SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 20 OF 1998

BETWEEN:

NEWTON SPENCE **Appellant**

and

THE QUEEN **Respondent**

BEFORE: THE HON. MR. SATROHAN SINGH Justice of Appeal
THE HON. MR. ALBERT REDHEAD Justice of Appeal
THE HON. MR. ALBERT MATTHEW Justice of Appeal (ag.)

APPEARANCES: Mr. Othneil Sylvester Q.C., Miss Nicole Sylvester with him for the appellant
Mr. Hayman Balroop Director of Public Prosecutions (ag.), for the respondent

[July 21:22 September 13 1999]

JUDGMENT

SATROHAN SINGH JA

On November 11, 1998, the appellant **Newton Spence** was convicted by **a jury of 11** of the offence of the **Murder** of **John Edwards**, contrary to **Section 159 of the Criminal Code, Chapter 124 of the Laws of Saint Vincent and The Grenadines, Revised Edition 1990**. On that said day **Odel Adams J** sentenced him to **death.**

The case for the prosecution was that on January 15, 1995 John Edwards (the deceased), who was a passenger on the appellant's bus, left the bus without paying his fare of $1.00. The appellant went after him for the fare. The deceased sought to avoid him by walking away and the appellant shot him in the neck with a .38 revolver. The bullet entered on one side of his neck and exited on the other side of the neck. He subsequently died after an operation at the Kingstown General Hospital.

The case for the appellant was that the appellant did go after the deceased, but, his purpose was to take him to the police station for his fare. The deceased threw a stone at him from about 10 feet away. The stone hit him on his shoulder. He still pursued the deceased. The deceased then attempted to throw a second stone. The appellant then pulled out his revolver from his pocket and as he did so, a shot went off. At the trial he raised the issues of **Accident, Self Defence and Provocation**. He also raised the issue of **Novus Actus Interveniens**, alleging that John Edwards may not have died from the bullet wound, but as a result of the negligence of Dr. Thomas who performed an operation on him. He states however, that he was deprived of having this issue properly ventilated at the trial because the post mortem examination was illegally done.

He has appealed from his conviction and challenges the legality of the jury's verdict on the following issues: **(1) the legality of a verdict of 11 jurors on a Capital offence: (2) Causation: (3) Novus Actus Interveniens: (4) Non direction in the summing up: and (5) Missing Exhibits.** The appellant filed 44 grounds and subgrounds of appeal but, at the hearing, the numerous remaining grounds, I think 27 of them, were all abandoned by learned Queens Counsel for the appellant. I propose first to deal with the grounds that challenged the legality of the unanimous verdict of 11 jurors.

UNANIMOUS VERDICT OF 11 ON A CAPITAL OFFENCE

At the trial of this appellant and just about the end of the appellant's evidence in-chief, one of the empanelled jurors Ronelle Payne, was excused from further consideration of the case in accordance with the provisions of **S15 of the Jury Act Cap 21 of the Laws of St. Vincent and the Grenadines,** because her non- refundable paid for holiday clashed with the sitting of the Court, and because of apparently "extremely insulting" correspondence written by her and her paramour (not a juror) to

the judge on that issue, contemptuously attacking the administration of justice in this jurisdiction. This dismissal of the juror occurred after the judge had consultations with all counsel in the matter in Chambers. The transcript shows that all counsel agreed that the juror should be discharged. This note in the transcript is described in an affidavit of Nicole Sylvester as being inaccurate, that there was never such agreement. However, Mr Sylvester advised the Court that he was not pursuing the issue of any challenge to the exercise of the Judge's judicial discretion in discharging the incapacitated juror.

It appears from the transcript that this juror was discharged, because all the lawyers and the trial judge were of the view that, because of the nature of the correspondence and her firm desire to undertake her holiday, she became incapable of continuing to properly serve the ends of justice. So the trial continued with eleven jurors who brought in a unanimous verdict of guilty of Murder.

The complaint of the appellant was that as a result of this, there was a material rregularity at his trial which made it a nullity as **he was deprived of a unanimous verdict of twelve persons.** He contends that the Judge should have discharged the entire panel.

