REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 12 of 2008

BETWEEN

REED RICHARDS

Appellant

AND

THE STATE

Respondent

PANEL:

S. John, J.A.

P. Weekes, J.A.

A. Yorke Soo-Hon, J.A.

APPEARANCES:

Mrs. Elder, Ms. A. Francis for the Appellant

Ms. D. Seetahal SC for the Respondent

DATE DELIVERED: May 28th 2009

JUDGMENT

Delivered by P. Weekes, JA

1. The appellant was charged with the murder of Roland Marshall who was last seen alive on October 28, 2004. On March 5, 2008 the jury returned a verdict of guilty. It is against that verdict that the appellant now appeals.

The Prosecution Case

2. Roland Marshall (the deceased) was a taxi driver who plied his taxi in south Trinidad. He went missing on the night of October 28, 2004. That day Ria Ramnarine, who knew the deceased well, took a lift with him in his taxi around 4 p.m. At about 6:15 p.m. the South Oropouche Police Station received an anonymous telephone call and as a result, officers went Grove Park, Dow Village. There they found the deceased's taxi abandoned. Upon inspection of the vehicle they noticed that the front of the car was damaged and found what appeared to be bloodstains in the trunk. Later that evening the deceased's son received a call on his mother's cellular phone and a voice demanded a ransom of $50,000.

3. The following morning police discovered the deceased's body in Grove Park. A post mortem determined that his death was a result of multiple puncture/stab wounds. The deceased's cellular phone was eventually found at Day's Inn, also called Annabelle's Hotel, and turned over to the police. Investigations revealed that subsequent to October 28, 2004 calls had been placed from that cellular phone to the deceased's wife's cellular phone, as well as to the appellant's landline.

4. The appellant was arrested six months later on April 11, 2005. He gave three oral statements during three separate interviews after having been cautioned on each occasion. During the first interview, he admitted to having worked as a construction worker at Annabelle's Hotel during the previous year. In the second interview he indicated that he had found the deceased's phone at the hotel, and made a call to his phone. In the course

of casual conversation with a police officer, (not during an interview) the appellant made an oral admission that he had seen the deceased's car on the morning of October 29, 2004 and vandalised it, taking the car deck and the cellular phone. He had used the phone and left it at Annabelle's Hotel.

5. He was interviewed a third time and admitted to being intoxicated on the night of October 28, 2004 and trying to rob the deceased in order to pay an outstanding bill at a bar at which he had been drinking and smoking cocaine. He admitted to getting into the deceased's taxi, trying to rob him, struggling with him and stabbing him with an ice pick which he taken from the deceased. He further indicated that he had left the deceased alive. He later took the police to the scene on April 13, 2005 and pointed out where the struggle occurred.

6. When the appellant spoke to the Justice of the Peace later that day, he admitted to signing the first and third interview notes but denied having been cautioned or told of his constitutional rights. The appellant also informed the Justice of the Peace that before the third interview, the police had promised him that he would be allowed to go home if he gave them information. The Justice of the Peace then certified the interviews and the contents of the station diary which she had previously read to the appellant. The appellant was charged with the offence on the following day.

The Defence Case

7. The appellant testified but called no witnesses. He said that on the afternoon of October 28, 2006 he was at work and had not been drinking since he is forbidden to do so by his religion. He denied involvement in the death of the deceased.

8. He accepted the contents of the first interview, denied the contents of the second and denied making the oral admission of vandalising the car. He denied ever having had possession of the deceased's cellular phone. He testified that the police had concocted the third interview notes and threatened him with a gun to make him sign them.

9. He denied volunteering to go to the scene and said that he only signed the station diary on his return from the scene because he was promised that he would be allowed to go home. He denied telling the Justice of the Peace that the contents of the third interview notes were true.

10. Counsel for the Defendant sought to argue the following Grounds of Appeal:

Ground 1

Motive to lie on part of Prosecution witnesses

The Learned Trial Judge erred in law when he directed the jury to consider why the Justice of the Peace would lie against the Appellant.

Ground 2

An error of law occurred when the prosecutor in her closing submissions asked the jury to consider why the police would make up the interviews and statements and why would the Justice of the Peace come to Court to lie.

11. These two grounds of appeal concern comments made by State Counsel in her closing address as well as comments made by the trial Judge in his summation which asked the jury to consider why certain prosecution witnesses would fabricate their evidence. It is necessary to set out the impugned paragraphs.

12. Prosecutor's closing address at page 42 lines 19-23

> **Now, I pausing there. Tell me which policemen will sit down and fabricate something with such detail. If that is the case, resign your job and go Hollywood and start to write screenplay, you will make more money. The level of detail that went into that could only have come from him.**

Page 47 lines 17-27

> **And these are important considerations because you know this case turning on one thing too, credit. Who do you believe? Do you believe**

the word of a man who has been convicted seven times and had been caught out lying, not only by the police in the interviews, but also caught out lying in the box in the course of cross examination, do you believe that? Or do you believe the word of officers who have come before you to speak about what they did from step to step.

Page 57 lines 16-20

And the State has called the Justice of the Peace and allowed her to be subjected to cross-examination so you could form in your mind an intention of the integrity of the woman. Did she have to come to Court here to lie? Is there anything for her to gain? She is just a JP.

Judge's Summing up page 33 lines 1-23

You will consider the evidence of the Justice of the Peace as well. Do you think that she was an independent witness? Do you think that she has an interest to serve in this matter? It may very well occur to you that these police officers may have some kind of interest in securing a conviction against the accused. But, what interest does the Justice of the Peace have to serve in the matter, is she independent? She told you that she recorded exactly what transpired in her certificates, and she told you from the witness-box, also, what transpired when she interviewed the accused. She told you that she read over her certificates to the accused and the accused signed the certificates.

Now, as I told you, do you think the Justice of the Peace came here to tell lies on the accused or, do you think she was speaking the truth to you? You will assess her as a witness, assess carefully what she told you, look at her certificates, see whether or not you see the accused's signature appearing after those certificates. Do you accept her evidence, that she read over these statements to the accused, that she asked him if they were true and correct? These are all matters which you will have to consider.

13. Mrs. Elder submitted on behalf of the Appellant that the effect of the trial judge's direction as it related to the evidence of the Justice of the Peace was that the jury would be led to believe that if they believed that she had no reason to lie they should accept her evidence as true. Counsel was concerned that the focus of the jury would be to look for a motive why the Justice of the Peace would lie and not to examine the veracity of her evidence. If no motive were found, then they would most likely believe that the accused was lying. Counsel further submitted that this direction placed a burden of proof on the appellant to provide reasons why the Justice of the Peace would lie. In the absence of a

prove motive to lie the jury would inevitably conclude that the appellant was lying and that that lie was intended to deceive them on a material fact in issue.

14. With respect to the Prosecutor's closing submissions questioning why the police would lie about fabricating the statement, counsel for the appellant repeated her submissions made on ground 1 and reiterated that the questions asked reversed the onus of proof. It was submitted that the Appellant was placed in a position where he would be forced to answer the question of why the witness would lie, yet since the question was asked in the Prosecution's closing address the Appellant was not even given an opportunity to respond.

15. Mrs. Elder referred the Court to the Australian case of **Palmer v R (1998) 193 CLR 1** where the High Court held that a complainant's account gained no legitimate credibility from evidence that the accused could not suggest a motive for her to lie. In the circumstances of the case the asking of the question "why would she lie" had such a prejudicial effect that there may have been a miscarriage of justice.

16. Ms. Seetahal submitted on behalf of the Respondent that **Palmer** should be restricted to the propriety of a prosecutor cross-examining an accused on the reasons that the virtual complainant in a sexual offences case would lie. Counsel submitted that **Palmer** should be distinguished from the present case since there is here no issue of the prosecutor cross-examining the Appellant as to why anyone would lie on him. Further, this was not a case of oath against oath of single witnesses on both sides.

17. With respect to the prosecutor's comments as to why would the police make up the statements, Ms. Seetahal submitted that the comments were focused on challenging the credibility of the Appellant and did not reverse the onus of proof. It was submitted that the Appellant did not have to provide an explanation for why the state witnesses would lie.

