

SAINT VINCENT AND THE GRENADINES**IN THE COURT OF APPEAL****BETWEEN:****EVERSLEY THOMPSON****Appellant****and****THE QUEEN****Respondent**

Before: The Hon. Mr. C.M. Dennis Byron Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh Justice of Appeal
The Hon. Mr. Albert Matthew Justice of Appeal [Ag.]

Appearances:

Mr. James Guthrie, Q.C.; Mr Victor Cuffy and Mr Keir Starmer
for the Appellant

Mr. Karl Hudson Phillips, Q.C. and Mr Parnell Campbell
for the Respondent

1997: May 26; 27;
July 21.

JUDGMENT**BYRON, C.J. [AG.]**

This matter has come before us for the second time. On the 21st day of June, 1995 the appellant was convicted for murder and sentenced to death after a trial by jury, before Joseph J. His appeal was dismissed before this court on the 15th day of January, 1996 and he has appealed to the Judicial Committee of the Privy Council, who have invoked powers under section 8 of the Judicial Committee Act 1833 to solicit the views of the court on certain questions which have not been raised before us relating to the admissibility of the oral and written confessions made by the appellant.

The questions are:

- "1. Whether, and if so to what extent?
 - (1) section 3 of the Evidence Act 1988 (Cap. 158 of the Laws of St. Vincent and the Grenadines) and/or
 - (2) section 5 and 6 of the Application of English Law Act 1989 (Cap. 8 of the Laws of St. Vincent and the Grenadines) and/or
 - (3) any other Laws of St. Vincent and the Grenadines import into (or exclude from) the Law of St. Vincent and the Grenadines the Police and Criminal Evidence Act 1984 (PACE) applicable in England both generally and as they relate to the admissibility of evidence in criminal proceedings:"
2. If, and in so far as, such provisions apply in St. Vincent and the Grenadines what is their effect in the present case?"

The Background Facts

Between 7:00 p.m. to 9:00 p.m. on 18th December, 1993 the 4 year old D'Andra Olivierre disappeared from her home where she lived with her family at La Pompe, Bequia. Her body was never recovered. When the alarm over her disappearance was raised her family and friends began a search. Three members of the family gave evidence that they had seen the appellant under a tree nearby. Blood and faeces were seen on a stone near the sea. The police investigators testified that the appellant made oral statements to them on the morning of 19th December, 1993 to the effect that he had thrown her into the sea and later that day around 11:45 a.m. to 1:00 p.m. made a written caution statement confirming and amplifying the oral admissions. At the trial the appellant ran a defense of alibi, alleged police brutality, denied that he had confessed either orally or in writing and denied that he had signed the statements allegedly bearing his signature. The trial judge in accordance with the prevailing practice in St. Vincent and the Grenadines determined the admissibility of the confessions against the legal framework of voluntariness and the Judges Rules.

Question (1), (2) and (3)

I can begin by dealing with question (1), (2) and (3). In order to do this, I refer to the Application of English Law Act 1989 section 5(l):

"(1) Subject to the provisions of this section, only the following Acts of Parliament of the United Kingdom shall apply in St. Vincent and the Grenadines, that is to say -

- (a) all such Acts as are specified in the Schedule, to the extent specified therein; and
- (b) any such Act which applies, either specifically or by general description, by virtue of any Act of the Parliament of St. Vincent and the Grenadines other than this Act."

PACE was not specified in the Schedule and was not made to apply by any other Act of the Parliament of St. Vincent and the Grenadines specifically. I will be considering whether it has been made to apply by general description under section 3 of the Evidence Act, 1988.

Question (1)

Section 3 of the Evidence Act, 1988 (Cap. 158 of the Laws of St.

Vincent and the Grenadines

states:

"Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court, court martial or tribunal, or before any person having by law, or consent of parties, authority to hear, receive and examine evidence, touching the admissibility or sufficiency of any evidence, the competency or obligation of any witness to give evidence, the swearing of any

witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in St. Vincent and the Grenadines".

In 1926, the Evidence Ordinance was passed. Section 2, which incorporated the English law of evidence on various matters, was clearly the precursor and precedent for section 3 of the 1988 Act.

One of the important regimes which affected the admissibility of evidence in Criminal Proceedings was the "Judges Rules" which did not have the force of rules of law but were prepared as administrative rules for the guidance of the police officers in conducting their investigations in England.

