ANTIGUA AND BARBUDA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

CRIMINAL APPEAL NO. 2 OF 1998

BETWEEN:

OSCAR FRANCIS **APPELLANT**

V

THE QUEEN **RESPONDENT**

Before: **The Honourable Mr. Satrohan Singh** **Justice of Appeal**
The Honourable Mr. Albert Redhead **Justice of Appeal**
The Honourable Mr. Albert Matthew **Justice of Appeal (Ag)**

Appearances: Mr. John Eli Fuller for the appellant
Mr. Cosbert Cumberbatch DPP for the respondent

[February 10 : 22 1999]

JUDGMENT

SATROHAN SINGH JA.

On February 2, 1998, the appellant Oscar Francis was convicted by a mixed jury of nine of the **Murder** of **Steven Henry** before **Georges J**. He was sentenced to **Death by Hanging**. He appeals from this conviction.

The case presented by the prosecution rested primarily on statements made by the appellant to the police wherein he admitted inflicting the fatal injury on the deceased. To a lesser extent on circumstantial evidence, which disclosed, that just before Henry was stabbed, the appellant was seen in possession of the murder weapon, an 8" long knife partly concealed in a paper bag. He was then standing facing the deceased. They had a disagreement over money. The deceased was then seen with a stab wound to his throat. This happened about 11:30 pm on May 10th, 1997.

Regarding the statements, at about 11:40 pm the said night, the appellant was escorted by a police officer to the St. John=s Police Station. There he handed over the knife to the police which appeared bloodied. He then told the police AMe and a man just got into a little misunderstanding at Browne=s Avenue and me pull me knife and he must get cut somewhere across the throat@. At around 1 am on the said night, the police cautioned the appellant and obtained a statement from him. This was recorded in the officer=s book. In this statement the appellant said:-

> AI have nothing to say, however, the man say he have some kind of gun, and he left and go in the bus by Paget and came back with his hand in his pocket, and he held me by my jacket and pull me and me believe he was going to do something, so I pull me knife and he got cut somewhere across he throat@.

Steven Henry died from the stab wound the next day May 11th, 1997 in the afternoon. The wound was 4" - 6" deep penetrating the neck down to the chest into the clavicular area.

On May 12, 1997, a police officer told the appellant about the death of Steven Henry and he was again cautioned. He said Aofficer, me go tell you everything@. He then gave a written statement at about 3:45 pm to Sergeant of Police McLean Joseph in the presence of Inspector of Police Mc Kenzie Joseph. At the end of the recording of the statement, it was read over to the appellant who said he understood it and he signed it. Inspector Joseph signed as a witness. At the trial, the voluntary nature of this statement was challenged by the defence. A **Voir Dire** was done and the trial Judge ruled that the statement was given voluntarily by the appellant without oppression. In that statement the appellant said:-

> AI know the man you call Steven. Me and he were friends And we use to drink together. Saturday 10th May, on that night we were drinking in Sister=s joint in Brownes Avenue, there he stopped to get a drink of rum. Then I moved away from him. After that he came close to me, so I moved away

> from his stool and went by the door, and watched him go into the bus he lived in which is nearby. I then pulled out my knife which I had in my pocket, and put it behind my back, and wait for him. Shortly afterwards he came back, and he held me in my shirt collar, and I pull out my knife and I stabbed him in his throat. I then take out the knife and I walked away and go to the station, and I make a report, and handed over the knife to the police. I did not see Steven with any other weapon in his hand. Apart from when he told me he was going to mark my face, he never threatened me. I got vex because I did not like what he was saying, he was just chatting, and I was annoyed. That is why I stabbed him. Officer that is the truth, I have nothing else to say.@

At the trial the appellant exercised his right to say nothing.

On this evidence the learned Judge left for the consideration of the jury, the offence of **Murder**, the offence of **Manslaughter** based on the concepts of the requisite intent or its lack thereof and **provocation**. The Judge also left with them the incident of a complete acquittal based on the appellant=s suggestion of possible **self-defence**. **The grounds of appeal** relied on by the appellant challenge the Trial Judge=s summing up on his directions to the Jury on (1) **the written confession** of the appellant (2) **self defence** and (3) **provocation**. They also accuse the Judge of (4) **confusing** the Jury on the issue of malice and (5) failing to put the case for the defence in a coherent and reasonable manner.

1. **THE CONFESSION:**

At the trial, the appellant objected to the admissibility of the written confession given by him to the police on May 12, 1997. **Georges J** conducted a **Voir Dire** and ruled the statement free and voluntary. The main grounds of the objection were that the appellant was kept at the police station in excess of 40 hours without food and rest. Having perused the transcript I can find no legal justification for interfering with this ruling of the Trial Judge. At the **Voir Dire**, the appellant himself testified that

he was given food and he was allowed to sleep and did sleep before the statement was taken. He also admitted that he told the officer the truth and that the officer wrote it down, read it back to him and he then signed it. He said he was not beaten or threatened, that no one compelled him to make the statement and that he made it freely.