18. In the case of **Palmer v R,** during a trial for sexual offences against a child, the accused was asked in cross-examination whether he could suggest any reason why the complainant would invent allegations against him. He was unable to suggest such a reason. The Court held that the asking of the question had such a prejudicial effect on the accused that there may have been a miscarriage of justice. Brennan CJ, Gaudron and Gummow JJ who gave joint reasons reiterated the point that an accused has nothing to prove and is entitled when cross-examining the virtual complainant to test her credibility by probing to see whether she had any motive for her accusation. However, an accused should not be cross-examined to elicit that he knows of no reason why the complainant would lie.

> **7. It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. And evidence may be given by other witnesses of events from which such a motive may be inferred. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.**

19. The Court further explained that asking the question "Why would he or she lie?" would cause the jury to speculate. They quoted Sperling J in the Court of Criminal Appeal of New South Wales in **R v E (1996) 39 NSWLR 450 at 464**:

> **"[W]e are dealing here with a case where there is no direct evidence of an actual motive to lie, nor evidence from which a specific motive to lie could reasonably be inferred. To ask, "Why would he or she lie?' in such a case is to invite the jury to speculate as to what might be possible motives for lying and to assess their likelihood. That is not to try the case on the evidence, but to speculate concerning unproven facts. The absence of evidence of a motive for lying and of a plausible explanation for lying is not proof that there was no motive for lying. Yet to pose the question at all is to give legitimacy to that method of reasoning and to that conclusion.**

20. **Palmer** was applied and expanded in the case of **R v Jovanovic 98 A Crim R 1** a decision of the New South Wales Court of Criminal Appeal. In that case the appellant was convicted of a sexual offence with a minor. On appeal, the appellant argued that the trial judge should have discharged the jury following the Crown Prosecutor's submission that there appeared to be no reason why the complainant would lie. The appellant argued that the trial judge further erred in inviting the jury to consider that submission. In essence the facts in **Jovanovic** were quite similar to the present case.

21. The Court of Appeal held that the argument that because there is no apparent reason for the complainant to lie, the complainant is likely to be telling the truth and should, therefore, be believed should not take place in a criminal trial. Where there is direct evidence of an actual motive to lie or evidence from which a specific motive to lie could reasonably be inferred, a comment may be made attacking the credibility of the complainant in relation to his or her motive to lie. However it was held to be impermissible to invite the jury to bolster the complainant's credibility with an argument that there is no apparent reason for the complainant to have lied. This was held to contravene the principle that truthfulness is not to be inferred from the absence of any apparent motive to lie.

22. The Court further held that by inviting the jury to consider the Crown Prosecutor's submission that the complainant had no motive to lie, the trial judge was instructing the jury to start with a presumption that a crown witness is telling the truth. This is inconsistent with the concepts underlying a criminal trial, embodied in the standard directions concerning onus of proof and the jury's obligation to consider what evidence to accept and what to reject. A jury should not be directed to consider whether an accused's denial of the allegations on his oath should be discounted because of his interest in the outcome of the trial.

23. It is important to note that it is not in every case that Counsel is precluded from cross-examining an accused on or questioning a motive to lie. In the case of **R v. Uhrig (unreported) Court of Criminal Appeal NSW, No 60200 of 1996** Hunt CJ recognised

that there are two situations which may arise. The first situation, as explained by Priestly J.,A. at page 2 of **Jovanovic**, is the case where there is no direct evidence of an actual motive to lie, or evidence from which a specific motive to lie could reasonably be inferred, the other case is where a motive to lie is asserted in relation to the evidence of the complainant or witness.

24. In the former case, where there is no evidence of a motive to lie, to allow the question to be put to the jury "Why would the witness lie?" would run the risk that the jury may think it open to them to infer that because the witness had no apparent motive for lying that fact of itself showed the witness was telling the truth. The second case, where there is a real issue in the case whether the witness had an actual motive to lie is one where that issue is a relevant factor in judging a witness's credit and the question may be asked.

> **"What this Court said in F and in E should not be interpreted as excluding arguments being put to the jury, by either counsel or the judge, relating to the validity of the motive to lie which has been asserted in relation to a witness in the particular case. That is so notwithstanding that there is no requirement for the accused to prove such a motive, although in many such cases where the evidence of that witness is vital to the Crown case it would be appropriate for the judge to direct the jury that, even if they reject the motive to lie put forward by the accused, that does not mean: that the witness is necessarily telling the truth, and to emphasize that the Crown must still satisfy them that the witness is telling the truth. I believe that it is necessary for such a distinction to be stated expressly, in order to avoid skilful advocates attempting to persuade trial judges that a necessary consequence of this Court's decisions in those two cases is that arguments relating to a motive to lie are excluded in every case. That is not a necessary consequence at all."**

Per Hunt CJ in **Uhrig** at pp 16-17

25. In the local case of **Earle Charles v. The State Cr.A. No. 26 of 2001** the appellant was found guilty of rape. The main issue in the case was whether the victim was telling the truth when she said that the appellant was the one who had raped her on the day in question. It was a matter of credibility. The case for the defence was one of fabrication. It was suggested to the victim in cross-examination that she was having a

relationship with her teacher and that her stepmother and the appellant disapproved. The inference from the line of cross-examination was that since the appellant and his wife did not approve of the relationship the victim fabricated the case against the appellant.

26. On appeal the appellant argued that it was improper and prejudicial for the trial judge to direct the jury on the absence of motive as to why the victim would lie. The direction created the risk, counsel submitted, of reversing the onus of proof and deflecting the jury's consideration from the issue of credibility. The Court considered **Palmer** and agreed with the findings of the Australian Court. However Hamel-Smith J.A. distinguished the case. The appellant Charles suggested that the virtual complainant had a motive to lie – her parents' disapproval of her relationship. In such a case the trial judge was entitled to warn the jury that suggestions and innuendos did not constitute evidence in the case. He directed them that since the suggestion was that she had some motive to set up her father, they should, in assessing the evidence, look to see if they could find any reason from the *evidence* as to why the victim would set up her father. The Court held that given the way in which the appellant conducted his defence, it was a legitimate question for the jury to consider.

27. Hamel-Smith J.A.

> **12. We agree with what has been said in Palmer. An accused has nothing to prove and is entitled when cross-examining the virtual complainant to test her credibility by probing to see whether she had any motive for her accusation. He may or he may not be successful but he is not required to lead evidence to support his suggestions. If he does not, he runs the risk that since the suggestions made to the complainant are not *evidence* the jury will ignore them. On the other hand, a trial judge is entitled to warn the jury that the suggestions are mere allegations and serve no useful purpose. And in that context he is entitled to direct the jury that there must be *evidence* of motive if they are to consider that issue. Accordingly, the direction complained of in the instant appeal cannot be taken in isolation. It must be looked at in its context.**
>
> **14. It was, in our view, given the way in which the appellant conducted his defence, a legitimate question for the jury to consider. The appellant did not simply rely on his alibi. It was plain that he was suggesting that her motive was to set him up because of his (and her stepmother's) objection to her relationship with Arnold. The appellant had given evidence at the trial but refrained from touching that issue**

> **altogether. Arnold was also called on behalf of the prosecution but no attempt was made to suggest to him that he was having a relationship with her. The attack therefore was to discredit the victim with wild suggestions that had no foundation at all and the trial judge was entitled to direct the jury not to speculate but to consider the *evidence* in the case only to determine if there was credible *evidence* on motive that would undermine her evidence. He reminded them that the suggestions were not *evidence*. We think that in a case of this nature it is quite in order for a jury to consider the question of motive to test the victim's veracity as long as the trial judge does not lead them to believe that there is any onus on the accused to prove motive.**

28. The distinction appears to be whether there is evidence from which a jury might find a motive to lie. In the present case there was no evidence from which a jury could infer a motive to lie. In such a case it was clearly improper for the prosecutor to ask the jury to consider why the police officers or the justice of the peace would lie. The Court is of the view that based on State Counsel's closing address there was a real risk of the jury thinking that because the police officers and justice of the peace had no apparent motive for lying that fact of itself showed the witness was telling the truth.

