SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 21 OF 2005

BETWEEN:

GREGORY DURRANT

Appellant

and

THE QUEEN

Respondent

Before :

The Hon. Mr Denys Barrow, S.C	Justice of Appeal
The Hon. Madame Dancia Penn S, QC	Justice of Appeal [Ag.]
The Hon. Madame Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr Cecil Blazer Williams for Appellant
Mr Collin Williams, Director of Public Prosecutions for Respondent

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2007: May 21
October 15

JUDGMENT

[1] EDWARDS, J.A. (Ag): On the 16th November 2005, a jury convicted the Appellant and 2 other co-defendants who stood trial on an indictment which charged them, and 2 others, for Robbery with Aggravation. The particulars of the offence were that:

> Garry Williams, Gregory Durrant, Jahjust Steele, Richard James and Anjay Charles, on the 27th August 2003, at Kingstown, Saint Vincent and the Grenadines, stole

$68,838.35EC in cash; the property of Mustique Company Limited and at the time of doing so, and in order to do so used force on Ulric Robinson.

[2] The co-defendants, Anjay Charles and Richard James, pleaded guilty and were found guilty of theft and robbery respectively. The Appellant was convicted of robbery and sentenced to 6 years hard labour. We granted leave to amend the grounds of appeal against his conviction which are set out below:

> "(1) The learned trial judge wrongly admitted the statement of Gregory Durrant the Appellant, into evidence by not properly or at all adjudicating on -
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> (a) the denial of a Solicitor to the Appellant by the police before a statement was extracted from him;
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> (b) threats made by the police to the Appellant before a statement was extracted from him.
>
> (2) The learned judge allowed the confessions of a co-accused to be entered into evidence without any pre-warning to the jury and did not exclude statements prejudicial to the Appellant in the confession."

Factual Background

[3] Before considering these grounds, we propose to relate the circumstances which brought about the trial and eventual conviction of the Appellant. The Appellant, then 45 years old, was a brokerage clerk for about 11 years at Mustique Company. A few weeks before the 27th August 2003, the Appellant told the co-defendant, Jahjust Steele, about the nature of his duties and his time schedule on Wednesdays each week, when he went to the Scotia Bank and the Barclays Bank, now First Caribbean International Bank, to do transactions for his Company. On this day each week, he collected large sums of cash ranging from $10,000.00 to $100,000.00 E.C, accompanied by one security guard. He usually did this between 8: 15 am and 9:00 am. The security guard and the Apellant were usually transported in the Company van by the Company driver, Mr Lesly Dopwell. The driver

usually collected mail from the Post Office while the Appellant was performing his duties at the banks, escorted by the security guard.

[4] According to the Appellant's version of the events, he had met Jahjust, who is a young man, about 3 months prior to disclosing his Company's business to him. Jahjust was a friend of his daughter, Indra Durrant, who also worked with Mustique Company at the same office as her father, at Granby Street on the 3rd floor of the Kingstown Co-operative Credit Union building.

[5] On the morning of the 27th August 2003, Jahjust visited the Company office building where he was seen talking to Indra Durrant. According to the Appellant, he left as usual that Wednesday morning to perform his usual duties at the Banks. After the bank cashier had negotiated the 5 cheques the Appellant had given her, he received the money $68,838.35, and the security guard, Mr Ulric Robinson, himself and the cashier went to a secured room in the Bank where they re-checked the money. Upon completing this task, the Appellant's cell phone rang, and he spoke to Mr Dopwell, the driver, who was enquiring whether he was ready. Thereafter, having replaced the money in a white canvas bag, they put this bag into a black bag and they left the Bank whereupon they met Mr Dopwell in the parked Company van. Upon returning to the Company office building, they entered the corridor leading to the 3rd floor. While going up the steps the Appellant, who was carrying the bag, set a quick pace. Mr Robinson, the security guard, was behind him while Mr Dopwell, carrying the mail bag, was bringing up the rear.

[6] At a point where there were steps continuing up to the 3rd floor and steps leading to another floor, 3 masked men suddenly appeared behind Mr Dopwell. Mr Robinson was hit on his head by one masked robber carrying a stick, and he fell, bleeding and unconscious. The stick man attempted to hit the Appellant who by then had looked behind him, saw what was happening, allegedly lost his step and fell on the ground. The stick man grabbed the bag with money from the Appellant, and the 3 masked men, one grabbing the mail bag, fled from the building. Mr Dopwell went back down the stairs screaming. The Appellant ran up the stairs to his office door shouting that he had been

robbed. Someone inside his office opened the locked office door and the Appellant ran in and made an alarm.

[7] The police arrived on the scene and the Appellant made a report to the police at his office. He was subsequently interviewed and a statement taken. The evidence adduced by the prosecution revealed that Jahjust had organized the robbery, using co-defendants Garry Williams, Richard James and Anjay Charles to carry it out, while he remained with another accomplice, Lincoln Corke, in Corke's car some distance away from the scene of the robbery. Lincoln Corke transported the participants in the robbery, having had limited knowledge about the robbery before it happened.

