THE REPUBLIC OF TRINIDAD & TOBAGO

THE HIGH COURT OF JUSTICE

CR 5004/06

BETWEEN THE STATE

-v-

NIMROD MIGUEL

RULING ON VOIR DIRE

BEFORE THE HONOURABLE MR. JUSTICE IAN STUART BROOK (Ag.)

IN THE SAN FERNANDO SECOND ASSIZE

MS. MAURICEIA JOSEPH AND MS. ANGELICA TEELUCKSINGH on behalf of the STATE

MR. CAPILDEO MAHARAJ AND MR. RAMESH DEENA on behalf of the DEFENDANT

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Ian Stuart Brook J. (Ag.):-

1. On 4/1/08, I commenced hearing a voir dire, which concluded yesterday, to determine the admissibility of the accused's written statement under caution dated the 25/1/04 and timed at 4:05pm ('the statement'), pursuant to written grounds, filed on 3/1/08, of some 26 paragraphs ('the Grounds'). As they are filed, I do not quote them, but merely annex the document hereto.* Paragraphs 2, 3 & 16 were abandoned at the start of the voir dire; paras 20, 21 & 22 were combined into one; and after some vacillation, Mr Capildeo Maharaj, advocate attorney for the accused, amplified paragraph 25 in terms that the Police could have charged him, after the pre-statement interview, at 12:50pm, on 25/1/04 ("the interview"), and, at that juncture, para (d) Appendix A of the Judges' Rules and Rule III thereof had been triggered. I should add, for completeness that this interview was not relied on, at committal, but was served as unused material, and this case is yet another example of, and pre-dating, what I said at paragraph 8 of *the State v. Winston Phillip* HCA 27/2004 and at pages 3-5 of *the State v. Jawan Jaggernath*, HCA 35/05 under the rubric "Interviews—Recommendation".

* Appendix A, *post*

2. Having heard from the various prosecution witnesses on the voir dire, I am satisfied so that I am sure, on the State's case, that the statement was given, to the Police, in the presence of the JP, Mr Ezra Dube, in the manner stated by him and Constables Renwick and Hamid. I do not have even a scintilla of reservation in accepting the evidence of the prosecution witnesses, which was clear, cogent and most compelling. I was particularly impressed by the evidence of these 3 witnesses, out of all the witnesses called by the Prosecution. Mr Capildeo Maharaj conceded, yesterday, somewhat realistically, for which the Court commends him, that he had made no inroads into their credibility whatsoever. At pretty well each and every turn in the investigation, witnesses testified that they had complied with police procedure by making records in the Station Diaries, which had been disclosed to the defence beforehand and/or inspected, in Court, before my very eyes. This was only challenged on a single occasion, when a witness testified that he had recorded/caused to be recorded the caterer's bringing meals for the accused and 2 other prisoners, whereas the record was to the effect that he had brought a meal for the accused alone. I remind myself that I may only use the fact that events were recorded as demonstrating compliance with procedure and not so as to bolster credit by way of prior consistent statement.
3. I am also sure that, *in the manner testified to by the prosecution witnesses*, the accused:
    - Was cautioned under R.II & III of the Judges Rules;
    - Was informed of his Constitutional Rights to a lawyer, relative or friend;
    - Did not request to see his mother or make any other request which was denied him;
    - Made no requests to make any telephone calls to anyone;
    - Was not denied the right to brush his teeth and/or wash his mouth, have a bath or proper toilet facilities;
    - Was given adequate nourishment and given beverages;

- Was held in a cell which had a flushing toilet, was not strewn with litter, nor infested with cockroaches and was not "in a very in-sanitary condition";
- Was provided with a mattress on which he might sleep and that he was not made to sleep on a concrete bunk;
- Was made aware of the identification of the interviewing officers;
- Was in a position to see and read the Notices to Prisoner posted on the walls of the Homicide Office, which were read out to him, in any event—I do not believe the accused's evidence that he could not read *at all*, at that time, but that he started to read the Bible on arrival at the Remand Yard a few days later. I note that an inability to read was not pleaded in the Grounds—merely that he could not read the Notices as they were too far away—and that the former was not raised with any Police Officer in cross-examination—it was merely put that he had not read the statement;
- Was consulted by Mr Ezra Dube, in private, who identified himself to him as a JP, to ascertain whether his statement was to be given voluntarily;
- Was never asked by the JP if he knew "a certain woman";
- Was never told by Constable Renwick that if he signed a pre-prepared statement he would go home.

