SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.6OF 2002

BETWEEN:

CHRISTOPHER REMY

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mrs. Waneen Louis-Harris for the Appellant
Ms. Victoria Charles DPP for the Respondent

2003: May 14;
September 22.

JUDGMENT

[1] REDHEAD, J.A.: The Appellant Christopher Remy was on 19th July, 2002 convicted by a jury of the murder of Gabriel Ishmael also known as Ti Frere. The murder occurred on 29th September, 1999 at Guesneau. At a separate sentence hearing held on 31st July 2002, Hariprashad Charles J. sentenced the Appellant to death by hanging. He now appeals to this Court against his conviction and sentence.

[2] The evidence led by the prosecution against the Appellant was mainly circumstantial. The evidence presented by the prosecution revealed that Aloysuis Ishmael also known as Dandius, a police officer along with another police officer in

compliance with an order of court removed the Appellant's daughter from the Appellant's home to the home of the mother of the child.

[3] It appeared from the evidence that Appellant was incandescent with rage, not only for the removal of his daughter but also for remarks which were allegedly made by Danduis that the Appellant could not do anything about the removal of the child because he had no money and he knows no law. There was also the allegation that the Appellant's window was broken at the time of the removal of the child. This was denied by the police officer ,Ishmael. The Appellant in his rage complained to many persons about Dandius' behaviour and at the same time issued threats to do harm to Dandius.

[4] Anthony Edgar testified on behalf of the prosecution, he said on oath:-

> "…. about 2:00 p.m. [on Wednesday 29th September 1999] I was by the Gas Station he [Appellant] came and told us he got to know who took his daughter away and it was Dandius. He said as he was cooling out by the Gas Station if Dandius come there he will make him turn a "sarge with no arms."

[5] Anthony Edgar said that he told the Appellant that he could not do that. He the Appellant then told Edgar:

> "to turn into Danduis and see what I would do to Danduis."

[6] The Appellant then said "if Dandius want to give trouble he had nothing with his [Dandius] father he must go and give his father a "plock" and that his father will rush up to call Mr. Dandius so Mr. Dandius will rush up and he will do what he wants with Mr. Dadinus."

[7] Lawrence Gregg testified on oath. He told the jury that the Appellant complained to him about Dandius taking his child from his home and saying that he the Appellant did not know law and did not have money.

[8] Lawrence Gregg said he asked the Appellant who is Dandius. The Appellant responded "Ti Frere's son, that is the police". The Appellant then said;

> " Dandius came at my home and took up my child and said Christopher does not know law and his family doesn't have money."

[9] Lawrence Gregg also testified that the Appellant told him if Dandius came to the Gas Station (where they were) he would take off both of his arms. The Appellant then pulled out a small cutlass from the side of his waist. He said that the cutlass was in a brownish leather case. Lawrence Gregg described the small cutlass as having a short plank with a black handle and with a shining blade.

[10] This witness testified on oath:-

> " At the time, the expression I get from his [the Appellant's] face it is possible for Dadinus to come so I left them and went to my home"

[11] Isaiah Sylvester testified that about 6.00 p.m. he was on the "block" by the Gas Station the Appellant came on the block. The Appellant showed him something by his waist. Sylvester said that it was in the shape of a cutlass. This witness testified that the Appellant asked him if he knew Ti Frere's vehicle number. He told the Appellant he did not. The Appellant then asked him if he knew "the blue van number". He told him no. However, Sylvester told the Appellant that if he saw the van pass he could tell him the number because he knew the sound of the vehicle. This witness testified that he Appellant had a drink and "went up the road in the direction of the Guesneau gap."

[12] Eurance Hippolyte testified that he knows the Appellant. He lives in the same area as the Appellant. He said on oath that at about 7.50 pm on 29th September 1999 he was driving towards his garage at Fond Cannie. He saw the Appellant walking towards the direction of Guesneau Gap. He waved to the Appellant and the Appellant waved to him.

[13] Eurance Hippolyte said that when he saw the Appellant he was wearing a short pants and water boots. This witness also said:-

> "On my way back, I met him close to the gas station. The accused was about 100 yards from my garage. The first time I saw accused he was close to Gwen's garage. I grew up in that garage. There is a short cut from Hughes Nelson's garage on Guesneau Road to Gwen's garage on Fond Cannie Road. I met the accused 100 yards from the short cut. The second time I met him, he was closer to the Gas Station. The place where I saw him a second time was over 100 feet from the gas station."

[14] Theresa Isidore testified that on 29th September 1999 she left work after 7.00 pm. She boarded the deceased's bus. The bus was driven by the deceased. It left with passengers for Forestierre – continuing her testimony this witness said:-

> "When it [the bus] reached Ti Rocher, only Wilma and I were on board. When the van reached by Hughes Nelson, they had an old car on the right side of the road. The van slowed down in some potholes in the middle of the road next to the white car. I saw somebody come from the old white car was running together with Mr. Ishmael's van. When he reached Mr. Ishmael's window I see him push a long shining thing through Mr. Ishmael's window and he pulled it back and he ran back. The van moved with a rev and a speed. The van drove to the bottom of the hill on the side of the grass. It came to a stop. I opened the door I came out. I peeped my head through Mr. Ishmael's window. I saw Mr. Ishmael's head was resting on the steering wheel."

