REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SCARBOROUGH

CR T2/15

THE STATE

V

MARK BLAKE

FOR

MURDER

RULING ON VOIR DIRE

Before the Hon. Madam Justice Lisa Ramsumair-Hinds

Appearances:

Mrs Maria Lyons-Edwards for the State

Mr Wayne Sturge for the Prisoner

Date of Oral Decision : Wednesday 16th May 2018

1) The Prisoner Mark Blake is before me and in the charge of the jury for the murder of Larry Phillips, which is alleged to have occurred on 27th March 2005 at Glen Road, Scarborough. The Prosecution's case is that he was arrested together with another person in the early hours of 30th March 2005, and quite spontaneously, made an oral utterance of an incriminatory nature. Later that said day, the police recorded a written confession statement under caution from Mark Blake.

2) The State has applied to have the incriminatory evidence, both in the oral utterance and the written statement, admitted into evidence for the jury's consideration. The Defence has filed eleven grounds of objection to the admission of this evidence.

3) A voir dire to determine admissibility of the challenged evidence was conducted, during which the Defence abandoned the 11th ground of their objections. The State called three witnesses, namely ACP Garfield Moore, ACP Vincel Edwards and Justice of the Peace (JP) Carlton Phillips. Additionally, both Prosecution and Defence agreed to the formal admission of the (edited) deposition of now deceased Insp Herbert Sharpe and the statement of then State Counsel Renuka Rambhajan. Mark Blake did not give evidence nor were any witnesses called on his behalf.

4) By oral decision, with the promise of this written ruling to follow, I decided that the State failed to meet its burden to prove beyond reasonable doubt that the incriminatory evidence in question was made voluntarily and in circumstances without oppression, inducement and in fairness to Mark Blake. Accordingly, both the written statement and the oral utterance are to be excluded.

REASONS FOR RULING

5) The Defence contends that Mark Blake was subject to physical violence, that only after agreeing to and signing an interview was he permitted clothing, food and medical attention, that he was never advised of his right to an attorney, nor given an opportunity to have a friend or relative present, that he was told he would remain in custody until he participated in and signed an interview, that the JP never identified himself and appeared only after the interview to authenticate notes of same, that he never made the oral utterance, and that he did not dictate the contents of, nor sign a written caution statement (in respect of which the admission of a copy is challenged).

6) The State responds that the grounds of objection must fail, inviting me to accept the evidence of the Prosecution witnesses as credible and to make the following findings:

   i. That Mark Blake was never subjected to physical violence at the hands of ACP Moore;
   ii. That the fact that Mark Blake was fed only after agreeing to an interview was not in the manner of an inducement, but rather just the natural sequence of events upon his arrest;
   iii. That Mark Blake was facilitated with the opportunity to have a relative or friend present;
   iv. That Mark Blake was properly informed of his right to have an attorney present;
   v. That Mark Blake was never made to remain in a cold air-conditioned room clad only in underwear until agreeing to an interview;

vi. That Mark Blake was never told he would remain in custody until he participated in an interview;
vii. That in fact there was no separate interview, in respect of which notes were taken, and subsequently authenticated by the JP but never produced to the court;
viii. That JP Phillips was properly introduced to Mark Blake, who had private audience with him, during which the JP was satisfied that Mark Blake wished to give the written statement voluntarily;
ix. That Mark Blake did make the oral utterance upon arrest;
x. That Mark Blake did dictate the contents of the written statement and sign same;
xi. That the fact that there was a pause in the recording of the statement to take Mark Blake to the Hospital is supportive of fairness to him;
xii. That ACP Edwards did make a photocopy of the written statement, which he verified was a true copy of the original;
xiii. That the combined effect of the evidence of ACP Edwards and State Counsel Renuka Rambhajan is that the original statement is simply not now in the hands of ACP Edwards, thereby making the copy admissible;
xiv. That I can be satisfied beyond reasonable doubt that the oral utterance and the written statement were voluntarily made and therefore admissible;
xv. That in all the circumstances, Mark Blake was treated fairly and therefore there can be no issue of potential unreliability of the incriminatory evidence;
xvi. That any and all issues of contradiction and discrepancy from the Prosecution witnesses are relevant only as to the weight to be attached to the incriminatory evidence.

7) Counsel for both sides helpfully provided comprehensive submissions on the applicable law and the facts in support of their respective positions on admissibility, and I thank them.

