TRINIDAD AND TOBAGO

Criminal Indictment No. 68 of 2006

The State of Trinidad and Tobago

v.

Marlon Edghill
Marcus Marshall

Defendants

REASONS FOR RULING

Delivered the 18th September 2009

[Delivered by Mr.Justice Volney]

1. At the conclusion of *voire-dire* proceedings, the court ruled that oral statements said to be given by each of the prisoners, and recorded in unsigned interview notes, would be admitted in evidence. A written statement given by the prisoner Edghill was disallowed. Written reasons for this judgment of the court were promised to be delivered at a later date. What follows is the considered opinion of the court.
2. Objection was taken to the admission in evidence of these oral confessionary statements. They were said to have been made in the course of separate interviews conducted within days of the prisoners' arrest. Learned Counsel each premised their respective challenges on involuntariness for the reason of oppression, and also argued against admission on the ground of want of compliance with the strictures of the Judges' Rules, and in particular, a failure to administer the Rule III caution.

3. There can be no doubt that a statement not obtained voluntarily may not be admitted in evidence. It is equally clear that a trial judge has the discretion to admit a statement obtained in breach of the Judges' Rules. This is permissible provided only that it would in all the circumstances of the case be fair to admit such statement.

4. **Edghill** was arrested in the early hours of November 14, 2003. This was done only on information. He was seen with an injury to his upper arm thereby arousing the suspicion that he may have been shot by the deceased at the time of his murder. He was taken to hospital where he was attended to. He was returned to the hospital on the following day and an x -ray examination revealed the presence of a gun shot lodged in his chest/shoulder area. This was

removed in what was defined by the surgeon as a relatively minor procedure after which the prisoner was discharged with a medical prescription. He remained in police custody, was subjected to interviews and is said to have given confessionary admissions in unsigned interview notes. He subsequently signed a cautionary statement in writing witnessed by a Justice of the Peace.

5. Allegations of threatening behaviour and assaults to the person of the prisoner by soldiers and police alike upon his arrest were denied by the police witnesses. An allegation that Sergeant Isaacs stuck a sharp instrument into the arm injury of the prisoner was likewise denied, as was that of his undergoing the surgical procedure by force. There was however some medical evidence to suggest that the wound to the shoulder exhibited light bleeding at the time of examination.

6. Evidence was led by the Prosecution that on 17th November 2002, this prisoner offered incriminating answers in an interview the answers alone of which were recorded. The notes of the interview were said to have been read over to the prisoner who said they were correct but did not sign them on invitation to do so. The prisoner is said to have agreed to give a statement under caution which was later recorded under the watch of a Justice of the Peace. He signed this statement after acknowledging the correctness of its content.

7. In *Voire-dire* proceedings, the onus of proving voluntariness must be discharged by the prosecution. There must be proof beyond a reasonable doubt that the statement was given voluntarily. Where, however, there have been breaches of the Judges' Rules, or of such other protective procedural rights as are guaranteed under the Constitution, a statement may be allowed in evidence provided that it would in all the given circumstances be fair to admit it.

8. It is not for the defence to lead evidence that may explain sources of questionable doubt arising in the presentation of the prosecution case. Where however the prisoner offers evidence it is for the Court to decide whether such evidence affects the reliability of the prosecution's case for admission of the questioned evidence.
9. Edghill testified and while suggesting being tricked into signing the cautionary statement and denied offering any oral admissions, the Court finds his evidence of pain affecting his processes to be sadly feigned and unbelievable especially in the face of contradictory medical evidence. The evidence of beatings at the hands of the soldiers and the police on arrest were not supported by the medical evidence and so rejected as untrue. The court found the evidence of this prisoner to be wanting and false, and surely not such as to cast a doubt on the truthfulness and reliability of the prosecution's evidence that the accused spoke as he did for reasons other than the alleged oppressive conduct. The court rejected the claim of the accused that then Cpl. Isaacs had placed a sharp object into the wound of Edghill causing it to bleed.
10. This Court accordingly adjudged that the statements, both oral and written, were not the result of any untoward conduct of the police as alleged by Edghill.

11. In the view of the court it became clear that during the course of the interviews the accused incriminated himself in a most damning manner. Not only had he placed himself at the scene of the crime but he had also admitted to a prior plan to steal a car. He proceeded to confess to his participation in the events leading to the robbery in the course or furtherance of which the deceased was fatally shot.