4. I hold that there is no requirement for an arresting officer to invite an arrestee to take with him to a Police Station a change of clothing, a toothbrush and toothpaste, soap or a towel, as pleaded at para. 4 of the Grounds, and note that this was not pursued in Submissions and that the accused conceded, in evidence, that he never asked the Police if he could brush his teeth, have water to wash his mouth or have a bath. Incidentally, the accused testified that his mother had taken clothing and toiletries to the Magistrates' Court at his first appearance, and he presumed that the female, with whom he had been arrested, must have informed her of his whereabouts. Counsel did not challenge the prosecution evidence of, now, Sgt (Ag.) Hamid: "I also enquired if

anybody had come to check him and he indicated that he was told his mother was there in the morning". There is no evidence that the mother or any other relative or friend endeavoured to communicate with the accused at the Police Station or drop off clothing and toiletries, which was denied them by the Police. On the State's case, the accused was arrested at an abandoned house, where there was little other than a couple of beds—one being broken—a table-top stove with no gas bottle and a few items of clothing. The suggestion to pack "an over-night bag" seems far-fetched in these circumstances, albeit that the accused testified that the house was far from abandoned and was the home of his girl-friend from whom, however, there being no burden on the accused, the Court did not hear.

5. I am satisfied so that I am sure that the accused gave the statement, for reasons best known to himself, to which I shall return in a moment, voluntarily, that he was not subjected to violence and oppression, or offered an inducement or promise and that it was obtained in circumstances which were fair to him.
6. In my view, this is yet another of the many examples that I have seen, both in our jurisdiction, and indeed elsewhere, where suspects are perhaps too anxious to try to exonerate themselves, in the Police Station, and seek to blame others for a killing arising out of a criminal venture in which they admit to having acted with confederates, in ignorance of the law as to joint-enterprise and the felony murder rule. Both during my time at the Bar and now on the Bench, one notes the regularity with which accused persons only seek the services of an attorney, after charge and at/after the first appearance at the Magistrates' Court. There are doubtless many reasons why this is the case, some of which are all too obvious, but are not for me to raise here.
7. What is important is that I am satisfied so that I am sure that the accused person was treated appropriately and fairly and advised, over and over again, of the R.II Caution, that he had the right to an attorney, relative or friend and a phone call, that the Notices to Prisoner were displayed and read out to him and, moreover, and importantly, following the practice suggested by Davis JA in *Whiteman*[1], the Preamble to the statement bears these concluding words: "I have also been informed of my Legal Rights to have a *(sic)* Attorney" and the accused's signature appears

[1] (1991) 39 WIR 397

slightly to the right of the solitary word "Attorney" appearing on the last line of that Preamble. The statement bears the interviewee's certificate from the Judges' Rules which confirms that the accused had read the statement. I do not believe the accused's evidence that he could not read *at all*, at the material time, but somehow, miraculously, started to read the Bible on arrival at the Remand Yard and, within a year and a half was able to read the 23rd Psalm, but, yesterday, purported to be unable to read the entirety of this certificate, faltering with the odd word, including "statement", but thereafter recited part of this Psalm including the word "righteousness", there being no suggestion of prior rote learning, perhaps at school/home, but testified that he had *read* it in the Remand Yard. For completeness, the accused testified with a most severe speech impediment—a stammer—and his faltering was, in part, due to this. *En passent*, I found it strange that the Court heard of this, for the first time, during the accused's evidence-in-chief, albeit that the JP had been asked if the accused had read the statement 'fluently or slowly' and the witness could not recall. The accused's present speech impediment is so severe that I cannot imagine that anyone who had interacted with him would have failed to recall it, provided, of course, that he was labouring under such impediment at the material time. I can well imagine other lines of cross-examination which could usefully have been explored if this was the case, with certain witnesses, but it is not necessary for me to go into those here.