8) It is trite law that, once voluntariness and fairness have been challenged, it is the Prosecution who bears the burden to prove that the reception of the impugned evidence is proper. The Prosecution's obligation is to prove beyond reasonable doubt that the admissions were made voluntarily, that is to say, that the inculpatory oral utterance and written statement attributed to Mark Blake were not obtained from him by 'fear of prejudice or hope of advantage excited or held out to him by a person in authority or by oppression.[1]' Indeed, Mrs Lyons-Edwards noted in her submissions 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.[2]"

9) <u>The issue of an oral utterance upon arrest</u>

Mark Blake denies making an oral utterance. Mrs Lyons-Edwards contends that I can be satisfied that he did indeed make such an utterance, based on the testimony of the police witnesses. Their accounts are analysed below.

i. **ACP Moore** said that Insp Sharpe was the first person to meet Mark Blake at the house on Milford Road, Canaan, where he was arrested. He stated that Mark Blake made an utterance

[1] Ibrahim v R [1914] AC 599
[2] Submissions filed on behalf of the State, May 16, 2018, p. 4 para. 7

before Insp Sharpe spoke to him. He testified that when he was arrested, the Accused said to the other man, **"Don't say anything! They can't beat you for a murder!"** He further noted that "he did not say anything other than what he said to the other man."

ii. **ACP Edwards** gave a different account. He testified that **Insp Sharpe identified the party of police officers** to the Accused and the other man. The Accused said in a loud tone of voice, **"Don't say anything. Is Sean whe sell we out. They cannot beat we for murder. Sean is a dead man walking. I must come out of prison."** ACP Edwards said he then identified himself, told Mark Blake of the report he was investigating, cautioned him, and he thereafter remained silent.

iii. **Insp Sharpe**'s version is also different. He said **he identified himself** to both men and Mark Blake shouted, **"Don't say anything. Sean done sell we out already. They can't beat yuh to talk for Murder. Sean is a dead man walking. I must come out of prison."** Insp Sharpe's evidence immediately following his account of the utterance is, "**I <u>again</u> cautioned him** and he remained silent."

Certainly, there are disparities between the witnesses as to the wording of the oral utterance. The evidence of ACP Edwards and Insp Sharpe, regarding the actual words attributed to Mark Blake, more closely resemble each other, than those ACP Moore noted. ACP Moore suggests that the utterance was made very spontaneously, even before any officer spoke to him. On the other hand, ACP Edwards and Insp Sharpe both stated that Insp Sharpe first identified himself before the utterance was made. ACP Edwards in fact said that Insp Sharpe identified the entire party of police officers. Insp Sharpe alone suggests that the utterance was made by Mark Blake after he was first cautioned. Minor differences in the wording are not overly problematic, however, the context of Mark Blake first being cautioned is a very significant issue in respect of which, the existence of three versions may pose a challenge in respect of credibility. Credibility is addressed below.

10) <u>The issue of a separate interview and notes</u>

In ***Reed Richards v The State***[3], the Court noted 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 the accusation. He may or may not be successful but he is not required to lead evidence to support the 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."

The Prosecution maintains that there is in fact only one written document, and Mark Blake does not disagree or challenge that his signature was attached (albeit involuntarily) to a document. He however denies **dictating** the contents of any document, but instead refers only to an interview. I note that what has been produced includes twenty-seven questions and answers. In the complete absence of any actual evidence as to the existence of a document other than the one produced, and where the cross-examination of the police witnesses and the JP contained no specific details such as to cause doubt that there may be another document which Mark Blake signed, I find no difficulty in agreeing with the Prosecution that this ground of objection fails.

11) <u>The issue whether the written statement is entirely a fabrication</u>

This particular issue is connected to that addressed at paragraph 10 above. I accept that the written statement is not entirely fabricated and in the main, can be attributed to Mark Blake. The question to

[3] Cr App No 12 of 2008

be determined is whether the document produced, which I accept was signed by Mark Blake (however the Defence refers to it) was made voluntarily.

12) <u>The issue of the timing of the meal</u>

Relying on the three-step process outlined in ***R v Barry***[4], I agree with the Prosecution that this ground also fails in successfully challenging the voluntariness of the inculpatory evidence. Both Prosecution and Defence essentially agree that upon his arrival at station, during the initial interview around 7am, Mark Blake answered affirmatively to the question whether he wished to have a meal. I do not believe this request provides any causal connection to the incriminatory evidence in the nature of an inducement.

13) <u>The issue whether Mark Blake was subjected to physical violence</u>

ACP Moore gave evidence and denied the allegations put to him in cross-examination that he slammed Mark Blake against a wall, slapped him on his ears and cuffed him in his belly. He however did say that he attempted to effect a physical search of Mark Blake's person and he resisted violently. As a result, Mark Blake had to be subdued, with the assistance of other officers. ACP Moore noted that there was an injury to Mark Blake's wrist, as he observed the impression of the handcuffs. He agreed that the handcuffs would have to be very tight to cause such an impression. He also agreed that Mark Blake complained that the handcuffs were causing him pain. However, ACP Moore entirely disagreed with Mr Sturge that in the 'struggle' or in the joint activity of multiple officers to 'subdue' Mark Blake, that the prisoner suffered any injuries. Whatever force was used was required only to 'subdue', 'restrain' or 'hold down' Mark Blake in order to effect the search; all three terms being synonymous.