29. It was most unfortunate that the trial judge repeated the sentiments of State Counsel that the jury should consider why the state witnesses would lie. In spite of the trial Judge's impeccable directions on the burden and standard of proof the trial Judge did not convey to the jury that even if they could find no reason why the police or justice of the peace would lie that did not mean that they were necessarily telling the truth.

30. We can see no good reason to limit the principle in **Palmmer and Javanovic** to sexual offence cases. The logic can be applied across the board and we find it relevant in this appeal.

31. The Court is of the firm view that the asking of the questions in the circumstances of the case may have occasioned a miscarriage of justice.

Ground 3

Judge's responsibility where an issue is first raised by prosecutor in closing

The Learned Trial Judge erred in law in that his adoption of the inferences made by the prosecutor in her closing submissions went beyond permissible grounds of judicial comment and caused prejudice to the appellant with regard to intoxication.

32. Counsel for the appellant submitted that the Learned Trial Judge adopted the approach of prosecuting counsel when he emphasized that the appellant's ability to recall the events of the night in question was inconsistent with his having been so intoxicated that he did not know what he was doing, or put another way, that he did not have the requisite mens rea. It was contended that these directions distracted the jury from considering whether, at the relevant time, the appellant could form or hold the requisite intention to kill or cause grievous bodily harm. The nub of counsel's contention is that the ability to recall events in detail is not inconsistent with the defence of intoxication and that the trial judge caused prejudice to the appellant by adopting these submissions. In support of her contention counsel cited the case of **Sooklal and Mansingh v The State [1999] UKPC 37.**

33. It was the State's case that the appellant was interviewed by the police and that during the third interview he made a detailed admission to having killed the deceased while under the influence of drink and drugs, to wit, cocaine. During trial the prosecutor did not make any link between the issues of recollection and intoxication. The prosecution's case appeared to be that the accused was drinking and smoking on the night in question and that his denial of those events in his evidence was an attempt to use religion to sanatise himself in the eyes of the jury. At trial Counsel was at pains to show that his denial came even in the face of his having committed several offences whilst a practising Muslim. She made no attempt to negate the fact that the appellant was drinking and smoking cocaine on the night in question.

34. It was during her closing speech that prosecuting counsel, for the first time, suggested that the detail with which the appellant was able to recall the events was

inconsistent with his having been drunk. She also opined that the appellant's ability to reason and to process information viz the steps he took to conceal the crime, were inconsistent with his having been intoxicated. At trial the judge summed up counsel's submission in this way:

Judge's Summing up page 37 lines 19-33

> **Now, the State counsel submitted to you when she was addressing you that, in her view, that the accused's mind was remarkably clear for a person who was intoxicated, that he gave many details of the incident which he was recalling some six months later. He recalls where he was drinking, what he was drinking, what he was smoking, that his bill was deep, that he needed cash, gave a detailed account of how the incident happened and, in that account, he had the presence of mind to throw away the ice pick. So, in her submission he was capable of forming the intention to kill or do grievous bodily harm. You will consider that as well, and consider the evidence that the accused gave, that he says that he was not drinking at all.**

35. In essence, the judge repeated prosecuting counsel's contention which had been advanced for the first time in her closing address. The case of **Sooklal and Mansingh** make it clear that the ability to recall events is not inconsistent with the defence of intoxication. However, the turn of events at trial raises the even more fundamental question of whether the appellant was prejudiced by the fact that a new and different issue was first raised during the prosecution's closing.

36. The English Court of Appeal considered just such an issue in the case of **R. v. Shawn Michael Smith [2003] EWCA Crim 997.** In that case the appellant was part of a group of men who attacked the victim. They kicked and punched him to the ground. The last kick which was delivered caught him on the head, causing him to fall back on the pavement and suffer a heavy blow. The heavy blow caused severe brain damage from which he never recovered. Three members of the group were eventually charged. The prosecution ran its case on the basis of joint enterprise and never suggested which appellant delivered the fatal blow. During trial, counsel for neither co-defendant

suggested who was the last person to kick the victim. In closing, one co-accused's counsel, for the first time suggested that it was the appellant who had delivered the blow. This suggestion would have virtually ambushed the appellant who would not have had an opportunity to respond since his attorney had already closed. In England, it is the defence that have the right of reply (which is exercised by prosecuting counsel in this jurisdiction) so that the prosecutor would also not have had the opportunity to respond to the new suggestion. The appellant alone was convicted. On appeal his counsel submitted that he suffered prejudice since:

> **...the appellant's ability to meet and answer the case that he had to face was so impaired that his trial was unfair and his conviction was unsafe. First, the prosecution had never made the allegation that the appellant delivered the final kick. Insofar as they suggested that such an allegation could be made against anyone, it was against Healey. Second, they did not suggest to the appellant in cross-examination that he had delivered the kick. Third, counsel for Healey did not suggest to the appellant in cross-examination that he had delivered that kick. Fourth, counsel for Healey in making his final speech after that of counsel for the appellant made this allegation for the first time. Fifth, the judge in summing-up and in answering the jury notes did not direct them that it had not been alleged by the prosecution that it was the appellant who delivered that kick. [Emphasis added]**

37. The court considered the case of **R v Fenlon and Others (1980) 71 Cr App R 307**, where counsel had sought to draw a distinction in relation to the position between co-defendants and other situations so far as cross-examination was concerned. In giving the judgment of the court the Lord Chief Justice said at page 313:

> **We can see no distinction in principle between one situation and the other. The basis of the rule ... is to give a witness of whom it is going to be said or suggested that he was not telling the truth an opportunity of explaining and if necessary of advancing further facts in confirmation of the evidence which he has given. There seems to be no reason why there should be any different rule relating to defendants between**

> **themselves from that applying to the prosecution vis-a-vis the defendant or the defence vis-a-vis the prosecution. It is the duty of counsel who intends to suggest that a witness is not telling the truth to make it clear to the witness in cross-examination that he challenges his veracity and to give the witness an opportunity of replying. It need not be done in minute detail, but it is the duty of counsel to make plain to the witness, albeit he may be a co-defendant, that his evidence is not accepted and in what respects it is not accepted. [Emphasis added]**

and concluded that:

> **We have come to the clear view that the combined effects of these various facts is that the appellant was convicted on a factual basis quite different from that which he had thought he was facing up to and including his counsel's final speech. He had no opportunity to deal with it. In that very important respect his trial was not fair. That conclusion can lead to only one outcome, namely that his conviction is unsafe and the appeal must be allowed.**

38. In the present case, the prosecution raised in closing an issue which had not been put by prosecution nor to defence witnesses, to wit, whether the appellant would be able to recall the events of October 28, 2004 so vividly if he had in fact been intoxicated on the night in question. In presenting this issue to the jury the trial judge did not acknowledge that this theory was not put to the defendant during the trial nor did he present possible alternative theories to the jury. He directed the jury on a theory that was first raised in closing arguments, a theory which was different from the basis upon which the case had been conducted and one to which the defence would not have had any chance to respond. This was unfair to the appellant who was to all intents and purposes "ambushed" by this new line. If the prosecution had intended to rely on this argument before the jury it would have been proper for counsel to raise it either on the prosecutions case or in cross-examination of the appellant.

39. There is merit in this ground.

Ground 4
Fairness of the Prosecutor's Closing Address

The Prosecutor's closing submission was improper and engendered prejudice.

40. Counsel for the appellant set out six sub-headings which are each considered in turn.

(A) The Prosecutor engendered prejudice by asking the jury why would the justice of the Peace come to Court to lie and why would the police officers lie. (Grounds 1 and 2)

41. This issue was dealt with under Grounds 1 and 2.

(B) The Prosecutor engendered prejudice by cross-examining and including in her closing submission the facts of the Appellant's previous convictions in effect causing a re-trial of issues already determined.

42. Mrs. Elder submitted on behalf of the appellant that when the prosecutor cross-examined the appellant as to his defences proffered at his previous trials and elicited details of the appellant's previous convictions the jury may not have considered his defence in the matter at hand independent of his previous convictions. Counsel argued that if the jury found that appellant's defences in those matters incredible they would correlate that credibility to the credibility of the appellant in the present case and the reliability of the appellant's defence would have been undermined.

