of the victims.

The case for the prosecution against the second named appellant **[Joseph]** was the eye-witness evidence of accomplice Samuel, an alleged oral confession made by Joseph to a then 12 year old crown witness Kevin DeSouza, evidence from John Cephas relating to the allegedly stolen U.S. dollars and this appellant's possession of the stolen BB gun. Joseph's defence was that of an alibi. He gave two statements to the police under caution to this effect and in his evidence before the jury maintained his alibi that at the relevant time he was at home sleeping. He also gave an explanation of innocent possession of the BB gun, that it was loaned to him by Harris.

Donaldson Samuel's evidence against both appellants was that himself and Harris, having stolen the shotgun (the murder weapon) from one Johnny DeSouza's home, the two of them and Marvin Joseph hatched the plan to rob the yacht with the aid of the gun. The plan was simply to rob. No one was to be killed. However, having completed the robbery and whilst he was downstairs, his evidence was that he saw when Joseph shoot one of the victims. Joseph then offered the gun to him to shoot the others but he refused as he said he did not know how to use a gun. Joseph then gave the gun to Harris who shot the other three victims. He then remonstrated with them for going against the plan not to kill but he left with them and hid the stolen goods and the gun. During his cross-examination by Mr. Watt, this witness admitted that he had previous convictions and that among them was one for stealing a shotgun for which he served six (6) months in prison.

Both appellants have appealed from their convictions.

THE APPEAL

The issues raised in this appeal relate to:

1. The admissibility of all the statements given to the police by the first-named appellant.
2. The quality of the evidence of prosecution witness Kevin DeSouza as it affected the second named appellant.
3. The quality of the evidence of prosecution witness John Cephas as it affected the second-named appellant.
4. Omissions and inadequacies in the summing up of the judge.

1. THE ADMISSIBILITY OF THE STATEMENTS OF HARRIS:

The major ground of appeal of the appellant Harris challenged the admission into evidence of the three statements he made to the police under caution, on the sole ground that they were made in circumstances of oppression resultant from breaches of the 1964 Judges' Rules. The submission of Mr. Bird was that this appellant didn't really give "statements" but was interrogated. He submitted that in his first statement the appellant was asked some 170 questions without "a water break", without the benefit of counsel and without being advised as to his right of defence or of his right to counsel. That in his second statement he merely wanted to change the name of a player in the crime and he was asked some 89 questions. Learned counsel concedes that the third statement (the confession to Murder) was properly taken but argues that it was tainted by the alleged illegality in the taking of the first two statements, it being a follow up of those statements.

The record discloses the sequence of events as follows: The crime was committed on January 27, 1994. The dead bodies were discovered on January 29, 1994 and the police commenced their investigations. On February 16, 1994, the police searched Harris' home in Barbuda and found the stolen Guernsey pound notes in his shirt pocket and some shot gun pellets. Harris was taken into custody at 5 p.m. the said day and held in a room at the Sunset View Hotel in Barbuda. Michael Lawrence, Detective Superintendent of Police attached to the International and Organised crime branch had a short interview with Harris, not more than 15 minutes that said night about 10:15 p.m. His evidence was that Harris was tired. He recorded Harris' first statement under caution the next day February, 17, 1994 from 10:45 a.m. to 2 p.m. The statement is in the form of questions and answers and disclosed therein are these words "12:40 p.m. Refreshment Provided". At the end of that statement Harris was told he would be detained to be later charged with this Murder. He was again cautioned.

On February 18, 1994 between 8:30 p.m. and 10:15 p.m., Superintendent Lawrence recorded a second question and answer statement from Harris. The text of this statement begun with this question "I understand that you wish to change certain aspects of the statement that you gave us yesterday. Is that correct? Harris answered "Yes Sir". Lawrence then asked him "Which parts of yesterday's interview do you wish to change". Harris answered "Just the name of Nanout". Lawrence then asked him "What do you mean just the name of Nanout" and Harris replied "I was covering for someone" "Glen Payne". The questions and answers continued to show why Harris was covering for Glen

Payne, that Nanout was not involved, that the second appellant Joseph was not involved and then the incident was rehashed identifying the role played by all including this new player. At the end of that statement Lawrence again told Harris he will be detained to be later charged for this offence.

On February 19, 1994 between the hours of 10:30 a.m. and 12:20 p.m. Harris gave his third statement under caution. This is the statement where he confessed to killing one of the victims. In this statement, Lawrence, after administering the requisite caution recorded these preliminary questions and answers: " Q: I understand that earlier this morning you travelled to Barbuda with some of my colleagues and there in a sand pit recovered the shot gun that was used to kill the people on board the yacht Challenger. On discovering this gun I am led to believe that you again wish to change your version of what happened on that night. Is that correct?" A "Yes Sir" MH. Q "Do you understand the meaning of the word truthful?" A: "Yes Sir" MH. Q: "This is a most serious matter that I am investigating and I therefore require at the earliest opportunity the complete and utter truth. Will you now tell me the truthful version of what occurred on the night of the 27th/28th January this year?"

The taking of this third statement of Harris seemed again to have been initiated by this appellant because he again needed to make changes to his story. The appellant then gave the details of the Murder naming the second appellant as the killer of three of the victims and himself as the killer of one. In that statement he was asked why he shot Williams and he answered "because he (Marvin) passed the gun to me and said "Do it, just do it", "and as one dead I did not see no reason why to keep the others alive", "if he had wait to hear what I had to say nobody would have been hurt". At the end of this statement he was again told he will be detained and in due course charged with Murder. Lawrence's evidence was that no force, threat, inducement or trick was used to get these statements from this appellant.

At the trial, Mr. Bird who represented Harris, objected to the admissibility of the statements on the singular ground that Harris was induced by Detective Constable Johnson who allegedly promised him that if he assisted in the inquiry he (Johnson) will ensure that Harris faced only a term of imprisonment and that if Harris produced the gun the prosecution will "go easy at the trial". The statement was not objected to on the ground of oppression or for any breaches of the Judge's Rules. A Voire Dire was held by **Redhead J**, to determine the voluntariness or otherwise of these statements. The Judge ruled that there was nothing in the evidence which led him "to believe that any pressure was used or inducement held out by the officers to the accused Harris to induce him to give

the interviews he gave". He found the statements to be freely and voluntarily given and admitted them in evidence. Against this background I now propose to deal with this ground of appeal.