[15] Theresa Isidore also told the jury that she ran in search of help. She spoke to a driver of a van. He stopped his van got out, opened the driver's side of Mr. Ishmael's van. She then saw blood coming down Mr. Ishmael's neck. Ishmael was taken out of his vehicle with the help of other men. He was put to lie down on the road. She said she then saw a big cut under Mr. Ishmael's neck and according to this witness he appeared to be dead.

[16] The Pathologist, Dr. Stephen King, carried out a post mortem examination on the body of Gabriel Ishmael. He found a 16-centimeter wound to the neck. That wound ran across the front of the neck from left to right and was slanted up towards the right.

[17] There were two (2) other superficial incisions on the right upper shoulder area. The upper part of the trachea and the interval jugular vein had been cut. The cause of death was hemorrhagic shock and areoembolism. In Dr. Stephen King's opinion the incision with the two other superficial incisions were most likely caused by a sharp instrument such as a knife or cutlass. Dr. King also said that it is possible that the injuries he had seen could have been caused with one action.

[18] The Appellant relied on the following grounds of appeal:-

(a) The effect of failure to hold an identification parade.

(b) Admissibility of statements under caution obtained from the Appellant on 4th day of October 1999.

(c) The verdict is unsafe.

(d) The prosecution's failure to discharge their burden of disproving the alibi.

(e) Comments by the learned trial Judge on the outcome of the voir dire to the jury.

[19] The Appellant's counsel argued that having regard to the evidence of Theresa Isidore the Appellant maintains that the identification of him by the said witness ought not to have been admitted to the jury.

[20] The fundamental question is whether the failure to hold an identification parade had such an adverse effect on the fairness of the proceedings that the evidence of Teresa Isidore should have been excluded." Theresa Isidore's testimony in my opinion cannot be elevated to that of an eyewitness testimony to the killing of the deceased.

[21] Theresa Isidore never identified the Appellant as the person who was running "together" with Mr. Ishmael's van and "pushed a long shining thing through Mr. Ishmael's window and pulled it back." An identification parade would have served absolutely no purpose. Moreover the prosecution's case was not based on

identification of the Appellant by Theresa Isidore. The case was based solely on circumstantial evidence.

[22] In her skeleton arguments learned counsel for the Appellant complained that the learned trial Judge in her directions to the jury at paragraph 135 of the record said:-

> "Members of the jury, on the basis of the evidence you will decide whether an identification parade was necessary, whether there should have been a confrontation. The defence is saying to you that there should have been an identification confrontation and the failure to do so is fatal in this case. It is a question for you members of the jury, whether there was any necessity for an identification, because no body possibly identified the accused as the one committing the act on the day in question."

[23] Unfortunately the learned trial Judge got it wrong. It is not a question for the jury to decide whether there was any necessity for an identification parade. It is the trial Judge to decide in the circumstances there ought to have been and identification parade and whether failure to have such identification parade comprises the fairness of the trial. [see R v Forbes [2001] 2 W.I.R.]

[24] However, as I have said, Theresa Isidore's evidence did not raise the issue of identification because she did not identify the Appellant as the deceased's assailant therefore no identification parade was necessary. It would have been pointless. There could therefore be no issue of the fairness of the trial being compromised by failure to hold an identification parade.

[25] However in that same paragraph of her summation the learned trial Judge said to the jury:

> "Eurance Hippolyte evidence places the accused in the vicinity of the area. He did not see who dealt the fatal blow on Gabriel Ishmael. Members of the jury on the basis of the evidence you will decide whether an identification parade was necessary"

[26] Unfortunately the learned trial Judge left it there having regard to the fact that the Appellant was relying on the defence of alibi, different consideration ought to have been given to the evidence of Eurance Hippolyte. I shall return to this aspect of the matter when I deal with the Alibi issue.

[27] The Appellant challenged the admissibility of a statement which he dictated to Corporal of Police Chicot on 4th October 1999. The Appellant alleged that the statement was not free and voluntarily, it was obtained by threats inducement and oppression and therefore was inadmissible.

[28] The admissibility of the statement was challenged before the learned trial Judge who held a voir dire. The police officer, Corporal Chicot gave evidence on the voir dire. In cross- examination the police officer, admitted that the Appellant was hand cuffed while he was in his office. Coporal Chicot explained:

> " I placed a handcuff loosely to the chair he was seated on, on his left hand his right hand was free"

[29] Coporal Chicot also said in the cross examination:

> " The accused was handcuffed for two reasons: his own protection and the protection of myself and my men, and the Justice of the Peace. Sometime it is customary for accused persons to be handcuffed when statements are being taken. He did not complain to me about the handcuff at anytime"

[30] The reasons given by the police officer for handcuffing the Appellant while giving the statement were for the protection of the Appellant and for the protection of himself and his men. It is unclear to me how the Appellant was protected by being handcuffed to a chair. It is difficult to appreciate why Corporal Chicot found it necessary to protect himself and his men from the Appellant when there is no evidence that the Appellant was behaving violently.

