SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 16 AND 17 OF 2003

BETWEEN:

[1] KEN CHARLES
[2] LEONARD O'GARRO

Appellants

and

REGINA

Respondent

Before:

The Hon. Mr. Adrian Saunders — Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal

Appearances:

Ms. Nicole Sylvester and Ms. Rochelle Forde for the Appellant Charles
Mr. Richard Williams for the Appellant O'Garro
Mr. Collin Williams, Director of Public Prosecutions [Ag.] and
Ms. Sandra Robertson for the Respondent

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2004: June 24;
December 6.

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JUDGMENT

[1] ALLEYNE, J.A.: On 20th May 2003 the Director of Public Prosecutions issued an indictment against Leonard O'Garro and Ken Charles charging them with the murder of Ronald Lewis at Mount Wynne, Saint Vincent on 12th April 2002. The indictment also charged both Appellants with wounding Shellean Gregg at the same time and place. The trial commenced on 9th July 2003 and on 24th July the jury returned unanimous verdicts of guilty in respect of both Appellants on both counts of the indictment. The learned trial Judge thereupon ordered social inquiry

reports and psychiatric reports and on 31st July, after hearing submissions from Counsel for both accused and the Director of Public Prosecutions, and evidence called on behalf of the Appellants, and the evidence of the Probation Officer, passed sentence of death on both accused in respect of the first count, and 25 years imprisonment in respect of the second count. The Appellants have appealed against conviction and sentence. The appeals were consolidated and heard together.

[2] At the commencement of the hearing the matter of sentence was discussed. It was common ground that at the sentencing stage of the trial the Court did not have before it a psychiatric report in respect of the Appellants. At the time of sentence this process was thought to be desirable but optional. Since then, with the decision in Mitcham and others[1], it is settled that in every case where the death penalty is sought by the prosecution, such a report must be considered.

[3] In that case Chief Justice Sir Dennis Byron laid out procedural guidelines in the following terms:

> "Accordingly, I put forward the following as a procedural guide:
>
> [1] If the prosecution intend to submit that the death penalty is appropriate in the event that the accused is convicted of murder, then notice to that effect should be given no later than the day upon which the offender is convicted. The notice may be given immediately upon conviction in which case it may be given orally. In any event the notice should contain the grounds on which the death penalty is considered appropriate.
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> [2] Upon conviction by the jury, and the Prosecution having given notice that the death penalty is being sought, the trial Judge should, at the time of the allocutus, specify the date of a sentencing hearing which provides reasonable time for preparation. Where the Prosecution and the trial Judge consider that the death penalty is not appropriate, a separate sentencing hearing may be dispensed with if the accused so consents and the offender may be sentenced right away in the normal fashion.

[1] St. Christopher & Nevis Criminal Appeals Nos. 10 – 12 of 2002.

> [3] When fixing the date of a sentencing hearing, the trial Judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner. The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt. The trial Judge should give written reasons for his/her decision at the sentencing hearing."

[4] At the outset, the learned Director of Public Prosecutions conceded that, in the event that the appeals against conviction were unsuccessful, the matter should be remitted to the trial judge for sentence in accordance with the guidelines. We will address this matter at the end of this judgment if it becomes necessary. The matter arises under the first ground of appeal in each case.

[5] Also related to sentence was the second ground of appeal in each case; that the learned trial judge did not give full and proper consideration at sentencing (to) the effect of intoxication. Ground 4 in the appeal of Ken Charles, and ground 5 in Leonard O'Garro's appeal, complain that the sentences for each offence were excessive. These issues also we will deal with in due course if it becomes necessary.

[6] Both Appellants appealed against sentence on the ground that the sentences for each offence were excessive. A number of additional grounds relating to sentence were also filed.

[7] The Appellant Ken Charles appealed against his conviction on the grounds that (1) the learned trial judge's summing up was unfairly and excessively weighed against the Appellant and in favour of the prosecution (ground 3), and (2) that the learned trial judge misdirected himself (and therefore the jury) on the issue of the police identification procedures and breaches of P.A.C.E. and the implications and inferences of fact and law that arise therefrom (ground 5). This Appellant filed and argued amended grounds of appeal against conviction, as follows:

> Ground 6. The learned trial judge in his summing up failed adequately or at all to direct the jury as it relates to intoxication and intent.

Ground 10. A material irregularity occurred in the course of the Appellant's trial rendering his trial unfair for and among the following reasons:-

(a) The learned trial judge failed to leave the issue as to admissibility of the evidence relating to the identification parade of the Appellant Ken Charles to the jury.

(b) The learned trial judge erred in law in allowing the case to go to the jury in light of the quality of the identification evidence as it related to the Appellant Ken Charles.

Ground 15. That the conviction was unsafe and unsatisfactory.

[8] The Appellant Leonard O'Garro appealed against conviction on the grounds that the learned trial judge's summing up was unfairly and excessively weighed against the Appellant and in favour of the prosecution, and that the learned trial judge misdirected himself (and therefore the jury) on the issue of the police identification procedures and breaches of P.A.C.E. and the implications and inferences of fact and of law that arise therefrom. In addition on the 19th April 2004 the Appellant filed additional grounds as follows:

(1) The conviction is unsafe and unsatisfactory.