The law as it relates to the admissibility of statements of this nature is settled and I do not propose to do a dissertation of the same here. That has already been done on too many occasions already. I propose merely to summarise it in this judgment from the cases such as **Ibrahim v R (1914) AC 599, R v Prager (1972) 1 All E.R. 1114, The State v. de France (1978) 26 WIR 179**, **Canale (1990) 2 All E.R. 187**. The golden rule is that the test of the admissibility of a statement is whether it is a voluntary statement. No statement of an accused person is admissible in evidence against him unless it is shown by the prosecution that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression. The Judge's Rules are not rules of law but rules of practice drawn up for the guidance of police offices. If a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it. The essence of admissibility is that the statement was made voluntarily.

The non observance of the Judges' Rules may lead to the exclusion of a confession but ultimately it all turns on the Judge's decision as to whether, breach or no breach, it has been shown to have been made voluntarily. A plain and admitted breach of the Rules, though it is to be deplored may fail to trigger exclusion if it does not operate in a way prejudicial to the accused. The main object of the Judges' Rules is to achieve fairness to an accused or suspected person so as, among other things, to preserve and protect his legal rights; but also fairness to the crown and its officers so that again, among other things, there might be reduced the incidence or effectiveness of unfounded allegations of malpractice. The task of the Court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice required the evidence to be excluded.

From the arguments advanced by Mr. Bird in this Court, the objection to the admissibility of the statements is on the ground of oppression emanating from alleged oppressive questioning only. The accepted explanation of "oppression" in this context today is that given by **Sachs J** (as he then was) in **R v. Priestley (1965) 51 Cr. App. R. 1** where His Lordship said:

> "... this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... Whether or not

> there is oppression in an individual case depends upon many elements... They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

Oppressive questioning may be described as questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent. [See **R v. Prager supra]**. The test is highly subjective and would appear to embrace almost any words and/or actions which are calculated or likely to weaken the mind of the accused to whom it is addressed or to undermine his will. [**The State v. de France supra].** The problem is to balance justly the rights of the investigating police against those of the investigated person. It is essential not to fetter the hands of the police unnecessarily. Once the questions are fairly asked without threats or any unlawful attempt to induce or extort an admission, the courts should not shut out relevant answers and statements obtained by such questioning. In **Daken v R (1964) 7 WIR 442 Wooding CJ at p.445** said:

> "Questions like this must be approached realistically and without undue tenderness and solicitude for the protection of detainees and therefore without unwarranted prejudice against the police. Everyone knows that theirs is already a difficult enough task of combating crime'. There could be nothing unfair in letting a man know that his friends have incriminated him and giving him an opportunity in their presence if he wishes to do so, to deny it all or to give his side of the story, if there is no pressure or importuning or insistence on him to make a statement. Nor could it be improper questioning to do so: see **R v. Lee (1962) 82 CLR 133**."

The questioning must not be so severe or overbearing as to be considered unfair.

The general issue of oppression, whilst not specifically addressed by Mr. Bird at the trial court, was addressed by the learned Judge when in his ruling he said he found no "pressure". The Judge in so concluding, had before him the witnesses who testified, including this appellant's evidence and the impugned statements with all the questions and answers. The attitude of a Court of Appeal in these circumstances is not to differ from the conclusions reached by the trial Judge on questions of fact unless telling factors and compelling circumstances

are apparent **[Francois v The State 1987 40 WIR 376].** The person best able to get the flavour and effect of the circumstances in which the confession was made is the trial Judge, and his findings of fact and reasoning are entitled to as much respect as those of any judge of first instance **R v. Rennie (1982) 74 Cr. App. R. 207**. In **DPP v Ping Lin (1975) 3 All E.R. 175 Lord Salmon** said at **p.188**:

> "A Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of evidence before him or failed to apply the correct principle - always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal".

The admission of a confession is a discretion which a judge has to exercise in the light of prevailing evidence. Before a superior court will interfere it must be satisfied that the discretion was exercised wrongly.

With respect to all the statements, the evidence does not show any long period of detention before the questioning. It shows time off for rest and refreshment and that the accommodation was in room at an hotel as against that of a prison cell. Regarding the first statement taken by Lawrence from Harris, I do not share the view of Mr. Bird that there was oppressive questioning or any form of oppression. I also do not discern any breach of the Judge's Rules. It is obvious from the evidence that at the stage of the proceedings when this statement was taken, the police had evidence which would have afforded them the reasonable ground for suspecting that this appellant was involved in the murder being investigated. In those circumstances and in compliance with the provisions of Rule II of the Judges' Rules they cautioned him. Having cautioned him, Rule II then permitted the police to put questions to him which they did and they made a record of those questions and answers, again complying with the provisions of this rule. The complaint is that they asked some 170 questions - over a period of 3 hours and 15 minutes. I still do not see the oppression complained of. There was a break for refreshment and the interview took place after the appellant had rested off the night before. Also, reading between the lines (so to speak) of the statement, an intention can be gleaned on the part of the interrogator to get from this appellant a full frank and intelligent picture of what really transpired on the 27th January, 1994 with not a scintilla of evidence to demonstrate any form of unfair questioning of this appellant. Because of the nature of the crime, the statement obviously would take a long time. Numerous questions had to be asked in order to get the details of what happened prior to,

during and after the crime in order to make it intelligible. This was not a case of a continual third degree grilling or questioning throughout the whole time. There was a break for refreshment.

Regarding the second statement given by this appellant, he was not yet charged for any offence but he was already informed he would be later charged.. It was at his request that this second statement was taken. He needed to change the name of a player involved in the crime. The submission of Mr. Bird was that all Superintendent Lawrence had to do was to change the name and not subject Harris to another 89 questions. I cannot agree with this submission. If Lawrence had done that, the second statement would have been ambiguous and unintelligible. It would not have intelligently told the story the appellant wanted told and that would have been unfair to Harris. As it turned out, Harris not only changed the name of "Nanout" but he also in that statement removed the second named appellant as a participant in the crime. This statement lasted just under two hours and finished just about lunchtime. The evidence relative to its taking revealed nothing unfair to this appellant. The circumstances show it to be an exceptional case where the questions were necessary to avoid ambiguity and make the statement intelligible. I therefore do not find any breach of Rule lll(b) of the Judges Rules as submitted by Mr. Bird. This rule provides for questions relating to the offence being asked for the purpose of clearing up ambiguities even after the appellant was informed he will be prosecuted.