However, the confession having been admitted in evidence, Georges J, in directing the Jury as to their approach to the statement, told them:-

> A**This statement I admitted in evidence as free and voluntary.** You will have to say what weight, if any you attach to that statement ... you will have to say if whether what is written in that statement is true.@

The criticism of Mr. John Fuller of these directions, was that the first or my emphasized part of the directions removed from the Jury=s consideration the question of the admissibility of the statement and left them with the impression that the Judge, having told them he found the statement free and voluntary, that what was written therein must be true.

The law on this issue is that the admissibility of a challenged confession was for the Judge and the weight and value to be given to such a statement if admitted, were for the Jury. In considering weight, the Jury were entitled to consider all the circumstances that led up to the confession being given which circumstances would include the very circumstances that the Judge considered in determining admissibility. The whole evidence relating to the statement will have to be rehearsed once more in front of the Jury. The witnesses can again be cross-examined on the issue. But the Jury=s function was not to reconsider admissibility. They must use the evidence only to determine the truth or otherwise of what was stated therein.

The rule is that the **Voir Dire** to determine admissibility of the confession is normally done in the absence of the Jury, but only at the request or with the consent of the defence. **R -v- Anderson (1929) 21 Cr. App. R 178.** However, the Trial Judge would have the final word as to whether the Jury should or should not remain in Court during legal submissions. **R -v- Davis (1990) Crim. L.R. 860: R -v- Hendry 88 Cr. App. R 187 C.A.** If done in the absence of the Jury, the Jury should not be made aware of what transpired at the **Voir Dire** concerning the admissibility of the statement. They should determine weight only on the evidence that was led before them. The accused, if he testifies at the trial, can have his credibility tested by previous contradictory statements he may have made at the **Voir Dire** subject to the right of the Judge to exclude such cross-examination as is unfair or oppressive to the Accused. The Jury should not be told of the ruling of the Trial Judge at that **Voir Dire (See Wong Kam Ming -v- the Queen (1980) AC 247 : Chan Wei Keung -v- the Queen (1967) 2 AC 16: Ragho Prasad -v- the Queen (1981) 1 WLR 469: R -v- Michael Murray (1950) 34 Cr. App. R 203. Ajodia -v- the State (1982) AC 204).**

The Jury should be directed that their function was to enquire into the truth or otherwise of the confession, and that, having considered all the evidence concerning the circumstances under which the confession was extracted from the appellant, they were free, to accept the same as true, or to disregard the confession, if they were not satisfied as to the truth of what was stated therein, because the weight and value to be placed on the confession was for them. It would be a misdirection to tell the Jury that the confession was obtained according to the rules of evidence **(R -v- Murray)**. The ratio of all of this, is that care should be taken to avoid the Jury being influenced by the Judge=s ruling on admissibility, in their consideration of the weight they should attach to the statement. I agree with Mr. Fuller that the Trial Judge erred but

only when he blurted out to the Jury that he had found the statement to be freely and voluntary given. He ought not to have made that disclosure to the Jury.

Mr. Fuller further asked this Court to reject the confession on the ground that it was unfairly extracted from the appellant. Learned Counsel contended that the appellant had already given earlier statements and despite that, the police still went to him for this final statement. I cannot yield to this submission. There was no evidence that could support this theory of unfairness. The transcript shows that at the time the appellant gave the earlier statements, the police had no knowledge that the victim was as yet dead. It was after those statements were given that they discovered that the victim had died. They then quite properly told the appellant of this new development, cautioned him and then obtained the confession. In my considered opinion, the police in these circumstances acted justifiably and quite fairly.

2. SELF DEFENCE:

In his directions to the Jury on the concept of self defence, the Trial Judge told the Jury:

> AYou must recognise that a person defending himself cannot judge the amount of defensive action which is necessary, because all of this is happening in a split second. If you conclude that the Accused did no more than what **is** strictly thought as necessary then you should treat that as strong evidence that the amount of force was reasonable and necessary.@

Mr. Fuller contended that the Trial Judge was here directing the Jury to use the erroneous objective test rather than the correct subjective test on this aspect of the concept. Reading this direction as is recorded in the transcript, I do not disagree and I would hold that if such were in fact the direction it would have been a misdirection. However, the Learned DPP responded by asking the Court to treat the word **Ais@**

(emphasized above) as being erroneously inserted there by the stenographer instead of the word **Ahe@** and to read the direction as Adid no more than what **he** strictly thought was necessary.....@ I am minded to go along with this suggestion otherwise the impugned sentence would make no sense. This ground of appeal fails.