In St. Vincent and the Grenadines, statute law regulates the procedure for trial by jury in criminal cases. It started with the **Jury Ordinance of 1938** which subsequently acquired **numerous** amendments. In **1990,** they were all put together, and formed **Cap 21 of the Jury Act of the laws of St. Vincent and the Grenadines [the Jury Act.]** In these Revised Laws, the numbering of the sections as they appeared in the **1938 Ordinance** were changed. After the laws were revised in 1990, and more specifically in 1992, there was another amendment described as **Act No: 68 of 1992.** Unhappily, the draftsman of this amendment referred the amendment to the **1938 Jury Act** rather than to **Cap 21**, thereby erroneously referring to the amended

section as **S13A** whereas it should have been **S15. S13A** of the amended **1938 Act** became **S15 of Cap 21 (the Jury Act).** I consider this clarification necessary as there were arguments before us as to the relation between the **1992 amendment** and the **Jury Act** which did not have a **section 13A.** I would now refer to the relevant statutory provisions that address the issue of a "**Verdict of 11.**

S14 of the Jury Act provides:

> " A jury in a criminal trial for a capital offence shall consist of twelve persons to be selected by ballot whose verdict shall be unanimous."

Learned Queens Counsel submitted that this provision is sacrosanct and cannot be altered, and that any law which purported to reduce a jury in a capital offence below twelve persons would be a law inconsistent with **S14.**

S15 states:

> "If, during the course of any criminal proceeding, one of the jury dies, or becomes incapable of serving, or absents himself, it shall not be necessary to discharge the jury or to add thereto another juror, but the trial shall be proceeded with by the remaining jurors notwithstanding such death, incapacity or absence."

And **S2 of Act No: 68 of 1992 states:**

> "For the avoidance of any doubt it is hereby declared that the provisions of subsection (1) [n**ow S15 of the Jury Act]** shall apply
>
> (a) to the trial of capital offences and non capital offences alike, and
>
> (b) where a second juror (being) a member of the same panel of jurors dies or becomes incapable of
>
> serving or absents himself, whether the trial involves a capital offence or a non-capital offence or both."

Learned Silk contends firstly, that **S15** is inconsistent with **S14,** secondly, that **S2 of 68 of 1992** had no application to **Cap 21** or **S15** therein, because of its reference to a non existent **S13A** in **Cap 21** and thirdly, if it did refer to **S15** then it is also inconsistent with **S14.**

There is no merit in the second contention of Mr. Sylvester because of my clarification earlier as to what led to the erroneous numbering of the section to be amended.

Addressing the first and third contentions, for this Court to find inconsistency in these two provisions **[S14** and **S15** as amended**],** I will have to find that they were irreconcilable and that they were repugnant the one with the other. If I do find them inconsistent, then I will have to determine, as a matter of construction which was the leading provision and which one must give way to the other. [See **Owens Bank Limited -v- Cauch and others (1989) 36 WIR: Institute of Patent Agents -v- Lockwood (1894) AC 34 and 44 (Hals Laws of England (4th Edition) paragraph 872]**

I have given anxious consideration to this matter and it is my judgment that there is no inconsistency between **S14** and **S15 of the Jury Act.** I agree with learned Queens Counsel that **S14** is the leading provision, but unlike the provisions dealt with in **Owens Bank** (Supra), these two sections of the law have no qualifying exclusionary or inclusionary words. **S14** did not say "notwithstanding the provisions of any law to the contrary" and **S15** did not say "subject to the provisions of the Act or any other law" or words to that effect. In my considered opinion, these two sections were meant to be nuptialised and read together, for the purpose of complementing each other towards the achievement of undelayed, convenienced and uncomplicated justice and fairness of trial. The transcript shows that the appellant represented to the Court below, through his counsel, that he could not take another trial. A very good example indeed of the purpose of **S15.** It is my view, that **S15** did not detract from the appellant having a fair trial. It also did not interfere with the unanimity of the verdict.