Mark Blake himself gave no evidence (as is his right) to support this ground of objection. The assertion was made in the written statement and in cross-examination of ACP Moore, which he denied. The medical report form details that upon examination by the doctor, "Nothing abnormal discovered." It is somewhat curious that the medical report did not disclose any finding consistent with ACP Moore's observation of the injury caused by the handcuffs. Nonetheless, there is nothing to contradict ACP Moore's denial of the particular allegations of physical violence.

Ultimately then, as long as I accept ACP Moore as a credible witness, this ground likewise fails. I will return to this point regarding credibility.

14) <u>The issue whether Mark Blake had the opportunity to have a relative or friend present</u>

Mrs Lyons-Edwards contends that there is support for me to find this as a fact, based on the evidence of all three police witnesses. Their evidence is analysed below.

i. **ACP Moore** stated in evidence that this right was indeed afforded. Mark Blake gave a telephone number for his brother Trevor to be contacted. The person to receive that call was Trevor's wife, Jessie Hall. ACP Moore, who was at a nearby desk, noted that Insp Sharpe made the call. He could not recall if anyone answered Insp Sharpe's call. Under cross-examination by Mr Sturge, ACP Moore confidently reiterated, "That is the honest truth, the exact number that Mr Sharpe called. I don't know the number of times he called. I know he get on a phone and he dialled a number. I don't know the number he dialled, but I know he would have dialled that number, because I know Mr Sharpe. He would have dialled the number."
ii. **ACP Edwards** also said that Mark Blake was given this opportunity to contact a relative. He said he asked Mark Blake if he wanted to contact a relative, to which Mark Blake responded

[4] (1992) Cr App R 384

affirmatively that he wanted to contact his brother Trevor, and gave ACP Edwards two telephone numbers (one of which matches that given by ACP Moore, but no mention of Jessie Hall is made). He further testified that Mark Blake spoke with someone, but he didn't know if it was his brother. Under cross-examination, ACP Edwards confirmed that he made the call himself and that Mark Blake spoke with someone. He stated that he overheard Mark Blake saying that he was under police arrest and he is at the Scarborough Police Station. He denied making this up.

iii. **Insp Sharpe** testified that (Sgt) Edwards (his rank at that time) asked Mark Blake if he wished to make a telephone call and Mark Blake said, "Yes", that he wished to contact his brother Trevor (nothing about Jessie Hall). He confirmed that Mark Blake gave two telephone numbers to (Sgt) Edwards. However, any mention of him making the call, whether to Trevor or Trevor's wife Jessie, is notably absent from Insp Sharpe's deposition. In fact, he is silent as to who, if anyone at all, made the call.

Mrs Lyons-Edwards did not invite me to accept the evidence of either ACP Moore or ACP Edwards on this point, yet to believe one certainly casts the testimony of the other in doubt. Again, I will return to the issue of credibility.

15) <u>The issue regarding the right to a lawyer</u>

i. **ACP Moore** simply said that he is aware that Mark Blake was told of his right to have his attorney, friend or relative at the time he was arrested.

ii. **Insp Sharpe** noted that (Sgt) Edwards "asked Mark Blake if he wishes to have an attorney. He replied, "Yes". (Sgt) Edwards asked him for the name and telephone number of his attorney. He said he does not know."

iii. **ACP Edwards** agreed that he asked Mark Blake if he would like to have his attorney present, that Mark Blake answered affirmatively, but did not know the name of his attorney. In cross-examination, Mr Sturge suggested that as an attorney himself, ACP Edwards ought to have appreciated that Mark Blake repeatedly expressed a wish to have the benefit of legal representation though he could not provide a name and number. What followed in the cross-examination was a sorry exchange between Mr Sturge and ACP Edwards (an attorney), during which ACP Edwards remained doggedly committed to answers which suggested a surprisingly poor appreciation of the value and importance regarding the Constitutional right to legal representation. ACP Edwards pointedly said that he asked Mark Blake if he wanted **his** lawyer, not **a** lawyer. He maintained this distinction between '**his**' and '**a**' lawyer. He testified that he told Mark Blake of this right to have '**his**' lawyer, not '**a**' lawyer, more than once. As a consequence, owing to the fact that Mark Blake did not provide him with a name and a number for **his** lawyer, there was nothing more to be done to give effect to this right. He spoke specifically of two instances, one at 7am and another at the start of the statement. He had however testified earlier in evidence in chief, that he "placed the Preamble of the Caution at the top of the Statement, read it to the Accused and he signed it." Written at the top of the Statement in question is a caution which includes the words,

"I have been told that I have the right of **a** legal adviser present."

There is certainly a substantive difference between what was written on the Statement Sheet and purportedly read to and signed by Mark Blake, and what ACP Edwards insisted that he said.