(2) The trial judge failed to direct the jury adequately or at all on the issue of the voluntariness of the caution statement.

(3) The learned trial judge failed to direct the jury as to the issue of oppression negating the voluntariness of the caution statement.

(4) The learned trial judge at voir dire No: 4 failed to give adequate weight to the evidence of Kensley Dougan.

(5) The learned trial judge failed to direct the jury as to the evidence of Kensley Dougan (JP) and the manner in which his evidence must be treated and its effect on voluntariness.

(6) The learned trial judge failed to give any or any adequate direction regarding intoxication and its effect or possible effects on intention.

(7) The learned trial judge erred in permitting the prosecution to lead evidence of the defendant's bad character and antecedents before the jury.

(8) The learned trial judge sentenced the Appellant to death having taken highly prejudicial and irrelevant material into consideration.

The Case of Ken Charles

Identification parade

[9] Learned Counsel for the Appellant Charles dealt with grounds 5, 10 and 15 together. Grounds 5 and 10 related to the issue of the identification parade, and ground 15, that the conviction was unsafe and unsatisfactory. Learned Counsel referred to the evidence of the witness Shelly Ann Gregg at page 13 of the record relating to the identification parade. This witness said she was told that the fellows she had identified in the photos may or may not be on the parade. There were about 14 or more men on the parade, and she identified the Appellants O'Garro and Charles from among them, telling the police officer Walker that 'those were the two guys who shot Ronald (Lewis) and me.' Learned Counsel submitted that it is a well established principle that where photos have been shown to an identifying witness, that witness should not be called for the purpose of identifying the accused. Counsel cited the case of Peter David John Lamb[2]. The relevant facts of that case, as shown in the headnote, were that an album of Criminal Record Office photographs including that of the defendant was shown to the jury (not the identifying witnesses) without anything being said or done by the defence which called for it. Lawton L.J. referred to a Home Office circular which indicated, among other things, that 'once a witness has made a positive identification from photographs, other witnesses should not be shown a photograph, but should be asked to attend an identification parade.' Criticism was made by Counsel for the Appellant of the fact that after having made an identification from the photograph, the witness was allowed to confront the Appellant in an identification parade. His

[2] [1980] 71 Cr. App. R. 198.

Lordship referred to this as 'unfortunate in the circumstances', and referred to this and other issues as 'all matters for the exercise of his discretion.'

[10] In that case the prosecution's case had depended entirely on the issue of identification by three witnesses, while on the other hand the defence was alibi. The Court accepted that the behaviour of the Appellant on arrest was consistent with innocence. Lawton L.J. held that the fact that the photographs were clearly photographs of the Appellant which had been taken while he was in custody for a criminal offence, a fact which must have been clear to the jury, would create the danger that the jury would take this as evidence that the accused had a criminal record, of which the Crown would not normally be allowed to lead evidence.

[11] His Lordship referred to a paragraph in the Administrative Guidance attached to the Home Office circular, which recognised that it cannot normally be said in Court that an identification was made from photographs, without revealing the existence of a criminal record. The Court of Appeal held, in Lord Justice Lawton's words, that the production of the photographs was 'an irregularity which should not have occurred.' His Lordship continued; 'It is not, I think, overstating the case to say that it was equivalent to the prosecution leading, as part of their case, the fact that the accused had a criminal record.'

[12] On the other hand, the Court went on to say this:

> "The court has said in the recent past that the mere fact that in a particular case the jury get to know wrongly that a man has a criminal record does not always lead to a conviction being quashed."

Lawton L.J. quoted from Widgery L.J. in the case of Cooper[3]:

> "we are … charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind, the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may

[3] [1969] 1 All ER 32

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."

[13] The learned Judge concluded:

> "photographs should not be produced or referred to by the prosecution as part of their case. The defence should be informed that photographs have been shown to one or more of the witnesses, whom the prosecution propose to call. The old practice should follow, that the defence should be left to decide for themselves whether any reference will be made to the fact that photographs have been seen by those who purport to pick out the defendant in an identification parade."

[14] I accept this case as good authority, and propose to apply the test laid down, as to whether there is some lurking doubt, in all the circumstances, which makes us wonder whether an injustice has been done.

[15] Learned Counsel for the Appellant Charles in her skeleton cited the cases of William Goss[4], and Rex v Haslam[5], in support of the general proposition that the police ought not to show photographs to witnesses who may subsequently be called to identify suspects in an identification parade. These cases are indeed helpful on the point, but do not lend support to the approach advocated by Counsel. Both cases rule that it is improper for the police to show photographs of 'an accused person', to use the words of the Lord Chief Justice in Goss, 'whom they are afterwards going to see.' However, it is clear from Haslam that where there are not already suspects (or accused persons) identified by the police, 'no criticism is to be made on the conduct of the police in the showing of the photographs to those witnesses.'