It is interesting to observe that these provisions with slight variations appear in

the **English Jury Act of 1974 [S16]** and in **Jury Acts** in other parts of this region and that they have stood the test of time.

The legal position in this jurisdiction therefore is that, on a trial of an accused person for a capital offence, a unanimous verdict from a reduced panel of eleven or ten jurors, in the circumstances contemplated by **S15 of the Jury Act** as amended, would be a legally acceptable and valid verdict.

SHOULD THE ENTIRE PANEL HAVE BEEN DISCHARGED:

Learned Queens Counsel submitted, that once the offence remained one of **Murder**, the trial should not have proceeded with eleven jurors. Mr Sylvester contended that the entire panel should have been discharged and the trial started **de novo.**

Whether or not there should be a discharge of the entire panel is a matter for the careful exercise of the Judge's decision. **[Blackstone (1992) paragraph 10 - 20 p1219.)** In St. Vincent and the Grenadines, that **Jury Act** does not mandate for the requirement of the consent of the parties for this purpose, as does the **1974 Jury Act of England.** However, as a matter of good practice, the Judge should ask the parties for their views before discharging either a single juror or the entire panel. In **R -v- Richardson (1979) 3 ALL ER 247,** it was held that even this consultation was not absolutely essential.

The test whether or not to discharge a juror, or two jurors, or the entire panel, was whether an evident necessity had arisen. Trial by jury depended on the willing cooperation of the public, and, if the administration of justice could be carried on without inconveniencing jurors unduly, it should be. An aggrieved and inconvenienced juror would not be likely to be a good one.

The paramount principle that informs judicial intervention at any stage in a criminal case, must be formulated in the pursuit of the goal of fairness of the trial.

And, this must be applied also in relation to the excusing or the discharging of a juror. The interests of justice and a fair trial should be the only relevant considerations in executing the aforementioned test. However, these views must not be allowed to be whittled down to mean that jurors should be excused because they whimsically express an unwillingness to serve. Jurors owe a civic duty to their country and their duty is an integral part of the administration of justice. **[Abdool Salim Yaseei and Thomas -v- The State (1990) 44 WIR 219]**

The test should be whether there was a real danger that an accused' position would be compromised by what was to happen **[Sawyer (1980) 71 Cr. App. R. 283].** There must be a real danger of prejudice to the accused in continuing to try the case. **[See Spencer (1987) A C 128 H.L.].** The Court should think in terms of possibility of that real danger rather than probability **[R -v- Gough (1993) A C 646 H.L.]**

A judge, in deciding to discharge a juror, must do so for a good or discernible reason. If the acts capriciously, that would be a material irregularity in the course of the trial which, subject to the application of the proviso, could lead to quashing of the conviction. **[R - v Hambury (1977) 65 A. App. R. 233 C.A.]**

An Appellate Court is unlikely to interfere save in extreme cases where the trial judge obviously erred in a manner likely to cause injustice.

Grounds which would justify this Court in reviewing this decision of the Judge, would be to say that the Judge failed to exercise his discretion, or he failed to take account of a material consideration or that he took into account an immaterial consideration. But they are not in themselves grounds for overturning the decision to be reviewed. We ourselves will have to apply the "possibility test" **[Gough]** and according to the result, uphold or quash the decision. There should not be a discharge of the entire jury unless a high degree of need for it arises. **[Winsor -v- R (1866) LR 1QB 289].**

In addressing this issue, Queen's Counsel for the appellant whilst not challenging the exercise by the Judge of his discretion to discharge the juror for the reasons already stated, challenged the accuracy of the judge's notes as represented in the transcript. Those notes stated that all counsel were agreed that the particular juror should be discharged and that the trial proceed with eleven jurors. In support of this challenge, Mr. Sylvester produced an affidavit from his junior Miss Sylvester, which purported to refute this note of the judge by stating therein the notes she made. These notes do not show any such agreement. This alleged discrepancy however, is of no moment to this appeal, as I have already said that such an agreement is not required by the **Jury Act.** However, I feel I should make an observation on the procedure of parties challenging a Judge's notes by way of affidavit.