Mr. Bird having conceded that the third statement was properly taken except for the taint he alleged in these first two statements and I having concluded that there was no evidence of any such taint, I would also conclude that the third statement was properly taken. In **The State v De France (supra) Haynes C** opined, and I agree with his opinion that the burden is on the appellant to show that his confession resulted from the alleged act or acts of oppression and that a Court will not presume this to be so. It is my considered opinion that this appellant failed to discharge this onus. There was no evidence on the record especially at the Voire Dire and especially from this appellant to support an inference that there were any conditions of oppression intended to cause this appellant to crack under their strain. The appellant himself in his evidence at the Voir Dire seemed to be suggesting that he was in total control of the situation and was flirting with the officers when he testified about deliberately misleading the officers as to the whereabouts of the shotgun and when he said "I had these officers going up and down for about fifteen minutes".

On the issue of the admissibility of the statements, Mr. Bird further argued that this appellant was not allowed the facility of legal counsel when he gave his statements. It has frequently been stressed that the right of access to legal advice is fundamental e.g. **Samuel (1988) Q.B. 615**; **Beycan (1990) Crim. L.R. 185**. However, it does not, in my view, follow that a breach of the provisions relating to access to legal advice will always be regarded as sufficiently significant or substantial to result in the exclusion of a statement. The presence of bad faith in the police in refusing access to legal advice is a factor making it more likely that the evidence will be excluded. (Blackstone' Criminal Practice p.2062 (1992). In **R v O'Connor 48 DLR (2d) 110 Haines J** at p. 112 stated:-

> 'During the argument I expressed the view to which I adhere that the mere denial of counsel at any stage of the inquiry or processing leading up to the charge, or thereafter up to the commencement of his trial, did not of itself warrant a dismissal of the charge against the accused. A simple illustration will suffice, a bank robber against whom there is overwhelming proof of guilt should not be acquitted because a policeman refused his request to retain counsel. On the other hand it seems to me that where the denial of counsel reflects on the character of the evidence secured from the accused himself, there may well be cases where the Court should in its discretion exclude that evidence.'

The record of appeal does not disclose that Harris was not told he had the right to legal counsel or that he had counsel or that he requested and was denied counsel. The truth is that the matter was not canvassed in the Court below evidentially or otherwise. We are being asked to speculate as to the true position. I do not propose so to do. As earlier mentioned, the admissibility of the

statements is a matter for the exercise of the Court's discretion. In the absence of evidence that this appellant requested and was denied legal representation, I would be extremely hesitant to rule that because the record does not show he had counsel, that, without more, that was enough to find unfairness in the taking of the statements. From the record it appears that Harris was able to cope with being interviewed. He was cautioned and said he understood the caution. He appeared to be in control and was calling the shots. The trial judge found that the statements were voluntarily given. There was no evidence of bad faith on the part of the police. The only function of the legal advice would have been to remind Harris of the rights of which he was already aware. There is no merit in this ground of appeal.

For all these reasons, I see no justification in interfering with the exercise of the Judge's discretion in admitting these statements into evidence. I would hold that all the statements passed the test of voluntariness and they were not taken in breach of any of the Judge's rules. Even if it could have been successfully argued that there may have been technical breaches of the Judge's Rules, I would hold that such breaches would not have merited the exercise of a discretion to exclude the statements given the circumstances of this case. To exclude in these circumstances would have been effectively to fetter the hands of the police unnecessarily. As an aside, I may mention that the judge, in retaining the first and second statements, would have assisted Harris in his defence as they spoke of Manslaughter like this evidence before the jury.

2. KEVIN DESOUZA

Kevin DeSouza is a fourteen year old boy who testified on oath on behalf of the prosecution. He is the cousin of the second appellant Joseph. His evidence impacted severely on the alibi defence of Marvin Joseph. He testified that he saw this appellant on "a Monday in 1994 in the beginning of February" that "Marvin had a gun in his waist" and that "Marvin" told him that he "got the gun off the yacht down by Low Bay and that he killed three people and somebody else killed one". This was damming evidence against Joseph and if believed provided the necessary corroboration of the evidence of the accomplice Samuel and gave meaning and relevance to the evidence of another prosecution witness John Cephas who testified that sometime shortly after the commission of this crime, Joseph offered to sell him U.S. dollars and enquired of him how he (Joseph) could get to Canada.

However, this evidence of DeSouza, which was in conformity with what he said in his statement to the police, became highly suspect when in cross-examination by Mr. Watt, DeSouza agreed that he gave no such evidence at the

preliminary enquiry into this matter. In his re-examination by the Director of Public Prosecutions at the Preliminary Inquiry, DeSouza denied every aspect of his statement to the police which sought to implicate Joseph. Before the trial court, he gave as his excuse for this inconsistency that "he was frightened" when he testified before the Magistrate. He said he was holding his stomach. He also said that he and this appellant were then agreeable. The submission of Mr. Watt is that because of this serious inconsistency, the Judge should have treated the evidence of this witness as being manifestly unreliable and in keeping with the learning to be found in **Black v. R (1989) 42 WIR 1,** exclude it from the consideration of the jury.

Black's case was from the Court of Appeal of the Bahamas. It concerned a no case submission made at the close of the case for the prosecution on the ground that the three key witnesses for the prosecution in a case of Murder gave evidence which were inconsistent with written statements which they previously made. In that case **Smith JA** referred to this extract from the case of **R v. Golder (1960) 3 All E.R. 457** at **p.459:**

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act."