While this may appear to be a question of mere semantics, it raises a serious jurisprudential point addressed in the seminal decision on Constitutional rights and freedoms in Trinidad and Tobago. In

The Attorney-General of Trinidad and Tobago v Whiteman[5], the Board held that a person who was arrested or detained had the right to instruct without delay a legal adviser of his own choice and to hold communication with him. Lord Keith of Kinkel who delivered the judgment of the Board, made a distinct point that this right would be of very little value if the arrested or detained person is not properly informed of the right. His Lordship went further to add that, regarding the protection of human rights, the language of the Constitution must be construed purposively so as to **give effect** to its spirit.

Appendix A of the Judges' Rules notes that the Rules do not affect the principle(s) that:

> c) that every person at any stage of an investigation should be able to communicate and consult privately with a solicitor.

I remain unsatisfied that Mark Blake was informed of his right to have a legal adviser present, or that he could instruct a lawyer and hold private consultation with him. I find that I cannot be sure that ACP Edwards (an attorney) did not frustrate any opportunity to give genuine effect to this right.

16) <u>The issue regarding whether Mark Blake agreed to give a statement under caution</u>

i. **ACP Moore** testified that Mark Blake asked to speak with Insp Sharpe and after speaking with Mark Blake, Insp Sharpe called him over to them. He then heard Mark Blake say, "**Get me a JP. Let me say what happened**." He said that Insp Sharpe immediately cautioned Mark Blake who again said, "**Get me a JP**." According to ACP Moore, this particular conversation took place sometime around 10:30am.

ii. None of this is contained in **Insp Sharpe**'s evidence. To the contrary, Insp Sharpe said that around 9am, (Sgt) Edwards told Mark Blake of the report, that he intended to further interview him and cautioned him. Mark Blake shouted, "**Bravo. Bravo. Bravo. I don't know nothing about what this officer telling me**." Insp Sharpe then stated that a short while later JP Phillips arrived at the Station. After having a meal, (Sgt) Edwards introduced the JP to Mark Blake, told the JP of the report being investigated and cautioned Mark Blake. (Sgt) Edwards further told the JP "in the presence of the accused that **the accused wishes to make a statement in relation to the matter**." Under cross-examination, Insp Sharpe said that he was present at all times Vincel Edwards interviewed Mark Blake. **At no point in Insp Sharpe's evidence does he state that Mark Blake himself expressed any intention/desire/wish to give a statement under caution**.

iii. **ACP Edwards** agreed in all material respects with the account given by Insp Sharpe as to what transpired around 9am, with one exception, specifically that he provided the meal, before (not after) the JP arrived. In fact, on his account, he provided the meal before 9am. ACP Edwards said that he told the JP in the presence of Mark Blake, that the Accused was a suspect in a murder of Larry Phillips and attempted murder of Darren Anthony Picton and **that he had agreed to give a statement**. He further told the JP that he would like his presence during the recording of this statement. **At no point up to this conversation with the JP did ACP Edwards state that Mark Blake said he agreed to give a statement**.

iv. Contrary to both Insp Sharpe and ACP Edwards, the **JP** testified that on his arrival at the station, he was met by Insp Sharpe and that it was in fact Insp Sharpe who told him, "in the presence of the Accused that (Insp) Edwards is investigating a matter with respect to Mark,

[5] (1991) UKPC 16

the Accused, and that Mark would like to give a written statement, hence I was asked to be present when the statement was being recorded."

These are significant inconsistencies on an issue of grave importance. None of the officers involved in the recording of the written statement testified that Mark Blake ever expressed to them or anyone else his willingness to give a statement under caution. Nonetheless, ACP Edwards told the JP that Mark Blake agreed to do so, though the JP himself said it was actually Insp Sharpe who told him that Mark Blake would like to give a statement. In their accounts, they both stated that Mark Blake, in response to being told of the report and cautioned at 9am, shouted, "Bravo. Bravo. Bravo. **I don't know nothing about what this officer telling me**." ACP Moore is the only witness who purportedly heard Mark Blake say anything that could be construed as willingness to speak about the report against him. There is no support for this in Insp Sharpe's evidence, which I would expect if ACP Moore is to be believed. Further, ACP Edwards pointedly said that Mark Blake never asked for a JP.

Needless to say, contradictions and discrepancies between all of the Prosecution witnesses on this particular issue adversely affect the very foundation of any finding of voluntariness. Had it been true at all that Mark Blake told either one of the officers who spoke to the JP that he wanted to give a statement under caution, it is beyond belief that they would have neglected to state that fact in evidence. Had it been true that Mark Blake told Insp Sharpe, in the presence and hearing of ACP Moore, to get him a JP so that he could say what happened, it would be quite remarkable for that evidence to have been omitted by Insp Sharpe. Credibility of, not one, but all three police officers is in issue on this point.