8. Having disposed of grounds based purely on fact, there only now remains for me to consider the argument under the Judges' Rules (R.III Caution and breach of Principle (d) Appendix A—see para. 1 *supra*), albeit that it was abandoned, by the defence, in Submissions.
9. Counsel eventually, quite properly, withdrew the R.III argument when I drew his attention to what de la Bastide CJ (as he then was) said in *Kenrick London v. the State*, Cr.A.No 24/2002, at page 7 concerning the R.II & R.III Cautions and the R.V Preamble.
10. Even with assistance from the Court, Counsel and his instructing attorney seemed to be in some difficulty in formulating the relevant submission on the Principle (d) argument, eventually abandoning the same after conceding, rightly in my view and

that of the State, that there was no evidence to charge the accused with murder, on joint-enterprise principles, but wrongly, in my view and that of the State, that the interview did *not* contain evidence of the ingredients of murder under the Felony Murder Rule. Accordingly, I requested the assistance of State Counsel, notwithstanding that Counsel had abandoned his submission.

11. In the interview, the accused admitted, *inter alia,* to planning with others to go see if they could get a car; at a certain point 2 of them jumped out of their car and said they were taking a particular one; the accused and 2 others stayed in their car whilst 2 others jumped in the man's car and drove off with it; the car in which the accused was followed the hijacked car to where it stopped; one Miguel (not the accused) took the man into the cane field to tie him up; the accused and another searched the car and found drugs; on returning from the cane field, when asked, by another, Miguel said that he had not tied the man's mouth; the accused went and tied his mouth; Miguel returned with *the* gun and told the accused to "bus one in the man head"; the accused declined and walked off; Miguel shot the man; they ended going up New Grant with the stolen car; the next day the accused helped others remove the number plates on the stolen car and replace them with new ones; that same night the car was hidden; the gun was a 32; Miguel had the gun "right through".
12. In *R. v. Powell; R. v. English*[1999] 1 A.C. 1, HL, it was held (following *Chan Wing-Siu v. R.* [1985] A.C. 168, PC), that a secondary party is guilty of murder if he participates in a joint venture realising (but without agreeing thereto) that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does so. The secondary party has lent himself to the enterprise and, by doing so, he has given assistance and encouragement to the principal in carrying out an enterprise which the secondary party realises may involve murder. Both sides agreed, rightly, in my view, that on the basis of the interview, the State could not prove the requisite degree of foresight.
13. The constitutionality of the reintroduction of the Felony Murder Rule had finally been confirmed by the Privy Council, in *Haroon Khan v. the State*, Privy Council Appeal No. 28 of 2003 to which reference should be made as to the background, history and

statutory provisions etc. It is noteworthy that their Lordships delivered their opinions on the 20rd November 2003, around 2 months prior to the arrest of the accused.

14. The interviewing officers testified that they discounted joint-enterprise thinking that Miguel had gone outside the scope of the joint-enterprise. As regards felony murder, Constable Hamid testified that: "at those times we were not considering Murder Felony Rule; reason being that there were too much uncertainty with that aspect of the law, too much issues needed to be cleared up so we didn't consider that. On 25/1/04 I was not aware of Privy Council judgment in *Haroon Khan*." Constable Renwick testified in similar terms: "I knew about the law of murder felony at that time – that I knew there were some problems and uncertainties with respect to that law and we did not consider it at that time. After that oral interview on 25/1/04, around that time I was not aware of the Privy Council judgment in *Haroon Khan*." Renwick, the Complainant, went on to testify that this was his first murder investigation.

15. Other than that the information that the Police had—mentioned in the interview—that the accused was "the shooter", came from the statement under caution of a suspect Aaron Sylvester, I know not what is contained in that document, which the defence confirmed having received as 'unused material'. However, on undisputed evidence, Mr Gaspard, of the DPP's office, took the decision that he should become a State witness and also directed that the accused be charged with murder, on the 26th January, the day after the accused gave the statement. For completeness, I should add that Sylvester was treated as a hostile witness at committal.

16. To my mind, it is quite plausible that a mere 2 months after that ruling, that officers, on the ground, particularly in San Fernando, had not heard of it, and I have no hesitation in believing their evidence on this. Accordingly, it is clear to me that they were acting with *bona fides* and that they did not sally forth and seek to obtain more damning evidence implicating the accused, being aware that they had sufficient evidence under their belts, already, with which to charge him under the recently sanctified felony murder legislation, *deliberately* breaching Principle (d) of Appendix

A of the Judges' Rules and invading his Constitutional Rights[2]. Were I to have found as a fact that they did or may have done this, then I would have had no hesitation in excluding the statement[3].