43. The impugned paragraphs were as follows

> **Seven convictions on your head. You stand up there you make three years in jail already, you didn't make some jail because you decide it easier to pay a fine and get on with your life. So you know about life, you know about the world. You know about police, you know about investigation...But you know sometimes you feel you being so smart and you end up being stupid. You feel you being so smart and you**

talking to save yourself and you just end up sinking yourself deeper. That is what happen to him. I not foolish you know ma'am, I not foolish. But you stand up in the box and talk, and was rude to the State attorney, asking me questions, saying I getting vex and if I only raise my voice a little tiny bit, "I not answering that, you can't talk to me that way." That is somebody who frighten of anybody? That is somebody who don't know what he is entitled to and what he is not entitled to? Remember a leopard don't change his spots and the same man there is the same man here." (Prosecutor's closing address at page 40 lines 26-49)

Page 46 line 35 – page 47 line 2

"You have to look at the person's conduct itself, I am glad he is aware of that, but at the end of the day you said it is haram to drink and smoke, yet in the first interview notes you said that your mother had to pull you out of school because you was drinking and smoking weed. You said it is haram yet in 1994, 1996 he had a conviction for possession of cocaine. He has a conviction for seven offences and that is not haram. He said I was attacking his religion, I was not attacking his religion, I was attacking him. I was attacking the hypocrisy of what he is saying. You are saying all these noble things with your lips, but your life is not leading what you say, what you profess to believe. And you cannot be talking one minute haram and the next minute sitting down with seven convictions. I was so frightened, Griffith pulled out a gun and put it on the table, I didn't know what to do, I wet myself. But you did not wet yourself when you were found guilty for possession of firearm, you had possession of it."

44. An examination of the notes of evidence in this matter reveals that the prosecutor attempted to establish two things when cross-examining the accused on his previous convictions. These were firstly, that he was not a credible witness and thus not worthy of belief and secondly that because he had been exposed to the criminal justice system on seven prior occasions he could not have been coerced or forced to sign a confession statement. We will deal with each separately.

Credibility

45. It was the appellant's case at trial that he was a devout Muslim and that he would not have been drinking alcohol or smoking cocaine because his religion considered it "haram", that is, forbidden or prohibited, by his faith. State prosecutor sought to establish that the appellant's claims that he would not do certain things because they were considered "haram" were incredible due to the nature and number of previous convictions recorded against him.

Q. You were convicted for possession of cocaine in 1994?

A. Yes ma'am.

Q. You were fined $500 or two months hard labour at the Siparia Magistrates' Court.

A. Yes Ma'am

Q. And the officer who charged you was PC Lochan?

A. Yes ma'am

Q. So tell me something, you were in possession of cocaine, that wasn't haram then?

A. That is since 1994 you know, ma'am.

Q. So it wasn't haram? You said you were practising as a Muslim for 20 years?

A. Sometimes we does find ourselves in situation, ma'am.

Q. But you said it with such clarity in chief, Mr. Richards, that that is haram and you would never do something like that.

A. I said I never smoke or drink, that is haram because you intoxicating the body. Having possession of it come like I having this in my hand, that is not going inside me ma'am.

Q. That is not haram. Robbery with violence is haram? In 1993 you were fined $200 or 30 days hard labour, compensation $2,000 or seven days simple imprisonment at the Siparia Magistrates' Court for robbery with violence, 1993 Corporal Ramsey charged you. You remember that?

A. Yes ma'am.

Q. That wasn't haram? You got a good excuse that smoking and drinking will damage the body, but you could just be holding the - - you don't find that sounding a little hypocritical to you?

...

Q. Is robbery with violence haram under the Muslim faith?

A. A lot of things is haram under the Muslim faith, ma'am, a lot of things.

46. It is apparent from examining the notes of evidence that the prosecutor did not question the appellant on the facts of his previous convictions. She merely asked him, as she was entitled to, whether he had been convicted of certain offences and what were his sentences. In relation to one of the convictions, the larceny of a motor vehicle, the appellant volunteered facts which the prosecutor spent little time acknowledging and on which she asked only two questions.

47. In the case of **R v. McLeod [1994] 1 WLR 1500** the English Court of Appeal noted that if an accused, who has attacked prosecution witnesses, has many previous convictions it may be necessary that the jury should understand the character of the person making the allegations and thus cross-examination on his previous convictions is permissible. The purpose of the cross-examination was said to be to attack the accused's creditworthiness as a witness and not to seek to show that he has a disposition to commit the offence in question.

48. The Court at pages 1512-1513 set out certain propositions that should be borne in mind when cross-examining an accused on his previous convictions. Not all the recommendations are relevant to the present case and this Court will only note the ones which are relevant.

(1) The primary purpose of the cross-examination as to previous convictions and bad character of the accused is to show that he is not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged.

(2) It is undesirable that there should be prolonged or extensive cross-examination in relation to previous offences. This is because it will divert the jury from the principal issues in the case.

(3) In every case where the accused has been cross-examined as to his character and previous offences, the judge must in the summing up tell the jury that the purpose of the questioning goes only to credit and they should not consider that it shows a propensity to commit the offence they are considering.

49. Applying these principles to the present case this Court is quite satisfied that the prosecutor's questions were proper. They were by no means unduly prolonged or extensive and it was clear that the State was attacking the appellant's credibility. The trial judge was also quite careful in his summing up to note that the appellant's previous convictions did not mean that he was more likely to have committed the offence. At page 34 lines 16-33 of the summing up he directed the jury as follows

> **Now do not assume because he has previous convictions that he is guilty of this offence or that he is more likely to commit an offence. You cannot do that, that would be quite wrong if you do that, you do not assume that. What you have to do, Members of the Jury, is to consider his previous convictions in relation to his credibility only. His credibility is the confidence that you may feel that he is speaking the truth to you. You will consider his previous convictions in considering his credibility alone. As I told you, do not assume, simply because he has previous convictions, that he is likely to commit a criminal offence, you cannot do that. Nor can you assume that because he has previous convictions, that he is not speaking the truth to you. You must assess him as you would assess any other witness and, as I said, you are entitled to consider his previous convictions when you are assessing his credibility.**

50. This Court finds that no prejudice befell the appellant as a result of this line of questioning. There was no retrial of issues already determined and there was nothing improper in the way the prosecutor sought to attack the appellant's credibility.

The Seasoned Criminal

51. The prosecutor in her closing argument asked the jury to find that the appellant was not only dishonest, but having been through the criminal justice system on seven previous occasions he was also well aware of procedure and could not have been afraid or coerced to sign a statement. This was a substantial part of cross-examination. At page 45 of the proceedings on February 29, 2008, line 46 the following exchange took place

> **Q. And you would have done time, you would have known the repercussions of interaction with the police and how you conduct yourself, because you make a jail, this is not your first offence.**
>
> **A. No.**
>
> **Q. This is not the first time you walking into a police station or dealing with police. You would have been cautioned before in all of these other matters, told of your rights?**
>
> **A. I was never cautioned and go through all these, the police never take no time out to caution me ma'am, I have no reason to lie about that. I listen to them giving evidence up here and say they caution me after every so often, that was a lie, that is frank-o-men lie, it is a frank-o-men lie, the police never cautioned me.**
>
> **Q. I put it to you that it is you who are lying, because you went through seven convictions, make a jail, so you know what a police investigation would terminate in if you are responsible. You would only talk if you want to talk, is that so?**
>
> **A. No, ma'am.**
>
> **Q. Because you would have been in jail for three years before?**

52. While we find the use by the prosecutor of the expression "seasoned criminal" inappropriate, no real objection can be taken to the argument that one who has experienced the rigors of the criminal justice system on more than one occasion might not be as faint-hearted as a first-timer. It is true that previous convictions do not necessarily

make an individual fearless on subsequent arrests, especially when being questioned (for the first time) about a murder but that does not negate the argument. The trial judge did not direct the jury on this point and a direction may well have cured any potential prejudice that the prosecutor's questions and statements may have caused the appellant. Nevertheless we do not think that in the context of the evidence the failure was fatal to the conviction.

(C) The Prosecutor engendered prejudice by stating that the male voice that called the family of the deceased was that of the Appellant with no evidence so to conclude.

53. It was submitted on behalf of the appellant that there was no evidence to support the prosecutor's submission that the male voice that requested the ransom was that of the appellant. Counsel argued that the prosecutor's speculation was severely prejudicial and had no probative value.