17) <u>The issue whether the JP spoke privately with Mark Blake in order to satisfy himself as to voluntariness prior to the recording of the statement</u>

More than one issue arose in respect of the JP's enquiries before the recording commenced.

i. Firstly, it would be troubling enough if Sharpe, Edwards and the JP had all consistently testified that the conversation between Mark Blake and the JP took place in the same room with the officers. The question for determination then could be couched as suggested in Mrs Lyons-Edwards' submissions, inviting me to find that Mark Blake's right to have private audience with the JP was not in effect infringed. Arguably, perhaps details of distance, seating arrangements and body positions could have supported this. However, Mrs Lyons-Edwards preferred to base her suggestion on the fact that the "JP testified that when he spoke to the Accused, ACP Edwards and Insp Sharpe were unable to hear and that is the point.[6]" Frankly, this is a peculiar invitation, as it is clear that I cannot accept the JP's bald conclusion as to what anyone else in the same room can or cannot hear.

   Nevertheless, the circumstances are more troubling than the suggestion above. **Insp Sharpe** testified that the "Justice of the Peace **asked us to leave the room for him to have a conversation with the accused. We did so**. After a short while the Justice of the Peace called us and **we returned to that room**." **ACP Edwards** said in evidence in chief, "The JP asked to speak with the Accused **in private and I allowed him to do so**", but said under cross-examination, "**Myself and Sharpe did not excuse ourselves from the same room, just the general area**."

   JP Phillips did not help matters. In evidence in chief, he first said, "**Mr Sharpe and Edwards were present** when I asked him if any threats or promises were made to him to make the

[6] Submissions filed on behalf of the State, May 16, 2018, p. 17 para. 48(d)

statement." At the request of Mrs Lyons-Edwards, the JP was allowed to refresh his memory from his deposition and then said, "**The Accused and I were alone** when I asked him certain things." Under cross-examination, the JP further complicated matters by giving two alternate versions. At one point he said, "**Sharpe was out of the room** when I spoke to him. I asked him to leave the room. **Edwards had not yet come into the room**." At another point he said, "That is correct, **we were on one end of the room and Sharpe was on the other end. I can't say for sure what Sharpe could hear or not hear or see or not see**."

Frankly, I am unable to believe that the JP spoke with Mark Blake privately.

ii) A second issue arising here relates to the **sufficiency** of the JP's enquiries. The JP asked **one** question of Mark Blake; whether any threats or promises were made to him to give the statement. That was the extent of his enquiry. In cross-examination, the JP admitted that he needed to satisfy himself in a private conversation with Mark Blake that the requirements for voluntariness were met. He agreed with Mr Sturge that he did not ask nor tell Mark Blake about his right to have a lawyer or relative present. He further agreed that he did not explain the purpose of his presence to Mr Blake. **More significantly, the JP agreed that it was Sharpe and not the Accused himself who told him that he wanted to give a statement**. He also agreed that he made assumptions that the statement was voluntary, that Mark Blake was not beaten and that he was told of his rights. The JP conceded that his Certificate of Authentication as to voluntariness was inaccurate. Had JP Phillips made proper enquiries, then the Court could have possibly had the benefit of evidence from an independent person attesting to circumstances supporting voluntariness, as contemplated by the guidance in the Judges' Rules.

18) <u>The responses to the allegations of ill-treatment and physical violence</u>

Mrs Lyons-Edwards put forward two views on this matter. She noted the **timing** of the allegation, in that it was made by Mark Blake **after ten pages** had been recorded. At the beginning of page eleven, Mark Blake stated that he had to make a request to put on his jersey (**the natural inference being that he was not wearing one at that time**). He then says that Officer Moore was rather forceful in assisting him with the jersey and he complained that it was causing pain. He then stated that, "He say stop playing the fucking ass and slam me against the wall and hit me a slap in me ears **causing me to injure me foot, me hand and me ears**. Apart from that **I asked to speak to Officer Sharpe that is when I decided to give a statement**."

Apart from ACP Moore, not one other witness stated and/or maintained that Mark Blake told them he wanted to give a statement. That it was only ACP Moore is itself suspicious, as he is the one against whom the allegation of physical violence is made, and significantly, not even Insp Sharpe corroborated Moore's evidence that Mark Blake asked for a JP to tell all.

More particularly, it would appear from the State's case, that it is only at this point, **for the very first time**, that any of the persons in some authority involved in the recording of this 'voluntary' statement heard an allegation of ill-treatment. That is not insignificant. So many possibilities exist which could have been implemented by any of the two officers and/or the JP, which could later be juxtaposed with the findings of the doctor, to cause this ground of objection to fail. The fact that at the end of the day, any issue of injury and/or pain, whether in a shoulder, foot, hand or ear, was unsupported by the doctor's examination, is of little moment because at the time this issue was raised, apart from mere physical observation that Mark Blake was fine/normal/healthy, there was no competent and definite knowledge upon which to conclusively deal with the question of whether it had the capacity to affect

the operation of his mind, **notwithstanding the appearance of lucidity**. The allegations relating to the need to ask for his jersey and the physical violence causing injury were simply recorded.