And gave this opinion with which I do not disagree:

> "While, in the context of the issues with which the court in Golder's case was concerned, the case is authority for the directions which, in the second part of the extract, it is stated should be given to a jury, we, respectfully, do not accept the case as establishing a principle of general application that a jury should, as a matter of law, be directed to regard as unreliable the evidence of any witness who is shown to have made a previous inconsistent statement, whatever the gravity or other nature of the inconsistency. This would be tantamount to imposing an obligation on a trial judge to withdraw from the jury's consideration the evidence of all such witnesses. In our opinion, unless the evidence of a witness has, in the view of the trial judge, been so discredited by such previous inconsistent statements as to make his evidence unacceptable by a reasonable jury, the question whether the witness's evidence is reliable or not should be left to be answered by the jury with proper directions and guidance from the judge on the purpose and likely effect of adducing evidence of the previous statements."

That Court then ruled that the nature of the material discrepancies were not such as to render the evidence of the three witnesses as a whole totally unacceptable and that the trial judge was right in leaving the issue of their credibility to be determined by the jury. The editor of Cross on Evidence at p. 275 referred to the passage quoted above from Golder and said:

> "If the first part of the statement was intended to be an inflexible rule, it is questionable because allowance must at least be made for the case in which the witness gives prima facie satisfactory explanation for this inconsistency".

The neat point on this issue before us, is whether we should hold, that because of this serious inconsistency between the evidence of this witness at the trial and his evidence at the preliminary enquiry, that the trial judge should have considered his evidence to be unacceptable by a reasonable jury and exclude same from their consideration.

It is axiomatic that it is the exclusive function of the jury to assess the credibility or otherwise of evidence before them and to weigh it. My considered opinion is that where there is a previous inconsistent statement and the witness is afforded an opportunity to explain the inconsistency, it will be a matter for a jury (not the judge) who would have heard the explanation, to decide whether or not as a result of the explanation the inconsistency is dissipated and to assess the consequent weight of the testimony. Where despite the explanation, the inconsistency is irreconcilable, a jury on proper directions may well reject the testimony. I am unable to hold, that where an explanation that is prima facie reasonable is offered for the inconsistency, that a judge should take it upon himself to withdraw the testimony from the jury or to direct the jury that the previous inconsistent evidence automatically nullified the sworn testimony of the witness. [See the **State v. Mootoosammy & Budhoo (1974) 22 WIR 83]** In **R v Teal and Others (1809) 103 E.R. Lord Ellenborough C.J.** said at **p.1024:**

> "..... though it may be a good reason for the jury, if satisfied that he (the witness) had sworn falsely on the particular point (on a previous occasion) to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the Judge: it only goes to the credit of the witness, on which the jury are to decide".

In **Daken v. R (1964) 7 WIR Wooding CJ** expressed this opinion with which I agree at p. 444:

> "In our view, then, the direction to be given must have due regard to the facts of each case. No general principle can be enunicated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The judge may, and in cases such as we are now considering we think it is his duty to, give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that."

The circumstances as disclosed in the instant appeal differ somewhat from the circumstances in the case of Black. In Black's case the three key witnesses gave evidence in conflict with their written statements. No explanation was given by them for the conflict. In this matter, DeSouza, in his statement to the police implicated Joseph with the alleged oral confession. He maintained that position at the trial. However at the preliminary inquiry he reneged from that position. He gave an explanation for this inconsistency. It is my considered opinion that given these circumstances, especially where an explanation is offered for the inconsistency, it would have been quite wrong for the trial judge to withdraw this evidence from the consideration of the jury or to direct the jury to disregard same. The jury in deciding credibility would have had to use their worldly knowledge of things generally and, having seen and heard DeSouza, ask themselves inter alia, why would this 14 year old cousin of Joseph want to lie on him. They may have found no acceptable reason. They might have considered whether the police put him up to it. They would then have been faced with the question if so, why did his story not correspond with the accomplice Samuel's story that Joseph killed only one of the victims. This witness said Joseph told him he killed three of them. They could also have asked themselves whether Joseph might not have made that statement to his then 12 year old cousin merely as a demonstration of some form of machismo on his part to impress the little boy. These are all matters eminently for a jury and not the judge. I would therefore hold that the trial judge was right in leaving the issue of the credibility of this witness to be determined by the jury. The summing up discloses that the learned

judge very accurately and with the utmost care and fairness directed the jury as to their approach in determining the credibility of DeSouza. He gave proper directions to them on the law in dealing with a witness of the age of DeSouza and he fully and properly dealt with the inconsistencies complained of. His summing up in my view on this issue can be said to be unimpeachable. There is no merit to this ground of appeal.

Mr. Watt also challenged this witness' testimony on the basis of an irregularity disclosed in the record of appeal. The irregularity was the absence from the record of any notes taken of the Voir Dire that was held by the judge in order to determine the capacity of 14 year old DeSouza to be sworn. It is accepted that the record is devoid of these notes and that it is settled law that in doing a Voir Dire in order to determine the capacity of a witness to be sworn, the trial judge should make a record of the questions asked and the answers given.

The legal position is that a judge is under a duty to inquire whether or not a child should give sworn evidence. In a trial on Indictment the examination of the child should be in open court in the presence and hearing of the accused and jury. The jury should be present to hear the answers which the child gives and to see the demeanour of the child when questioned so that they may consider what weight is to be attached to the evidence, if any subsequently given by the child. The inquiry should be recorded so that it appears in the official transcript of the trial. It is a matter for the discretion of the judge whether the child should be sworn. There is no fixed age limit above which a child is competent without judicial inquiry. As a general working rule however, it is within judicial experience that where the child is under 14 the precaution of judicial enquiry becomes necessary. **Khan (1981) 73 Cr. App. R. 190.**

I do not consider this irregularity beneficial to the appellants' appeal. It is accepted that the judge did hold the required Voir Dire, and that counsel for the defence were given an opportunity to cross-examine which they declined to do, before the judge ruled that the witness was competent. In my view, a reasonable inference to be drawn from this inaction of Counsel for the defence was their satisfaction that the witness was competent to be sworn. I therefore do not see a miscarriage of justice from this irregularity or any prejudice or unfairness to the appellant arising therefrom. Whether a child is of tender years is a matter for the good sense of the Court. This was a case where the witness at the age of 14, had reached the ripe age where a judge in his subjective discretion, if he was so minded, could have allowed him sworn testimony without a Voir Dire. That apart, Mr. Watt in his substantive cross-examination of this witness elicited these answers from the witness. "I recall swearing on the Bible

to tell the truth. I understand that I have to tell the truth, if you don't you go to hell". The arguments on this issue are without merit.