[16] Learned Counsel for the Appellant Charles conceded that, standing alone, this irregularity might not necessarily be sufficient to lead to the conviction being quashed. In her skeleton submissions learned Counsel for Charles says 'when Ken Charles was arrested he was at all material times a suspect and in the

[4] [1923] 17 Cr. App. R. 196.
[5] [1925] 134 L.T. 158.

custody of the police, it is in these circumstances that the witness Shelly Ann Gregg was shown photographs of the Appellant (Ken Charles), which fact is of tremendous concern as it raises the issue of fairness and due process.' In fact, as appears from the evidence of Shelly Ann Gregg at page 19 of the record, she was shown the photograph on 4th June, and Charles was taken into custody on 5th June, as deposed by the witness Sgt. Jemmoth Edwards at page 31 of the record. There is no irregularity in this respect. It may well be that the showing of the photographs led to the apprehension of the Appellant, but that is perfectly in keeping with proper police investigative processes. The words of Lord Hewart C.J. in Haslam quoted in paragraph 14 are apropos.

[17] Counsel complained that the learned trial Judge showed not a scintilla of concern that the photographs were referred to in the evidence, creating the impression that the Appellant was known to the police and that the evidence was regular. In my view that adds nothing to the admitted irregularity of the admission of the evidence concerning the photographs. Perhaps the learned trial Judge could have mitigated the effect of the irregularity by telling the jury that they should ascribe no significance to that evidence as they had no way of knowing the source of the photographs, but I am doubtful that this would have had much effect, or even have been a proper direction, especially in light of the fact that Counsel for the Appellant, in cross-examination of Shelly Ann Gregg, elicited the fact that the police had told her that the photographs she was viewing were photographs of criminals. In any event the harm had been done.

[18] Learned Counsel further urged, under ground 5 of the grounds of appeal on the issue of the identification parade, that it is critical that the individuals on the identification parade be of similar description, and for that purpose to take photographs to satisfy the requirement of fairness and due process. Counsel complains that this was not done in this case. In addition, Counsel submitted, the Appellant was not represented at the time of the parade, and this added to the unfairness of the process.

[19] I note that no issue was made of this in the cross-examination of the witness Shelly Ann Gregg, and in the cross-examination of the witness Vincent Walker, the police officer who conducted the parade, Counsel for O'Garro elicited the answer that 'As far as practicable all the persons on parade were of same colour and height. None stood out from the other – almost the same size.' Learned Counsel for the Appellant Charles elicited only that no photographs were taken. There was no suggestion of unfairness in the selection of participants in the parade, their height, appearance or otherwise. It does not appear to me that there is any merit in this ground of appeal.

The summing up was unfair

[20] Learned Counsel for the Appellant Ken Charles submitted that the learned trial Judge's summing up was unfairly and excessively weighted against the Appellant and in favour of the prosecution. Counsel pointed out that the only eye witness to the crime was the witness Shelly Ann Gregg. Counsel directed the Court's attention to the evidence of that witness at page 11 of the record, where she claimed to have seen the two Appellants at the scene, both with guns and wearing blue overalls. She said there were two shots or explosions and she dropped to the ground. She got shot and fell under the car. She heard two more shots.

[21] In contrast, Counsel pointed out that the learned trial Judge in his summing up at page 168 of the record said 'she (Gregg) identified to you the jurors and to the Court the two persons she said fired those shots at her and Ronald Lewis. She identified them as the two accused O'Garro and Ken Charles.' I note, however, that the learned trial Judge continued in his direction to the jury in the following words; 'She goes further; she identified the accused Ken Charles whom she described as the shorter of the two as the one who threatened to shoot her if she tried to get out. So right from the early stages she is telling us and the prosecution is asking us to accept that Ken Charles was the major player in this thing – major player; so the issue of unlawful joint enterprise … comes into play.'

[22] It is true that the witness Shelly Ann Gregg did not say that the Appellant Charles, or either of the Appellants specifically, fired the shots. In addition, as learned Counsel pointed out, the Appellant Charles denied having fired a shot, and there is no direct evidence that he did. The leaned trial Judge to that extent fell into error when he said that Gregg identified the Appellants as the two persons who fired the shots. It seems to me however that that error, in the light of all the evidence in the case, is altogether insignificant and could have made no difference, by itself or cumulatively, to the conclusion to which the jury came. I refer in particular to the evidence of Sgt. Jemmoth Edwards that on 6th June 2002 on being questioned about a gun the Appellant Charles said that is the gun they used to kill Lewis at Mount Wynne. Sgt. Edwards also gave detailed evidence as to demonstrations and statements by the Appellant at Mount Wynne, on their journey from Mount Wynne to Argyle, and at Argyle, which, if believed by the jury, would have seriously incriminated the Appellant. A confession statement by the Appellant was also entered into evidence.