Was there a failure on the part of the police officers and/or the JP when the allegations regarding clothing and violence arose, and if so, is there a causal connection with the issue of unfairness and voluntariness? Can I be sure that the free will of Mark Blake might not have been sapped in some measure, however small, as a result of not being properly clothed or the pain which he reported? I agree with the argument proffered by the State and accepted by Mohammed J (as he then was) in ***The State v Harrinarine Achalal***[7]:

> "that the initial judgment of fitness to be interviewed is one for those present at the time. In the case of reported and/or observed physical injuries on a suspect, there will be possibly some so minor and obviously insignificant, that it would be pointless for the police to offer medical attention. It is always a question of degree and each case must be looked at separately".

However, I find that the breach/unfairness in failing to frontally address the allegations, by applying any type of assessment or enquiry once raised, and the potential to affect voluntariness was compounded by the actual response of those persons in authority. In the presence of a Senior officer (at that time, Sharpe was senior) and a JP, both of whom were present to meet the requirements of the Judges' Rules, **ACP Edwards responded to these allegations by proceeding to ask twenty-seven questions**. The issue is not whether the questions were in breach of the Judges' Rules, but rather the complete failure to address two complaints which now present as grounds of objection. Punctuating the allegations and the twenty-seven questions are these words attributed to Mark Blake, "Apart from that I asked to speak to officer Sharpe **that is when I decided to give a statement**." The significance to the issue of voluntariness could not have been lost on an attentive and independent JP.

The inescapable question for me is this: **What was operating on Mark Blake's mind when he decided to give the statement?** I agree with Rahim J when he noted in his ruling on the voir dire in ***The State v Andrew Floyd***:

> "The essence of voluntariness and fairness is this: What ought to operate on the mind of an Accused throughout any admission is an understanding and appreciation that he has the right not to incriminate himself; that he willingly and of his own free will decides that notwithstanding the existence and entitlement to that right, he wishes to confess or admit something incriminatory."[8]

Respectfully, there remains a lurking doubt as to what operated in Mark Blake's mind before giving the statement and throughout its recording. I am particularly unsure that there was no issue regarding his jersey and any physical violence as the reasons which operated on his mind to loosen his tongue.

19) <u>The pause in the recording of the statement</u>

Mrs Lyons-Edwards has invited me to find that the fact that the officers stopped the recording of the statement when Mark Blake requested medical attention, and took him to the Scarborough Regional Hospital, before returning to resume and complete the statement, supports a general finding of fairness to Mark Blake. Such a contention is not completely devoid of merit. However, the

[7] HCA 111of 2003, at p. 14
[8] Ruling 1, CRS:40/09

circumstances surrounding the pause and subsequent resumption, as it relates to the overall integrity of the entire process and veracity of the witnesses, give rise to considerable doubt.

i) **ACP Edwards' account** – "Around 3pm that day **the Accused informed me that he wanted to be medically examined and he was not continuing with the statement**. I stopped the statement there and then and took the Accused to the Scarborough General Hospital and the Accused was medically examined. … We left the station at 3pm and returned at about 5:40pm. … When he returned, he agreed to continue with the statement and **we continued the statement. At the completion of taking** the statement, I indicated for him to read it over and to correct, alter or add anything he wished. He indicated that he would want me to read it over for him. **I read it over for him** and advised him he can correct, alter or add anything **and he made an addition**."

ii. **Insp Sharpe's account** – "At 3pm on that date, **Accused Mark Blake said that he was not feeling well and wanted medical attention**. (Sgt) Edwards and myself took him to the Scarborough Regional Hospital where he was medically examined and discharged. Around 5:35 on that date, we returned from the hospital with the Accused. **Around 5:40 (Sgt) Edwards commenced recording the statement** from the Accused Mark Blake. … On completion of that statement the Accused signed same. **It was read back to him, he said everything was okay**. **He was asked to make any changes or correction; he did not make any**."

iii. **JP Phillip's account** – "There was a break around 3 o'clock. **Mark Blake at that point said he was having a pain on his shoulder and that he would like to be taken for medical attention**. (Sgt) Edwards stopped taking the statement and the police took Mark Blake for medical attention. … He came back later. **(Sgt) Edwards then continued taking the statement from where he had left off. … (Sgt) Edwards continued recording the statement**. When he was finished, he asked Mark Blake whether he would like to read the statement and he said let Sgt Edwards read it for him. **(Sgt) Edwards read it to him and told him he could make any additions or alterations. He said it was okay, he had no corrections to make**."

iv. **ACP Edwards' Certificate** – "**At the end of recording this statement I asked Mark Blake whether he wanted to read the statement and he asked that I read it for him**. I then told him that he can correct, alter or add anything to the statement when it is read over. I then read the statement aloud and again asked him whether he had anything to correct alter or add. **He made addition which was recorded and read over to him**. **He <u>then</u> requested to be medically examine**. The process of recording was stopped at 3pm today and he was taken to the Scarborough Regional Hospital…"

v. **JP Phillips' Certificate** – "The statement was then recorded and **at the end he said before signing same he would like to be medically examined**. He was then taken to the Scarborough Hospital at 3pm."