The official notes to be used by this Court in determining an appeal are notes reproduced in the transcript or record of appeal. This transcript is provided by the Registrar of the Court below pursuant to **S 47 (1) of the Court of Appeal Rules 1968.** This transcript is at all times presumed to be accurate. Any party challenging its accuracy had the onus of proving its inaccuracy. If both sides agree as to inaccuracy, this onus would have been a fait accompli and would have been discharged. If, however, the alleged inaccuracy is disputed by one side (who supports the accuracy of the transcript), then unless there is serious compelling evidence to the contrary, the onus would not have been discharged and the Court would proceed on the notes as recorded in the transcript. To approach the matter otherwise, would be to set a dangerous precedent which could have the effect of creating too serious an erosion on the **prima facie** sacrosanctity of a judge's notes.

Given the circumstances upon which the single juror was discharged in this matter and applying the "possibility test," I can find no justifiable reason to interfere

with the trial Judge's discretion when he made that order. In my opinion, **Adams J** breached no law when he did not discharge the entire panel and when be allowed the trial to proceed with eleven jurors. In my judgment, he adopted this procedure in his pursuit of the goal of fairness, the appellant's convenience, and in the interests of justice. This ground of appeal fails. I now address the issue of **Causation.**

CAUSATION

One of the major grounds of appeal argued by learned Queen's Counsel, addressed the issue of causation. The allegation of the appellant was that had it not been for the negligence of Dr. Thomas who performed an unnecessary tracheostomy operation on the deceased, John Edwards would not have died from the gun shot wound.

At the trial, Dr. Maurice Robertson testified on behalf of the appellant with a critical academic exposition of the surgery performed by Dr. Thomas. Neither of the two doctors is a qualified pathologist, but they each have experience in pathology having done several post mortem examinations. Both are registered medical practitioners and are Fellows of the Royal College of Surgeons. Dr. Thomas has a Bachelor's degree in Surgery and Medicine with special training in neck problems.

The evidence of Dr. Thomas was that when he saw the deceased John Edwards, the patient was in a critical condition and he agreed with Drs Patel, Prakash and Peters, that in an effort at saving the patient's life, a tracheostomy operation had to be done. He then performed the operation. In doing so, he had to do a surgical incision of the neck of the deceased in order to accommodate a tube in the trachea for the purpose of suction. He did what he described as an emergency tracheostomy.

At the trial, Dr. Robertson criticized not only the fact of the need of an

emergency tracheostomy operation but also the method used by Dr. Thomas in performing the operation. His criticism was centered mainly on the type of tube used, and the fact of doing an incision on the neck, when there may have been access to the trachea through the bullet holes found in the neck of the deceased. Dr Thomas testified that the tube used was the only one available at the time, and that, even if there was the type of tube available as suggested by Dr. Robertson, he would not have considered using that tube. He said the new incision on the neck was necessary in order to perform the operation.

As mentioned earlier, Dr. Robertson's opinion was an academic one, he not having seen the patient. He admitted that at the preliminary inquiry in this matter before the Magistrate, he testified that "with the injury the deceased had, it would

be a right procedure to make a tracheostomy." He also told the Magistrate that he also would have cut the deceased below the bullet wound in order to insert the tube. Before the jury he said that he was aware of Dr. Patel's competence (one of the doctors who recommended tracheostomy) and that from the few operations he witnessed performed by Dr. Thomas, he was competent. He also said he would not criticize Dr. Thomas if he said no other tube was available. He further testified that Dr. Thomas may have been correct to avoid sedating the patient and that Dr. Thomas was reasonably skilful and careful. Despite this, he maintained his opinion that tracheostomy need not have been done in this case and convicted Dr. Thomas of negligence in his handling of the matter.

One of the aspects of this very bold conclusion of negligence referred to by Dr. Robertson of Dr. Thomas, was the fact that the operational notes made by Dr. Thomas were incomplete. However, he does not describe himself as being similarly negligent when confronted with his own admittedly incomplete notes of

operations performed by him.