3. THE EVIDENCE OF JOHN CAPHAS

John Cephas is the prosecution witness who testified that Marvin Joseph had U.S. Dollars for sale on a date shortly after the murders were committed and that he Joseph was seeking assistance from Cephas to get to Canada. Mr. Watt submitted that standing by itself this evidence was irrelevant and had no probative value as it proved nothing against Joseph. I agree. Learned counsel made this submission after his arguments to exclude DeSouza's evidence from the jury's consideration. He quite properly conceded however, that if De Souza's evidence were accepted by the jury, the relevancy of Cephas' evidence would materialize as that would have been the link from which the jury could have drawn the inference from Cephas' evidence of some implication in this crime by Joseph.

Having held that the credibility of DeSouza's evidence was properly left for the consideration of the jury, and there being the reality that such evidence, if accepted by the jury, was capable of corroborating the evidence of the accomplice Samuel, I am of the view that when the evidence of DeSouza and Samuel are coupled with the evidence of Cephas, that Cephas' evidence was a probative link in the circumstantial aspect of the Crown's case and was therefore properly admitted. I do not consider its admission more prejudical than probative. This ground fails.

4. OMISSIONS AND INADEQUACIES OF THE SUMMING UP:

Mr Watt for the second named appellant commenced his arguments before this Court by describing the judge's summing-up as being a "very very good summing up". He expressed this opinion in the context of the length of the trial. Mr. Bird referred to the judge's legal directions as it pertained to the credibility of the accomplice Samuel as being faultless. I endorse and agree with these views of both lawyers. However, they both register the complaint before us that in dealing with the evidence of Donaldson Samuel, the learned Judge did not deal at all with the bad previous record of this witness. Mr. Bird also criticised the judge for not adequately dealing with certain other inconsistencies disclosed in the evidence of this witness.

The record discloses that the Judge, shortly after the commencement of his directions to the jury, spent some time with them directing them on the law as it related to discrepancies and inconsistencies in a witness' evidence. He then referred to the major inconsistencies especially in the evidence of Donaldson Samuel and Kevin DeSouza and then promised to return to the issues of

inconsistencies later in the summing up, a promise which he never kept with respect to the evidence of Samuel. It is my opinion that whilst it might be the better approach for a judge to refer to all discrepancies major and minor seen in the evidence at a trial, he is not obliged to do so and I would not envisage injustice to a defendant in every case where a judge omitted to deal with all such discrepancies. Each case will have to be looked at in its own context.

On the issue of the accomplice's previous record being omitted from the summing up, the submission of both lawyers was that it was extremely important to the defence that the jury be reminded of these convictions, especially the one where the accomplice served six (6) months imprisonment for stealing a shot gun in 1992. They considered this a vital omission because in the witness-box Samuel attempted to give the jury the impression that he knew nothing about guns and was so afraid of guns that he refused to touch the murder weapon when asked to do so by Mr. Watt.

I do not disagree with this criticism of the judge's summing-up. However, for reasons which I will now give I am of the view that there could have been no miscarriage of justice resulting from this omission. It is accepted by all sides that when the jury retired to deliberate their verdict they had with them Samuel's list of previous convictions. Added to that, both Mr. Bird and Mr. Watt frankly accepted that in their addresses to the jury, they would have hammered home these points in favour of the appellants with much more zeal and vehemence than they did in this Court. Finally, we must presume that jurors are not stupid people, and that it would be inconceivable that any jury would view Donaldson Samuel as anything else but a Judas, and an arch criminal having regard to his previous convictions and to the role he played in this matter, and as such, they would have been minded to follow the directions of the judge to the letter as to how they should approach his credibility. Because of these reasons I do not perceive that any injustice was done to the appellants by this omission.

Mr Watt referred to another omission of the Judge. The defence of the appellant Joseph was that of an alibi. The appellant Harris said in sworn testimony that Joseph was not involved in the crime and that he was not there. This was evidence that was capable of corroborating or assisting Joseph's evidence. Mr. Watt argued that the judge in his summation did not remind the jury of this bit of evidence.

From a perusal of the summing up, I agree that the judge, at the specific point of time when he was dealing with Joseph's evidence, did not remind the jury of this supportive evidence from Harris. But, the summing up has to be read as a whole. When that is done, it is seen that the judge in giving directions to the jury

as to effect of the evidence of De Souza and Samuel on Joseph's case did make reference to Harris' evidence on the issue. This is how the judge dealt with it:

> "Finally, if you accept the evidence of young Kevin DeSouza to the extent that you feel sure Marvin would be guilty of Murder. Or if you accept the evidence of Donaldson Samuel to the extent that you feel sure when he said that Marvin shot the young guy, Marvin will be guilty of Murder. Melanson Harris told you from the witness box that it was him and Donaldson Samuel who went on the boat. First of all, this Accused gave evidence on oath. You will examine his evidence the same way you examine the evidence of the witness for the Prosecution. You will weigh them in the same scale, the same balance."

There is no merit in this argument.

Mr. Bird in his speech to this Court asked that we hold that Harris' defence was insufficiently put to the jury. This appellant's defence as I understood it, was really a guilty plea to manslaughter based on his sworn testimony of no intention to Murder and on the concept of joint enterprise. In his summing up, the judge gave the jury excellent and flawless directions on the concept of joint enterprise. The learned judge immediately after those directions then dealt with Harris' statements to the police and then told the jury "Melanson Harris said he went on board the yacht with others that night with the intention to rob the people of the boat, but he did not have the intention to Murder" and then gave them these directions:

> "Well, Mr. Foreman, Members of the Jury if you find that the Accused Melanson Harris in agreeing to carry out a robbery on the yacht, and that the loaded shotgun was only to be used to frighten the occupants of the yacht and some-how someone else shot the people, and that he did not have anything to do with the shooting as he said in this statement. Let me remind you what he said in his statement. After he had heard the gun shot and had gone down to the salon and seen the dead people, he said in his statement, I ask them, how they could do something like that. They told me no witnesses. That is the first statement. He is saying clearly, you may think that he had nothing to do with the shooting. In the same statement when asked by Detective Superintendent Lawrence, you went out with them on that night with the intention to rob the people on the boat, is that right? He said, yes, but I did not have intention to murder.