3. PROVOCATION:

Addressing the Judge=s directions to the Jury on the issue of provocation, the Trial Judge told the Jury:

> AThere are two questions to be asked **before you give in to provocation.** First question is, did the deceased conduct cause the Accused to lose his self-control. After you look to the determination as to whether the conduct cause the Accused to lose his self-control then you ask yourselves the next question. Would that conduct have caused a reasonable person to have lost their self-control? That is what you have to ask yourselves.@

Learned Counsel for the appellant argued that the words **Agive in to provocation@** emphasized above, placed a burden on the appellant to prove provocation. I do not agree. In my judgement, whilst there appears to be some inelegance in the language used, I am sure the Jury would have interpreted those words to mean **Abefore you can find provocation@**. This was a hair splitting ground of appeal and it has no merit. Indeed, in the very next paragraph of the summing up, the Trial Judge told the Jury:-

> AAs I said before, the burden is always on the prosecution: The Accused does not have to prove that he was provoked. The prosecution must satisfy you to the extent that you feel sure that he was not provoked before you can convict the Accused of murder.@

4. MALICE [CONFUSION]

In directing the Jury on **malice aforethought**, **Georges J** spoke to the Jury on **express malice** thus:

> AExpressed malice is said to mean either of the following state of mind preceding, coming before or existing in the act. That is the stabbing by which death is caused and it may exist where the act, that is the stabbing is unpremeditated. An intention to cause death or grievous bodily harm to the deceased or knowledge that the stabbing would have caused death or grievous bodily harm, that is serious bodily to the deceased.@

Mr. Fuller describes this direction as seriously confusing to the Jury and the DPP agrees with him.

In my judgement, it appears to be a hurried direction and some confusion appears to be there only because of the wrong placement of punctuation marks, a slip and certain minor omissions. It must be remembered that the transcript before us was punctuated by the stenotypist and not by the Trial Judge, and that the Jury when hearing the spoken words would not have had those erroneous punctuation marks. With proper punctuation, the Judge was trying to convey to the Jury that express malice meant a state of mind where the stabbing, was premeditated, or where there was an intention to cause death or grievous bodily harm to the deceased or knowledge that the stabbing would have caused death or grievous bodily harm, that is, serious bodily harm to the deceased. In my view, the use of the word Aunpremeditated@ in the direction, which was a misdirection of the Judge, was a mere slip especially when regard is had to the sentence that followed the use of that word. For this same reason, I do not consider that this misdirection could be fatal to the conviction. We have to presume intelligence in our jurors. I also do not accept the idea of serious confusion in this direction.

5. THE APPELLANT=S DEFENCE:

Learned Counsel for the appellant finally contended that the case for the defence was not put to the Jury in a balanced, coherent and reasonable manner. After a careful perusal of the Trial Judge=s summation to the Jury, I can find no

justification for this criticism. The appellant chose to remain silent at the close of the case for the prosecution. In the statements he gave to the police, there was disclosed the possible issues in his favour of provocation and /or self defence. The Learned Trial Judge dealt most adequately with those issues in his summation . This ground fails.

6. THE PROVISO

Regarding the misdirection to the Jury by the Trial Judge on the issue of the confession dealt with earlier in this judgement, the Learned DPP contended before this Court for the application of the proviso so that the conviction could be preserved.

Addressing this misdirection, I do not consider it so serious, that it could have affected the verdict of the Jury. In my judgement, in the context of this case, unlike in the case of **Michael Murray** (supra) it was not a complete misdirection on a point of law which went to the root of the question to make the conviction bad. After the **Voir Dire** was concluded and the trial was proceeded with, unlike in **Michael Murray** where defence Counsel was prevented from rehearsing the circumstances of the taking of the confession statement, then Counsel Mr. Lovell for the defence, was not in any way hindered in his cross-examination from rehashing the issues dealt with at the **Voir Dire**. It is to be observed that despite this full rein afforded to Counsel, he apparently voluntarily and astutely refrained from regurgitating the complaints of lack of food and rest before the statement was given. In my view, he did so for good reason, because at the **Voir Dire,** the appellant admitted being given sustenance and rest. The only aspect rehashed was the suggestion that the appellant allegedly told the police in that statement that the deceased had a razor and that they did not include that in the statement. This

suggestion was denied by the prosecution=s witnesses and no evidence was led in support thereof, the appellant having chosen to remain silent before the Jury. So what the Jury had before them, was the appellant=s undiluted confession which evidenced premeditation on his part, with no evidence to interfere with the full weight and value that they were entitled to place on it.

Given these circumstances, I conclude that no injustice was done to the appellant by this disclosure of the Trial Judge. In my judgment therefore , because of the massive strength of the confession as the Jury must have seen it from the evidence made available to them, coupled with the circumstantial evidence earlier mentioned, I am certain that had this misdirection not been present, the Jury would inevitably have returned the same verdict. And, this so, even if it could have been said that Mr. Fuller=s criticism of the Trial Judge=s summing up on self defence and express malice with the word Aunpremeditated@ therein had some merit.

7. CONCLUSION

For these reasons I would order that this appeal do stand dismissed. The conviction and sentence are affirmed.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal (Ag.)