THE LAW

S168 of Cap 124 of the Criminal Code of St. Vincent and the Grenadines

provides:

> "A person shall be deemed to have caused the death of another person, although his act is not the immediate or not the sole cause of death, in any of the following cases -
>
> > (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes his death. In this case it is immaterial whether the treatment is mistaken if it was employed in good faith with common knowledge and skill, but the person inflicting the injury shall not be deemed

> to have caused the death if the treatment which was the immediate cause of the death was not employed in good faith or was so employed without common knowledge or skill;
>
> b) if he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

In establishing the **actus reus** of the crime, the prosecution had to prove beyond a reasonable doubt a causal link between the act of the appellant and the death of John Edwards in order to clothe the appellant with liability. The initial stage of establishing this causal link involved the factual question of whether the appellant's act was the cause of the death of the victim. It had to be proved beyond a reasonable doubt that John Edwards would not have died but for the appellant's act. The cause had to be sufficiently major to be adjudged the legal cause of death. The appellant's act had to be an operating and substantial cause of the consequence. It is not possible to quantify this in any way. The appellant's act may not be the main cause, and, it need not be the only cause. There may in fact be several legally culpable causes. All that the prosecution had to prove was that the appellant's act was a cause. In doing so, they must show beyond a reasonable doubt, that the appellant's act must have had more than a minimal effect on the consequences.

In the case of **Jordan (1956) 40 Cr App R 152** the accused had injured the victim, who had been taken to hospital and treated. When the wound had almost healed, the victim received grossly negligent medical treatment, and died. The Court of Criminal Appeal held, that at this stage, the original wound was no longer an operating and substantial cause. The pneumonia which was the result of the negligent medical treatment was such a cause, and the jury should have

been directed on the question of whether this new cause was a **novus actus interveniens**. The verdict was held to be unsafe and the conviction was quashed.

It has been accepted, however, that **Jordan** should not be taken as typical of cases involving medical treatment or even negligent medical treatment. The law is, that only exceptionally will it be held that the original injury is no longer one of the operating causes, and, for obvious policy reasons, the courts are most reluctant to say that medical treatment given in good faith is a **novus actus interveniens**. **[Section 168 Cap 124 Supra].**

A stronger authority is **Smith [1959] 2 QB 35**, in which there was evidence that the wrong treatment had greatly impeded the chances of recovery, and that the true nature of the injuries had not been appreciated. Nevertheless the Courts-Martial Appeal Court held that the medical treatment was not a **novus actus**, that the accused was liable and that **Jordan** was an exceptional case, limited to its particular facts. That Court held that the fact that bad medical treatment had been given in that case **(Smith)** did not automatically mean the chain of causation had been broken. The question of causation should in such cases be left to the jury to decide.

The approach in **Smith** has been most recently confirmed in **Cheshire [1991] 1 WLR 844**. In **Cheshire,** although the accused caused the original wounds necessitating medical treatment, the most immediate cause of death was a respiratory infection which developed post-operatively, resulting in a severe respiratory obstruction. There was evidence that the medical team failed to appreciate the seriousness of this obstruction. On appeal against a misdirection on the point of causation, the Court of Appeal confirmed the conviction. Having considered both **Smith** and **Jordan**, they confirmed the approach of **Lord Lane** in **Malcherek [1981] 1 WLR** 690, where it was made clear that to the extent to

which the case of **Smith** and **Jordan** were in conflict, **Smith** was the preferred case. **Beldam LJ** in **Cheshire** concluded (at p. 851):

> "...when the victim of a criminal attack is treated for wounds or injuries by a doctor or other medical staff attempting to repair the harm done, it will only be in the most extraordinary and unusual case that such treatment can be said to be so independent of the acts of the defendant that it could be regarded in law as the cause of the victim's death to the exclusion of the defendant's acts."