54. Counsel for the respondent submitted that on the State's case and the second and third statements given by the appellant he admitted to taking the deceased's cellular phone. On his statements, he admitted to having taken the phone on October 28 and the phone was discovered at the hotel where the appellant worked on November 3, as such the jury was entitled to conclude that the person who made a ransom demand on the deceased's telephone on October 28 was in fact the appellant.

55. After referring to the telephone records in evidence and the phone calls made from the deceased's cell phone the prosecutor said at page 50 of the notes of evidence of February 29, 2008,

> **So these are independent pieces of evidence from which you could make your own determination. Now in the utterances he told the police in the third interview that he stabbed the man and took away the cell phone. So he is the person who is making these calls, that is how he came into possession of the phone. He is the man who made these**

calls. So if it is that he is in possession of the phone and he is emanating these calls, what does that say about him? It gives credence to what was recorded in this interview here, because it is not just a blanket interview, it is supported by the phone records which you would have in front of you, and you would see all the calls that were made and all of the calls that were received.

56. State Counsel was asking the jury to infer that the appellant was the person who made the ransom calls. It was not contained in his statement to the police that he had in fact made the calls but the appellant did admit in his third statement that he stole the deceased's cell phone and kept it for a few days. According to the appellant's statement he took the cell phone on October 28 and that was the same date on which the ransom call was made. Even though the appellant at trial did not accept the third statement as his own the statement was nevertheless admitted in evidence and was properly before the jury. State Counsel was entitled to ask the jury to conclude, from the appellant's own statement that he was the one making the ransom demand. There was nothing improper in her submission.

57. The trial judge dealt with the evidence of the cell phone at page 27 of his summing up. He accurately summed up the evidence about the calls made and what was said by the accused in his statements to the police, in examination in chief and in cross-examination. He went on

Now, of course, the accused, remember that he told you that that third interview is something which was made up by Corporal Hosein, so he doesn't admit that. Now in this case, Members of the Jury, you would have noticed that no "eyewitness" gave any evidence before you, nobody saw what happened and came here and told you what happened. The State, as I told you, relies heavily on the statements allegedly given by the accused and they rely as well, to a lesser extent, on evidence of certain circumstances which, when taken together, would provide a link between the offence and the accused. In this case the State, of course, relies on those telephone records that are before

you, that a call was made from the deceased's cell phone to his home, that's to the accused home. And the accused gave two explanations as to how he came by the cell phone, and we just dealt with those explanations. And, of course, in evidence, here, he denies making those statements about the cell phone, how he came into possession of the cell phone. In fact, in cross-examination he told you that he never was in possession of that cell phone.

58. The judge went on to address two other bits of circumstantial evidence and then concluded as follows at page 28

Now these are items -- now, carefully consider these statements and decide whether or not -- these bits of evidence, I should say, and decide whether or not you find that they are sufficiently reliable so that you may draw inferences from them. Now circumstantial evidence is evidence of circumstances which, when taken together, leads you to the conclusion that the accused committed the offence. Circumstantial evidence may not provide an answer to all the questions in the case. Circumstantial evidence can be very strong evidence and its strength really comes from the coincidence or the coming together of different circumstances which lead you in one direction.

Now, before convicting on circumstantial evidence I caution you that you must consider whether or not the circumstantial evidence could be fabricated, and you will consider, as well, whether or not the circumstantial evidence leads you in one direction. If you find that there are circumstances in the case that weaken or destroy the State's case then you ought not to rely on circumstantial evidence. So you consider the evidence, as I told you, very carefully, you bear in mind that you may act only on reliable evidence and draw conclusions from reliable evidence. Do not draw conclusions from evidence from which other inferences may be drawn, as I said, which point you in another direction, which may weaken the State's case or destroy it. And, as I told you before, the State's case in this matter is really based on the

oral statements allegedly made by the accused and, to a lesser extent on the circumstances which were pointed out to you.

59. The judge correctly directed the jury on how they were to approach the state's evidence and the Court finds there was no prejudice to the appellant. Sine this was an inference that could properly be drawn from the circumstantial evidence.

(D) By breaching attorney/client privilege in stating that because the attorney at law for the Appellant did not put certain facts to the relevant prosecution witnesses the Appellant was lying.

60. The essence of Mrs. Elder's submission was that when the prosecutor made reference to certain aspects of the appellant's case which were not put to the prosecution witnesses she wrongly asked the jury to conclude that the appellant was lying. Counsel argued that when an accused is placed in a position where he is asked to prove that he gave certain instructions to his attorney he is faced with a burden that he cannot discharge. Failure of the appellant to prove that he gave those instructions to his attorney would be detrimental to his credibility; in the absence of proof the jury would be likely to conclude that the appellant was lying or his defence was recently fabricated.

61. During cross-examination state counsel repeatedly asked the accused why his attorney had not put certain aspects of his case to the prosecution witnesses. There were two exchanges that this Court found worthy of comment. The first occurred when State Counsel questioned the appellant as to why there had been no prior record that he had been cold in the air-conditioned room during his second interview. At page 36-37 of the notes of evidence from February 29, 2008 the following is recorded

Q. You heard the state's evidence and you have agreed with that, that the room was an air-conditioned room?
A. Very cold air-condition.
Q. You are in an air-conditioned room now?
A. The room is a small room.

Q. But you could breathe proper in the room?

A. The air-condition was very cold ma'am, and I have problems with that.

Q. Why was it not put to the officers, when they took the box throughout the course of this matter, that the air-condition was cold and that you could not talk because of the cold?

...

Q. You remember you gave evidence, you stood up in the box, in other proceedings, and you spoke about the conditions under which the statement was taken from you, you remember that?

A. I can't recall that.

Q. Would you also recall that it was not recorded in those proceedings, and would you accept from me it isi not recorded that you mentioned anything about the room being too cold or anything like that, and you being uncomfortable because of the cold?

A. I can't recall ma'am.

Q. I am putting it to you today, this morning is the first time you are talking about that, that is fresh.

A. I mention that already to the judge and them in the previous matter.

Q. So the magistrate found you guilty because you really wasn't guilty, the police make up case on you because you really didn't do nothing, and now the judge didn't record something about you because I don't know whatever he would have in his mind.

A. I never say the judge didn't record anything. My lawyer there, Mr. Chatoor, could tell you that, could tell the Court that. I explain to the judge, Mr. Ian Brooks, that I have problems with the cold and we move from one court to another court to another court in the last year, and this is a retrial.

Q. Are you casting an aspersion now on the judge, that the judge didn't record that against you?

62. The appellant did not understand the question and Counsel explained what she meant and asked it again. The appellant explained that he did not know whether the judge

had recorded it or not but that it had happened. At this point Mr. Chatoor objected explaining to the judge that his client could not know what the judge had recorded and he also verified that the appellant had indeed complained about the cold and had asked to be transferred. The Court's response is recorded as follows

> **THE COURT: But even so Miss, the witness could answer within his knowledge.**

63. The second exchange occurred later at page 56 of the notes of evidence of the same date. The appellant was being questioned about his interaction with the Justice of the Peace and whether she had lied about him.