12. The Judges' Rules encourage that admissions beyond the point of an initial confession of guilt be acquired by set standards of fairness and that a Rule III caution be administered forthwith. By this rule, a prisoner is informed that he could be charged given the availability of evidence and that he was not obliged to say anything further unless he wished to do so.

13. Local decisions of the Court of Appeal appear to severely frown on the conduct of police officers who continue the gathering of evidence without this caution. Appellate judges have closely studied the trial judge's rationale for allowing impugned statements in evidence notwithstanding that the evidence may well be considered to be the fruit of the poisoned tree.

14. While the Privy Council has acknowledged in principle the need to maintain more than a modicum of compliance with the supposed mandatory injunctions of the Judges' Rules, the opinions of the Board have been decidedly to leave the question of admission of the evidence to the trial judge as a matter of discretion having considered guidelines set by their lordships in **Shabadine Peart v The Queen** from the Court of Appeal of Jamaica (Privy Council Appeal No. 5 of 2005).

15. There, Lord Carswell delivering the reasons of the Board stated, inter alia, that-

> "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; but the court may rule that it would be unfair to do so even if the statement was voluntary".

In **Ancil Edmond and Others v the State** Cr.App.Nos.22, 28 and 30 of 2006 John JA in delivering the judgment of the Court of Appeal of Trinidad and Tobago put it this way-

> "…a breach of the Judges' Rules does not automatically render the confession statement inadmissible. A judge will exercise his discretion to exclude it only in rare circumstances, that is, where it becomes necessary to secure a fair trial for the accused (emphasis mine).

16. In the instant case, Edghill had previously said nothing to incriminate himself and after a day long hiatus in the investigation after the

surgical procedure had seen to the removal of a bullet from his body, it is said that he requested to speak to a Homicide Officer. Inspector Ford, hitherto unconnected to the investigation, spoke with him. There had been no real evidence against him at that time as a plausible account had by then been offered for the presence in his body of the bullet, a matter that this court nonetheless found to offer the police some licence to treat with the prisoner as a suspect having regard to the initial report and forensics.

17. Edghill then said –

> "Boss, I want to tell you about the murder in St. Ann's. We went to rob the man and he car, we didn't go to kill nobody. Is Marcus who shoot the man. I want to tell you how everything happen."

Forde cautioned the prisoner in terms of Rule II of the Judges' Rules.

> According to Rule II of the Judges' Rules, -
> "As soon as a police officer has evidence which could afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms-

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

18. Rule II mandates that when after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept <u>of the time and place at which any such questioning or statement began and ended and the persons present</u> (emphasis mine).

19. The prisoner was informed of his rights and made no requests. He was taken to the Homicide Bureau Office where he was placed in an enclosed room. An interview was later conducted by Forde in the presence of Constable McKenzie. Only answers given in the interview were recorded and thereafter read back to the prisoner who is said to have confirmed their accuracy. He declined however to affix his signature to the note.

20. It is quite clear from the text of the interview that the prisoner incriminated himself by admitting participation in robbery with a co-adventurer during the course of which both he and his accomplice suffered gun shot injuries and the victim was shot.

21. It is equally clear that the need for a Rule III caution had arisen at a stage of the interview when the police had gathered sufficient evidence to charge the prisoner relative to enquiry to which his mind had been directed, that is, the murder of Russel Govia, or… to advise him that he would be prosecuted.

22. Appendix A (d) of the Judges' Rules provides 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 informed that he may be prosecuted for the offence".

23. Once charged, or informed that he would be prosecuted for the offence to which the enquiries are directed, Rule III mandates that he be cautioned in the following terms – "Do **you wish to say anything?** You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence". It is only in exceptional cases that **questions relating to the offence** should be put to the accused person after he has been charged or informed that he may be prosecuted.

24. The police officer conducting this interview did not charge Edghill when he was clearly in possession of incriminating oral admissions arising in the interview, nor did he advise him or cause him to be advised that he may be prosecuted for the offence as mandated. He was in breach of the Judges' Rules in that regard and at the stage when the accused was offered the protection of the further caution of Rule III, he was deprived of it. Additionally, there would then have been no licence for the officer to question the prisoner unless where such questions were 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.