[23] Unlike the cases cited by learned Counsel in support of her submissions on the irregularity regarding the reference to the photograph, this case did not rely solely, or even significantly, on the evidence of identification by Gregg. There was abundant, even overwhelming additional evidence of the Appellant's guilt, including his detailed demonstration, on his visit with the police to the scenes of the crime, of the events that occurred on that fateful evening and night, and his graphic and chilling description of the events in his confession statement. This is not a case in which there can be any lurking doubt as to the correctness of the jury's verdict, and the Appellant Ken Charles' appeal against conviction on this ground is dismissed.

Intoxication and intent

[24] On ground 6, relating to the issue of intoxication and intent, the Appellant submitted that the learned trial Judge in summing up failed to direct the jury

properly as to the need to acquit the Appellant if they believed that he was so affected by drugs that he did not intend or may not have intended murder.

[25] The defence for this Appellant was alibi. Nevertheless, in his confession statement to the police on which the prosecution placed great reliance, and which indeed was the main plank of their case, the Appellant spoke of having smoked a marijuana spliff, as a result of which, he said, 'me feel like me high'. That is the extent of the evidence on which learned Counsel for the Appellant contends that the learned trial Judge ought to have directed the jury on the issue of the effect of intoxication on intent.

[26] Archbold 2002 at paragraphs 17-105 to 17-113 explores the issue of self-induced intoxication in some depth. The learned author distinguishes by reference to decided cases the principles which apply in cases where 'basic intent' is sufficient *mens rea*, that is to say, where recklessness is sufficient to establish the necessary mental element, and cases, such as murder, where proof of specific intent is necessary. In such cases the jury must take into account evidence of intoxication, even though self-induced, in deciding whether or not the prosecution has proved the necessary intent[6].

[27] In R. v Sheehan and Moore[7], in the judgment of the Court of Appeal read by Geoffrey Lane L.J., at page 312, the Court expressed the view that:

> "In cases where drunkenness (I would add drug-induced intoxication) and its possible effect upon the defendant's *mens rea* is an issue, …the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.
>
> "Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink (drugs) to draw such inferences as they think proper from the evidence, and on that

[6] Archbold 2002 paragraph 17-109, 17-106.
[7] 60 Cr. App. R. 308 at 312.

basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

[28] The learned trial Judge did not give such a direction, and in my view the evidence before him on the issue, limited as it was to a statement in the Appellant's caution statement that he had smoked a marijuana spliff as a result of which 'me feel high' did not raise the issue of intoxication affecting the Appellants intent. It was sufficient, on the evidence in this case, for the learned trial Judge to direct the jury, as he did at pages 149 to 151 of the record, generally on the law concerning intent and relate the law to the evidence. The mere mention of feeling high, without more, does not impose on the trial Judge the need to give a special direction on intoxication and intent. I would dismiss this ground of appeal and dismiss the appeal against conviction in the case of the Appellant Ken Charles.

The Case of Leonard O'Garro

[29] This Appellant's grounds of appeal have been set out in paragraph [8] of this judgment. Mr. Richard Williams, learned Counsel for this Appellant, dealt with grounds 9 to 12 (2 to 5 of the additional grounds listed in paragraph 8), (which all relate to the admissibility of the Appellant's confession statement) together. Counsel referred to and developed his written submissions.

Confession statement

[30] On the issue of the admission of the confession statement, learned Counsel took issue with the learned trial Judge's application of the law regarding the issue of oppression, as found in his ruling on the *voir dire* at page 94 of the record of appeal, paragraph (11) of the ruling. Learned Counsel contended that the learned trial Judge did not consider the material facts in the matter and acted upon wholly wrong and irrelevant considerations, in that he failed to appreciate that the exercise of authority or power by persons other than the interrogator can also ground oppression, and thus the Judge placed no importance on the evidence of the Justice of the Peace Kensley Dougan.

[31] In support of his contention learned Counsel pointed to the evidence in cross-examination of the witness Dougan, who was present at the taking of the statement and whose evidence generally supported the prosecution's contention that the caution statement was voluntary. The only possible chink in the armour is the evidence elicited in cross-examination that 'when O'Garro was brought in (to the Courtroom in the Calliaqua Police station where the statement was taken) he had a lean and hungry look' and that 'he did apparently look exhausted'. There is no suggestion that his 'lean and hungry look' is anything other than his normal appearance, an impression that is borne out by Kensley Dougan's very last statement in re-examination on the *voir dire*, at page 96 of the record, where the witness said 'I said O'Garro looked lean and hungry. It is very similar to how he looks right now in the dock'. After all, Cassius also had such a look. Perhaps it is a characteristic of dangerous men, but it has not been put forward as a prejudicial statement.

[32] Learned Counsel also made reference to the evidence of Jemmoth Edwards that when the caution was administered to the Appellant he broke down in tears, and to the evidence of the Appellant regarding his treatment after arrest, being beaten while being transported from Barrouallie to CID headquarters in Kingstown, and being deprived of food from the time of arrest to the time the statement was taken, a period exceeding a day. Counsel referred also to the alleged incident when the Appellant's tea was thrown into the toilet when he refused to admit his participation in the crime.