[31] In my view it is not acceptable that an accused person when he is giving a statement should be handcuffed to a chair in the manner as described by Corporal Chicot.

[32] The Appellant went into the witness box after Corporal Chicot had given his evidence and was cross-examined by Appellant's Counsel. The Appellant then made lots of allegations against Corporal Chicot, such as threats by Chicot to cut his arm, to shoot him and promise made by Corporal Chicot to him that if he told Chicot what he killed the man with he would reduce the charge to manslaughter. These allegations were not put to Corporal Chicot when he was cross-examined. No wonder the learned trial Judge could not take these allegations seriously and in my view had no option but to rule the statement admissible.

[33] In addition the statement was witnessed by a Justice of the Peace. The Appellant made no complaint to him of any action by the police against him. The Appellant gave the reason for not complaining to the Justice of the Peace the bald statement that he thought that he was a friend of the police officer. No reason was given for his so thinking.

[34] The Appellant has advanced no cogent reason why we should disturb the discretion which the learned trial Judge exercised in admitting the statement.

[35] I turn now to the Appellant's complaint that learned trial Judge commented on the outcome of the voir dire to the jury. The learned trial Judge said to the jury:

> "At the end of the voir dire the second statement on 4th October 1999 was voluntary it was made in the presence of the Justice of the Peace Mr. Eustace Mc Combie and as such is inadmissible (sic) [admissible] in evidence"

[36] Mrs. Harris referred to: Mitchell v The Queen [1998] 2 W.L.R 839. It was held inter alia that the Judge's decision on a voir dire to determine the admissibility of a confession should not be revealed to the jury, since to do so might cause unfair prejudice to the defendant by conveying the impression that the Judge had reached a concluded view on the credibility of witnesses and of the defendant.

[37] The comments made by the learned trial Judge in the instant case were similar to those made by the Judge in Mitchell. However, in Mitchell the Judge commented on facts which the defence disputed. Notwithstanding that irregularity the Judicial Committee of Privy Council held that although the Judge's disclosure to the jury of his ruling constituted a material irregularity which had not been cured by the summing up, the evidence against the defendant had been compelling and the jury would inevitably have convicted him if that irregularity had not taken place, and that accordingly no miscarriage of justice had occurred and that defendant's convictions would be upheld"

[38] It was also argued on behalf of the Appellant that the statement was inadmissible as it was obtained by oppression.

> "Oppression …..imports something which tends to sap and has sapped, the 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." per Sachs LJ in R v Priestly 51 C.A.R at page 1.

[39] Learned counsel also referred to R v Prager [1972] 1 WLR 260.

[40] Apart from the shackling of the Appellant's left arm to the chair which is referred to above there is nothing on the record to support the allegation of oppression.

[41] The evidence, as I have indicated is that there was a Justice of Peace throughout the taking of the statement.

[42] Learned Director of Public Prosecutions, Miss Charles contended that even if the statement was not admitted the evidence against the Appellant was strong. She contended that the Appellant merely confirmed in his statement the testimony of the other witnesses.

[43] Having regard to the fact that this is a case which is based on circumstantial evidence, I am of the view that the Appellant made daming admissions, when he said in the statement;

> "About 8.00 pm I flagged down Ezra I thought it was "Ti Frere". I saw it was Ezra I just waved him. On his way back I flagged him down again. I again thought it was "Ti Frere." At the time I had a small kitchen knife in my waist. I wanted to question Ti Frere as to why his son came to my home if I was not satisfied with his answer then I made my mind to give him a plock. I met Scott [Anthony Edgar] about 20 minutes to 8.00 pm I told him of the incident with the officer and the child. He told me that Danduis thinks he is a bad John so if you want to know who he is, then do something to the father, Ti Frere and I would know who he is. I told him that if I saw Ti Frere passing now then I would stop him then depending on what he told I would give him a plock."

[44] Ezra Remy gave evidence for the prosecution he testified that he is a minibus driver. He said he used to ply the Castries/Forestierre route. He knows the Appellant who is his cousin. On Wednesday 29th September between 7.00 -8.00 pm he was traveling by the Guesneau Gas Station the Appellant stopped him. This witness said he turned at the junction and was going back down towards town. The Appellant again flagged him down. The Appellant then waved him and he continued driving.

[45] In cross-examination by the Appellant's lawyer he told the Court; "The deceased had a similar van like mine, same make same colour."

[46] I now deal with the fourth ground of appeal. The Appellant complains that the case for the defence was not properly put to the jury. In this regard learned counsel for the Appellant argued that the learned trial Judge failed to put the defence of alibi fairly and adequately to the jury.