17. Subjectively, the officers did not believe that they had sufficient evidence to charge, but what is the position when viewed objectively? I share the view of Deputy Judge Li, in *HKSAR v. Kwan Tsz Ngon*, 1997 No. HCCC 265 that Principle (d)[4] applies in circumstances where: (1) where the sum of evidence in the hands of the police viewed objectively is enough for laying charge, or (2) where the officer conducting the investigation subjectively believes that there is enough evidence to charge.

18. Whilst the State conceded, with which the defence, surprisingly, disagreed, that the elements of murder, under the felony murder rule were contained within the interview, is this "enough evidence to prefer a charge against that person for the offence"? Whilst an oral admission is sufficient to found a conviction for murder[5], one notes the regularity with which accused persons disavow alleged admissions at trial, particularly, for understandable reasons, in capital matters. The record of the interview was not signed by the accused, so that it was not capable of becoming an exhibit; at most it was an aide-mémoire in the hands of the interviewing officers. One notes that this case pre-dates *Frankie Boodram v. the State*[6], which was handed down on the 17th February 2004, just short of a month after the interview. I am mindful of the observations made by the Honourable Chief Justice in that case[7]. Whilst it would not be open to Counsel to argue that *Frankie Boodram* is retrospective, it is commonly argued that the interviewing officers *could always have* asked the accused to sign the alleged contemporaneous notes, and, in the absence of that having been done, the jury is usually invited not to believe that the accused gave the oral admission at all. I hasten to add that it was the accused's case on this voir dire that he

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[2] To which the Judges Rules have been elevated—see *Mukesh Chandradath & Zanna Andrews*, Crim. No. S67 of 2001, *Phillip Placid*, Crim No. 113 of 2003 and *Suresh Sing, a/c Rudy Singh*, Cr.No. 46 of 2002.
[3] See Lord Steyn's observations in *Allie Mohammed v. The State*, (1998) 53 WIR, 444, 454-5, P.C.
4 Principle (d): That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or inform him that he may be prosecuted for the offence.
[5]see *François v. the State*, (1988) 40 WIR 376.
[6] CrA. No. 17 of 2003
[7] at pages 16-17.

gave neither the interview nor the statement at his dictation—both, effectively are alleged fabrications, although it is hard to imagine why officers would fabricate admissions as to guilt by resorting to the felony murder rule, bearing in mind their evidence as to their knowledge as to the confused state of the law at that time, when it would have been so easy for them to have fabricated both in terms that the accused actually shot the deceased, which would then have accorded with the information they had, in the statement under caution of Aaron Sylvester.

19. I share the view of the Judges in Hong Kong that it would be an "inadequate investigation" of the offence if the Police had not gone on to seek to obtain confirmation of the bald admission of the interview[8]. This could have been done either by inviting the accused to sign the notes of the interview, or, as here, to give a written statement under caution. Support for the view that the Police, acting reasonably, would not have preferred a charge, at that early stage, is to be found in *R. v. Collier and Stenning*[9].
20. Accordingly, I hold that Principle (d) had not been triggered by the interview.
21. Alternatively, if I am wrong about that, and it *had* been triggered, and, according to the view of R.III held by myself[10], my sister Madame Justice Yorke Soo-Hon[11], my brethren in Hong Kong[12] and other English Judges[13], as opposed to that of Parker CJ in *Collier and Stenning, ibid,* a R.III, as opposed to a R.II caution ought to have been administered, before the commencement of the statement, what is the effect of such breaches? Further, the interviewing officer went on, during the statement, to ask the accused a series of questions, which, *prima facie*, were proscribed by R.III(b) of the Judges' Rules, when, in my view, although I was not addressed on this aspect of the

[8] See, *HKSAR v.Yip Siu Tak*, HCMA 364/2001, para 13
[9] [1965] 3 All ER 136, 138-9, albeit that I have expressed my disagreement with another aspect of the case—the view held by Parker CJ on the applicability of R.III, preferring the view held in Hong Kong.
[10] See t*he State v. Jawan Jaggernath (aka 'Jerry')* Cr. S. 35/05
[11] See *the State v. Dennis Nebblett*, Case No. 32105, page 13
[12] See *HKSAR v. Yip Siu Tak*, HCMA 364/2001 and *HKSAR v. Kwan Tsz Ngon*, 1997 No. HCCC
[13] See *R. v. Prager* [1972] 1 All ER 1114 (at first instance, with no adverse comment on application of R.III, on appeal)

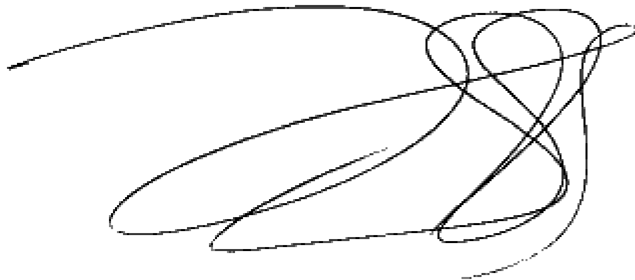
case by Counsel on either side, they could not be said to fall within the exception to the Rule[14], and this requires consideration.