[8] On the morning of the robbery, Jahjust had visited Corke at his home in Sion Hill and told Corke that: "his girlfriend father put him on a scene and we must go and check it out." After the robbery the same three co-defendants got into Corke's car and gave 2 bags to Jahjust. The robbers took off their shirts and put them in the bags. Corke transported them to a point where they got out of his car, leaving him and Jahjust. They drove to Sharpes. They picked up a friend of Jahjust named New Jacks, drove onto a dirt road, checked the money, burnt the bags and returned to the roadway. New Jacks got off, and Corke drove Jahjust to Block 2000 where he came off. Jahjust gave Corke $2500.00.

[9] The investigating officer W/Cpl Maloney was assisted by Sgt James and other police officers in the investigations. At about 5:15 pm on the 27th August 2003, Garry Williams was detained by the police. He apparently told the police everything about the robbery, and subsequently gave a caution statement which was admitted in evidence at the trial, unchallenged. In this caution statement he said the following things:

> *One day while he and Jahjust were in the park appellant went to drop his daughter Indra and Shelley to the supermarket and they all were in the vehicle alone. "While they were in the supermarket sitting in the back seat, me and Jahjust and Gregory alone. I hear Gregory say to Jahjust if he serious and if he ready to do this. Jahjust didn't tell me before he had a*

mission to go pon . But he didn't tell me . Gregory say we really got to do this thing cause he need some money. The place should a get rob long time, Gregory ask me if I going. I ask him what going on. He told me he have a mission to go pon. He said the place where he working have a lot of money and he want set up to rob the money so that everybody go get a cut out of the money. He started to explain to we. He say every Wednesday he does go to the bank, Barclay's Bank to draw over fifty,sixty thousand dollars. When he reach that part Indra them come back in the car. Now the next day we went up to Mustique Company part Gregory does work. He came outside and he tell we every Wednesday he goes to the bank he and a security guard to draw same amount of money. He is the main man who does hold all the money and we don 't have a problem robbing the money because he say the security guard does be an oldish man and every different Wednesday it does be a different security guard. He say sometimes the security guard does have a gun in he pocket or he waist. Now, he say all he want we to do is hit the security guard and he go hand over the bag with the money. He say if we want we go hit him a little lash so it ain't go look suspicious. Now he tell we if he stay over half an hour it would be a hundred and something thousand dollars and if he stay less than half an hour it would be fifty, sixty thousand dollars. Anyhow he say this Wednesday which means the 20th August 2003 he go show me it first before we go pon it, right to the bottom there. He told me to wake up early Wednesday morning and look for a place named Lady J, that is opposite the bank and go in there and sit down and watch. He say he go call we and tell we when he coming. He tell we go there 9o'clock. We go there and after 9 o'clock Jahjust phone ring. Then Jahjust tell me Gregory coming about three minutes . After I see Gregory in a black transport he and two other man, the driver and the security guard. We see him go in the bank with the black zip up bag, with a handle bag and the security guard was outside standing. Now on the Friday after is the 22nd August. Jahjust tell me that the man Gregory say he want three man to do the thin. He say Gregory say that we need a driver. He say

he want this thin happen this Wednesday 27th August 2003. He say Gregory say he have a taxi friend and he could set him up on the scene. Jahjust say Gregory say I must take the money from him and the other two men would beat the security guard. He say when the two man beat the security guard he would hand over the money and the two other man go run. He would go help the security guard in case he have a gun." Garry Williams also said in the statement that on the 27th August 2003, "*Jahjust* say the man Gregory call say he coming. He say he going give Black $1000.00, the brown skinned man $2000.00 and I have to get more than the other two man because I live with him and Gregory."

At the trial, the Appellant under cross-examination, denied that he had any such conversation with Garry Williams or Jahjust.

Detention and Questioning

[10] The police detained Lincoln Corke on the 28th August 2003. The Appellant was detained on the 29th August after the police executed a search warrant at his house for the $68,000.00, and found nothing. Corke cooperated with the police, gave them a statement, and was used as a Crown witness.

[11] The Appellant was placed in a holding cell from about 4:30 pm on the 29th August 2003 and he spent the night there, sleeping on cardboard on the floor. At about 12:00 o'clock on the 30th, the Saturday, the police took him from the holding cell to a room outside in the main office. Cpl Maloney, Cpl Jack, Sgt James, and 2 other police officers questioned the Appellant about the robbery, according to his account. He denied any involvement in the robbery. They told him Garry Williams had implicated him in the robbery and they confronted him with Garry. The Appellant stated that he continued to deny any involvement, and then another police man rushed into the room and hit him on his shoulder with a fire extinguisher , causing him pain. The Appellant alleged that the other police officers reprimanded the policeman and ordered him out of the room. Sgt. James and Cpl Maloney denied that this took place. Neither of them could remember if they were