[47] At paragraph 3 of the summation the learned trial Judge instructed the jury:

> "He has raised a defence which is known in law as Alibi. The accused says he was not at the scene of the crime when it was committed. As the prosecution have to prove his guilt so that you are sure of it, he does not

> have to prove he was elsewhere at the time. On the contrary the prosecution must disprove the alibi and in this case the prosecution attempts to do so by the evidence of several of their witnesses on the question of identification namely the evidence of Theresa Isidore and Eurance Hippolyte."

[48] It is most unfortunate that in her direction to the jury the learned trial Judge told them that the prosecution attempted to disprove the Appellant's alibi by the identification evidence of Theresa Isidore.

[49] Theresa Isidore had never identified the Appellant as the person who was running alongside of the deceased's bus. So to say that the prosecution attempt to disprove the Appellant's alibi by her evidence, is a misdirection.

[50] I now turn to deal with Eurance Hippolyte's evidence. As I had said earlier his evidence deserved a different treatment from that of Theresa Isidore's, so far as the Appellant's alibi is concerned.

[51] Hippolye testified that the he knows the Appellant who is from his area. He has known the Appellant since the Appellant was a child. He gave evidence that he saw the Appellant at about 7.50 pm walking "heading towards the direction of Guesneau Gap."

[52] This witness said on oath that he had passed the Appellant. He, Hippolyte continued on his way. On his way back down he saw the Appellant. He was then close to Gwen's Garage.

[53] Hippolyte said in cross examination:

> "When I saw the accused a second time, I was about 100 yards from the Gas Station. When I swing the Ti Rocher bend, going towards Bocage I heard a siren. It was after eight"

[54] The Appellant made a statement from the dock. In the statement he said;

> "I got up from bed and went by the Gas Station it was after 5.00 pm. I stayed there for a while, fellas were playing dominos in the dark under a

> lamppost. I went back to the "gap" I did not see anyone there that was after 7.00pm. I go back down on the block. On my way down I bought a packet of fudge peanuts and I go down on the block. There was 'Star Trek" Toowe, Rudy' and myself on the block, it was still after 7.00pm." Davies and Scott were there also, I told Jonas to buy a soft drink for me he told me he was not going so I gave it to Crop to buy . When I finish drinking the soft drink I bring the bottle back to the Gas Station. I stayed there still, the fellas were playing guitar, whilst there we heard a siren coming towards us, when it pass by us we saw that it was an ambulance. It was about 8.00pm ".

[55] The Appellant is saying from that statement that he was on the block from 5.00pm, except for a short while, until 8.00pm about the time when the killing allegedly took place. He mentioned names of persons, whom he said were on the block with him.

[56] Matthew Evans also known as Star Trek gave evidence for the prosecution. He said that between 7.00 pm and 8.00pm he was by the Gas Station in an old walled house. Rudy and Toowe were also there. Rudy was playing his guitar. The Appellant came there. The Appellant had a packet of peanuts eating. The Appellant remained there for about 10 minutes.

[57] Isiah Sylvester also gave evidence on behalf of the prosecution. He told the jury that he is also known as Jonas. He has known the Appellant from the time he was 'small". He said on oath:

> "On Wednesday 29th September at about 6.00pm. I was on the block by the Gas Station at Guesneau. We arrived on the block (Davis and myself) and 'Toe' [the Appellant] came and meet us there. Toe asked me to go and buy him a ju-cee. I told him that I was not going to buy a ju-cee. He showed me his waist that he had something. He told me that he is not going because they may say that he do something and he is not going by the Gas Station because he has something by his waist. He showed me something by his waist but I could not say what it was. I saw the shape, it appeared to be a cutlass.
>
> I told him to give Crop. He give (sic) Davis the $1.00 to go and buy the ju-cee. Davis is known as Crop. Crop went and buy the soft drink for him.

> He asked me if I know Ti Frere's vehicle number, I said no. So he asked me if I know the blue van number. I told him no. I told him if the van pass I could tell him the number because I know the van by the sound.
>
> Crop came back and gave him the soft drink. After he drink the ju-cee he went up the road in the direction of Guesneau Gap. A good moment after he left us Ti Frere passed and went up the road (the Guesneau Gap) on board the white transit.
>
> After Ti Frere passed myself and Crop went up the road. I went home to get a ripe banana and a piece of bread and I came back on the road. No one was there Davis (Crop) was giving jokes. A moment later I saw Toe coming down the road He asked me 'garcon' who is on the block. He was a little vex when he asked me who was on the block. I told him that he was on the block with Crop and myself. Now I cannot tell him who is on the block. He replied "so you don't know who is on the block?"

[58] From the evidence of these witnesses, if believed by the jury, the Appellant was on the bloc but at some stage he left and went away. Whereas he told the jury that at the material time he was always there, on the block, by the Gas Station, in the company of others.

[59] Apart from paragraph 3 of the record to which counsel for the Appellant has drawn our attention, the learned trial Judge at paragraphs 69 and 71 had also given instructions to the jury how to deal with the defence of Alibi.

[60] In dealing with Hippolyte's evidence the learned trial Judge ought to have told the jury that if they are satisfied to the extent that they feel sure that Hippolyte was speaking the truth and that the person he saw that night was the Appellant going in the direction of Guesneau Gap, then it meant that the Appellant couldn't have been on the "block" at the time.