So if you find that he had no intention to murder, if you find from the first statement that he had no intention to cause grievous bodily harm, and you say that the common intention was to rob the people on the yacht, and the loaded firearm was to be used only to frighten the occupants on the yacht, the firearm was not to be used to cause any serious injury. In other words if you find that there was no common intention to use the firearm to cause grievous bodily injury or to kill, then as I have said in those circumstances you can only find Harris guilty of Manslaughter and not Murder.

> In those circumstances, in relation to what he has said in the first statement. And Mr. Foreman, Members of the Jury, we will pause here for half an hour.
>
> Mr. Foreman, Members of the Jury to take up from where I left off. As I was saying on the first statement as a given by Mellanson Harris, if you find that he had no intention to Murder, if you find that he had no intention to cause grievous bodily harm, you say that the common intention was to rob the people on the yacht, and the loaded firearm was to be used only to frighten the occupants of the yacht; the firearm was not to be used to cause serious injury. In other words, if you found that there was no common intention to use the firearm to cause serious bodily injury or to kill then as I have said in those circumstances, you can only find Melanson Harris guilty of Manslaughter not Murder."

Following this, the judge gave the jury adequate and proper directions on the law as it related to Manslaughter identifying this offence with the defence of Harris and relating very fully the factual aspect of Harris' defence to that law. In my considered opinion, looking at the summing up as a whole, the learned Judge was extremely extravagant in laying before the jury the defence of this appellant. The summing up on this aspect was full, extremely fair and accurate. This argument also fails.

Mr. Watt made a similar submission regarding the defence of Joseph. In Joseph's case, the learned Judge dealt adequately with the law as it related to the issue of an alibi. The judge then reminded the jury that from the witness-box and in his two statements to the police, Joseph maintained his alibi that he was not on board the yacht and therefore he could not have killed anyone as he was somewhere else (at home asleep) at the relevant time. It was suggested that in dealing with Joseph's defence, the judge did not remind the jury of a so called discrepancy between the evidence of Samuel who said Joseph killed one person and the evidence of DeSouza who said Joseph told him he killed three people.

I do not consider this to be the type of discrepancy that could have impacted with any form of adverse tremor on the credibility of DeSouza. DeSouza was only testifying only as to what he said Joseph told him. It could be said to be more consistent with non-complicity. Consequently I do not consider this omission harmful to Joseph's defence. The judge did leave the full evidence of these two witnesses for the jury's consideration.

Regarding the possession in Joseph of the stolen BB gun, the learned judge reminded the jury that Joseph was saying that Harris gave him the gun. However, the judge did not remind the jury that Harris' evidence supported Joseph as to his alleged innocent possession of the gun or that Jason John's evidence (another witness for the prosecution) also said that Joseph told him of his innocent possession. It is my considered opinion that because of the massive strength of the case for the prosecution, this omission was negligible in so far as it could have affected the quality of the conviction against Joseph. I am certain that even if the jury were so reminded, the verdict would have been the same.

CONCLUSION

This was a horrendous crime. The case of the prosecution against the appellants was formidable. The accomplice' s evidence was sturdy. As it affected the first named appellant, it was corroborated to a certain extent by this appellant's sworn testimony and his first two statements to the police and to the extreme by his third statement. As it affected the second named appellant, it was corroborated by his possession of the BB gun if his explanation were rejected and by the evidence of Kevin DeSouza if accepted. The learned judge's summing up was thorough, fair and accurate on all issues of law. In my judgment, learned senior counsel for the Respondent has successfully repelled the appeal of both appellants in this court. I have no lurking doubt as to the acceptability of the verdicts of the jury. I discern no miscarriage of justice. Accordingly I dismiss both appeals and affirm the convictions and sentences imposed.

.....

Satrohan Singh

Justice of Appeal

I concur

.....

Albert Matthew

Justice of Appeal (Ag.)

ADDENDUM:

Since this judgment was written and signed, but before it was delivered, it was brought to the attention of this Court that Her Majesty's Privy Council expressed the opinion that it was wrong for a judge to let the jury know that he had admitted in evidence after a Voir Dire a statement made by an accused person after objections were taken as to its admissibility. In this appeal, the judge, in his summing up, made such a disclosure to the jury following of course the law as it stood previous to this new opinion. I do not consider that any injustice was done to Harris by this disclosure, the first two statements being supportive of his evidence on oath and Mr. Bird having expressed the opinion that the third statement was properly taken. Our conclusion therefore stands.

.....
Satrohan Singh
Justice of Appeal

.....
Albert Matthew
Justice of Appeal (Ag.)

ADAMS J.A. (Ag.)

The appellants Melanson Harris and Marvin Joseph along with one Donaldson Samuel were charged with the offence of murder contrary to common law.

The trial of these three opened on January 29th 1996 when a jury was empanelled in the High Court of Antigua and Barbuda, after which the matter was then adjourned to the following day January 30, 1996.

At the commencement of the proceedings on the 30th, Counsel appearing for the No. 3 Accused Donaldson Samuel asked that the indictment be read over to his client, whereupon that having been done, Samuel pleaded not guilty to the charge of murder, but guilty to the lesser offence of manslaughter.

In the end Melanson Harris and Marvin Joseph faced the jury alone as the No. 1 and No. 2 Accused respectively.
Donaldson Samuel was made a witness for the Prosecution and duly testified as such. Both of the Accused were convicted on 28th February 1996.

In relation to the appellants Marvin Joseph and Melanson Harris the prosecution relied substantially on Donaldson Samuel co-accused turned star witness, and a boy Kevin De Souza who testified that he was born in December of 1981 and that he was the first cousin of the appellant Marvin Joseph. For my part there is little that needs be said in this judgment in relation to the appellant Melanson Harris.