> **Q. That was not put to Ms. Arjoonsingh that she lied, and you saw her stand up here and give evidence, that was not put to her?**
>
> **A. Yes, my lawyer had told her that she was unfair to me, which was true, she was very much unfair to me, because when I let Ms. Arjoonsingh know what had took place…**
>
> **Q. Mr. Richards**
>
> **A. …she exact words was that she cannot do anything at this point in time.**
>
> **Q. My Lord, if he continues this we will be here till 4 o'clock this evening.**
>
> **THE COURT: Mr. Richards confine yourself to what is asked, okay.**
>
> **A. Okay, yes sir. No problem, sir.**
>
> **BY STATE COUNSEL**
>
> **Q. It was not put to the Justice of the Peace, Arjoonsingh that you were never with her alone for an interview?**
>
> **A. Ma'am, Ms. Arjoonsingh and I was in the room for a while.**
>
> **Q. Listen to my question, Mr. Richards you never put it to her that you were interviewed by her alone before Hosein entered the room?**
>
> **A. That was put to her ma'am. I heard my lawyer saying that. My lawyer said that to her ma'am.**

64. Ms. Seetahal submitted for the respondent that a prosecutor is entitled to comment on matters not put by defence counsel to prosecution witnesses during cross-examination but only raised in the accused's evidence. In support of this submission Counsel referred the Court to the Privy Council decision in the case of **Warren Thomas Jackson v. The State Privy Council Appeal no. 50 of 1997.** In **Jackson** a ground of appeal was based upon the judge's comments about the appellant's case not being put to the prosecution witnesses in cross-examination by his counsel. The Privy Council found that the judge's comments were not unfair. They noted at paragraph 44

> **Mr. Birnbaum submitted that these comments were unfair. Their Lordships do not accept this criticism. The matters upon which Mr. Pantor omitted to cross-examine the prosecution witnesses were important, and the omissions had quite properly been raised by Mr. Mohammed in the presence of the jury. In the absence of any explanation from Mr. Pantor the judge had to deal with them as best he could. It is to be noted that at the end of the summing up the judge invited Mr. Pantor to address him further if he so wished, but the invitation was declined; and that no complaint about the judge's comments was made in the Court of Appeal.**

This is what the judge said

> **Now, the rules of procedure require an attorney to put material things to an opposing witness to give the witness an opportunity to say yes or no or to explain.**
>
> **Now, is it important, is it material, for the accused to have told his attorney that the deceased attacked him and he was defending himself?**
>
> **No doubt since that is the defence of the accused, he would have told his attorney that, that the deceased had attacked him and he was defending himself. If that is so, then it was the duty of Mr. Pantor to put to Moorgan that in addition to these things, didn't he tell you that the deceased had attacked him and that he was defending himself?**

Perhaps Mr. Pantor forgot; perhaps the accused didn't tell him that, but I am merely telling you what the rules of procedure require because this may turn out to be very important in your consideration. Here was a man who just killed another person. He comes to the very first person after the incident and merely tells him, I just killed Carly. He's interfering with my life spiritually. And further on, I have nothing to explain to you. I will explain to the judge and jury.

Wouldn't you have expected him to say in the circumstances, well, the man attacked me and I was defending myself. But, of course, his attitude could very well have been, I don't have to say anything. I don't have to tell you anything. I will tell the judge and jury. ...

So these are matters for your consideration. Of course, Mr. Pantor didn't challenge what Moorgan says. He didn't put to Moorgan that the accused didn't tell him these things, to give Moorgan a chance to say yes or no as the case may be. So up to that point in the trial Moorgan's evidence went in unchallenged so to speak. But in spite of that, you will have, when you are deliberating, to look at the totality of the evidence and come to the finding of facts in the case because you have seen both sides; you have seen Moorgan; you have seen the accused; you have heard them."

...

On the other hand, it could be that the accused gave his attorney certain instructions, his attorney perhaps forgot to put it. Or that he didn't give his attorney the instructions and he came in the witness box and said something new which surprised even his attorney. So you look at it from both sides so to speak.

Again, as I make the point, while I just mention these rules of procedure, you bear them in mind. You do not fault people for omissions. You do not fault an attorney because he omits to do something. You do not fault an accused person because he may have forgotten something. You look at the evidence which is before you and come to your finding of facts on that evidence so to speak.

65. The judge had clearly directed the jury that there were various reasons why counsel for the accused may not have put certain things to a witness. An attorney may forget, it may be that in his professional opinion he thinks it unnecessary or it may be that he never received those instructions. The jury in **Jackson** had the benefit of the trial judge explaining to them the various reasons why certain facts may not have been put. The jury was also exhorted to look at the evidence in the case and not punish the accused because either he or his attorney had forgotten something.

66. The jury in this case did not have the benefit of such a direction. After the prosecutor repeatedly questioned him on why certain things were not put to state witnesses the judge, unfortunately did not give such a detailed direction to the jury. At page 6 of the summation the trial judge explained what it meant to put something to a witness.

> **Now, during the course of the evidence you would have heard the attorneys put questions to witnesses, I put to you that so and so happened or, I put to you that you did so, so, and things of that kind. Now, each attorney is supposed to put his or her case to a witness on the other side, and that is only fair because you must give the witnesses on the other side an opportunity to answer your case. Now, you must be careful about that. Bear in mind that what is put to a witness is a question. It may be phrased like a statement but it is still a question. It is the response to the question by the witness that is the evidence in the case, not the question. That is the first thing.**
>
> **The second matter is that where the case is not put to a witness on the other side and evidence is given of that allegation, then, although the answer is admissible or that evidence is admissible, it is a question of the weight that you will attach to that particular response. And I will give you an example later on in the case of a matter which was not put to a witness but of which evidence was given. It is admissible, as I said, it is evidence before you, but what you would have to consider is the weight that you will attach to such evidence having regard to the fact that the witness wasn't confronted by that case.**

67. The judge did in fact come back with an example at page 19 lines 10-30

> **Another matter for you to consider is that this allegation was not put to Corporal Hosein that he made up the statement, now that is an important matter. The third interview notes, as I told you, is important for the State's case, because, it is in that interview that it is alleged that the accused gives an account of what transpired and how it is the incident happened with the deceased. So that if this is made up by a State witness one would expect that Defence counsel would have those instructions and will put that to the State witness so that the State witness could respond, but this was not put to Corporal Hosein. So that that evidence, as I told you, the evidence of the accused, that Corporal Hosein made this up is a matter which you must consider carefully and you will decide what weight you can attach to that evidence having regard to the fact that the State witnesses were not confronted by this allegation. That was not put as well to Corporal Griffith that what you noted there was, in fact, made up by Corporal Hosein. So that is a matter that you must consider very carefully.**

And again at page 29 lines 16-30

> **He denies that he hid under a bed or that he was naked and that he was jumping up and down on the bed. He says the police snatched him, threw him on the ground and PC Badree mashed him on his head as if putting out a cigarette, and that they capsized his bed. Now, none of these things, unfortunately, were put to the State witnesses, in particular to Corporal Flanders who had given you evidence of the circumstances of the arrest of the accused. It was not put to him that the accused was snatched and thrown on the ground and mashed on the head by PC Badree. So these are things which came out for the first time when the accused gave his evidence. So, again, as I told you, it is a matter of weight that you can attach to this evidence.**

68. It is this Court's view that despite the direction given by the judge there was a grave danger that the jury would have ascribed the failure to put evidence to witnesses to doubtful veracity in the appellant's evidence. The failure of the trial judge to direct the

jury on the different reasons why certain evidence would not be put was prejudicial to the appellant.

(E) The Prosecutor engendered prejudice by labelling the Appellant as a jailbird.

69. Counsel for the appellant submitted that the prosecutor played on society's prejudice against convicted persons and engendered irrelevant and prejudicial considerations in the minds of the jury. Ms. Seetahal argued that since the evidence that the appellant had been incarcerated for three years was already before the jury, referring to the appellant as a jailbird caused no added prejudice. In any event, Counsel argued, the evidence is allowed for the purpose of challenging the appellant's credibility.

70. Calling the appellant a jailbird was not *evidence* admissible for the purpose of challenging credibility; it was merely unnecessary name-calling. Evidence of the appellant's previous convictions and incarceration was in fact before the jury and there was no need to refer to the appellant as a jailbird in order for them to recall that evidence.

71. In the Privy Council case of **Randall v. The Queen [2002] 1 WLR 2237** the Court noted that in cases where it is alleged that state counsel has stepped outside of his/duty as a minister of justice it is the duty of the appeal court to determine whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial. At paragraph 28,

> **While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and**

> **undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.**

72. The issue is whether state counsel's departure from propriety was of such a nature as to deprive the appellant of a fair trial. In **Bernard v The State [2007] 2 Cr App R 22** it was noted that:

> **If the defects were relatively minor, the trial may still be regarded as fair. Conversely, if they were sufficiently serious it cannot be accepted as fair, no matter how strong the evidence of guilt.**

73. The mere fact that a prosecutor is discourteous to a witness or has asked him questions to which he could not possibly know the answer will not always result in a conviction being quashed. Especially not in a case where the appellant himself was rude and belligerent. Labelling the appellant a jailbird is not deleterious to conviction but gratuitous name-calling is deprecated and should not occur. A trial judge should take steps to ensure that this undesirable practice is discouraged.