[61] The learned trial Judge at paragraph 71 of the record ended by telling the jury.

> " If you conclude that the alibi was false that does not by itself entitle you to convict the accused. There may be many reasons for putting forward a false alibi. It is a matter which you may take into account but you should bear in mind that an alibi is sometime invented to bolster a genuine defence"

[62] In Bernard v R W.I.R. 296 at 30 Lord Lowry giving the opinion of the Board said:-

> "When dealing with a defence of alibi, the trial Judge should normally tell the jury that, if they definitely disbelieve the alibi, they must entertain the possibility that the accused was not at the scene of the crime and has produced a false alibi to strengthen his case that he was not there."

[63] Apart from the error made by the learned trial Judge in treating the evidence of Theresa Isidore as identification of the Appellant when she was directing the jury on the alibi, one cannot criticize any other aspect of this part of the Judge's summing up.

[64] I deal finally with the ground, the verdict is unsafe. Learned Counsel for the Appellant referred to a passage in R v Cooper (1969) 1 All ER 32 at page 34:

> "This is a reaction which may not be based strictly on the evidence as such, it is a reaction which can be produced by the general feel of the case as the court experiences it."

[65] I am of the view when dealing with this topic the above quoted passage is most overworked and misused having regard to the facts of Cooper.

[66] In Cooper the Appellant was convicted for assault, the victim of the assault was a Miss Mc Farlane twenty two years old who said that at 11.00pm on a December night in 1967 she and a girlfriend were walking in Earls Court Road when three young men came and surrounded her friend. She walked on a little but realizing the men were drunk and that her friend was in some difficulty, she turned back to give her support.

[67] The victim said that as she approached the group, one of the men came towards her pushed her into a doorway and hit her in her mouth with his fist, with the result that she lost three front teeth. The man hit her a second time and ran off. The Court of Appeal in England thought this was a difficult identity case. However, Miss Mc Farlane had no trouble in regard to identification. The Appellant stood in an identification parade in January some six weeks after the offence and Miss Mc

Farlane picked him out at once. His own words "she never looked at anyone else".

[68] A Mr. Fahy who was one of the other men involved in this affair gave evidence. The substance of his evidence was that it was not the Appellant who hit Miss Mc Farlane but another man who goes under a variety of names one of which is Peter Burke. Mr. Fahy was destroyed in cross examination, no doubt because it was proved that immediately after the affair he had told the police that it was the Appellant who had been the assailant but his sworn evidence was in the contrary sense.

[69] The important witness on behalf of the Appellant was a Mr. Davis. He was a friend of the Appellant. He was not present on the occasion of the assault but he visited the Appellant in prison shortly afterwards and, owing to insufficient time for visits to see the Appellant individually he shared a visit with this man Peter Burke. He gave evidence in Chief that when the Appellant was talking to Peter Burke in prison he said that he had been identified the day before, he was very disturbed about it. Peter Burke answer was that the girl was probably mistaken and it would all come right in the end.

[70] In re examination Davis said that he asked Burke "what is this all about?" Davis had known little or nothing about the incident. Then Peter Burke told him that he [Burke] had administered the blow. Mr. Davis then said:

> "I asked him what he was going to do about it. He was evasive, I persisted and I asked him if he was going to let an innocent man suffer for this when he had done it. He said that there was nothing he could do about it because he had a very bad record and would get four years."

[71] The record revealed that Peter Burke had a striking resemblance to the Appellant. There was no criticism of the Judge's summing up to the jury, and indeed counsel for the Appellant had gone to some lengths to indicate that the summing up was entirely fair and everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding Judge.

[72] Having regard to the facts of and circumstances surrounding that case it is not difficult to appreciate why the Court of Appeal felt that the conviction of Cooper was unsafe and unsatisfactory. The victim's complaint was that she was assaulted by a man. The Appellant claimed that he was with the other men Fahy and Burke, but after this incident Fahy testified that it was not the Appellant who assaulted the victim. Fahy's testimony was discredited in cross-examination. Burke admitted to Davis that he Burke assaulted the victim. In those circumstances serious doubt would have been cast on the lawfulness of Cooper's conviction. This would have created a lurking doubt in the mind of the court. In the instant case there could be no such doubt.

[73] The Appellant was obviously incensed by the removal of his child from his home to the home of the child's mother and by remarks allegedly made by P.C. Alysious Ishmael one of the police officers involved in the removal of the child. The Appellant was so incensed that he made threats repeatedly that he would harm P.C. Ishmael. He would make him a "sarge with no arm". He pulled out a small cutlass from his waist brandishing it and at the same time making threats against P.C. Ishmael (Lawrence Gregg's testimony) that was on the night of 29th September,1999. He made threats against PC Ishmael's father, the deceased, at the same time seeking information about the deceased's bus.

[74] There is evidence given by the witness Isiah Sylvester that the Appellant was on the block left and went up the road. The irresistible inference is that he had the small cutlass with him when he left.