with Cpl. Jack in any room interrogating the Appellant. At a point in the interrogation, the Appellant said Cpl Jack drew up a chair beside him and started telling him that Garry had called his daughter Indra's name and was connecting her with the robbery. Cpl Jack told him that Indra is a beautiful girl and if he would allow her to go down like that. In the absence of the other police officers, Cpl Jack, he said: "told me that if I did not own up they would take the Coast Guard and go to Mustique and take up Indra...my daughter is very dear to my heart. She has been living with me since she was nine months old without a mother.. .She still lives with me at the age of 26 years old. Well it got me real disturbed that they were trying to accuse Indra, mess up Indra." At the same time an officer came in and asked Cpl Jack: "Anything yet". He related that Cpl Jack said: "No Durrant has not admitted to any thing so I guess you all will have to go for her." The officer closed the door and Cpl Jack told him; "Gregory you see, you see. It's Coast Guard they going for with Indra now in Mustique. You see now what you do Indra."

[12] The Appellant testified that he relented and requested Cpl Jack to recall Cpl Maloney, Ballantyne, and Sgt James, whom he considered to be his friends, to the room. Thereafter, he told them what he thought would help them. They listened to him, and continued accusing him. At about 3:00 pm, they took him handcuffed along with Garry Williams and Mr Corke into a police jeep in which Cpl Maloney was, and they drove first to the Mustique Company office, then they traced the route that Mr Corke had taken before and after the robbery. On reaching some bushes in Sharpes, the Appellant said he was upset and angry, so he sat on a stone and spoke loudly the following words in soliloquy: "Imagine I am here in the mountain in handcuffs and gun slingers. I have done nothing yet I am being treated like a criminal accused of something I did not do, and everybody is talking about where they brought this, where they have money, turning in money to police. I said everybody is talking about money, and turning in money. I have to be the biggest cunt, Everyone is here talking about money, and I am only one that can't say anything about money, or own to any money and it seem like you all fuck me three ways."

[13] They took him back to the police station and put him in the holding room. Cpl Maloney soon told him that she would have to take a statement from him. He said he blurted:

"Nah Maloney, I ain't saying nothing again unless my lawyer here eh. I am not saying anything else to you unless I have my lawyer here." Cpl Maloney then told him that she was not working this Sunday and it would be difficult to get onto his lawyer tonight. She indicated that the Justice of the Peace was there and he could make the statement in her presence as she would witness the statement. Cpl Maloney also told him that what he had said at Sharpes would have to be included in the statement and that as he was still under oath he would have to give them the statement. Cpl Maloney has denied this account. She said that when she cautioned the Appellant he said: "Blazer tell me not to give no statement, but me go tell you what happen because me ain't get no money".

[14] It was against this background that the Appellant's caution statement was obtained, witnessed by Mrs Lynch, the Justice of the Peace, who the Appellant knew before the 30th August 2003. The taking of the statement lasted half an hour based on the time recorded. In this statement, the Appellant admitted that he had told Jahjust about his activities on Wednesdays for the Company, but he never knew he would use the information to rob him. He also said towards the end of the statement that he had organised the robbery with Jahjust. The Appellant has denied saying that he had organised the robbery with Jahjust. He has accused Cpl Maloney of adding words to the blank portion of the statement after he (the Appellant) had signed it. He has accused her also of taking what he said in soliloquy out of context and putting it in the statement.

[15] It was put to Sgt James that Counsel Mr Blazer Williams had come to the police station on the 30th August 2003, while the Appellant was in the C.I.D., and asked him to see the Appellant but he (Sgt James) refused. Sgt James replied that the lawyer had told him that he came to see the Appellant as a friend and not as counsel, and he told the lawyer he could not see him since the Appellant was the virtual complainant in this matter; and at that point, there were some indicators that the Appellant may have been involved in the crime. He had then indicated that they had nothing concrete as such, so the Appellant was not a suspect per se, but he was the virtual complainant, and was, at the same time, assisting the police in their investigations.

[16] The other co-defendants were subsequently arrested and charged with robbery after some of the money was recovered from persons connected to Jahjust. He gave no statement to the police. Cpl Maloney recovered burnt pieces of metal zip, burnt paper and clothing from the bushy area at Sharpesdale, which was pointed out by Mr Corke. The Appellant's daughter was interviewed by the police pertaining to the robbery.

Grounds of Appeal

[17] We can now turn to consider the grounds of appeal at paragraph 2 above. Regarding the first ground, learned Counsel Mr Blazer Williams submitted that the behaviour of the police officers was oppressive rendering the caution statement of the Appellant inadmissible, unreliable, and prejudicial to the fairness of the trial. The Appellant was said to be a prisoner in custody from the 29th August 2003 when he was taken into custody and placed in the holding cell. He was not free to move as he pleased, spent the night sleeping on cardboard on the floor, was not free to communicate with whomever he wished, was interrogated at length on the 30th, placed in handcuffs and taken to places he had not gone; so that regardless of the police officers' ridiculous assertions that he was the virtual complainant, he was a prisoner in custody, entitled to meet with his lawyer under the law. We have no difficulty agreeing with Counsel Mr Williams that the Appellant was a prisoner in custody in such circumstances.