25. Of the distinction between the two cautions and the implications of breach for non-compliance with Rule III of the Judges' Rules, de la Bastide CJ in **Kendrick London v the State** Crim App No.24 of 2001 proffered the following statement in delivering the judgment of the Court of Appeal:- "There is no significant difference between the two cautions. The important message conveyed by both is firstly that the person to whom it is directed has the right to remain silent and secondly, that if he does say anything it will be recorded and may be used in evidence"…there is therefore no substance in the argument that they were given the wrong caution, since what they were told conveyed the essential message contained in both forms of caution prescribed by the Judges' Rules".

26. In **The State v Phillip Placid** Crim No. 113 of 2003 similar issues of breach arose and this court had occasion to make 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. 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".

27. In **Allie Mohammed v The State** (1999) 2 AC 111 Lord Hodson in delivering the reasons of the Judicial Committee suggested the approach for the judges when he had the following to say-

> "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".

28. It is this approach of balancing the respective interests that I perceive to be the correct one especially in view of the advice of the Privy Council in **Shabadine Peart** that breaches notwithstanding it remains a matter for the trial judge, seised as he would be, of the evidence and the facts as he finds them to be in *voire dire* proceedings to exercise discretion in deciding the issue of admissibility. This Court recognizes the common law principles touching on the fruit of the poisoned tree but equally holds fast to the proposition that it is only of such evidence gathered after the breach that there may be exclusion and the court has a duty only to edit out such evidence that it would be unfair to admit, and no more. To do more would be to unlawfully deprive the prosecution of its evidence.
29. It was enthusiastically argued by learned counsel for Edghill that on receipt of alleged admissions from the suspect, as he then was, of conspiracy to rob someone of a motor car, and of being *particeps criminis* in its execution in the vicinity of the crime scene, there was enough at hand to require a Rule III caution and in its absence any evidence forthcoming thereinafter would be inadmissible and ought to be disallowed.
30. While this contention is attractive, it is unsupported by legal authority. It is not surprising that no authority, text or precedent, has been put forward to support the submission. Quite clearly, the Judges' Rules were not formulated to hinder law enforcement in

carrying out a lawful function to gather evidence by way of confessionary admissions of guilt. In the judgment of the court, the call for the administration of Rule III did not then arise, as suggested, for the reason that the subject of the report was the unlawful killing of Govia, and not the robbery of his car.

31. The requirement that the Rule III caution be administered would, and should only arise when there is evidence to prosecute or charge the suspect…, or where he utters words that found a legal basis on which he might be prosecuted or charged with the subject of the report with which he is confronted. It is only then that the Judges' Rules have a basis to provide the additional protection beyond that of the advice against self-incrimination to be found in a Rule II caution.

32. To uphold the submission that an interrogation must be stopped to allow for a Rule III caution before there is evidence to found a legal cause is to construe the Judges' Rules against the interest they were set to protect and serve. These strictures were formulated to allow for an atmosphere of fairness to prevail in the intercourse between those sworn to secure the public interest and those entitled to a measured civility in the course of interrogation and the gathering of evidence. Construing the Rule in any way that serves to offset the balance between these competing interests is to run afoul of the assistance offered by Lord Hodson in **Allie Mohammed v. The State of Trinidad and Tobago.**

33. On the evidence adduced in the *Voire-dire* proceedings, it was evident that Inspector Forde had first obtained the requisite evidence after the prisoner had spoken of his confederate in an exchange of gunfire with the deceased who reportedly dropped down on the ground. While the need for the Rule III caution and the injunctions of the Judges' Rules were thereby triggered, no such caution was administered and continued questioning and accumulation of evidence became tainted by breach.

34. The approach of a trial judge faced with breach of the Judges' Rules and in particular a failure to administer a Rule III caution when required is to follow the advice offered in **Shabadine Peart**. To

deny the prosecution its evidence notwithstanding that the police had in fact given a suspect the advice against self-incrimination up to the point of confession of the crime would be to lend the assistance of the rules unfairly to an accused person.

35. The issue to be determined after recognition of breach is the degree and extent to which evidence adduced thereafter might fairly be left to stand. The approach must be pragmatic in view of the competing interests for and against its reception. Clearly it would be unfair to allow any evidence that strengthens the case of the prosecution by adding depth of detail,. And equally, it would be wrong to excise evidence that augurs only to collateral issues related to the credibility of the prosecution case for admissibility of the impugned oral admissions.