[75] At about 7.50pm according to the testimony of Eurance Hippolyte the Appellant was seen on Fond Cannie road walking towards the direction of Guesneau Gap where the incident occurred.

[76] The evidence of Theresa Isidore is that the person who inflicted the injury on the deceased did so with a "long thing like a cutlass". According to Dr. King "a sharp instrument such as a knife or a cutlass could have caused the injuries seen on the deceased".

[77] In my view the instant case cannot create the least doubt in my mind. There cannot be any lurking doubt in this case. The circumstantial evidence is overwhelming and is telling. The evidence to my mind points unmistakably to the Appellant. It reveals a man buoyed up by anger intended at any cost to wreak revenge on PC Aloysuis Ishmael or his father, the deceased.

[78] In my considered opinion, I am of the view that notwithstanding the errors of the learned trial Judge and the misdirection, the fairness of the trial was not in anyway compromised. I would therefore apply the proviso.

[79] The appeal is dismissed. The conviction is affirmed.

[80] I now deal with the question of sentence. At the sentencing phase the learned trial Judge wrote at paragraph 15 of her reasons:

> "I am of the view that this premeditated and planned attack on the deceased warrants severe punishment. This was a murder that had been carefully and deliberately planned. This was a murder where the victim was the father of a police officer, the said police officer having gone to the accused's home to execute a warrant of the family court of which the Appellant was upset and set out to revenge. His statement to several witnesses who testified were evident of what he planned to do with the police officer. He was bent on revenge. He could not wait until Monday where he was asked by the Commissioner to return. In my opinion the deceased suffered the consequence of death because of the acts of his son, a police officer acting in the execution of his duties. The evidence is palpably clear that the police officer was the principal target and there is enough evidence that he resembled his father and he also drives his father's vehicle from time to time."

[81] I agree with everything said by the learned trial Judge in the above quoted paragraph. There are factual bases for the opinions she expressed.

[82] It was argued on behalf of the Appellant that the offence for which the Appellant was convicted was a non- capital offence. Heavy reliance was placed on Spence & Hughes v The Queen Criminal Appeal No. 20 of 1998 and 14 of 1997. At paragraph 47 of this judgment the Chief Justice, Sir Dennis Byron said:

> "In my judgment a distinction must be drawn between capital and non-capital murder. In two Caribbean countries Jamaica and Belize legislation has already been passed drawing this distinction….."

[83] Sir Dennis then referred to the legislative provisions in Jamaica, in paragraph 48:-

> "The offences against the person (amendment) Act 1992 of Jamaica gives legislative effect to the distinction between capital and non-capital murder. The definition of capital murder in section 2 of the Act is both expansive and detailed. The classification of murder is related to the gravity of the offence and the record of the offender. Upon a conviction for non-capital murder the offender can be sentenced to life imprisonment with a mandatory period of seven years before becoming eligible for parole. An analysis of the statute shows the following:
>
> Factors determining gravity of offence:
> (i) If the deceased is a member of the security police or correctional force in execution of duty or a judicial office
> (ii) If the murder is attributable to the status of that person as a witness, party or juror in litigation;
> (iii) Murder committed in course or furtherance of serious crime or terrorism;
> (iv) Contract murders."

[84] It was argued that the murder for which the Appellant was convicted did not fall with any of the categories above-mentioned. So that it would not fall within the realm of capital murder. While it is true that the Chief Justice expressed the view that a distinction must be drawn between capital and non-capital murder and drew attention to Belize and Jamaica, it must be remembered that legislative provisions are in place to support that distinction.

[85] The four factors Sir Dennis outlined which determine the gravity of offence in Jamaica, in my opinion can only be used as a guide because there are legislative provisions. We have no such legislative provisions in St. Lucia. I cannot therefore

accept the argument that the murder for which the Appellant was convicted does not fall within one of the four classes and therefore is non-capital.

[86] There was also argument that the learned trial Judge in imposing the death penalty, from her reasoning she did so according to her (paragraph 15) because the Appellant killed the father thinking it was the son, the police officer, who had executed a warrant and removed the Appellant's child from his home.

[87] This argument was advanced as a result of the learned trial Judge saying:-

> "The evidence is palpably clear that the police officer was the principal target and there is enough evidence that he resembled his father and he also drives his father's motor omnibus from time to time."

[88] Having regard to the evidence as a whole, I do not think that the learned trial Judge could have thought for one minute that the Appellant killed the father thinking that it was the son.

[89] I agree with the learned trial Judge that this was a murder that had been carefully planned. It was brutally executed for revenge, revenge brought about by the deceased's son executing a warrant in the line of his duty.

[90] The Appellant made allegations that P.C. Ishmael made remarks about him when he took away the child. These remarks he considered to be offensive.

> " Christopher does not know the law and his family does not have money"

[91] This allegation is unsubstantiated in my opinion. The evidence reveals that when the Appellant's child was taken from his home he was not there. P.C. Aloysuis Ishmael gave evidence on oath he was cross- examined by the Appellant's lawyer. The record does not indicate that this witness was asked anything about the allegation made by the Appellant.