[18] Counsel Mr Blazer Williams contended that the Appellant was denied his fundamental right to consult with a lawyer before he gave the caution statement to the police. Denying him that right was in breach of The Police Regulation 155 and section 58 of The Police and Criminal Evidence Act 1984 (U.K.) (PACE).[1]

[19] In THOMPSON (EVERSLEY) v R[2] the Judicial Committee of the Privy Council held that following the enactment of the Evidence Act 1988 of St Vincent and the Grenadines, section 3, the admissibility of confessions was governed by sections 76 and 78 of PACE and not by the common law test of voluntariness. They held also that Code C of the 1984 Act (detention, treatment and questioning of

1 The Police Regulations SRO 110 of 1948 of The Laws of Saint Vincent and the Grenadines , Chapter 280 of The Revised Edition 1990 as amended.
2 (1988) 52 WIR 203 (P.C.)

persons) did not apply to the questioning of suspects which was governed by Regulations 86 (questioning persons) and 155 (right to contact legal adviser) of The Police Regulations 1948, as amended.[3] This Court of Appeal ruled in THOMPSON[4] that a judge in St Vincent and the Grenadines must consider the relevant provisions of PACE and the Codes, with applicable and necessary modifications when determining the applicability of confessions. This Court of Appeal also stated[5] that modifications are easily identifiable and determinable by a trial judge, and should be undertaken at the time the law and practice in England are being applied; in time case law will build up.

[20] Regulation 155 states that: "A legal practitioner, or his clerk if duly authorised in writing to act for him, shall be allowed to communicate with a prisoner in custody at a station. Such communication shall take place within sight of but out of hearing of a member of the Force."

[21] Section 8 (2)(d) of the Constitution of Saint Vincent and the Grenadines provides that every person who is charged with a criminal offence: "shall be permitted to defend himself before the court in person or, at his own expense by a legal practitioner of his own choice." In the absence therefore of any other relevant local statutory provision, section 58 of PACE must be considered by a court and may be modified, having regard to the Police Regulation 155, the constitutional provision, the police administrative framework , the existing realities in Saint Vincent and the Grenadines, and any other relevant matters. Section 58 of PACE provides: -

"(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.

(2) Subject to subsection (3) below, a request under subsection (1) above and the time at which it was made shall be recorded in the custody record.

(3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at court after being charged with an offence.

4) If a person makes such a request, he must be permitted to consult a

3 See note 1 above
4 At page 216 of the judgment
5 At pages 215 to 216 of the judgment

solicitor as soon as practicable except to the extent that delay is permitted in this section.

(5) In any case he must be permitted to consult with a solicitor within 36 hours from the relevant time , as defined in section 41 (2) above.

(6) Delay in compliance with a request is only permitted - (a) in the case of a person who is in police detention for a serious arrestable offence; and (b) if an officer of at least the rank of superintendent authorises it.

(7) An officer may give an authorisation under subsection (6) above orally or in writing but, if he gives it orally he shall con firm it in writing as soon as is practicable.

(8) Subject to sub-section (8A) below an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it--

(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or
(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
(c) will hinder the recovery of any property obtained as a result of such an offence.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that--
(a) the person detained for [the indictable offence] has benefited from his criminal conduct, and
(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1) above.

(8B) For the purposes of subsection (8A) above the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 2 of the Proceeds of Crime Act 2002.

(9) If delay is authorised - (a) the detained person shall be told the reason for it : and (b) the reason shall be noted on his custody record.

(10) The duties imposed by subsection (9) above shall be performed as soon as is

practicable. (11). There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist…"

[22] The companion provision for section 58 of PACE is section 78(1) which gives the trial judge the discretion to exclude relevant evidence in order to ensure a fair trial. It provides:

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

[23] Appellant's counsel therefore argued that the trial judge ought to have excluded the caution statement of the Appellant since he was not permitted to consult with his lawyer before the statement was obtained from him and this was in breach of section 58 (1) and (4) of PACE. Counsel Mr Williams asked us to apply the approach of the Court of Appeal in two English cases: R v SAMUEL[6] and DAVID JOHN PARIS.[7]

[24] In R v SAMUEL, the appellant was arrested on suspicion of robbery. He was denied access to a solicitor. He made a confession, was charged and convicted. The Court on its application of Annex B to the Code of Practice C (Detention and the right of a person detained to have access to a solicitor) held that this right could not be delayed after the appellant had been charged with a serious arrestable offence in connection with which he had been in police custody. Since the appellant had already been charged with the 2 burglaries before his fourth interview at which he had confessed to the robbery, access to a solicitor had been wrongly denied him. The Court declared that perhaps the most important right given to a person detained by the police is his right to obtain legal advice. That right is given by section 58 of PACE. 'Any officer attempting to justify his decision to delay the exercise of this fundamental right of a citizen will be unable to do so save by reference to the specific circumstances[set out in section 58], including evidence as to the person

6 [1988] 2 ALL ER 135
7 (1989) 89 Cr. App. R. 68

detained or the actual solicitor sought to be consulted."[8] It was held that the refusal of access to the appellant's solicitor before the last interview should not have taken place, and had the trial judge held this, he might well have concluded that the admission of evidence of that interview would be so unfair that it ought not to be admitted. It followed therefore that the conviction of robbery would be quashed.