He testified on his own behalf and it is my view that (having regard to the doctrine of constructive malice which operates in this jurisdiction) out of his very mouth a conviction of murder was inescapable. Part of the evidence in which he implicated himself reads as follows:

> "On 26th January 1994 I was at the cricket practice. I left, Samuel came to me saying lets try to make a quick money. I asked him in what way, he say on the yacht. I told him how we expect to get on board a yacht. Then he told me by this Sunfish and the Boston Whaler. So this was about 7:00, he told me he would come and check me back at 9:00 p.m. He came about 8:30, we got ready and left. We picked up the shotgun, went on the south side of the airport, went to a part south west of the power station. He told me to wait there while he go and get the

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boat. He came with the boat and a sunfish tied at the back of the boat. I boarded the boat. We went on our way to Low Bay. On our way to Low Bay he said it is going to be the quickest money you ever make. It took us about 10 minutes to get across the lagoon, then we left. Loose the Sunfish from behind the boat and took it across the patch of land to the beach; then we use a long stick to oar the Sunfish to the boat, then on our way had to use our hands. So when we get to the yacht Samuel carry the Sunfish to the yacht, then went up on the yacht. I passed the gun to him, then on his way to the cabin he took up a roll of tape. Then after he passed the tape to me and told me to hold that. Then he went down where the step is, I went to the front hatch then he went. I went down to like a bedroom or bathroom. I wake up one person. After the captain see the gun he called everybody up and Samuel approached him. Then after he asked him where the money is they pointed to the saloon of the boat. He told me to tie them up, I use the rope first then he took them up to the cabin to the deck then we took turns in searching. Then after we searched that is when I put the duck tape on their hand. We took them back to the cabin, I tied them properly and told them lets go. He did not listen. Then when I went to put the bag on the Sunfish I heard the gun went off. When I went down I asked him what the tuck he did that for. He did not say anything, I started to get scared. I went back out without saying anything, I started to get scared I did not want him to use the gun on me. So I did not say anything. Then we boarded the Sunfish and came back to shore, I pulled the Sunfish on the beach. Then he gave me a hand to pull the boat, we crossed the patch of land and then back to the lagoon. I was still scared, then after he hide the shotgun we went to my house. Then he gave me the travellers cheques, I told him half the money, he held the other half. He asked me if I wanted a diamond ring, I told him no. I was trying to protect myself so I did not want to say anything".

The fact that all the occupants were shot against the background of the robbery and died as a result of the shooting in the course of such robbery was not in dispute at the trial.

In my view, this being the case, the fact that the common law doctrine of "constructive malice" to which reference has been made was applicable, the mens rea in the context of this case had to be related to the crime of robbery and was to be ascertained by asking whether the appellant Melanson Harris was participating in the robbery with intent to rob the deceased persons.

In explaining the doctrine of constructive malice the learned authors in the 7th edition of ***Smith and Hogan at page 348*** *say* that before it was abolished in England the doctrine of constructive malice took two forms:-

> "(1) it was murder to kill in the course or furtherance of a violent felony (or possibly any felony) so that an intention to commit the felony (e.g rape, or robbery) was .n sufficient mess rea where death resulted;
>
> (11)…….
> ……."

The learned trial judge rather than describe the requisite state of mind in accordance with the doctrine of constructive malice, mercifully directed the jury that before they could find this appellant guilty they had to be sure not of an intent to rob, but the more evil intention of killing or causing grievous bodily harm. By their verdict it is clear that they undoubtedly so found, thereby clearly indicating that the Prosecution had discharged a heavier burden than would been required of them under the doctrine of constructive malice.

Against this background enough has been said to indicate that I am of the opinion that the appeal of Melanson Harris should be dismissed.

> Among the grounds argued by Counsel for the appellant Marvin Joseph was one framed in this manner:
>
> "The learned trial judge erred in law when he Tailed to properly and adequately put the case for the appellant and in particular to instruct the jury on the inferences that they could draw from the appellant's evidence and other corresponding evidence given by the Accused Melanson Harris"

Because of the thrust of this judgement I would restrict myself to dealing with this ground alone.

The case against the other appellant Marvin Joseph was constituted substantially by the evidence of the accomplice Donaldson Samuel (who pleaded guilty to manslaughter and admitted his role as a robber) and Kevin De Souza a boy of twelve at the time of the killing.

Samuels' evidence made the appellant Joseph an actual participant both in the shooting and the killing.

Kevin De Souza's evidence against the appellant Joseph was to the effect that Joseph and admitted to him that in relation to the killing of the people on the yacht he Joseph had "killed three and somebody else killed one"; in addition, De Souza testified that he had seen a gun in Joseph's waist after it had been removed from the yacht as part of the booty.

Appropriate warnings were given by the trial judge to the jury as to how they should approach the evidence of the prosecution witnesses Donaldson Samuel and Kevin De Souza. This not withstanding, I regret to have to say I find it impossible to accept that the defence of this appellant Marvin Joseph was satisfactorily put before the jury.

The summing up indicates that the defence was put in the following manner.

> " I now deal with the defence of the Accused Marvin Joseph. Marvin Joseph's case is a straight denial. His defence is an alibi. He is saying in other words, he was at home, he was elsewhere when the incident on the Challenger occurred. The defence is one of alibi, which simply means that the Accused said he was somewhere else at the material time but as the burden of proof is on the prosecution, the Accused does not have to prove that he was elsewhere. On the contrary it is for the prosecution to disprove the alibi. If you conclude that the alibi was false that does not of itself entitle you to convict the Accused the prosecution must still establish his guilt. Alibis are sometimes
> invented to bolster a genuine defence.
> He is saying that he was not there on board the yacht and
> therefore he could not have killed anyone on the yacht. He told
> you so in two statements given to Detective Superintendent
> Lawrence. Bearing in mind that the Accused does not have to

prove anything but if you accept that he was not on the boat Challenger, he is not guilty of any offence. If what he said in the witness box leaves you in doubt as to whether he was on the Challenger or not equally he will not be guilty of any offence, because it means that the prosecution would have failed to satisfy you to the extent that you feel sure of the guilt of Marvin Joseph. If you say that he was lying when he gave his evidence in the witness box you do not convict him merely for lying. Because if you are minded to convict, you can only do so because you are satisfied to the extent that you feel sure of the guilt of the Accused by the evidence led by the prosecution particularly if you accept the evidence of Donaldson Samuel and or Kevin De Souza. If you are satisfied to the extent that you feel sure that Donaldson Samuel was speaking the truth then he is guilty of murder. And or if you are satisfied so that you feel sure that Kevin De Souza is speaking the truth he is guilty of murder"

Now the defence as suggested and appropriately so by the learned trial judge was an alibi; from the above passage cited it seems to me that the trial judge put before the jury the direction required when a defence of alibi is raised; but no where in the above passage or elsewhere in the summing up did the trial judge refer to the fact that the alibi of the appellant Joseph was being supported by the sworn evidence of the other appellant Melanson Harris to the extent that Harris had sworn that the appellant Marvin Joseph was not on the yacht. I have underlined the word "supported" because the record indicates that in putting forward the case against Melanson Harris before the defence of Joseph had been projected in the passage above, passing reference was made to the fact that Marvin Joseph was not on the yacht. In my view it was necessary if fairness were to be achieved to highlight as part of the defence the sworn testimony of Melanson Harris in support of the alibi of his co-accused.