[92] The record does reveal however P.C. Ishmael saying in cross- examination up to the 29th September 1999, he had no problem with the Appellant.

[93] I would uphold the sentence passed by the learned trial Judge.

[94] The appeal is dismissed the conviction and sentence passed by the learned trial Judge are affirmed.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal [Ag.]

[1] SAUNDERS, J.A.[AG.]: On Tuesday 28th September, 1999, a police officer named Aloysius Ishmael, along with other officers, was told of the contents of a Family Court order. The officers were instructed to execute the order. It does not seem as though the actual order was shown to any of the police officers. Ishmael never saw it. The physical order itself did not form part of the evidence of the murder trial. The order apparently commanded the officers to proceed to the home of Christopher Remy and there to remove a young child, Remy's daughter, and place the child in the custody of her mother. The order was duly executed. Remy was not at home when it was carried out.

[2] Some time later on that very day, Remy had a conversation with a friend. He complained to the friend that Ishmael had entered his home and removed his child. Remy also told his friend that Ishmael had, at the time of carrying out the order, remarked to Remy's sister (who was at the home with the child when the officers got there) that the Remys have no money, they are nothing and that there was nothing they could do about the child's removal. Remy went on to tell his friend that he would make Ishmael pay. The friend counseled restraint. He told Remy to report the matter to the police. Remy insisted that he would make Ishmael pay. He said he was not going to the police.

[3] The following day, Wednesday, Remy and his friend again spoke. Remy said that he had been to the Commissioner of Police about the matter. The Commissioner advised him that the incident would be investigated and that he should return on the following Monday. Remy however told his friend that he was not sure that he had the patience to wait until then.

[4] Remy was seen by other friends that Wednesday. He again complained to them about the removal of his child from his home. He issued more threats against Ishmael. He brandished a small cutlass with a shining blade. He said he would take off both of Ishmael's arms. He also said that in order to get at Ishmael, he (Remy) might give Ishmael's father "a plock" whereupon Ishmael would rush up and provide the occasion for Remy to do with Ishmael what he wanted. To give someone a "plock" in local parlance is apparently to give them a beating.

[5] Later that evening, Remy was seen in the area of the Guesneau Gap. He had a cutlass with him and he was making inquiries about Ishmael's father's vehicle number. Shortly after this, Ismael's father, the deceased, was driving his mini-van towards the Guesneau Gap. As the van slowed down to avoid potholes a figure emerged from an old car to the side of the road. This person ran alongside the van and pushed something through the window next to the van driver. The vehicle picked up speed for a brief period before finally coming to a stop. It was discovered that the driver had sustained a severe wound to his neck. He bled profusely and subsequently died.

[6] Christopher Remy was arrested and convicted for the offence of murder. After a subsequent sentencing hearing the death penalty was imposed upon him. He has appealed both his conviction and his sentence. For the reasons set out in the judgment of Redhead, J.A. I agree that the appeal against conviction should be dismissed. I entertain reservations however about the appropriateness of a capital sentence in this case.

[7] The learned trial Judge gave written reasons for the decision to impose the death penalty. The Judge outlined that the Appellant had five previous convictions, two of which were for wounding and one for assault. The Probation Officer who interviewed Remy noted that he showed no sign of emotion or remorse. Indeed he has continued to insist that he was framed for this offence. In her round of interviews, the Probation Officer received mixed accounts about his character and reputation. These, I suppose, depended on who the informant was. The consensus though was that he had an awful temper and could become quite aggressive at times. After taking account of all of this, the Judge concluded that this murder fell into the category of one of the worst cases. The learned trial Judge stated in the process:

> "I am of the view that this premeditated and planned attack on the deceased warrants severe punishment. This was a murder that had been carefully and deliberately planned. This was the murder where the victim was the father of a police officer; the said police officer having gone to the accused's home to execute a warrant of the family court of which the accused was upset and set out in revenge. His statements to several witnesses who testified were evident of what he planned to do with the police officer. He was bent on revenge. He couldn't wait until Monday when he was asked by the Commissioner to return. In my opinion, the deceased suffered the consequences of death because of the acts of his son, a police officer acting in the execution of his duties. The evidence is palpably clear that the police officer was the principal target and there is enough evidence that he resembled his father and he also drives his father's motor omnibus from time to time."

[8] Every case of murder is utterly repugnant to the norms of human society. Each murderer deserves very serious punishment. The abolition of the mandatory death sentence in this jurisdiction has however meant that capital punishment should be reserved for the most extreme cases of murder. In the past, trial Judges were obliged to lump all murders together under one category and impose the same sentence upon everyone convicted of that offence. Today, a trial Judge has to be more discerning. An effort has to be made to grade cases of murder. This is possible because murder cases vary widely in degrees of criminal culpability and those who commit murder also have vastly different criminal backgrounds. The task of the sentencing Judge is to compare the case before her or him with other possible cases of murder. The Judge, before imposing the death sentence, should ask, am I satisfied beyond reasonable doubt that this offence falls into the worst,

the most extreme case of murder? If all possible cases of murder were categorised would this one fall into a type that I can regard as being exceptional?