[25] In DAVID JOHN PARIS, the appellant was arrested for armed robbery. While being kept incommunicado by the police he made a number of confessions after being denied a solicitor. At the trial he denied being involved in the robbery and stated that the police had invented the alleged admissions. He was convicted and he appealed. His appeal was allowed since the police officer concerned had not directed his mind to the matters listed in section 58 of PACE, and the failure to procure a solicitor was a breach of section 58 and Code of Practice C. Such a breach did not necessarily mean that any statement made by a defendant thereafter would be ruled out; but the appeal was being allowed because the trial judge had erroneously concluded that there had been no breach and had failed to direct his mind to the question of 'fairness' under section 79(1) of PACE.

[26] It is important to note the approach to section 78 (1) and 58 of PACE that was adopted in WALSH by the Court of Appeal.[9] The Court of Appeal observed that:

> "The main object of section 58 of the Act and indeed of the Codes of Practice is to achieve fairness - to an accused or suspected person so as, among other things, to preserve and protect his legal rights; but also fairness for the Crown and its officers so that again, among other things, there might be reduced the incidence or effectiveness of unfounded allegations of malpractice...it follows that if there are significant and substantial breaches of section 58 or the provisions of the Code, then prima facie at least the standards of fairness set by Parliament have not been met. So far as the defendant is concerned it seems to us ...to follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met , cannot but have adverse effect on the fairness of the proceedings This does not mean, of course that in every case of a significant or substantial breach of section 58 or the code of practice the evidence concerned will automatically be excluded. Section 78 does not so provide. The task of the court is not merely to consider whether there would

8 See note 6 above at pages 142, paragraph j. and page 144, paragraph e
9 (1990) 91 Cr App R 161 at page 163

be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded."

[27] It was emphasized by the Privy Council in THOMPSON v R[10] that the Court of Appeal does not set aside the exercise of the judge's discretion under section 78 of PACE unless it concludes that the decision to admit the confession was unreasonable in the Wednesbury sense; and that the judge's discretion operates at the stage where the trial judge decides whether the admission of the evidence would so affect the fairness of the proceedings that it should not be admitted.[11] Where the defence relies on breaches of section 58 of PACE to challenge a confession under section 78 of PACE, but the court decides that no breach occurred, it is most unlikely that the confession will be excluded.[12]

[28] Counsel Mr Blazer Williams contended further, that having regard to the evasiveness and convenient lapses of memory of the police officers under cross-examination concerning the Appellant's allegations that he was hit with the fire extinguisher, threatened by Cpl Jack about detaining Indra if he did not own up, and their explanations as to why the Appellant was not permitted to speak with a lawyer, the police officers were virulently incredible; and the Appellant's caution statement ought not to have been admitted in evidence. He argued also that the learned trial judge had failed to take into account the factors concerning the Appellant's detention and questioning which were vital in determining whether he was legitimately denied access to legal advice from his lawyer. The learned Director of Public Prosecutions, Mr Collin Williams, confined his submissions to the facts. He argued that based on the Appellant's testimony, the fire extinguisher assault on him was not operating on his mind at the time he gave the caution statement. He submitted further that it was necessary for the police to interview Indra Durrant in the circumstances, so allegations as to the effect that the police threat to detain her had on the Appellant, fades into insignificance.

[29] He submitted that the ruling of the trial judge does not demonstrate that she considered the

10 At page 229
11 For Wednesbury principles See Associated Provincial Picture Houses Ltd. V Wednesbury Corporation [1947] 2 ALL ER 680
12 See Hughes [1988] Crim. LR 519; Maguire (1990) 90 Cr App R 115

Appellant's evidence concerning Cpl Jack's threats to detain Indra, and she therefore failed to exercise her discretion reasonably in all the circumstances when she was admitting the statement. The cumulative effect of these omissions was that the learned trial judge failed to exercise her discretion in accordance with the relevant law reflected in THOMPSON v R and THE MODERN LAW OF EVIDENCE by Adrian Keane.[13]

[30] The transcript of the proceedings[14] confirms that immediately before the learned trial judge embarked upon the voir dire, she had concluded that the principles stated in AJODHA v STATE[15] were applicable. Consequently, in exercising her discretion to admit the statement of the Appellant, she erroneously applied the common law criterion of voluntariness. The learned judge made the following ruling after the voir dire -