I have said that in relation to the gun removed from the yacht the witness Kevin De Souza was putting the appellant Joseph in possession of the gun. But here again there were circumstances pointing to an innocent possession of the gun by the appellant Joseph, and to which the learned judge did not advert as part of Joseph's defence. In the first place the

appellant Melanson Harris swore that he Harris had stolen the gun from the yacht. In the second place Harris swore as to how Marvin Joseph had come into possession of the gun**,** and which version was supported by a prosecution witness Jason John and of course by the appellant Marvin Joseph himself.

That there was a possible innocent explanation for the appellant Josephs' possession of the gun was not drawn to the attention of the jury.

In relation to this very gun and speaking of the testimony of one Shane John the learned trial judge addressed the jury as follows:

> "In answer to Mr Watt he told you that Marvin told him not to allow anyone to see the gun. If you are satisfied to the extent that you feel sure that Marvin did say these words to Shane John then you have to ask yourself why he would not ask anyone to see the hand gun".

Whatever may have been the jury's answer to this question posed by the judge, it seems to me that they were entitled to be reminded that the sum total of evidence of Jason John, Marvin Joseph, and Melanson Harris was that the appellant Joseph had borrowed the gun from Harris, that Joseph had indicated a desire to buy it from Harris and had not yet paid for it. Might these facts not have caused Joseph knowing that he had not paid for the gun to be shy of displaying it to others? The appellant Joseph was in my view entitled to have that interpretation put before the jury of his reluctance to expose the gun to the view of others. ***See Pattinson 58 C.A.R*** **p. 407**.

But perhaps the gravest defect in the directions given the **jury was that** in relation to the witness Kevin De Souza. Part of the evidence of Kevin De Souza during his examination in chief was as follows:

> "I remember the end of January to the beginning of February 1994. 1 used to visit him, I remember a Monday in 1994. I saw Marvin that day, I was at Marvin's house when I saw him, just the two of us were there. Something happened that day, I cannot remember what time it was. I saw a gun (witness indicates the size of gun by demonstrating). It was black, it was in Marvin's waist when I first saw it. I asked him where he got it from. He answered me. Marvin tell me he get the gun off the yacht down by Low Bay. I cannot remember what else he told

me. Marvin told me he killed three men and somebody else killed one. The gun was in his waist. He showed me the gun".

Now this witness and Donaldson Samuel, were as I have said before, the key witnesses for the prosecution. The learned judge warned the jury that the evidence of these two had to be approached with caution. But in my view, the evidence given by De Souza as to the oral admission of the appellant Joseph needed a warning also. The evidence of De Souza as to the setting in which the alleged oral admission was made was scant in the extreme. The evidence of the admission took the form of indirect speech rather than a recollection of the words falling from the lips of the appellant Joseph and we know not what were the words actually used. Was De Souza correctly interpreting what the appellant Joseph had said? What distance separated the two men when the words were used? It seems to qualify as a grave omission for an oral admission to be relied upon by the prosecution in a case of murder, and put before a jury, without adverting to the danger of acting upon this sort of evidence. No such caution was given in this case . ***See Pattinson (supra)***.

It is ironically significant that ultimately any reservation one might have had as to Kevin De Souza's account of what the appellant Joseph had told him about the killings and by whom they were done, justifies itself because of the violent conflict with the evidence of Donaldson Samuel which regrettably must have escaped the attention of the learned trial judge. That conflict is better demonstrated by a verbatim account of what these two witnesses said on oath. Here is what Donaldson Samuel had to say about the shooting on the yacht.

"After Marvin shot the first guy he passed the gun to me. I told
him I did not know how to use it. He passed the gun to
Melanson. He told Melanson to shoot. <u>He shoot and Melanson
shoot the other three</u> ".

Here is what Kevin De Souza said the appellant Marvin Joseph had told him "Marvin told me he had killed three and somebody else killed one".

These two versions as to who had killed how many clearly show that whereas Donaldson Samuels was swearing that he had seen the No 1 appellant Harris kill three of four persons, the other star witness for the prosecution Kevin De Souza, was swearing that he had heard the No.2

appellant Joseph admit to him having killed three of the very same four persons!

These two varied accounts, one coming from Donaldson Samuel, and the other according to De Souza from the appellant at Joseph, was likely to lead to one or other of the following conclusions. It is either that Kevin De Souza was lying or mistaken as to what the appellant Joseph had told him or that Donaldson Samuel the rascal accomplice was being remorselessly dishonest before the jury.

Bearing in mind that the evidence of Kevin De Souza was intended to serve the prosecution objective of corroborating that of Donaldson Samuel, and was commended to the jury as having that cap ability it would have been of the utmost importance to have highlighted that frightening conflict for the benefit of the jury. The authorities abound to the effect that if the accomplice Donaldson Samuel was not a credible witness that the question Of his evidence being corroborated does not arise in law.

In my respectful view the general warning as to the importance of the credibility of these two witnesses could only have had its desired effect by highlighting such evidence as might have either enhanced or impaired that credibility. Failure to have done so may possibly have led to an injustice.

Having regard to the foregoing and bearing in mind that Donaldson Samuel exchanged his services as a witness for the prosecution for a plea of guilty to manslaughter, while still awaiting to be sentenced for that crime, I remain haunted by a lurking doubt as to the guilt of the appellant Marvin Joseph.

I accordingly would consider the conviction of the appellant to have been unsafe, and allow his appeal.

……..
ODEL ADAMS
Justice of Appeal (Ag.)