These rules have not been specifically adopted in relation to St. Vincent and the Grenadines but have been applied under section 2 of the Evidence Ordinance 1926 as being part of the Law administered in England. Then came the Evidence Act 1988. It is a fairly comprehensive treatment of the law of evidence, but the matter of relevance to these proceedings, being the admissibility in Criminal Proceedings of extra judicial confessions and admissions, is a notable omission. This is not surprising because in St. Vincent and the Grenadines there has never been any legislative regulation of these issues except by the provisions which required questions touching their admissibility to be determined according to the law or the law and practice administered by Courts in England. Prima Facie, therefore, section 3 of the 1988 Act accords with that tradition.

Section 3 of the 1988 Act repeated the provisions of section 2 of the 1926 Ordinance with a few significant alterations:

- ◆ Whereas section 2 of the 1926 Ordinance refers to the "Law of England" section 3 of the 1988 Act refers to the "law and practice "administered for the time being in England"
- ◆ Whereas section 2 of the 1926 Ordinance makes no temporal qualification section 3 of the 1988 Act refers to the law and practice administered "for the time being" in England
- ◆ Whereas section 2 of the 1926 Ordinance provides for such "modifications as may be applicable", section 3 of the 1988 Act provides for such "modifications as may be applicable and necessary".

An Act to consolidate cannot change the law

The respondent submitted that (1) the Evidence Act, 1988 was part of the law revision exercise carried out between 1987 and 1990, and as such must be interpreted as its long title indicated as being an Act "to consolidate the law relating to evidence in criminal, civil and other proceedings"; (2) the Law Commissioner did not have legislative

powers; (3) "the legislative intention was clearly that the provisions of the Evidence Ordinance, 1926 would continue in effect together with the addition of specific topics included for the purpose of modernisation".

Both sides invited us to refer to the Hansard report of the Parliamentary proceedings on the principles set out in **Pepper v Hart (1993) 1 All E.R. 42** and **Three Rivers DC v Bank of England (1996) 2 All E.R. 363**. I have decided to accept the invitation although I do not consider that the legislation was ambiguous or obscure or its literal meaning could lead to an absurdity, because the material relied on consisted of clear statements made by the Hon. Minister, who promoted the Bill in Parliament and who by a twist of coincidence no longer holds that office but appears as Junior Counsel for the respondent. In his presentation in Parliament he explained:

"We have seen fit in clause 3 of the bill which is reproduced on pages 4 and 5 to retain the applicability of English law wherever there are no appropriate provisions in this bill. You will notice, the final 4 lines of this section that provision is made for matters not mentioned in this Act to be decided according to the law and practice administered for the time being in England with such modifications that may be applicable and necessary in St. Vincent and the Grenadines. This very useful provision enables us to make use of the English rules whenever the occasion should arise in which our own rules may be in one way or another deficient to cope with the particular matter that might arise before the court."

This revealing extract rebuts the argument that the Act resulted from the Law Revision powers of the Law Commissioner. This is an act that was passed by the Legislature. It also reflects the policy of the government to retain the applicability of the English law of evidence in St. Vincent and the Grenadines where there are no appropriate provisions in the Act.

Under section 63, the statutory intention that the Evidence Ordinance of 1926 is repealed is indicated by saving its applicability in relation to certain matters specified therein.

Law and Practice

I do not think it necessary to go through the argument in support of the clear and obvious conclusion that the words law and practice administered in England must be taken to include Acts of the United Kingdom Parliament for the time being in force. See for **example Bashir V Commissioner of Lands (1960) 1 All E. R. 117** per Lord Jenkins at 127.

"the second Paragraph which provides that:

"In exercising the power of granting relief ... Under this section the court shall be guided by the principles of English law and the doctrines of equity."

It appears to their Lordships that..... the court, in determining whether relief should be granted and if so on what terms, is to be guided by the principles on which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date when the ordinance came into operation, and by the doctrines of equity."

"For the time being"

There are two possible meanings of the phrase "the law of England for the time being": the first that it refers to the law of England as it stood when section 3 of the Evidence Act 1988 took effect; the second or ambulatory meaning that it refers to the law of England as it stands whenever the court is asked to apply the relevant provision.

In an article in the Caribbean Law Review entitled "The Courts and the Inter-relation of the Civil Code in a mixed Legal System: St. Lucia revisited" Dr. Kenny Anthony discussed the importation of English law through the Civil Code. His researches revealed that in the case law throughout the Commonwealth the second meaning has been generally accepted.