> *"As you are all aware, in the case of the voir dire the judge comes to the conclusion as to the admissibility, that means whether it is going into evidence and that is me . I believe Cpl Maloney"s evidence that the statement was voluntary. More*over *Gregory Durrant said that the lash given by Cpl before was not operating on his mind when he gave the statement. I do not believe the accused that he did not give the last part of the statement since he signed at the end of every page at the end of the handwriting. Why then would he leave such a huge space as indicated by him before placing his signature? I believe Mrs Lynch- White. He gave the statement voluntary, he was not beaten or threatened. It was read over to him. He signed and she signed: that at the time of giving the statement the accused looked normal. The accused himself told the court that he was naturally a calm man. Statement admitted"*

[31] Though there is merit in Mr Blazer William's submissions that the trial judge applied the wrong test, the conclusions of both the Court of Appeal and the Privy Council in THOMPSON v R communicate that this may not always be fatal. In THOMPSON, the admissibility of the oral admissions and the written statement was challenged by the defence at the trial of the appellant, who had killed a four year old girl by throwing her over a cliff into the sea, when she began screaming, and tried to repel his vicious sexual assault on her. Her body was never recovered, and the prosecution's case rested completely on the oral and written admissions of the appellant that he had killed her in that manner. The defence had

13 (Third edition (1994) pages 298 to 299
14 At pages 175 to 179

challenged the admissibility of the oral and written admissions and a voir dire was held by the trial judge. She applied the Judges Rules and the common law test of voluntariness and ruled that they were admissible. He was convicted and sentenced to death and he appealed his conviction. The Court of Appeal dismissed the appeal and he sought leave from the Privy Council Board to appeal. Leave was granted, and the case was remitted by the Board to the Court of Appeal for an opinion and ruling on the applicability of sections 76 and 78 of PACE to St Vincent and the Grenadines and the effect of these provisions in the circumstances presented in THOMPSON. The Court of Appeal opined that:

> "On the evidence adduced, it was open to a judge applying the law and practice administered in England to reach the conclusion that the admissions and confessions should have been admitted in evidence, once the trial judge came to the conclusion , that there was no truth in the allegations of oppressive conduct by the police made by the appellant...[T]here were objective reasons to reject these allegations, no unfairness could have resulted from the admission into evidence of his clear and complete confession to this heinous crime....[I]f the provisions of PACE were applied, it is likely that the outcome would have been the same."[16]

[32] The Court of Appeal reasoned that once there were objective reasons to support the judge's conclusion that the appellant's story was incredible and untrue, since the judge had the advantage of seeing the appellant and the other witnesses who testified on this, the Court should not underestimate the value of that advantage in determining the credibility of the appellant's story.[17]

[33] At pages 227 to 228, the Privy Council endorsed this opinion and ruling of the Court of Appeal, adding that: "...once that allegation was rejected the risk of injustice to the appellant by the admission in evidence of the confession was eliminated, unless the appellant can point to unfairness which would be a ground for exclusion of the confession under section 78 of PACE."

[34] Lord Hutton at page 228, referred to Lord Mustill"s observations in DALEY v R[18] where he

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15 [1981] 2ALL ER 193
16 See note 2 above at pages 208 to 209
17 See note 2 above at page224 a to c
18 Daley v R (1993) 43 WIR 325 at page 334

[35] Lord Hutton reviewed some of the principles which underlay the common law test of voluntariness and concluded that: "in ruling that the appellant had not been physically ill-treated and that the confessions were voluntary, the judge was ruling on the issues which she would have had to consider if she had appreciated that the issue of admissibility was governed by section 76(2)(a) and (b) of PACE."[19]

[36] Before applying the approach of the Court of Appeal and Privy Council in THOMPSON to the appellant's ground of appeal and his counsel's submissions ,it is necessary to reproduce the relevant provisions in section 76 of PACE:

"CONFESSIONS

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

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

(a) by oppression of the person who made it ; or (b) in consequence of anything said or done which was likely in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

19 See note 2 above at page 228 a to f

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence - (a) of any facts discovered as a result of the confession; or (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) ……..
(6) ……..
(7) .....

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

[37] Section 82 (1) of PACE defines "confession" to include "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise".

[38] The suggested test for unreliability under section 76 (2)(b) of PACE is for the judge to imagine that he was present at the interrogation and heard the threat or inducement . "In the light of all the evidence given he will consider whether, at the point when the threat was uttered or the inducement offered, any confession which the accused might make as a result of it would be likely to be unreliable. If so the confession would be inadmissible....the judge will usually require evidence of the whole course of the interrogation in order ...to gauge the likely effect of the threat or inducement at this point, especially as there will usually be conflicting accounts of what happened at the interrogation. Even the terms of the confession may have to be considered...evidence of the terms of the confession may throw light on the facts concerning the interrogation."[20]

[39] "The judge then must not only examine all the relevant circumstances of the interrogation , both before and after what was 'said or done', but should also take into account the nature and effect of what was ' said or done', the seriousness of the offence in question and, if

20 The Criminal Law Revision Committee Report stating how it envisaged that the then proposed section 76(2) (b) would be applied at para 65 CMND 4991; referred to in THE MODERN LAW OF EVIDENCE.