(F) The Prosecutor engendered prejudice by stating that because the Appellant could recall the events of the 28th day of October 2004 the defence of intoxication was not available to him.

74. This issue was dealt with under Ground 3 and there is no need to further address this issue.

Ground 5

Particularity of reasons on the voir dire when there is an issue on the prosecution case

The Learned Trial Judge fell into error when he admitted into evidence the third interview notes.

75. An issue arises on the prosecution evidence in respect of the voir dir. It is common ground that the appellant was taken to the Oropouche police station on Wednesday April 11, 2005. It was the prosecution's case that after being cautioned he was interviewed between 1:00 p.m. and 2:45 p.m. and he signed the interview notes. He was also interviewed at about 9 p.m. after he was cautioned but he refused to sign those interview notes. He was interviewed a third time on April 12, 2005 between 3:00 p.m. and 5:00 p.m. and he signed the interview notes. It was during this third interview that the appellant provided details of the incident which significantly incriminated him.

76. The appellant testified that the interview notes were fabricated by the police and that he was threatened with a gun to sign them. The police however indicated that the appellant gave the interviews voluntarily and willingly signed the notes. The Justice of the Peace testified that the appellant told her that he gave the third interview as a result of a promise held out to him by the police that he would be allowed to go home after providing information.

77. The admissibility of the interview notes was challenged and on the voir dire the Justice of the Peace was called to testify. Her testimony is critical so that it is necessary to set out parts of it verbatim. She described the process of certifying the notes as follows:

> **Corporal Flanders then handed me the three written interviews notes dated 11.4.05 at 1:00 p.m., 11.4.05 at 9:00 p.m. and 12.4.05 at 3:00 p.m.... I inquired from Reed Richards if he was informed of why he was in custody, he replied, "Yes, for the murder of Roland Marshall."**

I inquired from him if any written interviews were conducted between himself and the police, he replied yes.

78. She then indicated that he denied being cautioned or informed of his constitutional rights and he indicated that he had seen his mother and an attorney and continued:

I inquired from Reed Richards if any promises, threats, inducements or violence were made to him to give this interview, he replied yes, the police promised him if he gave them the information he would go home.

79. The testimony of the Justice of the Peace on the voir dire raises the question whether, there being an issue on the prosecution case, the trial judge is bound to give reasons for his decision in a manner that indicates that he has adopted the correct approach to the assessment of the prosecution evidence.

80. In the instant case the trial judge gave reasons after the voir dire for his decision to admit the interview notes as follows:

Having considered the evidence and the submissions of counsel, I find beyond reasonable doubt that the oral statements made by the accused ...were voluntary statements in the sense that they were not obtained from the accused by threats, promises, inducements or by oppression.

81. It is settled law in what circumstances and with what particularity reasons should be given, it depends on the facts of the case. The case of **Wallace and Fuller v R [1997] 1 Cr. App. R 396** while oft cited as authority for the proposition that there was no rule of general application that a judge should always express his reasons for any procedural ruling also clearly affirms that reasons may be required even in respect of procedural judgments . In delivering the judgment of the Board Lord Mustill said:

> **Undoubtedly there will be occasions when good practice requires a reasoned ruling. For example, where the judge decides a question of law sufficient, but no more, must be displayed of his reasoning to enable a review on appeal. Again, on a mixed question of law and fact the judge should state his findings of fact so that the law can be put in context. Similarly, the exercise of a discretion will often call for an account (however brief) of the judge's reasoning, especially where the issue concerns the existence of the discretion as well as the way in which it should be exercised. <u>These are no more than examples. In every case it will depend on the circumstances whether reasons should be given, and if so with what particularity.</u> Frequently, there will be everything to gain and little to lose by the giving of reasons, even if only briefly. But other situations are different, as the present case well shows. [Emphasis added]**

82. In **<u>Wallace</u> (supra)** the irreconcilable conflict arose between the facts in prosecution case and the facts in the defence case. The court reasoned that in those circumstances reasons were not required. Lord Mustill continued:

> **Here, the trial judge was faced with an irreconcilable conflict of evidence between the police officers and the defendants, turning on credibility alone. No principles of law were in issue, and there was no discretion to be exercised. The only question was whether the judge believed one set of witnesses or the other. His ruling leaves the answer in no doubt. Simply to announce that he accepted the account given by the officers and the justice, and found the appellant's story unworthy of credit would not have advanced an appeal.**

83. The present case is however different, the issue arose on the prosecution case in that the Justice of the Peace clearly indicated that the appellant told her that he gave the third interview as a result of an inducement held out by the police thereby bringing into issue the question of voluntariness. The judge in giving reasons for admitting the confession should have given reasons with sufficient particularity to allow us to assess

whether he addressed his mind to this matter, and whether he applied the correct test to the assessment of the evidence.

84. In **Wallace** the court considered the Australian authority of **Webb (1994) 74 A.Crim.R. 436**. In **Webb** the appellant's conviction was quashed on the ground that the judge had given no reasons for admitting his confession in evidence. The court in **Wallace** quoted Malcolm C.J. and Ipp J as follows:

> **The relevant Australian authorities have been collected by Ipp J. I agree with his Honour that, in the circumstances of this case, the failure of the learned Commissioner to give any reasons for his decision to admit the confessional material was an error of law....**
>
> **Cases can arise where the admissibility of confessional material involves issues of voluntariness alone. It can occur that those issues depend for their resolution merely upon credibility disputes. In cases of that kind the basis of the presiding judge's decision to admit the confessional material may be apparent solely from the issues raised during the voir dire. Where, however, there are a multiplicity of issues that arise in regard to the admissibility of confessional material, the mere fact that the judge holds that the material is admissible does not necessarily indicate that he or she has applied the proper tests in so holding, or that all relevant factors have been taken into account. In such circumstances, without the court giving reasons, it is not possible to ascertain whether the decision was made according to law..**[Emphasis added]

85. In respect of the trial judge's task in assessing the voluntariness of a tendered confession, this court in the case of **Benjamin and Ganga v The State Cr. App. No. 50 and 51 of 2006** recommended the adoption of the three-step process propounded by the English Court of Appeal in **R v. Barry (1992) 95 Cr. App. R. 384, CA:**

> **Where a defendant alleges that his confession was unreliable within section 76(2) of the Police and Criminal Evidence Act 1984, [our**

> **equivalent being Appendix A of the Judge's Rules] the correct approach is first, to identify the thing said or done, which requires the trial judge to take into account everything said and done by the police. The second step is to ask whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence. The test is objective taking into account all the circumstances. The last step is to ask whether the prosecution have proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said and done, which is a question of fact to be approached in a common sense way.**

86. The foregoing excerpt not only points to the primacy of voluntariness in determining the admissibility of a confession statement, it also clearly highlights the fact that in the determination of the issue of voluntariness, a heavy burden is placed on the prosecution. The judge must be satisfied *on the prosecution evidence* that the confession was not obtained by foul means and his reasons must make it clear that he has applied this process to his assessment of the evidence on the voir dire. In keeping with the position in **Wallace and Fuller** when the conflict of evidence between the police officers and the defendants, turns on credibility alone no reasons are necessary, however where the conflict of evidence arises on the prosecution case reasons must be given with sufficiently particularity to show that the correct process outlined in **Barry** and adopted in **Benjamin and Ganga** was applied.

87. The Justice of the Peace testified that she was told certain things by the appellant; she was not a first hand witness to these matters. The appellant did not give evidence on the voir dire so that, at that stage, his complete denial of having given the interview was not before the judge. Nowhere in his reasons did the trial judge mention how he reconciled the evidence of the Justice of the Peace with the evidence of the police officers. There is no finding or even analysis of the Justice of the Peace's evidence as it relates to the admissibility; in fact he made no mention of the Justice of the Peace's evidence at all.

88. The judge ought to have made it plain whether he arrived at his decision that there was no inducement because he disbelieved the Justice of the Peace that the appellant ever told her that he was induced, or whether he believed the Justice of the Peace but believed that the appellant had lied when he told the Justice of the Peace that he was offered an inducement. He also should have outlined the consequences that flowed for the prosecution as a result of his disbelief of the evidence of one of its witnesses or alternatively the consequences resultant from disbelief of the appellant. In the circumstances we cannot ascertain whether the decision was made according to law.