[33] Oppression as a ground for excluding a confession statement has been considered and addressed by the Lord Chief Justice in the Court of Appeal in England in the case of Ruth Susan Fulling[8]. After reviewing the earlier decisions on the definition and scope of 'oppression', the Lord Chief Justice held at page 142 that the word should be given its ordinary dictionary meaning. His Lordship

[8] (1987) 85 Cr. App. R. 136.

quoted from the definition in the Oxford English Dictionary as follows:

> "exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc., or the imposition of unreasonable or unjust burdens. … There is not a word in our language which expresses more detestable wickedness than oppression."

[34] His Lordship went on to express that the Court found it 'hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator.'

[35] In R v Seelig[9] the Court of Appeal held that in making a judgment of what is oppressive or likely to make a confession unreliable the Court must have regard to the character and experience of the suspect. This same approach was adopted by this Court in Cox & Mitchell v R[10], where Redhead JA quoted with approval Lawrence J's judgment in R. v Vosin[11] in the following terms:

> "It may be and often is a ground for the judge in his discretion to exclude the evidence but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned or was an unguarded answer made in the circumstances that made it unreliable or unfair for some reason for it to be allowed in evidence against the prisoner."

[36] Cox & Mitchell also affirmed the Wednesbury principles[12] as applicable to the exercise by the Judge of the discretion to exclude a caution statement, adopting the dictum of Lord Greene M.R. at page 224:

> "A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not observe these rules, he may totally be said to be acting unreasonably ..."

[37] It seems to me that the learned trial Judge considered the matters which he was bound to consider, and excluded from his consideration those matters which were irrelevant to what he had to consider. In the exercise of his discretion he admitted

[9] 94 Cr. App. R. 17.
[10] Criminal Appeal Nos. 25 & 26 of 1996, Grenada.
[11] (1918) 1 C.A.R. 89 at 96.
[12] Associated Picture House Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223.

the caution statement. I do not consider that, on the evidence, the admission of the statement was unfair, or unfairly prejudicial, to a fair trial of the Appellant.

[38] It is not for the Court of Appeal, but for the trial Judge, in deciding the issue of admissibility on a *voir dire*, to determine what weight is to be given to the evidence of particular witnesses. We have no reason to doubt that the learned trial Judge gave due consideration to the evidence of the witness Kensley Dougan.

[39] The issue of whether or not a confession statement is voluntary is for the Judge, not the jury. The jury determines what weight to give the statement once it has been admitted. The jury heard whatever evidence there was affecting the issue of weight and they would have undoubtedly come to a fair and sensible conclusion on this. I am of the view that the learned trial Judge dealt adequately and properly with all issues concerning the confession statement and the grounds of appeal concerning this issue are dismissed.

### Intoxication and intent

[40] I have dealt at length with the issue of intoxication and its effect on intent in the part of this judgment relating to the Appellant Ken Charles. This ground was not specifically addressed by learned Counsel for the Appellant O'Garro, but the conclusion arrived at in relation to the Appellant Charles would apply equally to this Appellant. This ground of appeal is dismissed.

### Evidence of bad character

[41] The Appellant appeals against conviction on the ground that the learned trial Judge erred in permitting the prosecution to lead evidence of the Appellant's bad character and antecedents before the jury. Section 10(2) of the Evidence Act[13] provides in part:

> "A person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that

[13] CAP. 158, Laws of Saint Vincent and the Grenadines.

> he has committed or been convicted of or charged with any offence other than that with which he is then charged or that he is of bad character unless:
>
> (b) he has personally or by his counsel, asked questions of any witness for the prosecution with a view to establishing his own good character, or the nature or conduct of the defence is such as to involve imputation on the prosecutor or the witnesses for the prosecution."

[42] In his cross-examination of the prosecution witness Sgt. Jemmoth Edwards, the police officer who was in charge of the investigation and who had taken the Appellant's caution statement, learned Counsel who appeared for the accused O'Garro at the trial (other learned Counsel appeared at the appeal) elicited the answer 'I never dictated the (caution) statement to O'Garro.' The cross-examination ended with these words. There was no re-examination. The prosecution closed the case at that point. The Appellants both elected to give evidence.

[43] The Appellant was duly sworn and after the formalities commenced his substantive evidence saying ' On 12th April 2002 I did not leave my home at any time', thereby signaling his defence of alibi. Thereupon the learned Director of Public Prosecutions intervened and indicated a wish to address the Court in the absence of the jury. After submissions on both sides, and on behalf of the Appellant Charles, the learned trial Judge permitted both accused to adduce evidence in support of their alibi.

[44] The Appellant gave evidence concerning his apprehension and his transfer by police vehicle to the Criminal Investigation Department. He alleged that on the way the police boxed and slapped him intermittently as they traveled from Barrouallie to Kingstown, a considerable distance. He said that at the C.I.D. a big man held him by the neck, choked him, lifted him and dropped him on the ground. He alleged that the same big man threatened that if he did not talk he would take him to Argyle and kill him, and told the policemen to work him out and not to let him sleep. That night he was taken to Calliaqua Police station and locked in the cell with tight handcuffs on his wrists. He asserted that the statement which he

gave was made because he was beaten, threatened, forced. He was tired, sleepy and hungry, having had nothing to eat over a period of over 24 hours. Tea which had been brought to him was thrown into the toilet when he persisted in denying any knowledge about the incident at Mount Wynne.