See note 7 above at page 298

necessary the terms of the confession , The test of reliability is hypothetical: it applies not to the confession made by the accused, but to 'any confession which might be made by him'.... if the judge is of the opinion that the confession in fact made is or is likely to be reliable, it does not follow that it must be admitted - the judge may only rule it admissible if, notwithstanding that it may be true, he is satisfied beyond reasonable doubt that it was not obtained in consequence of anything said or done which was likely to render unreliable any confession which the accused might have made in consequence thereof."[21]

[40] It was accepted by the Court of Appeal in TYRER that the prosecution may discharge its burden of proof under Section 76 (2) by showing that there is no causal link between the confession and things said or done by the police officers which might have been conducive to unreliability.[22]

[41] We are of the view therefore that at the voir dire the learned trial judge should have considered: (a) whether or not the prosecution had proven beyond a reasonable doubt that the police officer did not hit the Appellant with the fire extinguisher; that Cpl Jack did not threaten the Appellant to detain Indra if the appellant did not own up to the robbery; that the Appellant did not make any request to Cpl Maloney to consult a lawyer privately at any time; that the police did not prevent the appellant's from communicating with the lawyer at any time; (b) where there was doubt or the prosecution had not discharged this burden of proof, the court should have gone on to consider whether the prosecution has discharged its burden of proof by showing that there is no causal link between the caution statement and the things that were said and done, or may have been said or done by the police officers which might have been conducive to unreliability; (c) where the prosecution is found to have discharged its burden of proof: whether the admission of the Appellant's caution statement would have such an adverse effect on the fairness of the proceedings that justice requires the evidence to be excluded.

21 The Modern Law of Evidence: see note 13 above: See pages 288 to 299 and footnote 20 :citing R v Cox [1991] Crim LR 276

22 (1990) 90 Cr App R 446 at page 449

[42] There was evidence before the learned trial judge that Sgt James did not allow a friend of the Appellant, who was a lawyer, to communicate with him while he was a prisoner in custody at the station on the 30th August 2003 since the lawyer wished to communicate with the Appellant, not on a professional basis, but on the basis that he was a friend of the Appellant. There was no other evidence before the judge to support the suggestions of counsel Mr Blazer Williams that he made the request to Sgt James in a professional capacity then, since Sgt James denied or did not agree with the suggestions. Having regard to Regulation 155 there was no evidence before the judge that this regulation had been breached in relation to the Appellant. Although the learned judge made no specific finding on this, she was entitled to conclude on the evidence before her that Regulation 155 had not been breached.

[43] The learned judge made no finding as to whether the prosecution had discharged its burden of proof by disproving the assertions of the Appellant that he was denied access to his lawyer before he gave the caution statement. Looking at the wording of Section 58 (1) and the Appellant's evidence as to what he told Cpl Maloney, though the request was arguably in equivocal terms, the trial judge was entitled to conclude that the Appellant was requesting to consult with his lawyer or to have his lawyer present for the taking of the statement. Having regard to section 58 (1) and 78 of PACE , had she applied these provisions, in our opinion, it is likely that she would have admitted the caution statement, although section 58 (1) may have been breached for the following reasons:

(a) Unlike the accused in R v SAMUEL, the Appellant was not charged with robbery before he gave the statement.

(b) Unlike DAVID JOHN PARIS, the Appellant was not charged and declined to give a statement or refuse to answer or speak until his lawyer had spoken to him or was present for the taking of the statement. The trial judge would have been entitled to take into account the evidence of Cpl Maloney which on objective assessment indicates, that despite the legal advice that he may have got about not giving a statement, nevertheless he was motivated to give the statement because he perceived that there may have been an advantage from

doing so since he did not get any money.

(c) On the evidence, the trial judge was entitled to take into account the demeanor and intelligence of the Appellant and the fact that the taking of the statement was properly carried out in the presence of a Justice of the Peace.

(d) The presence of the Justice of the Peace would have been likely to inhibit the fabrication alleged by the Appellant to have been done by Cpl Maloney, and this provided the Court with an independent witness as to what transpired. There were no such independent witnesses in R v SAMUEL and DAVID JOHN PARRIS.

(e) The Appellant was calm and apparently composed at the taking of the statement. He was obviously able to cope, and he obviously understood the caution and was aware of his legal rights.

(f) The trial judge must be taken to have been aware of the well established power of the court to exclude confessions unfairly obtained. This is mirrored in section 78(1) of PACE.

[44] Despite any breach of PACE that the trial judge would be likely to find, in the present circumstances she would have had a discretion whether or not to exclude the caution statement and having regard to the stated reasons, we are of the view that the trial judge was entitled to conclude that the admission of the statement would not have had such an adverse effect on the fairness of the trial that she ought to exclude it.

[45] In the trial judge's ruling, she found that the Appellant had not been beaten or threatened, thereby implying that she did not believe that he was hit with the fire extinguisher or threatened by Cpl Jack, as he asserted. The fact that in her ruling the judge commented on the Appellant's testimony that the lash was not operating on his mind, does not connote prevarication as to her conclusions. She subsequently stated in precise language that he was not beaten or threatened and he gave the statement voluntarily. Having regard to Lord Hutton's observations at paragraph 35 above, by parity of reasoning we state that: in ruling that the Appellant had not been beaten or threatened and that the caution statement was voluntary, the judge was ruling on the issues which she would have had to consider if

she had appreciated that the issue of admissibility was governed by section 76 (2) (a) and (b) of PACE. We conclude therefore that ground one has failed.