22. Even if Principle (d) and R.III were *not* triggered, those questions were, in my view, in breach of R.V(d). In my judgment, interviewing officers should proceed by way of a statement under caution *or* contemporaneously recorded questions and answers (with each Q & A signed by the accused) and not by way of an amalgam of the two[15]. Although, of course, as I, and others, have said before, it is high time that the Police turned to audio or, better still, audio/visual recording of interviews in this day and age.
23. It is clear that I have discretion to admit evidence obtained in breach of the Judges' Rules, provided the Police did not deliberately frustrate a suspect's constitutional rights[16], notwithstanding their elevation to that status[17].
24. On the one hand, I have to weigh the interest of the community in securing relevant evidence bearing on the commission of serious crime so that justice can be done. On the other hand, I have to weigh the interest of the individual who has been exposed to an illegal invasion of his rights. The fact that there has been a breach of a constitutional right, if that be the case here, is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, I must perform a balancing exercise in the context of all the circumstances of the case[18].
25. I have no hesitation in exercising my discretion in favour of the Prosecution, in respect of the breach of R.V(d), and, additionally, *if* there have been breaches of Principle (d) and R.III. Over and over again, the accused was reminded of the R.II Caution, that he had the right to an attorney, relative or friend and a phone call, the Notices to Prisoner were displayed and read out to him, which he said he understood, and he confirmed that he was informed of his right to an attorney in the R.V

[14] Necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.
[15] See *State v. Jawan Jaggernath*, HCA 35/05 under the rubric "Interviews—Recommendation".
[16] See, *Kenrick London v. the State*, Cr.A.No 24/2002 and *Allie Mohammed v. The State*, (1998) 53 WIR, 444, 454-5, P.C.
[17] see the learning to be found in the cases cited at fn.2
[18] See, *Allie Mohammed v. The State*, (1998) 53 WIR, 444, 454-5, P.C.

Preamble. The accused had the twin protection of the caution and the safeguard of voluntariness.

26. I find that he chose to speak, when he had no obligation to do so at all, which was made abundantly clear to him, and to proceed without the services of an attorney at law, for reasons best know to him. I accept that in all likelihood he would not have given the statement under caution, if competently advised by an attorney-at-law, but the choice was his to proceed on his own or with advice. He was a young man of 19[19] years of age, but one who started work at 15 and had been responsible for himself, financially, since that time, and not someone wholly dependent on parents.
27. Accordingly the statement under caution will be admitted into evidence as it stands—questions, answers and all.
28. Because of the concerns voiced by Mustill, LJ, in *Wallace (Wallford) and Fuller (Michael) v. R.*[20] , I shall hand down copies of this judgement, in Court, this afternoon, to Counsel on both sides, and indicate, simply, in the absence of the jury, that the challenged item of evidence shall be admitted. This judgment is embargoed and shall not be made public, until the conclusion of the trial, and Counsel must not disseminate copies of it, beforehand, even within their respective Chambers.



Brook J. (Ag.)
10th January 2008

[19] It emerged, subsequently, that the accused was 20½ at the material time, due to a simple, arithmetical error having been made by all.
[20] (1996) 50 WIR 387, 399

"APPENDIX A"

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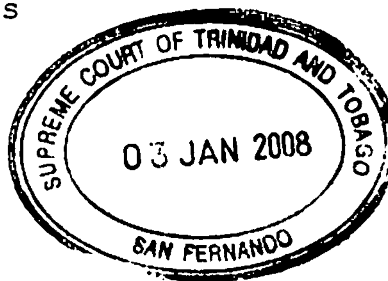
In Chambers with
ASAF HOSEIN

2nd January, 2008.

The Director of Public Prosecutions
Independence Avenue,
San Fernando.