[45] At the end of the examination-in-chief of the Appellant, the learned Director of Public Prosecutions in the absence of the jury sought leave to lead evidence of the Appellant's bad character pursuant to section 10(2)(b) of the Evidence Act. This application was founded on the suggestion put to the witness Sgt. Edwards that he had dictated the caution statement to the Appellant, which Sgt. Edwards peremptorily denied. The learned Director contended that this amounted to a suggestion of impropriety on the part of Sgt. Edwards. This, together with the evidence alleging his mistreatment and intimidation by the police after his arrest opened the door for the Appellant's character to be put in issue. In the circumstances of this case, such a conclusion would depend on a finding that 'the nature or conduct of the defence is such as to involve imputation on … the witnesses for the prosecution.'

[46] Unquestionably, the evidence above referred to would have imputed misconduct on the part of Sgt. Edwards and the prosecution generally. The question before the learned trial Judge would have been, was this sufficient to justify the conclusion that the nature or conduct of the defence was such as to involve such an imputation as is contemplated by the section. Clearly, it is[14]. No criticism can be made of the exercise by the Judge of his discretion to permit cross-examination of the Appellant on his character. This ground of appeal is dismissed.

Unsafe and unsatisfactory

[47] Learned Counsel for the Appellant Leonard O'Garro contended that the verdict of the jury is unsafe and unsatisfactory, and should be set aside. He drew attention to the quantity and quality of incriminating statements made by the Appellant and

[14] R. v. Bishop [1975] QB 274, 59 Cr. App. R. 246; Selvey v. DPP [1970] A.C. 304

his co-accused Ken Charles and emphasized that no attempt was made to edit the statements before they were admitted into evidence. Attention was drawn to the evidence of Dexter Hunte (page 41 of record), which related to a visit to Mount Wynne, Argyle and Biabou where the Appellant Charles is alleged to have made several statements implicating O'Garro in the murder of Lewis and the wounding of Shelly Ann Gregg. All these events and statements took place in the absence of O'Garro. Learned Counsel relied on the case of R. v. Silcott and others[15], in which it was ordered that any reference to a co-defendant in an interview be substituted by reference to a letter of the alphabet.

[48] The same issue arises, and was raised, in relation to the evidence of Gloria Stapleton, a Justice of the Peace who gave evidence of having witnessed the giving of a statement by the Appellant Ken Charles which tended to incriminate the Appellant O'Garro (page 48 of the record of appeal). This witness gave evidence of what the Appellant Charles said to the investigating officer. Complaint is also made in the same vein concerning the evidence of Sgt. Jemmoth Edwards at page 102 of the record but I can see no similar material in that evidence.

[49] The evidence emanating from the Appellant Charles and the evidence of his alleged statements reported by Gloria Stapleton are clearly highly prejudicial to the Appellant O'Garro, and not admissible against him. This is the dilemma faced by the Court in many cases of persons jointly charged with criminal offences. No application was made by Counsel for either Appellant for separate trials, nor have Counsel argued in this appeal that there should have been separate trials. The rule is that in the majority of cases it is in the public interest that defendants who are jointly indicted should be tried together; Archbold 2001[16] citing R. v. Hoggins and others[17]. Indeed in R. v. Moghal[18] it was said that it is only in exceptional

[15] [1987] Cr. L.R. 765
[16] page 81, paragraph 1-176.
[17] 51 Cr. App. R. 444, CA.
[18] 65 Cr. App. R. 56, CA. See also Archbold 2001 page 80 – 81, paragraph 1 –176.

cases that separate trials should be ordered for two or more defendants who are jointly charged with participating in one offence.

[50] Nevertheless, 'it is a fundamental rule of evidence that statements made by one defendant either to the police or to others, are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own. It is the duty of the Judge to impress on the jury that the statement of one defendant not made on oath in the course of the trial is not evidence against a co-defendant and must be entirely disregarded.'[19]

[51] Throughout the Judge's summing up, there were references to written caution statements made by the Appellants, and to other statements, made by the Appellant Ken Charles, and to demonstrations by him amounting to statements, which were allegedly made by the Appellant Ken Charles, but not reduced into writing. These statements each incriminated not only the Appellant making them, but also the other Appellant. It is necessary for me to examine in some detail how the learned trial Judge dealt with these various statements in his summing up. It will also be necessary for me to look at the evidence of Gloria Stapleton, the Justice of the Peace, and that of Sgt. Edwards, as it relates to the statements made by Ken Charles, and at how the learned trial Judge dealt with that in the same context.