In the Trinidad and Tobago case of **Mohammed v Mohammed (1967) 12 W.I.R. 124 Kelsick J.** accepted and adopted the reasoning in **Ramjattan v Rambaran** (Full Court of Trinidad and Tobago, No. 85 of 1958, unreported) where Camacho, C.J. (Ag..) said:

"Mr Alexander sought to restrict the meaning of the words 'for the time being in force' to the day on which the Evidence Ordinance was promulgated. In our view, however, the phrase 'for the time being in force' connotes a period of time rather than an instant, but in so far as any instant may be in question it refers, in our view, to the instant at which the question as to the admissibility etc., of the evidence arises, and is not confined to the instant of promulgation of the Ordinance.

The phrase 'the law of England is a wide one and clearly cannot be read as excluding the statutory law'.

We were referred to a number of cases from St. Lucia where the phrase 'for the time being' was held to be of ambulatory effect; e.g. the Court of Appeal case of **Mendes v Philbert** (1971) 16 W.I.R. 255; **Vialva v Christian** (1 5th July 1972); **John v Smith** (5th April 1973); **Cools v St. Lucia Agriculturists Association Ltd** (11th June 1974).

However, this discussion is largely academic because PACE was enacted in 1984 and was already the law of England for some four years before the Evidence Act, 1988.

The submission of the respondent that the legislative intent of the 20 1988 Evidence Act was that the "the Provisions of the Evidence Ordinance, 1926 would continue in effect together with the addition of specific topics included for the purpose of modernisation (computer prints etc.) could not be taken seriously. The clear language of the section does

not allow any such conclusion, and if the purpose was modernisation it would not be logical to limit the law to the ancient principles of 1926.

The conclusion that section 3 of the Evidence Act requires the application of the current law and practice administered in England, including PACE, to apply is inescapable.

Applicable and necessary modifications

Counsel for the respondent made the rather extreme submission that "whatever the effect of PACE on the law of evidence in the United Kingdom, the courts of St. Vincent and the Grenadines would have the power to "modify the provisions of PACE so as to read them as not changing existing law. "

I must therefore examine the meaning of the phrase "with such modifications as may be applicable and necessary in St. Vincent and the Grenadines."

There is some statutory guidance in the Interpretation and General Provisions Act 1976. Section 11 provides:

"An applied law shall be read with such formal alterations as the names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make the same applicable to the circumstances."

In this case however the words of the section do not limit modification to applicable formalities. They include all modifications as are applicable and necessary. This requires relating provisions of the law to the circumstances in St. Vincent and the Grenadines, and making such modifications as are reasonably required by the prevailing circumstances, and are legally ancillary to the existing institutions and legal framework, in order to make it reasonably convenient for the rules to be applied.

An example of a necessary modification appears in the case of **Zuliani v Viera** (1994) 45 W.I.R. 188. The court had to deal with the Supreme Court (St. Christopher and Nevis) Act section 78 which provides:

"Subject to rules of Court, the law and practice relating to solicitors, and the taxation and recovery of costs in force in England shall extend to and be in force in the state and apply to all persons practicing therein as solicitors of the court."

The Privy Council approved a decision of our Court of Appeal that the English Solicitors Act 1974 which was imported into the law of St. Christopher and Nevis needed a modification to a rule requiring a solicitor to obtain a certificate from the Law Society, as there was no such institution in St. Christopher and Nevis, and the requirement was inapplicable.

The respondent contended that even if PACE itself was applied in St. Vincent and the Grenadines the Codes of Practice which were designed to regulate the conduct of persons charged with the duty of investigating offences in the United Kingdom should be excluded.

In St. Vincent and the Grenadines the Judges Rules were applied on the ground that they were the law and practice administered for the time being in England. That is no longer the case. They have been replaced by the Codes.

Like the Judges Rules the codes are not rules of law. They provide guidance to police officers in the investigation process and they establish the standard of conduct by which the investigative process will be assessed. Section 67(11) of PACE prescribes that codes are admissible in evidence and those which appear to be relevant can be taken into account into determining any question before the courts. This requires the Judges to take the codes into account but it is a matter for their discretion whether a breach of the codes will result in the exclusion of evidence.

On my reading of the Codes I find that they could be applied in St. Vincent and the Grenadines with modifications which are applicable and necessary. The modifications are easily identifiable and determinable by a trial Judge. I do not think that it is necessary to make any pronouncement of how the codes are to be modified, this process should be undertaken at the time the law and practice in England is being applied. In time case law will build up. I do not think that approach will lead to uncertainty about the law, and it would be a fairly simple administrative exercise to send copies of the codes of practice to each police station, just as was done in respect of the Judges Rules.