In evidence, the witnesses all said that Mark Blake stopped the recording requesting medical attention. Recording continued after returning from the Hospital. The statement was **THEN** read over and signed. This is inconsistent with the Certificates at the end of the statement, which both state that the **END and READING OVER came before the request for medical attention**. Further, Insp Sharpe and JP Phillips clearly stated that **no changes** were made upon the reading of the statement and being advised that he could correct, alter or add anything. ACP Edwards said in evidence and wrote in his Certificate that **an addition was made and read over**. The JP's Certificate makes no mention of being

advised of his ability to make changes or whether he made any. These particular inconsistencies and discrepancies are of profound importance regarding whether the witnesses can be believed that the statement was made voluntarily.

vi) **The contents of the statement itself** – After the 27th question, and immediately before what purports to be Mark Blake's signature: "**I want to add that I will like to stop here for now and to be medically examine before I continue with this statement. I am stopping here at 3pm**. **I was medically examine at the Scarborough Hospital and continuing with this statement at twenty to six today in the evening.**" This certainly reads 'dictation'-style in accordance with the Judges' Rules. Frankly, that Mark Blake dictated these particular words seems highly improbable. Even worse, if the JP is to be believed, then recorded in the statement itself should be words to the effect that Mark Blake was having a pain in his shoulder. Notably, any such reference is non-existent in the body of the statement or either of the two Certificates of authentication at the end. The Judges' Rules required ACP Edwards to take down the exact words spoken by Mark Blake.

20) The issue of secondary evidence – the photocopy of the confession statement

Both sides presented extensive submissions on the failure to account for the absence of the original caution statement and the admissibility of the copy. I find no need to address this in any greater detail than to refer to the following excerpt from ***Kajala v Noble***[9] with respect to the best evidence rule and the reception of secondary evidence:

> "The only remaining instance of it was that if an original document is available in one's hands, one must produce it, that one cannot give secondary evidence by producing a copy. Nowadays, we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility."

Therefore, if I can believe that ACP Edwards handed over the original statement, which cannot now be produced, then so long as the voluntariness and admissibility of the statement has been established, the copy can certainly be admitted.

21) Credibility

It is patently clear from the factual analysis thus far, the evidence of the witnesses for the Prosecution is fraught with difficulties. There are precious few points of consistency. In respect of almost every material issue discussed above, there is, at best two, but generally several different accounts.

It is often the case that where the Defence challenges the admissibility of incriminatory admissions, that it falls to the trial judge to weigh the oral evidence of the one side against that of the other. This case is rather quite different in that, though Mark Blake himself gave no evidence (as is his right), I find myself faced with the question as to who I believe; only in this situation, it is a question of which Prosecution witness is credible and which cannot be believed. The Prosecution's case is replete with contradictions, inconsistencies, discrepancies, several breaches of the Judges' Rules, in some respects inherent implausibility, and a general cloud masking the integrity of the police conduct. The Court is left with a considerable amount of disquiet as to whether any of the witnesses can be preferred.

A crucial factor adversely affecting credibility relates to the circumstances under which the original statement cannot now be produced. ACP Edwards stated time and again that, in no uncertain terms, he handed the original statement to State Counsel Renuka Rambhajan. He is equally sure that this

[9] 75 Cr App R 149

handing-over occurred at the Scarborough Magistrates' Court around August 2007. Renuka Rambhajan gave an account of her handling of the case file while assigned to prosecute Mark Blake in the committal proceedings. She referred to detailed records of dates, conversations, requests and the return of the file with an accompanying Memo in March 2007. She noted that she had no further involvement in this matter and further, in the period July and August 2007, she was assigned to the Assizes. State Counsel Rambhajan firmly and categorically stated that, though she made several requests for the impugned statement from ACP Edwards, she never received same. With utmost respect to an alternate suggestion by Mrs Lyons-Edwards, I find that in light of the totality of the evidence outlined in detail above, this bald contradiction in the unchallenged final piece of evidence tendered by the State, proves to be **utterly fatal to the credibility of ACP Edwards**.

All allegations raised in the grounds challenging voluntariness, where I am placed in the unfortunate position to prefer one Prosecution witness over another, remain shrouded in doubt. Greater hardship is experienced when the witness I am expected to rely on is ACP Edwards. Simply put, it is most improbable that a witness would be lacking credibility in major parts of his testimony, but at the same time credible with respect to the remaining parts. On the basis of the indivisibility of credibility, I am unable to agree with Mrs Lyons-Edwards that there is no merit in the grounds of challenge based on bare denials.