[52] At page 154 to 158 of the record of appeal, the learned trial Judge directed the jury on the issue of joint enterprise, referring repeatedly to the caution statements of one or both accused as contributing to proof of the prosecution's allegation that they were engaged in a joint criminal enterprise. At page 155, line 19 to 21, the learned trial Judge directs 'you might say to yourselves – well, one of them said the other fired the gun and he didn't fire, but what you have to look at in that regard is what did they set out to do'. This particular direction on joint enterprise,

[19] Archbold 2001, page 1492 paragraph 15-368.

perhaps more than the other sections to which I draw attention, cries out for a direction on the irrelevance of the statement of the one accused made in the absence of the other, as against that other, on the issue of joint enterprise which the jury had to determine in respect of each accused. Similarly, at page 157, line 6 to 11, the learned trial Judge says:

> "If you look at that for Leonard O'Garro and you decide from what Ken Charles says that it was O'Garro who did the whole thing and he Ken Charles did nothing you are entitled to find him not guilty. But if you look at O'Garro's caution statement and you satisfy yourself – look both of them did this thing together to achieve this aim, then you can find them both guilty."

This, to my mind, amounts to a clear direction that the caution statement of the one made in the absence of the other not only could, but should be taken into account in determining the guilt, or innocence, of the other.

[53] At page 162 of the record, in reference to the evidence of Shelley Ann Gregg, the learned trial Judge says 'That evidence is confirmed by the caution statements of both accused persons. Ken Charles says Leonard O'Garro was wiping the car at that bridge; Leonard O'Garro says Ken Charles was wiping the car at that bridge.' Harmless as this may seem in isolation, it tends to confirm that these two Appellants were together, with Gregg, on that fateful night, and contributes to the impression that the statement of the one can be used against the other in determining, not only the credibility of Gregg to which the learned trial Judge was there referring, but also to proof of their guilt. Their presence together, with Gregg on that night, is the very core of the prosecution's case.

[54] At page 167 to 168, the learned trial Judge directed the jury in the following terms:

> "The prosecution's case really hinges on this evidence; this plus the two caution statements, as to what exactly happened on the 12th April 2002; I mean the two caution statements from the accused; which the accused gave to the police. There is some dispute from the defence. I will come to that later. But suffice it to say for now the prosecution is saying this is the basis of our case. The evidence of Shelly Ann Gregg who was on the scene and the evidence from the prosecution, from the caution statements of the two accused which forms part of the prosecution's case.

> "No attempt is made to discriminate between the accused and their statements, or to direct that the statement of the one cannot be used against the other. The learned judge clearly indicates that the case hinges on this evidence, yet gives no direction on the relevance and admissibility of the evidence as against each accused."

[55] At page 183, the learned trial Judge, in reference to the caution statements of the two accused, said this:

> "These statements are in evidence; if you look at them and you accept them it is for you to decide whether what is in those statements are the truth and whether what is in those statements help you in arriving at a just conclusion that these two are guilty or not guilty whatever the case may be."

Again, the learned trial Judge gave no warning or direction.

[56] The transcript of the learned trial Judge's summing up commences at page 144 of the record, and his extensive references to the statements and their importance in the case at page 154. However, it is not until page 188 of a summing up which ends at page 196 of the record that the learned trial Judge, for the first time, adverts to the principle of law that the statement of one accused given in the absence of another cannot be used in evidence against that other.

[57] At page 188 the learned trial Judge says:

> "The caution statements are in evidence; it is for you to look at them, decide whether they were given freely and voluntarily. Once you say they were given freely and voluntarily the next thing you do is to look at the contents. Are the contents true as far as you are concerned ? Now one thing I have to bring to your attention is if you look at the caution statements they complement, the two of them complement the evidence of Shelly Ann Gregg; you would see that they complement the evidence of Shelly Ann Gregg. You will also find that the caution statements complement one another, except in so far as Ken Charles says it was O'Garro who did everything."

Up to this point it is the clear impression that 'the statements complement (and impliedly confirm) one another and the evidence of Shelly Ann Gregg', thus, the case against each Appellant.

[58] It is only at this stage, as if incidentally and by way of afterthought, that the learned trial Judge, for the very first time, directs the jury as to the true state of the law. He says:

> "But I have to warn you what you read in one accused caution statement is not evidence against the other accused. Look at each caution statement on its own in relation to that accused. So you first look at O'Garro's caution statement in relation to what Shellean Gregg has said and decide whether O'Garro was part of this incident; that he shot Ronald Lewis. If you consider that what he is saying is true having balanced it against Shellean Gregg's evidence then you can decide if O'Garro is guilty of murder or whether he is guilty of wounding with intent. Then you look at the caution statement of Ken Charles; in relation to Ken Charles, what he did, what he says, and in relation to Shellean Gregg's evidence. But do not look at the two caution statements and say because Ken Charles mentioned O'Garro's name so O'Garro guilty; or because O'Garro mentioned Ken Charles name then Ken Charles guilty. What you do is to look at each caution statement in relation to the accused who gave that statement. Decide first of all whether it was given freely and voluntarily then you decide whether what is contained in it is true as far as you are concerned in relation to the other evidence from the prosecution, and do likewise for Ken Charles."

At page 192 to 193, the learned trial Judge said further on this subject:

> "And if you decide that, the second issue to decide on is whether the caution statements are true by looking at each one in relation to the particular accused who gave that caution statement."