[9] This exercise may sometimes be quite an invidious one to carry out because the comparison is a notional one. Moreover, in determining, in the face of the grieving relatives of a real victim, that a particular murder is less grave than some other notional murder, it could almost seem as though one were minimising the significance of the particular murder or devaluing the life of the particular victim. However, unless the trial Judge consciously carries out this grading exercise, the temptation always will be to compare the case being decided, not with other cases of murder, but instead with ordinary civilised behaviour.

[10] I understand the above to be in line with the recognized approach internationally. For example, in Bachan Singh v The State of Punjab, the view of the Indian Supreme Court was that "the death penalty can only be justified in the rarest of rare cases". In The State v Makwanyane, before South Africa had entirely abolished the death penalty, its Constitutional Court declared that "the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence".

[11] Returning now to the instant case and the trial Judge's reasoning, it was said that this murder was premeditated and planned. This may have been so but it is also true that the incident that motivated the Appellant, namely the removal of his daughter from his home, occurred some time after 4:30 pm on Tuesday 28th September, 1999. The murder took place the following day some time after 7:00 pm. In the context of a statute that requires as an essential ingredient of murder a specific intention to kill, as murders go, it cannot be said that there was here a very long period of premeditation and planning.

[12] The learned trial Judge opined that "the police officer was the principal target and there is enough evidence that he resembled his father and he also drives his

father's motor omnibus from time to time". If it was thereby intended to suggest that the Appellant murdered the father thinking it was the son, then that is not borne out by the evidence. There was abundant evidence that the Appellant harboured thoughts of revenge against the police officer. The sole motive disclosed by the evidence for the killing of the father however is when the Appellant suggested to his friend that he would give the father "a plock" so that the son would arrive on the scene. It never was a part of the Crown's case that the father and son so resembled each other that this murder may have been a case of mistaken identity. The only time the issue of resemblance came up during the trial was when Ishmael, at the end of his testimony, said in answer to the Judge, "My father looks like me". Immediately following this, the DPP was permitted to elicit further from the witness, "I sometimes drive the minibus that my father used to drive".

[13] R v Wilson Exhale was a case over which I presided. Exhale was convicted of murder. I described his conduct as brutish and savage. He had an abominable criminal record. Yet, I did not regard his case as deserving of the death penalty. It did not in my view fall within the category I regarded as one of the "worst cases". I ventured then to cite what I thought were examples of cases that would fall within that category and said:

> "….this was not a murder that had been carefully and deliberately pre-planned. This was not a murder where the victim was a judicial officer or a member of the security services or correctional force in execution of a duty or a judicial office. This was not a contract killing. This victim was not murdered because of his status as a juror or as a witness or party in litigation. In each of the above cited circumstances murder may, and I stress the word "*may*", more closely approximate to what I would regard as one of the "worst cases"…….. The Parliament of St. Lucia currently has before it a new draft Criminal Code. In the Draft Code that I have seen, Parliament apparently proposes to establish two categories of murder, capital murder and non capital murder. A list is given of the various circumstances in which a crime would constitute capital murder. I must emphasise that this document is still in draft form. I am not bound by it. I have no doubt that in its wisdom Parliament may see it fit to make amendments to the draft. It is interesting to note however that in the draft that I have seen the circumstances of this offence would not qualify to be listed among the category of capital murder".

[13] I might add here as well that Remy's case does not fall within any of the categories detailed in the draft Criminal Code. It was not the murder of a police, prison or judicial officer; or of a juror, witness or other person carrying out a judicial function. It was not a murder accompanied by robbery, arson or some sexual offence. It was not a murder for profit nor was it committed in the course of terrorism. To crown it all, Remy's criminal record, while not clean, was not the worst.

[14] There is one other circumstance that causes me discomfort regarding the imposition of the death penalty upon this Appellant. Before Remy was sentenced to death, the trial Judge did not have the benefit of any psychological or psychiatric report. Now, sometimes throughout a trial, little or no suggestion might be made of any abnormality of mind on the part of the accused. Sometimes, it is not in the interest of the defendant to raise such a matter. To do so may embarrass another defence being put forward. Or, as is the case in St. Lucia currently, there may be no provision in the law for a defence of diminished responsibility. In the relatively limited number of cases of murder that have been tried since this court's decision in Hughes and Spence, an interesting statistic stands out in a few. When at a sentencing hearing, reports on the prisoner's mental state are tendered, it turns out that the Appellant was or may have been labouring under some mental impairment. Such was the case in Patrick James and also in Berthill Fox. In each of these two cases that circumstance may well have made the difference between a capital and some other form of sentence. This is one of the reasons why it is so important for the sentencing Judge to have the benefit of such reports. Regrettably this was not done here.

[15] For all of the above reasons I would have quashed the sentence of death and remitted the matter to the trial Judge for another more appropriate sentence to be passed.

Adrian D. Saunders
Justice of Appeal