There is no doubt, however, that the law and practice administered in England with regard to the admissibility of confessions and admissions include the codes of practice.

A Judge in St. Vincent and the Grenadines must, therefore, in order to comply with the legislation be prepared to approach the task of determining such questions on the basis of considering the relevant provisions of PACE and the codes, with applicable and necessary modifications.

Question 2

Counsel for the appellant submitted that provisions of PACE would affect the case in point in relation to the following contentions argued on behalf of the appellant:

- (1) The confession was obtained by the oppression of the police.
- (2) the appellant was not offered and did not receive any legal advice whilst in police custody. DS Warrican said he was not told he ought to see counsel.
- (3) No written notes were made of the verbal admissions attributed to the appellant.
- (4) PS Adams and DS Warrican suspected the appellant of murder from the moment of his initial detention at 6:45 am on 19th December, 1989 but he was not cautioned until both officers had asked him questions about D'Andra's disappearance.

I would agree that it was the duty of the learned trial judge to determine the question of the admissibility of the confessions in accordance with the provisions of sections 76 and 78 of PACE, and it is clear that this was not done. However, as the transcript of proceedings does not set out the reasons for the Judge's conclusion that the confessions were voluntary and therefore admissible in evidence it is necessary to draw inferences as to her reasoning.

PACE provides: Sec.

"76.

- (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -

- (a) by oppression to the person who made it; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court, beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

- (8) In this section "oppression" includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture.)

"78

- (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

(1) Oppression

The allegations of misconduct by the police were so extreme in this case that it is clear that the judge did not believe the appellant at all because if she had entertained any doubt the statements would surely have been rejected on the test she applied.

It is reasonable to conclude, therefore that, the evidence given by the appellant of the use of force and threats against him must have been totally rejected by the learned trial judge. If there was any doubt about the truth of these allegations it would have been the duty of the learned trial Judge to refuse to admit the statement on the ground of lack of voluntariness.

A trial Judge applying the test under section 76 (2)(a) who disbelieved the appellant would have been entitled to reject the submission that the confession was obtained by oppression. In my view, there were objective reasons to support the Judge's conclusion that the appellant's story was incredible, and untrue. In addition the judge had the advantage of seeing the appellant and the other witnesses who testified on this issue, and I would not under estimate the value of that advantage in determining the credibility of the appellant's story.

(2) Right to Legal Advice

PACE Section 58 conveys a right to consult a solicitor privately at any time if the suspect so requests.

In my view the evidence did not reveal any breach of this provision because no evidence was adduced that the appellant requested to consult a solicitor before or during his confession to the police.

It is clear that in England the provisions of code C: 6; C: 11.2, 15.3; code D:2.15 (ii) and 5.2 would have been considered relevant. The codes require that before commencing an interview the interviewing officer must remind the suspect of his entitlement to free legal advice.

These provisions are supported by legal aid schemes in England. These have had statutory basis and in fact exist. They reflect the official policy of the British Government. It is interesting to note as stated in **The Police and Criminal Evidence Act 1984** by Michael Zanders second edition at page 108:

"There is no statutory duty solicitor scheme in Northern Ireland and therefore nothing about it in the Northern Ireland PACE order. "

Similarly, these provisions could not be applicable in St. Vincent and the Grenadines because there is no law or practice, or available

system under which a suspect can avail himself of free legal advice as a matter of right, during the investigation process.

In St. Vincent and the Grenadines the constitution provides in section 8 as follows:

- "8 (2) Every person who is charged with a criminal offence -
- (c) shall be given adequate time and facilities for the preparation of his defence;
 - (d) shall be permitted to defend himself before the court in person or, and at his own expense, by a legal representative of his own choice;"

The prevailing standards of Police conduct that have in practice been applied are those set out in the Judges Rules, which require the police to provide facilities for the legal defence of persons in custody, and for allowing the person in custody to consult a solicitor, provided that no hindrance was likely to be caused to the process of investigations or the administration of justice by his doing so, and by requiring that persons in custody be informed orally and by the existence of notices displayed at convenient and conspicuous places at police stations of the rights and facilities available to them which must include the right to be represented by solicitor of their choice at their expense.