The authors of **Blackstone [1992]** opined that medical treatment is not unconnected with the accused' act and is not unforeseeable by the accused. Medical treatment of itself they say must always be foreseeable. The possibility of careless or wrong medical treatment in an emergency must also be foreseeable. The fact of negligent treatment does not automatically break the chain of causation. In **Cheshire**, the court made it clear that if a jury were satisfied that the defendant's acts had made a 'significant' contribution towards the victim's death, that was sufficient.

From the above dissertation, I conclude the law on **Causation** to be as follows: As a matter of law, it is enough that the accused' act contributed significantly to the death. That it was intentional, and that it was dangerous on an objective test. **[DPP (Jamaica) -v- Daley (1980) AC237 P.C following D.P.P -v- New Berry 1977].** It need not be the sole or principal cause thereof. **R -v- Pitts (1842) C & Mar., R -v- Curley 2 Cr App R 86 CA**. It must be something more than **de minimis**, **R -v- Hennigan 55 Cr App R 262 C.A.**

Where there is an issue as to whether death was caused by some supervening event (e.g medical negligence), there is no onus on the prosecution to prove that the supervening event was not a significant cause of death. Their duty is to prove that the accused's act contributed significantly to the death and the direction to the jury should be so confined. **R -v- Mellor The Times**

February 29, 1996 C.A. A reasonable act performed for the purpose of self-preservation, including a reasonable act of self-defence, does not operate as a **novus actus** nor does an act done in the performance of a legal duty. **[David Keith Pagett (1983) 76 CAR 279.]** Mr Sylvester conceded that a legal duty was cast on Dr. Thomas to attend the deceased.

THE EVIDENCE

Addressing the evidence led on this issue, Dr Thomas gave the cause of death as Pulmonary Edema, Plural Effusion and Medistinal Emphysema. He testified that Pulmonary Edema involved the presence of fluid in the air sac of the lungs. Plural effusion was the collection of fluid around the lungs but inside the chest cavity which would prevent the patient breathing properly. And, Medistinal Emphysema was the collection of air in the area of the body between the two lungs. His conclusion was that all of this was caused by the bullet wound.

Dr Child, who examined the deceased on admission before he died, to a certain extent supported this evidence of Dr. Thomas. His evidence showed that he observed symptoms of these medical complications on his examination of the patient. Finally, the evidence was that based on these observations, Dr Thomas, Dr Patel, Dr Prakash and Dr Peters all agreed that a tracheostomy operation should be performed. This operation was then carried out. Subsequently the patient died.

The jury had before them this evidence in extenso for their consideration.

They also had the evidence of the academic opinion of Dr. Robertson, also in extenso. They had his criticisms of Dr. Thomas on his incomplete notes, his

method of performing the operation, and of the type of tube used. They also had his evidence as to the quality of Dr. Thomas' competency and that of Dr. Patel. On the question of Dr. Robertson's credibility, they had his evidence of his admissions in the Magistrate's Court already mentioned, which conflicted with his evidence before the jury inter alia, that such an operation was necessary and of his admission before the jury of himself being guilty of making incomplete operational notes, one of his allegations of negligence on the part of Dr. Thomas.

The jury also had before them Dr. Robertson's opinion as to the cause of death, that is, medestinal and subcutaneous emphysema which resulted in plural effusion and pulmonary edema leading to hypoxia and death. They also would have observed that those were substantially the same reasons put forward by Dr. Thomas in the post mortem report on the issue of cause of death. They also had his evidence that the bullet wound would have caused the respiratory distress of the patient, and that the wound was dangerous and would have caused death without treatment. They had his opinion that the wound contributed 35% to 40% to the cause of death. They also had his admission that a "man on spot is in a superior position than I would be." They had his own conflicting opinion that "if there was treatment in this case patient would be alive."