[46] The nub of the submissions of Mr Blazer Williams for ground two was that there was no independent, credible, relevant and admissible evidence to show that the Appellant conspired with others to rob the Mustique Company on the 27th August 2003. In the absence of any corroborative evidence, he argued, the Appellant ought not to have been convicted. He relied on a passage in MODERN LAW OF EVIDENCE at page 152, where it is stated that: "In criminal cases involving more than one accused in which evidence given against them calls for corroborative warning, prima facie the judge should direct the jury, in relation to each accused to look for independent evidence implicating him". The learned trial judge gave no such direction.

[47] Though this was a case involving more than one accused, the only probative evidence given against the Appellant came from his caution statement in which he admitted organizing the robbery with Jahjust to rob Mustique Company of the money that was taken. The caution statement of Garry Williams had no probative value against the Appellant. There was therefore no need in our view, for the trial judge to give any corroborative warning concerning the contents of Garry William's statement in relation to the Appellant. All that was required was an accomplice warning in relation to the evidence of Mr Lincoln Corke. The learned judge did give that warning. In any event, the evidence of Lincoln Corke had no probative value in relation to the Appellant. A voluntary unequivocal confession of guilt is sufficient to warrant a conviction without any corroborative evidence. Upon his caution statement being admitted in evidence, it proved the Appellant's own acts, knowledge and intention concerning the robbery.[23] "Indeed when a confession is well proved it is the best evidence that can be produced": per Erle J in R v BALDRY.[24]

[48] Appellant's counsel complained also that though the learned trial judge reminded the jury about the use of Garry Williams' caution statement by the prosecution to cross-examine the

23 R v SULLIVAN (1887) 16 Cox 347; Rv SYKES (1913) 8 Cr App R 233
24 (1852) 2 Den. 430

Appellant, and told the jury how to approach that caution statement and the evidence of the Appellant on oath, she subsequently gave further directions which must have had a prejudicial effect on the minds of the jury. The learned judge at pages 422 and 415 of the trial transcript gave directions to the jury on this. She said at page 422-

> "*As I told you earlier Garry Williams' statement is admitted in evidence. There was no objection to it. It is part of the evidence. You will say what weight you will put on it. He has now turned around and made a total denial of it. He can do so. It is for you to consider which one is the truth. Any evidence in that statement about any other co-accused is not evidence against them. What he has said against himself that is what that stands."*

And at page 415 she said-

> "*When several persons are accused of an offence like what we have here and one of them makes a confession or an admission, that confession or admission is evidence only against the party making it . So if Garry Williams makes a confession or admits to a crime with himself, and Gregory Durrant that confession or admission is only against Garry Williams himself, it does not attach to Gregory Durrant, but when the accused person in his evidence on oath in court has testified on his own behalf or otherwise it is evidence against his co- accused* , you *have to consider it....you will bear in mind…that I admitted the statement but it does not say it is automatically correct. It is for you ...to say what weight you place on that statement that was admitted. So wherever the statement is admissible the information in it may be used to extract from an accused person in the form of an evidence on oath all that he has formerly said about a co-accused. You will recall that the statement of Garry Williams was used by the prosecution to extract from him what he had said about a co-accused and you will also remember by that time he was saying nothing. He denied everything. His statement is in evidence." [At page 416] Now Garry's statement is evidence against himself. Any thing he may have said touching the other two is not evidence against them unless that evidence was given on oath* "

[49] Mr Blazer Williams identified the following directions at page 423 as causing the prejudicial effect-

> "*...there is a classic statement with regard to how you should look at an indictment in which two people are charged together...Lord , Diplock had this to say ,"Whenever two or more defendants , that is accused, are charged in the same count of an indictment with an offence which men can help one another commit, it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged so that he helped another to do such act, and that in doing the act or in helping the other accused to do it, he himself had the necessary criminal intent*"

[She then gave them directions concerning joint enterprise under the Criminal Code of St Vincent].

[50] The learned D.P.P, Mr Colin Williams submitted that the trial judge dealt fully with how to treat the co-accused, Garry Williams' statement. We endorse this submission. In our view, the evidence against the Appellant in his caution statement supported the conclusion that the jury must have, by their verdict, arrived at : that the appellant helped Jahjust and the other co-defendants to rob Mustique Company and that in organizing the robbery he had the necessary criminal intent. This classic statement of Lord Diplock in our view, in no way contradicted the previous directions at pages 422 and 415 of the record*, or* would have had any prejudicial effect for the Appellant

The appeal against conviction is dismissed.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Denys Barrow
Justice of Appeal

I concur.

Dancia Penn
Justice of Appeal [Ag.]