[59] Finally, at page 195 of the record, the learned trial Judge had this to say:

> "Secondly, the oral admissions were made by both accused to the police under caution. Not necessarily the caution statement that oral admissions were made, if you remember Sgt. Edwards' evidence that certain oral admissions were made at certain points O'Garro and then Ken Charles. These oral admissions are not evidence of one against the other; you have to consider these oral admissions in relation to the accused who made that admission; and not use it against the other accused because this accused might have mentioned the other's name in his oral admission. So look at both oral admissions especially pertaining to the gun that this is the gun that was used in killing Ronald Lewis. Look at it in relation to what Ken Charles said pertaining to himself and look at O'Garro's oral admissions to Sgt. Edwards as what he said pertaining to

himself. Don't use that to infer guilt on the part of the other defendant. I think I had pointed that out in relation to the caution statements but they also extend to the oral admissions.

"The other issue is on the issue of joint enterprise – unlawful joint enterprise. O'Garro says in his statement that both of us fired the guns. Now this statement by O'Garro in his caution statement is in relation to himself alone and not Ken Charles. Because I had directed you earlier that what one says in his statement does not infer guilt on the part of the other. So if O'Garro says we fired the gun look at it as O'Garro firing his gun. Look at Ken Charles' statement and decide for yourselves whether he fired his gun."

[60] Had this direction been given at the time when the leaned trial Judge was addressing the issue of those oral confessions, it might have put a completely different complexion on the jury's appreciation of the principle. However, the actual direction given at the time was to the exactly opposite effect and at the very least might serve to confuse the jury as to how to deal with that evidence.

[61] That is the sum total of the learned trial Judge's directions to the jury on how to treat the evidence of the one Appellant in relation to the other Appellant. In the context of his directions given in the earlier parts of his summing up, and what I perceive to be the damage that would have done and the possible injustice that could have resulted, I am of the view that those directions are too little too late. The jury must, to my mind, have been thoroughly confused as to how to treat the evidence, and their minds must have been greatly prejudiced by inadmissible evidence on the basis of the earlier directions, notwithstanding that correct directions were given at this eleventh hour.

[62] There is the further, related matter of the evidence of Sgt. Edwards and Gloria Stapleton, the Justice of the Peace, where they related what the Appellant Ken Charles said when he accompanied them to Mount Wynne and on their journey from there to Argyle, and at Argyle.

[63] The evidence of Gloria Stapleton in that respect is to be found at page 48 of the record. She reports that the Appellant Charles indicated to them at Mount Wynne where the Appellant O'Garro was standing and where the deceased Lewis was standing, when O'Garro fired the gun. She continues reporting how Charles related to them the events of the night of the killing, in considerable detail. She reported Charles' version of the burial of the deceased, O'Garro's alleged plan to kill Shelley Ann Gregg, and their plan to rape and kill her. All this is of course highly relevant and admissible in relation to Charles, but wholly inadmissible and highly prejudicial in relation to O'Garro. Unfortunately the learned trial Judge gave no direction on this and no warning to the jury, leaving them to infer that the evidence was both admissible and relevant in relation also to O'Garro.

[64] Similarly, Sgt. Edwards, at page 106 of the record, spoke of questioning the Appellant Charles about a gun and Charles' reply, in the absence of O'Garro, that 'That is they gun they (presumably 'we') used to kill Lewis at Mount Wynne.' He then relates their journey to Mount Wynne, Clare Valley, Riley and on to Argyle, accompanied by Gloria Stapleton. He related Ken Charles' confession, implicating O'Garro, all done in the absence of O'Garro. Again the learned trial Judge gave no warning or direction regarding the admissibility or relevance of this highly prejudicial evidence so far as it relates to the case against O'Garro.

[65] On the above grounds, the appeal against conviction, and therefore sentence, by Leonard O'Garro must be allowed.

Sentence

[66] The issue of sentence in relation to the Appellant Ken Charles remains to be resolved. At paragraphs [2] to [5] of this judgment I indicated the view of the Court, in which the learned Director of Public Prosecutions concurred, that in the event the appeals against conviction were unsuccessful, that matter should be remitted to the learned trial Judge. It is the view of the Court that in relation to the Appellant Ken Charles the matter of sentence be remitted to the trial Judge for

consideration in the light of all the circumstances of the case and of the Appellant, including the consideration of any psychiatric report, with the option of applying the death penalty or any lesser punishment in the discretion of the trial Judge in compliance with the procedural guidelines established in Mitcham.

## Conclusion

[67] The appeal of Ken Charles against conviction is dismissed and his conviction is affirmed. His appeal against sentence is allowed and the matter of sentence is remitted to the trial Judge for consideration in compliance with the sentencing guidelines laid down by this Court in Mitcham[20].

[68] The appeal of Leonard O'Garro is allowed, his conviction is quashed and his sentence set aside. It is ordered that his case be remitted to the High Court to be re-tried by a Judge other than the trial Judge.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, Q.C.
Justice of Appeal

[20] Supra 1