The jury had this evidence in extenso from both sides. The learned judge in his summation, reminded the jury of the intimate details of the evidence. He also gave the jury an unchallenged exposition of the law in solid understandable language on the concept of causation. By their verdict, the jury obviously did not accept the evidence of Dr. Robertson whenever he sought to

contradict the evidence of Dr. Thomas. In my judgment, if that were the approach of the jury, they could not be faulted, as from Dr. Robertson's

own admissions already mentioned, it was open for the jury to say that he was not qualified to pass judgment on Dr. Thomas. The jury also had before them that Dr. Thomas was a specialist in neck problems. This case amply demonstrates the accuracy of the opinion that medicine is not an exact science. Dr. Robertson not only disagreed with Drs. Thomas, Patel, Prakash and Peters but he even disagreed with **Professor Knight,** which he was free to do if he so felt, on a certain topic in his book on **Forensic Pathology.**

On the question of causation therefore, applying the law aforementioned**,** it was open to the jury to return the verdict which they did. This ground of appeal also fails.

NOVUS ACTUS INTERVENIENS

Addressing the concept of **Novus Actus Interveniens,** Mr. Sylvester submitted, that because Dr. Thomas did the operation on the deceased, he was legally precluded from performing the post mortem examination. He described Dr. Thomas as an interested party and that the maximum **Nemo Debet prodere se ipsum (**no one can be required to be his own betrayer) applied. Learned counsel submitted that as a result, his evidence lacked independence, it deprived the appellant of properly raising the defence of **novus actus interveniens** and that it violated the constitutional rights of the appellant to a fair hearing as required by **S8 (1) and (2) (d) Cap 2 of the laws of St. Vincent and the Grenadines.** He further described this act of Dr. Thomas as morally reprehensible, unfair and offensive as contemplated in **R.V. Sang (1979) 2 All ER 1222.**

In my judgment, having regard to my observations and conclusion on **Causation**, this ground of appeal dissipates into oblivion. I agree that it may be unethical for the same doctor who performed the operation to undertake the post

mortem examination for the obvious reason disclosed in abovementioned latin maxim. However, that **perse,** is not enough to warrant the exclusion of his evidence. There is no statutory provision or no law which specifically debars such a doctor from doing the post mortem. Only the principles of ethics, could act as such a bar. Given these circumstances, the evidence of the post mortem remained relevant and admissible and it all depended on the weight that the jury would give to it.

The Coroner's Act Cap 15, S 19 (3) of the laws of St. Vincent and the Grenadines provides:

> "If it shall appear to the coroner that the death of the deceased was caused partly or entirely by the improper or negligent treatment of a medical practitioner or other person, that medical practitioner or other person shall not be allowed to perform or assist at any post-mortem or special examination made for the purposes of the inquest on the deceased, but such medical practitioner or other person shall have the right, if he so desires, to be represented at any such post-mortem examination."

Mr. Sylvester submitted that this provision is supportive of his submission on this issue. I do not agree. This law presupposes a situation to a Coroner of which there is no evidence in this matter.

In my view, Dr. Thomas' performance of the post mortem examination was not illegal. It may have been unethical. His evidence was relevant and therefore admissible **Kuruma Son of Kaniu -v- R (1955) 1 ALL ER2 36**. The jury were given adequate directions by the judge as to their approach to this evidence with all the requisite warnings. In sum, the concept of fairness of the trial was not in any way eroded. Also, because of my conclusion on **Causation**, this ground of appeal became devoid of merit as it obvious from the medical evidence especially the evidence of Dr. Robertson of 35% - 40 % contribution of

the bullet wound to the cause of death and the law relevant thereto, that the concept of **novus actus** did not arise in this matter.

THE NON DIRECTION:

Learned Queens Counsel, challenged the learned judge's direction to the jury as to their approach to the evidence of the conflicting experts in this matter. He submitted that the judge did not direct the jury that they could convict, only if they were satisfied beyond a reasonable doubt, that they should accept the evidence of the expert Dr. Thomas. This argument appears to be supported by the case of **R -v- Platt (1981) Crim. L. R. 332.**

I agree that the direction should be, that before the jury could accept the opinion of Dr. Thomas, they had to feel sure that he was correct. However, I do not find merit in the submission. I can see very little difference between such a direction and this direction given by the trial judge to the jury:

> "The prosecution must convince you **make you feel sure** that the wound (meaning the bullet wound) was operating up to the time of death as a substantial Cause of such death."