Against this background I think that the codes require modification to the extent that the absence of legal aid facilities and the absence of free legal advice makes it pointless for the police to tell a suspect of a right to free legal advice. However the suspect should be informed of his right to be represented by a lawyer of his own choice. Under the law which the learned Trial Judge applied the police would have been in breach of the provisions requiring that the appellant be informed of his right to be represented by a solicitor of his choice at his expense. The effect of the omission to do so on the confessions must depend on the circumstances of the case.

The learned trial Judge would be entitled to consider the manner in which the investigations had been proceeding and other factors affecting the suspect and the surrounding circumstances in determining the legal effect on the admissibility of the confessions of the police investigator's failure to have taken special steps to assist the appellant to obtain legal advice.

This has been the law and practice that a trial Judge was required to apply under the laws of St. Vincent and the Grenadines prior to the 1988 Evidence Act and also under PACE. I would conclude that it is probable that in accordance with her duty she considered the omission of the police to advise the appellant of his right to consult a lawyer of his choice in the exercise of her discretion.

I would, therefore conclude, that the failure of the police investigators to advise the appellant to consult a lawyer is not an omission which would necessarily lead to the conclusion of, oppression, unreliability or unfairness, and that the learned trial Judge was entitled to exercise a discretion to reject this omission as a basis for excluding the confessions.

(3) No Notes of Verbal Admissions

Under the codes the police are required to make a written record of any interview, and this could be made either contemporaneously or as soon as practicable afterwards. The record should be available to the person who made it and he should be asked to sign it.

Under the Judges Rules statement made after caution were required to be recorded. There is no reason why the provisions of the codes with regard to the making of a written record should not be observed. In my view the codes do not need to be modified in that regard. The requirement is not novel or new and ought to have been considered by the learned trial Judge even when applying the standards laid down in the Judges Rules. However it would still be a question for her judicial discretion whether to allow evidence of the oral confessions to be adduced in the absence of a written record, signed by the suspect, and it is reasonable to conclude that the learned trial Judge did take this into account.

Failure to Give Caution Before Questions

Under the codes a person whom there are grounds to suspect of an offence must be cautioned before any questions about it are put to him for the purpose of obtaining evidence which may be given to a court in prosecution.

Under the Judges Rules the test was that as soon as a police officer has evidence which would afford reasonable grounds for suspicion that a person has committed an offence he shall caution that person before putting to him any questions relating to that offence.

On the evidence, the issue the learned trial Judge would have had to consider whether applying the Judges Rules or the codes of practice, was the amount of information the police had when they first picked up the appellant on 19th December. A main factor to be considered is at what stage could knowledge, that D'Andra's disappearance was the result of some criminal misconduct be imputed to the police.

At their outset, the investigations were into D' Andra's disappearance. The failure to find her, and the findings of blood and faeces on the beach were clues pointing to her death, which however

required further investigation because the body was not located. It is reasonable to conclude that the police would delay reaching a conclusion that her disappearance resulted from criminal misconduct until further searches and further lapse of time had eliminated or at least reduced the possibility of other explanations for her disappearance being revealed.

In my view therefore, there are rational grounds for hesitating to conclude that the police were conducting investigations into the crime of murder until the appellant had made the oral statement that he had thrown D'Andra into the sea. Sgt. Warrican's evidence was that he gave him the caution at that time.

In my view, a trial Judge determining the question according to the law and practice administered in England could have decided to admit the confessions into evidence.

Answers

I would therefore answer the questions as follows:

Question 1:

PACE has been specifically imported into the Laws of St. Vincent and the Grenadines to the extent that, whenever any question arise in any Criminal Proceedings before any Court, touching the admissibility of any evidence, and there are no provisions in the Laws of St. Vincent and the Grenadines which regulate the determination of such questions, the provisions of PACE, subject to such modifications as are applicable and necessary, are to determine those questions, and by necessary implication to guide the conduct of the police in their investigation to the extent that it is relevant to the issue of admissibility.

Question 2:

On the evidence adduced, it was open to a judge applying the law and practice administered in England to reach the conclusion that the admissions and confessions should have been admitted into evidence.

Once the learned trial Judge came to the conclusion that there was no truth in the allegations of oppressive conduct by the police made by the appellant and in my opinion there were objective reasons to reject those allegations, no unfairness could have resulted from the admission into evidence of his clear and complete confession to this heinous crime.

I would conclude therefore that if the provisions of PACE were applied, it is likely that the outcome would have been the same.

.....
C.M.DENNIS BYRON
Chief Justice [Ag.]

I concur

.....
SATROHAN SINGH
Justice of Appeal

I concur

.....
ALBERT MATTHEW
Justice of Appeal [Ag.]