22) Admissibility

In ***Wong Kam-Ming v R***, per Lord Hailsham,

> "Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is until that persons in custody or charged with offences should not be subject to ill-treatment or improper pressure in order to extract confessions. It is therefore of great importance that the courts should continue to insist that because extra-judicial statements can be admitted in evidence the Prosecution must be made to prove beyond a reasonable doubt that the statement was not obtained in a manner which should be reprobated and was in the truest sense voluntary."[10]

In ***Allie Mohammed v The State***[11], Lord Steyn delivering the reasons of the Judicial Committee, (quoting from Lord Hodson in ***King***) suggested the following approach for the judges-

> "On the one hand, the judge has to weigh the interest of the community in securing relevant evidence bearing on the commission of serious crime so that justice can be done; and on the other hand, the judge has to weigh the interest of the individual who has been exposed to an illegal invasion of his rights".

In this balancing exercise, Mrs Lyons-Edwards has reminded me of and urged the use of my judicial discretion in spite of breaches of the Judges' Rules. The guiding principle quoted ad nauseum in submissions and rulings on practically every voir dire in the past decade in this jurisdiction is that expressed by Their Lordships of the Judicial Committee of the Privy Council in ***Shabadine Peart v The Queen***[12]:

[10] [1980] AC 247, at p. 261
[11] (1998) 53 WIR 444 PC
[12] PC No 5 of 2005

"1. In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence …

2. From the foregoing discussion it is possible to distil four brief propositions:

(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed;

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. **A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules**[13]; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed;

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement;

(iv) **The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules**[14]; but the court may rule that it would be unfair to do so even if the statement was voluntary."

In ***The State v Phillip Placid***[15], where similar issues of breaches arose, Volney J (as he then was) made the following observations –

"In all cases, a flagrant breach of the injunctions of the Judges' Rules is an affront to, and blatant disregard of the careful guidelines set out for the guidance of the police and must attract the censure of the court. In deciding upon the sanctions necessary to meet with the justice of any case, a court is to be mindful of the nature, context, and extent of the breach, and, the steps taken, if any, **to distil the investigation of the non-compliance**[16]. The approach must be pragmatic, and just, and in accordance with the principle of the law both in its letter and spirit. This may only be achieved by excising the wrongly extracted benefit no matter the implications to prosecution, and no more".

I found inestimable guidance in the case of ***Hunte and Another v The State of Trinidad and Tobago***[17], where during the voir dire, the trial judge received conflicting accounts of the circumstances leading to the disputed confession evidence. The Judicial Committee noted that the failure of the police to allow Hunte to speak with his lawyer in private was inexcusable. On the facts, Hunte's lawyer was told he could only speak with his client in the presence of the officers. Indeed, his attorney was only able to have a brief whispered conversation, during which he advised Hunte to say nothing at all.

[13] Emphasis mine
[14] Emphasis mine
[15] Cr No 113 of 2003
[16] Emphasis mine
[17] [2015] UKPC 33

The Board noted that though there were a number of seriously unsatisfactory features regarding the confession evidence, they did not conclude that Hunte had been deprived of a fair trial. In spite of the deficiencies, there was no doubt that Hunte went on to sign the written confession statement **in the presence of a JP, who had earlier spoken to him privately and enquired whether he had been properly treated**.

Notwithstanding the departures from the guidance in the Judges' Rules, I still have a discretion to admit the impugned evidence to be examined by the jury on the general issue. The use of that discretion however does not dispense with the need to be first satisfied to the requisite standard on the question of voluntariness. In respect of assessing the voluntariness of Mark Blake's admissions, I was simply unable to rely on the Prosecution witnesses as truthful and I regret that I am unable to find a reflection of any meritorious circumstances such as those which successfully preserved some modicum of protection of Hunte's rights.

23) <u>Conclusion</u>

I find that the Prosecution has failed to discharge its burden to prove beyond reasonable doubt that Mark Blake gave the written confession statement voluntarily, and not as a result of oppression or threat or inducement. Faced with challenges to their testimony, I found the Prosecution's witnesses to be untrustworthy and less than credible. To say that I have been made to suffer profound doubt is no exaggeration. The integrity of the general conduct of the police witnesses in particular has left me with great disquiet. Though Mrs Lyons-Edwards urged me to consider the 'ring of truth' in the confession itself, the law does not permit the police to rely on questionably extracted confessions for the purpose of obtaining a conviction, **even if the confession is true**. As it relates to the deeply entrenched privilege against self-incrimination, where voluntariness cannot be established, the ends cannot justify the means.

I am reminded of the concern noted by the learned Justices of Appeal in ***Michael Ramdawar and Anthony Armogam v The State***[18]. The Court held that it was clear from the strong and robust direction to the jury in how they should treat the confession statements (being the only evidence against the Appellants), that the trial judge had strong suspicion and doubt about the voluntariness of the statements, and they ought not to have been placed before the jury.

Accordingly, I will not permit the admission of the written statement. With respect to the oral utterance attributed to Mark Blake upon arrest, I find that equally and by parity of reasoning regarding the indivisibility of credibility, there is likewise no legitimate basis upon which to admit same.

Both the written statement and the oral utterance are therefore excluded.

LISA RAMSUMAIR-HINDS
JUDGE
18th May 2018

[18] CA Crim 32/2001; CA Crim 33/2001