Dear Sir/Madam,

RE: **The State v Nimrod Miguel**
Charge: Murder
Date of Hearing: 3/1/08

GROUNDS OF OBJECTION RE: VOIR DIRE

1. The accused was not told or advised of his Constitutional Rights and Privileges to contact a relative, a friend, or to communicate with an Attorney at Law or anyone at the time of his arrest on the 24/1/04.

2. The accused was not informed of the reason for his arrest at the time of his arrest.

3. The arresting Officers neither showed nor read to the accused a warrant of arrest.

4. Upon arrest the arresting Officers did not invite the accused to take a change of clothing, toothbrush and toothpaste, soap or a towel.

5. Upon arrest on the 24/1/04 the accused was taken to the Princes Town Police Station. At the Princes Town Police Station the accused asked a Police Officer to make a telephone call to his mother. The accused's request was denied.

6. From the Princes Town Police Station the accused was taken to the San Fernando Police Station and placed in the Holding Bay (cell).

7. The accused was denied the right to brush his teeth and/or wash his mouth or have a bath.

8. The accused was denied proper meals.

9. On the 24/1/04 between the hours of 9:00am and 10:00am the accused was given 2 bread and butter and tea in a chubby bottle; at approximately midday, the accused was given rice and red beans; in the evening the accused was given 2 bread and butter. These meals were given to the accused whilst he was kept in the Holding Bay of the San Fernando Police Station. The Holding Bay of the San Fernando Police Station was in a very in-sanitary condition.

10. On the 24/1/04 at around midday the accused was taken out of the said Holding Bay and taken over to a room in the Homicide Office in San Fernando. The accused was interviewed by both Corporal Hamid and Corporal Renwick. Neither officers identified themselves to the accused. Neither officers advised the accused of his Constitutional Rights and Privileges and also his right to have a relative present; or a friend present; or an Attorney present; or to make a telephone call to a relative, a friend or an Attorney at Law. There was a piece of paper stuck up on the wall in the room, but the accused was unable to read it as it was too far from where he sat.

11. Before the Officers, Corporal Hamid and Corporal Renwick began interviewing the accused, the accused asked Corporal Renwick to make a telephone call to his mother. The accused request was denied him by Corporal Renwick.

12. After they had interviewed the accused, the accused was taken back to the Holding Bay of the San Fernando Police Station where he stayed during the night.

13. The accused was denied proper toilet facilities.

14. The accused was made to sleep on a concrete bunk attached to the wall of the Holding Bay which is approximately 6 feet long and 18 ices wide.

15. In the morning of the 25/1/04 the accused was given a meal consisting of 2 bread and butter and tea in a chubby bottle; at midday the accused was given a box

of rice and red bean and water in a chubby bottle; in the evening the accused was given 2 bread and butter.

16. On the 26/1/04 the accused was given similar meals.

17. In the morning of the 25/1/04 the accused was taken from the Holding Bay at the San Fernando Police Station to a room in the Homicide Office. In that room there were Corporal Hamid, Corporal Renwick and a dougla looking man.

18. Corporal Renwick, who had several pages with writing on, it asked the accused to sign the said pages with the writing. The accused asked Corporal Renwick to make a telephone call to his mother before he signed.

19. Corporal Renwick denied the accused the telephone call and told the accused "sign and you will go home".

20. Neither Corporal Renwick nor Corporal Hamid nor the dougla looking man identified themselves to the accused nor did any of them advised the accused of his Constitutional Rights and Privileges.

21. The doula looking man asked the accused if he knew a certain woman, the accused answered in the negative.

22. The dougla looking man neither identified himself to the accused nor did he interview the accused alone.

23. Upon the undertaking and/or promise meted out by Corporal Renwick to the accused, that is, sign and you will go home, the accused signed the alleged Statement.

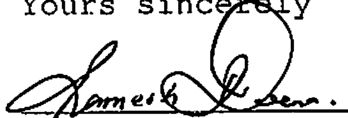
24. As the accused was kept in adverse conditions and denied basic hygiene which is tantamount to oppression and therefore when Corporal Renwick told the accused to sign the Statement and he will go home, the accused in belief that he would be allowed to go home, signed the alleged statement. This was inducement.

25. Breach of the Judges Rules by both Corporal Renwick and Corporal Hamid.

26. The accused requested upon his arrest at Princes Town and again at San Fernando the opportunity to contact his mother or to make a telephone call. However, his requests were denied in a clear breach of his Constitutional Rights.

Please be advised.

Yours sincerely



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