89. Accordingly, this ground succeeds.

Ground 6

Voluntariness of the Third Interview

A further misdirection occurred by the failure of the Learned Trial Judge to direct* the *jury on the circumstances relevant to voluntariness and credibility surrounding the third interview notes.

90. At trial the appellant testified that he did not give the third interview, he instead asserted that the notes of the third interview presented to the court were fabricated by the police. While he acknowledged that he signed the interview notes he alleged that he did so because he was threatened in that the police placed a gun on the table before the interview. The appellant therefore challenges the judge's failure to give a **Mushtaq** direction to the jury in respect of their consideration of the third interview notes.

91. In the case of **Benjamin and Ganga v The State Cr. App. No. 50 and 51 of 2006** this court comprehensively reviewed the law as it relates to the directions to be given to a jury in respect of a statement which an accused alleges was not given voluntarily. We reviewed the authorities of **R v Mushtaq [2005] 1 WLR 1513 (UKHL)** and **Barry Wizzard v The State [2007] UKPC 21** and applied **Wizzard**.

92. In **Wizzard (supra)** the Privy Council considered that where an accused indicated that he did not give a statement but his signature was appended to it because of violence,

inducement or undue influence there was no need for a **Mustaq** direction. The Board opined that an accused who said he did not make the statement at all did not bring the voluntariness of that statement into question. What he brought into issue was whether he made the statement at all. So that, **in respect of the jury's assessment of the weight to be attached** to such a statement, a trial judge was not obliged to direct a jury in accordance with **Mushtaq**.

> **A Mushtaq direction is only required where there is a possibility that the jury may conclude (i) that a statement was made by the defendant, (ii) the statement was true but (iii) the statement was, or may have been, induced by oppression. In the present case there was no basis upon which the jury could have reached these conclusions. The issue raised by the appellant's statement from the dock was not whether his statement under caution had been induced by violence but whether he had ever made that statement at all. The statement bore his signature. His evidence was that his signature was obtained by violence. This raised an issue that was secondary, albeit highly relevant, to the primary issue of whether he had made the statement. His case was that he had not made the statement, nor even known what was in the document to which he was forced to put his signature. In these circumstances there was no need for the judge to give the jury a direction that presupposed that the jury might conclude that the appellant had made the statement but had been induced to do so by violence.**

93. However in the case of **Ajodha v The State [1981] 2 All E.R. 193**, a Privy Council appeal not mentioned in **Wizzard**, the Board considered that in respect of the **judge's task of assessing the admissibility** of a signed confession statement when the accused denies authorship but admits to signing as a result of inappropriate police conduct a voir dire must be held. The Board considered that to call into question the circumstances surrounding the signing of the statement automatically called into question the voluntariness of the statement. For the purposes of clarifying the issue at hand it is necessary to quote at length from the case. Lord Bridge stated that:

If a defendant alleges that he was forced to sign a confession statement that raises the issue of voluntariness. It is wrong in law to distinguish between a statement made by the defendant but extracted by duress, undue influence or other inducement and a statement which the defendant has not made but which he has been forced to sign by one of those methods. By signing a statement the signor is regarded as adopting it and the same rules should apply as to its actual making. A forced adoption automatically raises admissibility which must be considered by the trial judge: it cannot be regarded merely as an issue of non est factum

94. Their lordships considered relevant authority and continued:

...if the voluntary character of the signature is challenged, this inevitably puts in issue the voluntary character of the statement itself. The fallacy, in their Lordships' respectful opinion, which underlies the reasoning of the judgments in the cases considered above which have arrived at a contrary conclusion, is to suppose that a challenge by an accused person to a statement tendered in evidence against him on the ground that he never made it and a challenge on the ground that the statement was not voluntary are mutually exclusive, so as to force upon the judge a choice between leaving an issue of fact to the jury and deciding an issue of admissibility himself. In all cases where the accused denies authorship of the contents of a written statement but complains that the signature or signatures on the document which he admits to be his own were improperly obtained from him by threat or inducement, he is challenging the prosecution's evidence on both grounds and there is nothing in the least illogical or inconsistent in his doing so.

It has to be remembered that the rule requiring the judge to be satisfied that an incriminating statement by the accused was given voluntarily before deciding that it is admissible in evidence is anomalous in that it puts the judge in a position where he must make his own findings of fact and thus creates an inevitable overlap between the fact-finding functions of judge and jury. In a simple case, where

the sole issue is whether the statement, admittedly made by the accused, was voluntary or not, it is a commonplace that the judge first decides that issue himself, having heard evidence on the voir dire, normally in the absence of the jury. If he rules in favour of admissibility, the jury will then normally hear exactly the same evidence and decide essentially the same issue albeit not as a test of admissibility but as a criterion of the weight and value, if any, of the statement as evidence of the guilt of the accused.

In the case presently under consideration, where the accused denies authorship of the statement but admits signing it under duress, the overlap of functions is more complex. Hearing evidence on the voir dire, the judge will of necessity examine all the circumstances and form his own view of how the statement came to be written and signed. In practice the issue as to authorship and that as to whether the signature was voluntary are likely to be inseparably linked. One can hardly envisage a case where a judge might decide that an accused was not responsible for the contents of the statement but had signed it voluntarily. A purist might say that, in considering the issue of authorship, the judge was usurping the function of the jury; but if it is necessary to consider the issue of authorship before the judge can be satisfied that the statement was signed voluntarily. There is in truth no usurpation but only a discharge by the judge of his necessary function in deciding the question of admissibility. If the judge rules the statement to have been signed voluntarily and therefore admissible, in this, as in the simple case, the issues both as to authorship and as to the manner in which the signature was obtained will again have to be canvassed before and left for consideration by the jury.

95. It has been said of the judgment in **Wizzard** that the issue of voluntariness seemed to evaporate once the judge was satisfied beyond reasonable doubt that the defendant's evidence of violence was not credible.[1] Taking the effect of **Wizzard** and

[1] **International Journal of Evidence & Proof VAIJ 2007, 11(4), 340-343**

Adjodha conjointly the decisions suggest that the admissibility of a confession and the direction to the jury about it are to be treated as independent issues. The trial judge must hold a voir dire to investigate the voluntariness of any confession which the defendant represents was obtained by coercion this includes one of which he denies authorship but admits signing as a result of coercion (**Ajodha**). Once the statement is admitted the jury should not be directed to consider the voluntariness of a confession that the defendant denies having made (**Wizzard**). This plainly does not remove from the judge the responsibility of reminding the jury that the defendant denies having made the confession and directing them that they must acquit him unless they are satisfied beyond reasonable doubt that his denial is a lie. The distinction drawn between voluntariness for the judge on the voir dire and the jury at trial is difficult to reconcile particularly in the face of case law[2] which recognises that the task undertaken by each is ostensibly the same.

96. The fact remains however that the Privy Council in **Wizzard** was clear that in the case where the accused denies authorship of a statement but confirms that he appended his signature thereto even if in circumstances that suggest it was not voluntarily obtained, he does not bring the voluntariness of the statement into question and therefore no **Mushtaq** direction is required.

97. Accordingly, this ground must fail.

Ground 7

The Learned Trial Judge's directions were unbalanced and unfair.

Ground 8

The Learned Trial Judge erred in law when he directed the jury to consider that allegations made against Cpl Griffith, Cpl Hosein and JP Arjoonsingh by the Appellant in his examination in chief were lies because they were not put to the individual witnesses by his attorney at law.

[2] **Ajodha v The State [1981] 2 All E.R. 193**

98. Grounds 7 and 8 are umbrella grounds encompassing issues already dealt with in the foregoing paragraphs; no more need be said of them.

Conclusion

99. Having regard to the above premises the appeal is allowed, conviction and sentence ae set aside and in keeping with the wel-known principles in **Reic v The State** (1978)27WIR254, a retrial is ordered.

Stanley John
Justice of Appeal

Paula Mae Weekes
Justice of Appeal

Alice Yorke Soo-Hon
Justice of Appeal