That was in effect the opinion of Dr. Thomas and up to 36 - 40% the opinion of Dr. Robertson. This was also the direction suggested in **R -v- Mellon (Supra).** The learned trial judge also gave the jury the classical direction in **R -v- Lanfear (1968) 1 All E. R. 683,** that the evidence of a doctor giving medical testimony, should be treated as regards admissibility and other matters of that kind, like that of any other independent witness. In **Platt**, it is accepted that there is no special form or set formula for the direction.

MISSING EXHIBITS

At the trial of this matter**,** which was really a retrial of the appellant for this offence, certain exhibits, referable to parole evidence, which were

supposedly kept in the custody of the Registry of the Court were missing and not available. They included x-rays, a stone**,** bullets and a spent shell. The gun produced, whilst it had the serial number of the appellant's gun, it had a different colour. The evidence on the gun was that it was stolen from the Registry and subsequently recovered. Mr. Sylvester submitted that these incidents deprived the appellant of a fair trial.

Given the circumstances of this matter, I do not agree with this submission. Firstly, a reasonable explanation was given for the gun. Secondly, the production of the gun, the stone, the bullets or the spent shell could not have assisted the appellant in any form. There was no evidence that more than one shot was fired that day. There was evidence from the appellant that his gun fired a shot. There was evidence that the appellant told a prosecution witness that he shot at the deceased but that he did not know if he got it. There was an alleged eye witness who said she saw when the appellant shot the deceased as the deceased was trying to run off. There was evidence from police corporal John that the appellant told him that the deceased had hit him with a stone and that he shot the deceased. There was evidence that the deceased was injured as a result of gun shot wound. The doctors gave parole evidence on the x-rays. The jury obviously would not be able to read x-rays.

In my judgment, the absence of these exhibits from the trial could not have deprived the appellant of a fair trial. It could only have affected the weight of the parole evidence, which was a factor in favour of the appellant and the jury

were adequately directed on this by the learned trial judge. This ground also fails.

CONCLUSION:

These grounds argued by Mr. Sylvester, formed the basis of his three main grounds of appeal that the trial judge wrongly allowed the case to go to the jury, that there were material irregularities at the trial and that the conviction was unsafe and satisfactory, unlawful, illegal and a nullity. These three main grounds therefore, as a matter of shorthand, are also without merit.

Learned counsel did not proffer any argument orally or in his skeleton on the ground of appeal that dealt with the appellant's statement to the police. This in not surprising as it is obviously without merit. The transcript shows that after the victim was injured and before he died, the appellant gave a statement under caution to the police. After the victim died, he was again approached for a statement and he said he would stand by what he said in the first statement. Apparently, there was a clerical typewritten reproduction of this handwritten statement which differed slightly from the original statement. That typewritten statement was served on the appellant. In my view, that could not have caused a miscarriage of justice because there were no serious differences, and the statement that was seen by the jury was the handwritten original statement which was confirmed as correct by the appellant in a subsequent statement.

The grounds of appeal specifically abandoned by counsel were grounds **2 (f) (g) (j) (k) (m) (n)(o) (p), 3** (all the sub grounds except sub grounds (e iii) (k) and (l). In an effort at avoiding prolixity, I do not propose to reproduce those 27 grounds here.

My conclusion therefore in this matter is that the learned DPP, Mr.

Balroop, in his debut appearance before this Court, has successfully repelled the arguments on all the grounds of appeal relied on by the appellant. A careful reading of the trial judge's summing reveals an evenly balanced and accurate summation on all the issues relevant to the charge on the indictment. No wonder the abandonment by learned Queens counsel of the majority of the grounds of appeal. The transcript shows that the appellant was afforded a fair trial and that there has been no miscarriage of justice. The appeal is therefore dismissed. The conviction and sentence are affirmed. Both lawyers made sterling presentations and gave immeasurable assistance to this court. For this I am indeed grateful.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal (Ag.)