36. Following this approach, the court determined that fairness favoured admission in evidence of the oral utterances of Edghill and rejection of his written statement. In arriving at this judgment, the court considered the ramifications of other apparent infractions such as unauthorized questioning and the failure to record questions. The court further determined in the balance that it would have been unfair to allow the written statement in evidence due to the non-disclosure to the Justice of the Peace of the extent and nature of the earlier oral utterances. There was ample opportunity for compliance with the Judges' Rules and the need by the start of the recording of the written statement to advise the prisoner that in view of his earlier utterances he would be charged with murder and was not then obliged to assist the police with a written statement. For those reasons, the court ruled that it would be unfair to admit the evidence notwithstanding its rejection of claims to oppression in the conduct of the police.

37. **Marcus Marshall** did not offer evidence in the Voire-dire proceedings. A trial judge tries the case in a trial within the trial according to the evidence. Where a prisoner opts to remain silent he effectively offers no evidence to undermine, contradict or explain the evidence presented by the prosecution. Accordingly, the evidence is

the case of the prosecution and in it the denials of suggestions made to the witnesses. It behoves the trial judge to consider the veracity of the denials given the facts as he otherwise finds them to be and may not surmise on what may have been in the absence of evidence from which he could otherwise make a finding of fact.

38. Defence Counsel nonetheless selectively pursued his filed grounds of objection with considerable vigour and aplomb. On his submission of oppression, he contended that the evidence of medication given to his client is ambivalent at best and the court ought to find that if an utterance was made, it would have been under the pressure of discomfort and pain, and involuntary. The court was unmoved by this submission in view of the medical evidence as to the nature of the injury and the surgical works to remove the bullet. There was also no evidence to suggest that attendant pain or discomfort did, or might have operated to sap the will of the prisoner and cause him to speak when he would otherwise have remained silent.

39. Mr. Brooks further submitted that in the absence of evidence, a rule II caution was unfairly administered and was oppressive (if not trickery) from the point that it might have served to cause the prisoner to believe that the investigators had evidence to treat him as a suspect when this was not so. While Officers Veronique, who led the interview, and Bacchus who recorded the note each admitted having no evidence on which the prisoner might have been cautioned as a suspect, the evidence of the hand injury and subsequent removal of a bullet was consistent with the forensic evidence that one or more of the assailants might have been wounded by the deceased when his gun was discharged at the scene of the crime. The finding of blood in the vehicle, and the retrieval of a bullet from the hand of this prisoner was licence enough for him to be treated as a suspect and offered the cover of a rule II caution. This ground accordingly failed.

40. Mr. Brooks adopted and canvassed the submission of Counsel for Edghill of the timing of the requirement of a Rule III caution. In his opinion, the failure to offer his client rule III protection when he is

said to have uttered words placing him at the scene of the crime in the context of a robbery was surely unfair enough for exclusion on this ground. For the reasons alluded to in the reasons for rejecting this ground in the case of Edghill and by parity of reasoning, this submission also failed.

41. In view of the evidence led by the prosecutor, the court found that the allegations of improper conduct by the law agencies having stewardship over the prisoner Marshall to be fabricated and surely not such as to sap his will to make him confess. The prosecution's witnesses in the voire dire impressed the court as being truthful and their testimony reliable and fit to be examined by the jury in the general issue. There was no evidence to contradict or undermine the case of the prosecution and accordingly it was accepted as proof of utterances given voluntarily.

42. On the further ground for rejection canvassed by counsel, the court agreed that at some point in the interview of the prisoner he had given the police cause to be charged thereby triggering the requirement of a rule III caution. This was not given. The prisoner had by then, however, been speaking under the protection of a cover against self-incrimination and the dicta of de la Bastide CJ in **Kenrick London v. The State of Trinidad and** Tobago (infra) alluded to earlier, is pertinent. There were no other circumstances as found by the Court of Appeal of Trinidad and Tobago in **Ancil Edmond and Ors. V. the State** Crim App. Nos. 22, 28 and 30 of 2006 to render admission of the utterances unfair for the reason of breach of the Judges' Rules.

43. For parity of reasoning, the court equally applied the approach adumbrated earlier in rejecting the objection of counsel for Edghill to that of Marshall and similarly found no basis in fact and law to reject the oral admissions to be found in the interview noted by Bacchus. There was decidedly no need to interfere with the text of the admissions as to do so would have been to deprive the prosecution of relevant contextual collateral evidence that might have been useful in

rebutting the allegation of fabrication made in the voire dire and likely to be relevant before the jury.

Dated this 16th day of July, 2009.

HERBERT VOLNEY
Judge